THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA NO. P 271 OF 2020

Claim No. CV 2015-02479

BETWEEN

BHAGWANTEE SINGH-WEEKES

And

BHAGWANTEE SINGH-WEEKES

(As Legal Representative of the Estate of Navin Singh)

Appellant/Claimant

AND

SOUTH-WEST REGIONAL HEALTH AUTHORITY

Respondent/Defendant

PANEL:

N. Bereaux JA

M. Mohammed JA

P. Rajkumar JA

DATE OF DELIVERY: 28 July 2023

APPEARANCES:

Mr. A. Ramlogan S.C, Mr. J. Jagroo, instructed by Mr. C. Dindial for the Appellant

Mr. V. Deonarine instructed by Mr. J. Maxime for the Respondent

I have read the judgment of P.A Rajkumar JA. I agree with it and I have nothing to add.

…….

Nolan Bereaux

Justice of Appeal

I have read the judgment of P.A Rajkumar JA. I agree with it and I also have nothing to add.

……

Mark Mohammed

Justice of Appeal

JUDGMENT

Delivered by P.A Rajkumar

Background

1. The instant appeal and cross appeal arise out of an assessment of damages in relation to the failure to diagnose Necrotizing Fasciitis (NF) in time resulting in the death of Navin Singh (the deceased) on October 30th 2014. The instant appeal is primarily against the quantum awarded by the trial judge, and is specifically in relation to the award made by her to compensate his estate for the earnings that he would have made had it not been for his untimely death. The appellant challenged other matters as set out hereinafter.

2. A summary of the circumstances thereof is adopted and reproduced from paragraph 1 of the Judge's decision on quantum as follows:

> *"The court found that the agents of the defendant/respondent were negligent in failing to consider a differential diagnosis of Necrotizing Fasciitis (NF) and/or some other infectious disease when Navin Singh was misdiagnosed with sciatica on the 25th of October and 27th of October 2014. The misdiagnosis caused a delay in treatment. Had the deceased been diagnosed with NF on the 27th of October 2014, been referred to a primary care facility and started treatment, is it (sic) likely that he would have been alive today.* (It is clear that is a typographical error and that sentence should be, it is likely that he would have been alive today).

3. The following abbreviated chronology provides further context for that award:-

   i. On October 25, 2014 the deceased complained of pain to his right leg. He had a fever and had vomited once at home. He was taken to the Princes Town District Health Facility (PTDHF) where he was diagnosed with sciatica.[1]

   ii. On October 27, the deceased's condition had become worse. He was taken back to the PTDHF which he entered in a wheel chair. At that time he was febrile and had severe pain to his right leg in the area of his knee. His right lower limb was swollen and there were changes to the colour of his skin. Again he was misdiagnosed with ? sciatica right side[2].

[1] See paragraph 9-12 judgment on quantum at page 10-11 record of appeal.
[2] See paragraph 10 judgment on liability

iii. On October 29, 2014 the deceased was rushed to the San Fernando General Hospital (SFGH). He had a roasting fever and his eyes were yellow. He was vomiting continuously and was in extreme pain. His right knee was even more swollen and darkened with three black spots. On that date he was diagnosed with NF. Despite treatment and surgical intervention at SFGH, he died on the following day, October 30th 2014.

There is no appeal from the finding that the respondent was liable for medical negligence as a result of misdiagnosis.

Orders Below

4. The trial judge made the following awards:

   i. Damages for pain and suffering - $35,000.00 (this was for pain and suffering prior to his death, October 27 - October 29, 2014);

   ii. Damages for loss of expectation of life - $25,000.00, (a conventional sum in this jurisdiction);

   iii. Special damages for funeral expenses, inclusive of interest - $54,265.72;

   iv. Damages for lost years inclusive of interest in the sum of $1,550,068.79;

   v. Costs were ordered to be paid as prescribed in the amount of $142,216.73.

The Appeal

5. As to i, ii and iii above there is no appeal.

6. The appellant appealed seeking i) reimbursement of the fees of her expert, and ii) the addition of the equivalent of Value Added Tax (VAT) to the award of prescribed costs. The respondent cross appealed on quantum, in particular a) the multiplier of 13, b) the multiplicand, and in particular, the alleged omission to take into account the 50% risk of amputation of the deceased's right leg, and the effect this would have had on the deceased's future earning capacity. This would have required an adjustment to either the multiplier or the multiplicand, c) the 5% reduction of the multiplicand utilized by the trial judge to take into account future contingencies, and the alleged omission to

take into account other material matters, and d) the rate of interest awarded on the pre-trial lost earnings which comprised special damages.

Issues

7. Issues in the appeal therefore included:

   i. whether the multiplier or multiplicand should have been reduced, or reduced by as much as 50%, to reflect a 50% possibility of the deceased's survival as a right leg amputee even if there had been no negligence on the part of the respondent, on the premise of his inability in that event to continue to earn income as a welder;

   ii. whether the trial judge was plainly wrong in applying a reduction of only 5% to the multiplicand to take into account future contingencies;

   iii. additional to this, this court raised the issue as to whether the multiplicand used by the trial judge was arithmetically accurate;

   iv. whether the correct rate of interest was utilized or applied in relation to earnings for the lost years accruing before judgment;

   v. whether the appellant was entitled to reimbursement in respect of fees of the expert Dr. David Mayer;

   vi. whether a sum equivalent to VAT should have been added to the prescribed costs awarded by the trial judge.

Conclusion

8. i) As to i, even assuming that at highest the evidence had in fact clearly demonstrated that, in the absence of negligence on the part of the SWRHA, there would have been a 50% chance of the deceased surviving with his right leg having been amputated (the assumption), that would provide no basis for the reduction of the multiplier or multiplicand. That is because the premise of the appellant that such an amputation automatically and inevitably translated into a complete inability to earn income as a welder (the premise), was not substantiated. Even if, after a timely and accurate diagnosis, his right leg had to be amputated in order to stop the spread of NF, there was no evidence to conclude that the deceased would have been unable to work at all, either as a welder, or in any other capacity, or even that his ability to earn income as a

welder would have been reduced to any extent. Neither is it at all so obvious that this can be assumed without evidence.

9. It has therefore not been demonstrated that the trial judge erred in concluding that the assertion of an impact on the deceased's ability to earn, far less such a drastic impact, was speculative and unsupported by any evidence. It is only if that premise of inability to earn as an amputee were substantiated that it would follow that the further assertion that either the multiplier, (number of years of potential earnings), or the multiplicand, (likely annual net earnings), should have been discounted to reflect that.

ii) As to issue ii, the further reduction of the multiplicand by 5%, (after an initial discount of one-third) to reflect future contingencies was adequately justified in the reasoned decision of the trial judge. It fell within the range of discretion available to a trial judge with which an appellate court would have no basis to interfere.

iii) As to issue iii, the trial judge's calculation inadvertently utilized an annual multiplicand based upon 48 weeks rather than 52 weeks. It was therefore arithmetically inaccurate. The correct multiplicand should therefore be $3831.75 x 52 weeks = $199,251.00.

iv) As to iv. the rate of interest applicable to pretrial lost earnings should be consistent with the rate used by the trial judge herself in relation to the other special damage claims, that is 1.25% per annum.

v) As to issue v, the appellant was entitled to reimbursement in respect of the expert expenses, established by the invoices disclosed, though not the letter relied upon on appeal with a further provision for expert attendance and preparation, altogether totaling $10,277.30 U.S.

vi) As to issue vi, there is no basis demonstrated for the addition of an amount equivalent to VAT on an award of prescribed costs and the trial judge correctly declined to make such an award.

Orders

10. The orders of the trial judge are affirmed subject to the following variations:

    i. The award in respect of the lost years is adjusted to $1,640,499.90 to reflect the increased multiplicand;

    ii. Interest on pre judgment lost earnings is adjusted to $7,450.25;

    iii. It is ordered that the appellant be reimbursed by the respondent for expenses incurred in relation to Dr. Mayer, in the amount of $10,277.30 U.S;

    iv. On the total claim of $1,762,215.87 costs are payable by the respondent to the appellant on the prescribed basis in respect of the costs before the High Court with no addition of VAT thereon;

    v. The parties will be heard on the costs of the appeal.

Analysis

The Award for Lost Years

11. The cross appeal by the respondent is in relation to the damages awarded under the Supreme Court of Judicature Act, Chapter 4:01 in respect of "the lost years". This is the period during which the deceased, had he lived, would have been earning income which would have accrued to his estate[3].

12. The components of the award for the "lost years" were:

    i) The **multiplicand**, representing the annual earnings of the deceased with appropriate adjustments.

    ii) the **multiplier**, representing the number of years during which the deceased would have been expected to continue earning income had he not died, subject to an appropriate discount to take into account the contingencies of life, and the fact that payment is accelerated for earnings that would otherwise have accrued in the future.

[3] The trial judge rejected a claim for dependency by the appellant (the mother of the deceased), to the extent of $5500 per month. In any event, it is likely that this dependency claim would have been exceeded by the monthly amount accruing to his estate, and possibly (though the claimant's age is not pleaded) for a longer period than that of any such dependency.

See **Alice Lee Poy John (Administratrix of the Estate of Curtis John) v Securiserve Limited and Anor CV 2008-01892** delivered July 2, 2010

> *21. In respect of pre-trial loss, I take into account the fact that 3 11/12 years have elapsed since the date of the Deceased's death. In doing so, I take into account the fact that:*
> *(1) The award is not susceptible to precise mathematical calculation but constitutes a Court's best effort at projecting from the evidence into the future and estimating as best as it can what the Deceased's prospects would have been. It is a process, however, that is necessarily uncertain. Those uncertainties for example include:*
> *(i) The possibility that the Deceased may have fallen ill or may have passed away, were it not for the accident, well before he came to the end of his working life.*
> *(ii) The possibility that the Deceased may have been unemployed. These are just a subset of possibilities that are encompassed in the uncertainties inherent in predicting the future.*

Multiplicand

13. The court considered that the multiplicand should be based upon the last pay slip of the deceased which reflected a net income of $3,831.75 per week. It also took into account that the pay slips of the deceased showed that he was eligible and did receive overtime payments, in some cases at the rate of double time. The court then took into account a one third deduction for **living expenses** which the deceased would have spent exclusively for his sole benefit. No issue was raised with respect to this one-third deduction. However its basis is discussed herein below for the sake of completeness. The court then made a further 5% reduction for **contingencies i**nclusive of holidays and sick days. The respondent challenged the 5% reduction as being insufficient.

Arithmetical Error

14. With respect to the multiplicand which was dealt with at paragraph 33 of the trial judge's judgment there is an arithmetical error which the parties appeared to accept in the course of the exchanges with this court.

15. The trial judge's analysis of the multiplicand was as follows: "with an accepted net income of $3,831.75 per week, this will equate to $15,327 per month". The error in that statement is apparent. A month is not in most cases simply 4 weeks. The error is

compounded by her calculation that the monthly income could be multiplied by 12 to produce the yearly income. That led to the trial judge multiplying the weekly wage by 48 rather than 52. The trial judge therefore erroneously assumed a four-week month and multiplied this by twelve producing a figure for a 48-week year. The correct calculation would have been to multiply the weekly wage of $3831.75/wk by 52 to arrive at his annual net earnings.

Living Expenses

16. The rest of the paragraph is as follows "taking into account the one third deduction for living expenses that Navin Singh would have spent exclusively for his sole benefit, the estate would have enjoyed ($15,327.00 subtract $5,109.00 of this amount) $10,218.00 per month. This will give a multiplicand of $122,616.00 per year ($10,218.00 X 12)".

17. As pointed out above that calculation simply needs to be revisited bearing in mind the fact that the multiplicand was understated. (The calculation therefore should be as follows: $3831.75 x **52** = $199,251.00 – annual income). It is this figure that would have been subject to the deduction utilized by the trial judge of 1/3 for living expenses. Therefore this net annual income multiplied by two thirds would be $132,834.00. In fact the 5% deduction, if supportable, (as to which see below), would have applied to annual net income of $132, 834.00. This produces a multiplicand of $126,192.30.

18. No issue was taken by any party as to the one third deduction for living expenses by the deceased. Therefore that is not a subject of the instant appeal because it appears now to be common ground that this was a reasonable deduction. In any event it could have been a reasonable proportion in this case had the correct approach been adopted for the reasons below.

19. It is necessary however to clarify a misconception in relation to the deduction for, and calculation of, **living expenses**. The one third deduction for living expenses in this case was adopted by the trial judge from the case of **Tiwari Tota-Maharaj v Auto Center Limited and others**, High Court Action Number 46 of 2003 at page 8. The trial judge

quoted therefrom as follows "that under the **Fatal Accidents Act**, the amount of living expenses is conventionally assessed at no more than one third of net earnings."

20. The claim in the UK under the Fatal Accidents Act was equivalent to the dependency claim locally under the Compensation for Injuries Act. However as indicated previously, the instant assessment is for damages due to the estate under the Supreme Court of Judicature Act Chapter 4:01 where different principles apply to the calculation of living expenses.

21. In fact the amount for living expenses to be deducted under the UK Law Reform (Miscellaneous Provisions) Act 1934, which provided the equivalent statutory basis for a claim by the estate in respect of the lost years, was the proportion of the victim's net earnings that he spent to maintain himself at the standard of life appropriate to his circumstances. Any sum expended to maintain or benefit others did not form part of the victim's living expenses and was not to be deducted from his net earnings. This was explained in **Harris v Empress Motors Limited** [1983] 3 All E.R. 561 as follows: "*the ingredients that go to make up living expenses are the same whether the victim be young or old, single or married, with or without dependents*". Living expenses in a claim under the UK Law Reform Act were, unlike under the UK Fatal Accidents Act, not a conventional sum but rather as a result of an analysis of the specific evidence and circumstances of the deceased[4].

22. For example in the case of **Alice Lee Poy John (Administratrix of the Estate of Curtis John) v Securiserve Limited and Anor CV 2008-01892** delivered July 2, 2010 (set out hereunder) **after consideration of the deceased's circumstances** it was concluded that the deceased earning approximately $172,000.00 per year would have had living expenses of at least one third of that sum. In this case the deceased had roughly equivalent net annual income of $199, 251.00 and a similar one third deduction for living expenses could have been justifiable if the necessary exercise had been conducted as set out at paragraph 14 of ***Alice Lee Poy***.

[4] Damages for the lost years were abolished in the UK by the passage of section 4 of the Administration of Justice Act 1982.

23. In fact in the case of **Presidential Insurance v Zimmer and Cardenas CA P115/2013** delivered May 2, 2017 discussed below, the trial judge had utilised and assumed a one third deduction for living expenses without conducting the necessary exercise in relation to the specific circumstances of the deceased in that case. This was treated as a reviewable error of law by the Court of Appeal.

24. However, given that the parties hereto have not appealed this deduction and have appeared to accept in this case that the deceased's living expenses were one-third of his net income it is not proposed to interfere with the trial judge's calculation of a one third deduction for living expenses. Nothing of course prevents the parties from agreeing between themselves the amount or the proportion to be deducted in any particular case as living expenses for the purpose of the calculation of damages for the estate under the Supreme Court of Judicature Act (SCJ Act).

25. In this regard, the trial judge misapplied the cases of ***Alice Lee Poy*** and ***Tiwari Tota Maharaj*** in assuming that **living expenses** for the purpose of calculation of the deduction therefor under the SCJ Act was simply a conventional, unwavering figure, rather than analysing the facts before her which would have gone into making up living expenses for the instant deceased. This was fully explained in ***Alice Lee Poy***, a case which the parties relied upon, as set out hereunder.

26. In the case of ***Alice Lee Poy John*** at paragraphs 6-8, 12-14.

> *6. This is a case under the Supreme Court of Judicature Act for damages for the estate of the Deceased. For reasons stated above this is the focus of this assessment and not the claim in respect of a dependency. A calculation must therefore be attempted of the earnings of the deceased for the years that he might have lived, and the earnings for which his estate has been deprived .The method of calculating the award for these "lost years" was considered by Lord Justice O'Connor in the case of Harris v. Empress Motors Ltd [1984] 1 W.L.R. 212 at p. 216H,*
> *"I come now to the main problem in these cases; how should the deduction which has to be made from the net loss of earnings for the lost years be calculated……"*
>
> *At the Head Note of this Judgment the approach to this problem was summarized as follows:-*

…In calculating the sum to be deducted for living expenses when assessing the net loss of earnings for the lost years, the ingredients constituting the deceased's living expenses were the same irrespective of the deceased's age, marital status or number of dependants; that the sum to be deducted as those living expenses was the proportion of net earnings the deceased would have spent to maintain himself at his standard of living and did not include savings or sums spent exclusively for the maintenance or benefit of others but where there were shared living expenses a pro rata proportion should be deducted; that, accordingly, the correct approach to the calculation of the deceased's living expenses was ***not*** *to make an assessment of those expenses as would be done for the purposes of calculating a* ***dependency*** *under the* ***Fatal Accidents Act 1976****, but to assess as a percentage the* ***available surplus*** *after deducting from the net earnings the cost of maintaining the deceased in his station of life;*

At p. 228, Lord Justice O'Connor stated:

"I return to the two decisions in the House of Lords. In my judgment three principles emerge: 1: The ingredients that go to make up "living expenses" are the same whether the victim be young or old, single or married, with or without dependants. 2. The sum to be deducted as living expenses is the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to his case. 3. Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings.

7. I am therefore guided by the position in the case of Harris v Empress Motors Limited. I note the reference at page 571(b) to the guidance of Lord Salmon in the House of Lords case of Pickett v British Rail Engineering Limited [1980] AC 136 @ 153- 154:
"Damages for the loss of earnings during the lost years should be assessed ***justly and with moderation****."*

Also at page 576(d) the case of White v London Transport Executive [1982] QB 489 at 499 is cited:
"Thus for example in this day and age the ordinary working man's life would not be regarded by him as reasonably satisfactory and potentially enjoyable if he cannot afford a short holiday, a modest amount of entertainment and social activity and, depending on his particular circumstances, a car."

Also at page 500 of the White v London case cited at page 576(h) to (j):

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

relatively a lot of money compared with that earned by most men in his circumstances, would be likely to have a large surplus."

8. I accept the reasoning in the Harris v Empress case that the surplus funds approach is to be adopted in preference to the savings only approach for the purpose of calculating the amount of the multiplicand to be used representing the earnings of the Deceased in the lost years.

Deductions

12. I was invited to make a deduction of two-thirds of the Deceased's earnings. I decline to do so. I note that in the White case the Judge deducted two-thirds of net income for the first five years until the Deceased would have left home. However, I note the reason for this at page 577(c) in Harris v Empress as follows:

"The reason for supporting this high rate of deduction in cases such as White, Gammell and Furness, is that the future is speculative and allowance has to be made for the fact that a man may never marry, may never save a farthing, may never support anybody; but when one is faced with the position in Pickett or in the present two cases, the position is entirely different. That which is speculative in Gammell to a very high degree is not speculative at all; that which is not to be deducted can be seen with reasonable clarity and, as one would expect, a very much smaller part of the net earnings will fall to be deducted."

At pages 577(d) to (e):

"We were asked by counsel for the defendants in the Cole case and by counsel for the defendants in the Harris case to give guidance, if we could, as to ***what proportion of the net earnings in the lost years should be deducted for the purpose of the Law Reform Act claim****. Regretfully,* ***I find it impossible to do this because so much depends on the amount of the joint expenditure and the number of persons among whom it is to be divided****; that* ***in general, according to the circumstances****, it seems to me that* ***the proportion will be greater than the percentage used for calculating the dependency under the Fatal Accidents Act****."*

13. I also note that ***under the Fatal Accidents Act, the amount of living expenses is conventionally assessed at no more than one-third of net earnings****.*

Living Expenses

14. Applying those principles to the instant case, I find as follows: From the deceased's net income must be deducted the Deceased's living expenses. I take into account the fact that the Deceased was married with 3 children.
(1) Each matter is fact specific.

(2) I find that on a balance of probabilities it is likely that the Deceased's net monthly earnings would be as I have set out above, that is approximately $14,300.00.
(3) I consider the following matters would be relevant to the deductions to be applied in respect of the instant Deceased: (i) I find it is likely on a balance of probability that the Deceased would have had the expenses of replacing a motor vehicle, maintaining such a vehicle, and providing it with fuel. (ii) I find it is also likely that the Deceased would have been required to pay the insurance on such a vehicle.
(4) I accept in accordance with Harris v Empress (ibid) that the sum to be deducted as living expenses is the proportion of the Deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation.
(5) I therefore propose to assess the monthly cost of the Deceased's enjoying a standard of living which would include: (i) A short holiday, (ii) A modest amount of entertainment and social activity, (iii) A car. (All emphasis added)

This extract references in a condensed form the relevant cases supportive of the principle that, unlike a dependency claim, living expenses under a claim for the lost years for the benefit of the Estate are to be assessed individually by a court and are fact and context dependent. In the instant case the deceased was unmarried and the complication introduced by expenditures for the joint benefit of anyone else, and the pro rating thereof would not arise.

27. This was also recognized in the decision of the Court of Appeal in ***Presidential Insurance v Zimmer and Cardenas*** per the Honourable Mendonça JA. In summary, Mendonça JA noted that:

    i) the available surplus approach was to be adopted in the assessment of the claim for the lost years[5]. This was based upon a deduction from the deceased's net earnings of the proportion that he would have expended to maintain himself at his standard of living, but not including any sums spent **exclusively** for the maintenance or benefit of others, (applying *Harris*);

    ii) he noted that the statement of O'Connor LJ in the *Harris* case of a conventional deduction of 33% of net income to represent what the deceased would have spent exclusively on himself was made in relation to the calculation of

[5] Paragraph 22, see also McGregor on Damages 19th Edition paragraph 38-109, page 1449, - - - the position in *Harris v Empress*

dependencies under the UK Fatal Accidents Act, which in this jurisdiction are made under the Compensation for Injuries Act, Chapter 8.05[6];

iii) the conventional percentage for living expenses mentioned in *Harris* might be a convenient starting point but what is an appropriate deduction in each case depends on the evidence;

iv) the Honourable Mendonça JA declined to infer an automatic one-third deduction for living expenses and instead proceeded to make inferences based upon the evidence as to what the appropriate deduction would have been for the deceased in that case. He concluded that for that deceased it would be two thirds of his net earnings;

v) he also declined to interfere with the multiplier of 12 utilized by the trial judge in that case in respect of the 34 year old deceased, presumed by the trial judge to have a retirement age of 55, and therefore a working life had he survived of 21 years.

Deduction for Contingencies – 5%

28. At paragraph 36 of her judgment the trial judge made a deduction of 5% to take into account the contingencies such as holidays and sick days. At paragraph 37, she therefore reduced the multiplicand (that she had found at paragraph 33) by 5% as follows: "therefore, the multiplicand is $116,485.20 ($122,616.00 – 5%). Using the multiplicand – multiplier formula, the estate would be entitled to $1,514,307.60 ($116,485.20x13)".

29. In fact the 5% deduction, if supportable, (as to which see below), would be applicable to two-thirds of net annual income of $199,251.00 which amounts to $132,834.00. A discount of 5% thereto would have produced a multiplicand of $126,192.30.

30. It is this multiplicand i.e. $126,192.30 that should have been multiplied by the multiplier. Using the trial judge's multiplier of 13, simply by correcting the arithmetic in

[6] see paragraphs 56 and 57 of judgment of Mendonça JA

her calculation, the estate would have been entitled to an award for the lost years of $1,640,499.90.

31. The instant appeal on quantum involves reviewing the elements which went into the calculation of the trial judge, i.e., i) the multiplicand itself ii) the 5% reduction for contingencies and iii) the multiplier. It does not require reviewing the one-third deduction, (incorrectly assumed by the parties and the trial judge to be a conventional sum), utilized for living expenses, which not having been appealed, must now be considered to be common ground between the parties.

Whether there should have been a 50% reduction in damages awarded for the "lost years"

32. The multiplicand was challenged on the basis that the trial judge should have reduced either the multiplier or the multiplicand (but not both), by 50% to take into account the fact that on her own findings there was a 50% likelihood that had the deceased not been misdiagnosed and had been treated for NF at an earlier stage, there would still have been a 50% chance of his survival as a right leg amputee. It was contended that in that scenario, he would have been unable to continue working as a welder, and his future earnings would have been zero (the premise). It was further contended therefore that compensation for his earnings over the lost years should have been halved to reflect that possibility.

33. While the possibility of a 50% amputation, even with early diagnosis is considered below, **the premise** that it would automatically translate into a 50% reduction in the appellant's lifetime earnings must first be considered. The trial judge concluded that it would not and that such a reduction was therefore speculative.

34. The trial judge did not reduce either the multiplier or the multiplicand on this basis. She found that the effect of amputation on the deceased's ability to find employment was purely speculative, as was the assumption that the deceased's disability would have shortened his work life span.

35. The trial judge did in fact consider that matter at paragraph 25 of her judgment on quantum as follows: "*As such taking account the vicissitudes of life, Navin Singh's ability to find employment would have been affected. However this is purely speculative. Navin's disability could have negatively affected his abilities as a welder, it alternatively may have empowered him to hire other welders and begin a business where he was less involved in the day to day activities*". The respondent took issue with the second part of that sentence, criticizing it as being highly speculative.

36. The judge's reasoning was not dependent on any finding or conclusion that the deceased could have become an employer of welders rather than being employed as one. Rather it was an explanation as to why the court was not prepared to accept the assumption of a decreased ability to earn income as a welder had the deceased survived.

37. The court was making the observation that if one were dealing with the question of possibilities, one was that his disability could have negatively affected his ability as a welder, but another was that it need not have done so. That was the context of the rejection of that premise as speculative. It therefore rejected the bare assertion that the deceased's possible disability as an amputee would have negatively affected his ability to earn as a welder because it was simply devoid of any factual or evidential basis.

38. Even if he lost his right leg there is no evidence that he would not have been able to use his hands. Further, in the 21st century prosthetics exist and persons are not confined to complete dependency by virtue of an amputation of the right leg.

39. Given that the deceased was a welder and an amputation, if it occurred at all would have been to his right leg, there was a dearth of evidence as to the effect of such an amputation on his ability to continue working, or earning income, as a welder.

40. If it were being contended that a welder, who prima facie did not need to work with his right leg, would be unable to earn a living because of its loss, such evidence needed to be placed before the trial court. In its absence it would have been purely speculative

to assume that his ability to find employment would have been affected, far less to the extent of complete inability to earn.

41. On the face of it, even as an amputee, there was no reason why the deceased would have been unable to earn income as a welder. It was the respondent who was contending, without evidence, that the earning capacity of the deceased, had he lived, would have been negated by amputation of his right leg. It was therefore for the respondent to lead the evidence in that regard. No such evidence having been led, the premise was entirely speculative.

42. For example, the issue of whether or not a prosthetic may provide support or assistance with mobility, or whether a workshop could be fitted to facilitate such a person working as a welder, was simply never explored. It is in fact purely speculative to assume that his earning capacity would have been completely impaired given the nature of his job. He was a welder, not a footballer. There can be no presumption therefore that his earning capacity would have been completely destroyed by virtue of a right leg amputation.

43. Examples of right leg amputees being able to conduct activities were raised with counsel at the hearing. Coincidentally, on the day of hearing an astronaut, who was also an above knee amputee of the right leg, and who additionally was a medical doctor, was the subject of a BBC report when he travelled into space. There can be no presumption therefore of an automatic inability to earn on the part of an above knee right leg amputee. Examples to the contrary exist and judicial notice can be taken of this notorious fact.

44. Rather than any automatic presumption of inability to earn after such an amputation, each case must be dependent upon the occupation of the amputee and any other relevant circumstances established at trial by evidence. The trial judge could not be said to be plainly wrong i) in rejecting that presumption (given that there was no evidence either to support its assertion by the appellant upon whom the onus lay), or ii) in appreciating the lack of evidence as to how it would have affected his potential earning capacity had he lived. In those circumstances the trial judge's analysis with

respect to not substantially reducing the multiplier or the multiplicand to the extent that the respondent proposed to take this into account, was justifiable and not plainly wrong. Counsel was not able to support the contrary assertion.

Whether the medical evidence established the probability of amputation even in the absence of negligence

45. The appellant contended that amputation could have been prevented with an early diagnosis of NF because such diagnosis could have allowed treatment involving surgical debridement and broad spectrum antibiotics. The SWRHA contended that survival with the 50 % possibility of a right leg amputation even in the absence of its negligence, was a finding of fact by the trial judge and a matter which had not been challenged in the court below.

Respondent's Arguments re Percentage Possibility of Amputation

46. Because it is not accepted that even with a risk of survival of as much as 50% as a right leg amputee the deceased earnings would have been significantly diminished, the arguments on this issue need not be addressed save for the sake of completeness. In summary the respondent suggested that the 50% chance of amputation need not apply because, inter alia:

    i. An early diagnosis would have meant that the chances of amputation being an appropriate treatment would have been far lower than 50%;
    ii. Amputation was only required in a minority of cases;
    iii. The chance of amputation was significantly increased by diabetes. In this case it was not compounded because the deceased did not have diabetes; and
    iv. Corroborative of the fact that amputation was not appropriate in the case of the deceased was the fact that it was apparently not even considered on 29th of October 2014.

This is completely irrelevant because even if at highest the appellant's proposition were to be accepted (that there was as much as a 50% chance of amputation even in the absence of negligence), there was no basis for the further premise or presumption that that would have reduced, or eliminated, his lifetime ability to earn as a welder such that it was required to be factored into the calculation of forgone potential lifetime earnings.

47. The various submissions on the expert evidence in relation to the assertion that there was a 50% chance of amputation even in the absence of negligence, involved a degree of speculation. That medical evidence was technical and required treatment and analysis via the experts, rather than selectively extracting and relying upon cherry picked items within that evidence.

Multiplier

48. In the instant case the deceased was 30 years old at the time of his death and was a welder. The trial judge utilized a multiplier of 13 taking into account the number of years remaining of his working life had it not been foreshortened. The multiplier is usually discounted to account for the fact that an accelerated lump sum is being awarded, rather than accruing in the normal course of a deceased's working life as well as to account for the vicissitudes and uncertainties of life. This exercise involves a degree of prognostication and even speculation. A claim for the lost years has been abolished in the UK. Even prior to its abolition, there were concerns raised about the possibility of over compensation by awarding compensation for earnings which might have never occurred. This may have been one of the reasons for Lord Salmon's injunction that damages for the lost years should be assessed justly and with moderation, ***Pickett***. Damages for the lost years remains the law in this jurisdiction.

49. The appellant contends that the selection of the multiplier of 13 was consistent with the respondent's own suggested multiplier of 14 prior to its suggested discount thereof of 50% discussed above. Further, it was consistent with the trial court's review of the authorities which were capable of justifying a post-trial multiplier of as much as 16, but in any event it could not be demonstrated that the trial judge's discretion n selecting that multiplier was plainly wrong.

50. In fact, the court gave careful consideration to the appropriate multiplier. In particular it considered the cases at paragraph 21 of its judgment with the following multipliers set out in a table:

i. **Ivan Ramjit v Richard Canhigh HC 2475/1984** -the case of a 25-year-old deceased teacher at a retirement age of 60 where a multiplier of 14 was used;

ii. **Heru v Singh 2005-000129** - the case of a 25 year deceased with a retirement age of 65 where a multiplier of 15 was used;

iii. **Sumintra Mohammed (Administrator of the Estate of Harold Mohammed) v Hakim Mohammed and Ors HC S542/1986** - the case of a 30-year-old deceased truck driver where a multiplier of 14 was used;

iv. **Maureen Samuel (LPR of the Estate of Stephen Duncan) v Susan Salraj HCA No. 2656 of 1998** - where in respect of a 32 year old deceased a multiplier of 12 was used; and

v. **Peter Seepersad v Theophilus Persad and Capital Insurance Limited Privy Council Appeal No. 86 of 2002** - where an **injured** taxi driver, (not deceased), was 35 years old at the time of injury and a post-trial multiplier of 16 was used. The latter case was not the case of a deceased but a case of personal injury.

51. With respect to the multiplier, the trial judge considered the relevant authorities set out at paragraph 20 of her judgment.

> *In consideration of the appropriate multiplier the court was guided by Rajkumar J (as he then was) in Alice Lee Poy John v. Securiserve Limited and another CV2008-01892 at paragraphs 19 and 21:*
> *"I note the case of Young v Percival [1974] 3 All ER 677 at 681 referred to in Harris v Empress at page 565(c) where the Court assessed the right multiplier to be 14 in respect of the Deceased aged 29 and considered a multiplier of 16 was too high. I note also the case of Mallett v McMonagle [1970] AC 166 at 177 per Lord Diplock at page 565(b):*
>
> *'In cases such as the present where the deceased was aged 25 and the appellant his widow about the same age Courts have not infrequently awarded 16 years ...of dependency. It is seldom that this number of years purchase is exceeded.'*
>
> *The award is not susceptible to precise mathematical calculation but constitutes a Court's best effort at projecting from the evidence into the future and estimating as best as it can what the Deceased's prospects would have been. It is a process, however, that is necessarily uncertain."*

52. The dictum in **Mallet v Mc Monagle [1970] A.C. 166** at 177 per Lord Diplock (that it was seldom that this number of years purchase (16) is exceeded), that statement was made in relation to a dependency claim which this is not. However the cases cited by

the trial judge at paragraph 21 are consistent with a conservative multiplier of 13. Her explanation for utilizing such a multiplier, after carefully considering the factors that went into determining the appropriate multiplier in the circumstances, was a matter of judicial discretion. Each case depends on its own circumstances. Therefore there is no basis for challenging the Judge's process of reasoning and careful analysis of the authorities in this jurisdiction, and in particular her conclusion at paragraph 27 that, *"**in the circumstances** the court is of the view that the multiplier should be reduced for the vagaries of the deceased's trade as well as the economic uncertainty. A conservative multiplier the court decided is 13".*

53. The multiplier selected by the trial judge is justifiable for the following reasons.

i. It is consistent with the range of multipliers utilized by other courts for persons of similar age and working life as the deceased;

ii. The multiplicand deducted only 5% for contingencies despite the deceased being in an occupation of moderately high risk;

iii. There was a chance as high as 50% that the deceased would have survived as an amputee. Although there was no evidence that he would have been unable to work as a welder or that his earnings as a welder would have been reduced, the multiplier chosen was justifiably conservative as it reflected the possibility that his earnings may not have been unaffected;

iv. The earnings utilized by the Trial Judge were his average net earnings over a period of a year. Those earnings included overtime for some periods. The likelihood of him continuing to earn equivalent overtime if he were to have survived as an amputee, is a matter that could potentially affect the multiplier, although not to the extent of reducing it by 50%.

The Trial Judge was aware of all of these matters as she referred to them in her judgment. It was a matter of balancing these factors and exercising a judicial discretion to arrive at a fair multiplier. There is no reason to consider that the Trial Judge omitted any relevant factor or erred in any way sufficient to allow her **discretion** to select the appropriate multiplier in the circumstances of the instant deceased to be reversed.

54. Further the appellant did not appeal on the issue of the multiplier utilized by the Trial Judge, although it sought to raise the possibility of this court of its own motion increasing the multiplier to as much as 16 if it chose to do so. For the reasons set out above that invitation is declined.

Whether multiplier should otherwise be reduced

55. The respondent contended that the following factors when taken into account would result in a reduced multiplier and multiplicand. Those factors are:
    i. The downturn in the local economy as a result of the Covid pandemic;
    ii. The fact that Petrotrin was the deceased's employer's main client but was no longer in existence.

56. With respect to the first of these, to the extent that they could have had an effect on the deceased's lifetime earnings they were taken into account by the trial judge in deciding to utilize what she described as a conservative multiplier of 13.

57. With respect to the second factor, although Petrotrin is no longer in existence, there was no reason to doubt that any shortfall in income could be eventually compensated for by development of equivalent clientele. That is especially the case in a society like the instant one, where as a result of ongoing criminal activity there is constant demand for welding of metal bars and metal working for burglar proofing of premises, metal doors and metal gates for access to premises. In any event these were all factors taken into account by the trial judge[7]. There was therefore no justification for any assertion that the trial judge should have reduced the multiplier further or should have increased the 5% deduction she made for contingencies as a result of these factors.

58. Having followed the court's analysis, and its careful consideration of the relevant factors set out below that went into determination of the multiplier, it cannot be fairly contended the trial judge failed to take into account any relevant matter.

[7] Paragraph 26

i. Remaining number of the deceased's years of working life until retirement (paragraph 23 of the judgment);
ii. The retirement age that she assumed for the deceased, that is 65, was not unreasonable for a self-employed person in good health;
iii. The authorities considered at paragraphs 20 and 21;
iv. The observation by the Privy Council in the case of **Scott v The Attorney General (Bahamas) [2017] UKPC 15** at paragraph 23 that the award of general damages was to be adjusted taking into account the background of society and to reflect the local conditions and expectations;
v. The nature of the work that the deceased did and the possibility that he could have become self-employed given his trade;
vi. The economic climate, and in particular the closure of PETROTRIN, (the large State owned petro chemical company that was a major client of the deceased's employer), and the impact of the worldwide Corona virus pandemic.

59. The multiplier was within a range that was reasonable for someone of the age and circumstances such as the deceased. That being so, this court, even were it not minded to agree with the multiplier used by the trial judge, should not or could not interfere with the exercise of her discretion in this regard.

Damages for the lost years

60. Given that there was no appealed basis demonstrated for i) reducing the multiplicand, ii) revising the 5% deduction for contingencies, or iii) adjusting the multiplier, the calculation of the award for the lost years would be correct in principle, though subject to adjustment for the arithmetical error identified above. The correct calculation should have been as set out above producing the total of **$1,640,499.90**.

61. The trial judge's assessment of the damages for the lost years must be modified accordingly and the figure of **$1,640,499.90** substituted.

Interest

62. At paragraph 38 of the judgment of the trial judge, (in referring to pre-judgment loss of earnings which was quantified special damages), she concluded that, of that award interest is to be paid from 17th of July 2015 (date of filing) to 28th of August 2020 (date of judgment) on damages at the rate of 6% per annum. Therefore the sum of interest for 5 years and 42 days is $35,761.19. The correct date from when interest would normally run would be the date of the incident, and in this case date of death, October 30, 2014[8]. However, in the instant case, even in the absence of negligence, the deceased would hardly have been in a position to immediately resume work had he survived. If his right leg had been amputated, in the absence of specific evidence of recovery time and the likely time when he could have resumed work, i) **in the specific circumstances of this case** given that the deceased was unlikely to resume earning from October 31, 2014 and ii) when there was no challenge to the commencement date of the rate of interest, the period from which interest would accrue utilized by the trial judge, (nine and a half months after death), can remain unchanged.

63. Here the challenge with respect to the claim for interest relates only to its rate. The trial judge used a figure of 6% per annum for interest on pre-judgment loss of earnings. The respondent contends that the rate to be used should have been 1.25% per annum for that period. It pointed out that that same rate was used for the same period at paragraph 64 of the trial judge's judgment. The trial judge may have been led to use the figure of 6% based upon the respondent having mistakenly submitted that figure in relation to the claim for pre-trial loss for loss of earnings. However, the court therefore failed to appreciate that for consistency the rate of interest on special damages should be the same rate that she accepted with respect to the other special damage claims at paragraph 63 of her judgment[9]. Further, the current rate of interest on general damages was 2.5% based upon the most recent short term investment rate for which

[8] Jefford v Gee [1970] 1 All. E.R 1202 at 1208b

[9] Despite the wording of paragraph 38 (which is suggestive of interest being on the entire sum awarded for the lost years, when the interest is calculated it is in fact found to be only in respect of the 5 plus years for pretrial loss of earnings. This is shown by the calculation $116,485.20 x 5.115 years by 6% producing the sum of $35,748.31. The calculation should actually be $126,192.30 x 5.115 years x 1.25% producing the figure of $8068.42.

evidence was available[10]. On special damages the interest rate would normally be half of that because it is based upon an accruing sum as explained in *Jefford v Gee* (supra) at page 1208.

> (a) Loss of wages*. This occurred week by week. In principle, the interest should be calculated on each week's loss from that week to the date of trial. But that would mean too much detail. Alternatively, it would be possible to add up the loss every six months* **and** *allow interest on the total every six months until trial. That would seem fair, especially as the loss for the initial weeks might be for total incapacity,* **and** *afterwards only for partial incapacity when he could do light work. More rough* **and** *ready, the total loss could be taken from accident to trial:* **and** *interest allowed only on half of it, or for half the time, or at half the rate.*

Further, interest on special damages is normally calculated from date of the loss to the date of the trial. In the instant case, although apparently not considered by the trial judge or the parties for the reasons above the court will decline to adjust the period for which interest is claimed on pretrial loss of earnings.

64. The trial judge erred in applying a rate of interest of 6% on pre-trial loss of earnings. This is because a) she failed to appreciate that based upon the case of *Fitzroy Brown*, in the absence of specific evidence to the contrary, the rate of interest on general damages was 2.5% and, based upon *Jefford v Gee*, the rate of interest on pre-trial lost wages would have been half of that. In any event it was inconsistent with the rate that she used for special damages in relation to funeral expenses. It would be appropriate to set aside her calculation of interest on pretrial lost earnings and apply a rate of interest of 1.25% per annum for the appropriate period.

65. The interest therefore, if for the same period used by the trial judge, rather than being $35,761.19, would be 1.25 divided by 6 multiplied by $35,761.19. (In relation to the items of special damages for funeral expenses, the court calculated interest from the **date of filing of the claim** rather than the date of incurring those expenses. This is not correct in principle. However there is no appeal in relation to this.)

[10] See the Honourable Archie CJ in AG v Fitzroy Brown Civ App 251/2012 found at page 141 respondent's authorities line 32

Whether the appellant was entitled to reimbursement in respect of the cost of the expert

66. The appellant contends that it was entitled to reimbursement in respect of the fees for the expert Dr. David Mayer. The trial judge disallowed the claim for those fees on the basis that the letter in support purporting to evidence payment of $12,000 U.S had been disclosed more than 14 days after the time allowed for its filing.

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67. At paragraph 76 of the judgment the trial judge referred to Part 28.12 as follows: "However, Part 28.12 allowed the defendant an avenue to disclose any invoices and records of payments made to Dr. Mayer's (sic) for his services. Those records should have been disclosed when they became available to the claimant, or at the latest within 14 days of becoming available. Because the claimant did not make timely disclosure to the defendant about the costs of Dr. Mayer's services, the claimant is not able to recover those costs".

68. The trial judge therefore disallowed the cost of the expert Dr. Mayer on the basis that a sanction was applicable to the late disclosure of the final cost of obtaining the expert's evidence. Part 28.12 Civil Proceedings Rule is as follows:

> ***28.12*** *(1) The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded.*
> *(2) If documents to which that duty extends come to a party's notice at any time during the proceedings that party must immediately notify every other party and serve a supplemental list of those documents.*
> *(3) The supplemental list must be served not more than 14 days after the new documents have come to the notice of the party required to serve it.*

69. The failure to disclose it was explained by the fact that the document evidencing payment, a letter dated 25 March 2020 (the letter), had not been available at the time provided for initial standard disclosure (July 13, 2018). It was contended that the final figure for the expert's cost became available only after the expert had given evidence.

70. According to the appellant disclosure was made at the first available opportunity. The document evidencing this became available to her on March 25, 2020. Filing had been suspended because of Practice Directions issued by the Honourable Chief Justice in

light of the then COVID pandemic. Its filing was one day after the 14 day period so extended had elapsed. This was because of the difficulty in accessing the newly established electronic filing platform. In those circumstances it contends that it did disclose the invoice in a timely manner and in failing to consider these matters, though appreciating that Dr. Mayer's evidence was an expense that would have been legitimately incurred by the appellant[11], the trial judge erred in law and was plainly wrong. The letter acknowledging payment for his services was disclosed and was the subject of communication with the court shortly after the court's delivery of its judgment on quantum on the 20th of August 2020. The appellant argues that there is no sanction that applies if a document which became available is disclosed more than 14 days after becoming available. The appellant contends that while there was a sanction in relation to standard disclosure, there was no such sanction in relation to continuing disclosure.

71. The respondent contends that the expert's testimony only lasted 2 hours and therefore it could have been easily calculable. Further, it should not have taken that length of time for production of a receipt or letter evidencing payment. It further contended that it was open on the appellant's argument for any party to extend the time for disclosure by simply generating, or causing to be generated, a new document and then disclose it within 14 days under its duty of continuing disclosure. The respondent further contends that Part 28.13 CPR provides a sanction and there is no application for relief from sanctions. Further even if there had been, no basis was established for granting such relief.

72. As accepted by the trial judge Dr. Mayer's expert evidence was necessary for the resolution of this matter. It was a **disbursement** giving rise to a liability by the appellant to satisfy it. The issue is whether there is justification for it not being reimbursable by the respondent.

[11] Paragraph 75

Sanctions

73. Part 28.13 CPR provides for sanctions for default. Even if it applied, it did not on its face require the automatic sanction of disallowing the final expenses of the expert, which could only have been determined after trial when the time based charge figure for his attendance would be known. CPR 28.13 is set out hereunder.

> ***Consequence of failure to disclose documents under an order for disclosure***
> ***28.13*** *(1) A party who fails to give disclosure by the date specified in the order* ***may not rely*** *on or produce* ***any document not so disclosed at the trial****.*
> *(2) A party seeking to enforce an order for specific disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.*
> *(3) An application under this rule may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.*
> *(4) On such an application the court may order that unless the party in default complies with the order for specific disclosure by a specific date that the party's statement of case or some part of it be struck out.*
> *(Rule 26.7 deals with applications for relief; Rule 11.15 deals with applications to set aside order made on application without notice; Rules 26.4 and 26.5 deal with judgment after striking out)* (All emphasis added)

74. The appellant relies upon a letter dated March 25, 2020 from Dr. Mayer purporting to acknowledge payment of $12,000 U.S. The trial judge rejected the appellant's claim for reimbursement of that sum. She purported to do so on the basis that the appellant had not complied in a sufficiently timely manner with its duty of continuing disclosure.

75. However, that was not the only material in respect of the claim for expert expenses. The facts require closer examination. The supplemental list was filed on July 2, 2020. The letter purporting to evidence payment of $12,000 U.S was dated March 25 2020, and together with other invoices, was disclosed therein. This was after the judgment on liability on February 14, 2020, and well after the date of the expert's testimony on July 1, 2019.

76. Also relevant was the fact that lists of agreed and unagreed documents were to be originally filed by July 13 2018. A bundle of documents, invoices, and receipts inter alia from American Medical Experts dated **November 30, 2017** and **December 11, 2017** and

from Accurate Court Reporting dated July 2, 2019, (before the original date for standard disclosure), were only disclosed in the supplemental list filed on **July 2, 2020**, purportedly under the appellant's obligation to provide continuous disclosure. The appellant accepts[12] that these invoices were properly disallowed. In fact, the appellant stated "The appellant has no quarrel with those being disallowed". However, it seeks to recover instead in respect of the letter dated March 25 2020 purportedly evidencing payment of $12,000 US payment which unlike those invoices was dated after the date ordered for standard disclosure, (July 13, 2018).

77. That position assumes:

    i) Those invoices fell within the category of documents that were required to be disclosed;

    ii) That if so, the appropriate sanction was disallowing recovery based therein.

Disclosure

78. Standard disclosure is provided for by CPR 28.4. It provides as follows:

> ***Standard disclosure***
> ***28.4*** *Where a party is required by any direction of the court to give standard disclosure that party must disclose all documents which are* ***directly relevant*** *to the* ***matters in question in the proceedings****.* (All emphasis added)

79. What is required to be disclosed under CPR 28.4 is all documents which are **directly relevant to the matters in question in the proceedings.** The matters in question in the instant proceedings before the trial judge were based upon the issues joined on the proceedings. It is the pleadings, and the issues joined thereon which define the parameters of a party's case. The issues in the instant case related to liability of the respondent and the quantum of the appellant's claim. The cost of Dr. Mayer's services as an expert witness was not such an issue at trial, although it became an issue after the trial and after the judgment was delivered when the trial judge was required to determine costs and reimbursable expert expenses. It is therefore not at all clear whether standard disclosure applied to them.

[12] (at paragraph 72 of submissions)

80. This is corroborated by the sanctions which are specified for failing to disclose documents under an order for disclosure. Those sanctions include:

    i) a party failing to give disclosure may not rely on or produce any document not so **disclosed at the trial**. The determination of costs and reimbursement of expert fees fell to be considered **after** the trial;

    ii) in relation to an order for specific disclosure, (which is not the case here) a party seeking to enforce such an order may apply to the court for an order that the other party's statement of case or some part of it be struck out.

    The ultimate cost of Dr. Mayer's services was not an issue that was or could have been the subject of the statement of case, or a matter in question in the proceedings.

Directly Relevant

81. In fact **Part 28.1(4)** specifies what type of document is directly relevant for the purpose of Part 28.4.

> *(4) For the purposes of this Part a document is "directly relevant" if—*
> *(a) the party with control of the document intends to rely on it;*
> *(b) it tends to adversely affect that party's case; or*
> *(c) it tends to support another party's case,*
> *but the rule of law known as "the rule in Peruvian Guano" does not apply.*

82. A document is directly relevant within the meaning of Part 28.4 CPR inter alia, if the party with control of the document intends to rely on it. The documents in relation to the expenses of Dr. Mayer were not being relied upon during the proceedings, but only after judgment.

83. Failure to produce those documents could not therefore attract the sanction of disallowing reliance thereon or production thereof at the trial. That is because no one was seeking to rely on invoices for the cost of the expert **at the trial**. Rather they were being relied upon after the trial for recovery of those costs.

84. Under the rules existing pre CPR the issue of reimbursement of those costs, would have been a matter for assessment before a Registrar who would have examined the documents in support and made a determination thereon whether the claims for

reimbursement had been proven, considering inter alia their relevance, authenticity and reasonableness. It would have been necessary for them to have been placed before the trial judge given that under the CPR the function of determining prescribed costs was vested in the trial judge, who would need to be satisfied, as did the Registrar pre CPR, of their authenticity, relevance, and reasonableness. However that is a matter of practicality, not based upon the duty of disclosure of documents **directly relevant** to the matters in question in the proceedings.

85. However, it is debatable therefore whether the invoices from American Medical experts, as to the disallowance of which the appellant has no quarrel, were in fact properly disallowed. That is because although i)there is a sanction for breach of the duty of standard disclosure; and ii) there is no reason in principle why the sanction relating to breach of the rules and timeframes in relation to continuing disclosure should be any different from that provided in relation to standard disclosure, that sanction could not be applicable to the invoices and letter concerning payment to Dr. Mayer because a) they were being relied on post-trial and b) were not in relation to any matter/issue in question in the proceedings as defined by the pleadings.

86. Those invoices are in the amount of U.S $3,114.80 and U.S $4,800.00. At a rate of $600/hr US they apparently do not include time testifying at trial which the respondent contends was two hours. At the rate of U.S $600/hour that would be $1,200.00 U.S. Preparation time of another hour would be justifiable in the amount of $600 U.S.

87. In principle it cannot be disputed that the appellant is entitled to reimbursement of expert fees. The previous invoices should have been considered by the trial judge as to their relevance, authenticity and reasonableness rather than it being wrongly assumed by all parties including the appellant that they were subject to the duty of disclosure, and could not be relied upon after the date provided for standard disclosure having pre-dated it. There can be no dispute as to their relevance, and given their detail there is no reason to dispute their authenticity. Finally, there is no reason to dispute the reasonableness of the hourly rates contained therein.

88. However, the letter which purports to acknowledge receipt of $12,000 U.S is devoid of any information equivalent to that on the detailed invoices previously submitted which had been disallowed. It is only consistent with those invoices if there exists an additional invoice which was never disclosed to the trial judge or to this court. It contains insufficient detail to justify payment and, more likely than not, encompasses the above figures in the invoices which predated it. The letter evidencing receipt of $12,000 U.S is devoid of detail and inconsistent with prior invoices from American Medical Experts. Further there is no reason for its extremely late production given the chronology above. It therefore does not justify any further payment.

89. It would have been open to the court to assess the reasonableness of its quantum and to consider whether its reimbursement should be allowed on its merits rather than on the highly technical and disproportionate basis that its disclosure one day later required those costs to be disallowed entirely.

90. It would be all the more an unfair result for a court having relied so extensively upon the expert report of Dr. Mayer, to then disallow the cost of the assistance of a foreign based expert in a highly specialized area on the basis that disclosure was one day out of time.

91. In those circumstances, this court can award reimbursement of the wrongly disallowed invoices dated November 30, 2017 and December 11, 2017 as well as an additional amount for 3 hours at a rate of $600 per hour totalling $1,800 U.S. All together this amounts to $9,714.80. Additionally, the invoice dated July 2, 2019 which reflected a payment of an amount of $562.50 would also be reimbursable and would be added to the above figure.

Whether the equivalent of VAT should have been added to the prescribed costs awarded

92. Finally the appellant contends the court should have awarded the equivalent of VAT on the prescribed costs awarded. It is claimed that there was an entitlement to a provision for VAT based upon a) the construction of Rule 67.13, (set out hereunder)

and b) the guidance of the Honourable Chief Justice in relation to the assessment of costs in the Practice Guide to the Assessment of Costs (the Practice Guide) (an addendum to the consolidated Civil Proceedings Rules (CPR)).

93. CPR 67.13 does not appear to do so.

> ***67.13*** *A party who is not himself registered for value added tax may add the appropriate amount of value added tax to the amount of any prescribed, assessed or budgeted costs awarded to him.*

It relates specifically to a party and provides that such a party even though he or she is not VAT registered may nevertheless add the appropriate amount of VAT to the amount of any prescribed, assessed or budgeted costs awarded to him. It is unclear why such a party would do so. What is clear however is that: i) it provides what a **party** may do and ii) it provides that whether or not he adds the appropriate amount of value added tax or not, (a matter which appears to be within his own discretion), he is to do so in relation to the amount of any prescribed, assessed or budgeted costs **awarded** to him. It does not refer to any amount **awardable** to him. It therefore contemplates that in relation to prescribed costs or assessed costs or budgeted costs, they have already been awarded to him by the court. This is therefore not authority that requires a **court** to add an amount equivalent to VAT to either prescribed, assessed or budgeted costs **awarded**. That is because those costs have already been awarded. In those circumstances the Trial Judge could not be said to be wrong because it has not been demonstrated where the authority to award an additional sum equivalent to VAT on an award of prescribed costs can be derived.

94. Although the rule itself refers to a party rather than the court, the appellant contends that the Practice Guide suggests that VAT can be awarded in relation to costs if a party's attorney at law is VAT registered. The respondent contends that her attorney was VAT registered and so informed the court and therefore, in the circumstances, the costs that are awarded on the revised sums should also include a component for value added tax, given that this is a sum that would have to be paid over to the VAT authority.

95. Paragraphs 9 and 10 of the Practice Guide are set out below.

*9. The English Court of Appeal, in the case of **Home Office v Lownds [2002] EWCA Civ 365; [2002] 1WLR 2450; [2002] 4 All ER 775 CA.,** has given guidance on the correct approach to **proportionality** when **assessing** costs by introducing **a two stage approach**:*
*"There has to be a global approach and an **item by item approach. The global approach** will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) (equivalent to Part 67.2(3) of the Trinidad and Tobago CPR) states are relevant. If the costs as a whole are not disproportionate according to the test then all that is normally required is that each item should have been reasonably incurred and the costs for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary, and if necessary, the cost of the item was reasonable."*

*10. The relevant costs for consideration **at the first stage** are the base costs only before VAT is added (see **Giambrone v JMC Holidays [2003] 2 Costs LR 189**).* (All emphasis added)

96. The Practice Guide was relied upon as being supportive of the proposition that in relation to prescribed costs a further figure is to be added being the equivalent of the VAT calculable thereon. Paragraph 10 of the Practice Guide was cited to this effect by counsel for the appellant. It refers to the ***Giambrone*** case hereunder. Paragraph 10 however is a continuation of paragraph 9 set out above. In its proper context, it refers to the question of proportionality and the two stage test applicable to an assessment of costs.

97. The Practice Guide does not refer to Part 67.13. Further, it relates to assessing costs, not **prescribed** costs. The case of **Giambrone v JMC Holidays [2003] 2 Costs LR 189** does not assist. See for example paragraphs 33 and 43 of ***Giambrone.*** At paragraph 43 thereof, the relevance of VAT was considered in the context of determining the reasonableness of the **base figure**, and determining whether in that case for that purpose VAT should be excluded from the starting point figure. This case is therefore not authority in any form for **requiring** a sum equivalent to VAT, additional to that expressly provided by the CPR in relation to **prescribed costs,** to be awarded by a court.

Prescribed Costs

98. The basis for prescribed costs is set out in the CPR as follows:

(All emphasis added)

Prescribed costs

67.5 (1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2)–(4) of this rule.
(2) In determining such costs the "**value**" of the claim shall be decided—
(a) in the case of a claimant, by the amount agreed or ordered to be paid;
(b) in the case of a defendant—
(i) by the amount claimed by the claimant in his claim form; or
(ii) if the claim is for damages and the claim form does not specify an amount that is claimed, by such sum as may be agreed between the party entitled to, and the party liable for, such costs or if not agreed, a sum stipulated by the court as the value of the claim; or
(iii) if the claim is not for a monetary sum, as if it were a claim for $50,000.

(3) The **general rule** is that the **amount of costs** to be paid is to be calculated in **accordance with the percentage specified in column 2 of Appendix B** against the **appropriate value**.

(4) The court may, however—
(a) award a percentage only of such sum having taken into account the matters set out in rule 66.6(4),(5) and (6); or
(b) order a party to pay costs—
(i) from or to a certain date; or
(ii) relating only to a certain distinct part of the proceedings, in which case it must specify the percentage of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C.

67.7 Prescribed costs include all work that is required to prepare the proceedings for trial including, in particular, the costs involved in instructing any expert, in considering and disclosing any report made by him or arranging his attendance at trial and for attendance and advocacy at the trial including attendance at any case management conference or pre-trial review but exclude—
(a) the making or opposing of any application except at a case management conference or pre-trial review;
(b) expert's fees for preparing a report and attending any conference, hearing or trial; and
(c) costs incurred in enforcing any order (which are generally fixed in accordance with rule 67.4 but may, in certain cases, be assessed in accordance with rule 67.12).

APPENDIX B

SCALE OF PRESCRIBED COSTS

Value of Claim Percentage

not exceeding $30,000 ... ... 30%
exceeding $30,000 but not exceeding $50,000 ... ... 25%
exceeding $50,000 but not exceeding $100,000 ... ... 20%
exceeding $100,000 but not exceeding $250,000 ... ... 15%
exceeding $250,000 but not exceeding $500,000 ... ... 10%
exceeding $500,000 but not exceeding $1,000,000 ... ... 7.5%
exceeding $1,000,000 but not exceeding $2,000,000 ... ... 5%
exceeding $2,000,000 but not exceeding $5,000,000 ... ... 2.5%
exceeding $5,000,000 but not exceeding $10,000,000 ... ... 1%
exceeding $10,000,000 ... ... .5%
Note: The costs for each stage of the scale are cumulative.
Example: Claim for $670,000 to be calculated as follows:
First $ 30,000 x 30% $ 9,000
Next $ 20,000 x 25% $ 5,000

Next $ 50,000 x 20% $ 10,000
Next $ 150,000 x 15% $ 22,500
Next $ 250,000 x 10% $ 25,000
Next $ 170,000 x 7.5% $ 12,750
Total Claim $ 670,000 Total Costs $ 84,250.

99. It is clear therefrom that prescribed costs are awarded on the basis of the **value** of the claim. Nowhere is there any reference to or provision for awarding an additional sum on prescribed costs so calculated in accordance with the rule equivalent to VAT. It is understandable why this should be so. An unsuccessful litigant who may or may not be VAT registered would otherwise have to pay an additional sum equivalent to VAT in respect of prescribed costs awarded to a successful party if that party is represented by a VAT registered attorney. However, he would not be required to do so if fortuitously the successful party is not represented by a VAT registered attorney. This would be so regardless of the value of the claim. Such an outcome would be difficult to justify in principle.

100. It is entirely a matter between an attorney and his client as to what he charges and requires his client to pay to him. The CPR provides the basis for recovery of costs from a successful party against an unsuccessful party. It seeks to provide increased certainty with respect to the cost exposure of an unsuccessful party, see **Mary Gomez and Ors v Ashmeed Mohammed** (decision on costs) CA S153/2015 delivered October 2, 2017. It does **not** provide that a successful party will necessarily recover the entirety of the legal fees that he expends in litigation. The appellant however seeks to equate those two entirely different matters, that is i) the amount a party pays or is liable to pay to his own attorney at law and ii) the amount that the CPR provides is to be paid by the unsuccessful party to him.

101. Counsel contended that he was VAT registered and had submitted his VAT registration certificate to the Trial Judge before she entered and finalized her order on costs. It is necessary to consider the distinction between costs which are awardable to a successful client/party payable by an unsuccessful party under the CPR, and costs/fees which are payable by a client to his attorney. It is only in relation to the latter that the VAT registration status of the attorney would be relevant, only because it would determine his ability to charge VAT on fees to his client.

102. The case of **Sookran Singh v Commissioner of Police Civil Appeal 103 of 2013** cited by the appellant, does not support any proposition that in the circumstances of the instant case VAT is to be added to an award of prescribed costs.

Conclusion – Total Claim

103. Based upon the above analysis the total of the appellant's claim is now as follows:

i. $35,000.00 for damages for pain and suffering;
ii. $25,000.00 for loss of expectation of life;
iii. $54,265.72 for funeral expenses inclusive of interest, (not the subject of appeal);
iv. $1,640,499.90 for damages for the lost years, (arithmetically adjusted);
v. $7,450.25 interest on pre judgment loss of earnings, (at interest rate of 1.25%).

The total of these claims is $1,762,215.87, (the total claim).

Orders

104. The orders of the trial judge are affirmed subject to the following variations:

i. The award in respect of the lost years is adjusted to $1,640,499.90 to reflect the increased multiplicand;
ii. Interest on pre judgment lost earnings is adjusted to $7,450.25;
iii. It is ordered that the appellant be reimbursed by the respondent for expenses incurred in relation to Dr. Mayer, in the amount of $10,277.30 U.S;
iv. On the total claim of $1,762,215.87 costs are payable by the respondent to the appellant on the prescribed basis in respect of the costs before the High Court with no addition of VAT thereon;
v. The parties will be heard on the costs of the appeal.

…….

Peter A. Rajkumar

Justice of Appeal