REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(San Fernando)

Claim No. CV2015 - 02491

BETWEEN

ANDREA SMITH
(Woman Police Constable No. 13643)

Claimant

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND ELECTORS OF THE BOROUGH CORPORATION

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Madam Justice Eleanor Donaldson-Honeywell

Delivered on: 02 February 2023

Appearances:

Mr. Chanka Persadsingh, instructed by Ms. Kelly Jo Sirju, Attorneys-at-Law for the Claimant

Ms. Evanna Welch, instructed by Mr. Nairob Smart, Attorneys-at-Law for the Defendant

ORAL JUDGMENT

A. Introduction

1. The Claimant fell and injured herself while on duty as a Police Officer on 14 August 2011. The fall took place at 4:45 a.m. in a car park area of the Chaguanas Police Station. The Claimant's right leg fell into a hole. She contends that the Second Defendant [hereafter referred to as "the Defendant"] was negligent.

2. The Defendant's case is that the hole was not as large as alleged, and it was in a part of the carpark that was used as a wrecked car storage area. The Defendant further contends that the Claimant was not acting in the course of employment by venturing into that area of the carpark.

B. Issues

3. There is no dispute between the parties that the Second Defendant's duty of care to the Claimant included the provision of a safe place of work. Accordingly, the issues to be determined are: –

    (i) Whether the Defendant breached the duty of care by failing to protect the Claimant from the foreseeable risk of falling into a hole

    (ii) Whether the Claimant contributed by her own negligence to the injuries sustained

    (iii) The quantum damages are to be awarded.

C. Applicable Law and Legal principles

4. There are four elements of the tort, namely:

    (i) A duty of care owed by the Defendant to the Claimant;

    (ii) A breach of that duty;

    (iii) Damage suffered by the Claimant;

    (iv) Which is caused by, and is a non-remote consequence of the breach.

    Winfield and Jolowicz on Tort[1]

Statutory Duty

5. **Section 6(1) and (2) of the Occupational Health and Safety Act, Chap 88:08,** provides as follows:

> "*It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees."*
>
> *6(2) - "Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular —*

[1] 20th Edition Goudkamp and Nolan, 5-002

(a) the provision of maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of equipment, machinery, articles and substances;

(c) the provision of adequate and suitable protective clothing or devices of an approved standard to employees who in the course of employment are likely to be exposed to the risk of head, eye, ear, hand or foot injury, injury from air contaminant or any other bodily injury and the provision of adequate instructions in the use of such protective clothing or devices;"

6. With respect to a breach of statutory duty, in **Joann Berkeley v Guardian Life Holding Limited and Guardian Life of the Caribbean Limited**[2], Rajkumar J (as he then was) referred to the decision of **Paris v Stepney BC**[3]. Lord Oaksey stated:

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case… The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present, where a one-eyed man has been injured, it is unlikely that such evidence can be adduced. The court has; therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take."*

[2] CV2008-01945 para 97
[3] [1951 1 AC 367, 382 -384

7. **Halsbury's Laws of England**[4], stated:

> "*At common law an employer owes to each of his employees a duty to take reasonable care for his safety in all the circumstances of the case. The duty is often expressed as a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable. All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have. Subject to the requirement of reasonableness, the duty extends to employees working away from the employer's premises, which may include employees working abroad."*

8. In **Rennie Bissoon v Absolute Transport Limited**[5], Mohammed J stated:

> *"The duty to take reasonable care will generally involve, as a starting point, a duty to perform an adequate assessment of all of the risks to which employees may be exposed during the course of employment, in order then to determine appropriate precautions to be taken to avoid injury. [Charlesworth and Percy on Negligence 14th Ed. 12-25]. It is no defence where the Claimant was an experienced employee who never complained about the safety of his workplace. [Charlesworth and Percy on Negligence 14th Ed. 11-20]"*

9. An employer has the duty to devise a safe system of work, which includes warning against risks even if those risks are obvious.

Causation

10. The Claimant must establish a causal link between the Defendant's negligence and his injuries, or, in short, that his injuries were indeed consequent on the negligence.[6]

Contributory Negligence

11. In **Ian Gonzales v Scaffolding Manufacturers (Trinidad) Limited & others**[7]**,** des Vignes J (as he then was) stated:

> "*Contributory negligence means that there has been some act or omission on the claimant's part which has materially contributed to the damage caused and*

[4] Vol. 53 (2020) para 377
[5] CV2016-03211 at para 22
[6] Clough v First Choice Holidays and Flights Ltd [2006] All ER (D) 165 (Jan), at para 44
[7] CV2009-03527 para 29

is of such a nature that it may properly be described as negligence. For these purpose, "negligence" is to be taken in the sense of careless conduct rather than its technical meaning involving breach of duty. It means the failure by a person to use reasonable care for the safety of either himself or his property so that he becomes blameworthy in part as an author of his own wrong. [Charleworth & Percy on Negligence (10th Ed.) @ p.170] When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued. All that is necessary to establish such a defence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. The burden of proving contributory negligence lies on the defendant; it is not for the claimant to disprove it. If the defendant's negligence or breach of duty is established as causing the damage, the onus is imposed on the defendant to establish that the claimant's contributory negligence was a substantial or material co-operating cause. The defendant must first prove that the claimant failed to take ordinary care of himself or such care as a reasonable man would take for his own safety and secondly, that his failure to take care was a contributory cause of the accident."

D. Pleadings and Evidence

12. The Claimant's pleaded case was supported by her own testimony as to liability, and her witness, Dr. Gopeesingh, provided supporting evidence on her injuries. In addition, the Claimant filed hearsay notices to rely on the medical reports, certificates and MRI scans of several other medical professionals, including doctors and radiologists.

13. Of the Defendant's two intended witnesses, Sgt Dave James' statement was entered into evidence by order of the Court as he died prior to the trial.

14. The Defendant's second witness, WPC Glasgow, failed to attend for trial. The Court declined to draw adverse inferences from her non-attendance as a witness due to illness, although there was no certificate to establish that she was in fact ill. However, at the outset, the Court observes that the witness testimony of WPC Glasgow, even if it had been admitted into evidence, would not have provided persuasive and credible evidence in any material respect against the Claimant's case. In fact, if admitted, WPC Glasgow's witness statement would present a contradictory picture of the case for the Defendant, in that WPC Glasgow was contradicting the evidence of the other witness, Sgt James.

15. The Claimant withstood extensive cross-examination by Counsel for the Defendant, remaining consistent in all material respects with her pleaded case and Witness

Statement. Much was made by Counsel for the Defendant about the unlikelihood of the size of the hole being eight feet deep, as stated in the Claimant's 29 August 2011 report. However, a similar depth of six feet was alleged by the Defendant's own witness, Dane James, in his initial report on 13 September 2011.

16. Furthermore, the Claimant, in her Reply pleadings, had clarified, at paras 1 and 3, that the size of the hole was such that only her right leg went below ground level. Consequently, her left knee took the brunt of the fall and was bent in a kneeling position.

17. In any event, there is merit to the submission of the Claimant's Counsel that the size of the hole does not materially impact on liability. It is sufficient that the hole was left open in an area where the Claimant had to perform one of her duties of lodging vehicles.

18. The Claimant's evidence that she could not have taken better care to avoid the fall is inherently logical and credible. She explained that the area was not well lit at 4:45 a.m. The area was paved with asphalt, and there was nothing to mark the danger of the hole. The lack of lighting is supported by the 13 September 2011 statement of the Defendant's sole witness, Dane James.

19. Additionally, the Claimant had just returned from a long period of maternity and vacation leave. Prior to that, she did clerical work for about four months at the Chaguanas Police Station. Her evidence that she was not assigned to the Chaguanas Police Station before that is uncontradicted. The Claimant's evidence is that it was due to her advanced pregnancy that she was doing clerical work for four months before she went on leave. She did not lodge vehicles during the four months she spent at the station before then. The Court accepts, on a balance of probabilities, that the Claimant could not have known of the hole located in the area of the car park where wrecked vehicles are stored. She did take reasonable care in observing her surroundings in the circumstance.

20. As to the suggestions in cross-examination that the Claimant should have taken evasive action when she saw her colleague, WPC Glasgow, jump or leap, this was also credibly answered by the Claimant. The Claimant was not sure of the nature of that movement because WPC Glasgow had a limp. Furthermore, WPC Glasgow was only one foot

away from the Claimant while they were walking so that did not give time for evasive action before the Claimant fell into the hole that WPC Glasgow jumped over.

21. Finally, the Defendant's case is that the Claimant ventured into the carpark area, where the hole was, in a manner that was not required for her duties.

22. This is refuted by the Defendant's own witness, Dane James, in his 13 September 2011 statement. He says the Claimant, WPC Glasgow and another officer, Cpl Simon, walked to the carpark to 'lodge' a vehicle brought into the station. This supports the Claimant's case that the walk over to the car park area came about due to a drag racing incident in relation to which her assistance was needed to charge the persons involved. The lodging of the vehicle was part of her duties in that regard.

23. There is no proof from the Defendant to contradict that it was necessary to walk on the asphalt to lodge a vehicle parked there or to walk further across it to address a suspicious group of persons as alleged by the Claimant.

24. The Court's finding, on a balance of probabilities, is that the Claimant was carrying out her lawful duties at the time that she fell into the hole. This included walking not necessarily on a walkway but on the asphalt where the wrecked car, which she had to lodge was located. The Claimant also acted in the course of her duties by walking directly rather than along a longer route towards where a group of suspicious persons were.

25. In the circumstance, the Claimant has proven that the Defendant breached a duty of care towards her and is liable in negligence for her fall.

E. <u>Injuries and Quantum of Damages</u>

26. The testimony of Dr Gopeesingh and certificates of other doctors all together provide credible evidence in establishing that the Claimant sustained permanent partial disability ["PPD"] of 30%. Additionally, when the injury was sustained in 2011, there was evidence from the medical reports, MRI and certificates from the doctors from 2011 to 2018. Looking at the wording as highlighted in closing submissions, one can see throughout the nexus and connection with the history of the fall.

27. The Defendant's submission that the Claimant's involvement in an accident in 2001 could have caused the injury, reported on in MRI scans and by Dr. Gopeesingh, is not supported by any medical evidence from the Defendant. Notably, by a 12 April 2018 order of then presiding Judge Hon Justice Dean Armorer (as she then was), the Claimant was directed to submit to an examination by an orthopaedic surgeon nominated and paid for by the Defendant on or before 30 June 2018. The Claimant testified under cross-examination to the fact that she complied with that order. However, the Defendant failed to tender any evidence pursuant to the said examination of the Claimant.

28. In that context, the only first-hand evidence concerning the Claimant's prior accident was that of the Claimant herself. As to that 2001 incident, the Claimant said that the actual injury was to her ribs. Accordingly, it was not brought up by her in answer to any questions asked during her visits to the doctors when they examined her, as the injuries those doctors were assessing were to her knees and back. Dr. Gopeesingh was also credible in saying that physiotherapy would not reduce the PPD. In fact, under cross-examination, he mentioned that even with physiotherapy, there could be a rubbing of bones together prognosis which could be worse in the future. He did agree though, that pain could be reduced with physiotherapy, but not the PPD.

29. The evidence of Dr. Gopeesingh, under cross-examination, credibly provided un-contradicted evidence that if the Claimant had complied with doctors' recommendations of physiotherapy treatments, the result might not have been a reduction in her PPD. Rather, he opined that her PPD could become worse though he admitted that there could be muscle strengthening and pain reduction.

General Damages

30. Counsel for the Defendant submitted that the Court should focus solely on the first medical report and, as such, submitted a range of $40,000-$50,000. In support of that range, Counsel relied on the following authorities:

- **Seaton v Attorney General CV No. 3667 of 2009**
- **Molly Gaffar v. Bertram Padmore HCS No 953 of 1997**
- **Harold v ADM Import and Export Distributors Ltd CV 2009-03728**

31. Meanwhile, Counsel for the Claimant submitted a range of $185,000-$300,000. In support of that range, Counsel relied on the following authorities:
    - **Kester Hernandez v The AG of T&T CV2011-01821**
    - **Clarence Vialva v Klint Ryan CV2009-01066**
    - **Calvin Dipnarine v The AG of TT CV2008-03944**
    - **Cohen Phillips v The AG of TT CV2015-03899**
    - **Nichola Rodriguez v Ansa Finance Merchant Bank Ltd and others CV2008-03048**

32. Other comparators include:
    - **Reshma Choon v Industrial Plant Services Limited CV2006–00574:** "While descending a flight of steps, the claimant slipped on a liquid substance and fell. She suffered a mild bulge in the spine in the area of the L5 S1 with minimal narrowing of the exit foramina and was treated conservatively first with medicine. She showed signs of nerve root irritation/compression and had surgery to remove the L5/S1 disc that is laminectomy and discectomy. The claimant was awarded $90,000; as updated to December 2010 to $102,841." cited in **Ashram Pariagsingh v AGTT CV2016-01487**

    - **Helena Holder v AG CV2011–00489**: "a thirty-five-year-old woman police officer slipped and fell at work sustaining injuries to her right knee, spine and back. She was diagnosed as having lumbar spondylotic radiculopathy with nerve compression at L4/5 and L5/S1. Her leg was placed in a cast and she was unable to use the bathroom and she underwent surgery. She had an inability to sit for more than thirty minutes, challenges with walking, used medication to control her pains and needed physiotherapy twice weekly to strengthen her muscles. She was also rendered medically unfit by the Medical Board and retired on the grounds of ill-health. She was unable to bear weight on her lower limb without her ankle and knee swelling and becoming painful. She was awarded $125,000 for general damages." cited in **Patrina Brown Mendoza v Unicomer (Trinidad) Ltd CV2016-00123**

- **Ashram Pariagsingh v The Attorney General of Trinidad and Tobago CV2016-01487**: The claimant was a corporal of police and, at the material time of the incident, was attached to the La Brea Police Station. During the course of his duties as shift commander, he was walking around the police station, checking to ensure that the compound was safe, when he fell. The medical reports indicated that he suffered a back injury that required surgery. Examination found lumbosacral spasm with decreased range of movement, absent ankle jerk, diminished sensation left S1 dermatome and weakness left dorsiflexion. Laminectomy surgery was done on February 15, 2013 of the L4 and L5 with L5/S1 bilateral undercutting facetectomy, foraminotomies and facet rhizotomies [awarded a 14% whole body impairment and a 50% permanent partial disability. The Claimant was awarded $115,000 for his pain and suffering and loss of amenities.

33. Having reviewed the cases submitted by both sides, my view is that on either side, the cases were actually not on all fours with the type of injuries sustained by the Claimant. Instead, I found that the claim of **Reshma Choon v Industrial Plant Services CV2006-00574** is more applicable to the injuries sustained by the Claimant. The Defendant's submission that only the first medical report is relevant in assessing the Claimant's injuries fails in that as aforementioned there is sufficient nexus connecting the other reports and the PPD finding to the injury.

34. Accordingly, I will award a quantum of $105,000.00 for general damages.

Special Damages

35. Counsel for the Defendant submitted that there should be no award for special damages as no receipts for payment are in evidence. However, the authority of **Rampersad v Willies Ice-Cream Ltd**[8] is relevant to this consideration. The evidence before the Court includes documented proof of treatment of the Claimant by Drs Persad and Chinia over a period of years. My finding is that the quantum claimed for the two doctors falls within the range of expenses that need not have been proven by receipts.

[8] CA App 20 of 2002 (2005)

36. On the other hand, it is reasonable to accept that those services would not have been free of charge, and the amount claimed is quite conservative. As such, the Court deems the amounts claimed as having been proven. Accordingly, special damages of $8,000.00 are awarded for the pharmaceutical drugs and doctors' bills claimed.

Interest

37. Applying the case of **Adana Paul v Wells Services Petroleum Company Limited**[9] cited by counsel for the Claimant as well as the researched current repo rate, interest is awarded on general damages at the rate of 3.5% from 16 July 2015 and at the rate of 2% on special damages from the same date to the date of this judgment.

Costs

38. Costs are to be quantified on the Prescribed Scale of Costs pursuant to Rule 67.5(1) CPR. To quantify costs on the Prescribed Scale, however, the "value" of the claim must be determined in accordance with Rule 67.5(2) CPR. In relation to the Claimant, the value of the claim will be the amount ordered to be paid by the Defendant: CPR 67.5(2)(a). The Claimant was awarded the sum of $105,000.00 in general damages together with interest thereon at the rate of 3.5% per annum from 16th July 2015 to 2nd February 2023. Also, $8,000.00 in special damages with interest thereon at the rate of 2% from the same dates. That amounts to a total sum of $141,988.39

39. Prescribed costs in accordance with the Scale of Prescribed Costs at Appendix B of Part 67 CPR 1998 are quantified in the sum of $30,298.26

F. <u>Conclusion</u>

40. **IT IS HEREBY ORDERED** that:

    1. Judgment for the Claimant against the Defendant

    2. The Defendant is to pay the Claimant general damages in the sum of $105,000.00 with interest at the rate of 3.5% per annum from 16th July 2015 to 2nd February 2023. That amounts to a total sum of $132,778.97

[9] CA App S349 of 2014 (2020) para 65

3. The Defendant is to pay the Claimant special damages in the sum of $8,000.00 with interest at the rate of 2% per annum from 16th July 2015 to 2nd February 2023. That amounts to a total sum of $9,209.42

4. The Defendant is to pay the Claimant's costs on the prescribed basis, quantified in the sum of $ 30,298.26

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Eleanor Joye Donaldson-Honeywell
Judge