IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2013-03876

BETWEEN

BRANDON SALINA

Claimant

AND

WILFRED RAMNATH

1st Defendant

FRANKIE SEECHARAN

2nd Defendant

CLIVE YEARWOOD

3rd Defendant

THE BEACON INSURANCE COMPANY LIMITED

4th Defendant

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Before: Master Alexander

Appearances:
For the Claimant: **Mr Azeem Mohammed instructed by Mr Yaseen Ali**
For the Defendants: **Mr Michael Quamina instructed by Mr Dave de Peiza**

DECISION

Introduction

1. This court sat to determine the question of quantum only of the claim by Brandon Salina ("Brandon") for injuries sustained in an accident on 24th June, 2010. It was, by far, a robustly contested assessment, with both attorneys seeking to impress upon this court that each of their cases was to be preferred as against the other, in arriving at a determination on compensation. At the conclusion of the evidence and upon mature and balanced assessment of both cases, it was decided that Brandon should recoup compensation of $120,000.00 for pain and suffering and loss of amenities with interest of 2.5% per annum from to 16th October, 2013 to 4th October, 2017;

special damages of $209,407.00 with interest of 2% per annum from to 24th June, 2010 to 4th October, 2017; future surgery of $90,000.00; future medical care in the lump sum of $100,000.00; future loss of earnings in the lump sum of $150,000.00; prescribed costs of $48,062.03. It was the considered view of this court that Brandon's case was inflated to obtain maximum compensation and so propel him into unjust enrichment consequent on his injuries. Following solid and sound judicial guidance that a claimant can only recover monetary compensation that would put him back in the position he would have been in but for his injuries, the ruling of this court was as stated above and for the reasons as expanded upon hereunder.

Facts

2. On the said day of the accident, Brandon was a lawful passenger in motor vehicle HAX 7975 ("maxi taxi #1") travelling in a westerly direction along the Priority Bus Route in the vicinity of Tacarigua, in the island of Trinidad. It would appear that this was a head-on collision, caused by a speeding vehicle, where on impact Brandon, who was seated behind the front seat, was thrown through the front windscreen onto the roadway. He actually landed on the opposite side of the roadway on which maxi taxi #1 was travelling. At the time of the accident, Brandon was 22 years old. At the material time, the 1st defendant was the driver and the 2nd defendant was the owner of maxi taxi #1, with whose knowledge and consent it was being operated when the collision occurred. The 3rd defendant was at the material time driving motor vehicle HCP 2867 ("maxi taxi #2"), travelling in the opposite direction, when he so negligently managed and/or controlled it that it collided head-on with maxi taxi #1 in which Brandon was a paying commuter. Beacon Insurance was the insurer of both maxi taxis, so acceded to liability and to pay the damages, interest and costs ordered by this assessing court. This court's authority to act was derived from the order of Boodoosingh J dated 29th January, 2014.

Principles

3. The evidence provided in this matter formed the platform for this assessment. This court was also guided by established principles on compensatory damages. One such principle was that perfect reparation for injuries can never be realized. This apart, it was this court's charge to use its reasonable common sense, and with an equitable hand seek to put Brandon back, as far as possible, into his original position. Money served as the tool by which this was achieved which, though

insufficient as a restorative device, was the sole compensatory mechanism by which this court could seek to restore injured persons to their pre-accident position. It was required to be utilized fairly and justly, weighing all evidence presented, to bring about "full" compensation. It meant as with all assessments, this court embarked on a comparative exercise to arrive at the appropriate quantum, based on the evidence presented.

4. In this assessing exercise, past precedents of similar injuries and awards attracted in this and other commonwealth jurisdictions provided valuable guidance. Where there were evidentiary deficiencies, this court applied a fair hand, in exercising its judicial mind to the evidence presented without undue pedantry in recompensing the injured party for the wrong done to him. In so doing, it was borne in mind that Brandon did not invite the tort upon him but was engaged in an ordinary and rather common activity as a member of the travelling public, when he was visited with this wrong perpetrated by the defendants. Travelling in a maxi-taxi in this country was not an unusual activity, albeit it brought its own risks, and as an injured passenger, Brandon was entitled to recover fair compensation.

5. To be borne in mind also was that this was a claim for which Brandon could only approach the courts once. This was factored into this exercise to ensure that just and equitable compensation was given. Thus, the singularity of this award was a core guiding principle to which serious and balanced consideration had to be given along with all other factors in this assessment. Singularity, however, was never meant to be used as a justification for overcompensation. It was merely a consideration to assist with the weighing and balancing exercise of determining what, in all the circumstances of a particular case, would be judicious and fitting compensation. These were some of the principles guiding this exercise but this court remained cognizant throughout this exercise of the full list by which it must be directed in reaching a fair quantum. At this point, it would be fitting to reference 2 very succinct descriptions of principles on assessments:

"*You must give the plaintiff compensation for his money loss, you must give him compensation for his pain; of course it is almost impossible for you to do what can strictly be called 'compensate' him, but you must take a reasonable view of the case, and consider under all the circumstances what is a fair sum to give him*…"[1] per Bramwell LJ

"*The award is final, it is not susceptible to review as the future unfolds, substituting fact for estimate*."[2] per Lord Scarman

6. Brandon's compensation covered all his losses including pain and suffering, the nature and extent of his injuries, any continuing disabilities, loss of amenities and pecuniary damages. The final award was influenced by the quality of evidence advanced in this matter. Of foremost consideration in this exercise was that Brandon had to be compensated for any negative fallout on his life from his injuries. Thus, this court was cognizant always of the reduction in his ability to live life as before and/or slippage in his ability to enjoy the amenities of life or to earn as he did prior to his injuries.[3] All of these were weighed with external factors such as the declining value of the dollar and the precedents in local and regional jurisdictions of awards for similar injuries, to achieve the judicious award. It was also borne in mind that this court's role was not to unjustly enhance Brandon's pecuniary position post-injury. At the end of the day, this exercise was not a legalized sweepstake. Thus, the evidence advanced in support of Brandon's case and why he can only fairly attract the award he has, will be examined in justification thereto.

Evidence

7. There were several witnesses who filed statements and gave oral evidence at this assessment:
    i. Brandon Salina;
    ii. Dr David Santana, Orthopaedic Surgeon
    iii. Karen Maharaj ("Karen"), Administrative Manager of Alphega Security Limited
    iv. Dr Derrick Lousaing, Consultant Orthopaedic Surgeon

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1 *Phillips* v *The London and South Western Railway Co* [1879] 5 CPD 280
2 *Lim Poh Choo* v *Camden and Islington Area Health Authority* [1979] 2 AER 910 HL; [1980] AC 174
3 *Baker* v *Willoughby* [1969] 3 AER 1528

The Medical Evidence

8. The only medical witness called to give *viva voce* evidence on Brandon's behalf was Dr Santana, a specialist orthopaedic surgeon. He, however, was not the first medical professional to treat Brandon. This fact and certain areas of his professional medical opinion that deviated from the original prognosis and/or were contrary to the defendants' medical expert were sources of contention between the attorneys, so will be explored fully hereunder. Suffice it to say upfront was that the starting point to determine the nature and extent of Brandon's injury, any likely continuing disabilities and, by extension, the quantum awarded was the medical reports of the treating doctors and/or experts. It must also be pointed out that while the first in time medical professional to treat an injured would be a useful platform for assessing compensation for the injuries, this may or may not determine the full extent of injury or his continuing disabilities, hence the importance of updated reports. Nevertheless, this court will adopt a chronological approach to the medical evidence presented.

Dr Farah Ahmed's report

9. The first medical report dated 3rd November, 2010 was given under the hand of Dr Farah Ahmed of the Eric Williams Medical Sciences Complex and stated that, on the day of the accident, Brandon presented with left shoulder and abdominal pains. On examination, he was found to have tenderness anteriorly over the right and left hip; skin abrasion over the anterior aspect of his right leg, scalp and left elbow; and a minor laceration on his right hand which was sutured. It would appear that he was able to move all limbs without pain and his neurological, cardiovascular, respiratory and abdominal examinations were all unremarkable. Multiple x-rays of the chest, pelvis, right leg, left shoulder and a CT scan of the cervical spine were all normal. He was given olfen painkillers and discharged on 5 days' sick leave.

Dr Santana's evidence

10. Brandon visited other doctors thereafter but the next medical report in evidence was penned on 2nd April, 2013 by Dr Santana ("the 2013 Santana report"), some 3 years after the accident. The 2013 Santana report documented Brandon's complaints of headaches, dizziness, memory loss, inability to sleep on his back and locking of the knees. The 2013 Santana report indicated that the right knee was swollen, but all consequential tests were negative and he had a full range of motion of the neck

and back. Physiotherapy was recommended and a 5% disability was awarded, but no notation made of inability to work. Then there was the medical report dated 17th October, 2014 by Dr Santana ("the 2014 Santana report"), about 4 years after the collision and which, for the first time, documented low back and neck pain and again was silent as to inability to work. This 2014 Santana report followed two reviews of Brandon (in August and October, 2014) by Dr Santana and made a diagnosis of foramina stenosis at the L5-S1 level and recommended surgery to relieve the nerve compression. In arriving at his findings, Dr Santana relied on an MRI of the lumbar spine which revealed minimal scoliotic curvature of the lumbar spine with convexity to the right; on the L2-L3-4 levels - mild diffuse disc bulge causing mild indentation on the thecal sac and mild narrowing of bilateral neural foramina; on the L4-5 level - diffuse disc bulge causing mild narrowing of the spinal canal and bilateral neural foramina; on the L5-LS1 level - diffuse bulge with facet arthropathy causing mild narrowing of the spinal canal and moderate narrowing of bilateral neural foramina (R>L). Arthroscopic surgery to his right knee was recommended. Brandon was assessed, at this point, with a permanent partial disability of 30%.

Analysis

11. Mr Quamina, counsel for the defendants, sought to influence this court into believing that the Santana reports were in a vacuum and the injuries identified therein delinked from the accident. The evidence showed, however, that the Santana reports followed a period whereby Brandon was under Dr Santana's care, who testified in court that he had seen him first on 1st July, 2011; then on 2nd July, 2012; 4th March, 2013; 29th August, 2014; 17th and 13th October, 2014. The Santana reports would have either pre-dated or followed these visits and are relevant to this assessing exercise. Of interest to this court was the difference in diagnosis between both reports and what was responsible or would have caused the shift. Clearly, the 2014 Santana report presented with clarity injuries sustained by Brandon, which were not highlighted in the 2013 Santana report and without making a direct link to the 2010 collision. In his oral testimony, Dr Santana sought to clarify this by pointing to the fact that while the initial MRI presented normal findings, there was a red flag which he referred to as "effusion"[4] or swelling in the knee, manifested on the first visit. This he explained was an indication that something was wrong and it was linked to Brandon's injuries. Dr Santana

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4 Effusion is a collection of fluid (i.e. joint fluid) in the knee

also stated that an MRI was only a picture and not the full story, so could not substitute for a physical exploration of the affected area (surgical intervention). It was the latter procedure (surgery) that would actually capture defects that might be causing the effusion. This he explained would be consistent with the type of injury that had occurred in this particular accident. Hence his recommendation of surgery to the knee and back, without which he stated that the medical condition would get progressively worse and with mounting pain.

12. In defence of his clients' case, Mr Quamina, expectedly, has put up a stiff resistance to the findings in the 2014 Santana report as correlating to injuries that flowed from the accident, asking this court to note the clear failure of Dr Santana to link these findings in that report to the collision. This default on the part of Dr Santana was not only strongly condemned but, Mr Quamina insisted that, given this lacuna, the medical findings in this 2014 Santana report cannot and must not be attributed to the collision, or as flowing from injuries sustained therefrom. He asked that the evidence of Dr Lousaing be preferred as it made specific findings as to causation. He pointed in particular to the fact that the 2013 Santana report described medical findings that were unremarkable, conceding only the swollen knee as significant, and 4 years later the 2014 Santana report recounted low back pain reflective of foramina stenosis that did not arise previously. Then he sought to link this diagnosis to Brandon being overweight, which was supported by his medical witness. This court will now turn to Dr Lousaing's evidence.

Dr Lousaing's evidence

13. Dr Lousaing is a consultant orthopaedic surgeon who was called as a witness for the defendants. In his undated medical report ("the Lousaing report"), he makes specific findings as to causation and linked the mild bulges and back pain of Brandon to him being significantly overweight and the loads applied to the lumbar spine. He recommended the conservative treatment of weight loss and a good core exercise programme for Brandon's lower back. The Lousaing report also referenced "an effusion but no intra-articular findings of note" and stated that while the lumbar spine showed multiple bulges at the lower lumbar spine, this signal was essentially normal. Of Brandon's right knee injury, Dr Lousaing reported that the contusion was resolved. For both injuries, he recommended no surgical intervention and assessed him as a type 1 disability of 15%.

14. When asked by this court, Dr Lousaing was insistent that there was no advantage to be obtained from surgery in Brandon's case:

    A. "*There would be no benefit, you have normal disc signal with a bulging disc so the ability to make that patient better is very low because the factors that are operating can be dealt with non-operatively and the factors are the weight and the overload and modification of activity in terms of how he does things. By proper core strengthening programme, he will probably get a better result. Intrusive measures are done if there is pathology that you could correct and if there is pathology that's pressing against nerves and causing a root or a nerve compression that is of significance* …"

    He went on to suggest that most adults have back pain and are not operated on, so Brandon was not to be the recipient of surgical procedure simply because he complained of back pains.

Analysis

15. In weighing Dr Lousaing's evidence with the totality of evidence before this court, it was found that he attempted to brush off Brandon's complaints of back pain as "normal" and even inconsequential, without providing any scientific basis. This did not sway the mind of this court into easily dismissing the claim. He was clearly providing an opinion that was not pinioned on any solid scientific, technical or medical plank or documentation in support of his position. His broad medical balm of "overweight" was viewed suspiciously, especially against the backdrop of the fact that he saw Brandon for evaluative purposes on one occasion; had at least 2 errors in his report (one on Brandon working after surgery, which never occurred); he relied on the MRIs only and may not have seen previous medical reports of treating doctors before doing his own. In the view of this court, Brandon, who was involved in a major vehicular accident, was the subject of an uninvited tort. He was also a relatively young man when this accident occurred. He was not merely an ordinary adult who, never having been involved in a collision, suffered degenerative challenges with age.

16. Under cross examination, Dr Santana agreed that his findings were consistent with Brandon being overweight but linked them to the accident rather than the weight issue. It was Dr Santana's evidence, in contrast, that obesity might be a reason for a diagnosis of foramina stenosis (a degenerative spinal condition manifesting in lower back pain) but that Brandon's severe lower back

pain was consistent with the injuries he had suffered in the accident. In fact, he staunchly maintained that obesity of itself could not cause Brandon's back injury, especially given his age.

17. Mr Quamina, however, asked this court to give serious consideration to the lapse of time between the accident and diagnosis of lower back pain and, in the circumstances, to prefer the evidence of Dr Lousaing to that of Dr Santana whom he described as an unimpressive witness, who was struggling to bring his viva voce evidence in line with what was contained in his medical reports. Mr Quamina also sought to convince this court that Dr Santana's evidence was inconsistent with Brandon's witness statement so must be rejected on this basis. In the mind of this court, any inconsistency between the evidence of Dr Santana and Brandon must be read in favour of accepting the doctor's evidence, as he is the specialist and not Brandon. Whatever medical evidence Brandon attested to in chief must be viewed against the backdrop that he was not qualified to give same and its evidentiary value weighed accordingly.

18. As regards Dr Lousaing's evidence, this court was mindful that it was also far from seamless. Given that he was charged with providing a detailed medical evaluation, there was no justification for making findings as to "significantly overweight" without an explanation as to how he arrived at this prognosis. To this end, this court accepted the submission of Mr Mohammed, Brandon's counsel, that the failure of Dr Lousaing to give Brandon's body mass ratio, weight or height in comparison to acceptable standards, in the context of his injury, borders on being a "maliciously prejudicial" prognosis. Mr Mohammed also fingered the several corrections to what he considered as critical parts of the Lousaing report and sought to discredit the entire medical on this basis. This court disagreed. To argue that amendments to a document served to discredit the entire report was not found rational or acceptable. What was clear and can be accepted by this court was that Dr Lousaing sought to ascribe Brandon's back problem to him being overweight, without documenting fully, or at all, the tests conducted to reach this conclusion or providing a clear explanation for this prognosis. There was also no attempt to explain why, prior to the accident and despite Brandon being overweight, there was no complaint of back problems. Further, Dr Lousaing recommended non-surgical intervention to the lower back and right knee but failed to give a medical explanation for such findings, which was only belatedly provided when this court sought to solicit the explanation.

19. On the other hand, Mr Quamina stridently argued that Brandon failed to seek or return for medical treatment in a consistent manner and/or to pursue physiotherapy for any material time, so a negative inference should attach. He then condemned the explanation given by Brandon, in his evidence in chief, of not working so being unable to continue after 2 or 3 sessions of physiotherapy, pointing out that under cross examination his evidence contradicted this, when he claimed he had stopped because he could not afford it. I find this argument by Mr Quamina to be hollow and artificial, in seeking to manufacture a contradiction where there was none. In my view, Brandon's explanations as to why he could not continue with physiotherapy were not contradictory or even mutually exclusive. Clearly, if he were unemployed, it meant he may not have been able to afford the cost of the treatment. This court, therefore, did not allow itself to be swayed by this aspect of Mr Quamina's arguments, ingenious though they may be.

Karen's Evidence

20. Karen was the administrative manager of Alphega Security Limited ("Alphega"), the company with which Brandon was employed as a security guard at the time of the accident. She was in charge of the general administration and management of Alphega, including having charge of its records and accounts. She testified to having knowledge of his job requirements and of Brandon as an employee of Alphega. Her evidence was that Brandon earned $2,000.00 per fortnight excluding overtime, with a net salary of $3,468.73 per month. It was common for him to earn overtime because of the high demand for security officers. She provided evidence of him working 23 hour shifts on 5th and 10th June, 2010. She stated that had he not been involved in the accident, he would have been earning approximately $4,518.73 per month. He was also entitled to an additional one month salary bonus per year. It was also her evidence that Brandon was a good worker who, had he continued in Alphega's employ, would have "probably obtained the rank of corporal" earning $20.00 per hour working 12 hour shifts per day, six days per week. As a corporal, his income would have amounted to $5,760.00 per month plus overtime. His yearly income amounted to $74,880.00.

21. It would appear that Brandon's contract was not terminated by Alphega and Mr Mohammed submitted that it was frustrated because of his inability to perform his duties. While conceding documentary deficiencies, Mr Mohammed urged this court to accept Karen's evidence on the basis that it was unchallenged. In this regard, he has taken issue with Mr Quamina's submissions as to

the inability of Alphega to produce pay slips or original records, save a computer print-out, asking the court to note that it carried an NIB stamp on it. It was argued also that this document was not disproved or discredited by the defendants. Mr Mohammed argued further that while Karen could not provide thorough paperwork from Alphega, her explanation as to the difficulty in finding documents after approximately 6 years and that the employee in charge of those records had migrated should suffice to have this court assess Brandon's financial losses.

Analysis

22. In the view of this court, it was incumbent on Brandon, who was seeking compensation, to furnish the requisite proof of his claim, in as thorough and clear a way as possible. He should not expect to come before this court with a shoddily prepared case or to raise fallacious arguments as to what this court should or should not look for in terms of proof of a claim. It was mind boggling that a company, with a battery of employees in the business of providing security services, would be unable to produce proper records of emoluments of its employees. It was also a stunning admission by a high ranking employee, who claimed to be the record holder of that company, to turn up before this court and confess that she did not have a proper or any paper trail to support her evidence but that this court should take her word for it. Even her evidence, of an employee under her charge who could have assisted with the records having migrated from this country, leaving Alphega without assistance in providing documentary records, was incomprehensible to the mind of this court. This was further compounded by Mr Mohammed who audaciously argued that as his witness was an "independent" one, her evidence must be accepted as believable and trustworthy, despite its glaring deficiencies. Was it really expected that this court would not apply its mind in an objective and fair way to the evidence presented and/or that it would not, given the state of the evidence, be influenced to question the credibility of this witness' evidence? How was it that the administrative manager and holder of the company's records was incapable of furnishing same and was content to present before this court and ask that her word be accepted as to what the non-existent records were. Documentary records are not generally stored in the mind and are usually capable of presentation in some form, whether paper, electronic or computerized.

23. Farfetched and incredible also was her evidence that records were deemed dated and so destroyed within a 5-6 year period and/or that no attempt was made to ensure proper storage of company

records following such a short time span. It left me to infer negatively as to whether this witness was being truthful and independent or simply out to hoodwink this court. In the circumstances, this court found this witness' evidence as too risky and unsafe to be relied upon and slight weight was ascribed to it. Karen also failed to ground her evidence as to the likely promotional prospects of Brandon on any solid scientific foundation. This left this court to wonder what, if any, bases for promotion in the company existed, who would make the decision for promotion and what assessing criteria for promotion would be applicable. There was also no evidence as to the length of time it would take to get promotion and what were the variables that would affect this. In the circumstances, this aspect of her evidence too was given little weight in this exercise.

Brandon's evidence

24. Brandon's evidence was that he suffered from severe back pain, 24 hours per day for about 6 months. Thereafter, he described the pain as moderate, intermittent pain with at least 2 days per week being severe. This has been ongoing from 24th June, 2010 and was continuing. He was unable to stand for more than an hour, to concentrate or to have sex and experienced discomfort during sleep. He was unable to go swimming at the beaches, dancing and socializing at family events, playing sports or jumping and rough playing with his nephews and nieces. He claimed that he would have to take medication for the rest of his life.

25. His evidence was that as a security officer, his duties included significant walking up and down steps, bending and inspecting beneath machinery and equipment, searching personnel, opening gates and physically restraining unruly persons. The frequency and regularity with which some of these duties were required to be executed were not revealed. Prior to working with Alphega, he worked with Advance Security Limited for approximately 1 ½ years. It would appear that after the accident, he was engaged in doing ceiling work, for approximately 7 weeks. He refuted the evidence of Dr Lousaing that he was working full time for 7 months or that he worked after surgery and/or that he was told he had to lose weight and to go on an exercise programme. In fact, he never had surgery so wanted both surgeries as recommended by Dr Santana.

26. As to his loss of earnings, he testified to being of limited education and dependent now on family members to take care of his financial needs. Mr Mohammed asked this court to accept Brandon's

evidence, arguing that whilst he may have been inconsistent at times, there was no lack of clarity or any inconsistency with respect to evidence on the substantive areas of his claim. As regards Dr Lousaing's evidence that Brandon did ceiling work for 7 months after surgery, this court was hard pressed to accept this evidence in its totality. It was clear that Brandon did inform the doctor that he was engaged in ceiling work at some point but given that he never had surgery, this court could not accept the doctor's evidence as packaged. It was accepted, therefore, that Brandon did do ceiling work after his injury, for a period of at least 7 weeks.

Case Law

27. Brandon sought an award of $275,000.00 for his alleged severe multiple injuries to the back, neck and right knee. In support, he provided 8 cases[5], several of which were antiquated but still applied to the present facts to assist with the quantum. Of the 8 cases, this court found it useful to discuss here the 2 most recent ones in the context of its detailed comparative analysis with Brandon's

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[5] (1) *Trinidad Transport Enterprises Limited* v *Layne* CA 10 of 1971 where the respondent (a taxi driver of 38 years) suffered a back injury, namely a lumbar disc lesion associated with myofascial pain and injury to the left leg. He suffered severe pain to his back; his left leg was without sensation and the injury affected his sexual life. In 1972 the COA affirmed the award of $12,000.00, adjusted to $350,970.00 in 2010. (2) *Deyalsingh v The Mayor of POS* HCA 2341/79 where the plaintiff (a bar supervisor of 49 years) suffered a wedge compression fracture of the twelfth thoracic vertebra. His condition was inoperable and eventually he might be unable to work. He suffered with back pain and was unable to have normal sexual intercourse. There was a finding by the judge of a personality change which was taken into account in his assessment. The plaintiff was relegated to working in a lower status, less demanding job. In 1980, he got general damages of $25,000.00 for pain, suffering, loss of amenities and $192,000.00 for future pecuniary loss. His general damages was adjusted to $232,102.00 in 2010. (3) *Ali* v *Hasranah* HCA1483 of 1976 where the plaintiff (a contractor/labourer of 30 years) suffered a subluxation of the cervical vertebrae (a broken neck) at the C5 C6 level. The injury resulted in trauma to the spinal cord and, he was likely to suffer from cervical spondylosis (resulting in weakness at the extremities), spasticity and ataxia (unsteadiness of gait). He was awarded general damages of $25,000.00 for pain and suffering and loss of amenities (including the probability of a future operation) and $20,000.00 for loss of future earnings. This was adjusted to $223,592.00 in 2010. (4) *Moreau* v *Port Authority of T&T* HCA 3958 of 2006 where a 47 year old plaintiff suffered a spinal injury; pre-existing degenerative cervical and lumbar disc disease; and acute prolapse at C5/C6 caused by the accident. He had surgery for anterior cervical decompression. He was awarded for pain and suffering and loss of amenities $200,000.00; loss of future earning $499,000.00; and future surgery $38,665.00. His general damages was adjusted to $212,487.00 in 2010. (5) *Ramdoolar* v *Boodoo* HCA S710/73 where the plaintiff (a council labourer) suffered a fracture of the 12th dorsal vertebra and a less serious, mild compression fracture of the 11th dorsal vertebra (before assessment severe back pains when attempting to lift heavy objects, fusion of 12th dorsal and 1st the lumbar vertebrae; numbness of both feet with the power of both lower limbs being diminished; straight leg raising gave rise to pain at an angle of 45 degrees on the right side and severe spasms and cramps on the left side. Some osteoarthritis of the lower dorsal and upper lumbar spine evident. The judge considered the plaintiff likely to succeed in the clerical grade and awarded general damages of $20,000.00, adjusted to $214,154.00. (6) *Pemberton* v *HiLo* HCA 6039/88 where the plaintiff (a jeweller of 36 years) suffered pains in his head, right shoulder, lower back, right leg and experienced weakness in his hand. The equivalent of US$14,025.00 was awarded in TT currency, but converted at the rate prevailing at the time of payment by the defendant was made, in addition to $1,100.00 for local medical expenses. The further sum of $20,000.00 was ordered to be deposited into court by the defendant to be paid to the plaintiff upon production of documentary evidence that surgery to his mouth had been scheduled. He was awarded general damages of $85,000.00, adjusted to $209,828.00 in 2010.

injuries. The first was ***Kester Hernandez* v *The Attorney General***[6] delivered on 15th February, 2013 where a 19 year old claimant sustained severe injuries to the spine sustained at his workplace and was ascribed an 80% permanent disability to perform his job. He was awarded $300,000.00 for general damages. In ***Hernandez***, there was comprehensive medical evidence led on the resulting disability and its serious and debilitating effects. The medical evidence laid the platform for and showed why there was a need for restrictions, accommodations and medical assistive devices to help that claimant perform his basic ordinary and/or usual but now restricted personal and social activities. The severity and extent of incapacitation from the injuries sustained in that case were not mirrored in Brandon's case, but his injuries were also serious and requiring of surgical intervention. The impact of these remained unknown given that they were future procedures. Nevertheless, it would appear that the injuries in ***Hernandez*** were more severe and extensive than Brandon's, so as to exclude him from attracting an award that was higher than the one given in that case.

28. Secondly, in ***Kurlene Pierre* v *Miles Almondoz & Co and Trinidad and Tobago Insurance Company Limited***[7] the plaintiff/passenger (25 years) suffered injuries to her neck, both knees, right shin and bruises to the left eye as a result of an accident. The appeal was allowed, save for the cost of future surgery and further medical care (not pursued). The adjusted award for general damages was $110,000.00; loss of future earnings of $576,000.00; special damages of $18,000.00; future medical care of $125,000.00. In comparison, there was not much equivalency here with Brandon's injuries, save the knee injury.

29. On the other hand, Mr Quamina suggested 3 cases as a guide to the quantum. The first was ***Lennard Garcia* v *Point Lisas Industrial Port Development Corporation Limited***[8] delivered on 19th September, 2013 where a 60 year old claimant sustained injuries twice, initially from a fall after slipping on some oil at the defendant's workplace and then at the hospital when he was dropped from a stretcher. His injuries were to his upper right shoulder, left palm, soft tissue injuries to his back and right knee; persistent right-sided sciatica; degenerative spinal stenosis at L4-5 and L5-S1 levels. He experienced daily lower back pain which was radiating down his left leg to his knee

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6 *Kester Hernandez* v *The Attorney General of Trinidad and Tobago* CV2011-01821
7 *Kurlene Pierre* v *Miles Almondoz & Co and Trinidad and Tobago Insurance Company Limited* CA02/12
8 *Lennard Garcia* v *Point Lisas Industrial Port Development Corporation Limited* CV2010-03061

posteriorly; his left palm was having triggering of the left middle finger; mild prolapses of the L3-4, L4-L5 and L5-S1 discs; mild spinal canal stenosis at L3-L4, L4-L5 and L5-S1 areas of the discs; some nerve root entrapment on the left side; pain when sitting, standing and walking; weakness in his left leg and wasting of his left quadriceps muscle from the nerve being pinched by the prolapsed disc. Medical evidence pointed to him getting moderate to severe lower back pain for the rest of his life with the only means of relief being analgesia and if he were to lose weight. He was awarded in 2013 $80,000.00.

30. Secondly, in ***Ferosa Harold*** v ***ADM Import and Export Distributors Limited***[9], delivered on 17th April, 2015, a claimant after slipping on some substance and falling in the defendant's business place was diagnosed by Dr Pierre with soft tissue injury to the neck, lumbar spine and left shoulder and was awarded $60,000.00 in general damages. The claimant in ***Ferosa Harold*** gave evidence that during the 7 year period from injuries to trial, there was no improvement in her pain. That claimant suffered with daily pains that affected every facet of her life. She could not sit in one position for too long, walk upstairs or perform domestic duties of cooking and washing wares. In the case of ***Ferosa Harold*** the court was not satisfied on the medical evidence that she was disabled to the extent claimed and actually found Dr Pierre's evidence was not an independent, objective and scientific assessment of her disability but read as if it were a repetition of the claimant's complaint made to him. The court also expressed concerns about that claimant's credibility.

31. Finally, in ***Ramesh Sam*** **v** ***Tropical Power Limited***[10], a decision delivered on 20th May, 2013, where a claimant suffered lumbar disc injury and severe nerve root impingement but the court expressed concern with the medical evidence, an award was made of $75,000.00 as general damages; $74,100.00 as special damages and future loss of earnings in the lump sum of $30,000.00.

Analysis

32. Brandon's injuries appeared to be more closely aligned to ***Lennard Garcia*** than the others presented by Mr Quamina. The quantum settled upon by this court would have been influenced by

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9 *Ferosa Harold* v *ADM Import and Export Distributors Limited* CV2009-03728

10 *Ramesh Sam* v *Tropical Power Limited* CV2008-03126

Brandon's injuries; the medical and other evidence; a comparative analysis of the cases submitted as well as by all the principles of assessments. It was concluded that given the nature of Brandon's injuries, he could not attract the high end award being sought by Mr Mohammed but one that fairly compensated him for his injuries. While this court found loopholes in the Santana reports, it was concluded that it was not patently unsafe to accept his findings or that they should be disregarded wholesale. Consideration was given to his oral testimony where he sought to bring clarification to his medical diagnosis and connect the injuries to the accident. In this regard, it was also considered that he did not refute the linkage made by Dr Lousaing between Brandon's obesity and his persisting disability but debunked it with an alternative diagnosis. That apart, Dr Santana was clear that his diagnosis was accurate and reflected a need for surgical intervention to alleviate some of the continuing symptoms, pain and suffering. On the other hand, the evidence of Dr Lousaing seemed skewed towards minimizing the continuing effects of the injuries by the blanket prognosis of overweight, without providing clear details or some scientific and technical platform for this conclusion. Thus, there was no evidence of Brandon's weight, body mass and how these could or could not result in his manifested symptoms or ongoing disabilities. There were also careless mistakes reflected in Dr Lousaing's report on critical details that led to corrections and caused this court some unease and to wonder how these errors may have impacted his findings. While this court found areas to be critiqued in both doctors' reports, the more scientifically or technically sound medical was that of Dr Santana. To this end, the medical evidence of Dr Santana was preferred over that of Dr Lousaing.

33. This court accepted that Brandon would continue to experience pains and upon mature consideration of the medical evidence, it was decided that he should attract compensation as above for general damages. In arriving at this conclusion, it was considered that that award was a one off payment, so must be such that it would fully compensate him for losses sustained. These losses included any inability to lead a full life and to enjoy the amenities, which come from the ability to move freely in society and to earn as he used to prior to his injury[11]. It was considered also that this exercise was restorative and not meant to elevate him financially hence the award of $120,000.00.

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11 *Baker* v *Willoughby* [1969] 3 AER 1528

Special Damages

34. This court's approach to Brandon's plea for special damages was to allow all claims that were specifically particularized and proved. With respect to items that were not supported by documentary proof, this court sought to avoid being unnecessarily pedantic and unbending but to examine the evidence with a view to determining the reasonableness of the claim and if sufficient platform existed to justify any form of award. In the circumstances, Brandon claimed the following:

Medical expenses

35. He gave evidence of incurring medical bills of $11,770.00 and provided proof of $12,925.00 which he was allowed to recover. An additional sum of $15,000.00 was sought for the attendance of Dr Santana. The Court of Appeal has made it clear that the fee for the attendance at trial of a medical professional (not deemed an expert) would fall under prescribed costs and that it would be within the discretion of the judicial officer to increase that award[12]. Medical expenses would be allowed in the sum of $12,925.00.

Loss of earnings

36. As a security guard with Alphega, Brandon earned $2,000.00 per fortnight. He claimed loss of earnings from 24th June, 2010 (date of accident) to March, 2017 in the sum of $324,000.00. He averred that this sum did not include overtime or public holidays, which was paid double time. His claim of being unable to work from the date of the accident was corroborated by Karen.

37. As any determination as to inability to work was within the purview of the medical expert, this court turned to the evidence of those professionals. Dr Santana's oral evidence was that Brandon needed both back and knee surgeries (to be done separately), with recuperation time of 3 months and 6 weeks respectively. Neither surgery would result in reversal nor cure of his injuries but his pain would move from intolerable to manageable and he might be able to do some form of sedentary work. He also testified that Brandon would have to take a daily painkiller, such as arcoxia, but was unable to provide an exact pricing of this drug or of the stomach protector used along with such a

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12 *Kurlene Pierre* v *Miles Almondoz & Co and Trinidad and Tobago Insurance Company Limited* CA 02/12

drug. Such estimates would only reasonably be available after the surgeries were performed and the pain blocker needs of the patient assessed.

38. In the view of this court, absence from work would not necessarily mean that a claimant was deemed medically unfit so the medical evidence must support this claim. To be successful with a loss of earnings claim, he must prove, *inter alia*, that his injuries prevented him from working or earning income, as he did prior to the accident. The medical evidence of his doctor pointed to the need for future surgical procedures, which come with downtime for recovery. That was accepted as reasonably proven. The evidence failed, however, to reach the threshold for establishing that Brandon was permanently disqualified from working and, in fact, suggested otherwise. The very idea of being disqualified from security duties but then taking on work on gypsum ceilings gave this court some disquiet in accepting wholesale his claim for loss of earnings. Unfortunately, he failed to bring the full evidence of any earnings he made subsequent to the accident. What was clear from the evidence was that he could have worked in some limited capacity. As at the date of the assessment and in light of the non-surgical interventions, it was accepted that he has been out of full time employment due to his injuries. It was argued that as his earnings fell below the yearly allowance to attract taxes that there should not be any sum discounted for contingencies. In the view of this court, the usual discount applied to awards was not only for taxes but covered holidays, illnesses or other contingencies and would be applied to any award given under this head of damages. Thus, loss of earnings would be allowed up to assessment less 35% for contingencies, such as holidays and sickness, which was deemed fair and appropriate:

From 25.06.10 to 11.10.16 (75.57 months x TT$4,000.00 per month)	=	$302,280.00
Less 35% for contingencies	-	$ 105,798.00
TOTAL LOE	**=**	**$196,482.00**

Future Loss of Earnings (post trial)

39. A claim for loss of future earnings was pleaded and reliance placed on the evidence of Dr Santana to support the claim that Brandon can no longer work permanently. However, Dr Santana testified that while Brandon could not work as a security guard, he could do light or sedentary duties. Dr Santana ascribed a permanent disability to the back of 30% and right knee of 5%. Surgery was said to be necessary to relieve symptoms but not correct the knee problem. Mr Mohammed has argued

that the court should consider whether any prudent employer would want to employ someone to do light manual work with restrictions. He then called upon the defendants to show where Brandon might obtain this type of employment. The court was asked to consider Brandon a semi-handicap on the labour market and to use the multiplier x multiplicand approach to calculate his loss.

40. In coming to a determination on this aspect of his claim, this court considered Brandon's evidence of his inability to properly function as a security officer and of his unsuccessful attempt at doing another job. This alternative job was, in the mind of this court, more physically demanding than security work. Considered further was that his witness, Karen, supported his inability to do security work, which involved some moving of files and lifting of books and boxes. While she was not a medical expert, her familiarity with his job specifications and functions was noted. At the end of the day, however, Karen was an administrative employee, whose expertise in security management or execution skills was never established. Viewed from those lenses, her evidence was not ascribed much weight or significance, so as to influence this award. Also noted was the incongruity in Brandon's evidence under cross examination as to when he worked with Mr Hazel doing gypsum ceiling and whether it was for a short stint for the Christmas or he was fired. Several pieces of evidence as to loss of earnings simply did not add up. It was found that there were some attempts by Brandon at twisting or manipulating the truth, which was heavily frowned upon by this court. This caused this court some concern and led it to conclude that Brandon was capable of doing some form of sedentary work, as supported by his medical evidence. This conclusion was bolstered by how the evidence as to loss of earnings was presented, including the missteps, the qualifications as to what exactly would have been told to Dr Lousaing about working on ceilings and the period during which he worked with Mr Hazel. This was only compounded by the failure to bring the necessary documentary evidence or to call Mr Hazel as a witness to clarify and confirm when he was employed with him, his performance and the circumstances of his departure. It meant that his claim of permanent disability from all types of work was not accepted by this court. Accepted only was that he needed surgical intervention which will result in his pains being more manageable and presumably an increased functionality in sedentary employment. Given his lack of forthrightness and deficiencies in the evidence, this court awarded a lump sum of $150,000.00 to cover any future loss of earnings.

Future Surgery

41. Brandon's amended claim for surgeries to his lumbar spine and right knee was supported by Dr Santana, who recommended these interventions. Future surgery of $90,000.00 was allowed.

Future Medical Care

42. Brandon claimed future medical care of $14,235.00 yearly for 16 years in the global sum of $227,760.00. The medical evidence of Dr Santana pointed to the need for further surgical interventions and resultant downtime for recuperating. There was also evidence to support a need to be on continuing painkillers for the rest of his life, albeit evidence of the type, strength and cost of the particular drugs was not available. Suggested only was that he might require arcoxia and pantecta once per day for the rest of his life, since the arcoxia would result in the least damage to the stomach. There was no estimate provided of this long term cost. A cash bill from Capital Drugs Limited was annexed to Brandon's witness statement showing spending of $39.00 per day on these drugs. There was also medical evidence of the need for physiotherapy for at least 18 months, with again no estimated cost provided. Given the evidentiary insufficiencies, this court allowed a lump sum of $100,000.00 to defray these expenses.

43. The order of this court is as stated in paragraph 1 of this judgment. A stay of execution of 48 days is applied to this decision. And, it is so ordered.

Dated 4th October, 2017

Martha Alexander
Master