

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-01821

BETWEEN

KESTER HERNANDEZ

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Defendant

THE MINISTRY OF NATIONAL SECURITY

Second Defendant

BRIGADIER KENRICK MAHARAJ THE CHIEF OF TRINIDAD
AND TOBAGO DEFENCE FORCE

Third Defendant

SERGEANT WILLIAMS J #8955

Fourth Defendant

Before: Master Alexander

Appearances:

For the Claimant:

Mr Azeem Mohammed, instructed by Mr Yaseen Ali

For the Defendants:

Ms Florence Ramdin

REASONS

1. On 21st October, 2003 the claimant, Kester Hernandez (hereinafter “Kester”) was a 19 year old recruit in training with the Trinidad and Tobago Defence Force when he sustained injuries in an accident on the compound. On that date, he was in the dormitory located at Tetron Barracks, Chaguaramas and in the process of lacing up his boots when one of his trainers, Sergeant Williams number 8955 (the fourth defendant), pushed a steel locker onto his back causing personal injuries,

damages and consequential losses. This accident occurred approximately 3 weeks into Kester's training and he was admitted to the Medical Institute Room (i.e. the "sick bay") where he was in and out until his passing out 3 months later. Kester alleges that on many occasions between training and passing out, his instructors had hid him in the dormitory from senior officers during inspection. Upon passing out as a soldier, he was placed on light duties up until 14th May, 2007, when he was recommended to have surgery to repair his spinal disc damage. Subsequent to surgery, he was ascribed a 50% permanent partial disability and it was recommended that he be medically boarded as he was unfit to continue working as a soldier. On 9th June, 2011 he was dismissed from the Defence Force as medically unfit. On 13th May, 2011 he filed legal proceedings seeking compensation for injuries sustained.

2. On 19th April, 2012 Charles J entered judgment in default of defence against the defendants with the assessment of damages and costs to be heard by a master. The issue before this court relates to the quantum to be awarded to Kester.
3. Kester's injuries were listed in his statement of claim and medical reports as:
 - Annular disc bulge of the L5/S1 of the lumbo sacral spine causing displacement of the traversing left S1 nerve root;
 - L5/S1 radiculopathy;
 - Decreased power left ankle dorsiflexion;
 - Spasm in the entire back' cramps in both legs radiating down to the toes, pain in the deck, headaches, difficulty sleeping, lancing pain in left hand, pain in waist and groin area;
 - Unable to sit or stand for more than 10-15 minutes;
 - Sexual intercourse painful.

The medical evidence

4. Several medical reports by Dr Henry Bedaysie have been tendered into evidence dating back from 2007. Dr Bedaysie on 14th May, 2007 recommended surgery of the L5 laminectomy and L5/S1 discectomy with foraminotomies, facetectomies and facet rhizotomies which was done on 19th July, 2007 at Westshore Medical Centre. Kester's injuries are detailed in the medical report of Dr Henry Bedaysie dated 16th January, 2008, where he was ascribed a 50% permanent partial

disability. By medical report dated 9th July, 2008 Dr Bedaysie recommended that he be assessed before the Medical Board. On 18th November, 2009 he was medically boarded on the basis that he was unfit to continue as a soldier in the army. He has since been awarded an **80% permanent disability** in his job as a soldier.

DAMAGES

5. Damages are pecuniary compensation obtainable by success in an action for a wrong based in tort or a breach of contract and usually take the form of a one time, lump sum award of money. See **Mc Gregor on Damages**.¹ In actions for personal injuries, damages recoverable are usually in the form of special or general. 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.

General

6. To assess general damages, the principles in *Cornilliac v St Louis*² are applied including: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which the plaintiff's pecuniary prospects have been materially affected.
7. As noted above, Kester's injuries consisted of an annular disc bulge of the L5/S1 of the lumbo sacral spine causing displacement of the traversing left S1 nerve root; decreased power left ankle dorsiflexion; and L5/S1 radiculopathy. These injuries (their nature and extent) have not been challenged by the defendants. He remains with the challenges of lifting heavy objects or standing for more than 10 minutes. Dr Bedaysie has stated that Kester's injury is serious and there is need for restrictions, accommodations and medical assistive devices to help him carry out his usual but now restricted personal and social activities.
8. With respect to his pain and suffering, Kester's evidence is that immediately on the locker being pushed down on him, he felt a sharp pain in his lower back. For the next several months in training, he spent the time in the sick bay and on passing out he was assigned light duties of

¹ **Mc Gregor on Damages**, 17th edition paragraph 1-001 page 3

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

cleaning the barrack room or working in the canteen or store room, with no strenuous activities. He received medical treatment from the army doctors and POSGH, until in August, 2004 he was sent for an MRI scan which he did privately in that month. He claims he kept getting a run around about seeing a specialist at the POSGH to read the MRI. Eventually, in May, 2007 Dr Ronald Charles (the army doctor) referred him to Dr Bedaysie. When he saw Dr Bedaysie, the MRI scan was read and he was informed that he had a spinal injury and required surgery. The surgery was performed by Dr Bedaysie on 19th July, 2007 at a cost of \$40,000.00, which was paid for jointly by his insurers CLICO and the Defence Force. To be noted is that it took Kester 3 years to get a medical professional to read/interpret his MRI and diagnose the spinal injury and need for surgical intervention.

9. Kester states that since the accident, he has been in unbearable, daily pain until the surgery in July, 2007, when the pains became less intense. He claims that currently, he has moderate to severe daily pains, which he has learnt to manage by refraining from activities that would put pressure on his back. He takes the painkiller tablet of Arcoxia 120mg and Losee 20mg per day at a cost of \$20.75 and \$15.00 respectively. He claims that he currently has back and neck pains radiating down his legs to toes and at times his legs become numb, and he cannot even get off the bed or stand up. He still gets very little sleep at night because of this pain. He claims further that when having sexual intercourse, “the pain is so unbearable I have to stop and this is very frustrating”.

10. With respect to his loss of amenities, it is to be noted that generally, “[D]amages may be awarded for the loss of the pleasures or amenities of life, either permanently – by the loss of a leg, for e.g. – or temporarily – as by mere detention in hospital or in bed for a period. This is a distinct element altogether from pain and suffering, or from loss of earning power.” See **Munkman on Damages For Personal Injuries and Death**.³

11. Kester’s evidence is that he can no longer enjoy many of his recreational activities such as cricket, football and running, which he did every day on the beach or on the Las Cuevas playing ground. According to his evidence, he cannot now do simple tasks such as, “lift anything over 15 pounds, run, climb, jump, bend or stand up for more than 10 minutes.” He claims also that he has become heavily dependent on his parents to assist him with strenuous household activities. His father does

³ Munkman on Damages For Personal Injuries and Death 11th edition pages 46-47.

the lawn cutting, scrubbing, tree pruning, lifting and changing the gas tank. His mother washes his clothes, mops the floor and cuts the meats. Of interest is that he is married but gives no evidence to his wife's role or effects on their relationship as to his loss of amenities, save and except the sexual issue.

12. Kester's evidence is that his pecuniary prospects have been materially affected by his injuries. He states that he was dismissed in May, 2011. Since then he has been unemployed and unable to earn a salary. His last salary was at a grade "B" soldier payable since 26th April, 2005 at \$6,386.95 per month. Other soldiers who trained with him have reached higher ranks of Lance Corporal and now are earning a higher salary. He states that the injuries have, "caused me not to be able to move forward in rank and thus earn a higher salary. Had I not been injured I would have been a Lance Corporal by now a Full Corporal in three years time and a Sergeant five years later." He states further that soldiers retire at 55 years. The Defence Force, by dismissing him, caused him to suffer the loss of pension and gratuity. It has also failed to submit any documents to the National Insurance Board of Trinidad and Tobago, as his employer, to enable him to claim for financial assistance for the injuries he sustained at work. He has also lost his medical insurance benefits and coverage with CLICO. He is unable, without a salary, to make payments and not entitled, as he is no longer a soldier, to be insured as a member of the Defence Force. He has also not received his rent and ration allowance of \$32.88 per day effective 26th June, 2006 when he got married. He sought to mitigate his losses by seeking employment recently around July, 2012 with Amalgamated Security in Chaguanas, as a security officer, but was refused the job. In January, 2012 he sought and obtained a job at the Car Park in Las Cuevas but could not take it, as it involved lifting a steel bar to allow cars to enter and leave.

13. Counsel for Kester suggested an award in the range of \$350,000.00 would be reasonable for the injuries he sustained. He relied on several cases including:

- *Trinidad Transport Enterprises Limited v Layne*⁴ where the Court of Appeal for a back injury awarded as adjusted to December, 2010 \$350,000.00.

⁴ *Trinidad Transport Enterprises Limited v Layne* CA 10 of 1971

- *Dayalsingh v The Mayor of POS*⁵ where there was an award as adjusted to December, 2010 to \$232,102.00.
- *Ali v Hasranath*⁶ where an award as adjusted to December, 2010 was \$223,592.00.
- *Moreau v Port Authority*⁷ where an award as adjusted to December, 2010 was \$212,487.00.
- *Ramdoolar v Boodoo*⁸ where an award as adjusted to December, 2010 was \$214,154.00.
- *Pemberton v HiLo*⁹ where an award as adjusted to December, 2010 was \$209,828.00.

14. Another case considered was *Moonsammy v Ramdhanie & Capital Insurance*¹⁰ where in April 2005 an award of \$75,000.00 was made for a back injury at L4/5 and L5/S1; as adjusted to December, 2010 to \$121,102.00. Also considered was *Thomas v Ford, RBTT & NEMWIL*¹¹ where in 2008 Master Sobion awarded for spinal injury L4/5, L5/S1 nerve compression; soft tissue injury to buttocks knees and elbows and 2 fractured ribs \$100,000.00; as adjusted to December, 2010 to \$117,013.00.

15. The cases provided were notably quite dated and some involved injuries which were more extensive than those of Kester. I took this into account as well as the medical evidence as to his medical unfitness for work as a soldier; that his pain is now moderate to severe (though daily) but clearly improvement was facilitated by his surgery. I accept that perfect compensation is hardly possible and that Kester whilst he faces decreased pain, it is continuing pains that he would have to live with for the rest of his life. Bearing in mind that this award is a one off award and to adequately compensate him for his pain and suffering and all present and future losses occasioned by the tort, and without granting him a financial avalanche, I find the sum of **\$300,000.00** would meet the justice of this case.

⁵ *Dayalsingh v The Mayor of POS* HCA 2341 of 1979

⁶ *Ali v Hasranath* HCA 1483 of 1976

⁷ *Moreau v Port Authority* HCA 3958 of 2006

⁸ *Ramdoolar v Boodoo* HCA S-710 of 1973

⁹ *Pemberton v HiLo* HCA 6039 of 1988

¹⁰ *Moonsammy v Randhanie & Capital Insurance Ltd* CA Civ No. 62 of 2003

¹¹ *Thomas v Ford, RBTT & NEMWIL* HCA 2834/2002

Special

16. The following items of special damages have been claimed.

- **Loss of earnings**

Counsel for Kester has asked that the claim for loss of earnings of \$6,386.95 x 3 months totaling \$19,160.85 be disallowed as not having been proven. Instead, he asked based on the evidence of Sergeant Major Trent Alleyne, Kester would have reached the rank of Lance Corporal by now earning a yearly salary of \$90,063.75 (i.e. \$7,505.31 per month). This evidence was accepted. To my mind, Kester would most likely have reached the rank of Lance Corporal at this stage, having passed out as a soldier in 2003 and is entitled to increases earned in salary as officers in that range. Loss of earnings will be allowed from 9th June, 2011 (when he was dismissed as medically unfit) to date of assessment as follows:

From 9th June, 2011 – 3rd October, 2012

@ \$7,505.31 x 14 months	=	\$105,074.34
Less 25% for contingencies & taxes	=	\$ 26,268.59
TOTAL NET PAY	=	<u>\$78,805.75</u>

- **Loss of rent and ration allowances**

Kester has given evidence that he got married on 26th June, 2006 and has not received rent of \$1,400.00 per month and ration of \$1,000.00 per month (daily \$50.00). He provided the documentary evidence to support same. This evidence was unchallenged and is accepted. He is entitled to be reimbursed this loss from 26th June, 2006 to 3rd October, 2012 which amounts to 75 months and 7 days as follows:

From 9th June, 2011 – 3rd October, 2012

@ \$2,400.00 x 75 months + 7 days	=	\$180,560.00
Less 25% for contingencies & taxes	=	\$ 45,140.00
TOTAL ALLOWANCES PAYABLE	=	<u>\$135,420.00</u>

- **Medical expenses**

Kester pleaded and proved medical expenses in the sum of \$11,400.00. This is allowed.

- **Transportation**

Kester gave viva voce evidence of this loss, stating that he attended Dr Bedaysie’s offices and other doctors at least 36 times. This claim is reasonably expected and the sum is not unreasonable. This is allowed in the sum of \$2,500.00.

Special damages will therefore be awarded in the sum of **\$228,125.75**.

Loss of Future Earnings

17. Kester claims loss of future earnings and his counsel has asked that this be calculated on the basis of the multiplier x multiplicand method to give the sum of \$1,803,136.50, using a multiplier of 22 and an annual salary of \$109,281.00 less 25% for tax holidays. At the time of the assessment, Kester was 28 years old. Evidence was presented to the court by Sergeant Major Alleyne that the age of retirement of soldiers (Corporal and below) is 45 years (and not 55 years as stated by Kester); of Sergeants is 47 years and of Warrant Officer Class I and II 50 years. Had he not sustained these injuries, he would most likely have worked until 45 years, leaving him with at least 17 years of working life. Counsel referred to *Peter Seepersad v Francis & Capital Insurance*¹², where a 37 year old appellant taxi driver was awarded a multiplier of 16. To be noted is that a self-employed person would have a longer working life, retiring after 65 or even 70 years. To my mind, a multiplier of 13 would be reasonable given that Kester would have had to face mandatory retirement at 45 years. His multiplicand would be based on the annual salary of \$118,863.72 (i.e. \$7,505.31 per month + \$2,400.00 rent & ration). I note further that Kester is 80% permanently disabled for work as a soldier. Whilst this is not disability across the board; it is permanent (not partial) disability so speaks to the severity of his injuries. In the circumstances, I am minded to award future loss of earnings on a total loss basis, taking into account a reduction in terms of the contingencies of life, taxes, sickness and holidays.

Salary of \$118,863.72 yearly x 13	=	\$1,545,228.36
Less 25% for tax and holidays	=	\$386,307.09
TOTAL LOSS OF FUTURE EARNINGS	=	<u>\$1,158,921.27</u>

¹² *Peter Seepersad v Francis & Capital Insurance* PC No 83 of 2002

Loss of future annual pension and gratuity

18. Counsel for Kester has submitted that he is entitled to compensation for a loss of gratuity in the sum of \$239,052.19 and an award of annual pension of 5 years of \$68,300.63 per year totaling \$341,503.15 in reliance on the House of Lords decision in *Longden v British Coal Corporation*.¹³ The evidence in support of this was provided by Sergeant Major Alleyne who confirmed that Kester would in fact have suffered loss of an annual pension and gratuity (terminal grant) upon his dismissal from the Defence Force. Sergeant Major Alleyne's evidence is that Kester (as a private) would have had 25 years service at the age of 45 years so would have been entitled to a one off terminal grant of \$148,389.61 and an annual pension of \$42,397.03. This sum would increase for higher ranks e.g. a Lance Corporal will get a terminal grant of \$197,014.45 and an annual pension of \$56,289.85. A Full Corporal will get a terminal grant of \$239,052.19 and an annual pension of \$68,300.63. Sergeant Major Alleyne states also that with Kester's regimental number, he would most likely be a Lance Corporal today, without his injury, and that the majority (not everyone) from his batch would have been promoted. He stated further that promotion in the army is based on general ability, education, vacancies and upon recommendation and is conditional on a person staying the full term of his contract.
19. There were several concerns with this claim. First, it was introduced via submissions and did not initially form part of his claim for damages. Further, there was no evidence before me that Kester was guaranteed to stay on in the Defence Force, but for his injuries, until the age of retirement so as to access these sums. To be noted is the fact that a gratuity is only payable after a service of 10-19 years and a terminal grant benefit (also gratuity) is payable from 20 years and above. Kester, at the point of his discharge from the army, had been in the service for 7 ½ years. To be noted further is that a soldier can leave the army at any time prior to retirement age. Counsel is seeking damages for loss of future pension calculated on the basis of promotion at least 2 ranks higher (Full Corporal) than he held at the point of his discharge based on the evidence of Sergeant Major Alleyne that Kester would "most likely" be a Lance Corporal today had he not been injured. I further considered the Pensions Act Chap 23:52 which states at section 9(1) that "No officer shall have an absolute right to compensation for past services or to pension, gratuity or other

¹³ *Longden v British Coal Corporation* [1997] UKHL 52; [1998] 1AER 289

allowance under this Act, nor shall anything herein or in the Regulations contained limit the right of the State to dismiss any officer without compensation.”

20. To my mind, the inconclusive and uncertain nature of the evidence that required the court to make assumptions without some more firm foundations as to Kester’s likely promotion to other ranks proved a source of disquiet. I note also the evidence of Sergeant Major Alleyne that promotion is based on certain criteria including aptitude and performance and not as of right.
21. There was also no evidence before me as to whether soldiers contributed or not to the pension to which they eventually become entitled. The *Longden case* (supra) involved a contributory pension scheme and dealt with whether there was entitlement to receive the collateral benefits of an incapacity pension or the normal retirement pension or both. Both pensions (disability and retirement) were derived from the same scheme. In *Longden* the claimant had received a lump sum as part of his incapacity pension and the issue of a set off and/or reduction from the pension to be received at the normal retirement age was considered. In the instant case at bar (unlike in *Longden*) there was no claim made for damages for loss of pension after the normal retirement age except via the submissions. To be noted further is that Kester did not receive workmen compensation or NIS payments and a claim was made for damages for these but not pursued or quantified at the assessment. Further, Kester has been allowed full sums for future loss of earnings without any deductions being made towards pension or gratuity.
22. I bear in mind the rule that damages are compensatory and the only loss recoverable is the net loss; it is not meant to unfairly enrich the injured party. The concern of this court is to ensure that Kester is properly compensated and not be made to enjoy a double recovery for the tort. I also considered the principle that compensation for personal injuries is a once and for all award. Given the evidence I am unable with any certainty to project what rank Kester would have achieved on retirement or if he would have retired in the army but for his injuries and/or how to approach the calculation of his pension loss. In the face of these imponderables and uncertainties and the many evidentiary clouds surrounding this claim (including that it was not pleaded) I was not prepared to allow this claim. In my view, it is one that falls outside the remit of this assessing court.

Future medical care

23. The evidence points to Kester requiring painkillers (arcoxia and losee 1 each per day) for the rest of his life. The cost of these tablets according to the evidence of Dr Bedaysie is \$20.50 and \$15.00 respectively, at a daily cost of \$35.50 and yearly \$12,957.50. He also requires physiotherapy twice per month and swimming twice per week for the rest of his life. The estimated cost of physiotherapy sessions is \$200.00 and swimming ranged from \$30.00 - \$50.00. The yearly cost of physiotherapy would be \$4,800.00 and swimming (using the lowest sum) would be \$2,880.00 yearly. Counsel asked that the yearly sum of \$21,917.50 be allowed to give \$482,185.00 that is based on a multiplier of 22. I am prepared to allow a yearly sum of \$20,637.50 x 13 to give a total of **\$268,287.50**.

Future domestic assistance

24. In evidence is that Kester has great difficulty performing his household chores such as cutting lawn, pruning trees and scrubbing drains. He claims that he has utilized the help of his parents for these duties. Dr Bedaysie confirms that he requires a domestic assistant. Kester claims that to employ someone he would have to pay \$450.00 per week at a yearly sum of \$23,400.00. To my mind, had he not sustained his injuries he would have been able to perform these duties on his own. I concluded, however, the estimate given is on the higher end of the spectrum. In my opinion, trees are not necessarily pruned or lawns cut on a weekly basis so the claim for weekly assistance in this regard is unreasonable. I note that there is no sufficient evidence as to why there is a need for such a regular and/or frequent need for these services or any information on the type or condition of Kester's yard. Further, I note that this need for domestic assistance is not linked to his personal or bodily needs or tending and caring for himself but to household chores and yard duties. I note, however, the medical evidence that speaks to Kester's need for domestic assistive devices for the rest of his life. Based on the evidence before me, I was unable to properly and fairly quantify the damages for this claim. Given the evidentiary uncertainties, I am prepared to allow a lump sum of \$8,000.00 to defray this cost. This claim is allowed in the sum of **\$8,000.00**.

Order

25. It is ordered that the defendants do pay to the claimant the following:

- i. General damages in the sum of **\$300,000.00** with interest at the rate of 9% per annum from 18th May, 2011 to 15th February, 2013;
- ii. Special damages in the sum of **\$228,125.75** with interest at the rate of 5% per annum from 21st October 2003 to 15th February, 2013;
- iii. Loss of future earnings in the sum of **\$1,158,921.27**.
- iv. Future medical and domestic care in the sum of **\$276,287.50**.
- v. Costs of the assessment in the sum of **\$97,153.37**.

Dated 15th February, 2013

Martha Alexander
Master

Ms Kimberly Romany
Judicial Research Assistant