THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-01441

BETWEEN

LIONEL RACKAL

(The Representative Claimant of the Estate of Denise Rackal, Deceased)

Claimant

AND

DARRYL LA PIERRE

1st Defendant

THE TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION

2nd Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Persad maharaj and Mrs. Persad –Maharaj for the Claimant
2. No appearance for the1st Defendant
3. Mr. S. Badassie Instructed by Ms. Jaggernauth for the 2nd Defendant

Date of Delivery: June 14, 2017

DECISION

1. Before the Court for its determination is the Claimant's claim against the 2nd Defendant for the following reliefs:
    i. Damages for vicarious liability for the negligence and/or nuisance and/or strict liability and/or assault and battery caused by the 1st Defendant in failing to properly secure the said dogs and/or allow the said dogs to escape and maul the deceased resulting in the death of the deceased.
    ii. Damages for breach of statutory duty and/or occupiers liability and/or negligence caused by the failure of the 2nd named Defendant to take steps to prevent the deceased from being mauled to death by the dogs of the 1st named Defendant, the lawful tenant of the 2nd named Defendant and owner of the said dogs.
    iii. Aggravated damages.
    iv. Damages due to the deceased under the Supreme Court of Judicature Act Chapter 4:01.
    v. Damages under the Compensation for Injuries Act Chapter 8:05
    vi. Costs.
    vii. Interest.
    viii. Such further or other reliefs.

Procedural History

2. The Claimant instituted the claim against
    i. the 1st Defendant, Darryl La Pierre as the owner of the dogs that attacked the deceased; and
    ii. the 2nd Defendant, The Trinidad and Tobago Housing Corporation (hereinafter called "HDC") as the statutory body upon whose lands dogs were kept as this Defendant was the 1st Defendant's landlord and managed the housing development.

3. The action is also instituted for the benefit of the deceased's dependents under the **Compensation for Injuries Act Chapter 8.05** of the Laws of Trinidad and Tobago and for the benefit of the deceased's estate under the Supreme Court of Judicature Act Chapter 4.01 of the Laws of Trinidad and Tobago.

4. On the 14th June, 2016, a judgment in default was obtained against the 1st Defendant as the owner of the dogs, and it was ordered that damages had to be assessed.

5. The 2nd Defendant instituted an ancillary claim against the 1st Defendant and obtained a judgment in default of defence.

6. At the trial of this action evidence was given on behalf of the Claimant and on behalf of the 2nd Defendant and the trial was adjourned to enable the parties to file their respective submissions.

7. On the March 9th 2017, the 2nd defendant filed an application that the trial be reopened and it produced a letter dated the 11th January, 2017, whereby one of the Claimant's witnesses Christopher Booker purportedly made requests, concerning another matter with HDC, and permission was sought to adduce inter alia this evidence as fresh and or further evidence in the matter.

8. The Court issued an Order in Chambers to reopen the matter and fixed the 29th March, 2017 for the continuation of the trial and also permitted the 2nd Defendant to file a supplemental list of documents.

9. Christopher Booker was subsequently cross examined and a witness statement of Andel Arnold was also admitted into evidence.

Undisputed facts

10. The facts which are not in dispute are as follows:
    i. Lionel Rackal was lawfully married to Denise Rackal and they had 2 children.

    ii. Denise Rackal was permanently employed with Personal Safety and Security Training Company Limited, at the time of her death and was on her way to work to provide security serviced for the 2nd Defendant.

11. Denise Rackal was mauled to death on the 9th May, 2011 and the cause of her death was acute blood loss as a result of injury to her right carotid artery.

12. This incident happened in the vicinity of Flamboyant Avenue and Bengal Avenue, an area under the control of HDC, being their Edinburgh South Gardens Housing Project development.

13. The dogs which bit her belonged to the 1st Defendant.

14. The 2nd Defendant is the 1st Defendant's lessor.

Issues

15. The primary issues for the Court's determination are whether the HDC should be held liable for the death of the deceased and if so what quantum of damages should be paid by the Defendants.

The Evidence

16. The Claimant (who is the deceased's husband) testified and called Susan Rivas, Scherade Rivas, Christopher Booker and Andel Arnold. The Defendant relied on the evidence of Sherman Holder.

Analysis of the Evidence

<u>The Claimant</u>

17. The Claimant did not witness the actual attack on his wife. He recounted the particulars of his wife's employment and the fact that on the 9th May, 2011 she went to work as a Security Guard at Endinburgh Gardens. Later that day he visited the area and saw his wife's bloodied body on the ground. The Claimant stated in evidence that on the day his wife was killed, he was shown two "holes" in the 1st Defendant's fence; one at the side of the fence and a missing bar in the gate. He described the space between the bars of the gate as measuring approximately one foot in height and a little more than half of a foot in width and said that it was about two to three feet from the ground.

18. He described the hole in the chain link wire fence on the Southern side of the 1st Defendant's property as a round hole less than a foot from the ground and he stated that he had had no previous opportunity to observe the holes in the 1st Defendants fence as he did not live in the area and never passed by the house before.

19. The Claimant also stated that his wife previously passed by the 1st Defendant's dogs and she had complained to him about the dogs barking at her.

20. The Claimant also gave unchallenged evidence with respect to his wife's income at the time of her death.

21. This witness withstood cross examination and all his responses were consistent with the evidence outlined in his witness statement. The witness was forthright and he instilled in the Court the feeling that he was credible and truthful; his evidence seemed to be probable and plausible and the Court accepted his evidence with respect to the holes in the 1st Defendant's fence and gate.

Susan Rivas

22. This witness is a HDC lessee and occupies a townhouse on Achee Street, which is two streets away from Flamboyant Avenue where the deceased was killed. She testified that on the 9th May 2011, the HDC was in control of the area as construction work was ongoing. She recounted that complaints in relation to townhouses could have been made to the HDC office at the development and she knew that the 1st Defendant had four pit bulls. She further testified that her son Scherade was previously bitten by the 1st Defendant's dogs but she did not pursue the issue because the 1st Defendant was a police officer.

23. At paragraph 4 of her witness statement Ms. Rivas stated that:-

"At the time of the incident the second defendant was in the process of further developing Edinburgh South Gardens. ……As I regularly passed along Flamboyant Avenue, I observed that Flamboyant Avenue was used by the officials and workers and or servants and

or agents of the second defendant to get from the main office on the Fifteenth street extension to the entrance to the construction site whereby they would pass in front of the first defendant's property. Flamboyant Avenue was a shortcut for the workers of the second defendant to get from the main office to the construction site."

24. Ms. Rivas' evidence was that she would usually visit the HDC sub-office at the Edinburgh South Gardens Development to lodge any complaints. She stated that she did not have to go to the head office in Port of Spain to make complaints and HDC usually addressed her complaints within a short space of time. Complaints, she said, did not have to be in writing to be addressed, as she was able to easily speak with officials at the sub-office.

25. Under cross examination, she stated that she was aware that her neighbour, one John Paul, was made to remove a picket fence. However, she stated clearly that he was not made to remove the said fence because she had complained, but because HDC had rules and regulations which all occupants of properties had to follow.

26. The Court found that this witness, like the Claimant, was forthright and she too engendered in the Court an unshakable feeling that she was truthful. The Court also found that her explanation as to why she elected to take no action after he son was bitten by the 1st Defendant's dogs was probable, as many people in this society are fearful of and do not trust police officers. The Court noted that her evidence with respect to the condition of the 1st Defendant's fence was consistent with the Claimant's observations about same and accepted her evidence in relation to the level and nature of communication with the HDC office on the compound when issues arose.

Scherade Rivas

27. This witness is Ms. Rivas' son and he testified inter alia that he was previously bitten by the 1st Defendant's dogs and that he frequently passed the 1st Defendant's house on his way to visit his girlfriend.

28. In his witness statement Scherade testified as follows:

"6. The roads, the demised lots and surrounding areas of Edinburgh Gardens are also under the control of the 2nd named Defendant.

7. The second defendant would manage the housing development. They would regularly hire contractors to maintain and landscape the development and its roads. They would maintain and landscape the grass verge on the side of the road and the trees. 8. I also know that an official from the second Defendant Corporation had requested that my neighbor John Paul remove a picketed fence that he had placed along his boundary. He did remove the fence following the instructions he got from the official of the second defendant."

29. At paragraph 11 of his witness statement the witness stated that:

"Flamboyant Street is a common area or street in the housing development. It is a roadway, that was used by all the tenants in Edinburgh Gardens and the public to travel by car and by foot. The roadway was freely used by members of the public who were not restricted in any way by the second defendant from entering onto and passing on the roadway."

30. At paragraphs 15-22 of his witness statement he stated that:

"15. The defendant's property was not secure as there was a missing bar in the front gate and the four dogs would escape and return to the 1st defendant's property."

16. Often when I pass the 4 pitbulls in the ownership and control of the 1st defendant and his family would be on the inside of the property. They would run to the fence and or the gate and they would bark.

17. On many occasions as I am walking along the track, I would see the dogs outside roaming around. Most times it would be the big, black pitbull and sometimes it would be all four dogs. I would try to avoid them by instead passing along Plumbago Street and then unto Flamboyant Street. When I did encounter one or more of the dogs, I

would stop walking, when they came close to me they would sniff me but would not attack.

18. However, I was afraid of them. Since I started living in Edinburgh Gardens the dogs lived in Flamboyant Avenue and roamed the street and tormented passers-by. I would often observe the dogs from the gallery of my girlfriend's home. The dogs were dangerous and would bark at passers-by and rush people and cars on the streets.

19. On one occasion I observed then attacking another dog in a very vicious manner. The attack went on for about one minute when one of the teenage sons of the first defendant came out and pulled the big black dog off and the dog ran inside……..

20. I know that these pitbulls had also bitten other dogs in the area from my living in the neighbourhood and from my discussions with either my mother and or my girlfriend as we all live in the neighbourhood and knew our surroundings.

21. About two years prior to this incident, I was the first human that the dogs attacked. I was passing along the track and the first defendant's stepson opened the gate and the dogs ran out and attacked me.

22. The big black pit bull ran out, jumped on me and bit me on the stomach. This dog then locked his jaws on my right leg. The other dogs followed him and started biting me. The first defendant's s step-son hit the black dog off me and he ran inside. The other dogs followed him."

31. During his cross examination, this witness said that the 1st Defendant's gate was missing a bar and that his dogs would wiggle out and they were often on the roadway.

32. The Court accepted this witness's evidence and found that his testimony was probable and plausible and formed the view that he was honest. The Court noted that he was an

independent witness who had no personal agenda as there was no tangible benefit which he could derive by giving evidence in support of the Claimant's case.

Christopher Booker

Christopher Booker was the Project Manager for HDC who worked in Edinburgh Gardens at the time of the incident.

33. In his witness statement, this witness testified as follows:

> *"I know that several reports had been made to the HDC, some of them through me, by angry residents complaining of attacks by dogs which were kept by the First Named Defendant at the said premises which were not secure, causing the dogs to escape and roam Flambouyant Street, posing a threat to the residents and users of the said road access. The reports indicated that the dogs exhibited dangerous tendencies and violent behaviour. I am aware that the dogs had attacked other dogs and residents were afraid of them. I am also aware of the attack on Scherade Rivas, a resident of Ackee Street, Block 5, who was the first human bitten and harmed by the First Named Defendant's dogs in or about the year 2009.*
>
> *9. I had also previously seen the dogs at the First Named Defendant's premises on many occasions. However, I had not personally seen them exhibit any dangerous behaviour or violent tendencies.*
>
> *10. About one week before the incident involving the death of Denise Rackal on the 9th day of May, 2011, one of my junior officers and I were on duty and walking along Flambouyant Street, and whilst in the area, we observed one of the said dogs was making its way through the fencing of the property of the First Named Defendant at or about 2:00pm- 2:30 pm. Eventually, the dog came out on to the roadway and my junior staff member and had to avoid contact with the dog to avoid being bitten and/or attacked by this dog. We felt very intimated by the dog and were fearful of being attacked and harmed. Whilst taking cover in one of the unfinished buildings, I saw the said dog, watching us, waiting for us to come out. We were in the unit for*

approximately one hour with the dog remaining there and I realised that the dog did not intend to move. I had to call someone at the site office to get us to safety.

11. Mr. Fraser who was the Project Manager for the contractor, Heron Lewis Constructions Limited came in a van and rescued us from the unfinished building where we were seeking refuge from the First Named Defendant's escaped dog. Mr. Fraser had to approach us in a manner where we had to jump into the seat very quickly. We went back to the site office."

12. "I then made a call to my head office to one Mr. Allan Cunningham who was my superior and the Area Manager, for several HDC projects. I briefed him of the situation and told him that I am fearful of this vicious dog on site. He had the authority to cause the Estate Management Department to compel the Second Named Defendant to remove the dogs from the premises. Based upon the instructions that I received from Mr. Cunningham, I drafted a statement as to the particulars of the incident and I handed it to Mr. Cunningham.

13. The following morning, I went to the home and approached the son of the 1st named Defendant, who was a fully grown adult and explained what had had happened the previous day. I obtained the assurance of the First Named Defendant's son that the necessary precautions would be taken to secure the gate to ensure that the dogs would no longer be able to get through and escape unto the roadway, threatening passers-by. I observed however that the fencing around the property also had holes in it and the premises were not secured at the time of the incident.

14. I recalled drafting a letter to Mr. Cunningham about two days after speaking to the Second Named Defendant's son, about my concerns with the said dogs. I hand delivered this letter to the head office."

34. By the Statement of Case, the Claimant pleaded the following particulars of negligence as against the 2nd Defendant:

"(a)Causing or permitting the roadway to become a danger to persons lawfully using same and failing to maintain a safe neighbourhood for passersby.

(b)Permitting the deceased to use the roadway knowing that it was unsafe to do so.

(c)Having control over the roadway as a common area in the development and failing to take reasonable care and or sufficient measures to ensure the safety of passers-by.

(d)Failing to properly manage the said housing development all lands, houses, including houses held on leases and buildings or other property vested in it, belonging to it or under its control.

(e)Knowing that the public was allowed and allowing the public to pass on the common areas of the housing development and failing to take reasonable care to inspect and ensure that it was safe for the use of the public.

(f) Having knowledge and or notice that a dangerous dog was being harboured on the premises, and failing to exercise its power to rectify the dangerous situation by demanding the removal of the dangerous dos and/or the eviction of the lessees and or the re-entry onto the premises.

(g)Knowing that dogs constituted a public nuisance and or knowing that the dogs had previously escaped and a threat to the safety of passers-by and failing to insist on the removal of the dogs and or evict the sub-lessee and or terminate the lease.

(h)Failing to evict the First Named Defendant and or terminate the lease for failure of the First Named Defendant to conform to the conditions under its lease.

(i) Having knowledge of the presence of the dangerous dog and failing to take reasonable steps to ensure that persons using the roadway are reasonably safe.

(j) Allowing lessees to keep dogs on the premises without imposing restrictions on the harbouring of dangerous dogs on the compound which the Second Named Defendant had control over and knowing that the premises would pose an unreasonable risk.

(k)Allowing and or authorizing lessess to keep dogs on the premises and or the housing development thereby silently acquiescing in the keeping of the dangerous dogs and or the threat or the foreseeable risk to the public safety.

(l) Failing to ensure that the First Named Defendant secured his premises so as to prevent the escape of the dogs.

(m) Failing in its duty and or statutory duty to inspect and discover the presence of the dangerous dogs and or that the dogs were creating a nuisance in the neighbourhood.

(n)Failing in its duty and or statutory duty to the public to ensure that the premises were safe and in good repair.

(o)Knowing that the lease permitted dogs, including dangerous dogs and failing in its duty to warn invitees of the existence of dangerous conditions in the housing development.

(p)Failing to post signs warnings passers-by that dangerous dogs are kept in the housing and or to instruct and or ensure that the First Named Defendant installed like signs,

(q)Failure to act promptly after receiving complaints about the dogs.

(r) Failing to issue notice/s to the First Named Defendant and or take steps to prevent the occupation of dangerous dogs.

(s) Failing to warn and or to sufficiently warn, the First Named Defendant as a resident, that the dangerous dogs were a nuisance, annoyance and or an inconvenience to the other lessees and the public and ought not to be allowed on the compound.

(t) Failure to enter upon and inspect the said premises and insist upon the removal of the dogs as nuisances and or to repair defects in the premises that would allow the dogs to escape and cause a danger to passersby.

(u)Allowing the First Named Defendant to keep and or harbor dogs and failing to exercise care and control, knowing of the dogs propensities to attack, having knowledge of the dogs previous attack on humans.

(v)Having control over the first defendants premises and failing to take active steps to supervise the occupation of the First Named Defendant and or the dangerous animals kept within its compound;

(w) Failing to appreciate the warning the First Named Defendant was not an effective measure of control to ensure the safety of the public."

35. Having regard to the particulars pleaded, the Court is of the view that it was not necessary to expressly plead that Mr. Booker had informed Mr. Cunningham as to the fact that the dogs were dangerous or that they had previously escaped as the particulars of negligence clearly articulated that the Claimant's case was premised on the fact that the 2nd Defendant did have knowledge as to the propensity of the dogs as well as the fact that they had previously escaped and that this Defendant had an obligation to ensure that the common areas were safe.

36. During his cross examination Mr. Booker stated that prior to his encounter with the dogs he did speak to Allan Cunningham about the dogs. He also stated that,

> *"I remember Ms. Roberts said she and her grandson were passing on the road and she was fearful of the dogs and she had to turn back… I spoke to Cunningham that someone needed address the situation."*

37. Mr. Booker was the Project Manager for Edinburgh South Development and he was responsible for the overall management of the site. This responsibility continued until the

site was completely handed over and at the time of the incident no hand over had been effected.

38. At paragraph 5 of his witness statement he said that as part of his portfolio, he was routinely present on site as an HDC employee and he did his best to ensure that the tenants within the development observed the covenants contained in their leases. Under cross examination, he testified that the morning after the incident when he encountered the brown dog, he had a cordial conversation with the 1st Defendant for about 10- 20 minutes and he explained to him that he would have to reinforce the fence. Later in cross examination he also said that he dealt with a lot of complaints together with his junior staff.

39. The Claimant submitted that Christopher Booker was, at the material time, an employee of the 2nd Defendant and that he dealt with complaints and had prior knowledge and exposure to the dogs and by extension the HDC also had knowledge as to the vicious propensity of the dogs.

40. Mr. Booker testified that he had an encounter with one of the dogs and he said he was aware of the attack on Scherade Rivas and that several other reports were made to him by angry residents.

41. Mr. Booker further testified that HDC's head office was located at 44-46 South Key but that there was a sub-office on site and that the office was opened from 8 a.m. to 4 p.m. He said that HDC repaired Ms. Rivas' roof which was leaking pursuant to a report made by her and that they also attended to a complaint she made about John Paul's fence.

42. At paragraph 4 of his witness statement he testified that *"the 2nd named Defendant was always responsible for the management and supervision of all lands, houses, building, streets and or other property vested in it, belonging to it or under its control in the Edinburgh garden development"* and at paragraph 10 of his witness statement, he stated that *".....Further, it would have been within the per view of the Estate Management Department of the Second*

Named Defendant, upon receiving reports of the presence and/or violent behaviour of the dogs to ensure that they were removed from the premises."

43. During the course of his cross-examination it was also revealed that as Project Manager Mr. Booker had a diary where he kept notes of all events and which diary was left in the custody of HDC when he demitted office, same was however was not produced to the Court.

44. Mr. Booker became the subject of further cross examination in relation to his credibility when the application to reopen the case was made and successfully granted. The concern revolved around a letter dated the 11th January, 2017 which was penned and given to HDC lawyers JD Sellier in a Carillion arbitration matter and in which his assistance was requested.

45. The Court considered the effect, if any, of the letter on Mr. Booker's credibility and the issue as to the weight that ought to be attached to his testimony but did so after it outlined the evidence of Andel Arnold and Sherman Holder.

Andel Arnold

46. Ms. Arnold is an Attorney at Law attached to Mr. Persad Maharaj's Chambers and she testified that she interviewed Mr. Booker, prepared his witness statement on the said day and he executed same. She further testified that no enquiry was made of her by Mr. Booker as to whether he could withdraw his witness statement and no request was made to defer the filing of same. The Court found this witness to be frank and forthright and accepted her chronology of events and found as a fact that Mr. Booker's witness statement was prepared and executed on the 9th January, 2017 and that no directions or requests were made by Mr. Booker to delay the filing of same.

Sherman Holder

47. Mr. Holder is the Manager of the HDC's Legal Department. He testified that he checked the files relating to Lot No. 65 Edinburgh South Gardens and there was no endorsement of any complaint or evidence that HDC had knowledge of the danger created by the dogs. In paragraph 10 of his witness statement he said

"As one of HDC's Attorney's at Law , I am aware that HDC has a system for receiving and addressing complaints, whereby complaints are made to the Customer Service Representative, which then assigns all such complaints to the relative department and all information id placed on the relevant file. HDC's field officers are then dispatched upon receipt of a complaint to investigate and they would prepare a written report of their findings and a copy of that report would also be placed on the file corresponding to the respective tenant/property. I have searched the said files and say that HDC has no antecedent records and or complaints of any dogs on the said property and/or any problems relating to dogs and or any dogs escaping from the confines of same, breaches of the then Dangerous Dogs Act 2000 and /or any nuisance regarding any dogs on the said property and or in relation to Darryl La Pierre and or Raquel Sealey-La Pierre"

48. Mr. Holder was working at HDC as an attorney at law since March, 2011, about two months prior to the incident, but he had worked with HDC in various capacities since 2007.

49. He testified that he first became aware of the incident when he received the pre-action protocol letter and when asked as to whether any steps were taken against the 1st Defendant he stated:-

"At the time of the receipt of the letter, it was general knowledge that the dogs were no longer there."

50. During his cross examination Mr. Holder accepted that he produced no file or minute sheet which was searched to enable his determination that there was no record of any complaint in relation to the 1st Defendant's dogs.

51. Mr. Holder's evidence was that HDC's legal department is located on the ground floor of the building and that tenants' files and leases are kept and stored in a filing room there. He stated that endorsements are recorded on the respective tenants' files via a minute sheet and that any employee of HDC in any department can record an endorsement on a file's minute sheet, as an individual's file moves throughout the building to the various departments.

52. However, at paragraph 3 of his witness statement he stated that *"I have conduct and I have read and I am familiar with the contents of HDC's files, documents and records (hereinafter collectively referred to as "the said files") relating to Lot No. 65 Edinburgh South Gardens, Gentian Park, Chaguanas (hereinafter called "the said property") and make this statement based on the contents of the said files relating to the said property."*

53. At paragraph 10 of his Witness Statement the witness spoke interchangeably of a file and files.

54. At paragraph 3 he also stated that,

> "*I have no reason to doubt the endorsements and documents in the said files. The said files are stored in HDC's Legal Department over which I have sufficient supervisory control and conduct with restricted access by other employees and third parties."*

55. During his cross examination he was asked what documents were on the file and he stated recalled was Darryl and Raquel La Pierre's application for housing and letters inviting them to visit the HDC. He later stated that he read the newspaper article dated the 11th day of May, 2011 wherein Ms. Jearlean John, the then Managing Director of the HDC stated that Darryl La Pierre was in breach of his contract.

56. According to Mr. Holder, Customer Service Representatives receive complaints which are endorsed on the files and field officers are then sent out to investigate. The procedure for lodging complaints he said was tedious and he also said that the HDC did not cater for tenants to lodge complaints at site offices.

57. He did not explain the procedure for lodging internal complaints from employees of HDC but did say that internal matters are dealt with by a way of a memorandum.

58. Mr. Holder also stated that HDC retained control over "the areas which we did not release control to lessees" and he confirmed that HDC was responsible for, cutting the grass, the

drains, curtilages, roads, and the removal of garbage in Edinburgh Gardens. He further testified that it was HDC's policy to ensure that the homeowners got along and to ensure that there was no social conflict. Conflict, he said, would include issues relating to dogs. He further testified that it was the responsibility of the Social Services Department and The Estate Management Department to deal with complaints of tenants.

59. Counsel for the Claimant suggested to Mr. Holder that if an investigation into the incident was done, a report would have been prepared and he did not give a positive response but insisted that the report was in the form of the response to the pre-action protocol letter HDC received. Later in cross examination, he relented from his earlier position and stated that an investigation would have been done in order for a response to have been written but admitted that he did not know this for a fact and he could not state whether an investigation had been carried out to confirm whether the 1st Defendant had committed any breach of the lease.

60. At paragraph 22 of his witness statement Mr. Holder said as follows:

> *"I am aware that HDC has hundreds of thousands of tenancies for numerous Housing Developments all over Trinidad and Tobago and other buildings. It would be an insurmountable burden , a mere impossibility and highly impracticable for HDC to employ persons to visit each of its tenants on a daily basis to ensure that there is compliance with each term and/or condition of a tenancy agreement , including Deeds of Lease."*

61. The Court felt a degree of disquiet in relation to Mr. Holder's testimony as he appeared to have a very casual and cavalier approach to his evidence. The Court was not satisfied that thorough investigations were conducted in relation to any reports with respect to the 1st Defendant's dangerous dogs and felt that the 2nd Defendant had an obligation to produce and disclose any relevant documentation, including the 1st Defendant's file.

62. Mr. Holder had no firsthand knowledge of the presence of the dangerous dogs or of the incident and his evidence was premised upon his alleged search of files.

63. He did not reveal whether he conducted investigations with other employees or departments of HDC before he came to the conclusion that there were no recorded complaints in relation to the 1st Defendant's dogs.

64. Mr. Holder further stated that it was only after the receipt of the Pre-Action Protocol letter that he and the legal staff became aware of the incident and of the presence of the dangerous dogs.

65. According to his evidence, the HDC's Social Services Department would have dealt with disputes relating to dogs if they were aware of any such circumstance.

66. Although Christopher Booker referred to Allan Cunningham in his witness statement filed on the 19th January, 2017, the 2nd Defendant did not avail itself of the opportunity under the CPR to adduce rebuttal evidence.

67. The Court also noted, as was pointed out earlier, no attempt was made to secure and produce Mr. Booker's diary which was handed over to the HDC when he left their employ.

68. In ***Wisniewski (A Minor) v. Central Manchester Health Authority [1998] EWCA Civ. 596,*** Booker L.J. considered a string of authorities which dealt with the effect of a party's failure to call witnesses. He summarized the principles thus:

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the exercised inference; in other words, there must be a case on that issue.*

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

69. Although the Claimant's pleaded case did not make mention of Mr. Cunningham, the Court felt that the evidence in relation to any alleged report made to him was relevant and that it was consistent with the Claimant's pleaded case.

What regard should the Court have to Mr. Booker's evidence?

70. **The letter that Mr. Booker wrote in connection with the Carillion arbitration was tendered into evidence and is indicative of a sense of entitlement and self-centered interest that is far too prevalent in this society. Once the State is involved, it is often seen as a source of unlimited cash that is ripe for the taking and without regard to the legality of any such request, unreasonable requests or questionable demands are often made.**

71. **Mr. Booker's demands in the said letter may have amounted to an attempt to extort money and benefits in exchange for his help and his actions must be strongly condemned. There is however no connection between the said letter and the material issues in this case. His witness statement was prepared before the said letter was issued and the Court has no evidence before it to establish that he requested that his witness statement was not to be immediately filed. The decision as to when same was filed was made by the Claimant's lawyers. In the letter there is no express reference to the instant matter nor is there any statement that his willingness to testify in the instant matter was contingent upon the satisfaction of his outrageous demands. Although Mr. Booker exercised poor judgment when he issued the letter, the Court is of the view that a consideration of the timeline of events does not lead to a circumstance where the Court, on a balance of probabilities, can find that his testimony is unreliable. His testimony withstood cross examination, no ulterior motive was established, and he did**

not instill in the Court the feeling that his evidence lacked candour or that he was a false witness.

72. **The Court found no information before it so as to suggest that Mr. Booker was invested in the outcome of the instant matter or that he had a benefit to derive by his election to testify in this case. His evidence in relation to the communication he had with Allan Cunningham seemed plausible and probable and the case presented by the 2nd Defendant was devoid of any credible evidence which eroded Mr. Booker's assertions. On or about the 9th May 2011 Mr. Booker was the 2nd Defendant's employee at the site, he dealt with previous complaints and had prior knowledge of the 1st Defendant's dogs including the fact that they frequently escaped and had the propensity to cause harm to persons. In the circumstances and although it strongly disapproves of the position adopted by Mr. Booker in the letter sent, re the Carillion arbitration, the Court having accepted Ms. Arnold's evidence as to the time line, also accepted Mr. Booker's evidence.**

73. **On the evidence the Court therefore found that the relevant facts in this matter are as follows:**

    i. **The HDC permitted occupants of single units to keep dogs.**
    ii. **The 1st Defendant's premises was not properly secured as there were holes in the fence and the gate via which his dogs could and did escape.**
    iii. **Mr. Booker had actual knowledge of this fact and was aware that the dogs when they were outside of the 1st Defendant's property, posed a danger to persons who were on Flamboyant Street.**
    iv. **The 1st Defendant's dogs had previously attached Scherade Rivas and this attack was well known in the area.**
    v. **Mr. Booker did, prior to the 9th May 2011, speak to the 1st Defendant about repairing his fence but same was not done.**
    vi. **Mr. Booker had previous reports that the 1st Defendant's dogs were dangerous and formed that view himself when he had an incident with one of the dogs, one week before the 9th May, 2011.**

vii. **Mr. Booker did call Allan Cunningham, the Manager, and he did inform Mr. Cunningham that the 1st Defendant's dogs were vicious and he was fearful and a statement was issued to Mr. Cunningham before the 9th May 2011. Mr. Cunningham therefore knew of the situation on the Thursday or Friday before the deceased's death. The 2nd Defendant had a policy to deal with situation where nuisances occurred and where the nuisance affected lessees. Notwithstanding this knowledge neither Mr. Cunningham and by extension the HDC acted with sufficient dispatch so as to cause the HDC's Social Services Department or any other department or functionaries to intervene with a view of having the 1st Defendant repair his fence or to remove the dogs.**

viii. **Both Mr. Booker and Mr. Cunningham hold senior positons with the 2nd Defendant**

The Law

Vicarious Liability and Agency

74. Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relationships with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. **Bowstead & Reynolds on Agency 19th Edition page 1 paragraph 1- 001.**

75. Agreement between principal and agent may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for the other to infer from that conduct assent to an agency relationship. **Bowstead & Reynolds on Agency 19th Edition page 55 paragraph 2 – 030.**

76. Where the principal has not expressly authorised the tort, he may be liable for a tort committed by his agent while acting within the scope of his implied authority. Where the tort by the agent falls entirely outside the scope of his authority the principal is not liable. **Halsbury's Laws of England 5th Edition Volume 97 page 307 paragraph 431.**

77. According to **Black's Law Dictionary 8th Edition page 934** 'vicarious liability' is defined as *"liability that a supervisory party (such as an employer) bears responsibility for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."*

78. The law recognizes that an owner of premises may be liable for the unsafe state of the tenanted premises if, when the danger amounts to an actionable nuisance he has undertaken the duty to repair. Thus, if a tile should fall off the building either into the street or into the neighbouring property, the owner, not the tenant, may have to pay any damages arising from the accident. In **Wringe v. Cohen 1940 1KB 229** it was held that if, owing to want of repair, premises on a highway became dangerous so as to constitute a nuisance and it collapsed and injured a passer-by or an adjoining owner, the occupier or owner of the premises, if he undertook the duty to repair, is answerable, whether he knew or ought to have known of the danger or not.

79. The owner, though not in occupation, is also liable where, he has undertaken the duty of fencing. ***Wilchick v Marks and Silverstone* [1934] 2 KB 56.**

80. According to **Halsbury's Laws of England 5th Edition Volume 78 page 130 paragraph 140:**

"The keeping of any animals in such a position or in such circumstances as to cause material discomfort or annoyance to the public in general or to a particular person is a nuisance, public or private, as the case may be."

81. **Halsbury's Laws of England 5th Edition Volume 62 page 643 at paragraph 622** states, *"The landlord is not liable for any nuisance caused by the tenant by reason on the manner in which the premises are used by the latter; but apart from a nuisance caused in that way, the landlord is liable for the existence of a nuisance upon premises which are in the occupation of his tenant where:*

    i. *He has let the premises or bought the reversion with a nuisance existing upon them, the existence of which he knew or ought to have known, and in such case he cannot*

divest himself of liability to third persons merely by taking a repairing covenant from a tenant;

ii. *He has let the premises for a purpose which is likely to cause a nuisance of a particular character and such nuisance results;*

iii. *He has let the premises taking from the tenant a covenant to do the act which results in the nuisance; and*

iv. *The nuisance arises during the tenancy from the dangerous state of the premises and he has contracted to repair, or he has expressly reserved the right to enter and repair, or he has an implied right to enter and repair."*

82. In the case of such a nuisance arising from want of repair, the landlord is liable whether or not he knew or ought reasonably to have known of the dangerous condition of the premises.

83. In **Romeo v Conservation Commission of the Northern Territory (1993) 151 ALR 263** at p298, Kirby J said:

"... the law of negligence must ultimately respond to common notions of fairness and justice. If foreseeability and proximity, alone, take the law into the imposition of duties of care which are unfair, unreasonable and unrealistic, the time will have come to re-express the preconditions for the existence of the duty in a way more harmonious with such considerations."

84. Kirby J said at p300-301:

"...courts have both the authority and responsibility to introduce practical and sensible notions of reasonableness that will put a brake on the more extreme and unrealistic claims sometimes referred to by judicial and academic critics of this area of the law. ... It is quite wrong to read past authority as requiring that any reasonably foreseeable risk, however remote, must in every case be guarded against. ... Although

a reasonably foreseeable risk may indeed give rise to a duty, it is the inquiry as to the scope of that duty in the circumstances and the response to the relevant risk by a reasonable person which dictates whether the risk must be guarded against to conform to legal obligations. Precautions need only be taken when that course is required by the standard of reasonableness. Although it is true, as the appellant argued, that an occupier is not entitled to ignore safeguards against dangers because of the absence of past mishaps, it is equally true that years of experience without accidents may tend to confirm an occupier's assessment that the risks of harm were negligible.

As to the expense of taking alleviating action, it is increasingly recognised that courts must "bear in mind as one factor that resources available for the public service are limited and that the allocation of resources is a matter for" bodies accorded that function by law. Demanding the expenditure of resources in one area (such as the fencing of promontories in natural reserves) necessarily diverts resources from other areas of equal or possibly greater priority. While this consideration does not expel the courts from the evaluation of what reasonableness requires in a particular case, it is undoubtedly a factor to be taken into account in making judgments which affect the operational priorities of a public authority and justify a finding that their priorities were wrong. I leave aside, but shall return to, the extent to which "true policy" decisions of a public authority are justiciable. But even in so-called operational decisions, which are subject to court assessment, it is necessary to evaluate more than simply the cost of preventing the particular accident. Inherent in the suggestion of the obligation of prevention is the cost that would be incurred in the measures necessary to prevent all equivalent accidents of a like kind and risk."

85. On this topic, Hayne J said at p307-308:

"The fact that an accident has happened and injury has been sustained will often be the most eloquent demonstration that the possibility of its occurrence was not far-fetched or fanciful. Indeed, often it will be difficult, if not impossible, to demonstrate

the contrary to a tribunal of fact. That is why it is of the first importance to bear steadily in mind that the duty is not that of an insurer but a duty to act reasonably.

What is reasonable must be judged in the light of all the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may; it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly, it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which may go towards judging what reasonable care on the part of a particular defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all the circumstances of the case."

86. In determining the scope of the duty of care of a public authority the court must determine as a matter of fact, in all the circumstances of the case, what is reasonable. The following factors (though not exhaustive) should be taken into consideration:
    i. The likelihood of injury
    ii. The cost and reasonableness of counter measures.
    iii. The fact that an accident has happened and injury has been sustained before. However, an occupier is still not entitled to ignore safeguards against dangers because of the

absence of past mishaps an occupier is not entitled to ignore safeguards against dangers because of the absence of past mishaps

iv. gravity of the injury that might be sustained
v. ability to control entry on the lands.
vi. whether the danger was hidden or obvious,
vii. whether it could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public,

The laws governing the HDC

87. **Section 13 of the Trinidad and Tobago Housing Development Corporation Act 24 of 2005** provides as follows:

"13. (1) Subject to this Act, it shall be the function and duty of the Corporation to—

(a) do all things necessary and convenient for or in connection with the provision of affordable shelter and associated community facilities for low and middle income persons;

(b) carry on any business activity that is incidental to or which may be performed conveniently by the Corporation or which may assist the Corporation in connection with its delivery of the services referred to in paragraph (a); and

(c) implement the broad policy of the Government in relation to housing as may be directed by the Minister from time to time."

88. In order to fulfill the duties stated above, according to Section 13 (2), it may,

"(f) sell, lease, exchange or otherwise dispose of real or personal property acquired by it pursuant to this Act;

(b) manage all lands, houses, including houses held on leases and buildings or other property vested in it, belonging to it or under its control;"

89. The HDC is a statutory authority created for the provision of shelter for low and middle income persons and it has the power to lease lands and to manage the lands over which is has control.

90. **The Trinidad And Tobago Housing Development Corporation (Vesting) Act Chap 33:06** provides that:

> *"The demise lands are hereby declared to be held by and vested in the Corporation for a term of nine hundred and ninety nine years from the appointed day, upon the terms and conditions set out in Part I of the Second Schedule, excepting and reserving the matters set forth in Part II of the said Second Schedule."*

91. Edinburgh Gardens is listed in the First Schedule as one of the lands vested in HDC.

92. The second schedule to the Act states:

> *"1.Upon the Corporation paying the rent hereby reserved and observing and performing the several covenants and stipulations on its part herein contained, it shall and may peaceably hold and enjoy the demised lands during the said term without any interruption by the State or any person claiming under or in trust for the State."*

93. Under the **Vesting Act, the Second Schedule Part I Terms And Conditions Of The Building Lease** imposes on the Corporation the duties to:

> *"(h) repair and keep in tenantable repair all buildings erected on the demised lands and all other buildings at any time on the demised lands and all additions thereto and all sewers, roads, drains and all boundary, walls, fences and hedges;*
>
> ...
>
> *(k) not use or permit or suffer to be used the demised lands and the buildings thereon or any part thereof for any illegal or immoral purpose nor do or permit or suffer to be done on or upon the same, anything which may be or become a nuisance, annoyance or cause damage or inconvenience to the State or the tenant or tenants of the State or occupiers of any adjoining or neighbouring lands;"*

The HDC Lease Provisions

94. By clause 2 (10) of the lessees covenants , the lessees covenants to permit the lessor or a duly authorized agent at all reasonable times to enter into and upon the demised premises for the purpose of viewing and inspecting its state and condition.

    Further, by clause (4) "…….if the Lessees shall at any time fail or neglect to perform or observe any of the covenants, conditions or stipulations herein contained and or their part to be performed and observed then in such a case it shall be lawful for the Lessor or any other person or persons duly authorized by re-enter into and upon the demised lands……"

Application of law to the facts

95. The relationship of the 2nd Defendant to the 1st Defendant was one of lessor and lessee by virtue of a deed of lease dated the 02nd June, 2009 and registered as Deed Number DE 201000938821D001 wherein the HDC leased the said premises to the first Defendant and Raquel Sealey-La Pierre for the period of 199 years commencing on the 1st January, 2009. This deed of lease contained the rights and obligations of the second defendant lessor and those of the first defendant lessee.

96. **The deceased was mauled to death along Flamboyant Avenue. This is an area which formed part of the common area upon which all persons who had business on or within the development were free to traverse. The dogs, at the time of the attack, were on a portion of property which belonged to and/or was under the HDC's control, namely a common area. Mr. Booker and Mr. Cunningham were aware that the dogs regularly escaped via holes in the 1st Defendant's fence and gate and that they proceeded unto the roadway. They also knew that the dogs were dangerous and capable of causing injury and that there were previous incidents where the dogs had attacked persons when they were outside of the 1st Defendant's property. HDC had an Estate Management Department and a Social Services Department that dealt with issues such as the situation that persisted with the 1st Defendant's dogs. Mr. Holder, though he denied knowledge of this particular problem, definitively stated that if the HDC was aware of the situation which occurred in this case, where dogs with the propensity to**

cause injury were escaping unto the roadway, the Social Services Department would have intervened.

97. **He said that HDC usually intervenes when there is a conflict between lessees and if there is a report about dangerous dogs the HDC would investigate and take steps and he said, *"that is what the Social Department does".* He also testified that when complaints are investigated, remedial steps would be taken and that the HDC could also re-enter tenanted premises from which the nuisance arose and take action to effect a remedy so as to abate the nuisance.**

98. **Under the Lease, the HDC had a non-delegable duty to repair fences but there is no evidence that the 1st Defendant's fence was erected by the Corporation. The HDC, though, had an obligation to ensure that all lessees their servants and/or agents enjoyed all common areas within the development and the HDC had a duty of care so as to ensure that any such person enjoying a common space within the development which was under its control, was safe. The HDC however failed to address the issue and took no steps to have the fence repaired nor did they mandate the 1st Defendant to do so. Further, no steps were taken to have the dogs removed or to implement systems so as to ensure that the said dogs could not traverse unto Flamboyant Avenue. These dogs had previously attacked Mr. Booker and he was fearful of them and reported this fact to Mr. Cunningham. In such a circumstance a reasonable man in the 2nd Defendant's position must have foreseen that the failure to implement steps or systems so as to prevent the escape of the dogs unto Flamboyant Avenue, involved the risk of injury to the class of persons who used Flamboyant Avenue. In the circumstances there was a duty for the HDC to implement systems by way of response to the said risk and it had an obligation to evaluate the magnitude of the risk, the degree of probability that the risk could lead to injury, and to consider that such dogs as those kept by the 1st Defendant had the propensity to be dangerous and as they had previously escaped unto Flamboyant Avenue, it had an obligation to take steps to mitigate any such risk that such a situation could have posed to persons who were using Flamboyant Avenue.**

99. **There were options available to the HDC which were not explored, it could have repaired the holes in the fence, or it could have taken steps so as to ensure that the 1st Defendant effected the repairs or it could have taken steps to have the dogs lawfully removed. Although those options were available, the 2nd Defendant failed to act. The HDC, through Mr. Booker and Mr. Cunningham, had knowledge of the threat that the dogs posed and though the risk of injury was foreseeable by a reasonable man, as a consequence of the failure to take action so as to prevent the presence of the dogs on Flamboyant Avenue, the deceased who was on Flamboyant Avenue on that faithful day as she was merely discharging her contracted obligation to provide security, was mauled to death in a horrific and tragic way.**

100. **The substantial threat which these dogs posed was not fanciful or farfetched and the HDC had an obligation to ensure that common spaces such as Flamboyant Avenue was safe and to circumvent the evident danger that the 1st Defendant's dogs posed to members of the public who traversed upon common areas in a development which was still at the material time under its control.**

101. In **Young v. Cumberland House Local Community Authority No. 3, 1999 SKQB 112**, a three and one-half year old was viciously attacked by a sled dog in the area adjacent to a park under the control of the Cumberland House Local Community. The authority had established a policy of exterminating dogs running at large. A further policy was a policy where residents could call the authority's offices about a dog problem. Josephine Carriere was very clear that she took steps to request the Authority to take action to deal with the dogs. Therefore the Authority had knowledge of the problem. She called and left a message at the Authority's office advising them that the dogs were chained in the public area. These lands were under the direct control of the administration of the Authority and the authority did nothing. The Court at paragraph 69 stated that:

> *"[69] I am satisfied that the Local Community Authority owed a duty of care to the children of Cumberland House to allow them to safely access the park and adjacent ball park area without being threatened or injured by dogs that may be tethered or*

chained on land under its control and management. I am satisfied that the Local Community Authority was negligent in that it failed to act on the request of Josephine Carriere to deal with the dogs, that had been tethered in the park area for eighteen days."

102. **On the facts of this case the Court finds that the HDC had a statutory obligation to manage and control the lands vested in it and this development was still under its charge. This obligation existed over the common areas such as Flamboyant Avenue and it had to take steps to ensure that persons who had access to the said Avenue could do so without being subject to the risk of injury by the dogs which were kept, by its lessees and it was negligent when it failed to act and to implement steps so as to ensure that the 1st Defendant dogs could not have escaped and thereby endanger persons on Flamboyant Avenue.**

103. By virtue to Clause 2(5) of the Deed of Lease which the 1st Defendant had with the HDC, all lessees covenanted to keep their property in good and suitable state of repair. The Court found that this covenant was breached by the 1st Defendant as his fence had a hole and there was a space in the gate which enabled the dogs to escape. The hole and gap in the gate were significant, given the type of dogs which the 1st Defendant had. The HDC through Mr. Booker and Mr. Cunningham was aware of the 1st Defendant's breach of the aforesaid covenant but did nothing to address the said situation.

104. By virtue of the Clause 4(1) of the said Deed of Lease, it was agreed that, "…if the Lessees shall at any time fail or neglect to perform or observe any of the covenants conditions or stipulations herein contained and on their part to be performed and observed then and in such case it shall be lawful for the Lessor (HDC) or any other person or persons duly authorized by it on that behalf to re-enter into and upon the demised lands or any part thereof in the name of the whole to peaceably hold and enjoy the said demised lands thenceforth as if these presents had not been made and without making to the Lessees any allowance or compensation whatsoever whether in respect of the building erected on the lands hereby demised or otherwise and without prejudice to any right of action or remedy of the Lessor in

respect of any antecedent breach of any of the covenants by the Lessees hereinbefore contained." Based on Mr. Booker's evidence he was aware of the holes in the fence and as the 2nd Defendant's Project Manager and steps should have been taken to address the 1st Defendant's breach of covenant.

105. **In the circumstances the Court finds that the HDC also failed to take steps pursuant to Clause 4 of the Lease so as to address the 1st Defendants breach of Clause 2 (5) of the Lease and failed to ensure the safety of persons in common areas namely Flamboyant Avenue and by its negligence in failing to respond in a timely manner in relation to the 1st Defendant's dogs, a tragic but avoidable circumstance occurred on the 9th May, 2011.**

Damages

106. By virtue of Section 27 of the Supreme Court of Judicature Act Chapter 4:01 the Estate of a Deceased can recover damages for Loss of Expectation of Life and Loss of Earnings for the lost years.

107. An award of damages for Loss of Expectation of life is a *"conventional award to mark the fact that some loss has been incurred in respect of the loss of expectation of the deceased's remaining life. As a rule, this award is not subject to inflation or to the status or age of the deceased while still living."*. In this jurisdiction, the conventional sum of $20,000.00 has been awarded for Loss of Expectation of Life and this sum does not attract interest: In **HCA No: 46 of 2003 Tota-Maharaj & Ors. v Autocenter Ltd & Ors** at pages 2-3 of his judgment Rajkumar J (as he then was) stated that:

> *"I am asked to consider whether, bearing in mind the fact that nine years have passed since this sum was last re-visited and re-valued, the sum in respect of loss of expectation of life, although a conventional sum, should be increased. I bear in mind that inflation over nine years would have significantly decreased the purchasing capacity of the sum of $15,000.00. I also bear in mind the explanation of the rationale behind this award in **McGregor on Damages 15th ed para 1530/1531** and note that it is contemplated that this award would not remain static over time.*

Unlike in the United Kingdom the legislature has not abolished this head of damage and it remains part of our law.

Accordingly, while taking into account the fact that the award is in respect of a conventional sum, I am minded to increase the figure awardable for loss of expectation of life to reflect the fact that failure to increase a conventional sum by an amount, however incremental, would result over time in that award ceasing to become of any relevance as it would have been eroded by the effects of inflation and converted from a conventional sum to a nominal sum."

108. This Court recognises that nine years has elapsed since the judgment in **Tota Maharaj** (supra) and this Court adopts the position advanced by Rajkumar J (as he then was) but having recognised that this award should not be static and that awards with respect to conventional sums should be periodically reviewed so as to reflect and ensure that the said sum remains relevant, this Court is of the view that an incremental increase is warranted and the Court therefore awards the sum of $25,000.00 for loss of expectation of life.

109. An award of damages for Loss of Earnings for the lost years is an award of damages for the years in which the Deceased would be earning if she was living. It therefore compensates the Deceased's Estate for the loss of the portion of the Deceased's earnings of which the Estate is now deprived and the 'multiplier/multiplicand approach' is adopted in assessing such award.

Multiplicand and Living Expenses

110. In **Harris v Empress Motors Ltd (1983) 3 All ER 561,** O'Conner LJ stated that:

"In assessing the damages recoverable by a deceased's estate under s 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 for the deceased's loss of earnings in the lostyears; i.e. the years in which he would have been earning had he lived, the following principles are to be applied in calculating the living expenses to be deducted from his net earnings in the lost years in order to reach the amount of recoverable damages: (1) the ingredients that go to make

up 'living expenses' are the same whether the deceased was young or old, single or married or with or without dependants: (ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation: (iii) accordingly, any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings for the purposes of the 1934 Act. However, where the deceased expended the whole or part of his net earnings on living expenses (such as rent, mortgage interest, rates, heating, electricity, gas, telephone etc. and the cost of running a car) for the joint benefit of himself and his dependants, a proportion of that expenditure (the exact proportion being dependant on the number of dependants) should be treated as expenditure exclusively attributable to his living expenses and thus deductible from his net earnings in making the assessment under the 1934 Act; ***for example,*** *where the only dependent is the deceased's wife one-half of the expenditure for their joint benefit should be deducted from the net earnings, but where there is a wife and two dependent children one quarter of the expenditure for the family's benefit should be deducted from his net earnings."*

111. At page 571(b) Lord Salmon in the House of Lords case of **Pickett v. British Rail Engineering Limited (1980) AC136** at153-154 state that:

"Damages for the loss of earnings during the lost years should be assessed justly and with moderation."

112. At page 576(d) the case of **White v. London Transport Executive (1982) QB 489** at 499 the Court opined that:

"Thus for example in this day and age the ordinary working man's life would not be regarded b him as reasonably satisfactory and potentially enjoyable if he cannot afford a short holiday, a modest amount of entertainment and social activity and depending on his particular circumstances, a car."

113. Further in **White v. London** case (supra) at page 576(h) to (j) the Court said:

> *"The first inference that needs to be drawn as it seems to me, if my definition of the loss in question is correct, is whether, and if so, broadly to what extent, the deceased's prospective earnings match the circumstances into which he had been born and was living. Because if a man born and brought up in a very comfortable circumstances is a relatively low earner, his earning might not even be sufficient to meet his reasonable need, let alone to exceed them, while, on the other hand, a man with relatively modest demands, earning relatively a lot of money compared with that earned by most men in his circumstances, would be likely to have a large surplus."*

114. In calculating Net Earnings for the purpose of determining the multiplicand, the following items is usually deducted from the Gross Income:

i. The expenses incurred in earning the income;
ii. Tax Liability;
iii. National Insurance Contributions; and
iv. Health Surcharge

115. In its calculation of the quantum to be used as the multiplicand for the purpose of calculating the deceased's earning in the lost years, the Court adopted and applied the surplus approach. The Court also considered inter alia that each matter is fact specific and noted that the deceased was still a relatively young, married woman with a family, and would have been faced with all the expenses involved in looking after a home and children. In accordance with the dicta in **Harris** (supra), the sum which ought to be deducted is the percentage of her net earnings that she would have spent exclusively on herself so as to maintain the standard of life to which she was accustomed. Given the fact that her income was modest and having noted that she had children, the deceased's expenditure on herself would have been modest and she would have had limited funds to spend on clothing and entertainment. There is no evidence to suggest that she was in the position to, or that she did, enjoy annual vacation trips but she did incur the daily cost of travel to and from work. The Court formed the view that her expenditure on herself inclusive of personal expenses, entertainment and having

taken into account sickness and the other contingencies as outlined in **Persad v. Seepersad Civ Appeal 36 of 2000**, should result in a deduction of 1/3 of her net earnings.

116. In relation to income taxes, given the quantum of her earnings, her tax liability would have been limited. When an income tax deduction is made, the tortfeasor in effect receives a benefit to which there is no entitlement, as sums deducted for tax are not paid by them to the relevant state department. An urgent review of this situation should therefore be undertaken and the necessary regulatory framework should be effected so as to ensure that the state could collect the tax sums deducted from the deceased's gross income. Once such a deduction is made the State should not be deprived of that deducted sum and the said deduction ought not to occur in a vacuum.

117. The Claimant had no standard hours of work but earned $14 per hour (gross) as well as overtime. The Court accepted the Claimant's evidence at paragraph 27 of his witness statement, where he alleged that his wife worked for an average of $3,763.84 per month. This figure does not appear to be unreasonable as the deceased worked as a security officer and typically these officers work long days and usually more than five days a week. The Court carefully considered the deceased's pay slips which were annexed as LR12 to the Claimant's witness statement and noted that the deceased's net pay fortnightly in 2009 ranged from a low of $638.00 for the period 1-15 September 2009 to a high of $2956.00 for 1-15 May 2010. In the circumstances the Court is inclined to use as the multiplicand the net monthly figure of $3,500.00. This figure could represent the deceased's fair net monthly average earning. Therefore her average net annual salary would have been $3,500.00 x 12 = $42,000.00 less living expenses of 1/3 or $14,000.00, which would result in an annual multiplicand of $28,000.00.

118. Six years and one month has elapsed since the deceased's demise up to the date of this judgment. Accordingly the sum award for loss of earnings (pre assessment) is 28,000.00 x 6.083 = $170,324.00. Interest shall accrue on this sum at a rate of 2.5% from the date of loss.

Loss years – Post assessment lost

119. In calculating the multiplier the Court noted that on the date of her death the deceased was 47 years old. The Claimant's evidence is that she was permanently employed and could have worked until 65, she was in good health and he testified that as far as he was aware she had no known illness. At the date of the trial the deceased would have been 53 years old and from this date may have been able to work for a further 12 years until she attained the age of 65.

120. In **CV. No.3243 of 2004 CV 2009-00988 between Dave Leon Moore v. Dexter Lewis #12925 The Attorney General of Trinidad and Tobago,** the deceased was 54 at the date of the trial and the judge used a multiplier of 6 for post assessment losses. He stated as follows:

> *"35. I am guided by the Privy Council case Privy Council No. 86 of 2002, Peter Seepersad v Theophilus Persad & Capital Insurance Ltd delivered on 1st April 2004. In that case the appellant who suffered personal injuries was 37 years old at the date of trial. I note that at paragraph 18 the Privy Council took into account the current discount rate on treasury bills in Trinidad and Tobago as being between 5% and 6% and assessed a multiplier of 16 years in order to provide proper compensation to the appellant taking into account interest rates in Trinidad and Tobago and making some allowance for the contingencies of life.*
>
> *36. I take into account that in the Seepersad case the multiplier used was 16 for a plaintiff 37 years old at the date of trial.*
>
> *37. I note also that interest rates in Trinidad and Tobago have been on the decline.*
>
> *38. The multiplier of 16 in the Peter Seepersad case was for future loss of earnings, as pre-assessment loss of earnings had been quantified. 39. In Ansola, Johnson v*

Singh, Ramnarine; Roopnarine, Ganesh; The Great Northern Insurance Company Limited H.C.3487/2003 delivered in 2008 this court used a multiplier of 8 in relation to a claimant who was at trial aged 47 years. I propose to use a multiplier for future loss of 6."

121. For the purpose of calculating loss of future earnings (post assessment losses), and guided by the approach taken by Rajkumar J (as he then was) in **Dave Leon Moore** (supra), this Court is of the view when one takes into account the vicissitudes of life and all the factors including inter alia prevailing interest rates that the multiplier should be 6 years. Accordingly the sum of ($28,000.00 x 6) or $168,000.00 is payable and no interest shall accrue on this sum.

Pain and suffering

122. The undisputed evidence established that the deceased bled to death as a result of her having been bitten by dogs, her death certificate revealed that the cause of her death was acute blood loss and a damaged right carotidal artery. This scenario that led to her demise must have resulted in her severe pain but there is no evidence before the Court from which it can establish the nature, intensity or severity of the pain to which the deceased was subjected. Accordingly the Court is constrained to make a nominal award under this head of $1,500.00. Interest shall accrue on this sum at a rate of 2.5% from the date the claim was instituted until the date of this Judgment.

Aggravated damages

123. In **CV 2007-02297 Mayers v. The Attorney General of Trinidad and Tobago,** Master Alexander stated that, *"aggravated damages can be awarded where there are aggravating features about the case which would result in the Claimant not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. It also covers any conduct of those responsible…which shows that they had behaved in an insulting, malicious or oppressive manner…"*

124. In **Civil Appeal No. 159 of 1992 Thaddeus Bernard, Airports Authority of Trinidad v. Nixie Quashie** De la Basitde CJ in discussing an award of Aggravated Damages stated that such damages, "…are meant to provide compensation for the mental suffering inflicted on the plaintiff as opposed to the physical injuries he may have suffered. Under this head of mental suffering are included such matters as the affront to the person's dignity, the humiliation he has suffered, the damage to his reputation and standing in the eyes of other and matters of that sort."

125. On the facts there is no evidence from which the Court could conclude that either the Defendants knowingly acted in a malicious or oppressive manner so as to humiliate or injure the deceased and no award under this head is hereby made.

Special damages

Special damages claimed

126. Cost of letters of Administration - $3,500.00
Funeral Costs - $12,000.00

127. The 2nd Defendant did not dispute that the cost of the deceased's funeral expenses was the sum of $12,000.00, but the 2nd Defendant pointed out that the said sum is not recoverable by the deceased's estate. The Court however however finds that justice and fairness demands that the sum for the funeral should be paid to the deceased's husband Mr. Lionel Rackal.

128. With regard to the Claimant's claim for the cost of letters of administration, according to Master Alexander in **Amarsingh Boodram (Administrator of the Estate of Mohan Boodram) v Jewan Persad CV 2011-01931**, *"[i]n this jurisdiction, the practice has been to allow the recovery of the cost of obtaining a grant of letters of administration. See Deosahai Bedaisee (Administrator of the Estate of Indra Bidaisee, deceased) v Ramdial Transport Ltd. HCA No 2541 of 2002."* At paragraph 22 (a), Master Alexander stated that,

"…There is no evidence in support of this claim as the receipt in support was struck out. Counsel of the defendants submitted that this expense is not a loss or damage for the benefit

of the deceased's estate in reliance on the case of Deonarine v Narine. It is to be noted however, that in several recent cases in this jurisdiction, the expense was allowed: Mangine Ramnarine (Administratrix of the Estate of Dolly Partap otherwise Dolly Dookharan) v Joseph Hospedales H.C. 953/1984 and Deosahai Bedaisee (Administrator of the Estate of Indra Bidaisee, deceased) v Ramdial Transport Ltd. and anor H.C. 2541/2002. In the present case scenario, however, the receipt having been struck out and the maker not being called to tender same into evidence, this claim is not allowed for insufficiency of proof."

129. The Court is satisfied with the Claimant's evidence that $3,500.00 was paid to obtain a grant of administration. The cost associated with the obtaining of a Grant of Administration would not have arisen but for the tortfeasor's action which lead to the deceased's demise and therefore the said sum should be allowed. Accordingly, the Claimant is entitled to special damages in the sum of $15,500.00 with simple interest at a rate of 1.25% per annum from the 10th May, 2011 to the date of this judgement.

130. The **Compensation for Injuries Act** provides:

"Whenever the death of any person is caused by some wrongful at, neglect, or default, and the act, neglect or default is such as would before the commencement of this Act (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been under such circumstances as amount in law to an arrestable offence".

132. Section 7 of the Compensation for Injures Act further provides:

i. *"In every action in respect to injury resulting in death such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.*
ii. *The amounts recovered after deducting the costs, if any, not recovered from the Defendant, shall be divided among the persons mentioned above in such shares as are determined at the trial.*

iii. It shall be sufficient, if the Defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under this Act for his wrongful at, neglect or default, without specifying the shares into which it is to be divided by the Court; and if the said sum is not accepted and an issue is taken by the Plaintiff as to its sufficiency, and the Court shall think the same sufficient, the Defendant shall be entitled to the verdict upon that issue".

133. And section 10 of the Compensation for Injuries Act provides:

"In an action brought under this Act, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for who benefit the action is brought."

134. The Court found that the evidence adduced by the Claimant to support an entitlement to an award under the Compensation for Injuries Act was wholly inadequate. At the time of the deceased's death, both children were over the age of 16 and no detailed evidence was adduced so as to establish the exact quantums that were spent on either child. At the time the Claimant was also employed and any award made to the deceased's estate must be taken into account when assessing an award under the Compensation for Injuries Act. Given the paucity of the evidence in relation to dependency, any award under the Compensation for Injuries Act would be very nominal and considerably less than the sums awarded under the Supreme Court of Judicature Act. Accordingly, the Court did not proceed to calculate same and noted that on an intestacy, the deceased's estate has to be divided as between the Claimant and his children on a ½ and ½ basis.

Conclusion

135. The award assessed by the court shall be as follows:

a) The sum of $25,000.00 for loss of expectation of life.
b) Earnings for pain and suffering in the sum of $1500.00 with Simple Interest at a rate of 2.5% from the 06th May, 2015 to the 22nd June, 2017.

c) Loss of earnings up to date of the judgment in the sum of $170,324.00 with interest on this sum on a simple interest basis at a rate of 2.5% from the 10th May, 2011 to the 22nd June, 2017.

d) Special Damages in the sum of $15,500.00 with simple interest at a rate of 1.25% per annum from 10th May, 2011 to 22nd June, 2017.

e) Loss of Future Earning (post trial assessment) in the sum of $168,000.00.

f) Interest shall accrue from the date of this Judgment at the revised statutory rate of interest.

g) The Defendant shall pay to the Claimant costs on a prescribed cost basis as provided for by the Civil Proceedings Rules (1998) as amended on the sums awarded by the Court.

h) There shall be a stay of execution of 35 days

……..

FRANK SEEPERSAD

JUDGE