

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO HCA S-1306 of 1998

BETWEEN

RAMSARAN BALKARAN

Plaintiff

AND

AI CONSTRUCTION LIMITED

Defendant

Before: Master Alexander

Appearances:

For the Plaintiff: Camille Mohan

No Appearance for the Defendant

DECISION

1. On 18th January, 1995 the plaintiff was engaged in the construction of a building in Westmoorings when the scaffold upon which he was standing collapsed, causing him to fall to the ground and to sustain injuries. At the time, the plaintiff was employed as a mason/carpenter with the defendant. On 22nd December, 1998 the plaintiff filed a writ of summons and subsequently a statement of claim on 10th November, 1999 seeking compensation for his injuries. This matter is of some vintage and came before this court pursuant to a judgment in default of appearance entered against the defendant on 14th August, 2000.

THE INJURIES

2. The plaintiff's injuries were detailed in the medical report dated 13th November, 1997 of Dr Ramashawardath B Mahabir, Ophthalmologist/Eye Specialist/Surgeon (Consultant with the General Hospital, Port of Spain) as follows:

- fracture of the floor of the right eye;
- haemorrhage behind the right eye;
- damage to optic nerve in the right eye;
- irreversible blindness of right eye.

Dr Mahabir assessed his **ocular** permanent disability at 30%.

THE EVIDENCE

3. At the assessment, the plaintiff relied on the following pieces of documentary evidence:

- (i) Witness statement of the plaintiff, Ramsaran Balkaran, filed on 29th December, 2011.
- (ii) Witness statement of Dr Ramashawardath B Mahabir filed on 29th December, 2011 with annexed medical report dated 13th November, 1997.

GENERAL DAMAGES

4. General damages are losses to the plaintiff that cannot be precisely quantified and are presumed by law to flow from the wrong committed by the defendant, as the direct, natural and probable consequences of it. See *Mario's Pizzeria Ltd v Hardeo Ramjit*.¹ To assess general damages, the principles set out in *Cornilliac v St Louis*² are applied:

- i. The nature and extent of the injuries sustained;
- ii. The nature and gravity of the resulting physical disability;
- iii. The pain and suffering which had to be endured;
- iv. The loss of amenities suffered; and
- v. The extent to which the plaintiff's pecuniary prospects have been materially affected.

¹ *Mario's Pizzeria Ltd v Hardeo Ramjit* CA 146 of 2003

² *Cornilliac v St Louis* (1965) 7 WIR 491

(a) Nature and extent of the injuries sustained

5. The plaintiff's injuries were all eye-related. The nature and extent of his injuries were reported by Dr Mahabir to be a fracture to the floor of the right eye; damage to the optic nerve and irreversible blindness.

(b) The nature and gravity of the resulting physical disability

6. The gravity of the injuries and resulting physical disability are evident in the fact that the plaintiff is now blind in his right eye. In his medical report, however, his left eye is stated to have normal vision. In his witness statement he sought to give evidence of being diabetic and hypertensive as well as of being advised by Dr Mahabir that he suffers from 'glaucoma' in his left eye for which he requires tests. It is to be noted that the medical report upon which he relies in this matter does not support these claims and there is no updated medical. Further, there is no sufficient, or any, causal link established between these current ailments of the plaintiff and the injuries sustained in this matter. Given the lack of supporting evidence before me, I am constrained to disregard this aspect of his evidence.

(c) Pain and suffering endured

7. The plaintiff claims that on the day of the incident, when the scaffold collapsed under him and he fell to the ground, he hit his head and his right eye came out of its socket. He states that when this happened, "I was slipping in and out of consciousness and was in excruciating pain." He claims also that at the time of the accident, he could not see anything from that eye and to date he still is unable to see from his right eye. There is no other evidence as to his pain and suffering at the time of the accident and thereafter save that he states in his witness statement that at present, "I get sharp pains in **my left eye** occasionally, causing the entire eyeball to hurt." It is to be noted that he claims that he was hospitalized for approximately 2 weeks after the accident but his medical report is silent thereto. I accept, however, that he would have had some pain and suffering, given the nature of the injuries.

(d) Loss of amenities suffered

8. With respect to his loss of amenities, there is little evidence. He claims only that following the accident, he was unable to work and his 2 daughters were forced to stop going to school

because he could no longer afford their schooling and that the entire situation has left his family and him in a state of depression.

(e) Extent to which pecuniary prospects have been materially affected

9. The plaintiff was the sole breadwinner in his family. He states that when the accident occurred he was unable to work and the defendant only paid him compensation for 2 weeks. He provides no details as to the exact sums paid to him in this respect. He states that he does not work and is not trained or qualified in any other field or trade. He states also that he does not have, “a very high educational background”. He does not state what his level of education is or how he has managed to support his family and himself since 1995 save to say that both he and his wife do not work. There is a pattern of failure by the plaintiff to provide the requisite evidence to assist this assessing court to fairly assess his damages and losses in this matter.

AUTHORITIES ON GENERAL DAMAGES

10. Counsel for the plaintiff submitted that a reasonable award for non-pecuniary loss would be \$200,000.00 and in this regard suggested 2 cases for consideration by this court as follows:

- ***Balwant v Balwant***³ where Best J in January 2002 awarded a 34 year old housewife who was blinded in the left eye; had post concussion syndrome; scalp neuralgia; headaches; fainting and some brain damage the sum of \$220,000.00; as adjusted to December, 2010 to **\$406,944.00**.
- ***Rampersad v Mohammed & Ors***⁴ where Tam J in March, 2001 awarded an 18 year old who was blinded in the right eye with some scarring the sum of \$150,000.00 (including \$10,000.00 for job disability); as adjusted to December, 2010 to **\$291,731.00**.

³ *Balwant v Balwant* HCA S-1133 of 1986

⁴ *Rampersad v Mohammed & Ors* HCA S-1121 of 1998

11. In the *Balwant case* the injuries were more extensive than those of the instant plaintiff and whilst the injuries in the *Rampersad case* appear to come closest to those sustained in the case at hand, it is to be noted that there was no issue of scarring with the instant plaintiff. Also, I sought guidance from a few other decisions to determine an appropriate award in the circumstances of the instant case including:

- *Dadd v Hub Travel Limited*⁵ where Best M in 1988 for loss of sight in the right eye and contact lens required in the left eye awarded the sum of \$24,000.00 (and future economic loss of \$60,000); as adjusted to December, 2010 to **\$102,179.00**.
- *Plouden v Auto Rentals Limited*⁶ where Persaud J in July 1983 for loss of one eye awarded the sum of \$15,000.00; as adjusted to December, 2010 to **\$95,090.00**.
- *Joseph v Canning's Food Limited*⁷ where Edoo J in 1985 for loss of an eye by a 19 year old awarded \$30,000.00; as adjusted to December, 2010 to **\$166,096.00**.
- *David v Raymond & Mohammed*⁸ where Best M on 11th October, 1989 for a loss of a right eye and serious tongue laceration awarded the sum of \$55,000.00; as adjusted to December, 2010 to **\$203,301.00**.

12. The awards in the above cases for the loss of an eye ranged between \$95,000.00 to \$203,000.00 with the higher end award covering other injuries, as seen in *David's case*. The injuries in the instant case related to the right eye and led to blindness in that eye as confirmed by the medical report in evidence. The plaintiff subsequently attempts in his witness statement to outline other ailments which were neither pleaded in his statement of claim nor for which there was medical evidence in support. Given that there was no nexus with these ailments and the injuries sustained in the instant case, they were not factored into the instant

⁵ *Dadd v Hub Travel Limited* HCA 974 of 1985
⁶ *Plouden v Auto Rentals Ltd* HCA 685 of 1977
⁷ *Joseph v Canning's Food Limited* HCA S-866 of 1977
⁸ *David v Raymond & Mohammed* HCA S-50 of 1979

award. To arrive at a reasonable award for injury to the plaintiff's eye leading to blindness thereto, I considered the cases submitted by the plaintiff and their respective awards. For comparative purpose, I also had resort to the cases of *Dadd*, *Plouden*, *Joseph* and *David* above, which in my view were more on par with the injury in the instant case.

13. In addition to the above, I considered that the purpose of an award of damages was to compensate for an established loss. In so doing, an injured plaintiff must understand that such an award is not intended to give him a gratuitous benefit or to place him in a more advantageous position than he would have been in prior to the injury. Such awards can never perfectly compensate an injured party. It is helpful in the exercise, however, if a plaintiff places the requisite evidence before an assessing court to aid in the process. The instant plaintiff relied on a medical report dated 1997; sought to introduce other ailments without any foundational or causal link to the instant injuries and for which no supporting documentary evidence was before me; failed to provide an updated medical for an assessment that took place more than 16 years after the incident and was content in his witness statement to give limited evidence in support of his claim. Nevertheless, I bore in mind that this award is a singular one so must be reasonable and just in all the circumstances, albeit monetary awards can hardly compensate for physical pain and suffering. In the circumstances of the present case, I found that an award of **\$120,000.00** would meet the justice of this case.

SPECIAL DAMAGES

14. It is trite law that special damages must be pleaded, particularized and “strictly” proved.⁹ Thus, an assessing court requires a plaintiff to come armed with the requisite proof of losses sustained. It is also settled law that a plaintiff must plead his losses sustained. In the absence of the necessary documentary proof (such as receipts, bills, invoices, pay slips, job letters etc) items of special damages will be disallowed.

⁹ *Grant v Motilal Moonan Ltd.* (1988) 43 WIR 372 per Bernard CJ and reaffirmed in *Rampersad v Willies Ice-Cream Ltd* Civil App 20 of 2002

- Medical expenses and continuing

15. In his statement of claim, there is a claim for medical expenses and continuing in the sum of \$7,500.00. He did not annex any receipts to the statement of claim. There was also no reference to this claim in his witness statement or submissions. It is assumed that this claim was abandoned so no sums were awarded in this respect for lack of proof.

- Loss of earnings

16. The claim for loss of earnings was pleaded as \$1,920.00 per month from February to November 1999 and continuing. The witness gave evidence that he was employed as a mason/carpenter with the defendant since 1993 earning \$1,920.00 per month. He states further that when the accident happened, the defendant only paid him compensation for 2 weeks. He does not state if this compensatory payment amounted to 2 weeks salary or otherwise. His words in his witness statement were, “[W]hen the accident occurred and I was unable to work, the Defendant only paid me compensation for two (2) weeks.” He also does not provide dates or specify the 2 weeks for which he was paid or any record of his emoluments. It is noted, however, that his claim for loss of earnings (as particularized in his statement of claim) was from February to November, 1999. The incident which caused the instant injury took place in **1995**. There is no claim for loss of earnings from 1995. Further, the witness statement makes no reference to the period for which loss of earnings is claimed. Counsel for the plaintiff submitted, however, that loss of earnings is being sought from “the month after the injury February 1995. His evidence is that he was paid 2 weeks wages immediately after the accident to January, 2012. It is to be noted that there was no amendment of the statement of claim in this matter and no evidence in the witness statement in support of this claim or counsel’s contention.

17. Loss of earnings is a claim that can be specifically calculated and for which documentary proof is generally available. In the instant case, there was no supporting documentary evidence in support of this claim (whether in the form of a job letter, pay slips, bank statements, income tax and other statutory payments) that was made prior to the injuries and which have since stopped. There is also no medical evidence that this plaintiff is unable to work because of his injuries. This is a plaintiff who has lost one eye and according to the medical evidence

remained with a normal left eye. I note the words of Pemberton J in *Elva-Dick Nicholas v Jayson Hernandez and Capital Insurance Limited*¹⁰ that, “[I]t is clear that the mere enumeration of alleged losses is insufficient proof and the Court would be restrained to deny compensation for items of damage not proven by way of proper documentation, for instance the production of receipts or invoices.”

18. Further, see the words of Master Paray-Durity in *Sookdaye Babwah v Dennis Harrinanan & Ors*¹¹, who quoting from *Bonham Carter* observed:

*On an evaluation of the evidence in support of item (a) it is the Court’s opinion that **the Plaintiff has failed to adequately prove the full extent of her alleged loss of earnings.** The Plaintiff has not produced any bills or receipts to prove her purchases of material and sale of the manufactured goods, she has also failed to provide the Court with sufficient particularity of the types of bags sold to the business places that she named and the number of bags which were sold. [emphasis mine]*

19. To my mind, the instant plaintiff has failed to provide any proper evidential basis to support his claim for loss of earnings and, as such, it cannot be maintained. Given the evidence or lack thereof, I am constrained to disallow the claim for loss of earnings.

FUTURE LOSS OF EARNINGS

20. The plaintiff claims loss of future earnings in the sum of \$184,320.00 based on his salary of \$1,940.00 and the fact that his job as a mason/carpenter does not usually have a retirement age. Counsel suggested a multiplier of 18 based on the age of the plaintiff which is 50 years.
21. Apart from the evidence in his witness statement as to his salary, there is no other evidence before this court. It is to be noted also that there is no medical report certifying him permanently unfit to work and/or pronouncing that his injuries will severely impact on his earning capacity. What is clear and supported by the evidence is that this plaintiff is now blind in his right eye and has normal vision in his left eye. It is also in evidence before me that he

¹⁰ *Elva-Dick Nicholas v Jayson Hernandez and Capital Insurance Limited* CV2006-01035

¹¹ *Sookdaye Babwah v Dennis Harrinanan & Ors* HCA S-136 of 1994

spent 2 weeks at the hospital and this is accepted. There is no evidence before me as to how his eye injury impacted on the performance of his pre-accident job as a mason/carpenter (if at all) and/or on any other work that he may have been able to obtain subsequently. The medical report does not state the length of his incapacitation following his injury. It is also silent on whether blindness in one eye renders him permanently or temporarily unemployable or affected his earning capacity in any way and/or whether he is qualified for or fit to do another job. This medical report was dated 13th November, 1997, more than 2 years 10 months after the incident. Given the insufficiency of the evidence, assessing future loss of earnings on the multiplier x multiplicand basis is an impossible one as the plaintiff has not demonstrated that there is a continuing loss of earnings which is attributable to the accident.

22. In the case at bar, I considered whether the plaintiff is entitled to a lump sum based on the Court of Appeal decision of *Thomas v Ford et al*² where Kangaloo JA noted:

*In my view the appellant is entitled to an award for loss of future earnings. Such awards are made where a claimant demonstrates that there is a continuing loss of earnings which is attributable to the accident. It is usually computed using the multiplier/multiplicand method where the court assess the expected period of incapacity to derive a multiplier which represent the discounted length of the claimant's expected working life. This figure is then applied to a multiplicand which represents the claimant's annual net loss. However there are recognized instances where a court is entitled to disregard this conventional approach and arrive at a lump sum figure to compensate the claimant for his future loss of earnings. This approach had traditionally been utilized in personal injuries claims involving young children, based on the case of *Joyce v Yeomans* [1981] 1 WLR 549.... However the law is not static but continuously and constantly developing. Thus over time the principle in *Joyce* has been extended to claims involving adults where there are evidential uncertainties that prevent a court from using the multiplier/multiplicand method to assess damages for loss of future earnings. [Emphasis mine]*

23. Smith JA went on to explain, “[G]iven the great difficulty in ascertaining the appellant’s loss of earnings, the Master properly applied the lump sum method. The actual award of \$40,000.00 is

within the range of accepted awards in Trinidad and Tobago for this loss, namely \$10,000.00 - \$50,000.00. See The Lanyer Volume 7 No. 6 pages 43-49 and see Reshma Choon v Industrial Plant Services Ltd CV 2006-00574 at paragraph 20.”

24. The case at bar is not one where the plaintiff's salary was unknown or where the evidentiary difficulties justify a departure from the traditional multiplier/multiplicand method to assess the quantum of loss of future earnings. In this case, the plaintiff did not provide any or adequate proof of continuing loss of earnings attributable to his injuries. There is also no explanation as to why such proof could not be made available. It is to be noted that his medical report ascribes him a 30% **ocular** permanent disability and not disability across the board. Given that there is no evidence certifying him unfit to work permanently, temporarily or otherwise, I am not minded to award any sum for future loss of earnings.

ORDER

25. It is ordered that the defendant do pay to the plaintiff:
- i. General damages in the sum of \$120,000.00 with interest at the rate of 8% per annum from 10th November, 1999 to 21st September, 2012;
 - ii. Costs to be taxed by the Registrar in default of agreement.

Dated 21st September, 2012

Martha Alexander

Master