

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S-463 of 1998

BETWEEN

BOYSIE SEECHARAN

Plaintiff

AND

H&C BANDSAWMILL COMPANY LIMITED

Defendant

Before: Master Alexander

Appearances:

For the Plaintiff: Mr Winston Seenath instructed by Ms Pamela Maraj

For the Defendant: Mr Ronnie Bissessar instructed by Ms Jessica Maicoo

DECISION

Introduction

1. This is a matter of some vintage arising from an accident on the job that occurred in the year 1994. The plaintiff, Boysie Seecharan, a sawmill gauge-man (hereinafter “Boysie”) was on 16th May, 1994 working at the defendant’s sawmill located at 3 ½ mile mark Clarke Road, Penal. He had just clamped a log for cutting and pushed the gauge for the saw to cut the log, when the blade burst and fragments came into contact with his right hand injuring him. Particulars of Boysie’s injuries as pleaded are as follows:
 - i. Cut on postero-lateral aspect of the right arm and right wrist-examination shows four (4) scars approximately 5 cm long on the radial aspect of the right forearm and wrist;
 - ii. Dislocation of the right arm and wrist;
 - iii. Loss of sensation on dorsum of right hand. Slight weakness of flexion and extension of the elbow;
 - iv. Slight loss of power on dorsiflexion of the right wrist with a 13 degree deficit of flexion and a 3 degree deficit of extension;

- v. Plaster-paris back slab; and
 - vi. 25% permanent partial disability.
2. On 9th February, 2009 a consent order was entered before Shah J giving judgment to Boysie as against the defendant (“the Sawmill”) with damages to be assessed by a master. The only witness called was Boysie and he relied at the assessment on his witness statement filed on 30th January, 2012 together with the medical reports of Dr Pierre dated 5th May, 1995 and Dr Collymore dated 29th August, 1995 which are exhibited to his witness statement. There was one witness called for the Sawmill – Mrs Chandai Jugmohan whose witness statement was filed on 28th February, 2011 (hereinafter “Chandai”). Both Boysie and Chandai gave viva voce evidence and were subjected to cross-examination.

The Evidence

Boysie’s evidence

3. Boysie states in his witness statement as follows:
- i. He was born on 1st March, 1960 and was 34 years at the time of the accident and working as a gauge-man earning \$420.00 per week.
 - ii. Upon the accident, he was taken to the San Fernando General Hospital (“SFGH”) where his wound was cleaned, stitched and arm placed in a cast. He was given pills and an injection and remained warded at the SFGH for approximately 4-5 days where he was treated by Dr Pierre. He was eventually discharged on 20th May, 1994.
 - iii. After being discharged from the SFGH, he attended the Ward Clinic where he began sessions at the physiotherapy department.
 - iv. Boysie was seen by both Dr Pierre and Dr Collymore.
 - v. He experiences pain in his right hand whenever it rains and the air is chilly. He is unable to lift any heavy weight or objects as his muscle has wasted away and is very weak due to the nerve in his hand being injured.
 - vi. He was unemployed for approximately 1 year 5 months (that is 17 months) until he began working in November, 1995 at another sawmill in Marabella.

The medical evidence

Dr Pierre's report

4. The medical report of Dr Pierre dated 5th May, 1995 certified that the clinical examination revealed no neurovascular injury and that Boysie had the full range of his right elbow movement. Dr Pierre expressed the view that Boysie had made a 'satisfactory recovery' as at 24th April, 1995 and his disability was because of muscle weakness, which can be improved through physiotherapy sessions. Based on the examination conducted on 24th April, 1995, he was ascribed a permanent partial disability of 10% because of muscle weakness, likely to improve with physiotherapy.

Dr Collymore's report dated 29th August, 1995

5. Boysie was seen by Dr Collymore on 2 or 3 occasions after he was discharged from the SFGH. Based on an examination he conducted of Boysie on 22nd August, 1995, he stated that the power of the grasp of the right hand was not measurable on the dynamometer while that of the left hand was 69 pounds. He assessed his permanent partial disability as 25% and advised him that his injury would heal with time.

Chandai's evidence

6. Chandai, who is the witness for the Sawmill, states in her witness statement as follows:
 - i. As at 16th May, 1994 Boysie was employed with the Sawmill as a gauge-man when he sustained injury to his right arm and right wrist.
 - ii. At the time of the accident, he was receiving a salary of \$1,640.00 per month.
 - iii. Under cross-examination, she stated that the Sawmill was no longer in need of a gauge-man as this job had become redundant as a result of technological developments. She also admitted that the machine that now performs the gauge-man's job was operated by an operator who is paid \$200.00 per day for approximately 7-8 hours work.
 - iv. The Sawmill does not require its operators to work on a daily basis having regard to the reduction in the workload.

7. There are several undisputed facts or common grounds between the parties including –
- that the injuries sustained were as spelt out in the claim;
 - that Boysie has worked since the accident and can perform light duties;
 - that Dr Collymore has informed Boysie that his injuries **would heal with time**;
 - that Boysie has received NIS and social welfare payments after the accident;
 - that Boysie’s NIS payments ceased after he was medically assessed but not before he had received a lump sum of \$2,500.00 as NIS;
 - that Boysie received \$20,160.00 as workmen compensation from the Sawmill.

General damages

The locus classicus in this jurisdiction on the factors to be considered when making an award for general damages are the principles set out in *Cornilliac v St Louis*¹ including (a) nature and extent of the injuries sustained (b) the nature and gravity of the resulting physical disability (c) pain and suffering (d) loss of amenities (e) the extent to which, consequentially, the plaintiff’s pecuniary prospects are affected.

8. The nature of the injuries sustained by Boysie is not disputed. The extent and resulting effects seem to be points of contention. Boysie claims that he is unable to lift any heavy weight or objects since his injuries. A major complaint is that of weakness in his muscles and pains caused by fluctuating weather conditions. Counsel for the Sawmill has asked the court to note that Boysie has not complained or given any evidence that he is unable to use this hand altogether and he is, therefore, not deprived of the use of his right hand. It was further contended by counsel for the Sawmill that the extent of Boysie’s injuries is discomfort in his right hand, which has not affected his job prospects to the extent that his income earning capacity has been diminished. The court was asked to view Boysie’s evidence of weakness in his right hand as exaggeration and his injury not grave or debilitating given his obvious lack of discomfort or physical symptoms in lifting the religious book when he was sworn in as a witness as well as the medical reports, one of which pointed to likely healing of injury with time. To be noted is that approximately 1 year after the injury, Dr Pierre recommended

¹ *Cornilliac v St Louis* (1965) 7 WIR 491

physiotherapy (as opposed to surgical intervention or drug therapy) as the appropriate treatment to improve Boysie's condition and to treat with any lingering pain or discomfort. Of note also is that Boysie attended 3 physiotherapy sessions at the clinic and then continued same at home. Counsel for the Sawmill has asked that this be viewed as Boysie being personally responsible for the delay in the rate and extent of his recovery. I note Boysie's evidence that Dr Collymore had indicated that the injury 'would heal with time'; the lack of medical evidence of any permanent damage ensuing from the injury and the clear medical assessment that the injury was one that would improve on its own with time.

9. As to the nature and gravity of the resulting physical disability, Boysie was warded at the SFGH for 4 days and was given one injection and pain killers. After being discharged, he was treated at the Ward Clinic and thereafter attended 3 physiotherapy sessions. As stated above, the main complaint is that of being unable to lift any heavy weight or objects as well as of muscular weakness due to the damage caused to the nerve in his right hand. There is no evidence post 1995 that this is indeed the present situation. Of note also is that Dr Pierre has certified that the clinical examination revealed no neurovascular injury. There is no direct evidence that Boysie's injuries have permanently affected or altered the quality of his life. He claims, however, that the gravity of the resulting physical disability can be seen in the effect on his earning capacity (discussed below). To be noted is that the continuing effects of his injuries as outlined by his witness statement are not reflected in any of the medical reports tendered into evidence and, in the face of a lack of updated reports or direct evidence from the doctors, leave it open to the inference of some exaggeration on his part (discussed below).

10. In his witness statement, Boysie states that initially he, "experienced a terrible lancing pain, in my arm. My arm was stiff and lacked mobility. This lasted for roughly 2 weeks then the pain subsided to a dull throbbing pain." It is also his evidence that at the hospital, his hand itched terribly at times and he was unable to do anything because of the position in which he was placed. He claims that after his discharge, his hand was weak and it pained terribly whenever he placed any stress on it. He claims also that the pains continued during his physiotherapy treatment and his fingers were stiff. Further, Boysie gave evidence of pain that is currently confined to periods when it rains and is chilly, "I am still unable to lift any heavy weight or

objects as my muscle has wasted away and it is very weak since the nerve in my hand was injured. I have stopped visiting any doctor as I was told ... it would heal with time.” It is clear that his increases in pains are proportional to a decrease in temperature. This complaint of pain was not reflected in the medical reports nor is there any evidence of him seeking medical advice/attention or of him resorting to drugs to alleviate the problem. There is no evidence of him having sought medical treatment since August, 1995. To my mind, this failure to seek any medical intervention suggests that he did not suffer from pain to the extent as to cause him any substantial discomfort or significant pain.

11. As to the loss of amenities suffered, Boysie has given evidence that he can no longer lift heavy objects and experiences weakness in his right arm. Apart from this claim of ‘weakness in the right arm’, there is no evidence he does not have the full use of his right arm or it has been affected in any significant way by mobility and flexibility. There is absolutely no evidence before the court to suggest that Boysie’s quality of life has been compromised. Further, there is no evidence that his relationship with his family or friends has been affected.
12. Boysie has given viva voce evidence that he is only able to perform light duties. Whilst there is no direct evidence that he could not perform his duties as a gauge-man, it is noted from the evidence of Chandai that his job has been made redundant by virtue of technological developments and the gauge-man job has been replaced by an operator. There is no evidence that Boysie made any attempt to be trained for the job of an operator.
13. He states in his witness statement and viva voce evidence that he was unable to work up until November, 1995 which is inconsistent with Dr Collymore’s report where he complained in August, 1995 that he experienced pain after he worked for an entire day. To be noted in his witness statement, he gave evidence that he commenced working in November, 1995 at a sawmill in Marabella where he performed ‘light duties’ at a salary of \$80.00 per week. He failed to state when this job ended and why. Then in his viva voce evidence, he states that he first worked at a sawmill in Union Road, Claxton Bay (not Marabella) for a 2 week period earning \$500.00 per fortnight. No evidence is given as to why he was unable to continue in that job, performing light duties, which he admitted he is capable of performing. Boysie would like the court to believe that he is incapable of performing any duties that would allow

him the benefit of a comparable salary. There is no evidence or explanation as to why Boysie is unable to maintain or perform any job. Under cross-examination, he admitted he worked with CEPEP. There is no evidence that he was unable to perform his duties while at CEPEP. There is no evidence as to why he has not sought re-employment with CEPEP and apart from the 2 groceries, he has made no reasonable attempts to find employment. Boysie's evidence as to his income and employment is at best lacking in detail and/or accuracy. Unable to find that he has made serious or diligent efforts to secure a job, I concluded that he has been less than forthright in describing his employment history to the court.

Case Law

14. Counsel for Boysie provided several cases as a guide to assist with arriving at an appropriate award for pain and suffering and loss of amenities including:

- *Arjoon v Williams*² where for a fracture of the radius and ulna which caused permanent or long term damage, an award was made of \$3,500.00; as adjusted to December, 2010 to \$93,005.00.
- *Premasagar v Rajkumar*³ where for a fracture in two places at the elbow, minor lacerations, a weak grasp, inability to lift heavy objects, some deformity and with an ascribed permanent partial disability of 18% an award was made of \$9,000.00; as adjusted to December, 2010 to \$88,056.00.

The injuries in these matters were similar (though not directly on par as one refers to elbow and the other the wrist) and in my view more severe than the instant case but serve as useful guidance.

- *Leid v Cannings Industries Ltd*⁴ where for a laceration of the wrist; limited use of the right hand and an ascribed permanent partial disability of 20% the plaintiff was awarded \$3,000.00; as adjusted to December, 2010 to \$79,719.00.
- *Ramjohn v Pollard*⁵ where for a serious right hand and fingers injury, with a fracture of the 5th metacarpal which had to be treated with plastic fixation; reduced

² *Arjoon v Williams* HCA 1538 of 1972

³ *Premasagar v Rajkumar* HCA 244 of 1974

⁴ *Leid v Cannings Industries Ltd* HCA 74 of 1972

⁵ *Ramjohn v Pollard* HCA 441 of 1976

grasp; severe scarring; deep lacerations on the right leg going to the bone and an ascribed permanent partial disability of 10-12 % a plaintiff, who was warded at the San Fernando General Hospital for 2 months, was awarded \$12,000.00; as adjusted to December, 2010 to \$70,681.00.

- ***Boiselle v Bernard***⁶ where for a serious left wrist injury, an award was made of \$16,500.00; as adjusted to December, 2010 to \$106,501.00.
- ***Telemaque v Cazoe & Cazoe***⁷ where for 5 wounds and 1 abrasion caused by a cutlass to the right arm resulting in scarring and loss of manual dexterity and the need to have 2 separate operations; weakness of grasp and an ascribed permanent partial disability of 15% an award was made of \$30,000.00; as adjusted to December, 2010 to \$99,211.00.
- ***Rattan v Carlisle Tire and Rubber (Free Zone) Ltd***⁸ where for damage to the fingers of the hand of a 28 year old from it being crushed and the flesh charred which resulted in the loss of 2 digits of all fingers on the left hand; he underwent 4 operations and was in severe pain for a year with post traumatic stress disorder, which included insomnia, irritability, distressing flashback, anxiety, forgetfulness and lack of concentration, an award was made of \$90,000.00; as adjusted to December, 2010 to \$159,156.00.

15. Counsel for the Sawmill provided for consideration the following cases:

- ***Surugh v Lalsingh***⁹ where a plaintiff who was a driving instructor suffered a severe laceration on his right forearm which resulted in the loss of some of his skin. He was hospitalized for 4 days after which it was found that he had suffered from a considerable loss of grip of the right hand; there was loss of muscle and there was inability to extend the middle and ring fingers. The plaintiff also had his skin grafted. He was awarded \$2,500.00; as adjusted to December, 2010 to \$85,791.00.

⁶ *Boiselle v Bernard* HCA 3424 of 1979

⁷ *Telemaque v Cazoe & Cazoe* HCA 2770 of 1980

⁸ *Rattan v Carlisle Tire and Rubber (Free Zone) Ltd* HCA 1029 of 2000

⁹ *Surugh v Lalsingh* HCA S-756 of 1968

To my mind, Boysie's injuries are not as severe as the plaintiff's in **Surugh** since he did not lose use of any of his fingers; did not lose any muscle or skin; and he suffered no loss of grip. To be noted, however, is that Boysie was left with scarring and did suffer a loss of sensation as well as muscle weakness.

- **Mannie and Sookchan v Ramlogan and Simon**¹⁰ where Lucky J (as he then was) awarded the second plaintiff general damages of \$7,500.00 for a comminuted fracture of the right radius and ulna; contusion on her interior chest wall and a torn right medial collateral ligament. The right hand had to be manipulated twice and she was placed in the Orthopaedic Clinic and then received physiotherapy. When she was re-examined almost 8 months later, it was found that she had lost 45 degrees supination and 10 degrees pronation in the right forearm and a 25% range of movement in all directions in the right wrist. This award as adjusted to December, 2010 was \$33,580.00. The injuries in **Mannie** and the award were not comparable to the instant case as Boysie's injuries were not as extensive.
- **Patrick v PTSC**¹¹ where the plaintiff for a fracture of the right radius was awarded \$750.00; as adjusted to December, 2010 to \$14,930.00. In my view, this case provided little comparative guidance to the instant case and little if any weight was attached to it. Counsel for the Sawmill's contention that **Patrick case** is one of the most applicable in terms of similarity of injuries; mode of treatment required and the effect and pain associated with the injury so provides useful guidance is rejected.

16. The cases supplied as guidance by both counsel were dated. To be noted is that in the cases supplied by counsel for the Sawmill, the injuries were not exactly on par with the present case save and except **Surugh case**. Counsel for the Sawmill, however, submitted that the cases of **Patrick** and that of **Mannie** are the most applicable and on par, which is not accepted. He suggested an award of \$15,000.00 for pain and suffering, which in my view is on the lower side of the compensatory scale. In his submissions, counsel for the Sawmill sought to have this court believe that there was exaggeration as to the nature and extent of Boysie's injuries; there

¹⁰ *Mannie and Sookchan v Ramlogan and Simon* HCA No S-1449 of 1981

¹¹ *Patrick v PTSC* HCA No140 of 1972

were no lasting or negative effects of these injuries on his quality of life or earning capacity. He called no medical or other evidence in support of this contention. On the other hand, in the majority of cases provided by counsel for Boysie, the injuries were clearly of greater severity and the effects more serious as for example *Premasagar case* as well as *Leid case* or simply not on par with Boysie's injuries as was *Rattan case*. Despite this, all cases were considered to the extent that they provided some form of guidance, whether limited or not. In conducting the comparative analysis, I bore in mind the inherent danger in adjusting awards on the basis of a 'straight line method' as flagged by Stollmeyer J (as he then was) in *Deokie Kimkaran and Sintra Boodoo v Sakaldip Boodoo & anor*¹² namely that, "this method results in older decisions yielding higher sums on adjustment than amounts awarded in cases more recently decided." I also considered that past cases serve merely as a guide and reliance on awards of damages given in older cases is but an 'inexact science'. See *Seepersad v Persad and anor*.¹³

17. I note that the awards in the dated cases provided ranged from the high \$159,000.00 to as low as \$15,000.00. I considered Boysie's main injury was to his predominant hand and it is his evidence it has had a debilitating effect on him, not as much physically as financially (discussed below). He was hospitalized for 4 days and the pain and suffering, particularly in certain weather conditions, continue to be a challenge and source of disruption in his life. Boysie, however, chose not to bring any updated medical evidence of his continuing, if any, medical challenges. As at the date of the assessment, Boysie's injuries were 18 years old and in the face of the evidence called, the medical reports dated 1995, one of which stated categorically that the injury would heal with time, and the lack of confirmation of this or medical proof otherwise, I viewed with suspicion his claim that he continues being as hamstrung by his injuries to date as he was in 1994 or even 1995 when the last report was obtained.

18. I concluded that he is entitled to compensation but cannot recover more than the amount of his net loss. The purpose of an award of damages is to compensate him for the losses sustained and not to enrich him; to leave him no worse off than he was before the injuries, nor

¹² *Deokie Kimkaran and Sintra Boodoo v Sakaldip Boodoo & anor* HCA S-1493 of 1996

¹³ *Seepersad v Persad and anor* [2004] 64 WIR

should he be made better off. In so doing, I bear in mind the time honoured principle that an award of damages should as nearly as possible put him in the same position as he would have been in if he had not sustained the wrong for which he is to be compensated. The major injury appears to be the dislocated right wrist. This, however, was accompanied by a cut on the postero-lateral aspect of the right arm; 4 scars approximately 5 cm long on the right forearm and wrist; loss of sensation on the dorsum of right hand; slight weakness of flexion and extension of the elbow; and slight loss of power on dorsiflexion of the right wrist with a 13 degree deficit of flexion and a 3 degree deficit of extension. There was no deformity or injury to fingers as in some of the cases relied on by counsel for Boysie. Nevertheless, I bore in mind the Collymore report from which it could be inferred that as at 1995 there was some decreased power of the grasp of the right hand but note the dearth of evidence as to what was the current situation some 18 years post-injury, especially given the medical conclusion that the injury would heal with time. In the circumstances, I am prepared to award Boysie the sum of **\$80,000.00** for his pain and suffering and loss of amenities, which I consider to be full and adequate compensation for the injuries he has sustained.

Special Damages

19. It is trite law that special damages must be pleaded and proven. It is incumbent on Boysie, therefore, to prove his case and/or justify the award to which he is entitled. I will now turn to the claims for special damages made by Boysie which are as follows:

Travelling	\$240.00
Medical report and travelling to obtain same	\$ 61.00
Medical Dr Collymore and travelling	\$128.00
Medicines	\$128.00

20. For none of these claims did Boysie provide receipts, bills or any documentary proof. Further, the submissions were silent as to the lack of documentary evidence and/or these claims. I note the very precise sums claimed and in the face of a lack of proof and/or explanation for this lack of evidence, I am constrained to disallow these claims.

Loss of Earnings

21. In his statement of claim, Boysie claimed loss of earnings “*from 16th May, 1994 and continuing at \$420.00 per week.*” His claim as at the date of assessment amounts to \$401,520.00. Boysie’s evidence is that he was unemployed for approximately 1 year 5 months after the accident as he could only perform light duties (i.e. 17 months). Counsel for Boysie has asked that great weight be put on Dr Collymore’s findings and that the court holds that with his decreased power of grasp, it must have had a great impact on his ability to use his right hand (the dominant hand) and would have affected his earning capacity and/or resulted in loss of earnings. Counsel for the Sawmill contended otherwise, namely that Boysie has not strictly proved the exact period that he was unable to work and/or provided evidence demonstrating his inability to work because of his injuries. To resolve the issue, I turned to the evidence of the parties both in chief and under cross-examination as well as the medical reports.

22. It is Boysie’s evidence that following his injuries, he could only perform light duties. He gave evidence that he worked first for Mr Bhikarrie for 2 weeks in November, 1995 earning \$500.00 per fortnight. Mr Bhikarrie did not continue his employment because he was not able to perform. He claims further that his ability to obtain a job performing light duties was limited. He claims he worked in 2010 with CEPEP for about 2 weeks, holding the garbage bags for rubbish to be put inside, and earned approximately \$1,650.00. There is no explanation or evidence as to why he did not seek previously or obtained further employment with CEPEP post 2010. He claims that he sought employment as a watchman, without success. He also gave evidence that he went in search of work at 2 groceries (Food Basket in 2011 and a grocery operated by a man named Robin in 2012) but there were no vacancies. There is no evidence as to why it was only in 2011 and 2012 (approximately 17 and 18 years after the accident) that he made attempts to find employment at groceries. There is also no evidence as to when he sought the watchman job. In fact there is no evidence of any attempts made by Boysie to secure employment between 1995 and 2010. To my mind, his evidence is at best disingenuous.

23. Counsel for Boysie has asked that the court accept - his advanced age (53 years); lack of special skills; alleged ‘severe limitations with his right arm’ and resulting weak muscles - as

justifiable reasons for this failure to secure jobs where he could perform light duties. Counsel also submitted that there is obviously a loss of income since light work is hard to find; he has had to contend with persons in the labour market who are more able bodied than him; it was his dominant hand that was injured; he did not possess a high level of skill or education to obtain work of a supervisory nature; manual work required the use of both hands; any extended use of the right hand causes pain reducing his effectiveness in the labour market; he is effectively handicapped in today's labour market since any employer would not want to employ him with such limitations. Most of these contentions are rejected outright as being claims and/or assertions for which absolutely no proof or evidence was provided to this court.

24. In evidence and what is clear to this assessing court is that –

- Boysie received an injury to his right wrist in 1994;
- he sought to rely on 2 medical reports dated 1995;
- no updated report as to his current medical condition or confirming his claim as to continuing disability or inability to work was furnished to this court;
- no past employer was called or documentary evidence presented to corroborate his claim that his employment was either terminated because of his challenges ensuing from his injuries or of any unwillingness to employ persons with his alleged disability, skill or educational level;
- there is no medical report from his then doctors certifying him unfit to work temporarily or that he was disadvantaged or handicapped on the labour market in his post-accident capacity.

25. After looking at all the evidence, it was clear to me that Boysie has not provided any or any sufficient evidence demonstrating his inability to work post 1995. Further, I viewed with some disquiet his oral evidence. It is now 18 years since he sustained the injuries. I note that in Dr Collymore's report reference was made to Boysie suffering pains **after working for the entire day**; and this was 1 year after the accident. The clear inference to be made from this is that Boysie was performing some form of work, at least as at the date of that report in August, 1995. Boysie's evidence however is that he began working in November, 2005 for \$160.00 per week, which he alleges was the first time he had worked since the accident, which is

inconsistent with Dr Collymore's report. However, in his viva voce evidence he admitted that he received \$500.00 for the 2 weeks (not \$160.00 per week as stated in his witness statement). Further, I note that in Dr Pierre's report dated 5th May, 1995 it was indicated that Boysie had made a *satisfactory recovery* and his injury would heal with time. I note also that he himself has admitted to being able to perform light duties. I, therefore, viewed with suspicion, his claim that 18 years after the injury, he is still not healed enough to regain employment.

26. I accept that initially Boysie may have had some challenges in returning with an injured right wrist to the labour market doing manual work. I do not find on the evidence any proof of disability extending beyond this period of 17 months. To my mind, Boysie has not satisfied this court that he is unemployable or a virtual handicap on the labour market. There is no medical or other evidence in support of this claim. In fact, I note that even NIS ceased his monthly payments after a one-time lump sum of \$2,500.00 following its assessment of him. To my mind, if he were disabled or subjected to a continuing disability he would have brought the necessary evidence. Based on the evidence before this court, I concluded that Boysie was malingering and was content to sit at home and await his windfall upon his assessment, rather than seeking to return to gainful employment. In the circumstances, I am only prepared to accept that his period of unemployment would have lasted for a maximum of 17 months. He is awarded loss of earnings for 17 months minus sums earned of \$500 + \$1,650.00 as follows:

\$420.00 x 4 x17 = \$28,560.00

Less \$2,150.00 = \$26,410.00

Loss of future earnings

27. Counsel for Boysie has submitted that he is entitled to loss of future earnings in the sum of \$360,000.00. He has asked the court to note that as at the date of the assessment, he has shown that he was unemployed and obviously suffering a loss of earnings. The court was asked to accept that he is a handicap on the labour market, as his injuries have placed him at a disadvantage and/or he will lose his job more readily than his able-bodied competitors.

28. Of note is that loss of future earnings has not been pleaded nor has Boysie given any satisfactory evidence that he is unable to work or that the light jobs he could now perform will

not provide compensation equivalent to what he had earned pre-accident. To my mind, Boysie, based on the insufficiency of the evidence presented, has failed to make out a proper case that he is entitled to any future loss of earnings and has failed to plead this or damages for diminution in loss of earnings. Whilst I can and do accept that injury to a dominant hand could render a worker less competitive than younger or more able-bodied workers, I do not find there is sufficient medical or other evidence before me that Boysie has continued after 18 years to be a virtual handicap on the labour market or has been rendered wholly physically or even substantially incapable of performing the same work as before.

29. An award for loss of future earnings can be granted where a claimant shows that there is continuing loss of earnings linked to the accident. In *Moonsammy v Randhanie and Capital Insurance*¹⁴ the test was set out for establishing future loss of earnings/ loss of earning capacity. Also in *Dennis Harrinanan v Vidya Pariag and anor*¹⁵ where the Court of Appeal found 2 significant weaknesses in the evidence adduced in the claim for loss of earnings – (i) no independent evidence from any purported customer to verify the plaintiff in fact sold bags and (ii) “the plaintiff produced not a single document in support of her claim; not a bill, nor a receipt, nor any record of any kind.” Based on these, the Court of Appeal set aside the award of loss of earnings to the plaintiff.

30. In the instant case, it is not in dispute that the claimant was unemployed at the date of the assessment. There was also no credible medical evidence provided to suggest that Boysie is incapable of working or that his injuries would affect his earning capacity temporarily or permanently or that his condition will continue for the rest of his life. His attending doctor gave him a 10% disability and then Dr Collymore increased this to 25%. The latest medical is over 18 years old and does not support this claim of being unfit for work. I am thus unprepared without more to accept counsel for Boysie’s blanket assertions that given the presence of muscle weakness, “[E]ven though it was expected to improve over time, it obviously did not because the Plaintiff has shown us in his evidence that there is still loss of sensation on the dorsum of the hand and loss of power.” I am also unwilling to accept

¹⁴ *Moonsammy v Randhanie and Capital Insurance* CA 62 of 2003; HCA 2316 of 2001

¹⁵ *Dennis Harrinanan v Vidya Pariag & anor* Civ App No 239 of 1998 page 2, paragraph 2

counsel's *carte blanche* conclusion that, "his obvious inability to do anything strenuous with the arm, must be as a result of the injuries sustained." This is evidence that should have come from a medical practitioner who actually treated Boysie. To my mind, if he were still suffering the effects of his injuries, he would have produced an updated medical evidencing same. Boysie's evidence as to being wholly incapable of doing his pre-accident job was uncorroborated by a medical professional, employer or otherwise. Whilst I bear in mind the decision of the Court of Appeal in *Great Northern Insurance v Ansola* I was not convinced by his evidence and given the nature of the injuries, I was unable to conclude that he was effectively a total or even a partial handicap on the labour market. I am, therefore, not minded to award any sum for loss of future earnings given the insufficiency of the state of evidence. This claim is disallowed for insufficiency of proof.

Order

31. It is ordered that the defendant do pay to the plaintiff:
 - i. General damages in the sum of **\$80,000.00** with interest at the rate of 9% per annum from 15th May, 1998 to 22nd February, 2013;
 - ii. Special damages in the sum of **\$26,410.00** with interest at the rate of 6% per annum from 16th May, 1994 to 22nd February, 2013;
 - iii. Costs of the assessment to be taxed by the Registrar in default of agreement;
 - iv. Stay of execution of 28 days.

32. It is also ordered that the sums received in workman's compensation, NIS and social welfare are to be deducted from damages payable.

Dated 22nd February, 2013

Martha Alexander
Master