REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 169 of 2008

BETWEEN
RAMNARINE SINGH

FIRST DEFENDANT/SECOND APPELLANT

GANESH ROOPNARINE

SECOND DEFENDANT

THE GREAT NORTHERN INSURANCE COMPANY LIMITED

C0-DEFENDANT/FIRST APPELLANT

AND

JOHNSON ANSOLA

PLAINTIFF/RESPONDENT

IN THE COURT OF APPEAL

Civil Appeal No: 121 of 2008

BETWEEN

THE GREAT NORTHERN INSURANCE COMPANY LIMITED

CO-DEFENDANT/APPELLANT

RAMNARINE SINGH
FIRST DEFENDANT

GANESH ROOPNARINE

SECOND DEFENDANT

AND

JOHNSON ANSOLA

PLAINTIFF/RESPONDENT

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
R. Narine, J.A.

APPEARANCES: **Ms. A. Hasnain appeared on behalf of Ramnarine Singh.**
Mr. R. Kawalsingh appeared on behalf of The Great Northern Insurance Company Limited .
Mr. Y. Ahmed appeared on behalf of Ganesh Roopnarine.
Mr. A Hosein appeared on behalf of Johnson Ansola

DATE DELIVERED: April 5th, 2012

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

R. Narine,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. On the afternoon of Sunday January 26th, 2003, Johnson Ansola (the Plaintiff) was a passenger in motor vehicle TAR 6606, a 10 ton dump truck, owned by Ramnarine Singh (the owner) when it ran off the road and overturned. At the time of the accident the vehicle was driven by Ganesh Roopnarine (the driver). The driver was an employee of the owner. The driver was using the truck to give a lift home to several persons who had assisted him on that day in doing some renovations at his home. The Plaintiff was one of six such persons. He was seated in the cab of the truck along with two other passengers and the driver. The other three passengers were in the tray of the truck. As a consequence of the accident the Plaintiff suffered personal injuries.

2. By writ of summons issued on December 12th, 2003 the Plaintiff commenced these proceedings against the owner, the driver and The Great Northern Insurance Company Limited (the Insurer) who were the insurers in respect of the owner's vehicle at the material time. The Plaintiff claimed that the accident occurred as a consequence of the negligence of the driver who was at the material time the servant and or agent of the owner. As against the Insurer, he pleaded that the insurer was joined as "co-defendant pursuant to section 10A of the Motor Vehicles Insurance (Third-Party Risks) (Amendment) Act being the Insurers" of the vehicle. He claimed against all defendants damages, interest, costs and such further and or other relief as may be just.

3. All defendants delivered a defence. The driver in his defence alleged that the accident occurred wholly or partly as a result of the negligence of an unknown third person, who, while driving in the opposite direction, negligently attempted to overtake another vehicle. As a consequence of this the unidentified vehicle came into the path of the driver who, in an attempt to avoid the head-on collision, pulled the truck to the extreme left of the roadway. As a result of this manoeuvre the left front wheel of the truck came into contact with the edge of the roadway. This caused the truck to go off the roadway and the driver to lose control. The vehicle overturned. The driver further alleged that he had the owner's express or implied permission to keep possession of the truck at all times and when he was not working, to use it at any time for his private use and benefit.

4. The owner and the Insurer filed a joint defence. They denied that the driver was at the time of the collision the owner's servant or agent. Further or alternatively they averred that the accident occurred when in the emergency or in the agony of the moment created by the unknown vehicle overtaking another vehicle, the driver swerved to his left and despite taking all reasonable precautions the truck ran off the road and overturned. They contended, in the circumstances, that the accident was caused by the negligence of the unknown driver.

5. They also referred to a statement made by the driver on July 22nd, 2004 where he stated, inter alia, that he did not tell the owner that he was using the vehicle to do his own

work on the day of the accident and he had no permission from the owner to use the vehicle to take men to do his work.

6. The trial Judge found that the accident occurred as a result of the negligence of the driver. He further found that the driver was the servant and/or agent of the owner hence the owner was vicariously liable. With respect to the Insurer, the Judge found that at the material time the vehicle was being driven with the permission of the owner. The Judge held that in those circumstances, the Insurer was liable to the Plaintiff by virtue of section 4(7) of the Motor Vehicles Insurance (Third-Party Risks) Act, which provides:

> *"Section 4(7) -*
>
> *Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons."*

7. The Judge then proceeded to assess damages as follows:

> general damages for pain and suffering and loss of amenities - $150,000.00;
>
> future loss of earnings - $285,000.00.
>
> special damages of $270,135.00; included in this figure was the sum of $191,500.00 for loss of earnings from the date of the accident to the date of the trial.

8. The Judge awarded interest on the general damages of $150,000.00 at the rate of 12% per annum from the date of filing of the writ. He also ordered interest on some of the items of special damages from the date of the accident at the rate of 6% per annum.

9. The owner and the Insurer have appealed. In summary, the grounds of appeal are as follows:

1. The finding of the Judge that the driver was negligent in the driving of the vehicle was wrong having regard to the evidence;

2. The finding of the Judge that the driver was the servant and the agent of the owner was wrong in law;

3. The finding of the Judge that the driver had implied or expressed permission to use the vehicle at the material time was wrong having regard to the evidence;

4. The pleadings of the Plaintiff as against the Insurer contain certain fatal flaws the effect of which is that there is no justiciable claim against the Insurer;

5. The quantum of damages is unreasonable and too high;

6. The award of interest and the general damages from the date of the filing of the writ is wrong and it ought to have been awarded from the date of service of the writ.

10. I will deal first with the question of liability and then the issue of damages. As regards liability, it is convenient to discuss the grounds of appeal under the general topics of the liability of the driver, the liability of the owner and the liability of the Insurer. I will first consider the liability of the driver for the accident.

11. The defence of the driver, as has been indicated above, is that the accident occurred as a result of the negligence of an unknown driver. He stated in his witness statement that some friends and relatives had come to his home to help him with renovation works. After completion he decided to take some of them home because of the difficulties they were encountering with transportation. It is while doing this that the accident occurred.

12. The driver said in his witness statement that while proceeding in a southerly direction along the Southern Main Road he saw a small red car travelling in the opposite direction overtaking another vehicle. The road in that area has two lanes - one lane to accommodate north-bound traffic and the other south-bound traffic. In overtaking the other vehicle, as was to be expected, the red car came into the south-bound lane. The

driver observed that the red car was coming directly towards the front of his vehicle. Fearing a possible collision he pulled to the extreme left of the road and applied brakes.

13. He stated that on the extreme left of the road were a grassy area and then a drain. When he pulled to the extreme left the front wheel of the truck went off the edge of the road and onto the grass. He then lost control of the truck which ran off the road and into the drain causing it to overturn.

14. The other evidence as to the circumstances surrounding the accident came from the Plaintiff. In his witness statement he did not make any mention of the overtaking vehicle but in cross-examination he did say that he saw a vehicle, which was travelling in the opposite direction, overtaking another vehicle. He, however, said that the driver did not *"mash his brakes in time. If he did mash brakes in time he would have avoided the accident and not turn over."*

15. The Judge found as follows:

> *"I find he [the driver] did not take sufficient steps to swerve, to slow down, or manoeuvre his vehicle to avoid the collision. The fact that the truck overturned is consistent on a balance of probability with the fact that the truck was most likely being driven too fast to properly slow it down and take it to the edge of the roadway without having its wheels enter a ditch. Excessive speed and failing to take any adequate manoeuvres are both particulars of negligence that I find proved against this Defendant.*
>
> *The Plaintiff testified that the driver of the truck was careless, that he did not mash his brakes in time. If the driver did mash his brakes in time, he would avoid the accident and not turn over. He said that he did mash his brakes before the accident, but not on time. I find this the most likely cause of the accident."*

The Judge therefore found the driver to be driving at an excessive speed, but the most likely cause of the accident was the driver's failure to apply his brakes in time.

16. The simple question is whether the driver was negligent in the circumstances of this case. His duty was to drive with reasonable caution and skill. The standard is one of

reasonableness and not perfection. Care must be taken therefore not to impose any higher duty on the driver. As Laws L.J. said in **Ahanonu v South East London and Kent Bus Co. Ltd.** [2008] EWCA Civ. 274 at para 23:

> *"The Judge, as my Lord has said, has in effect sought to impose a counsel of protection on the bus driver…" Such an approach I think distorts the nature of the bus driver's duty which was of cause no more nor less than a duty to take reasonable care. There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.*

17. In this case the only evidence that the driver was driving at an excessive speed was that of the Plaintiff. He stated that the driver was driving at 60 miles an hour. His other evidence as to speed did not lend much confidence to his statement. For example, he stated that a reasonable speed at which he was accustomed driving on a straight road with no traffic would be 75 miles an hour, that the speed limit on the nation's highways is 80 to 90 miles an hour and that even though he said the driver was travelling at 60 miles an hour he would not call that speeding but travelling at a reasonable speed. He also conceded that he was not looking at the speedometer before the accident occurred.

18. The Plaintiff's evidence as to the speed limit on highways is wrong; it is not more than 80 kilometers per hour. Further, his evidence as to the speed at which he travels appears so excessive that it is reasonable to assume that there must something wrong with the estimate. I do not think that on the face of the Plaintiff's evidence reliance can be placed on his estimate of the speed at which the vehicle was travelling. The Judge however seemed to accept the evidence of the Plaintiff but given his evidence the acceptance of it required a cogent explanation. It cannot be accounted for simply by the advantage the Judge enjoyed of having seen and heard the witnesses. However no explanation has been given by the Judge.

19. The Judge also stated that the evidence of the driver also demonstrated that he was travelling at an excessive speed. But according to the drive's evidence at no time did he say that he was travelling faster than 45 to 50 kilometer per hour which I would not

think to be excessive in the circumstances. In my judgment the evidence does not support the Judge's finding that the driver was travelling at an excessive speed. Despite this however, I think the Judge's conclusion on the liability of the driver is correct. The fact is that a vehicle does not overturn by itself. Where as in this case it is not struck by another vehicle but overturns when it runs off the road, there is a prima facie case that that happened as a consequence of the negligence of the driver. The driver's explanation, as appears on the pleadings, was that he swerved to avoid the head-on collision with an on- coming vehicle. That could amount to a defence provided that in the circumstances he exercised such care as may reasonably be expected of him in the circumstances. The onus to establish this is on the driver. It should be noted that for the driver to escape liability he must show that he is in no way negligent. The evidence of the driver, however, does not approach that standard.

20. Under cross-examination the driver stated that he could see about 200 feet ahead of him. He came around a bend in the road and saw the two vehicles approaching in the opposite direction. At that time they were on their proper side of the road. Although he says he could see for 200 feet ahead of him, he said he could see the vehicles approaching for about a minute and after the red car began to overtake the other vehicle he saw it in his lane for 45 seconds. He however claimed that when the red car pulled in front of him to overtake it was only 15 feet in front of him. Clearly his evidence as to time and distance was unreliable and the Judge was entitled to remark that "*clearly the witness's sense of time was not to be relied upon and that his evidence is not creditable insofar as the claims that the red vehicle was 15 feet in front of him, having suddenly pulled in front of him.*"

21. The result was that there was no reliable evidence from the driver before the Judge as to the level of the emergency created by the overtaking vehicle to assess the reasonableness of his response. The evidence of the Plaintiff is lacking in particularity, but he did say that the driver did not apply his brakes in time and, if he did, he could have avoided the accident. The Judge, as he was entitled to do, accepted this evidence.

22. Indeed, there is no dispute that the driver did not apply his brakes when the red vehicle began overtaking. He stated that when he saw the red car overtaking he did not *"mash his brakes."* Instead he slowed his vehicle by taking his foot off the accelerator. He further admitted he only "*mashed his brakes"* when he pulled the truck to the extreme left. This is a strange response from someone faced with an approaching vehicle in his lane and not one that can be said to be reasonable. An explanation for this is however provided by the driver when he said that he did not realize how far away the red car was. This amounts to no more than an admission that he was not keeping a proper look out.

23. The driver further accepted a suggestion put to him in cross-examination that he could have avoided the accident by slowing the vehicle to 30 kilometers per hour and allowing the red vehicle to get back in its lane. This is consistent with the Plaintiff's assessment of the cause of the accident referred to earlier and provides justification for the Judge's conclusion that the failure of the driver to mash his brakes in time was the most likely cause of the accident. In my judgment, the evidence before the Judge provides no basis to conclude that the driver exercised such care as may reasonably have been expected of him in the circumstances and the Judge was correct to hold that he was negligent and liable to the Plaintiff.

24. I turn now to the liability of the owner. All parties to this appeal have accepted that the Judge's finding that the driver was the servant and or agent of the owner at the material time so as to make the latter liable for the acts of the driver cannot be supported. I think they are correct to do so and I will briefly outline my reasons for so saying

25. In finding the owner liable the Judge correctly noted that the fact of ownership of a vehicle can give rise to an inference that the vehicle at the material time was being driven by the owner or its servant or agent. He further noted that the inference was a rebuttable one but did not think that in this case it was displaced since the driver was employed by the owner to drive the vehicle and was doing so negligently at the time of the accident. The Judge further found that the driver was permitted to use the truck on weekends. Whether the finding as to permission to use the vehicle is correct is an issue

in this appeal and one which I will address shortly, but for the moment I will assume that the finding is correct. Having found that the driver was permitted to use the vehicle, the Judge seemed to think that this had a conclusive bearing on the liability of the owner as he stated:

> *"I expressly find… that [the driver's] use of the truck on the Sunday in question though for personal use, had the express or implied permission or consent of [the owner], such as to constitute him the servant or agent of the owner."*

26. The Judge fell into error when he concluded that the permission given by the owner to the driver to use the vehicle was sufficient to make the driver the servant or agent of the owner. It is not the law that once the employee has the permission of the employer to use the vehicle that is sufficient to constitute the employee the servant or agent of the employer. Nor is it the law that so long as the tortious act is in the nature of the act the employee is employed to do that the employer will be vicariously liable for the tortious act of the employer

27. Where the relationship of employer and employee exist the employer is liable for the torts of the employee so long as they are committed in the course of the employee's employment. In other words, the employee at the moment of the act must be on the employer's business. The fact that the employer may have had the permission of the employer to drive the vehicle is insufficient to establish vicarious liability. The question is whether at the time of the act, the employee was acting in the course of his employment. As is noted in **Charlesworth and Percy on Negligence** (12th ed.) (at para 3-122):

> *"The fact that an employee is permitted to use his employer's vehicle does not make the employer liable for the employee's negligence in using that vehicle, unless it is being used for the employer's business."*

So that in **Britt v Galmoye** (1928) 44 TLR 294, the employer, at the request of the employee lent his vehicle to his employee after the day's work was finished so that the

employee could take two of his friends to the theatre. While doing so the employee, through his own negligence, injured the plaintiff. It was held that the employer was not liable as the journey was not on the master's business. The Judge in his judgment stated:

> *"But here the servant though admittedly in general employment as a driver of vans, was authorized to drive women who were not friends of the master. The journey was not on the master's business."*

28. I do not think that in this case there can be any issue that at the time of the accident, the driver was not acting in the course of his employment. He was employed by the owner to make deliveries for him using the owner's vehicle for that purpose. At the time of the accident the driver was taking to their homes his friends and relatives who had assisted him in some work he was doing at his home. By no stretch of the imagination can that be regarded as acting in the course of his employment. He was simply not employed to do that work. At the time of the accident therefore he was not acting in the course of his employment.

29. Apart from the master servant relationship, the owner may be liable on the principle of agency. As Lord Pearson noted in **Morgans v Launchbury and Others** [1972] 2 ALL ER 606,613:

> *"If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving."*

In that case it was held that to establish the existence of an agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in the performance of a task or duty delegated to him by the owner.

30. I think in this case it is clear that at the time of the accident the driver was not using the car pursuant to an express or implied request by the owner or on his instructions nor was he doing so in the performance of a task or duty delegated to him.

31. In my judgment, therefore, the Judge was wrong to find the owner liable for the negligent acts of the driver. The orders of the Judge against the owner must therefore be set aside and the claim against him dismissed.

32. It was accepted by the parties that, subject to certain pleading points taken by Counsel for the Insurer to which I will refer later in this judgment, the liability of the insurer depends on whether the driver was driving the vehicle with the consent of the owner at the time of the accident. This is as a consequence of section 4(7) of the Motor Vehicles Insurance (Third Party Risks) Act which was earlier set out in this judgment. It has been held by this Court that this section extends coverage to a class of persons, namely those driving the insured vehicle with the consent of the insured (see Civil Appeal No. 51 0f 2008 **The Presidential Insurance Company Ltd. v Resha St. Hill and others).**

33. The Judge found that the driver had the consent of the owner to drive the vehicle. The insurer and the owner argued that the Judge erred in coming to that conclusion. They argued that the Judge failed to properly consider or assess the totality of the evidence, failed to assess properly or at all the credibility of the witnesses and in any event drew the incorrect inferences from the evidence. On the other hand, not unexpectedly, the Plaintiff and the driver sought to support the Judge's findings.

34. On the evidence before the Judge it is not disputed that the driver was allowed to keep the truck after work on weekdays and on weekends. However, what the driver was permitted by the owner to do with the truck while it was in the driver's possession is the critical question, the answer to which depends on the evidence.

35. In a statement made by the owner on January 22nd, 2004 he stated that the driver was not permitted to do any private work with the vehicle except with his permission. He further stated that the driver did not have permission to use the vehicle on the day in question.

36. In a subsequent statement the owner said that he had given the driver the vehicle to go home on evenings and on weekends because transportation was difficult. He further stated that he was aware of the driver using the vehicle on weekends. He was not aware of the driver using the vehicle for his personal use on the day of the accident but in any event, he would not have objected because he trusted him. He then stated:

> *"I am aware of Ganesh using the truck to refill his water tanks and to use the truck to visit family members. He would also use the truck to make his groceries and any other personal use."*

37. In cross-examination the owner gave evidence that was inconsistent with parts of both statements. He testified that he was aware the driver used the truck to "full water for himself and his family." He was however not aware that the driver used the truck to do groceries. In fact he had stopped him a few times from going to the grocery with the truck. He was also not aware that he had used the truck to visit family members. He further stated that the truck was to be used for work related purposes only.

38. The driver, in his written statement, admitted that he had given a previous statement to the Insurer in which he repeated what he was told by the owner to say, namely that on the day of the accident, the owner did not know that he was using the truck and he was never authorized to put men on the truck on that day. He seemed to suggest that this was a misrepresentation of the position, but did not seem to say otherwise in his evidence.

39. The driver further stated in his witness statement that when he was first employed, he was given a truck to drive from the first day on the job and was permitted to go home with it. At first there was no clear arrangement regarding his personal use of the truck but these arrangements developed over a period of time. In the first month of employment he was given permission to use the truck on weekends, to go to the grocery and to run personal errands. On Sunday mornings he would take the truck to the owner's home to service it after which he would use it to go to the grocery and visit family or

friends. He stated that on many occasions when he used the truck to visit friends and family the owner would see the truck parked on the roadway. He knew this as the owner commented about seeing the truck but without raising any objection. Further he said that as his hours of work were very flexible, after he had finished work for the day, he would use whichever truck was in his possession to attend to his domestic and other chores. He had the owner's "*full permission and approval for this."*

40. He further stated:

> *"[The owner] never objected or stopped me from the use of the truck after work for domestic purposes. For example on occasions after work, I will use the truck to go to [the owner's] home to collect my pay and then I will go to the grocery with my wife using the truck.*
>
> *On one occasion at work when we had finished early [the owner] suggested to me to take my wife and family to the beach at Carenage or Chaguaramas. He mentioned that there were good parking facilities there. I did not however take him up on his offer."*

41. However, with respect to private jobs, the driver said that he knew that he did not have the owner's permission for this. He further said that on the day in question he told the owner that he was doing some renovations at home. He told him this so that he would know that he would not be available to work that day. He said that he did not ask for his specific permission to use the truck since he believed he had the implied permission of the owner to use the truck for this activity "as he had not objected."

42. In cross-examination it was put to him that every time the owner saw the truck parked on the road when he was using it for his personal use he would tell him that that was an unauthorized use of the vehicle. The driver's response was that "he trusted me." He further stated that he could not have used the truck to pick up his friends and go liming or his family to go to the zoo. He also said that had he asked permission to use the truck to take his children to the zoo, the owner would have said yes, but not picking up *"fellows to lime or to go to the bazaar."*

43. The Judge found that the driver used the truck for the following purposes:

> *"1. Work during the week;*
> *2. Work on weekends;*
> *3. For carrying water including on weekends;*
> *4. For doing his groceries including on weekends; and*
> *5. For getting to and from his home."*

In so finding, the Judge accepted the evidence of the driver. The Judge further found that on the day in question the driver did not have the express permission of the owner to use the truck. The owner in fact did not know that the driver was using the truck that day. There was no real dispute on the evidence on this point.

44. The Judge, however, found that specific express permission of the owner to use the truck on the day of the accident was unnecessary because the driver had the express or implied permission of the owner for the general use of the truck for personal business. His reasoning is essentially contained in the following three paragraphs:

> *"In this case, [the driver] was doing what he was employed to do, namely, driving of the truck. He was doing it in an improper manner. He was doing it negligently. He was doing it contrary to express orders, namely, not to use the truck save for work and for carrying water and for getting to and from work. While it is clear that [the owner] did not know that [the driver] was using the truck that weekend and neither did he know that [the driver] was going to be transporting more than two passengers in the truck or that he was going to use it for his own purposes, namely, transporting personnel on his private business, [the owner] was aware that [the driver] did not respect any alleged limits on the use of that truck and consented expressly or impliedly to his general use for personal business.*
>
> *I find that there is no evidence that there was ever any prohibition on [the driver] using that truck for his own purposes. When he used it to collect water, he did so with the express permission of the owner. When he used it to go to the grocery he did so with the express permission of the owner. When*

he used it to go and visit his family… I find that he used the truck with the express or implied permission of the owner. All the evidence is to the effect that [the driver] was permitted to use the truck as his own on weekends, that he was not acting contrary to any permission that he had been granted expressed or implied, and that the owner of the truck never put a stop to his use of the truck as he could have if at any point in time he felt that [the driver] had exceeded his permission to use the truck.

It is clear, therefore, that the permission [the driver] had to use that truck had mutated into almost a blanket or generalized permission so much so that [the driver] "did not feel that he had the need to ask [the owner] specifically for the use of his truck on the day of the accident. In fact, the witness statement of April 6th, 2004 makes it clear he also used it to make his groceries and any other personal use. I expressly find that this reflects the position regarding the use of the truck, namely that [the driver's] use of the truck on the Sunday in question though for personal use, had the express or implied permission or consent of [the owner] ….

45. The Judge's reasoning is, with respect, not easy to follow. He states in the first of the three paragraphs quoted above that the driver had express orders not to use the truck, save for work, for carrying water and for getting to and from work. Yet in the second paragraph he stated that there was never any prohibition on the driver's use of the truck for his own purposes. These two statements appear on the face to be contradictory. They however may be understood by reference to the first and third paragraphs where the Judge seemed to be saying that the earlier permission not to use the truck save for the limited purposes had *"mutated into almost a blanket or generalized permission*."

46. The mutation occurred because the driver did not respect any limits on the use of the truck that the owner was aware of the use of the truck by the driver for other purposes, and he did nothing to stop it and did not place any effective boundaries on the use of the truck.

47. The Judge's reasoning consisted of essentially three steps. First although there were express prohibitions on the use of the truck, the driver did not obey those orders, secondly the owner was aware of the driver disregarding the limitations he placed on the use of the truck and thirdly he did nothing effective to prevent its use. In those circumstances the Judge concluded that the owner expressly or impliedly consented to the general use of the truck by the driver for personal business.

48. There is clearly evidence to support the Judge's findings in the first two steps of his reasoning. There were limits on the driver's personal use of the vehicle but he nevertheless used it for a variety of personal uses. The owner stated that he was not aware of such use of the truck by the driver other than the driver's use of the truck to go to the grocery and he prevented this. The Judge however rejected this evidence. In the end he accepted that the owner's statement of April, 2004 represented what the owner knew of the use of the truck by the driver. There the owner stated that *"he was aware of [the driver] using the truck to refill his water tanks, and to use the truck to visit family members. He would also use it to use it to make his groceries and any other personal use."*

49. The Judge's acceptance that the owner was aware of these uses by the driver reflected also the evidence of the driver that the owner would make comments to him when he saw that the truck was used for non work related purposes. It was therefore clearly open to the Judge to find that the owner was aware of the use of the truck by the driver for non work related purposes. There can be no objection to this finding.

50. The next step in the Judge's reasoning is that the owner did not take steps to stop the use of the truck for non work related purposes. His failure to do so amounted to an express or implied consent on the part of the owner to the driver to use the truck for his personal business.

51. There is evidence that the owner objected to the use of the truck having become aware of it. The Judge found as a fact that the owner repeatedly told the driver not to use the vehicle to do his groceries. Although the Judge made no explicit finding whether the owner, although aware of other uses, objected to them, there is evidence that the owner did object. In the course of his cross-examination the owner accepted that he said nothing in his two statements about objecting to the use of the truck by the driver for other purposes. His reply was that it was not in his statement but that he did tell him. It is difficult for me to accept that the Judge would have accepted the owner's evidence that he objected to the use of the truck by the driver to go to the grocery but would have rejected his evidence that he objected to the use of it for other purposes. This would have required a level of mental gymnastics not open to the Judge. But the Judge had in mind something more than simply verbal objections. I think this is clear from the Judge's comment that "it would have been a simple matter to stop [the driver] from keeping the truck on weekends if the owner did not consent to the use of the truck for personal business."

52. The question therefore is whether the Judge was correct to conclude that despite the owner's objections to the use of the truck for the driver's personal business, the owner's failure to take other steps to prevent the use of the truck by the driver amounted to the owner's consent to use the truck for his personal use. The Judge clearly thought it did and I think he was correct. In my judgment it is reasonable to conclude that as the owner knew of the driver's disregard of his instructions regarding the use of the vehicle but took no effective steps to prevent it, when he was in a position so to do, he may be taken as giving his employee, the driver, implied consent to use the vehicle.

53. It was suggested by Counsel for the owner that if there was permission to use the vehicle there should be implied limitations that the vehicle would not be used as a people carrier or in breach of the law to carry more than the number of persons it could lawfully carry. I am however unable to agree with this as the owner did not seem concerned whether the vehicle was so used even suggesting to the driver that he take his family -

which would have put the number of passengers in excess of the licensed limit - to the beach.

54. I turn now to a consideration of the pleading points raised by Counsel for the insurer. There were two points raised which were said to be fatal flaws in the pleaded case of the Plaintiff. They are without any merit.

55. The first point refers to the requirement of the insurer to give notice under section 10 A (5) of the Motor Vehicles Insurance (Third - Party Risks) Act (The Third Party Risks Act). Counsel for the insurer submitted that under that section the Plaintiff must give notice to the insurer of his intention to commence proceedings. The failure to plead that notice has been given is fatal to the Plaintiff's claim. Counsel referred to no authority to support this submission. It is however clear that the requirements to give notice under section 10 A(5) is a condition precedent. In other words the effect of section 10 A(5) is that before a plaintiff becomes entitled to sue, it is necessary he fulfills the condition therein stipulated as to the giving of notice.

56. In every pleading the fulfillment of a condition precedent is implied and accordingly an averment that the condition precedent has been fulfilled need not be pleaded, (see O. 18 r. 7 (4) of the **Rules of the Supreme Court**, 1975 (under which these proceedings were filed)) and **Gates v W.A and R.J. Jacobs** [1920] 1 Ch. 567 and Civil Appeal 18 of 1982 **Motor and General Insurance Company Limited v Koongie**). It is for the defendant if he thinks that any condition precedent has not been performed or fulfilled to take that objection in his defence or in an application to strike out and prove the material facts to establish that the condition precedent has not been performed or fulfilled. The insurer has not attempted to do that in this case.

57. The second submission was that the writ of summons and the statement of claim claimed against the insurer damages, interest, and costs. Counsel submitted that the only relief that can be sought against the Insurer under section 10 of the Third Party Risks Act

is a declaration that the insurer pay the benefit of any judgment obtained against the insured.

58. Before the introduction of section 10A, a person who was insured or suffered loss in a road traffic accident could not begin proceedings against the insurer of the offending vehicle unless he had first determined the liability of the insured and obtained judgment against him. However with the introduction of section 10A it is now possible to proceed against the insurer even though there has not been a determination of the liability of the insured. Proceedings may therefore be commenced against the insurer and the insured at the same time and they usually are. Section 10A is largely procedural and permits the plaintiff to claim against the insurer the same relief as he would have been entitled to claim under section 10.

59. Under section 10 the insurer's liability is to pay the person entitled to the benefit of the judgment any sum payable thereunder in respect of any liability that is required to be covered by a policy under section 4(1)(b), in addition to interest and costs. As the claim, before section 10A was introduced, was made after judgment had been obtained against the insured, the claim against the insurer was generally for a sum certain being the amount of the judgment, interest and costs and was treated as a liquidated demand. Under section 10 therefore the claim against the insurer was essentially for the damages, interest and costs which had been awarded against the insured. There is no doubt that that was the appropriate claim as the third party, under that section, was entitled to receive from the insurer payment of the benefit of the judgment in addition to interest and costs.

60. Under section 10A the claim against the insurer has not changed. This is clear from section 10A (3) which provides:

> *"Section 10A (3) -*
>
> *Where the insurer is joined as a co-defendant under this section, or is required to pay to any person entitled to the benefit of the judgment under section 10, he shall be liable to satisfy the judgment that may be obtained against the insured in*

addition to all costs and interest payable in respect of such judgment and any costs for which the insured may be held liable."

61. Where the insurer is joined as a co-defendant and is therefore sued at the same time as the insured the claim cannot be for a sum certain. But there is no doubt that the claim is for payment of the damages, interest and costs for which the insured may be held liable. It is in my judgment therefore entirely permissible to claim against an insurer joined under section 10 A payment of the damages, interest and costs awarded against his insured. On a fair construction of this claim that is what had been done.

62. In the circumstances the Judge was correct to find the driver liable for the accident. He was also correct to find the insurer liable under section 4(7) of the Third Party Risks Act. The liability of the driver and the insurer is for the damages for which the driver is liable. That is the issue which I will now address.

63. The insurer and the owner submit that the award of damages is excessive. They challenge the award in respect of pretrial loss of earnings, loss of future earnings and general damages. I will first deal with the award in respect of pretrial loss of earnings.

64. The Judge awarded under this heading the sum of $191,500.00. The insurer and the owner challenge the award on two grounds, namely:

1. The medical evidence was insufficient and not credible; and

2. The amount the Judge found that the plaintiff would have earned was not substantiated by the evidence and in any event the Judge failed to take into account the plaintiff's duty to specially prove his alleged pretrial loss of earnings.

65. Several points were taken with respect to the sufficiency of the medical evidence. The first relates to the absence of any evidence from the doctors who treated the plaintiff prior to 2008, when he was examined by Mr. Santana, an orthopaedic surgeon. The Plaintiff's position is that he was unable to work from the date of the accident, January 26th 2003, to the date of the trial in 2008 - a period of over five years. Indeed as will be

apparent below, the Plaintiff claims that as a result of the accident he is unable to work at all.

66. The Plaintiff's evidence was that prior to the accident he was self-employed as an upholsterer/joiner. In his witness statement he listed the injuries he claimed to have suffered in the accident and the effect those injuries had on him. He stated:

> *"I have attempted to resume my business as an upholsterer/joiner since the accident but it was a physical impossibility because of my injuries. I even started to work in other workshops but because of the pain I suffer when working I was unable to perform the duties required by me and I had to leave. Since the date of the accident I have been unemployed.*
>
> *I have no formal education, I could barely read and write. The only skill I have is as a joiner/upholsterer working with my hands. I am uneducated and cannot get employment in any other field."*

67. It was, of course, not sufficient for the Plaintiff to give oral evidence of the injuries allegedly sustained by him and the effect upon him. In establishing his claim to pretrial loss there had to be medical evidence as to the nature of the injuries he sustained and the residual effect that they may have had on his ability to work. It is relevant to note that it is not the case that the Plaintiff called no medical evidence. He did in the person of Mr. Santana. Mr. Santana had seen the plaintiff once in 2008 and had prepared a medical report on him. There was also a witness statement signed by him and filed on behalf of the Plaintiff and he gave viva voce evidence. Counsel for the Insurer and the owner argued that Mr. Santana's evidence does not assist the Plaintiff. They submitted that since Mr. Santana only saw him once in 2008 there is no direct medical evidence of the Plaintiff's condition between the dates of the accident in 2003 and when he was seen by Mr. Santana in 2008.

68. In the light of this submission it is necessary to examine the medical evidence. Of course it should be examined in the light of the onus on the Plaintiff. That onus, in the light of the Plaintiff's position that he was unable to work from the date of the accident, is to show the nature of the injury suffered as a consequence of the accident and that it

rendered him incapable of performing any work from the date of his injury to the date of the trial.

69. In the medical report, Mr. Santana described the injuries sustained by the Plaintiff in the 2003 accident as follows:

- Right shoulder dislocation.
- Severe comminuted, compound fracture of the right lower tibia and fibula.
- Right talar dislocation.

The doctor noted that the Plaintiff's complaints at the time he saw him in 2008 were as follows:

- Severe pain in the right ankle.
- Numbness in the right ankle and foot.
- He is not able to walk flat on his right sole.
- Pain in the right tibia and fibula.
- Inability to stand for long periods

70. He stated that an examination revealed a fixed equinus of 30^{o} and diminished range of motion of the right ankle. X-rays revealed severe osteoarthritis of the right ankle. The report also stated that the Plaintiff required an arthrodesis of the ankle.

71. In his witness statement Mr. Santana explained that because of the Plaintiff's injuries, he would not be able to stand or walk for long periods of time as he still suffers pain all over his body at the injury sites when he attempts to do any work. The doctor further stated that the Plaintiff is unable to walk flat on his right sole and has to use a walking stick to move around. This would be so even when the arthrodesis is performed. The doctor opined that the Plaintiff would not ever be able to resume his trades as an upholsterer/joiner as this would entail, inter alia, prolonged standing, squatting and fluid mobility.

72. The doctor further indicated that even if the proposed arthrodesis were performed it was unlikely that the Plaintiff would be unable to resume work as an upholsterer/joiner.

This is because the likely result of the surgery would be to fix the ankle joint in a certain position. The Plaintiff would therefore not be able to stoop which he would be required to do as an upholsterer/joiner. It was suggested to the doctor that the Plaintiff could do a watchman's job but the doctor for stated reasons did not agree.

73. Quite clearly the medical evidence outlined the nature and residual effect of the injuries suffered by the Plaintiff in the accident. There was no other medical evidence led at the trial. The evidence of the doctor was essentially unchallenged and it was certainly not challenged on the basis that the condition of the Plaintiff worsened by 2008. The evidence clearly suggested that the effect of the Plaintiff's injury would have been no less in 2008 than it was in the period between then and the accident. It was sufficient evidence on which the Judge could find, as he did, that the Plaintiff was unable to work since the accident. There was no need in the circumstances of this case to lead other medical evidence. As the doctor said in his written statement:

> *"Because of the injuries he suffered he would not be able to stand or walk for long periods of time as he is still suffering pain all over his body at the injured sites when he attempts to do any sort of work."*

And in response to the Court:

> *"This man sustained dislocation of talus, severe injury, post traumatic pain with all movements of ankle for the rest of his life."*

74. The other objections taken by Counsel as to the sufficiency of the medical evidence, it should be noted, are relevant both to the pretrial loss and the future loss of earnings. It is convenient to refer to them at this stage.

75. Counsel submitted that the Judge's conclusion that the Plaintiff would not be able to resume work for the rest of his life was based on three facts, namely; 1) the Plaintiff is suffering pain all over his body at the injury sites when he attempts to do any sort or work; 2) the Plaintiff's ankle swells when he performs the most menial of tasks and this would affect the Plaintiff's mobility and ability to do his job; and 3) the Plaintiff is unable

to walk flat on his right sole and has to use a stick for moving around. With respect to the first fact Counsel argued that this was a weak basis for the doctor's conclusion that the Plaintiff could not work, as he did not testify to any tests done to verify the veracity or intensity of the Plaintiff's complaints. As regards the second fact, Counsel argued that there was no evidence that the doctor observed the swelling himself and so Counsel questioned the basis of this conclusion. With respect to the third fact, Counsel submitted that there was no evidence as to whether this would continue for the rest of the Plaintiff's life or how this would prevent him from working. Moreover, Counsel submitted, the doctor's report and his witness statement are void of any scientific criteria to show exactly what was the medical effect of the Plaintiff's injury.

76. I do not agree that the medical evidence is open to attack on the bases suggested by Counsel.

77. With respect to Counsel's submission on the first fact it was no part of the owner's or insurer's case in the Court below that there were such tests available and this is not a fact of which this Court can take notice. It would be wrong in those circumstances to reject the doctor's evidence on the basis that there were tests available to determine the intensity and veracity of the Plaintiff's pain which were not conducted by the doctor.

78. Quite clearly the doctor was of the opinion that one would expect injuries such as were suffered by the Plaintiff, particularly to his ankle, to cause severe pain. Pain killers would provide some relief but the pain would still be there. The doctor's evidence is consistent with that of the Plaintiff that up to the present time he suffers pain and although he received some relief from pain killers the pain never goes away. According to the Plaintiff, the pain would be less severe and become moderate when he takes pain killers. The doctor's evidence was in agreement with this.

79. I think the fact that the Plaintiff suffered pain as a consequence of his injury and that this is relevant to his ability to work is sufficiently made out on the evidence.

80. As regards the swelling of the ankle, while it is true that the doctor did not see such swelling, he did say in evidence that this was his conclusion. The doctor was therefore of the opinion that the Plaintiff's injury would cause his ankle to swell. There is no other medical evidence to challenge his conclusion. Not only is there no other medical evidence but the Plaintiff's evidence was that he did in fact experience swelling in his ankle which was not disputed. There is therefore no basis to reject the doctor's evidence on this point.

81. With respect to the third fact, although there is no evidence that the Plaintiff will continue to be unable to walk on the sole of his right foot, there is no dispute on the evidence that the Plaintiff's mobility will not improve. This is so despite the proposed surgery. As the doctor noted, although the proposed surgery is likely to reduce the pain experienced by the Plaintiff, it has as its cost, severe limitation of movement of the ankle. He further indicated that the Plaintiff may have to use a walking stick for the rest of his life. There is every likelihood of further deterioration, as there will be degeneration of the right ankle joint with time and the development of post-traumatic osteoarthritis.

82. The thrust of the medical evidence was that the Plaintiff suffered a "severe injury". As a consequence of the injury he suffers pain when he performs even menial tasks. He is unable to stand or walk for long periods and the injury to the ankle diminishes the range of movement. In short the injury affects the Plaintiff's mobility and ability to work. The Plaintiff's condition is likely to further deteriorate. There is post-traumatic osteoarthritis of the right ankle and further deterioration is likely. Although surgery was recommended, it would reduce the pain but limit movement as the ankle would be fixed in a certain position that does not permit stooping. The evidence clearly describes the injuries and the residual effect on the Plaintiff and is evidence on which the Judge could have come to the conclusions he did.

83. It was suggested by Counsel that it was curious that the doctor would recommend surgery to reduce pain but acknowledge that the effect would be to reduce movement of

the ankle thereby making it impossible for the Plaintiff to stoop and so continue his job as an upholsterer/joiner. I however see nothing in this submission. The evidence is that even without the operation he cannot resume his job. At least there will be a reduction in pain with the procedure. Given the circumstances the proposed surgery is a reasonable option.

84. As regards the credibility of the medical evidence, Counsel pointed to the fact that the medical report and witness statement were signed on the same day and the report does not contain information that is contained in the witness statement which was prepared in collaboration with an attorney's clerk. Counsel submitted that all of this raised suspicion. I do not see anything inherently suspicious in this. It is not unusual for medical reports to be supplemented by the other evidence of the doctor. I also do not see why the fact that the statement was prepared in collaboration with the clerk should raise any suspicion. The doctor made it clear that he read the statement, made changes to it and could not have signed it unless he agreed with it. Quite clearly the Judge had no particular issue with the doctor's credibility and this Court attaches great weight to his opinion as he had an opportunity to see and hear the witness. The arguments advanced by Counsel provide no basis on which to differ from the Judge.

85. Counsel's second ground on the pretrial loss, as indicated above, was that what the Plaintiff would have earned is not substantiated by the evidence. Counsel submitted that the evidence is unsatisfactory and incomplete bearing in mind that the claim was in the nature of special damages and had to be strictly proved. In the circumstances no award for pretrial loss should have been made.

86. The Plaintiff's evidence as to loss of earnings is contained in his witness statement and in his viva voce evidence.

87. In the witness statement his evidence as to loss of earnings consists of two short sentences namely:

> *"Prior to the accident referred to herein I worked as a self employed upholsterer/joiner. My average salary per month was $3,000.00."*

No documents to support this claim were annexed to the witness statement. In his viva vote evidence he stated that he had records for the amount of money he made per month. He had "accountant's records" but not with him. The records were never produced to the Court.

88. In the cross-examination he gave more detail of his earnings which is contained in the following extract from the Judge's notes of evidence:

> *"I made about $750 per month* [this is an error and it should be per week]. *That is my pay. I use to have work all the time - right through*.
>
> Question: *What is the smallest sum you ever made for the week?*
>
> Answer: *About $350.00 relaxing when I hardly work. That's just for me alone. How the work run I could make up to $1,200.00 per week. Take out electricity, piping. I pay the worker $300.00 per week have to pay current about $200.00 when the bill comes. The tools are electric (Court takes notice that electricity bills are every two months).*
>
> *Out of that $1,200.00 I would take about $500.00 for expenses. That would leave me with about $700.00*
>
> *For best week I would carry home about $700.00 per week and for worst week would carry home $350.00."*

89. The Judge accepted the Plaintiff's evidence as to the amount he would earn for his best week and what he would earn for his worst week. The Plaintiff, however, gave no evidence as to how many weeks per year he would earn $700 and how many he would earn $350. The Judge made a finding that fifty weeks per year would be the Plaintiff's best weeks and that it was probable that the Plaintiff would take time off equivalent to a vacation and reduce the amount of work he produced for that period. That period, which the Plaintiff described as his worst weeks, the Judge estimated to be two weeks per year. The Judge therefore found that he would have earned net earnings of $700.00 per week "*which is not at all an excessive sum for someone who is performing upholstery and joinery services"* for fifty weeks of the year and $350.00 for two weeks of the year. The

Judge therefore awarded as pretrial loss (being a period of five years and five months) the sum of $191,500.00.

90. Pretrial loss is an item of special damage. It has to be pleaded and particularized and strictly proved. The degree of strictness of proof that is required depends on the particular circumstances of each case. As Bowen L.J. said in **Ratcliffe v Evans** (1892) 2 Q B 524, 532 - 533:

> *"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles to insist upon more would be the vainest pedantry."*

The Judge clearly found that the Plaintiff had proven his loss. The question that arises is whether he was wrong to do so. The following cases help to illustrate the approach of the Court of Appeal in cases such as this.

91. In Civil Appeal 41 of 1980 **Gunness and Another v Lalbeharry**, the appellant was injured in a vehicular collision. In an action for damages for negligence the Judge allowed certain claims and disallowed others. Among the claims disallowed was a claim for special damages relating to the loss of various items of jewelry, handbag, cosmetics and $25.00 in cash. On the Appeal Court held that the Judge erred in disallowing the claim. Braithwaite J.A with whom the other members of the Court of Appeal agreed stated:

> *"In disallowing the appellant's claim for these items, the judge merely stated:*
>
> > *'From the evidence which you gave and which was unsupported, I find that you failed to prove such loss.'*
>
> *There is no evidence to contradict the evidence of the appellant nor had she been shown not to be a credible witness. There is therefore no justification for the judge's finding in this respect. The fact that her evidence is unsupported is clearly not sufficient to deny her claim for a loss which must be taken, in the*

absence of evidence to the contrary, in the circumstances of her loss of consciousness to be at least strong prima facie evidence of the fact which she alleged."

92. In Civil Appeal 162 of 1985 **Uris Grant v Motilal Moonan Ltd. and Frank Rampersad**, the appellant's furniture and other articles were destroyed when a vehicle ran off the road and crashed into an old house in which she lived. She brought an action claiming damages in respect of the destroyed chattels. According to the evidence the appellant had made a detailed list of the things destroyed the day following the accident. In the statement of claim the Appellant's loss had been particularized. A default judgment was taken up and in the assessment before the Master, the appellant produced in evidence the list she had prepared which itemized each item and the price thereof. She however produced no receipt verifying the price she had paid for the items. She admitted that she did not have such receipts nor did the appellant retain the services of a valuator to value the damage.

93. The Master held that the appellant had failed to prove the damages and awarded an ex gratia payment. The Court of Appeal held that the Master erred. Bernard, C.J in giving the judgment of the Court noted that the appellant's evidence as to her loss represented strong prima facie evidence and was unchallenged. With respect to the lack of receipts to support her claim, the Chief Justice said:

"By the production in evidence of the list of chattels destroyed together with the costs of their replacement, the appellant had established a prima facie case both of the fact of loss of those articles and of the costs of their replacement at the time. Her special damage had to be established on a balance of probabilities. The respondent called no evidence in rebuttal. In the event, the Master, in my view, either had to accept the appellant's claim in full or, if for whatever reason she had reservations she should have approached the matter along the lines in Ratcliffe's Case by applying her mind judiciously to each item and the cost thereof in the list. This she did not do….

In my view, the Master erred. The appellant did call prima facie evidence of her replacement costs the fact of which, as I said was unchallenged. At this stage I must pose the question whether in this country it is unreasonable, in a case of this kind, for a person to be unable to produce bills for clothing,

groceries, watches, kitchen utensils, furniture and/or other electrical appliance and/or for that matter to remember the time of the purchase. To my mind, this is clearly in the negative and to expect or insist upon this is to resort to the "vainest pedantry."

94. In Civil Appeal 239 of 1998 **Harrinanan v Parriag and others** the appellant appealed from the assessment of damages of the Master. One of the items of damage that the Master awarded, which was challenged in the Court of Appeal, related to the loss of earnings of the plaintiff. The plaintiff claim for loss of earnings was based on evidence given by her that prior to the accident she had carried on a business from her home making ladies' and babies' bags. The evidence was that as a result of injuries to her eyes which she suffered in the accident she was not able to resume the business. The plaintiff provided oral evidence of the persons to whom she purportedly sold the bags that she made. The Court summarized the evidence given by the Plaintiff as to her loss of earnings as follows:

"In the case of the customers who bought wholesale from her, she gave evidence of the quantities of bags which they purchased on a weekly basis. She also provided fairly detailed evidence of the costs involved in the production of these bags. This was made up of the cost of materials like leatherette, in the case of the ladies' bags and quilt in the case of the babies' bags, and the other accessories such as zippers and linings, rivets etc. which were also used to make the bags. Finally, she provided evidence of the price at which she sold the bags. This was slightly more for ladies' bags than for babies' bags."

95. The Court noted that there were two significant weaknesses in the evidence produced in support of the claim for loss of earnings. First, not a single one of the plaintiff's customers was called as a witness to testify that they did in fact purchase bags from the plaintiff and there was no explanation offered for this. Secondly, the plaintiff produced not a single document in support of her claim; "not a bill, nor a receipt nor a record of any kind." She did however offer an explanation for this.

96. Despite these weaknesses, the Master nevertheless found that the plaintiff did manufacture and sell bags from which she earned an income. The finding was challenged before the Court of Appeal but the Court despite the shortcomings in the evidence did not

feel able to override the Master's finding that the plaintiff was in fact involved in the business of making bags. The Court, however, set aside the Master's award because the plaintiff faced other insurmountable difficulties, namely that the medical evidence did not establish the contention that she could not resume her bag making business and that the evidence as to the total bags sold did not distinguish between the amount of ladies' bags and babies' bags sold.

97. From these cases it seems clear that the absence of evidence to support a plaintiff's viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial Judge, he can support the plaintiff's claim on the basis of viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the Judge was prepared to accept. Indeed in such cases, the Court should be slow to reject the unchallenged evidence simply and only on the basis of the absence of supporting evidence. There should be some other cogent reason.

98. In this case the Plaintiff's evidence is open to criticism. He produced no documentary evidence although he said that he had such evidence. He called no other witnesses such as customers for whom he would have done work. However despite these shortcomings, the Judge made a clear finding that the Plaintiff carried on the business of an upholsterer/joiner. He was entitled to do so. He had the benefit of seeing and hearing the Plaintiff give evidence of this and this evidence was unchallenged. The fact that it was not challenged has particular relevance in this case as the Plaintiff was known to the driver. According to him, he was in the process of giving his friends and relatives a lift, among whom included the Plaintiff, when the accident occurred. The driver however did not challenge the Plaintiff's evidence on this basis. Like the Court in **Harrinanan's** case I too do not feel able to override the Judge's finding. It is also logical to accept that the Plaintiff did earn an income as an upholsterer/joiner. The question however remains as to how much did he earn.

99. The Judge had evidence before him as to the Plaintiff's weekly earnings. This was not very satisfactory. The Plaintiff give two figures relating to what he described as his best weeks and his worst weeks, his best weeks being $700.00 per week and his worst weeks being $350.00 per week but he however gave no evidence as to how many weeks of the year would be his best weeks and how many would be his worst weeks. I agree with Counsel for the owner that the approach of the Judge was entirely arbitrary when he decided that out of a year, fifty weeks would be the Plaintiff's best weeks and only two weeks his worst weeks.

100. Counsel for the driver urged the Court that the consequence of this should be the total rejection of the Plaintiff's claim for pretrial loss. Reliance was placed on the **Harrinanan's** case. But as I mentioned, although in that case the Court referred to the incomplete evidence of the Plaintiff's earnings which led the Master to make an arbitrary division between the number of ladies' bags and babies' bags sold, there was a more compelling reason to upset the Master's award and that is the lack of evidence supporting the claim that the injury resulted in an inability to resume work as the plaintiff contended. But for that evidence, I do not believe that the absence of evidence as to the division between the ladies' and the babies' bags sold would have led the Court to reject entirely the claim for loss of earnings. I think, that unlike the **Harrinanan** case, where the Court could find no basis to arrive at an award for loss of earnings, the evidence in this case provided some basis to do so.

101. The Judge stated that $700.00 per week was "*not at all excessive for someone who is performing upholstery and joinery services*." That may very well be so, but it does not determine what this particular plaintiff earned. The Plaintiff's evidence is that he had "*work all the time- right through*", but that evidence does not help in determining how many weeks were his best weeks. He gave no such evidence and as he indicated he may, notwithstanding the presence of work, take it easy. I think in all the circumstances, particularly given that the burden of proof is on the Plaintiff, the appropriate and fair course would be to use the average of his best and worst weeks as his weekly loss of

earnings. This would produce a figure for the Plaintiff's weekly earnings of $525. In the circumstances the Judge's award should be reduced accordingly to $147,000.

102. I turn now to the challenge to the award for loss of future earnings. In arriving at this award the Judge adopted the conventional multiplier/multiplicand approach. The owner and the insurer have submitted that the Judge was wrong to do so. It was submitted that the trial Judge ought to have considered that there was great uncertainty in discerning any future pattern of earnings so as to justify the use of the multiplier/multiplicand approach in assessing the Plaintiff's future loss of earnings. They argued that it is possible that the manual skills possessed by the Plaintiff as an upholsterer/joiner may eventually become obsolete, that he may have to seek employment with an establishment rather than be self-employed or he may expand his business. Moreover, they argued, there was no evidence to show the stability and performance of the plaintiff's business. They submit that a **Blamire** award in the vicinity of $40,000.00 would have been the fairest means of compensation for loss of future earnings. Alternatively they say that even if the multiplier/multiplicand approach was correct the multiplicand was too high.

103. The **Blamire** award gets its name from the case of **Blamire v South Cumbria Health Authority** [1993] 2 PIQR Q1. In that case the Court of Appeal of England held that the Judge was entitled to reject the conventional multiplier/multiplicand approach in favour of a global broad brush approach given the number of imponderables. To appreciate the decision of the Court of Appeal, it is appropriate to have an understanding of the facts of the case.

104. That case involved a claim by a plaintiff for damages for personal injuries. The plaintiff, a nurse, injured her back while lifting a patient. The injury had left her back vulnerable - a condition that she would endure into the foreseeable future - as a consequence of which she could not continue in a nursing job that involved lifting patients and in all probability would have to fall back on her second skill which was secretarial work. The trial judge summarized his views on the issue of future loss of earnings as follows (see Q4):

"I believe from what I have seen of her that, when she does obtain secretarial work, she will do it efficiently and give satisfaction to her employers. Her personality is such that I think she would be an asset in any office, and I see her as attractive to potential employers. But that it is going to be significantly harder for her to get such work than were she a nurse, I have no doubt. That this is so at the present time is established; I feel justified in finding that the same would probably be true for the whole of her working life. In any event it is likely to be harder to find a working environment which she finds congenial. It is reasonable to expect some recurrence of back trouble during the rest of the plaintiff's working life, and if she should lose a job through long absence with back trouble it may be difficult to get another. I must take account of the possibility that she might be unable to get any suitable secretarial work and may, accordingly have to seek part time light nursing work of the kind which she was doing in the residential home. That, of course, would enable her to earn something but would leave a substantial shortfall in comparison with her earnings were she still able to be a full-time nurse.

105. The trial judge did not apply the multiplier/multiplicand approach but awarded a lump-sum. On appeal by the plaintiff the Court of Appeal said that there were two issues facing the trial judge: a) What was the likely pattern of the plaintiff's future earnings had she not been injured; and b) What was the likely pattern for the plaintiff's future earnings given the fact that she was now injured?

106. The Court of Appeal said that there were uncertainties in respect of both questions. **Steyn L.J.** in his judgment, with which the other Judges were in agreement, stated (at Q5):

"First, there was uncertainty as to what the plaintiff would have earned over the course of her working life if she had not been injured. It is not necessary to mention all the difficulties which confronted the plaintiff. One was the possibility that she might have more children. Another was the fact that she clearly would like to have done part time work rather than full time work…. The second aspect

was the uncertainty as to the likely future pattern of her earnings, and here the uncertainties were very great. Bearing in mind that the burden rested throughout on the plaintiff, it is in my judgment clear that on the materials before him the judge was entitled to conclude that the multiplicand/multiplier measure was not the correct one to adopt in this case."

107. The **Blamire** case is very different to this one. There is not present in this case anything of the uncertainties that existed in the **Blamire** case. The critical question before the Judge in this case was what was the future earnings of the Plaintiff had he not been injured. There is no real uncertainty as to the likely future pattern of the Plaintiff's earnings. Before the accident he worked as an upholsterer/joiner. This was his only skill and there could be little doubt that had he not been injured he would have continued in those trades in the future. In every case there will be the possibility that things may not remain the same in the future. As Counsel for the owner submitted, there is a possibility that the Plaintiff's income may fall and that he may have no work at times or may go bust or be unemployed. This is so in all cases and the way that the Courts deal with such possibilities is to make an adjustment in either the multiplier or the multiplicand. I therefore do not accept Counsel's submission that this was an appropriate case for a **Blamire** award. It was susceptible to the conventional approach which the Judge used.

108. As regards the multiplicand, the Judge arrived at this figure by using the annual earnings figure of $37,500.00, which represented fifty of the Plaintiff's best weeks at $700.00 per week and two of his worst weeks at $350.00 per week. In view of the conclusion I have arrived at earlier (see para. 101) this figure will have to be altered also so that the annual figure or multiplier is reduced to $27,300 (being 52 weeks at $525 per week).

109. Counsel for the owner and the insurer submitted that the annual figure should be further reduced to make allowances for contingencies. They pointed to Privy Council Appeal 86 of 2002 **Peter Seepersad v Theophilus Persad and Capital Insurance Limited** where the Privy Council applied a 50% discount to the plaintiff's annual loss of earnings in arriving at the appropriate multiplicand.

110. In the **Seepersad** case there was evidence that the plaintiff could have worked. He was a taxi driver and could have driven his taxi for part of the day. This was therefore a case where the plaintiff did not experience a 100% loss of earnings. That was the basis of the deduction in that case. However, as I have mentioned, it is appropriate in any given case to make allowances for contingencies. In this case the Judge did not expressly say he did, but I have little doubt that he had that in his mind by adopting the multiplier he did. Even if I am wrong in saying that I would not interfere further with the multiplicand having regard to the multiplier used.

111. In view of the above I would therefore reduce the award for loss of future earnings to $218,400.00.

112. Lastly there is the challenge to the award of general damages. As I understand the position of the owner and the insurer in oral argument it is to the effect that the award is too high because the Judge, in arriving at the award, took into account the injuries to the Plaintiff's shoulder and tibia and fibula referred to earlier but there was no medical evidence of such injuries, only the Plaintiff's say-so that the injuries were sustained by him.

113. I do not agree. According to the medical evidence of Mr. Santana the Plaintiff sustained those injuries. There is no indication in Mr. Santana's medical report that such injuries were merely reported to him by the Plaintiff. Indeed, it appears in the report as the doctor's own findings. The doctor was not cross-examined on this and there is no basis to conclude that the medical evidence did not support those injuries suffered by the Plaintiff.

114. As I indicated earlier in this judgment (see para.9), there is an appeal in relation to the award of interest made by the Judge. The Judge ordered that general damages should carry interest at the rate of 12% per annum from the date of filing of the writ on December 12th, 2003. The parties have however agreed that that was an error and interest

should run from the date of service of the writ on January 6th, 2004. I agree. The award of interest will therefore be varied to that extent.

115. Before leaving this appeal I would like to refer to a submission made by Counsel for the owner in the course of argument which, although not necessary to address for the purposes of this appeal, I think should be addressed as it may be a source of general confusion. This relates to an award for loss of earning capacity. The submission was made that if the Court agreed with the Insurer and the owner and set aside the Judge's awards in relation to loss of the earnings, the Plaintiff should not be awarded any sum for loss of earning capacity because he was not employed at the date of the trial. In support of the submission reference was made to Civil Appeal 25 of 2007 **Thomas v Ford and Another** where Kangaloo, J.A said, "*this is not a case where damages for loss of earning capacity can properly be awarded because the Appellant was unemployed at the date of trial and there is no evidence of his handicap in the labour market."*

116. I do not think that Kangaloo, J.A attempted to lay down as a general principle that damages for loss of earning capacity can apply only in cases where the plaintiff at the date of trial or assessment was employed. The remarks he made were, I think, limited to the facts of the particular case before him. While damages for loss of earning capacity would generally arise where the plaintiff is employed at time of the assessment, an award under that head is not dependent on whether the plaintiff is employed. Such an award can apply in cases where there is evidence of a disadvantage in the labour market whether or not the plaintiff is employed. **Smith v Manchester Corp**. (1974) 17 KIR 1 and **Moeliker v Reyrolle** [1957] 1ALL ER 9 are representative of situations where the plaintiff is employed at the date of trial but may experience a handicap in the labour market as a consequence of his injury if he were to lose his employment. These cases may be representative of the most typical situation and the label of a **Smith v Manchester** award is best left to those situations as arose in that case and in the **Moeliker** case (see **Morgan v UPS** [2008] EWCA Civ. 377). It was however made clear in **Cooke v Consolidated Fisheries Ltd.** [1977] I.C.R. 635 that it does not make any difference to the availability of the award that the plaintiff was not actually unemployed at the time of the trial.

117. In the **Harrinanan** case referred to earlier, the appellant was out of work since the accident. As was noted earlier, the Court of Appeal set aside the Master's Award in relation to loss of earnings. The evidence however supported a claim that the plaintiff would experience some handicap in the labour market and the Court accordingly made an award for loss of earning capacity. The Court was clearly entitled so to do.

118. In the circumstances, this appeal is allowed in part. The Judge's orders as against the owner are set aside and the claim against him is dismissed. The awards of the Judge in respect of pretrial loss and loss of future earnings are set aside and in their places are substituted the sums of $147,000.00 and $218,400.00 respectively. The interest awarded on general damages by the Judge shall accrue at the rate ordered by the Judge but from January 6th, 2004, being the date of service of the writ of summons, in lieu of the date of filing of the writ.

119. With respect to costs, it seems to me that the driver should have his costs of the appeal. He did not in fact challenge any of the findings of the Judge and his arguments were limited to opposing the arguments of the owner and the insurer in relation to findings of the Judge which this Court has upheld. I would therefore order that the driver's costs of the appeal be paid by the owner and the insurer. With respect to the costs of the owner, the Insurer and the Plaintiff, the owner has succeeded fully on one point. This is a significant point which has resulted in the entire claim against him being dismissed. This point was supported by the insurer. Indeed all the parties acknowledged that the Judge had erred and there was no oral argument on the issue before this Court. The owner and the insurer have however raised a number of other issues in the appeal, which for the most part have proved wholly unsuccessful. It would not be an exaggeration to say that as between the two of them Counsel for the owner spear-headed the argument on almost all issues in the Court of Appeal. Notwithstanding the owner has been successful and should be entitled to his costs in the Court below, I think the costs in the Court of Appeal should reflect the fact of his failure on several of the issues raised here. Similarly, the costs of the Insurer should reflect its failure on several of the issues

raised in this Court notwithstanding some success on other issues. In those circumstances I therefore order that the owner's costs in the Court below be paid by the Plaintiff. In respect of the appeal, as between the Plaintiff on the one hand and the owner on the other, there shall be no order as to costs. As between the insurer and the Plaintiff however the Insurer shall pay three quarters of the Plaintiff's costs of the appeal.

Dated this 5th day of April, 2012.

Allan Mendonça
Justice of Appeal