

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-03126

BETWEEN

MARVIN RAYMOND LYONS

Claimant

AND

SHERLON CASEMAN

MERVIN ISAAC

REINSURANCE COMPANY OF TRINIDAD AND TOBAGO

Defendants

Before: Master Alexander

Appearances:

For the Claimant: Mr Yaseen Ahmed

For the Defendants: Mr Keston McQuilken instructed by Ms Helen Joseph

DECISION

A. BACKGROUND

1. This assessment of damages arises from the personal injury claim filed on 31st March, 2011 following a motor vehicular accident on 13th March, 2009 in Wallerfield for which judgment on liability was obtained on 1st December, 2011. On the day of the accident, the claimant was driving along the Eastern Main Road, Wallerfield when the second defendant, who was in the process of overtaking another vehicle, collided with the claimant's motor vehicle TAZ 8033. The claimant filed his claim seeking compensation for the personal injuries he sustained in that accident and to defray the expenses to which he has been put. He called as witnesses on his behalf Dr Shevanand Gopeesingh, Ms Natalie Parris (the claimant's

common-law wife), and himself. His damages were assessed using the time honoured principles laid down in the seminal case of *Cornilliac v St Louis*.¹

B. GENERAL DAMAGES

The Nature and Extent of Injuries

2. The claimant sustained multiple injuries. In his amended statement of case, these injuries were pleaded and particularized as: posterior dislocated hip; compound comminuted fracture of the right tibia; compound fracture of medial left malleolus; comminuted fracture of the right acetabulum; and soft tissue chest injury. Consequent on these injuries, he sets out in his amended statement of case that he suffers with pains in the right hip; right leg; left ankle on walking; stiffness in the right hip; diminished external rotation and abduction by 10⁰ in the right hip and diminution in the dorsi flexion by 10⁰ of the left ankle.
3. He testified that following the accident, he was taken to the Arima Hospital and then to the Mt Hope Hospital where his wound on the left ankle was stitched. These injuries resulted in one foot being shorter than the other. It is his evidence that he underwent several surgical procedures including on 15th March, 2009 where surgery was done to put his hip back in place and insert a cast on his right shin. His right leg was strapped to weights and his left ankle, which was broken, was placed in a back slab. Subsequently, Dr Kumar diagnosed his condition as having fracture dislocation, right hip fracture, right tibia and left ankle fractures. There was no rebuttal evidence called to this medical evidence. Counsel for the defendants in his submission has taken issue with the claim of posterior dislocated hip, as not being supported by the medical evidence/MRI scan and the soft tissue chest injury as not being proved.
4. The claimant testified that on 6th April, 2009 surgery was performed to his right shin/tibia area with placement of a metal plate and 7 screws. There was an infection in the shin area for which he was prescribed antibiotics. A further surgery to the left ankle took place on 4th June, 2009 which lasted for 3 hours. These incidences of surgeries have not been challenged.

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

On 23rd February, 2010 MRI results showed fractured acetabulum with a medial displacement of the fracture fragments and undisplaced fracture of the head of the femur on the right side and moderate joint effusion with haemorrhage synovitis. The final surgery took place on 15th May, 2012 to remove the metal plate screws from the shin area. Between October 2011 to May, 2012 he remained on antibiotics for the discharge to the right foot.

The Nature and Gravity of the Resulting Disability

5. The evidence points to the effects of the claimant's injuries continuing. In his report dated 17th May, 2010 Dr Gopeesingh recommended physiotherapy and possible right hip replacement and ascribed a 45% permanent partial disability. Subsequently, following an examination of the claimant in July, 2012 the doctor recommended that the hip surgery be performed at a cost of \$80,000.00 and post operation physiotherapy of approximately 30 sessions. Counsel for the defendants has asked that Dr Gopeesingh be deemed to be not credible as a witness given that he saw the claimant for the purpose of assisting him with legal proceedings more than 1 year after the accident; and relied on dated x-rays to recommend ankle surgery. I had the benefit of hearing Dr Gopeesingh under cross examination and did not find him to be an unreliable witness. I accept that the effects of his injuries are serious enough to have left the claimant with some measure of continuing disability.

Pain and Suffering

6. Evidence as to the pain and suffering of the claimant has been presented in a clear, precise, credible and cogent manner. The claimant's evidence speaks to immediate intense and unbearable pains in his right foot, right leg, hip and chest areas, particularly on attempting to move, when the accident occurred. This pain continued while the fire officers were cutting him out of the truck and at the Arima Hospital, where he was initially taken, then at the Eric Williams Medical Sciences Complex to which he was transferred. His evidence is that at no point, from the accident site to the hospitals to which he was taken, was he administered any painkillers. When he awoke in the hospital on the day after the accident, he still felt unbearable pain in his two feet, chest and hip area. He was unable to move so was given painkillers. The pain continued and was worse at nights, despite being given medication both

orally and intravenously. He experienced pain throughout the first 3 weeks he spent at hospital. He testified that the several surgeries he underwent were painful (once the anaesthetics wore out); his right leg was shorter; he was bedridden; he had to use a bedpan; and he required the assistance of nurses or his wife to feed and clean himself. These events took an emotional toll on him leading to an onset of depression. In addition, the wound on his right shin became infected by a “flesh eating” bacterium that resulted in him being isolated from the other patients and being placed on stronger antibiotics. At this point, he became “severely depressed because of the infection” in his foot. Following 5-6 weeks of being hospitalized, the pain did decrease to a moderate pain in the area of his right waist but became sharper whenever he moved on the bed. He also continued to experience moderate pain and discomfort in his feet, ankle and hip but the chest pains had decreased significantly.

7. He spent 3 ½ months in the hospital before being discharged, “When I was discharged from the hospital, my right tibia/shin was still in bandages and the infection was present and was causing discharge, my left ankle was in a cast and my waist and hip was (sic) in moderate pain.” After he was discharged from the hospital, he remained wheelchair bound for several months and took 3 painkillers per day and later 2 per day. Intercourse caused sharp, intense pain in his waist so he avoided it. He commenced the use of crutches sometime in November, 2009 but, experienced great difficulties in moving around because of the pain and required assistance from his wife. “At that point in time I was only able to walk for no more than 15 minutes without getting severe pain to the right side of my hip area. Also, I was not able to sit for long periods since I was getting sharp pains in my hip area.” He gave clear evidence also of reducing pain, which he described as “moderate to severe” on ambulation for long periods or on build up of the discharge in his right shin. By February, 2010 the infection in his right leg had become chronic. However, by July, 2010 he had stopped using crutches; was moving around with a walking stick but still experiencing continuous “severe pain and discomfort” in the hip area. “[P]resently I cannot walk for more than half an hour without getting intense pain in my hip area and my two feet. Also I cannot sit for long periods and bend down properly without sharp pains. I cannot make any sudden movements without getting sharp pains in my hip area. Since the third surgery took place I now take one painkiller every two days. Whenever I attempt to have sexual intercourse I still

experience sharp pains in my waist area. Also, I still have to undergo blood test at the Orthopaedic clinic to ensure that the infection is fully healed. I currently have large scars on my tight (sic) shin area and I am very embarrassed to wear short pants (sic) since people stare at me. Whenever I go out I always wear long pants.”

Loss of Amenities

8. The accident has caused many changes in the claimant’s life. He testified that pre-accident he lived a very active life involving a lot of physical activities such as football, cricket, basketball, skipping, jogging and other forms of exercise. He also led a very active social life which included socializing with family and friends. Additionally, he played an active domestic role as he would do gardening, trimming the lawn and fence, cleaning the yard, cutting overgrown bushes, painting and cleaning and doing minor repairs around the house. Since the accident, he finds it challenging to perform these tasks; he is unable to walk for long periods so cannot even take his family out to various eating establishments that they frequented prior to his injuries. Sexual intercourse causes sharp pains in the hip area and has affected his marital life.

Effect on Pecuniary Prospects

9. Prior to the accident, the claimant used to drive and take gas tanks off the truck for RAMCO Industries Limited (hereinafter “RAMCO”). He has since, however, been unable to return to work. Around November, 2010 he tried some masonry for 1 hour and had to stop. He also did PH taxi work for about 1 month and as a panel van driver between February, 2011 to July, 2011, for 2 to 3 days per week, but did not continue due to severe pains. He is currently receiving social welfare of \$1,450.00 monthly (see below). To be noted is that there is no objective medical evidence that the claimant is unable to work permanently as a result of this accident. He has given evidence that he feels he is unable to resume working and of an aborted attempt to find alternative work as a taxi driver. Of note, it was under cross examination that he admitted to driving a panel van for 5 months also. Whilst I was prepared to accept that during the recovery period following his accident, he would not have been able to work, I was hard pressed to accept his self-diagnosis of permanent inability to work without some more cogent and credible medical evidence in support (discussed further below).

C. CASE LAW

10. Counsel for the claimant advanced several authorities for consideration in arriving at an appropriate award for pain and suffering and loss of amenities and recommended as reasonable compensation in the instant case the sum of \$230,000.00:

- ***Johnson Ansola v Ramnarine Singh, Ganesh Roopnarine and the Great Northern Insurance Co Ltd*²** – where a 46 year old plaintiff who was a passenger in a vehicle sustained a severe comminuted compound fracture of the right lower tibia and fibula, a right talar dislocation and a right shoulder dislocation. There was a diminished range of motion of his right ankle and he complained of severe pain in the right ankle and pain in the right tibia and fibula. He was unable to stand for long periods and had to use a stick to move around because of his injuries. Operation of the right ankle was advised as a requirement to correct these problems and relieve pain. Permanent partial disability was assessed at 30% which could be reduced by 10% if surgery is performed. He was awarded general damages for pain and suffering and loss of amenities of \$150,000.00 and for future surgery \$60,000.00 which was unchanged on appeal.
- ***Caribbean Molasses Company Trinidad Ltd v Ganace*³** – where a plaintiff/taxi driver suffered a compound comminuted fracture of the right tibia and fibula and a fracture of the right femur. A pin was inserted in the tibia and a rod in the bones and he developed an infection of the wound, which subsequently subsided. His knee movement was restricted from 180⁰ to 160⁰ and movement was severely limited. His ankle joint was stiff and he could not drive and had to walk with crutches. The Court of Appeal increased the award for general damages from \$40,000.00 to \$126,000.00 of which \$96,000.00 represented loss of prospective earnings and \$30,000.00 damages for pain and suffering and loss of amenities. This figure was adjusted in December, 2010 to \$195,959.00. Of note is that this case is of some vintage so cautious reliance was placed on it in conducting the comparative assessment.

² *Johnson Ansola v Ramnarine Singh, Ganesh Roopnarine and the Great Northern Insurance Co Ltd* HCA No 3487 of 2003
³ *Caribbean Molasses Company Trinidad Ltd v Ganace* Civ App No 7 of 1979

- ***Cindy Kanhai v Miguel Mohammed & ors***⁴ - where Master Paray-Durity on 27th June 2008 awarded \$250,000.00 to a claimant who was 20 years old at the time of the assessment for compound fractures of the tibiae and fibulae of both legs, surgeries; legs of different lengths; continuing pain; and scarred leg; as adjusted to December, 2010 to \$309,622.00.
- ***Dexter David v The Minister of National Security, The AG of T&T, Arvin Kalloo and Stacey Gremona-Simmons***⁵ - where a plaintiff/police officer suffered a fracture of his hip and the mid shaft of his right femur in a vehicular collision. He experienced severe pain in his hip and right leg; underwent surgical procedures to repair the fractured hip and a steel pin and plate were placed in the area of the fracture. In this case, there existed a high probability that arthritis in the hip would develop and it would become necessary to perform surgery to remove the pin and plate and replace the hip in order to treat the arthritis in the future. The plaintiff was unable to run, squat or stoop for too long and this adversely affected his ability to work and be self sufficient. He continued to experience moderate pain, which had to be controlled by use of analgesics for 1 ½ years after the accident. He was awarded \$200,000.00 as general damages.

11. Counsel for the defendants has suggested \$180,000.00 as fair compensation based on several recent authorities including:

- ***Nimrod Joseph v Roy Edwards and Presidential Insurance Company Limited***⁶ – delivered on 24th February, 2012 where a claimant sustained a fractured right tibia and fibula; comminuted intra-articular fracture left distal radius; cerebral concussion; multiple abrasions to his arms, right thigh and left leg; and multiple facial lacerations and abrasions with loose incisor tooth. He used crutches for 2 years and was still walking with the aid of crutches at the time of the assessment. He was ascribed a permanent partial disability of 60% and was awarded \$160,000.00 in general damages.

⁴ *Cindy Kanhai v Miguel Mohammed & ors* CV2010-01087

⁵ *Dexter David v The Minister of national Security, The AG of T&T, Arvin Kalloo and Stacey Gremona-Simmons* HCA 1838 of 2002

⁶ *Nimrod Joseph v Roy Edwards and Presidential Insurance Company Limited* CV 2008-00500

- *Nyeem Mohammed and Natalia Mohammed v Sarju Singh*⁷ – delivered on 29th June, 2012 where the first claimant sustained comminuted segmental tibia and fibula displaced fracture, patella tendon fracture and fifth metatarsal fracture to the left lower limb; and displaced patella fracture with patella tendon rupture and ACL rupture to the right lower limb. He also suffered an extensive Grade III B open fracture dislocation of the foot and ankle injury with missing tarsal bones. He also suffered injury to his chest, rib fractures and pulmonary consolidation. He also had amputations of the right great toe and first metatarsal bone; multiple pre-operative blood transfusions and was still using a walking stick at the assessment. He was awarded \$225,000.00 as general damages. To my mind the injuries in that case were more severe than in the present case.
- *Nicholas Celestine v Vishnu Ramlakhan & Ors*⁸ – delivered on 29th June, 2012 where a claimant who sustained fractures of the left tibia and fibula bones of the left leg; ACL injury to the right knee Grade II; trauma to the head, neck, right knee and left leg; costochondritis from blunt trauma to the right anterior chest wall; cerebral concussion; cerebral oedema and whiplash injury to the neck was awarded \$140,000.00.

12. For pain and suffering and loss of amenities, this claimant's case has been clear and compelling. He has endured physical, emotional and psychological distress. In particular, he spelt out the onset of depression following the infection at the wound site and must be compensated for his pain, discomfort and inconvenience following this accident. Considering all the evidence, I find the sum of **\$180,000.00** will meet the justice of this case.

⁷ *Nyeem Mohammed and Natalia Mohammed v Sarju Singh* CV.2010-03904

⁸ *Nicholas Celestine v Vishnu Ramlakhan & Ors* CV.2007-03889/HCA S-411 of 2005

D. SPECIAL DAMAGES

13. The claimant has claimed special damages as follows:

1.	Cost of medical report	\$600.00
2.	Cost of painkillers and continuing	\$1,800.00 and continuing
3.	Travelling to and from Mt Hope Hospital 12 times at \$200.00 each	\$2,400.00
4.	Loss of earnings at \$3,012.00 per month from 13 th March, 2009 and continuing	-
5.	Future cost of hip replacement surgery	\$80,000.00
6.	Cost of x-rays on 27 th July, 2012	\$700.00
7.	Cost of doctor's visit on 27 th July, 2012	\$300.00
8.	Future cost of physiotherapy 3 (sic) sessions at \$300.00 per session	\$900.00 (sic)

- *Items Nos 1, 2, 3, 6 and 7*

It is trite law that special damages must be pleaded and proven strictly⁹. Whilst pleaded, he has provided no documentary evidence of these losses. The claimant sought to give evidence that he has purchased painkillers at the cost of \$80.00 to \$90.00 per month after being discharged from the hospital in June, 2009 and is still purchasing these painkillers at a much reduced extent. Under cross examination, he claims that he has purchased painkillers as late as September, 2012 but that all his receipts were misplaced. Of note is that the medical examination for which he seeks reimbursement was conducted a mere 2 months approximately before the filing of the witness statement. Also, the receipts for painkillers bought in the months preceding the witness statement, and even in the same month when it was filed, could not be produced. I find it disconcerting that this claimant has failed to bring properly into evidence before this court the receipts that were available. It is unacceptable and incredible that a claimant who is aware that he has proceedings before a court could be so careless in the handling of the evidence to support his case and expect a court to compensate him on his mere say so. Claimants who ignore judicial caution of the need to support their claims and choose to do otherwise when approaching an assessing court are not to be reward for such wanton disregard. Claims based on estimation and guesswork, as

⁹ *Mario Pizzeria Limited v Hardeo Ramjit* Civ App No 146 of 2003

artful and creative as they may be, will not succeed in an assessing court, especially when these could easily be proven. These claims are disallowed for lack of proof.

Item 8

The claimant has made a claim for 30 sessions of physiotherapy at a cost of \$300.00 per session in the sum of \$9,000.00. He has not produced any evidence from a reputable physiotherapist in terms of the cost and length of these sessions. Dr Gopeesingh has, however, given evidence of the need for such post operative sessions, which he approximates to be about 30 at the estimated cost of \$300.00. He has admitted under cross examination, however, that a physiotherapist would be the best person to determine the exact cost and number of sessions required. I accept the doctor's evidence that the claimant would require physiotherapy and do not think he should be denied outright this opportunity because of a lack of documentary evidence as to the exactitude of the cost and number of such sessions. Since conclusive evidence as to the number of sessions required is not before this court, I am prepared only to allow half of the sum as claimed. He is allowed \$4,500.00 to defray physiotherapy expenses.

Loss of earnings (pre-trial)

The claimant claims loss of earnings less deductions from March, 2009 to February, 2013 at \$3,012.00 in the sum of \$144,576.00. He has provided a job letter from RAMCO dated 27th April, 2009 which states that he has worked as a house to house contractor since 25th May, 2003 earning weekly the sum of \$753.00. It also confirms that the claimant has not worked since 14th March, 2009 with the company.

The claimant's evidence is that he worked with RAMCO as a driver, delivering and selling 20 pounds cooking gas cylinders, solely on commission and has never received a basic salary. This is accepted. He claims further that for every 20 pound gas tank he sold, he would receive \$2.75 towards his commission salary. He provided pay slips showing his earnings from October 2008 to March, 2009.

I have reviewed the evidence led on loss of earnings and have not found any medical evidence that speaks to outright inability to work. It is clear from the evidence that the claimant has not resumed his pre-accident job and he links this to his injuries and the challenges these pose to his work of driving and lifting 20 pounds cylinders off the truck. Given the nature of his injuries, I can accept that they would have posed some challenges to the performance of his pre-accident job. I note his evidence of seeking alternative employment sometime after November, 2010 doing masonry, which he had to abandon because of pain in his hip area as well as of driving a PH taxi for 1 month (but not every day) also abandoned. It is his evidence that he feels he is unable to resume working due to the pain in his hip and his ambulation challenges.

Of note is that under cross examination, he admitted to also driving a panel van for income for at least 5 months. I view with some disquiet that this information was only solicited under cross examination and there was no evidence of the income generated from these several private stints. To my mind, this claimant was not being entirely upfront with this court. The lack of forthrightness of this claimant and the failure to supply full evidence of his post-accident earnings to this assessing court was frowned upon. Nevertheless, I accept the evidence that he worked for six months then had to stop due to his pains. To my mind, this highlighted that he was not a total handicap on the labour market but also bolstered his claim that his disability had some effect on his ability to work. Based on all the evidence before me, in particular the nature of the injuries suffered by this claimant, I am prepared to allow loss of the earnings up to the date of assessment.

I note that counsel for the claimant has submitted that he earned as a PH taxi driver for an average of 20 days at \$70.00 per day the sum of \$1,400.00 and as a panel van driver from February 2011 – June, 2011 for 12 days per month for 6 months at \$120.00 per day the sum of \$8,640.00. It is unfortunate that this type of evidence was not brought properly before this court. Given the uncertainties and/or variations in his income earning, I am prepared to accept the claimant's monthly income to be \$3,175.33 as estimated in the workmen compensation agreement. From this sum is to be deducted workmen compensation; welfare

payments received and private earnings. I will also apply a deduction of 15% for contingencies of life.

\$3,175.33 per month for

Period of loss of 46 months

i.e. March, 2009 to January 2013 = \$146,065.18

Less 15% for contingencies of life (\$21,909.78)

Less

Mitigation:

▪ PH taxi driving = (\$1,400.00)

▪ Panel van driving from February - July, 2011
at \$120.00 per day for 6 months = (\$8,640.00)

Payments made:

▪ Welfare payments August, 2009 to May, 2011
plus back pay of 2 months (\$1,100.00 for 24 months) = (\$26,400.00)

▪ Welfare payments May, 2012 to February, 2013
at \$1,450.00 for 10 months = (\$14,500.00)

Total loss of earnings = \$73,215.40

Future surgery

14. The claimant is seeking an award for future surgery based on the evidence of Dr Gopeesingh that he would need hip replacement. This is allowed in the sum of \$80,000.00.

Loss of future earnings

15. The claimant has not satisfied me on the evidence that he is medically unfit to work permanently. To my mind, any claimant who is so incapacitated will produce the necessary evidence to bolster this claim. Nevertheless, I note that he may still require hip replacement surgery. I also note that alternatively the evidence points to him being on a waiting list at the hospital to insert pins into his hip. He has elected not to produce updated medical reports on his condition which would have better assist this court in coming to a conclusion. I also bear in mind that this claim was not disproved. In addition I could find no sufficient

evidence to substantiate or discredit a claim for loss of future earnings or that he suffers any continuing medical dysfunctions that disqualified him from working permanently. I accept, however, that with his injuries he would have suffered some loss of future earnings but was unable to properly determine the extent of this loss. Given the unsatisfactory state of the evidence adduced, I was not prepared to award any sum for loss of future earnings upon the traditional multiplier/multiplicand method. I then turned to see if he should be considered for a lump sum award. In so doing, I considered that having sustained his injuries, there was some continuing incapacitation and the medical evidence that he required hip replacement and/or further surgery to insert a pin. I also bore in mind that he could at least work for 6 months out of the year. Based on the evidence before me and the evidentiary uncertainties in assessing quantum, I find that an award based on the lump sum approach would meet the justice of this case. Thus, he is awarded a lump sum of \$80,000.00 for loss of future earnings. Workmen compensation of \$68,587.12 ought to be deducted from this award, leaving a remainder of \$11,412.88.

16. It is ordered that the defendants do pay to the claimant:
- i. General damages in the sum of **\$180,000.00** with interest at the rate of 9% per annum from 31st March, 2011 to 17th September, 2013;
 - ii. Special damages in the sum of **\$77,715.40** with interest at the rate of 6% per annum from 13th March, 2009 to 17th September, 2013;
 - iii. Future loss of earnings in the lump sum of **\$11,412.88**;
 - iv. Future surgery in the sum of **\$80,000.00**.
 - v. Interim payment of \$55,000.00 to be deducted.
 - vi. Costs as assessed in the sum of **\$34,373.00**;
 - vii. Stay of execution of 28 days.

Dated 17th September, 2013

Martha Alexander
Master