IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2015-02006**

BETWEEN

SUMINTRA MATADEEN

Claimant

AND

JAMEEL BRATHWAITE

First Defendant

GUARDIAN GENERAL INSURANCE LIMITED

Second Defendant

Appearances:

Claimant: Natasha Baiju-Patrick
First Defendant: No Appearance.
Second Defendant: Andrea Orie

Claim No**. CV2015-02007**

BETWEEN

CARLINE MATADEEN

Claimant

AND

JAMEEL BRATHWAITE

First Defendant

GUARDIAN GENERAL INSURANCE LIMITED

Second Defendant

Appearances:

Claimant: Natasha Baiju-Patrick

First Defendant: No Appearance.

Second Defendant: Andrea Orie

Before the Honourable Madame Justice Quinlan-Williams

JUDGMENT

THE INTRODUCTION

1. This matter involves claims for damages for personal injuries and consequential loss arising from an accident which occurred on the 2nd July, 2014. The claims were filed separately however, on the 3rd June, 2016, these two claims were consolidated and subsequently tried together.

2. On the 24th March, 2016, Judgment in Default of Appearance was entered against the First Defendant, Jameel Brathwaite in both claims. The issues of negligence and liability for the accident have been determined by the entering of that judgment. Therefore, the First Defendant was negligent in driving PCE 2730 thereby causing the accident. Accordingly, the issues that remain outstanding are that of damages and whether the Second Defendant is liable to satisfy same.

3. The Second Defendant is denying liability to satisfy the judgment against the First Defendant on the basis that the insurance policy was breached by the deliberate action of Kwesi Charles in renting the vehicle to the First Defendant.

THE CLAIMS

4. Both Claimants, Sumintra Matadeen (Sumintra) and Carline Matadeen (Carline) claim damages for personal injuries and consequential loss arising out of the accident which occurred at Manahambre Road intersection with St. Madeline Circular Road, St. Madeline. The Claimants alleged that the accident was caused by the negligence of the First Defendant, his servant and or agent in the driving/management and or control of the motor vehicle registration number PCE 2730. Sumintra claims that she sustained several injuries including injuries to her head, right foot, left rib, face, right little finger and left middle finger. Carline claims that she sustained several injuries including to her right big toe, right foot, left shin, forehead, right shoulder and her right sinus.

5. Against Guardian General Insurance Limited (Second Defendant), the Claimants claim a declaration that the Second Defendant is liable to satisfy the judgment, costs and interest against the First Defendant.

6. The Claimants also pleaded that the Second Defendant, on the 4th December, 2014, paid the owner of motor vehicle PAX 6158 the sum of Sixteen Thousand Dollars ($16,000.00) for the damage done to the vehicle as a result of the accident.

THE DEFENCE (SECOND DEFENDANT)

7. The Second Defendant issued an insurance policy to Kwesi Charles (Kwesi), the owner of motor vehicle registration number PCE 2730. The Second Defendant denies that they are liable under **Motor Vehicle Insurance (Third Party Risks) Act, section 100**[1] to indemnify the First Defendant or its insured or to satisfy any judgment obtained by the Claimants in this matter. The Second Defendant stated that it discovered that Kwesi at the material time rented the vehicle to the First Defendant contrary to the terms of the insurance policy. The Second Defendant's evidence is that the terms and conditions of the insurance policy agreement between Kwesi and the Second Defendant excluded coverage for the use of PCE 2730 for hire or reward or for use otherwise than in accordance with the limitations prescribed in the certificate.

PRELIMINARY ISSUE: WHAT IS THE EFFECT OF THE CLAIMANTS' FAILURE TO REPLY TO TRIABLE ISSUES RAISED IN THE DEFENCE.

8. This preliminary issue would be dealt with prior to the court considering the main issues in this claim. The Second Defendant in their defence raised new matters and documents, specifically:
    i. that the First Defendant was not the insured under the policy of insurance;

[1] Chapter 48:51

ii. that the subject policy limited the use of PCE 2730 and excluded rental;

iii. that at the time of the collision PCE 2730 was rented by the insured to the First Defendant for a sum of Three Hundred Dollars ($300.00); and

iv. Kwesi breached the subject policy by renting PCE 2730 to the First Defendant, therefore the Second Defendant is not liable.

9. The Claimants in their claims referred to the First Defendant as the owner/driver of PCE 2730. The Defendant's submit that these are new issues and that the Claimants did not reply to these new issues raised in the defence filed by the Second Defendant. This issue was addressed in the case of **<u>Great Northern Insurance Company Limited, Verernon Montrichard, Carl Arneaud and Rosanna Glasglow</u>**[2] at paragraph 30, Bereaux JA stated:

> *….even if the plaintiff does not submit a reply, that does not relieve the defendant of the obligation to prove the allegations raised in the defence. The allegations of fact are deemed to have been denied. There is an implied joinder of issues on the defence and the defendant is put to proof on all issues raised….*

10. Also instructive is the case of **<u>Nanan v Toolsie</u>**[3] Jones J (as she then was) stated:

> *In the absence of any specific rule with respect to the effect of a failure to file a reply, in my opinion, the fact that the claimant has not filed a reply to a defence while not amounting to an admission of any new facts raised in the defence will prevent the claimant from raising at trial any facts, other than those contained in the statement of case, in challenge of those facts raised in the defence….the effect of the failure of the claimant to file a reply is that the claimant has not sought to challenge by way of the provision of alternate facts any of the new facts raised by the defendants in their defence.*

11. The authorities are clear, the fact that the Claimants did not reply to the new issues raised in the Second Defendant's Defence is not an admission, however the Claimant is prevented from challenging these new issues at trial with anything outside of their

[2] Civil Appeal No. 265 of 2008
[3] CV 2010-04210

pleaded case. Notwithstanding this, the Second Defendant still has to prove the issues raised in their defence, on a balance of probabilities.

THE ISSUES

12. There are two issues of fact that have to be determined. Firstly, whether the First Defendant or Kwesi was the insured of the Second Defendant under the policy. In this regard, the court accepts the evidence of Neikheitha Nelson, Clerical Assistant I in TECU Credit Union's Insurance Department. Her evidence is that she processed Kwesi's application for insurance coverage of motor vehicle PCE 2730. The court also accepts the documentary evidence in the form of the Certificate of Insurance which names Kwesi as the insured for motor vehicle PCE 2730. The court is therefore satisfied on a balance of probabilities, that Kwesi is the insured under the policy. The court is also satisfied on a balance of probabilities, that the Private Motor Vehicle Policy (annexed to the witness statement of Neikeitha Nelson as N.N. 2) between the Second Defendant and the insured, makes provision for Indemnity to Authorised Drivers. The indemnity is "Against all sums including claimant's costs and expenses which such Authorised Driver…becomes legally liable to pay in respect of (a) death or bodily injury to any person. "Authorised Driver" is defined in the Certificate of Insurance, Section 5, as "any person who is driving on the Policyholder's order or with his permission".

13. The Claimants relied on a number of cases to show that the insured does not have to be made a party by the Claimants, and that the indemnity applies in the same way to authorized drivers. In **Digby v General Accident Fire and Life Assurance Corpn Ltd**[4] it was held that

> *the authorized driver is to be indemnified "in like manner" to the policy holder…just as the policyholder is to be indemnified against any claim made on her by a person*

[4] (1943) A.C. 121

other than herself, so the authorized driver is to be indemnified against any claim make on him by a person other than himself (page 145, paragraph 1)

14. In **The Great Nothern Insurance Company Limited, Vernon Montrichard, Carn Arneaud and Rosanna Glasglow**[5], Bereaux JA, spoke of the oddity of the Appellant insurance company making no effort to join the insured as a party. Bereaux JA also spoke about the standard of proof required of the Appellant Insurance Company to discharge its burden of proving that an unauthorized driver was driving the insured vehicle, approving the trial judge's view:

    An insurance company seeking to disavow a policy and this preclude a plaintiff's recovery of damages, was to be held to a high standard of proof even though the standard was proof on a balance of probabilities (Page 9)

15. In **Corey Bailey and Jason George, Rodney Lavia and New India Assurance Company (Trinidad and Tobago) Limited**[6], Rajnauth-Lee J (as she then was), noted that it was the defendant's burden to prove that the Policy is being used otherwise than in accordance with the Limitations as to use. Rajnauth-Lee J (as she then was) ruled that the burden of proving a rental agreement and that the driver was not authorized was on the Insurance Company. The Second Defendant relied on the case of **Maharaj 2002 Limited v Pan American Insurance Company of Trinidad and Tobago**[7] that the Claimants should have replied to the issue raised in the defence. However, the issues raised in that case were not similar and therefore does not assist the court. Where, as here, it is alleged that an insured or his authorised driver were liable and the Insurance Company should be liable to indemnify same. The court is satisfied on a balance of probabilities that the burden is on the Second Defendant to prove that the First Defendant is not an authorised driver.

16. Secondly, whether the use of PCE 2730 as a rental would void the insurance cover as being contrary to the limitations as to its use under the policy. Again, the court accepts the evidence of Neikhetha Nelson that the type of coverage that the insured was given was

[5] CA No. 265 of 2008, HCA No. 2554 of 2001
[6] HCA, S-1224, Claim No. CV 2006-02217
[7] CV 2015 - 003645

one for private vehicle use as opposed to those for commercial type policies which are issued for vehicle rentals. This coverage was based on the information that the insured provided to her as to the use of the vehicle. The policy did not cover the use of vehicle for commercial purposes.

17. With these two factual issues determined, the following issues are left to be decided:
    i. Whether at the material time PCE 2730 was being used by the First Defendant as a rental;
    ii. Whether the Second Defendant waived their right to deny liability as they would have settled part of the claim;
    iii. What quantum of damages, if any, should be paid to Sumintra; and
    iv. What quantum of damages, if any, should be paid to Carline.

ISSUE I: WHETHER AT THE MATERIAL TIME PCE 2730 WAS BEING USED BY THE FIRST DEFENDANT AS A RENTAL.

18. The Second Defendant's pleaded case is that at the material time PCE 2730 was being used as a rental. To support this assertion the Second Defendant relied on a hearsay statement made by the First Defendant to Vernon Hanslal (the investigator).

Evidence - Vernon Hanslal

19. This witness is the Managing Director of Exponential Investigation Services Limited (Exponential). The witness stated that Exponential was hired by the Second Defendant to investigate the accident. According to the witness, the investigator's duties are to

> *conduct investigations into, and report on, the facts and circumstances of the collision which forms the basis of these Actions and/or loss allegedly sustained therein ["this investigation"], and to conduct interviews, collate information, record statements, take photographs, extract information from the records of the*

Police and generally to do the usual acts, matters and things which are undertaken in the course of such an investigation." [8]

20. The investigator stated that as part of his investigation, he met with the First Defendant at his home and recorded a written statement from him. This written statement was signed by First Defendant. The investigator testified that the First Defendant said to him, inter alia:

    On the morning of July 2, 2014 I rented vehicle PCE 2730 from my neighbour Kwesi Charles at a cost of $300.00 for the day and was supposed to return the vehicle the next day when I would have paid him the rental fee. I'm always renting vehicles but this is the first time I actually rented a car from Kwesi. I was using PCE 2730 to transport my family to a graduation.

21. This written statement is dated 21st September, 2014 and is attached as VH 3 to the investigator's witness statement.

22. In cross-examination the investigator admitted that at the end of the First Defendant's statement, there is no certificate of truth. He admitted that he usually attaches certificates of truth after all his statements, however he also insisted that it is not true that the reason he did not put the certificate of truth is because he did not believe the First Defendant. Later in cross-examination he said there was no certificate of truth as the First Defendant did not volunteer to put one.

23. The investigator said that he recorded what the First Defendant said to him. He did not discover anything that the First Defendant said as untrue. This is contrary to the written report where he stated during their investigations and that of the Police, no information or evidence was unearthed to support his (the First Defendant's) account of how the accident occurred. Furthermore, in his report the investigator stated that when he spoke to Cpl Gopaul and Officer Flaviney they advised that the First Defendant gave them a

[8] Paragraph 7 of Vernon Hanslal's witness statement

similar version of the accident and they expressed some degree of doubt as to the truthfulness of his account. The investigator also stated that at the time he received instructions he did not receive information about the insurance policy, he also did not see the certificate of insurance or the proposal. The investigator also testified that he could not recall whether he communicated with the Second Defendant about the First Defendant's statement prior to the report being submitted. He stated that there is a file with regard to the investigation and that he had it with him in court. The witness checked the file and stated that he does not have a written correspondence to the Second Defendant stating that he received the statement from the First Defendant. He testified that there may have been a phone call and it is possible that he communicated with a representative of the Second Defendant that the First Defendant rented the vehicle from the insured. He also stated that after he was finished recording the statement, the First Defendant informed him that he also told the police that he rented the vehicle from the insured.

Law and Analysis

24. The **Motor Vehicle Insurance (Third Party Risks) Act**[9] is an act that made provision for the protection of third parties against risks arising out of the use of motor vehicles. Specifically, the **Motor Vehicle Insurance (Third Party Risks) Act section 10** makes it the duty of the insurer to satisfy judgments against persons insured in respect of third-party risks. Section 10 (1) provides:

> *10. (1) If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, in addition to any*

[9] Chapter48:51

amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

25. Therefore, the Second Defendant, as the insurer, has a duty to satisfy judgments against insured in respect of third party risks, both by virtue of the **Motor Vehicle Insurance (Third Party Risks) Act** as well as by virtue of the contractual arrangement made between the Second Defendant and the insured.

26. The Second Defendant is claiming that the insurance policy was breached and is relying on this alleged breach to be absolved of the responsibility to satisfy the judgments against the First Defendant. The insurance policy, in this case, covered the insured and any authorised driver. However, the policy stipulated that the motor vehicle registered as PCE 2730 was for private use. To avoid liability, the Second Defendant has the burden of proving, on a balance of probabilities, that the insured, rented the vehicle to the First Defendant.

27. The issue here is whether this hearsay evidence rises to the required standard to discharge the burden of proof.

28. The **Evidence Act[10] section 41 (3)** (section 41) provides guidance in estimating the weight, if any to be attached to statements admissible in evidence, by virtue of section 37, 39 or 40:

> *…regard shall be had to all circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular-*
>
> *In the case of a statement falling within section 37 (1) or 38 (1) or (2), to the question whether or not the statement was made contemporaneously with the occurrence or existence of the fact stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.*

[10] Chapter 7:02

29. There are three considerations under section 41: all the circumstances, whether it was made contemporaneously and whether the maker had any incentive to conceal or misrepresent the facts.

30. The first section 41 consideration is to have regard to all the circumstances. In estimating the weight to give to the hearsay statement the court must have regard to "all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement". These circumstances are detailed in a chronology in order to put the hearsay statement in its proper context:
    i. The Police Report of an accident which occurred on the 2nd July 2014. This is the first and contemporaneous account of the accident. The report does not include an account of the car being rented by the First Defendant from the insured.
    ii. The Status Report from Exponential dated 25th August 2014. Up to this time there is no contact made with or contact information for the insured or the First Defendant.
    iii. Email dated 17th September 2014, from Exponential to the Second Defendant. Stated in the status report is "we eventually made telephone contact with the Insured and he provided information on the Insured Driver's address…. provided the contact information for the driver". There is no account by the insured as to how the First Defendant came to be driving the vehicle. The investigator made arrangements to meet with the insured and the driver later that week.
    iv. The same email of 17th September 2014, from Exponential to the Second Defendant. The investigator reports that he made contact with the First Defendant's mother. Exponential expressed their opinion that "from the information and evidence gleaned thus far points culpability to the Insured Driver".
    v. On 21st September 2014, the investigator records a detailed statement from the First Defendant. In that statement the First Defendant reports "I rented the vehicle from my neighbour Kwesi Charles at a cost of $300.00 for the day and was

suppose to return the vehicle the next day when I was suppose to have paid him the rental fee". This is the first time there is any mention of a rental arrangement. The investigator records a full and detailed multi page statement from the First Defendant.

vi. On the 25th of September 2014, the insured and the First Defendant, both sign a Motor Vehicle Accident/Loss Report. The report states that the insured and the First Defendant are cousins. The Report also states that the car was used by the First Defendant for the purpose of "Transport Family". There is no mention in this Motor Vehicle Accident/Loss Report of the car being rented by the insured to the First Defendant.

vii. The investigator stated[11] that he received further instructions from the Second Defendant on the 26th October, 2015 to attend on the Police to ascertain whether any of their records reflected the rental of PCE 2730 and, if so, to obtain certified copies of any such record. He attended to the station the same day and did not receive any such report.

viii. The Exponential Report dated November 20, 2015. The report states that they conducted interviews with Cpl Gopaul and Officer Flaviney. The report states, in part "Gopaul advised that their investigation unearthed no independent eyewitnesses. They advise that the Driver of PCE 2730 Jameel Brathwaite gave a similar version of the accident to them as he gave to us, and express some degree of doubt as to the truthfulness of his account…he found no marking to suggest that PCE 2730 was travelling west along the Manahambre Road as the driver so claims"[12]

ix. An Evaluation of Accident Report formed part of the Exponential Report. It is dated November 20, 2014. The Evaluation of Accident Report states "It should be noted that the driver Jameel Brathwaite stated that he rented the Insured Vehicle from the Insured which he also indicated to the Police, but there was no

[11] Paragraph 15 of Vernon Hanslal's witness statement
[12] Page 6 of Exponential Investigation Report

contractual agreement and the Insured, since the accident, has shown little or no interest in Insurers handling of this matter". Their stated opinion, was that the First Defendant was culpable for causing the accident.

31. Having considered the circumstances outlined above, the court is satisfied on a balance of probabilities that the hearsay statement was not made at the first opportunity; the report to the police. The court did not apply any weight to the investigator's evidence, that the First Defendant told the investigator and the police that he rented the vehicle from the insured. Given the details contained in the statement recorded by the investigator, the details in the Status Report and the Exponential Report, such an important matter would have been noted at the time it is alleged that the First Defendant said this to the investigator. The hearsay statement was so important that the investigator, on instructions, returned to the police station seeking confirmation of same. However, it seems that the investigator did not make efforts at this stage to contact the insured, who lives around the corner from the First Defendant and who he had previously made contact with to get the contact information for the First Defendant.

32. The court has to consider that the hearsay statement is the lynchpin of the Second Defendant's case. It is the only evidence relied on to vitiate the contract. Putting the hearsay statement in the context in which it was alleged to have been made, the court is not convinced of its reliability.

33. In the circumstances in which the hearsay statement was made, the court is satisfied on a balance of probabilities that it cannot assign any weight at all to the hearsay statement. As this is the only evidence that the Second Defendant has to prove that the vehicle was rented, it does not satisfy the required burden of proof to displace the duty imposed under the **Motor Vehicle Insurance (Third Party Risks) Act**, **section 10.**

34. The second section 41 consideration is if the hearsay statement was made contemporaneously with the accident. In this instance it was not. The accident occurred on the 2nd July, 2014 and this hearsay statement was made on the 21st September, 2014.

35. The third section 41 consideration is whether the maker of the statement had any incentive to conceal or misrepresent the facts. From the beginning and continuing the First Defendant provided explanations as to how the accident occurred. Those explanations if true, would mean that he was not liable for the accident. Those explanations the police and the investigator found not to be credible. The hearsay explanation about the rental, could have been provided by the First Defendant in an attempt by him to absolve the insured from responsibility for the accident. This hearsay statement has to be considered in light of the fact that the police and the investigator had questions about the veracity of the First Defendant.

36. Even if the court was able to attached weight to the hearsay statement, after accounting for the three section 41 considerations, the court would have to examine the hearsay statement. The hearsay statement itself does not lead to one interpretation; that there was a rental agreement between the insured and the First Defendant. Did the insured know that there was a rental agreement and that the First Defendant rented the vehicle from him for Three Hundred Dollars ($300.00)? Or is that the First Defendant who, according to him, was accustomed to renting vehicles, decided of his own accord, that when he returned the vehicle the following day he would give the insured Three Hundred Dollars ($300.00). There is nothing in this hearsay statement which suggest that the insured had knowledge of this rental agreement that the First Defendant spoke about. There was no payment when the First Defendant took the vehicle. This may have provided support that the insured had knowledge of and agreed to the rental arrangement. The statement spoke to what the First Defendant knew and intended to do; "I rented the vehicle", "When I would have paid him the rental fee", "I am always renting vehicle", "this is the first time I actually rented a car from Kwesi". Nothing in the hearsay statement

provides any evidence that the insured had knowledge of the rental agreement. The hearsay statement isn't clear enough for the court to be satisfied on a balance of probabilities that there is only one interpretation, that there was a rental agreement comprising the four necessary elements: offer, acceptance, consideration and intention to create legal relations. For this reason, the court is also satisfied on a balance of probabilities that the Second Defendant would not had met the burden of proof to displaced the duty imposed under the **Motor Vehicle Insurance (Third Party Risks) Act**, **section 10**.

37. Accordingly, the Second Defendant is liable to satisfy the judgment, costs and interest against the First Defendant.

ISSUE II: DID THE SECOND DEFENDANT WAIVE THEIR RIGHT TO DENY THE INSURANCE

38. The finding on this issue is largely irrelevant based on the previous findings relative to the hearsay statement. In brief, the court is satisfied on a balance of probabilities that parties are entitled to contractually decide issues without being penalized as suggested the Second Defendant should be penalized here. The exhibit A.D.T.12 attached to the witness statement of Ariane Davis Thomas is a "Third Party Release and Discharge Form". In consideration of the payment of Sixteen Thousand Dollars ($16,000.00) Sumintra Matadeen discharged Guardian General Insurance Limited from any and all actions, causes of action, claims and demands for upon or by reason of any damage, and property which heretofore has been or hereafter may be sustained in consequence of or in any way attributable to an accident involving vehicle registration number PCE 2730 and PAX 6158. "IT IS UNDRESTOOD AND AGREED that the said payment is not deemed to be an admission of liability on the part of Guardian General Insurance Limited".

39. The discharge is limited to damages and specifically excludes loss or injury to persons as a consequence of the accident. The Second Defendant isn't asking to avoid liability or void

the contract by the terms of the agreement outside of its limited expressions. They are saying, as far as this matter and these parties are concerned, the Second Defendant has not admitted liability by this pay-out. If it becomes necessary then you prove liability in the usual manner. The court has not considered the fact of the payment as evidence against the Second Defendant.

ISSUE III: WHAT QUANTUM OF DAMAGES SHOULD BE PAID TO SUMINTRA MATADEEN

Evidence- Sumintra Matadeen

40. Sumintra has passed her 60th birthday and is currently unemployed. Prior to the accident she was employed under the CEPEP Programme as a forelady for a salary of One Thousand Four Hundred Thirty Seven Dollars and Fifty Cents ($1, 437.50) fortnightly. Since the accident the witness has been unable to work. The Witness's evidence is that she is no longer marketable for any job as she suffers pain even in carrying out simple duties.

41. Sumintra's evidence is that at the time of the accident she experienced severe pain to her head, right foot, ankle, knee, chest and right hand. She was rushed to San Fernando Hospital, accident and emergency department and remained there for about twenty (20) hours. Whilst there she was revived and the medical personnel did some tests which included an x-ray. Thereafter, she was taken to the Intensive Care Unit (ICU) for further health care. The witness's evidence was that at this time she had a fractured right femur, tibia, foot, right hand, little finger, middle finger and left rib. Throughout this time the witness was in unbearable pain where there were fractures. She also had cuts on her face and headaches from hitting her head during the accident. She testified that she had surgery on her right knee and right fibula (plates and screws where inserted) and was then again returned to the ICU. After the surgery the witness was in pain and she was given painkillers and antibiotics to prevent infection. The witness was also at this time unable to move around on her own. The witness's evidence is that tubes were inserted into both her right and left chest. These tubes failed on several occasions and caused the

witness a lot of pain. After about three weeks in ICU the witness was again taken to surgery to repair her femur and tibia. The witness stated that she again suffered excruciating pain all over her body and was prescribed painkillers and antibiotics. The witness's evidence is that she spent twenty five (25) days in ICU and then she was taken to the Orthopaedic Ward for further treatment. The witness was discharged on the 16th September, 2014 and was required to follow up at the outpatient clinic. At this time the witness could not walk on her own and was confined to a wheelchair.

42. In January, 2015 she went to Mr. Dean Baiju as she still had pain and swelling in her right foot, ankle and knee. This pain was greater at night or when the weather was cold. She stated that the pain usually kept her awake at nights. Mr. Baiju recommended that she continue with physiotherapy for her right knee and ankle, deep breathing exercises for her chest and knee replacement surgery at Sixty Five Thousand Dollars ($65,000) and or ankle fusion at a cost of Fifty Thousand Dollars ($50,000).

43. The witness's evidence is that presently she is still suffering from pain and swelling in her right foot, ankle and knee; severe pain at night in her right leg; weakness of her right leg; restricted movement of her knee , ankle and hands, pain in her fingers on both hands and she has to use a walking aid.

44. The Claimant claims:

i. Future loss of earnings;

ii. Special Damages:

a)	Medical Report-South West Regional Health Authority	$75.00
b)	Medical Report - Mr. Baiju-	$1,000.00
c)	Loss of Earning	$86,250.00
d)	Knee Replacement	$65,000.00
e)	Ankle Fusion	$50,000.00

Cross examination

45. The witness stated that she went to clinic after she was discharged, however she stopped going clinic in November, 2016. In cross examination the witness maintained that she still has health problems from the accident, her knee and ankle swells. She also stated that she takes tablets on her own, which is the same medication that they gave her when she was in clinic.

46. The witness stated that she worked with CEPEP and the retirement age was sixty years. She testified that she worked for One Thousand One Hundred Dollars ($1,100.00) per fortnight. This is contrary to her pleaded case, her evidence in chief and the document provided from her previous employer which has her fortnightly salary at One Thousand Four Hundred and Thirty Seven Dollars and Fifty Cents ($1,437.50). The witness during cross examinations also stated that she was not on a waiting list for surgery at San Fernando Hospital.

47. The witness when questioned about her duties as forelady stated that she was responsible for ensuring that workers were there and she also worked along with the other workers. The witness stated that she was not on a waiting list for the surgery at San Fernando Hospital.

Expert Witness Evidence- Mr. Dean Baiju

48. This witness is an Orthopaedic Specialist Consultant Surgeon. On the 14th January, 2015, Sumintra visited his office and informed him that she had a painful right foot, ankle and knee especially in cold weather. He reviewed all her previous medical reports and investigations, assessed her and was of the opinion that she needed to continue physiotherapy for her right knee and ankle. That she needed to do deep breathing exercises for her chest injuries. He was also of the view that she would require knee replacement surgery (which he estimated would cost $65,000.00) and or an ankle fusion

(which he estimated would cost $50,000.00). His assessment was that she was 50% permanent partial disable.

Cross Examination

49. He stated that he reviewed Sumintra's previous reports and they did not assist or contribute to his findings. The previous reports assisted in verifying what Sumintra said. The witness stated that he saw Sumintra on one occasion on the 14th January, 2015 and she is not in his care, she came for the purpose of the report. He admitted that he is unaware of her present medical status.

50. When the witness was questioned about the change of words in the section treatment and recommendation[13] used in his report dated 26th January, 2015 the witness said he cannot recall why he changed the vernacular.

51. He also admitted that the surgeries he recommended are available at San Fernando, however he was unaware of the wait time.

Law and Analysis

52. The relevant principles for assessing general damages in a personal injury claims were set out by Wooding CJ in **Cornilliac v. St Louis[14].** They are as follows:

    x. The nature and extent of the injury;
    xi. The nature and gravity of the resulting physical disability;
    xii. The pain and suffering which had to be endured;
    xiii. The loss of amenities suffered; and

[13] In the report attached to his witness statement at DRSB1 under treatment and recommendation he stated "because of the intra-articular fractures necessitating knee replacement surgery. Whereas in the same document attached at SM 3 he stated "this may eventually require knee replacement surgery".
[14] (1966) 7 WIR 491

xiv. The extent to which, consequentially, pecuniary prospects have been materially affected.

General Damages: pain, suffering and loss of amenities

53. The nature and extend of the injuries are:

    i. Bilateral pneumothorax, with a left haemothorax and 8th rib fracture;

    ii. Right leg fractures including:

        a) A supracondylar comminute femur fracture;

        b) A right tibial plateau fracture;

        c) A right ankle pilon fracture

    iii. Hands - a 5th digital proximal phalanax fracture right hand and a laceration to the 3rd digital left hand.

54. Sumintra's evidence is that to date she is still suffering from pain and swelling in her right foot, ankle and knee; severe pain at night in her right leg; weakness of her right leg; restricted movement of her knee , ankle and hands, pain in her fingers on both hands and she has to use a walking aid.

55. In **Amin Mohammed and Alvin Panalal and others**[15] Mendonca JA at paragraph 12 stated:

    In a case where there are multiple injuries, or injuries of a different character, as in this case, I think the proper approach of the Court to the assessment of damages can be found in the case of Sadler v. Filipiak [2011] EWCA Civ. 1728 (at paragraph 34) where it was stated:

    > It is in my judgment always necessary to stand back from the compilation of individual figures whether assistance has been derived from comparable cases or from the JSB guideline advised to consider whether the award for pain, suffering

[15] Civil Appeal No 61 of 2009.

and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured persons recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.

56. The court considered the evidence and the submissions filed by the Second Defendant on the 31st of October 2017 and the Claimant on the 01st December 2017. The following cases were considered in determining the quantum to award under this head. Firstly, **Florida Spann and Rooplal Balkissoon and Others**[16] the injuries were a grade III open fracture right medial and lateral tibial plateaus; framed right patella, 20 x 5 cm laceration to proximial tibia; grade II open fracture left tibial plateau 12 x 3 cm laceration; laceration to the dorsum left hand. The award for general damages in this case was Two Hundred Thousand Dollars ($200,000.00).

57. **Layne and Sylvester**[17] the injuries were serious leg injuries and fractured ribs. The award adjusted to 2010 was Three Hundred and Twenty Five Thousand Dollars Two Hundred and Sixty Six Dollars ($325,266.00).

58. **Henry Belford and Khamerajie Dass and another**[18] the injuries sustained were loss of consciousness, multiple abrasions to the forearms and hands, dislocation to the right shoulder, fracture dislocation to the left shoulder, comminuted fracture left tibial plateau schatzer V; gross swelling of the left knee and proximal leg; pain in the right side upper

[16] CV2011-014064
[17] HCA 1186 of 1973
[18] CV2012-02204

quadrant, right pulmonary embolism and shortening of leg. The award was One Hundred and Fifty Thousand Dollars ($150,000.00).

59. The court is satisfied on a balance of probabilities that the sum of Two Hundred and Thirty Thousand Dollars ($230,000.00) would be a just award in this case, given the nature and severity of the case. I am of the view that this adjustment was necessary to reflect the combined effect of all the injuries that Sumintra incurred as well as her pain and suffering and loss of amenities. The sum of Two Hundred and Thirty Thousand Dollars ($230,000.00) is to be paid together with interest at a rate of 2.5% per annum from the date of service of the Claim Form and Statement of Case to the date of the judgment herein.

General Damages: Future surgery

60. The court was not satisfied on a balance of probabilities that the need for future surgery was satisfactorily proven. In cross examination Mr. Baiju could not explain the discrepancies between the report attached to his witness statement as opposed to the one attached in the report in Sumintra's witness statement. The discrepancy is that in one report he stated that the surgery was necessitated whereas in the other report he stated that the surgery may eventually be required. On the evidence the doctor did not clarify whether the surgery was in fact a necessity or whether it was something that may eventually be required. He also said she would require knee replacement surgery and or an ankle fusion. The court was not satisfied on a balance of probabilities whether it was either a knee replacement or in the alternative an ankle fusion or both. The court is not satisfied on a balance of probabilities that it should make an aware of damages for future surgery.

Future income

61. Sumintra's evidence in this case is that retirement age is sixty (60). Sumintra has attained the age of sixty as at the date of the trial. Therefore, future income is not a head under

general damages that would be considered in this case. However, the income that she would have lost from the date of the accident to her retirement age would be assessed under special damages; loss of earnings.

Special Damages.

62. Special Damages are the actual pecuniary loss the Claimant is able to prove from the date of the injury to the trial date. Special damages must be specifically pleaded and proved. This court would award the following special damages in this case:

i.	Medical Report	$75.00
ii.	Medical Report (Mr. Baiju)	$1000.00
iii.	Loss of Earning[19]	$70,078.12

63. Accordingly, the total special damages awarded to Sumintra is Seventy One Thousand One Hundred and Fifty Three Dollars and Twelve Cents ($71,153.12) together with interest at a rate of 2.5% per annum from the date of the accident (2nd July, 2014) to the date of the judgment herein.

ISSUE IV: WHAT QUANTUM OF DAMAGES SHOULD BE PAID TO CARLINE MATADEEN

Evidence-Carline

64. The witness was twenty two years old at the time of the trial, she is employed as a Clerk II at Petrotrin. The witness's evidence is that after the accident she was taken to the San Fernando General Hospital General Hospital Emergency Department. She remained there for ten (10) hours. At that time she was suffering from pain to her head, swelling of the right eye, pain in the right shoulder, pain to the right leg which seemed deformed, laceration to the face and swelling to the right foot. Medical personnel conducted test

[19] This figure represents two and a half years income less 25%.

which included and X-ray and ultrasound of her entire body. Thereafter, she was transferred to ward eight where the medical personnel attended to the witness's head injury and right eye area. She remained here for five (5) hours and then was discharged with a prescription for three days of voltaren and olfen.

65. The Medical Report of South West Regional Health Authority Report showed that the witness had swelling and mild bruising right side periorbital haematoma to right eye, pain to right shoulder, full range of movement, left tibia fibula deformity and pain and pain and swelling to right foot. The ultrasound scan assessment showed that the witness had a haematoma to the right eye, soft tissue injury to the right shoulder, query fracture left tibia fibula/right for, query orbital fracture. Diagnosis fracture 1st digital right foot displaced and right orbital fracture, haematoma to right eye.

66. The witness stated that she continued to experience pain in her big toe, her shin and she went to Mr. Baiju medical clinic in January, 2014. After he examined her recommended continuing with physiotherapy for her right leg and foot and lower left leg. He also recommended she saw an ophthalmologist. The witness testified that she went to an ophthalmologist and she was informed that her vision in her right eye was not affected. The witness stated that her right eye still waters a lot and she gets headaches, she also cannot put all her weight on her right foot as this causes her pain, especially when she wears certain shoes.

Expert Witness Evidence- Mr. Dean Baiju

67. The witness gave evidence that the reviewed Carline at his clinic on the 14th January, 2014. On this date Carline complained that her right eye waters a lot and that there is swelling at the back of this eye. She also complained that her big toe hurts especially when she puts weight on it and when she wears closed toe shoes. Her right shin was also sensitive. Mr. Baiju recommended that she continued desensitization/strengthening physiotherapy

of her right leg and foot as well as lower left leg and be reviewed by an ophthalmologist. He assessed her temporary partial disability to be less than 15%.

Law and Analysis

68. The court considered the evidence and the submission filed by the Second Defendant on the 31st of October 2017 and by the Claimant on the 1st of December 2017. The court considered a number of cases. In **Corneal Thomas v P.C. Llewellyn Bethelmy #16347 and another**[20] the injuries were soft tissue injury to neck, left shoulder, muscle spasms, stiffness in those areas and loss of consciousness. The award was Thirty Five Thousand Dollars ($35,000.00).

69. In **Michael Gaffor v Holder Roger Lance and others**[21]. In this case the claimant was unconscious after the accident. The claimant suffered a laceration to the shin, tenderness to the ribs, shoulder dislocation, fractured hip bone and partial permanent disability was 15%. The award in this case was Seventy Five Thousand Dollars ($75, 000.00).

70. The court is satisfied on a balance of probabilities that the sum Forty Five Thousand Dollars ($45,000) should be awarded for general damages for pain and suffering and loss of amenities together with interest at a rate of 2.5% per annum, from the date of service of the Claim Form and Statement of Case to the date of the judgment herein.

Special Damages: loss of actual income:

71. The Claimant and the Second Defendant agrees that the figure for loss of earning to be awarded is the sum of Thirty Six Thousand Dollars ($36,000.00) ($3000.00 x 4 weeks x 3 months). After discounting for tax, the award for loss of earning is Twenty Seven Thousand Dollars ($27,000.00).

[20] CV 2012-05160
[21] Cv 2012-00296

Special Damages: medical report and Doctors Visits

72. This witness is claiming and the court is awarding the following sums for special damages; medical reports and Doctors' visits

Medical Report- SWRHA	$37.50
Fee to Mr. Baiju	$1000.00
Fee to Dr. Ramkissoon (Optomologist)	$300.00

73. This court would award the following special damages in this case:

i.	Medical Report	$37.50
ii.	Medical Report (Mr. Baiju)	$1000.00
iii.	Ophthalmologist Fee	$300.00
iv.	Loss of Earning[22]	$27,000.00

74. Carline's total Special Damages is for the sum of Twenty Nine Thousand Nine Hundred and Forty Three Dollars and Ten Cents ($29,943.10) together with interest at a rate of 2.5% per annum from the date of the accident (2nd July, 2014) to the date of the judgment herein.

IT IS HEREBY ORDERED THAT:

75. It is declared that the Second Defendant is liable to satisfy the judgments obtained by the Claimants herein against the First Named Defendant inclusive of all costs and interest in both claims CV 2015-2006 and CV 2015-2007;

76. In respect of CV 2015-2007:

[22] This figure represents three months income less 25%.

i. The Second Defendant do pay the Claimant (Carline Matadeen) the sum of Forty Five Thousand Dollars ($45,000) representing an award for pain, suffering and loss of amenities with interest at a rate of 2.5% per annum, from the date of service of the Claim Form and Statement of Case 15th June 2015, to the date of the judgment herein.

ii. The Second Defendant do pay the Claimant (Carline Matadeen) the sum of Twenty Nine Thousand Nine Hundred and Forty Three Dollars and Ten Cents ($29,943.10) representing an award for special damages together with interest at a rate of 2.5% per annum from the date of the accident 2nd July, 2014, to the date of the judgment herein.

77. In respect of CV 2015-2006, I hereby order that:

i. The Second Defendant do pay the Claimant (Sumintra Matadeen) the sum of Two Hundred and Thirty Thousand Dollars ($230,000.00) representing an award for pain, suffering and loss of amenities with interest at a rate of 2.5% per annum, from the date of service of the Claim Form and Statement of Case 15th June 2015, to the date of the judgment herein.

ii. The Second Defendant do pay the Claimant (Sumintra Matadeen) the sum of Seventy One Thousand One Hundred and Fifty Three Dollars and Twelve Cents ($71,153.12) representing an award for special damages together with interest at a rate of 2.5% per annum from the date of the accident 2nd July, 2014, to the date of the judgment herein.

78. Parties are to negotiate costs, in the absence of agreement costs to be assessed by a Master of the High Court.

Dated this 19th day of February 2018

JUSTICE QUINLAN-WILLIAMS

JUDGE

(Leselli Simon-Dyette - Judicial Research Counsel)