

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV 2007-04800

BETWEEN

STEPHAN MARTIN FERNANDEZ

Claimant

AND

TORRENCE DANIEL

Defendant

CAPITAL INSURANCE COMPANY LIMITED

Co-Defendant

\*\*\*\*\*

Before: Master Alexander

Appearances:

For the claimant:

Mr Imran Khan

For the defendant and co-defendant:

Mr Ravi Pherangee and Mr Anand Rampersad,  
instructed by Ms Kizzy Subero

**REASONS**

1. On 26<sup>th</sup> October, 2012 the following decision on the assessment was rendered by this court:

It is hereby ordered that the defendant and co-defendant do pay to the claimant:

- a) General damages for pain and suffering and loss of amenities in the sum of one hundred and sixty five thousand dollars (\$165,000.00) inclusive of interest;
- b) Special damages in the sum of eighty seven thousand, three hundred dollars (\$87,300.00) inclusive of interest;
- c) Loss of future earnings in the sum of one hundred and eighty thousand dollars (\$180,000.00);
- d) Costs as assessed in the sum of \$38,838.00; and

e) Stay of execution of twenty eight (28) days.

This decision is now the subject of an appeal pursuant to which these reasons are provided. To put this decision into context, it is necessary to look first at the background of this matter.

2. On 6<sup>th</sup> November, 2005 the claimant was a passenger in PBM 6078 travelling along Tasker Road, Ste Madeleine when the vehicle ran off the road, causing him to sustain personal injuries. He alleges that he was unconscious until he woke up at the San Fernando General Hospital, which is unconfirmed by the 2 contemporaneous medical reports. He filed a claim form and statement of case on 20<sup>th</sup> December, 2007 seeking compensation from the driver of the vehicle and his insurers for the injuries and losses sustained as a result of that accident. Judgment in default of defence was entered against the defendant on 7<sup>th</sup> July, 2008. Subsequently, on 1<sup>st</sup> April, 2009 Dean Armorer J entered judgment against the co-defendant and granted leave for a defence to be put in on the issue of quantum only. That defence was filed on 15<sup>th</sup> April, 2009 and the assessment was dealt with on 19<sup>th</sup> January, 2012 and 1<sup>st</sup> March, 2012.

### **General Damages**

3. General damages are those which the law implies and are losses which cannot be precisely quantified, so they are not specially pleaded. To assess general damages, the usual principles in *Cornilliac v St Louis*<sup>1</sup> were applied: (a) The nature and extent of the injuries sustained; (b) The nature and gravity of the resulting physical disability; (c) The pain and suffering which had to be endured; (d) The loss of amenities suffered; and (e) The extent to which the claimant's pecuniary prospects have been materially affected.

4. To set the proper foundation for determining the quantum to award and put the claimant's case in context, it is necessary from the outset to look at his evidence. It is stated in the claimant's witness statement that he had fallen asleep in the vehicle when the accident happened. All he remembers is waking up in the San Fernando General Hospital (SFGH), in total shock and disbelief, unsure of what had happened. His clothes were off and he had on a neck brace. He

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<sup>1</sup> *Cornilliac v St Louis* (1964) 7 WIR 491

had three broken teeth and was being treated for multiple injuries to his spine, nerves and head as well as for cuts and bruises.

5. The claimant was transferred to the Eric Williams Medical Sciences Complex where spinal tests were performed. On 21<sup>st</sup> November 2005, he underwent surgery at the SFGH to free his spinal cord from his spinal bones. He recalls being in severe pain, all over his body but particularly in his head and back. While at the hospital, the claimant was in a lot of pain and could not move or do anything to help himself. He was taken care of by a nurse and used a bedpan. When he was discharged over a month later, he was unable to walk and had to be lifted in a wheelchair from the bed to the vehicle and to his home. He described his physical, mental and emotional pain thus:

*I was in severe pain all the time and wondered what I did to deserve this. My head and back pained me the most and even the hair on my hands hurt. No one was able to touch me and I could not have been dressed with clothing because of this. I felt very exposed and embarrassed.*

*I remained in hospital for over a month and this was the worst time of my life. All I did all day was to lie down in pain and worry about my condition and what was going to happen to me. I felt a sense of hopelessness and wondered how my girlfriend was going to make out since I was the only breadwinner in our home.*

6. On discharge, the claimant spent a few months in bed at home, unable to do anything for himself. He states that he was constantly in pain and could not move his body. After several months, he began therapy at the hospital, which included stretching his hands, neck and head and exercising his legs. Cold packs were placed on his body and he underwent hot wax therapy. After the third session of therapy, he began to walk with assistance. The claimant stated that this was a frightening experience for him. After 6 or 7 sessions of therapy, he was able to walk very slowly on his own.
7. As time passed, the claimant continued to experience pain and could not run or do any physical activities. He constantly had to wear a neck brace, especially while travelling and sleeping. He averred that he experienced weakness in his legs and back and that he was unable to grip objects with his hands. The claimant continued to visit the clinic and regularly attended neurosurgery

clinic for almost a year and a half. His evidence as to his pain and suffering was not tested under cross-examination and was accepted.

8. The claimant gave evidence as to his resulting and continuing disability, stating that since the accident his 'memory has been bad'. He continues to experience neck and shoulder pains. The claimant claims that he has been seriously affected by the cervical cord injury as he is now unable to use his body/limbs as before; in particular his left side. He states in his witness statement that at present he cannot lift anything heavy or stand or sit for long periods. He explained that the left side of his body is weak and he cannot put pressure on it. He now claims to suffer from memory loss, headaches and dizziness, especially if he is in the sun. He states, "*I often cannot spell words that I know or even my name. I sometimes forget people's names or where I am and the date.*" The slightest jerk or wrong turn of his neck results in severe pain. He continues to use the neck brace and cannot lift or play with his two daughters. The claimant states that he worries constantly of the struggle to meet his financial obligations since, "*we are months behind in our rent and in jeopardy of being evicted. This is heart breaking for me and I feel less of a man as I cannot support my family.*"
9. Of note is that the medical report of Dr Adam dated 13<sup>th</sup> may, 2010 indicated that an electroencephalogram done on 11<sup>th</sup> April, 2010 was normal with no evidence of cerebral dysfunction and confirmed findings of previous reports of a cervical cord injury post laminectomy with a left hemiparesis as well as a left shoulder strain and a post concussion syndrome. The post concussion syndrome was not included in the statement of case but Dr Adam confirms this under cross examination.
10. The claimant testified as to his loss of amenities stating that he was a ballroom dance instructor and enjoyed dancing, playing cricket, tennis and football, swimming and "deejaying"; all of which he can no longer do because of his neck and hand injuries. It is stated in the claimant's witness statement that he, "*hates the fact that he was a productive citizen of the country before the accident but now he cannot do all the things that he would have liked to.*" He explained that he believes that the accident has ruined his future and that of his family since he cannot work as hard as he would like to provide them with all the material comforts in life. This court notes where the claimant states, "*I am unable to fulfill my potential and it is really depressing at times knowing how active and vibrant I was before.*"

*Sometimes I do not even have the will to carry on. My dreams have been shattered because of my injuries. I wanted to own a house and car one day”*

11. Admitted into evidence on behalf of the claimant were the following documents:

- Radiology Consultation Report by Dr Maharaj dated 22<sup>nd</sup> November 2005
- A medical report dated 25<sup>th</sup> June 2007 by Dr Obi Chizoba
- Medical report dated 25<sup>th</sup> June 2007 by Dr Richard Spann
- Medical report dated 13<sup>th</sup> May 2010 and 25<sup>th</sup> August 2011 by Dr R. U. Adam

12. Counsel for the claimant listed the following injuries suffered by the claimant (as detailed in the statement of case): headache, neck pain and pain/numbness of both hands; cervical spine tenderness, hyperaesthesia of the fingers and hands; upper fracture of the upper 3 incisors; cervical cord contusion at C4/5 level; weakness on left side of body and parasthesia right index finger; mild weakness of the left limbs; loss of normal cervical lordosis consistent with paravertebral muscle spasm; and a permanent partial disability of 50% ascribed.

13. The medical reports as well as the viva voce evidence of Dr Adam confirm the injuries sustained by the claimant. The major injury was that of the spinal cord for which he underwent a surgical procedure (laminectomy) to alleviate its effects. Dr Adam in his evidence in chief stated that the claimant, who was given a grade 4/5 weakness in the left side, suffered with diminished power in the left upper limb. He describes this as a situation where the claimant would experience a weak hand grip and have the limb subject to easy fatigue and tiredness so that “it will affect or seriously impair his ability to use that left side **in a continued manner.**” To my mind, this does not completely rule out the use of the limb but spoke to a limitation in its sustained or continuous use. To be noted also is that Dr Adam (who was not his attending or treating physician) saw him 4 years after the accident in 2010 and for the sole purpose of providing an evaluative opinion. Under cross examination, he kept reiterating that he went on what the claimant had told him.

## Case Law

14. To arrive at an appropriate quantum, I sought guidance from all the cases provided by the parties but found 3 to be particularly useful:

- *Dial v Ali*<sup>2</sup> where an adjusted award as at December, 2010 was made of \$201,677.00 for injuries to the cervical spine resulting in permanent neck pains particularly while at work; loss of normal spine curvature and of grip and concussion.
- *Taitt v Rampersad*<sup>3</sup> where for a severe cervical cord injury; C5/C6 disc herniation with nerve root involvement and frozen shoulder; loss of grip causing inability to drive and erectile dysfunction an adjusted award of \$142,473.00 was made.
- *Moreau v Port Authority*<sup>4</sup> where on 28<sup>th</sup> April, 2010 Best J awarded a 47-year old \$200,000.00 (as adjusted to December, 2010 as \$212,487.00) for spinal injury from head impact on vehicle roof; pre-existing degenerative cervical and lumbar disc disease; acute prolapse at C5/C6 caused by the accident; and surgery for anterior cervical decompression.

15. The injuries in all three cases above bore certain similarities to those sustained by the claimant at bar. In the present case (unlike *Dial*), there was no evidence of loss of normal spine curvature. After reviewing all the cases, I concluded that an award in the vicinity of the *Taitt case* (supra) would meet the justice of the instant case. In determining the appropriate sum, I also considered that it was a once and for all award. Thus, it must adequately and fully compensate the claimant for his pain and suffering and all present and future losses occasioned by the tort without unjustly enriching him. Having had the opportunity to observe and listen to the claimant, I formed the opinion that his evidence in totality consisted of exaggerations and inexactitudes (discussed further below). His evidence was neither crisp nor precise but rather seemed to be shrouded in uncertainties. He was not a very believable witness. To every question asked under cross examination, the claimant's answer was couched in vagueness, which made it very hard to believe. In these circumstances, I find the sum of **\$165,000.00** to be a fair, reasonable and appropriate award.

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<sup>2</sup> *Dial v Ali* HCA 1709/1976

<sup>3</sup> *Taitt v Rampersad* HCA 1052 of 2006

<sup>4</sup> *Moreau v Port Authority* HCA 3958 of 2006

## Special Damages

16. It is trite law that special damages must be pleaded and proved and consist of out of pocket expenses and loss of earnings incurred down to the date of trial. Such damages are generally capable of substantially exact calculations see *Bernard v Seebalack* (supra). In his statement of case, the claimant pleaded special damages as follows:

- Medical expenses and continuing - \$500.00
- Certified copy and travelling - \$100.00
- Travelling and continuing - \$500.00
- Loss of earnings as a landscaper at \$1,500-\$2,000 per week from 6/11/05 and continuing.

17. In his submissions, the claimant has sought special damages in the sum of \$1,200.00, referring to the receipt attached to his witness statement dated 14<sup>th</sup> April, 2010 from Dr Rasheed Adam. The defendant argues that the claimant had not annexed any documentation to his statement of case in support of medical expenses as Part 8.6 (2) CPR demands, and as a result, the claim for special damages must be disallowed. This I reject as it is clear that the receipt exhibited to the claimant's witness statement was obtained **after** the filing of the statement of case. It is a legitimate expense with respect to the injuries suffered by the claimant arising out of the accident. Further, Dr Adam gave viva voce evidence in court of the examination he conducted on the claimant. Thus, I am prepared to award the claimant the sum of **\$1,200.00**.

18. As a result of the accident, the claimant claims that he suffered loss of earnings. The claimant brought no documentary evidence to the court in support of his earnings being \$1,500.00 - \$2,000.00 per week. I considered that as a labourer such documentary evidence may not easily be forthcoming so I turned to his viva voce evidence and witness statement as well as that of his witnesses. The claimant stated in his witness statement that he charged on average the sum of **\$200-\$300** for a medium yard and that he would charge **\$300-\$500** for a large yard. Of particular interest were his responses under cross-examination, part of which is documented hereunder:

Q: How long before the accident you were a landscaper?

A: Can't give you how long I was in it I can't remember.

Q: In paragraph 20 you said 10 years?

A: It is about that or it could be less.

Q: How much customers you did landscaping for?

A: A lot.

Q: What you mean 5, 10, 50 or 100?

A: Over 20 or more.

Q: You have 20 in all?

A: Could be more.

Q: How often you visited to do yards?

A: I work by call.

Q: How often they call?

A: That question is hard to answer.

Q: Is it once every two months or week?

A: That is hard to answer.

Q: What do you do by customers?

A: By some I cut yard plus edges, trees, lawn everything.

Q: You alone do jobs?

A: Yes I alone.

Q: How much are you paid per job?

A: According to job and size of property.

Q: Line 8, paragraph 20 – so roughly you earn 6 – 8 thousand per month?

A: Yes.

Q: What you did with the money?

A: The majority I put it in the bank.

Q: Do you know if a bank statement is attached to the witness statement; have you produced any?

A: No

Q: You don't think that it was necessary to bring a bank statement?

A: No

Q: How much you use to put in the bank?

A: To tell the truth, I've a family of 2 plus a wife so I can't give you a full figure of what I does put away.



19. Having had the opportunity to listen and observe this claimant's demeanour as he gave his evidence, I found him to be flippant and less than believable. He was the sole operator of his small business yet, despite telling the court that he places 'the majority' of his earnings in the bank, could not clarify what he considered to be "the majority". Apart from the evidence above, he could not say when pressed under cross-examination what was his expenses or the cost of servicing (maintaining) the sole machine he used to run his business. Given that he only had one machine, and not a fleet, I find this hard to accept. It was necessary to weigh his evidence with that of his witnesses.

20. The corroborating evidence before the court with respect to this claim of loss of earnings was that of Mr Glenford Doyle (hereinafter "Doyle"). Doyle stated in his witness statement that around 2001, the claimant started to do landscaping work for him and would cut his yard once every 3-4 weeks. Doyle stated further that he would usually pay the claimant **\$150.00 - \$200.00** to cut his yard according to how high the grass was. This payment was made in cash and he never requested a receipt from the claimant, as he was a small operator. Under cross-examination, Doyle stated that he would class his yard as a "big yard". It is his evidence that he would also ask the claimant to trim the trees in his yard; rake the yard; give it a general cleaning; wash his motor vehicle and work as a general handyman. He does not state if there was any additional fee attached to these services or if they were covered by the \$150.00 - \$200.00 paid to the claimant.

21. I note the inconsistency between the claimant's viva voce evidence and that of his sole witness, Doyle. If Doyle's evidence is accepted, it is safe to assume that the claimant would be paid at least \$150.00 - \$200.00 for a big yard, which conflicts with his evidence that he charges **\$300-\$500** for a large yard. In fact, I note that nowhere in his evidence does the claimant state that he charges \$150.00 for any size yard. Further, his seeming inability to provide clear answers to questions posed was a source of concern for this court in assessing the credibility of the evidence of the claimant. To my mind, this claimant was not as forthright as he could have been considering his responsibility to prove his claim for special damages. His evidence was imprecise, vague and shrouded in uncertainties and even when pressed under cross examination to provide details and clarity to various aspects, such as loss of earnings, he was unable to do so. Given his display under cross-examination, the circuitous responses to very simple questions, he

proved to be an unbelievable and unreliable witness. I concluded that he was trying to manipulate and mislead the court as to his actual earnings.

22. In the circumstances, I was prepared to and in fact only accepted that –

- (i) The claimant did landscaping and odd jobs in order to gain income.
- (ii) The claimant was unable to return full time to this type of work as a result of his injuries.
- (iii) The claimant earned somewhere in the range of \$150.00-\$500.00 for a medium to large yard.
- (iv) The claimant's occupation was seasonal, with his earnings fluctuating on a "need to basis".

23. I am, however, unable to accept, without more substantial evidence, that the claimant's client base was "20 customers or even more." I note in his evidence in chief he stated, "*I would walk around in certain areas and simply ask people if they needed their grass cut. If they said yes I would do the job and they would pay me on the spot.*" There was a clear uncertainty as to a fixed or guaranteed clientele. There was no documentary or corroborating evidence that he was the daily or even weekly recipient of landscaping or odd jobs. Doyle's evidence was that the claimant worked for him every 3 to 4 weeks but that he (Doyle) did not cut his grass regularly in the dry season. In fact, Doyle stated that he would have his grass cut "once for the month" during the dry season. This court also notes the lack of documents, receipts, bank statements or invoices/bills evidencing purchase or maintenance of landscaping equipment. In this regard, I bear in mind the recent observation of the Court of Appeal in the ***Great Northern Insurance Company v Ansola***<sup>5</sup> case that when considering proof of special damages on the basis of only viva voce evidence the court, "*should be slow to reject the unchallenged evidence simply and only on the basis of the absence of supporting evidence.*" In the present case, this court was unconvinced by the evidence because the credibility of the claimant was in issue.

24. In determining loss of earnings also, I note with interest the evidence of Dr Adam who in discussing the claimant's unfitness for work seemed convinced that he was an electrician by trade and did general labouring. I also bear in mind that he first saw the claimant in 2010, more than 4 years after the accident, for evaluation purposes. Of note also is that the claimant has been awarded a 50% permanent partial disability and the evidence itself does not confirm total

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<sup>5</sup> *Great Northern Insurance Company v Ansola* CA Civ No 169 of 2008

incapacity. In the circumstances, I was minded to treat this not as a total loss claim but as a partial loss claim, taking into account also the contingencies of life.

25. On the basis of the evidence before me, the award of loss of earnings is based on an average income of \$3,000.00 per month by the claimant, working at least on one medium yard (or large) per day at \$150.00. Further, the claimant's claim that he earned weekly between the sums of \$1,500 - \$2,000 confirms this since (based on a 7 day week) he would have worked at least 1 to 2 jobs per day at most. I am satisfied that the claimant's loss would have approximated at least to \$172,200.00. I bear in mind that the resultant effects of the injuries sustained by the claimant may to some extent militate against him finding suitable alternative employment but he was not a total handicap on the labour market. I am prepared to reduce this sum by 50% (inclusive of 25% for contingencies of life). The claimant is thus awarded \$86,100.00 to cover his loss of earnings.

26. An award of **\$87,300.00** is therefore made under the head of special damages.

### **Future Earnings**

27. 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. See *Munroe Thomas v Malachi Forde & Ors*<sup>6</sup>. In the instant case, it is not in dispute that the claimant was unemployed at the date of the assessment as he gave evidence that he has not been able to work since the accident. The medical evidence of Dr Adam which was confirmed under cross-examination was that the claimant is unfit to work "in any capacity in his level of training." In his viva voce evidence, Dr Adam refers to the claimant's level of training being that of an electrician and general labouring. It is clear that his evidence was based on what he was told by the claimant and I note that he first saw him 4 years after the accident and only for the purpose of preparing a report. I was not very persuaded by his evidence.

28. Before the accident, the claimant was employed as a landscaper, cutting yards, trees and plants. His witness, Doyle, testified that the claimant did not return to work for him after the accident. The claimant claims that he cannot return to this type of strenuous work as it would require him

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<sup>6</sup> *Munroe Thomas v Malachi Forde & Ors*. Civil App No 25 of 2007

to walk long distances with a weed whacker and tools on his back in the sun. The claimant states that before he started landscaping, he worked in various labouring jobs (welder, fabricator, mason, and plumbing) to which he cannot return as his body cannot handle it. To be noted is that he was awarded a 50% permanent partial disability by Dr Adam, which does not speak to a total incapacity. In fact, he indicated under cross-examination that total loss of earnings would apply to someone who is completely paralyzed from neck down, but the claimant's incapacity relates to "his ability to perform in his physical capacity". Given the evidence, this court was not prepared to assess the claimant's future loss of earnings on a total loss basis but on a partial loss basis.

29. In respect of the loss of future earnings, counsel for the defendants submitted that there was no credible evidence regarding the claimant's loss and, therefore, on the authority of *Blamire v South Cumbria Health Authority*<sup>7</sup>, he suggested a lump sum award. The claimant, however, suggested an income of \$229.00 per day as reasonable and proposed a multiplicand of \$59,540.00. Counsel further submitted a multiplier of 18. I note that the income of the claimant would have fluctuated and that the claimant has not provided any documentary evidence as to his average monthly earnings but states in his witness statement that he earned on average \$200-\$300 per job, with a weekly income of \$1,500-\$2,000. I did not agree that this was a case suitable for the *Blamire* award or that the evidentiary difficulties justify a departure from the traditional multiplier/multiplicand method to assess the quantum of loss. I, therefore, used the average income of the claimant as \$36,000.00 annually. Making the deduction of 2/3 for the claimant's reduction in earning power, I am minded to apply the multiplicand of \$12,000.00 and, bearing in mind that the claimant was 34 years of age at the time of assessment, a multiplier of 15. The claimant is, therefore, awarded loss of future earnings in the sum of **\$180,000.00**.

30. In the circumstances, this court made the following order for general and special damages:

It is hereby ordered that the defendant and co-defendant do pay to the claimant:

- a. General damages for pain and suffering and loss of amenities in the sum of one hundred and sixty five thousand dollars (\$165,000.00) inclusive of interest;

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<sup>7</sup> *Blamire v South Cumbria Health Authority* (1993) PIQR Q1

- b. Special damages in the sum of eighty seven thousand, three hundred dollars (\$87,300.00) inclusive of interest;
- c. Loss of future earnings in the sum of one hundred and eighty thousand dollars (\$180,000.00);
- d. Costs as assessed in the sum of \$38,838.00; and
- e. Stay of execution of twenty eight (28) days.

Dated 21<sup>st</sup> January, 2013

**Martha Alexander**

**Master**

**Kimberly Romany**

**Judicial Research Assistant**