

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV2018-01701

BETWEEN

CRYSTAL PHILLIP

Claimant

AND

TOBAGO REGIONAL HEALTH AUTHORITY

Defendant

Before: Master Martha Alexander

Date of delivery: March 18, 2022

Appearances:

For the Claimant: Ms Dawn Palackdharry Singh

For the Defendant: Ms Asante Brathwaite

DECISION

BACKGROUND

1. The claimant was a nurse with the defendant, when a leg of the chair on which she was sitting broke and she fell to the ground sustaining personal injuries. The incident occurred on September 05, 2015 at around 7:30am at the nurse's station at the Scarborough Regional Hospital ("the Scarborough Hospital"), in the island of Tobago. At the material time, she was

in the course of her employment where she was in the process of taking over the surgical ward. She claimed that when she fell, she hit her head and entire body, which she identified as her back, neck, buttocks, waist, hips and legs. There was no claim for injury done to her hands or facial injury.

2. The defendant was at all material times the provider of health care services in Tobago with responsibility for administration, and the employer of all the nursing and other staff working at the Scarborough Hospital. The defendant was sued as the employer of the claimant and the occupier of premises, pursuant to the provisions of the State Liability and Civil Proceedings Act Chapter 8:02.
3. The claimant sued for injuries suffered from the fall at work and pleaded that she held a valid contract of employment dated October 07, 2015. Of note was that this postdated the date of the incident. The claimant pleaded that on the day after the incident that was September 06, 2015 she returned to the Accident and Emergency Department at the Scarborough Hospital, as she was experiencing severe neck spasms, severe neck pain, shooting pains from her right buttocks down to her heel, palpitation in the back of her head and sacral pain.

INJURIES

4. The claimant was diagnosed with whiplash injury, and with sacral pain secondary to a fall. This initial diagnosis was made allegedly by Dr Mahal of the Accident and Emergency Department, Scarborough Hospital. She also claimed that upon further assessment, Dr Seun Harewood, Orthopaedic doctor on the surgical ward, at the Scarborough Hospital diagnosed her as suffering from radiculopathy and back pain. She was admitted to the adult surgical ward on September 07, 2015. She claimed that she was discharged on September 17, 2015 by these doctors but there was no report. Subsequently, she was followed up at the physiotherapy department for care and treatment and ward review. She continued on sick leave from her job

with the defendant having been issued twenty-four sick leave certificates from the defendant's employees or agents. The defendant admitted that she was allowed sick leave at intervals during the period September 05, 2015 to February 20, 2017.

MEDICAL EVIDENCE

5. At the assessment, Dr Stephen Ramroop, specialist surgeon in orthopaedic surgery, provided medical evidence, with his most updated report being July 09, 2020. Dr Ramroop documented that the claimant had significant tenderness and decreased range of movement of the muscles of the low back, and sacroiliac joint and coccyx; swelling of the paraspinal muscles and clinical signs of a L4 L5 weakness in her right lower limb. X-rays and MRIs showed a bulging disc. She was given a trigger point injection on the coccygeal area and experienced slight improvement in pain but not for long. In his report, Dr Ramroop stated that she could not perform her usual activities of daily living and occupational activities and tasks. During cross-examination, he clarified that he had obtained those pieces of information from the claimant. He ascribed her a permanent partial disability (whole body impairment) of 18% in his report. Based on the combined diagnoses of all the medical reports¹, the claimant suffered with coccydynia and radiculopathy. During cross-examination, Dr Ramroop confirmed that her injuries were consistent throughout all reports.

THE LAW ON DAMAGES

6. As a rule, general damages flow from the direct natural or probable consequences of the wrong. They are incapable of precise quantification and include past and future non-financial losses as well as future financial losses. To determine the appropriate quantum, the court used

¹ Report of Dr David Toby dated February 22, 2016; and Dr Stephen Ramroop dated January 09, 2020 and July 09, 2020

the signposts in *Cornilliac v St Louis*² to guide the award. These markers were: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which the claimant's pecuniary prospects have been materially affected. Using these tools, the court proceeded to determine what constituted fair and appropriate compensation to the claimant for the injuries she had sustained from falling off her chair. It meant having to weigh and/or balance the evidence and law to reach fair compensation. There were several other guiding principles that were used, with the most touted being that the exercise should not aim for unjust enrichment and that perfect compensation was not possible. The court also considered the impact of inflation on the declining value of the dollar and that a claimant must come prepared to prove her damages by bringing the necessary evidence. If a claimant was relying on the flexibility of the court's approach to the receipt of evidence, then there was a standard of credibility to be met for uncorroborated oral evidence. Where evidence was capable of being called, a claimant must comply rather than simply refuse to provide it. In the present matter, the claimant was entitled to both general and special damages, and her awards thereto would rest on the quality of evidence provided in support and justification of same.

THE EVIDENCE

7. As to general damages, the court accepted the evidence set out in the medical reports as fully defining the parameters of the claimant's injuries and resulting disabilities. These were not major, life threatening or severe bone injuries but they significantly affected her life. The claimant gave evidence of unceasing pain in the sacral region from the waist down to her toes; pain in her head; severe neck spasms and shooting pains from the right buttocks down to her heel. Her evidence was accepted that she was in the throes of constant headaches and pains in her body. Evidence of the claimant's pain and suffering also found expression, to some

²(1965) 7 WIR 491

extent, in the evidence of Dr Ramroop who described observing her in the waiting room and during his examination of her.

8. The defendant's counsel has challenged the evidence of excruciating pain pointing out that there was an absence of receipts for pain medication, evidence of pain treatment or special pain relief assistive devices or other mechanism for treating with the said excruciating pain. She submitted that the claimant has failed "*to substantiate the intensity and consistency of her pain and the treatment of same*" so it must be that she was exaggerating. The court dismissed these arguments of counsel for the defendant, as pain is subjective. Further, the lack of evidence of pain management, prescription or assistive devices could not establish or substantiate the defendant's case that the claimant was exaggerating her pain. The court accepted, therefore, that the claimant's pain was continuous and restrictive.

9. As to her loss of amenity, the evidence of this was also included in her witness statement and the medical reports before the court. She gave a detailed account of her challenges at home in completing simple, mundane tasks, her need for assistance and her inability to enjoy her usual activities of living. She averred that her life turned *topsy turvy* after the fall and injuries suffered. She stated that she became both physically and emotionally stressed from what she was going through and gave clear and detailed evidence of how hospitalization and immobility impacted her life. She attested to an inability to squat, lift objects, bend, sit for long periods and that these challenges affected her ability to work, perform chores, go to the beach and have pleasurable intercourse. As a rule, "*[D]amages may be awarded for the loss of the pleasures or amenities of life, either permanently – by the loss of a leg, for e.g. – or temporarily – as by mere detention in hospital or in bed for a period.*"³ Based on the evidence, the claimant suffered a loss of amenity brought on by her fall, for which she was entitled to be compensated.

³ Munkman on Damages for Personal Injuries and Death 11th edition pages 46-47

10. The claimant was entitled to compensation for her loss of pecuniary prospects caused by her injury, which must be pleaded and proved. At the time of the incident, she was a nurse and returned to work but was on continuous sick leave for a period after the fall. This eventually caused a major fall out with her employer and her contract was not renewed. The evidence as to her loss of earnings was contested robustly and consisted of some conflicts so would be explored in detail below.

COMPARATORS

11. There was no want of comparators in the present matter. Based on these, counsel for the parties suggested awards for pain and suffering that reflected a vast difference in quanta, with the claimant suggesting \$200,000 and the defendant \$90,000. Some of these comparators were clearly and glaringly inappropriate and distinguishable either based on the severity and/or extent of injuries. In the conduct of this comparative analytical exercise, the court referenced some of the cases that were deemed inappropriate comparators for the purpose of setting the contours of the assessment. In the opinion of the court, comparators even where found unsuitable or capable of being distinguished were still informative in settling the award for the present claimant. As with most personal injury cases, the nature and extent of injuries as well as the pain, suffering and loss of amenity will not always be equivalent. What was required in the current exercise was that the court recognized the contextual realities of the comparators and made the adjustments to reflect same.

12. The comparators used for assessing the claimant's injuries included:

- i. ***Kester Hernandez v The Attorney General***⁴ where a 19 year old suffered severe spinal injuries at his workplace and was awarded an 80% permanent disability to perform his job. He

⁴ CV2011-01821 delivered on February 15, 2013 by Alexander M

suffered annular disc bulge of the L5/S1 lumbosacral spine, which caused displacement of the traversing left S1 nerve root, L5/S1 radiculopathy and decreased power left ankle dorsiflexion. He experienced spasm in the entire back, cramps in both legs radiating down to the toes, pain in the neck, wrist, groin area and left hand, headaches and difficulty sleeping. He was unable to sit or stand for more than 10-15 minutes and sexual intercourse was painful. He was awarded \$300,000.

Comparatively, the present case was distinguishable from ***Kester Hernandez***, where the injuries were more severe and extensive including nerve root displacement, disc injury and other spinal injury.

- ii. ***Candice Bailey v North Central Regional Health Authority***⁵ where a pregnant nurse fell when the chair on which she was sitting collapsed and had a miscarriage a few days later. She suffered L4/L5 annular tear to the posterior longitudinal ligament, lumbar spondylosis at L5/S1; loss of lordosis consistent with paravertebral muscle spasm; L5/S1 interval disc space desiccation changes; minimal posterior disc bulge with minimal bilateral neural foraminal narrowing; L5/S1 minimal disc herniation. She experienced pain in coccyx; pain while walking for long periods, bending over, sitting or lying down; coccydynia; a large focal central disc prolapse of the lumbo-sacral spine; prolapsed intervertebral disc; and permanent partial disability of 40% and was awarded \$250,000 in general damages.

Comparatively, the above injuries were more severe but the case provided a marker for the award to the present claimant to be set at a lower quantum.

- iii. ***Clarence Vialva v Klint Ryan***⁶ where the claimant suffered from a post-concussion syndrome; mild disc bulge at L3/4 level; diffused disc bulge at L4/5 causing stenosis of central spinal canal and narrowing of bilateral neural foramina; mild disc bulge at L5/S1 indenting anterior epidural fat with no significant narrowing of bilateral neural foramina. Surgery was

⁵ CV2018-03859 delivered on June 18, 2020 by Madame Justice Mohammed

⁶ CV2009-01066 delivered on January 8, 2013

recommended of the L4 laminectomy and L4/5 discectomy and he was assessed with a 40% permanent partial disability; and awarded \$275,000 in general damages.

Comparatively, the present case was distinguishable from **Clarence Vialva**, as the injuries there were clearly different in severity, type and extent including post-concussion syndrome, disc and neurological issues.

- iv. **Calvin Dipnarine v Attorney General**⁷ where for lumbosacral spasms with decreased range of movements, diminished sensation bilateral S1 dermatomes, L5/S1 radiculopathy and spondylolisthesis, neurological deficit and corrective surgery with the insertion of two pedicle screws in L5 and two screws in sacrum plus two connecting rods. The claimant experienced loss of libido, inability to stand, sit or walk for long periods of time and inability to engage in sports and exercise and was awarded \$200,000.

Comparatively, injuries in the present case shared some affinity to **Calvin Dipnarine**, though the injuries above were more serious. This was a relevant comparator in the circumstances.

- v. **Wayne Wills v Unilever Caribbean Limited**⁸ where a claimant suffered an acute lumbar strain, and a L4/L5 disc herniation that necessitated surgery two and a half months after injury. Immediately following the injury, the claimant suffered pain in the neck and along the left side of his body, which intensified over the next few days. After surgery, the claimant progressed well but had some episodes of pain including one severe spasm. His prognosis was continued intermittent pain. The claimant experienced an inability to play football and hockey, to have regular sexual intercourse or sweep and was in pain up to the date of hearing. Initially, his award was \$75,000; which was upgraded by the Court of Appeal to \$200,000.

Comparatively, **Wills** was a good and relevant comparator for the present case.

⁷ CV2008-03944 delivered by Mohammed M on February 24, 2012

⁸ Civil Appeal No 56 of 2009 delivered on December 18, 2013

- vi. ***Rennie Bissoon v Absolute Transport Limited***⁹ where a claimant suffered lumbar spondylosis with L4-L5 and L5-S1 degenerate disc disease as well as cervical spondylosis with C5-C6 and C6-C7 degenerate disc disease and was awarded \$100,000 in general damages. Comparatively, this case was only relevant to map the lowest possible award.
- vii. ***SWRHA v Samdaye Harrilal***¹⁰ where for loss of satisfaction in bringing her pregnancy, confinement and labour to successful conclusion and the loss associated with the physical loss of a child an award was made of \$120,000. Comparatively, this was a most ill-suited comparator and the court was at a loss as to why counsel would have recommended it for deliberation so it was rejected and not considered.
- viii. ***Betty James v AG***¹¹ where a claimant fell while descending a flight of stairs and suffered injuries for which she underwent surgery. Her suffered ligament injury; lumbar disc prolapsed and lumbar root nerve compression. She suffered lower back and ankle pain, which was so severe she was unable to walk, sleep or stand in comfort. She also could not stand for long periods of time, bend, lift objects or carry out routine tasks without pain and discomfort. She could not run or walk with speed and suffered hip pain. Her pains affected her enjoyment of dancing, playing netball and sexual intimacy. She was awarded \$125,000 for general damages reduced by 20% contribution to \$100,000. Comparatively, this case was relevant and served as a cap for the possible award.
- ix. ***De Leon v Ramlal***¹² where a claimant suffered a fracture at the C5/C6 level of the cervical spine, fracture of the left iliac crest (pelvis), post-concussion syndrome and whiplash injury resulting in an inability to drive. Court of Appeal awarded \$75,000 as adjusted to December 2010 to \$153,082. Comparatively, this case involved fractures and was of limited relevance.

⁹ CV2016-03211 delivered on February 25, 2019 by Madame Justice Mohammed

¹⁰ Civ App 60 of 2008 delivered on May 12, 2011

¹¹ CV2010-05009 delivered on April 22, 2015 by Rahim J

¹² CA No 53 of 1999 delivered on April 11, 2000 by Permanand JA

- x. ***Gerard Jadoobirsingh v Bristow Caribbean Limited***¹³ where a claimant suffered spinal injuries in a helicopter accident namely mild protrusions at four locations in his spine C3/4, C5/6, L4/5 and L5-S1; loss libido, irritability, and post-traumatic stress disorder leading to depression. He suffered extreme pain that made sitting at a desk for more than 30 minutes and writing for more than 15 minutes impossible; numbness and cramping. He was haunted by images of being hit by the tail boom of the helicopter and being thrown from the aircraft. His neurosurgeon recommended two surgical procedures. In 2007, he was awarded \$80,000; as adjusted to December, 2010 to \$105,150.
- Comparatively, this case was not a strong comparator and little regard was given to it.
- xi. ***Raquel Burroughs v Guardian Life of the Caribbean***¹⁴ where for cervical nerve compression or irritation to C4 to C7, L2/L3 and L5/S1, restriction of all neck movements, patella pain, tenderness of the left and right sacroiliac joints and lumbar paraspinal muscles. She continued to experience neck, back and knee pains, which resulted in restrictions in ambulation and social activities. She was assessed as having a 50% permanent partial disability. She underwent surgery and was still experiencing pain post surgery. She continued to suffer chronic pain albeit on a reduced scale and was awarded \$78,000.
- Comparatively, this case was of limited relevance as a comparator.
- xii. ***Andre Marchong v T&TEC and Galt and Littlepage Limited***¹⁵ where a chair collapsed and the claimant fell sustaining soft tissue injury and lumbar spasm. This resulted in some narrowing of the lateral recess at L4-L5 with possible impingement of the traversing L5 nerve root and early disc desiccation at the L5/S1 level. He complained of continuous back pain radiating

¹³CV2005-00784 delivered by Dean-Armorer J on November 20, 2007

¹⁴CV2011-04315 delivered on May 17, 2017 by Alexander M

¹⁵CV2008-04045 delivered on May 21, 2010 by Jones J (as she then was)

down his right leg and pain on prolonged sitting. As such, surgery was recommended to alleviate pain. He was awarded \$60,000 as general damages.

Comparatively, this case was not a fair comparator so no regard was given to it.

- xiii. ***Helena Holder v AG¹⁶*** where 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.

Comparatively, this case was not the most updated and relevant comparator, as the injuries bore some similarity to that of the present claimant.

DISCUSSION

13. The claimant's injuries have been the source of pain, suffering and loss of amenity and have caused significant losses. The pains have been debilitating and ongoing. The injuries were not fractures or other bone injuries but caused significant tenderness and radiculopathy, which involved the pinching of the nerve root in the spinal column. She has been treated with physiotherapy, from which she experienced slight improvement but which she did not continue. The court compared her injuries to those in the cases above and, whilst it was not determinative or factored into my award, it was observed that the present claimant received an 18% permanent partial disability award as to whole body impairment. She has not had surgery, and

¹⁶CV2011-00489 delivered on March 10, 2020 by Alexander M

physiotherapy has not been fully pursued to determine if it would have worked, so her pains have been lingering on and enfeebling. She has given a narrative of pain and suffering in her evidence in chief and it was accepted that after the fall, pain has saturated her entire life and significantly reduced her enjoyment of it.

14. In arriving at the quantum in this case, the court took into account that the injuries in most of the cases above were not exactly on par with the case at bar. In several of the authorities, the injuries were more extensive, more debilitating and more life altering. Thus, the court did not accept that the claimant at bar deserved an award that mirrored those in ***Kester Hernandez*** and ***Clarence Vialva***. These awards were at the top-end range and the arguments of her counsel that her injuries equated with the claimants in those two cases were dismissed as far-fetched and fanciful at best. The majority of cases cited above consisted of mismatched injuries and were soft comparators for the present matter save ***Holder***. Bearing all these factors in mind, all principles on assessment, the analysis of the comparators and her evidence, it was considered appropriate and just to award \$120,000 for pain and suffering.

SPECIAL DAMAGES

15. The law and judicial principles on special damages are known and clear. Special damages do not necessarily follow from the ordinary course of the tort nor will the law seek to infer these from the nature of the act. Given that special damages are exceptional in nature and character, the claimant must be clear and explicit in her pleading of these damages, particularize and strictly prove them¹⁷.

¹⁷*Ströms Bruks Aktie Bolag v Hutchinson* [1905] AC 515, 525-526

16. Further, the court's approach must be realistic¹⁸ in assessing the proof advanced, by considering the quality of evidence in the context of the nature of the item claimed; the difficulty or ease with which proper evidence of value might be obtained; the value of the individual item; and the character of the acts which produced the damage. Moreover, this realistic approach must not derogate from the overriding obligation imposed on a claimant to prove her special damages claimed and not to simply, by a process of random estimation or waving of a wand pluck figures out of the air with the hope that her claim would be accepted by the court. Further, whilst the claimant must prove the fact of the loss and its amount¹⁹, where no evidence existed to contradict the claim or to show that the witness was bereft of credibility²⁰, the court could make the award. A court will not generally disallow a claim on the basis of unsupported evidence alone, especially where there was no contrary evidence. In exercising its duty under this head of claim, the court was mindful to consider the availability of evidence, any absent evidence, the actual sum claimed and specificity of that sum as well as the lack of contradictory evidence. This court's approach was to grant the claim that complied with the requirements for pleading and proof and to give consideration where documentary evidence was unavailable. In the view of the court, a claimant who claims special damages should be able to prove it.

Loss of earnings

17. The claimant failed to plead loss of earnings although she gave evidence that she has been unemployed since October 18, 2017 and the defendant has refused to renew her contract. She attested that the refusal to renew her contract was related directly to her ability to perform certain functions because of her injury. Counsel for the claimant then submitted that the claimant ought to be awarded loss of earnings based on a monthly salary of \$9,684.64 for three years and nine months in the sum of \$435,808.80.

¹⁸*Jody Ali v Donnie Ramai* CV2013-00262 page 2, paragraph 3 delivered on July 14, 2014 by Alexander M

¹⁹*Dennis Peter Edwards v Namalco Construction Services Ltd* Civil Appeal No 28 of 2011 delivered on July 25, 2013

²⁰*Gunness and another v Lalbeharry* CA No 41 of 1980 delivered on March 11, 1985

18. Counsel for the defendant submitted that as there was no specific claim made for loss of earnings and that her last contract was executed and/or renewed on October 07, 2015, which was after her injuries, this claim should be rejected. There was some conflict in the evidence as counsel for the defendant also submitted that the defendant exercised its right not to renew the contract when it naturally ended in March 2017. Of note, however, was that the claimant returned to work after the fall and counsel submitted that the defendant was accommodating and facilitative at all times. Two witnesses for the defendant, nurses Lisa George-Alleyne and Michelle Edwards-Benjamin, confirmed that she was posted at various stations at the hospital in order to comply with the restrictions upon her return to work. Counsel also submitted that an ergonomic chair was sourced for her and when she expressed dissatisfaction with it, the defendant got her another. When her contract naturally ended in March 2017, the defendant exercised its right to not renew because of the claimant's poor appraisal, egregious insubordination and a failure to indicate an interest in continued employment. According to the evidence of nurse Michelle Edwards-Benjamin, the failure to renew the contract was not related to the claimant's injuries. The defendant, therefore, sought to discredit the claimant's evidence for loss of earnings by alleging that the non-renewal of her contract was based on factors other than her injuries (i.e. poor appraisal, egregious insubordination, and failure to indicate an interest in renewing the contract). Heavy weight was made of the fact that the claimant had neglected to attend physiotherapy to lessen the resulting effects of her injuries and her eventual withdrawal therefrom. This was noted including the claimant's evidence that her inconsistent attendance at physiotherapy was because the defendant's employees had denied her the opportunity to attend.

19. Counsel for the claimant asked that the arguments of the defendant be rejected. She advanced that the claimant, who was employed with the defendant in 2012, already had one successful renewal of her contract. Counsel argued that whatever difficulties that the claimant had with the performance of her duties arose from her injuries and how the defendant and its

employees or agents subsequently treated her. Counsel pointed out that instead of facilitating the claimant and assisting her, she was deemed problematic because of the concessions that she needed in order to work. The court was of the view that the defendant had made concessions and was facilitative and found the claimant was massaging the evidence to suit the case she wanted to present. It was clear that this claimant was in pain and stressed by it but also that she was demanding and unreasonable in her stance on the job. Further, the claimant's evidence was that she had sent out job applications to various regional health authorities but got no response. She managed to secure a private nursing job, which required her to turn an elderly patient in bed and this aggravated her back pain. The evidence was limited in terms of salary and length of time during which she held the job as well as details of places to which she had applied.

20. In the view of the court, a claimant ought not to be penalized for the wrong done to her by the defendant. If a claimant could not work because of severe debilitating pain, this must be pleaded and proved. This claim was not pleaded and no award would be given in the circumstances.

Transportation

21. The claimant sought transportation cost and provided receipts to support her claim of \$4,650. The driver was not called to get the evidence in and she filed no hearsay notice to which they were attached. The defendant was denied the opportunity to challenge this evidence. Further, the claimant has failed to provide the foundation in her pleadings for this claim and counsel for the defendant decried the absence in her pleadings of detailed evidence of the driver's name, routes travelled and reasons for requiring transportation on the specific days on the receipts. Counsel for the defendant also advanced that the failure to file the hearsay notice deprived the defendant of the opportunity to file a counter notice to compel the driver's attendance at the assessment. She thus asked that the receipts be treated as inadmissible as they were meant

to establish the truth of what is contained in them: *Subramaniam v Public Prosecutor*²¹. In the view of the court, pleadings are required to be brief and the information identified by counsel for the defendant as requiring to be inserted in pleadings was better suited for evidence. It sufficed that the claimant pleaded that she had suffered this loss and the sum total of it.

22. The challenge with this claim related to the claimant's failed attempt at complying with the rules of evidence, in her bid to secure compensation for a legitimate expenditure. In her evidence, she averred to living alone and having suffered a wrong at the negligent hands of the defendant. Her evidence that she had to seek medical attention and physiotherapy (as confirmed by Dr Ramroop's reports) meant that she would have incurred transportation expenses. This does not shield her from the responsibility to observe the rules of evidence and to file a hearsay notice if she intended not to call the maker of the document. The court also retained the discretion to permit the claimant to adduce the evidence despite the failure to serve the hearsay notice. In the present case, the court was not minded to allow the claimant to ignore the rules of evidence and still rely on the receipts to recover her full losses. She might not be able to recover the full sum expended but the court was minded and felt it reasonable to make an award for transportation, as she would have incurred this cost consequent on her injuries. The court would award transportation expenses to the claimant in the sum of \$1,500.

Domestic care

23. The claimant sought domestic care of \$198,000 for the period September 20, 2015 to March 28, 2018 on the basis that she no longer was able to perform basic tasks. She provided no medical evidence in support of the need for such services for the extensive period. Further, the claimant was cleared fit to return to work on January 12, 2016 and it was assumed that at that time any need for domestic services would have been reduced significantly or non-existent. She also failed to call her caretaker although she provided receipts. Counsel for the

²¹[1956] 1 WLR 965

defendant also submitted that the claimant continued to receive laundry allowance of \$240 per month and meal allowance of \$700 per month from 2015 to 2017 even while on leave. In the view of the court, any such sums must be discounted from a claim for domestic care to avoid double counting. This court was prepared to accept that in the initial stages of her injury, she would have required some domestic help and agrees with the defendant's counsel that an appropriate award would be for the period September 20, 2015 to January 31, 2016 (i.e. 20 months x \$1500) in the sum of \$30,000.

FUTURE LOSS/LOSS OF EARNING CAPACITY

24. The claimant pleaded loss of future earnings on the basis that due to her injury, she was unlikely to return to work as a registered nurse. The court noted that it was part of the pray for relief so the defendant was forewarned that it was a claim it had to answer. On the other hand, there was no claim for loss of earning capacity but counsel for the claimant submitted extensively on it and adopted wholesale the judge's analysis set out in ***Candice Bailey***. It was unfortunate that counsel sought to adopt this approach without appreciating that each case must be analysed in its own context and based on its own evidence. The court was at a loss as to whether the submissions in ***Candice Bailey*** were to be viewed as the submissions for the present claimant or how counsel expected this court to use the over lengthy and cumbersome quotations lifted from ***Candice Bailey***. In the view of the court, there was a clear distinction to be made between the two cases based on the evidence provided – the evidence in ***Candice Bailey*** was that claimant's evidence, not the evidence of the present claimant. The judicial time wasting could have been avoided by a simple appreciation of the evidentiary differences in the two cases. The court would now address these heads of damages below in the context of the law on which they must be planked, the pleadings and the facts of the present case as well as on the evidence provided.

25. Where the injuries of a claimant have caused her to be unemployable, she would be entitled to claim loss of future earnings specifically.²² Generally, the claim for future loss of earnings must be buttressed by strong medical and/or scientific evidence of exclusion from future employment. To obtain such an award, a claimant must demonstrate that, “*there is a continuing loss of earnings attributable to the accident.*”²³ The claimant must prove that she was incapacitated, totally from earning, or that her actual earning power has been eroded completely because of the injury, to justify an award for total loss of future earnings.
26. Typically, a claim for loss of earning capacity might arise where a claimant faces a substantial or real risk of losing her employment at some future time and, because of her injury, might be at a disadvantage in getting another job or an equally well-paid job.²⁴ There is no general requirement that a claimant who seeks an award for loss of earning capacity must be employed at the time of hearing, albeit generally that might be the case. A claimant who is unemployed at the time of the hearing might also make a claim for loss of earning capacity once there existed a risk of suffering a disadvantage in securing employment. To obtain an award for loss of earning capacity, therefore, what was required would be evidence of disadvantage on the employment market. The circumstances where it would be appropriate to make such an award were clarified in ***Ramnarine Singh v Ganesh Roopnarine, The Great Northern Insurance Company Limited v Johnson Ansola***²⁵ where Mendonca JA stated:

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

²²McGregor on Damages 18th edition para 35-061

²³*Munroe Thomas v Malachi Ford; RBTT Bank Limited (formerly Royal Bank of Trinidad and Tobago Limited)* Civil Appeal No 25 of 2007

²⁴*Moeliker v A Reyrolle and Co Ltd* [1977] 1AER 9

²⁵Civ Appeal No 169 of 2008

*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] sic 1 ALL 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 (emphasis mine).*

27. Counsel for the claimant submitted that she was entitled to recover loss of earning capacity of \$581,075. This was based on a basic salary of \$9,684.64 per month using a multiplier of 5 (i.e. \$116,215). She argued that the non-renewal of the claimant's contract on factors other than her injuries must be rejected, as the difficulties in the performance of her duties were due to her work related injuries. She made no reference to the claimant's own medical evidence, treating it almost as non-existent and as if the medical evidence in ***Candice Bailey*** was indistinguishable from the present matter.

28. The medical evidence of the present claimant confirmed that she would be able to return to work or be employable. According to Dr Ramroop "*with appropriate treatment ... she will be able to return to duties on a phased basis.*" Moreover, Dr Ramroop was clear during cross-examination that the claimant was neither handicapped on the labour *market* nor incapable of working ever again. An examination of the claimant's evidence showed a glaring absence of anything that supported a case that she was unable to earn in the same manner that she did prior to the fall. There was also no evidence that pointed to mitigation of loss in any serious way and the limited evidence of having obtained a private nursing job was presented vaguely and

insufficiently. In fact, when cross-examined as to whether she had tried to perform other jobs besides nursing, the claimant stated, *“No that is my passion, my career, I studied for years.”* Based on her evidence, after her contract with the defendant ended, she waited for two years before seeking employment. She stated that it was in 2019 that she sent out applications for employment and actually took jobs in private nursing in that same year, 2019, and in 2020.

29. A claimant who was rendered unemployable or could no longer work after having sustained an injury must bring the medical evidence to support that case. A claimant might have a passion for a pre-injury job, might have studied for years to obtain a career but these realities would not absolve her from seeking to mitigate her losses or from bringing the evidence that she could not work in any other field. The claimant has not shown how her injuries rendered her incapable of performing her duties as a registered nurse or any other form of work whatsoever. She has not shown to the satisfaction of this court that she had mitigated her loss. The medical evidence as to the nature of the injury and the residual effect that the injury had on the claimant’s ability to work proved the contrary.
30. The court considered the present claimant’s case, including the medical evidence that coccyx surgery was recommended. Further, the medical evidence showed that with treatment, she would return to work. Dr Ramroop’s prognosis was that with the appropriate treatment such as pain management using trigger point or facet joint injections or surgery to remove the coccyx, she would be able to return to her nursing duties but on a phased basis over the next twelve to eighteen months. He stated that the cost of such pain management treatment was \$50,000 over the next six to eight months and surgery to the coccyx was approximately \$45,000. He also stated that while the claimant could not bend, lift heavy objects at this time nor sit or stand for long hours, she could be considered for light duties with restrictions and assisted devices. These included braces, appropriate backrests on chairs, reduction of cases that involve lifting and bending such as sedentary activities and occupational tasks in the early phase of her return to work after the treatment and rehabilitation program.

31. Based on the medical evidence, there was no clear incapacitation or inability to work and a rather short timeframe for recovery and return to work, initially on a phased basis, was given. Further, the fact that a claimant was not given a renewed contract was not a sufficient basis to ground an award for future loss of earnings. On the medical evidence, the claimant could return to work after a stint of pain management and a surgical procedure. In the recent Court of Appeal case of *Giselle Khal v Seelal Harrilal and Guardian General Insurance Limited*²⁶ future loss of earnings was not granted but an award was made for continuing physiotherapy. This court would follow that approach and award medical care as outlined by Dr Ramroop in the sum of \$95,000. No award would be made for future loss of earnings, as this claimant likely would be able to work after medical treatment.

DISPOSITION

32. It is ordered that the defendant do pay to the claimant the following:
- i. General damages in the sum of \$120,000.00 with interest at the rate of 2.5% per annum from May 10, 2018 to March 18, 2022;
 - ii. Special damages in the sum of \$31,500 with interest at the rate of 1.25% per annum from September 05, 2015 to March 18, 2022;
 - iii. Future medical expenses in the sum of \$95,000;
33. It is also ordered that costs are assessed in the sum of \$47,565.58 and that there be a stay of execution of this order of 28 days.

Martha Alexander
Master of the High Court

MARTHA ALEXANDER
MASTER OF THE SUPREME COURT OF
TRINIDAD AND TOBAGO

²⁶Civ App 287 of 2016 delivered February 08, 2022