

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-03126

BETWEEN

RAMESH SAM

Claimant

AND

TROPICAL POWER LIMITED

Defendant

Before: Master Alexander

Appearances:

For the Claimant: Ms Rekha Ramjit

For the Defendant: Mr Ronnie Vinda Persad instructed by Ms Stephanie Boodoosingh

DECISION

A. Background

1. The damages of the claimant, Ramesh Sam (hereinafter “Sam”) are being assessed hereunder pursuant to the order¹ of Rampersad J by virtue of which judgment was entered for **60%** of his claim against the defendant. The parameters of this assessment were defined by the claim form and statement of case as follows:

General damages for –

- (i) pain and suffering and loss of amenities;
- (ii) loss of future earnings

Special damages for –

- (i) Cost of medical report = \$ 350.00
- (ii) Cost of travelling = \$ 160.00
- (iii) Cost of physiotherapy = \$ 440.00
- (iv) Loss of actual earnings = \$41,600.00

¹ Dated 5th July, 2011, which was made by consent at the trial

Facts

2. Sam, a 36 year old truck driver, was employed with the defendant company (hereinafter “Tropical Power”) with duties that included driving a 3 ton truck and operating machinery located thereon viz. a pump and a diesel generator. On 10th August, 2007 Sam, having climbed a ladder at the side of the said truck, was pumping diesel into a steel tank bolted down on its tray when he fell off sustaining injuries.

Injuries

3. His injuries as particularized in his statement of case were: diffused severe tenderness with mild swelling and severe paraspinal muscle spasms; severe restriction of movements at the lower spinal region; mild swelling of the left knee and severe localized tenderness at the medial femoral condyle with mild effusion; spondylotic changes in lower lumbar regions; L4-L5 disc bulge; bilateral stenosis causing irritation of the L5 and L4 nerve roots; and **possible** intra substance tear of the medial meniscus. Subsequently, Dr Neil Persad’s report dated 2nd April, 2009 pointed to diffuse annular bulging at the L4/L5 level with narrowing of the lateral recess bilaterally with potential for nerve root impingement; lumbar disc injury and unstable medial meniscal tears on his left knee. Another report dated 13th August, 2009 of Dr Neil Persad confirmed lumbar disc herniation and severe nerve root impingement.

Evidence

4. Documentary evidence properly before this court, **on behalf of Sam**, included:
 - a. Medical report of Dr Anil Kumar dated 17th March, 2008;
 - b. Medical report of Dr Neil C Persad dated 29th May, 2008;
 - c. Medical report of Dr Neil C Persad dated 2nd April, 2009;
 - d. Medical report of Dr Neil C Persad dated 13th August, 2009;
 - e. Witness statement of Dr Neil C Persad filed on 15th June, 2010;
 - f. Witness statement of Ramesh Sam filed on 15th June, 2010.

There was viva voce evidence and cross examination, **on behalf of Sam**, of the following:

- g. Dr Neil C Persad
- h. Ramesh Sam

5. Documentary evidence properly before this court, **on behalf of Tropical Power**, included:
 - i. The Report of exponential Investigations Services;
 - j. Witness statement of Vernon Hanslal filed on 11th June, 2010;
 - k. Witness statement of Michelle Dabiedeen filed on 11th June, 2010, allowed in by permission;
 - l. A Job Orientation Form dated 16th August, 2005; allowed in by consent.

There was viva voce evidence and cross examination, **on behalf of Tropical Power**, as follows:

m. Vernon Hanslal

Examination of the Evidence

Ramesh Sam

6. Sam's evidence is that he began working with Tropical Power approximately 2 years prior to the accident. He was performing his usual duties on a Friday morning, when he fell off the ladder flat onto the ground on yellow boulders. Immediately upon falling, he felt a shock on his left knee and extreme pain. He was taken by ambulance to the Chaguanas Health Facility, where he was treated and discharged. By that Sunday, he was in extreme pain and could not move. He described his pain as a, "shooting pain to both of my calf regions." On Monday 13th August, 2007 Tropical Power provided a vehicle and took him to its doctor, Dr Anil Kumar, at Westshore Medical Centre, where he was treated at its expense until he was referred by letter dated 17th March, 2008 to another Orthopaedic Surgeon or Neurosurgeon for continued care. Sam did consult Orthopaedic surgeon, Dr Neil Persad, and obtained a medical report dated 29th May, 2008, and subsequently 2 others, but did not follow up care with him. Under cross examination, he confirmed his visit to Dr Neil Persad was for the purpose of a "one off" assessment for the court proceedings. He also attended therapy sessions at Sports Medicine and Injury Rehabilitation Clinic Limited, paid for by Tropical Power. He is currently awaiting a date for surgery at the Mt Hope Medical Complex. Tropical Power ceased paying his medical expenses and salary sometime in January, 2008.
7. He testified that as a result of the accident, he cannot sit for long periods; suffers cramps and finds challenging walking to and from the bathroom, hiking or lifting his child. He claims that

if required to sit for longer than ½ hour to 45 minutes; he would have to lean his body to the right side and sitting for that length of time causes his foot to cramp up so he would need to walk around. He testified also that he has suffered a loss of amenities in that his family life is affected by his injuries; he no longer enjoys sexual relations with his wife; has poor bladder control and sometimes passes stool on himself. He can no longer ride a bike or take his family on long car drives without pain. As a result, he feels embarrassed and inadequate as a grown man and has reduced his socializing consequent thereon. He also contends that he tries to make a day's work on the days when he is able to but his pains hinder him from keeping a steady job. He continues to hold a heavy-T driver's licence and earns income by assisting his brother on his truck for one day during the week, for a couple of hours. Under cross examination, he admitted that some of his complaints namely: his inability to sit for long periods; his cramps on standing or sitting for long periods and sexual dysfunctions were not in the reports of Dr Neil Persad. His claim for loss of earnings is discussed further below.

Dr Neil C Persad

8. The salient aspects of Dr Neil Persad's evidence are that Sam first sought his services some **10 months** after his injury and was not under his continued care. He provided a report, as an expert, assessing Sam's injuries, based largely on: the medical history as given by Sam; a review of the MRI; his own medical examination and a report, purportedly from Dr Kumar (Sam's treating physician) but, bearing no letterhead or signature and which was not in evidence. Under cross examination, he was unable to verify certain injuries allegedly sustained by Sam and which were pleaded including – the mild effusion; any swelling and spondylotic changes in the lower lumbar regions. Under cross examination, he also conceded that the only material change between his first 2 reports was based on information from Sam that his symptoms have continued and not on new observations, tests or procedures conducted by him. Based solely on the continued complaints of Sam, he confirms the medial meniscal tears. In his second report dated 2nd April, 2009 he concludes, "Mr. Sam has clinical features of lumbar disc injury as well as unstable medial meniscal tears on his left knee. He remains unfit for work at the present time. His present partial disability continues to be twenty eight (28%) percent." In his third report dated 13th August, 2009, he states, "Examination revealed severe lumbar muscle spasm and clinical features consistent with lumbar disc herniation and severe nerve root

impingement. I have advised him to seek the services of a spinal surgeon as this is the next step in management. A referral was given for him to the emergency department at the Port of Spain General Hospital. I also prescribed a course of steroids. He is unfit for work.” Under cross examination, he admitted that he assessed Sam as “unfit for work” solely in relation to the pursuit of employment as a heavy-T driver and not in relation to any other employment or endeavour. He admitted further that he last saw Sam on 13th August, 2009 so could not speak to his current physical condition, injuries or dysfunction or if he could earn an income. He confirms that his report or notes do not speak to Sam’s claim of sexual dysfunction, poor bladder control or that he hiked or rode bicycles. Further, he could not dispute Sam was driving a heavy-T vehicle and lifting boxes in February, 2010, though he was surprised.

9. After hearing the evidence of Dr Neil Persad and having had the opportunity to note some of the incongruence between his witness statement and oral testimony, I was hesitant to attach much weight to his evidence, particularly with respect to his conclusion that Sam was “unfit to work.” First, I note that he was not the attending or treating doctor when the injuries occurred and first saw Sam some **10 months** thereafter. Secondly, he admitted that his notes contained missing entries. Thirdly, he was unable to address the apparent variance between his assessment of Sam’s injuries and those of Dr Kumar, the treating physician, whose report he purportedly had seen (see below). Fourthly, his findings were based largely on a reconstruction of Sam’s history as reported to him by Sam and others. Whilst this is an option utilized by some medical practitioners, I find this in itself is manifestly unreliable, particularly for an assessment of damages. In fact, some of the material relied on by him to premise his expert opinion (unsigned report of Dr Kumar also bearing no letterhead) were either not furnished to the court for its independent evaluation or debased. I concluded that he could not best speak to or chart Sam’s course of recovery, as he did not manage his care or convalescence. In these circumstances, I was unable to wholly and unquestioningly accept his evidence, particularly the aspects that were based on the regurgitation of Sam’s continuing complaints without clinical examination and confirmation, as to do so would be unsafe. What is accepted are those aspects of his findings that are based on his direct observations, examinations and evaluations ensuing therefrom.

Dr Kumar's report

10. Dr Kumar was not called by Sam to give evidence, despite being the attending/treating physician at the time of the injuries and for several months thereafter. His report dated 17th March, 2008 went into evidence by consent. He stated therein that he ultimately could find no medical basis for Sam's continued insistence of "recurrent severe back pain with stiffness" and unchanged pain in the knee. On the basis of prolonged physiotherapy for 6 months; rest from his job; the physiotherapist report of significant improvement; the nature of the injury and the MRI reports, Dr Kumar expressed the opinion that there should have been at least significant improvement, if not resolution altogether of Sam's condition. He then recommended that Sam resumes work, "starting only with light duties for a few months as vocational rehabilitation." Sam refused to return to work so Dr Kumar recommended that he sought other consultation.

11. Based on the evidence before me, I am not satisfied that Sam has advanced any cogent, compelling or unambiguous proof of his pain and suffering and loss of amenities beyond his last visit to Dr Neil Persad on 13th August, 2009; or of his loss of earnings beyond September, 2009; or of any continued dysfunction under which he claims he labours or of the need and intention to pursue future surgery (discussed further below). I came to the view that this is an injured employee who after getting an assessment from his treating doctor that he did not like decided to seek out an alternative assessment that would meet his favour and approval. Once that was obtained, he has not shown any pressing interest in pursuing further medical treatment and/or of returning to gainful employment. I now turn to Tropical Power's evidence with a view to getting some clarity and context for the evidence already led.

Vernon Hanslal's evidence (for Tropical Power)

12. Vernon Hanslal operates an investigative agency and testified that his company was hired to conduct surveillance on Sam and report accordingly. This surveillance was conducted on different days during the working week. He gave eyewitness testimony that Sam was seen pursuing employment for income; lifting boxes and engaging in deliveries, which remained unshaken under cross examination.

Michelle Dabiedeen's evidence (for Tropical Power)

13. Michelle Dabiedeen is the Human Resource Manager of Tropical Power. Her evidence confirms that Sam's employment with Tropical Power was never terminated but rather, he had abandoned the job. He last reported for work on 10th August, 2007 and never returned after that date. Further, she gave evidence that on several occasions thereafter, Sam was offered employment including light duties based on Dr Kumar's recommendation but that he had declined all such offers. She testified further that Sam remains still on Tropical Power's medical plan with SAGICOR for which it pays all premiums. Under this medical plan, 80% of Sam's medical expenses would be reimbursed but he has chosen not to submit claims despite being informed of his benefits thereunder. Tropical Power has paid all his medical bills and full salary up to 2nd January, 2008. The last reimbursement for medical expenses was received by Sam's wife on his behalf on 30th June, 2008. After 2nd January, 2008 Tropical Power stopped paying Sam as he had expressed no interest in returning to work and arrangements were made for him to receive his NIS payments.

C. Case Law on General Damages

14. Parties have advanced several authorities for consideration by this court on determining an award for pain and suffering and loss of amenities, which are as follows:
 - ***Sookhoo v Public Transport Service Corporation***² – where a 42 year old sanitary attendant fell down 12 stairs and suffered injuries including dizziness and pains in the back and thighs; resumed work after 5 months but was unable to bend. Subsequently, it was revealed that he had a lumbar disc lesion and his right straight leg raising was restricted to 15%. He also had normal reflexes but with diminished sensation in the 5th lumbar; a bilateral defect at the 5th lumbar and 1st sacral disc space, compatible with a herniated disc and nerve root compression. This suggested that the nerves to the legs and sexual organs were compressed. There was also spondylosis-thesis at 4/5 level of the vertebral column, which could have been associated with a previous injury or surgery. He was assessed with a 40% permanent partial disability and awarded on 20th February, 1998 \$36,200.00 as adjusted to 2010 to \$80,660.00.

² *Sookhoo v Public Transport Service Corporation* CA Civ 21 of 1993

- ***Richardson v Kiss Baking Company Limited*³** – upon an examination 2 ½ years after the accident and an MRI of the cervical, thoracic and lumbo-sacral spine showed a bulge on the disc L4-L5-S1. Six months after the symptoms were unchanged and the medical findings were post concussion syndrome and neck and lower back strain and it was determined that the symptoms could continue indefinitely or be permanent. At that time he was deemed medically unfit to continue his work as an electrician and assessed with a permanent partial disability of 30%. He was awarded on 31st January, 2000 \$35,000.00 as adjusted to 2010 to \$71,385.00.
- ***Manwaring and Ors v CL Singh Transport Service Limited*⁴** - a 30 year old female plaintiff suffered injuries to the head and back with extensive muscular tenderness and pain in the back. Subsequently, examinations showed a narrowing of the intervertebral foraminae on the left and right level of the 4th and 5th cervical vertebrae; limitation of straight leg raising to 45⁰ on the left compared to 90⁰ on the right; tenderness to percussion over the left sacro-iliac region, but no weakness or problem with walking. Cervical spondylosis and left sciatica were diagnosed. The examining doctor's opinion was that the accident might have aggravated but not caused the problem. She was awarded on 13th January, 1997 \$20,000.00 as adjusted to 2010 to \$46,346.00.
- ***Maharaj v Chapman*** – where for a blow to the right knee which caused inflammation of the synovial membrane of the right knee causing severe pain for 4 – 5 months; swelling and need to use a stick for walking a plaintiff was awarded on 17th May, 1990 \$5,000.00 as adjusted to 2010 to \$17,261.00.
- ***Marchong v T&TEC*⁵** - where for soft tissue injury and lumbar spasm which resulted in some narrowing of the lateral recess at L4-L5 with possible impingement of the traversing L5 nerve root and early disc desiccation at the L5/S1 level; back pain radiating down the leg; pain on prolonged sitting; recommended surgery might alleviate the pain. Jones J awarded \$60,000.00 in May 2010 as adjusted to 2010 to \$62,533.00.
- ***Ravi Dabideen v Century Eslon Limited*⁶** – where for a degenerated disc at L4-L5 and L5-S1, broad base L4-L5 herniation with potential site for nerve root irritation at this point on walking; angular tear at the above level; excruciating back pain and radicular pain; failure at both

³ *Richardson v Kiss Baking Company Limited* HCA 696/1996

⁴ *Manwaring and Ors v CL Singh Transport Service Limited* CA Civ 105/1991

⁵ *Marchong v T&TEC* HCA 4045/2008

⁶ *Ravi Dabideen v Century Eslon Limited* CV 2010-02916

conservative management with physiotherapy and the trial of epidural steroid injection (corrective surgery imperative) an award was made on 13th July, 2012 of \$100,000.00.

- ***Carolyn Fleming v The Attorney General of Trinidad and Tobago***⁷ – where for intermittent pains on both upper and lower back radiating towards legs; L4/L5 S1 nerve root impairment and a permanent impairment of 25%; ligament injury causing instability to the lower back or lumbar spine; inability to sit for long periods or to lift or push items an award was made on 21st May, 2012 of \$80,000.00.
- ***Hyacinth Valere Culley v Krishna Gajadhar and Goodwill General Insurance Company Limited***⁸ – where for pains in the lumbar spine, the left iliac, left hip, Achilles tendon, left arm; and muscular swelling of the posterior aspect of the thigh; difficulty raising left leg off the ground on walking; swelling and tenderness of the knee joint; muscle spasms and dysfunctional uterine bleeding an award was made of \$80,000.00.
- ***Gerard Antrobus v Port Authority of Trinidad and Tobago***⁹ – where for a lumbar disc protrusions; foraminal compromise; diffuse disc bulges L2/3, L3/4 and L4/5; L5/S1 diffuse disc bulge with small posterior right para central protusion and facial hypertrophy causing compromise of the bilateral foramina; mild effusion in the both facetal points; small extradural juxta facetal synovial cyst on the left side; nerve compression and persistent lower back pains an award was made on 25th September, 2012 of \$90,000.00.
- ***Tinto v Bennet and Small***¹⁰ – where for a bilateral genu varum or bowing of both knees (more marked on the left side); swelling of the left knee with loss of appearance of the parapatella fossce, both right and left knee flexion below the expected 130^o; moderate spasm of the left paraspinal muscle mass with all movements of the lumbo sacral spine diminished at full range; limitation of abduction and flexion of the right and left shoulders. The plaintiff was awarded on 11th October, 2002 \$15,000.00 as adjusted to 2010 to \$27,283.00.

⁷ *Carolyn Fleming v The Attorney General of Trinidad and Tobago* CV.2007-02766

⁸ *Hyacinth Valere Culley v Krishna Gajadhar and Goodwill General Insurance Company Limited* CV.2007-00363

⁹ *Gerard Antrobus v Port Authority of Trinidad and Tobago* CV.2009-00726

¹⁰ *Tinto v Bennet and Small* HCA 2133/2001

Loss of future earnings

15. Sam has claimed loss of future earnings citing an inability to earn income for more than 1 day per week. The evidence does not debunk this claim of 1 day per week income earning capacity but showed that he still held a licence for and operated a heavy-T vehicle as well as could lift fairly large boxes, without confirming their weight. I note, however, Dr Kumar's last assessment and recommendation; Sam's refusal to return to light duties; the evidence that he still drives a heavy-T vehicle; Dr Neil Persad's inability to confirm any current inability on Sam's part to earn income as well as the overall lack of updated evidence to support this claim. To my mind, if Sam were only capable of working 1 day per week, this evidence could have been corroborated by an employer, colleague or through documentary evidence in the form of his pay record. He chose not to do so. I bear in mind also that this claim was not disproved. Counsel for Tropical Power has asked this court to note that Sam has not been able to show the nexus between this claim and the injuries sustained. Given the lack of proper evidence, judicial notice was so taken. Consequently, I have found no sufficient evidence to substantiate or discredit a claim for loss of future earnings or that he suffers any continuing medical dysfunctions. In my view, the evidence led on behalf of Sam has been contradictory and unsatisfactory and has failed to reach the threshold that would move this court to make an award for loss of future earnings using the traditional method. I considered, however, that having sustained his injuries, there may be some continuing incapacitation which may affect his future earning capacity but found it a challenge to fairly assess same. Further, in light of his failure to even disclose he is still earning income, I view with suspicion his claim for such continuing losses on the basis of any permanent disability. Of note is the words of Kangaloo JA in ***Monroe Thomas v Malachi Ford and ors*** that "... *in this jurisdiction has grown the tendency for litigants to exaggerate the effect of injuries and to be vague in the evidence given, in the hope that if more is asked for, something that is more or less adequate will be awarded. ... Litigants and their advisers in this jurisdiction must come to understand that ... accidents, though unfortunate, are not lotteries with huge jackpots to be won.*"¹¹ Given the unsatisfactory state of the evidence adduced on Sam's behalf, I was not prepared to award any sum for loss of future earnings upon the traditional multiplier/multiplicand method. I then turned to if he should be considered for a lump sum

¹¹ *Mario's Pizzeria Limited v Hardeo Ramjit* Civ App No 146 of 2003, para. 32, Unrep Jud [T1]per Kangaloo JA

award. In arriving at my decision, I considered the extent to which Sam's evidence was discredited; his challenge with telling the truth; his demeanour in giving his testimony; and particularly the contradictory medical evidence as to his fitness to resume work as well as the fact that he is doing some measure of work. In light of the evidentiary uncertainties, 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 \$30,000.00 for loss of future earnings.

SPECIAL DAMAGES

Loss of earnings

16. Sam claims loss of earnings from the date that Tropical Power ceased payment of his income 5 months after his injuries. His salary as confirmed by Tropical Power was \$5,200.00 and loss of earnings was claimed in the sum of \$41,600.00 and continuing from 2nd January, 2008. Of note is that the accident occurred on 10th August, 2007 and Dr Kumar certified him fit to resume light duties 7 months thereafter. In evidence is that he has refused all such offers to return to work as he considered he was unable to work. To my mind, Sam's evidence as to his loss of earnings is vague, unconvincing and clearly by not being forthright, he intended to mislead this court into making an uninformed and unfair award in his favour. I will now explore this evidence.

17. From the outset, it is emphasized that there is no evidence that Tropical Power has terminated his employment. He last received salary from Tropical Power on 2nd January, 2008 for a period of 5 months after his injury. He states in his witness statement, "*Based on certain discussions with Dr Persad, I formed the view that I was unfit to work.*" Under cross examination, he confirms that it was he who had formed the view that he was unfit to work. This position of unfitness to work was affirmed by Dr Neil Persad in his medical reports; though on cross examination he could not explain the conflict in this position and that of Dr Kumar. I concluded that this evidence was largely, if not wholly, influenced by the continued complaints of Sam and not borne out by any proper scientific evaluation and evidence. Further, it is Sam's evidence that he did not inform Dr Neil Persad that he was indeed still working. I, therefore, attached little weight to this aspect of Dr Persad's report and evidence.

18. What remains clear, and is accepted by this court, is that Sam still drives a heavy-T vehicle and does so to earn an income. It is his evidence that he does not remember the time from which he began driving to earn income following the accident, initially saying it was February, 2010 then on being pressed on further cross examination admitting it was at least September, 2009. He was silent as to the income generated from this employment leaving it up to the inference of this court that he was not intent on being open and truthful in assisting with the assessment of his damages. His stunning admission on cross examination as to his evasiveness makes this clear:

Q. Yes so in your mind you want this Court to give you money for loss of income from the accident without telling this Court how much money you have actually earned since that time. Am I understanding you correctly?

A. Yes

On cross examination, he admitted further that he was dropping off goods at Hilo; wore a harness/back strap for lifting heavy objects; would lift boxes; would put goods on trolley and lift boxes and groceries as part of his employment. Given his failure to advance proper evidence and in light of his claim that at least by September, 2009 he has been earning income of an unspecified sum, I am only prepared to allow loss of earnings for 2 years from the date of the accident of which he has received income for 5 months already. From this sum, I deduct 25% for taxes, sickness, holidays and other contingencies of life as depicted below:

\$5,200.00 x 24	=	\$124,800.00
Less 5 months salary received	-	\$26,000
Sub Total	=	\$ 98,800.00
Less 25% for contingencies	-	\$ 24,700.00
Total loss of earnings	=	<u>\$ 74,100.00</u>

Other Items of Special Damage

19. Sam claims special damages as follows:

- Medical report - \$350.00
- Travelling for physiotherapy
in January, 2008 - \$160.00
- Cost of physiotherapy - \$440.00

Whilst pleaded, he has provided no evidence (documentary or otherwise) of these losses. This claim is disallowed for lack of proof.

Future surgery

20. Sam is seeking an award for future surgery which was neither pleaded nor proved. This is disallowed.

D. Order

21. It is ordered that the defendant do pay to the claimant 60% of his claim as follows:

- i. General damages in the sum of **\$45,000.00** (being 60% of **\$75,000.00**) with interest at the rate of 8% per annum from 15th August, 2008 to 20th May, 2013;
- ii. Special damages in the sum of **\$44,460.00** (being 60% of **\$74,100.00**) with interest at the rate of 5% per annum from 10th August, 2007 to 20th May, 2013;
- iii. Future loss of earnings in the lump sum of **\$18,000.00** (being 60% of **\$30,000.00**);
- iv. Costs as assessed in the sum of **\$29,622.15**;
- v. Stay of execution of 28 days.

Dated 20th May, 2013

Martha Alexander
Master