

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007-03072

BETWEEN

BYRON BAPTISTE

Claimant

AND

BRIAN BECKLES
(Trading as Bry's Hardware)

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Rennie Gosine for the Claimant

Mr. Martin George for the Defendant

ASSESSMENT OF DAMAGES

BACKGROUND

1. On the **29th April, 2006** the Claimant, Byron Baptiste was injured in an accident when the backhoe that he was driving overturned. It was found at trial that he had been supplied with a defective tyre by his employer, and knowing this, had not only chosen to operate the backhoe, but to operate it down a slope at a speed which did not take into account the deficiencies in the tyre that he claimed.

2. At the time of the accident the Claimant was 67 years old. He was operating the backhoe in the course of his employment when on descending a hill the backhoe skidded and overturned, pinning him under it for approximately 2 hours. As a result he suffered personal injuries which ultimately resulted in his left leg having to be amputated below the knee. The court found that he

and the defendant, his employer, had each contributed towards his damage. Those injuries are detailed in the agreed medical reports set out hereunder.

3. He filed a claim by claim form on August 21st 2007. The matter first came before this court on April 1st 2009 and was heard on April 21st 2009. Judgment on liability was delivered on June 12th 2009 when it was ordered that there be judgement for the claimant for 50% of his damages to be assessed by this court in default of agreement which the defendant is to pay. The defendant's counterclaim was dismissed.

4. There was no agreement. The matter was adjourned for written submissions on quantum to be filed and it was adjourned for decision on quantum to be delivered on December 1st 2009. In fact the defendant appealed and the appeal was dismissed on **May 8th 2013**. When the matter was once more before this court opportunities were provided to the parties to file updated written submissions on quantum, and explore the possibility of agreement on quantum, but to no avail.

CONCLUSION

a. Damages for pain and suffering, loss of amenities

5. The medical reports were agreed at trial. The evidence at trial was in respect of both liability and quantum. Damages are assessed, with a reduction of 50% to be applied thereafter, as follows:

i. Based on the assessment of:

a. the claimant's **pain and suffering**, and

b. **loss of amenities**, and

ii. having regard to **trends** set in relation to awards in respect of similar leg injury as well as those of lesser severity,

a reasonable award in the circumstances, in respect of general damages for pain and suffering and loss of amenities as a result of the amputation of his left leg below the knee, would be **\$350,000.00**. Discounted by 50 % for contributory negligence, that award would be **\$175,000.00**.

b. Loss of earnings/ Loss of pecuniary prospects

6. In this case the claimant's likely working life could not be assumed to have been significantly greater than one year. He was 67 years old and had already retired from his full time

job. With or without the intervention of the accident his future earnings, taken from the date of the accident, would not have been likely to exceed 12 months earnings, although he has clearly lost those earnings. There would therefore be no further post trial losses of earnings or further loss of pecuniary prospects.

7. A further award for loss of earnings in the sum of **\$24,000.00** (50 % of \$48,000 - earnings for 12 months) would be appropriate. Since the claimant was found to be **50%** contributorily negligent, **\$199,000.00** is awarded for pain and suffering, loss of amenities **and** loss of earnings.

c. Special damages

8. Proven Special damages - \$1650.00

(Cost of prosthesis – not proven

Domestic assistance – not proven)

d. Interest

9. i. Interest is to run on the principal sum of the **general damages** - \$175,000.00, at the rate of 6 % per annum from September 3rd 2007 (date of service of claim) until **May 8th 2013** - date of judgment of the Court of Appeal.

ii. Interest is to run on the principal sum of the **general damages** - \$175,000.00 thereafter at the rate of 12 % per annum from date of judgment of the Court of Appeal **May 9th 2013** until July 16th 2014. (Interest is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter.

iii. Interest is to run on the special damages totalling **\$25,650.00** (\$24,000.00 comprising 50 % of the lost earnings, plus proven special damages of \$1650.00) at the rate of 6% per annum from 29th October 2006 (6 months after the accident) (at which point the full amount of lost earnings and proved special damages would have accrued and been due and payable), until **May 8th 2013** (date of judgment of the Court of Appeal).

iv. Interest is to run on the special damages continuing thereafter at the rate of 12 % per annum from date of judgment of the Court of Appeal **May 9th 2013** until **July 16th 2014**. (Interest is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter.

e. Costs

10. Costs are payable by the defendant on the basis prescribed by the Civil Proceedings Rules calculated upon a claim in the total sum above inclusive of interest.

ORDERS

11. Accordingly the defendant is to pay directly into court for the benefit of the claimant the following:-

- i. The sum of **\$175,000.00** for general damages for pain and suffering and loss of amenities.
- ii. Interest on this sum at the rate of **6 % per annum** from **September 3rd 2007** (date of service of claim) to **May 8th 2013** (date of judgment of the Court of Appeal).
- iii. Interest at the rate of **12 % per annum** on the sum of **\$175,000.00** from **May 9th 2013** to **July 16th 2014**.
- iv. The sum of **\$25,650.00** (\$24,000 plus proved special damages -\$1,650.00), together with interest at the rate of **6%** per annum from **29th October 2006** (6 months after accident) to **May 8th 2013** (date of judgment of the Court of Appeal)
- v. Interest at the rate of **12 % per annum** on the sum of **\$25,650.00** from **May 9th 2013** to **July 16th 2014**.

The defendant is to also pay the following:

- vi. Costs payable on the basis prescribed by the Civil Proceedings Rules calculated upon a claim in the total sum above inclusive of interest.
- vii. Liberty to apply.

ANALYSIS AND REASONING

COMPENSATION FOR THE INJURY

12. The well known standard analysis begins with the framework identified in **Cornilliac v St Louis** (1965) 7 WIR 491, by the Honourable Wooding C.J. (as he then was) at page 492 under the following heads:-

- (i) the nature and extent of the injuries sustained;
- (ii) the nature and gravity of the resulting physical disability;
- (iii) the pain and suffering endured;
- (iv) the loss of amenities suffered; and
- (v) the effect on pecuniary prospects.

GENERAL DAMAGES

(i) The nature and extent of the injuries sustained

13. The claimant injured his leg when a backhoe he was driving overturned pinning him under it. At the time of the accident the claimant was alone but some 2 hours afterwards persons arrived on the scene, the backhoe was lifted from his leg, and he was taken to the Hospital.

14. The Claimant's injuries have been described in agreed Medical Reports as follows:

Medical report of 10th July 2006

The above named patient was seen on Ward 13, General Hospital Port of Spain on the 29th April 2006 with history of pain in the left foot following crush injury.

According to the patient, he was the driver of a forklift that rolled down a hill in the early hours of the 29th April 2006, and came to rest with his left foot underneath, causing an open injury to it.

Clinical and Radiological examinations revealed:

- a) A Degloving injury extending from the anterior aspect of the left foot extending laterally and down to the posterior-medial aspect of the Achilles tendon. Wound was severely contaminated with debris, grass and glass. There was no vascular or tendon injuries.*
- b) A mildly displaced fracture of the left distal tibia with bimalleolar involvement. Patient was admitted and had extensive washout and closure of wound in the Main Theatre.*

He was placed on intravenous antibiotics and analgesia.

Post-operatively, patient was noted to be febrile and had revision of wound with washout in the Main Theatre on the 2nd May 2006.

Patient was transfused with two units of blood during admission.

However, the temperature spike still persisted and on inspection of the wound on the 7th May 2006, it was noted that there were areas of necrosis around the lateral aspect of the left foot with an offensive odour.

Patient had debridement of the infected left foot with an external fixator applied to the left ankle and tibia on the 8th May 2006 pending amputation of the left leg due to the poor prognosis of the foot injury.

On the 11th May 2006, the patient and his son were told on the need for a below knee amputation due to the nature of the injury and they gave their consent for the procedure.

Subsequently, patient had a below knee amputation on the 11th May 2006.

Post-operatively, he was stable and discharged on the 25th May 2006 for follow up in the Surgical Outpatients' Clinic. He was assessed to have sixty percent (60%) permanent partial disability.

Patient is still being followed up in the Surgical Outpatients' Clinic.

Medical Report dated 19th July 2006

Medical Report dated 19th July 2006 states that the claimant's injuries were:

- 1. Severe degloving soft tissue injury of the left leg from proximal to distal **contaminated** with debris, and*
- 2. Compound fracture of the left tibia and fibula.*

*An attempt was made to clean the wound and debride and he was placed on antibiotics and analgesics on the day of admission. This was repeated on the 2nd May 2006 but he continued to be febrile and the muscles became necrosed. On the 11th May 2006 he was not doing well and it became evident that the leg had been overcome by sepsis. A **below knee amputation** was performed on that day. At presentation on the 13th July 2006 he was still in a healing process and will need stump preparation and a below knee prosthesis. The cost of which is sixty thousand dollars (\$60,000.00)*

Permanent Partial Disability is 50%.

15. (ii) The nature and gravity of resulting physical disability

The claimant said that for the first 8 months after the accident he was unable to assist himself. He could not do his chores. He now uses a wheelchair or a cane to move around the house. At trial he clarified that by "cane" he meant crutches.

(iii) The pain and suffering that had to be endured

16. The Claimant's account of the impact of the injury is set out at paragraphs 7 and 19 of the Claimant's Witness Statement as follows: - [all emphasis added]

*17. When the backhoe fell and pinned me, I was in great pain. No other person was around. I remained pinned for **approximately 2 hours**. I saw blood flowing from my body. My left leg was in great pain. I was crying. No one was around.*

I remained at the hospital for approximately 1 month. For this month, I was bed-ridden and in tremendous pain. I was depressed having regard to the fact that I had lost my left leg.

The claimant states in his witness statement that when the backhoe fell and pinned him he was in great pain. No other person was around. He remained there for approximately two hours. He saw blood flowing from his body.

18. After he was removed he was taken to the Port of Spain General x-rays were taken and a plaster was placed on his left leg. There were stitches throughout his leg. He was informed the following day that his leg would have to be amputated. He begged the doctor to save his leg but he was told that it could not be saved. He spent approximately one month in hospital during which time he was bed ridden and in tremendous pain. He was also depressed because he had lost his left leg.

19. This evidence is accepted. It is consistent with the medical reports and the undisputed fact that his leg was in fact amputated below the knee. There is no doubt that he was discovered pinned under the backhoe, that the claimant sustained a crush injury to the limb, and that the defendant was instrumental in extracting him from under it with the aid of a Jack. Severe pain in the circumstances he described would border on an understatement.

iv. The loss of amenities suffered

20. The claimant says in his witness statement at paragraph 26, that prior to the accident he was a very outgoing person and was involved in various activities including swimming and hiking. He is now confined to his house and is unable to do these activities with one leg.

21. What is not emphasized is that the claimant was 67 years old at the time of the accident. He had retired. However he was clearly sufficiently fit to continue to work as a back hoe operator. While it may be an exaggeration to state that he is confined to his house, clearly his mobility is necessarily affected by his injury. The effects of a partial amputation on mobility cannot be trivialized.

FINDINGS

22.

- i. **Pain and suffering** – initially severe, and probably continuing for at least one month.
- ii. **Nature and extent of injury sustained** -as in the agreed medical reports eventually resulting in below knee amputation of limb.
- iii. **Nature and Gravity of resulting physical disability** - with loss of a portion of a limb, significant restrictions on mobility are assumed, although not complete immobility or confinement to his house.

JUDICIAL TRENDS

General damages

23. Not all the cases cited were considered to be of assistance, particularly those which dealt with minor leg injuries, which this most definitely was not. The Court must consider awards in cases in which comparable injuries were sustained. However there are few recent cases on this type of injury, of which the following appear to be the most recent:

1. **Jaggernath Seunath v Errol Ramdeo No. 1128 of 1980** per the Honourable Justice Permanand - delivered **28 February 1992**.

At the time of the accident the Plaintiff was just 18 years old. His leg was amputated 24 hours after an initial unsuccessful operation. He was about to embark on a career in the Police Service. With the loss of a leg this was no longer possible and he became a clerk at the Ministry of Agriculture.

The plaintiff had to use an artificial leg and when he took a bath had to remove the leg and balance on the other leg. The specialist who testified at trial that the cost of a good quality limb

was available at a cost of CAN (Canadian Dollar) \$20,000.00, also testified as to the cost and availability of alternative artificial limbs.

The plaintiff suffered severe pain and discomfort even in the witness box. He was unable to take part in cricket which he enjoyed as a youth playing for a Club, or cycling, dancing, or swimming. He was now restricted to attending cinema shows.

As a result of the accident the plaintiff lost his girlfriend whom he had reasonably expected to marry but who never turned up to see him again.

An award of **\$200,000** was granted on 28th February **1992** in respect of the pain and suffering and loss of amenities components of his claim.

2. Roger Phillip v Gulf Marine Service Limited & Another HCS 924/1995 Master Mohammed - Delivered December 7th 2011

The plaintiff was injured when cargo fell on his left leg leading to eventual amputation **above** the knee. He suffered excruciating pain and remained under the cargo for five minutes before anyone came to his assistance by which time he observed that his leg was being held together by a piece of skin.. He waited some 1 to 1 and a half hours before he could get treatment.

At hospital he underwent surgery and when he awoke the next day he observed that his left leg was amputated above the knee and the stump bandaged. He was in pain and received medication three times a day to relieve his pain. He was unable to perform everyday tasks for himself. He had to use a bedpan and was sponged off by the nurses and had to use a tube to urinate which was painful and embarrassing. He was at hospital for three weeks and upon being discharged he was confined to a wheelchair.

He endured severe pain for three months. He relied on pain killers and antibiotics. His wife attended to all his needs including his personal hygiene. He attended clinics for one year.

During this time leg remained bandaged and swollen. He was measured for a prosthesis but had difficulty walking or sitting comfortably. At the time of assessment he still had moderate pain, occasional severe pain, and phantom pains - three years after the accident. As to loss of amenities he had been a long distance runner for 13 years previously, participating in marathons .He cycled

and played competitive football. He also enjoyed swimming and dancing. He was no longer able to take part in these activities.

The Master awarded \$425,000 .00 for damages for non-economic loss.

24. While there are cases from the 1960s and 1970s these are of little assistance. See the Privy Council case of **Peter Seepersad v Theophilus Persad and Capital Insurance Privy Council Appeal No. 86 of 2002 delivered 1st April 2004 at paragraph 15**

*Their Lordships entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an **inexact science** and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.*

25. To the extent that reliance may have been placed on adjustments to the figures in cases from the 1960s and 1970s it is arguable that in fact there are insufficient cases sufficiently recent to allow comparison of like with like and therefore to establish a range of awards. In view of the dearth of relevant cases on equivalent injuries it is necessary to consider cases with leg injuries of lesser severity to at least establish a benchmark, if possible, from first principles.

26. **H.C.A 3487/2003 - Johnson Ansola v Great Northern Insurance**, and on appeal **Ansola Civil Appeal No: 121 of 2008 The Great Northern Insurance Company Limited Co-Defendant/Appellant Ramnarine Singh, Ganesh Roopnarine v Johnson Ansola delivered 5th April 2012**

Ansola involved leg injuries of some severity. Although they fell short of amputation, they affected the future pecuniary prospects of the claimant involved and gave rise to significant loss of amenities

27. The injury to his foot meant that he could not stand or walk for long periods, and the prolonged standing, squatting or fluid mobility, required by his occupations as joiner/upholsterer, were not possible.

28. The effect of that claimant's **less severe** injury was, in those circumstances, **inability to continue working**.

29. In the instant case the Claimant could not reasonably have been expected to find alternative employment subsequent to the amputation, although it is noted that the claimant in the *Roger Philip* case attempted to find alternative employment as a fisherman, and a taxi driver, despite an amputation above the knee.

30. I consider that although the effect on **pecuniary prospects** is **similar** to those in *Ansola*, the pain and suffering component of the injury of the instant claimant, and the trauma of having to live thereafter without a portion of a limb, would justify a higher award than the award of \$150,000.00 awarded, and confirmed on appeal, in respect of pain and suffering and loss of amenities in that case.

31. In the case of **Baldor v Prestige Car Rentals, Bankers Insurance & Patrick Alamani, High Court Action No. 442 of 2000**, the Honourable Justice Mendonca (as he then was), in a judgment dated 22nd November 2000 assessed damages in respect of an 18-year-old female pedestrian who suffered **severe knee injuries** including a ruptured anterior ligament of the knee, a ruptured posterior ligament of the knee, severe damage to the lateral perineal nerve of the knee and rupture of the medial collateral ligaments of the knee causing complete instability. She had no control over her foot as the result of nerve damage and was unable to bear weight.

32. Nine months after the accident, she underwent four hours of surgery for the repair to the anterior ligament. As a result thereof, the plaintiff was able to bear weight on crutches. Seven months later, she was able to walk but limited to approximately 100 yards.

33. She **needed to use crutches** or at best a walking stick at all times and had to wear a knee brace. She was unable to sit or stand for any length of time and full weight bearing was difficult. She had significant foot drop and numbness of the dorsum of the foot. She required a foot drop splint at all times and recovery of the lateral perineal nerve was very slow.

34. There was major scarring of the knee and likely future scarring after further surgery which was contemplated. Her permanent partial disability was assessed at 40% and three further surgical procedures were required to repair the ligaments and the foot drop.

35. The **best outcome** contemplated from surgery was that the plaintiff would still be left needing to use a walking stick and she would **always be limited in her ambulation**, although **after surgery she would be able to walk a few hundred yards without significant pain** or having to stop to rest. Her permanent partial disability would be reduced but still would be significant.

36. She suffered **severe pain at the time of the accident** and **severe pain at the time of surgery**. It was contemplated that her **future surgeries would be equally painful**. At the time of trial, the plaintiff continued to complain of pain and found it painful to climb up and down stairs in her home and she was unable to sit or stand for long periods without experiencing cramp. The brace that she wore also caused her sleep to be disturbed. She was awarded **general damages of \$155,000.00 for pain, suffering and loss of amenities**. This was also a severe and painful injury, resulting in significant loss of amenities, although, unlike *Ansola*, and the instant case, not resulting in complete loss of earning capacity.

37. I consider that based on the findings as to the claimant's actual level of pain and suffering, injury, and level of disability, and in light of the range and trend of awards for injuries similar in their effects, an award of \$350,000.00, (before deduction for contribution), as general damages for pain and suffering and loss of amenities would be appropriate.

38. This is more than twice the awards in *Ansola* and *Baldor*, (but probably twice what those awards would be if heard and determined today), for injuries which, though less severe than

amputation, still left their victims with significantly restricted mobility, and, in the case of *Ansola*, though not *Baldor*, left him unable to earn a living.

39. The injuries in those cases had a similar effect on loss of amenities and enjoyment of life. In the case of *Ansola* it had an even more significant effect on his pecuniary prospects as he had a longer working life ahead of him than the instant claimant. The distinguishing feature between the injuries in the instant case, and the injuries in *Ansola* and *Baldor* would, arguably, be the level of pain and suffering endured, and the significant trauma of having to live with the loss of part of a limb.

40. An award of \$350,000.00 also represents an uplift of 75 % from the case of **Jaggernath Seunath v Errol Ramdeo HC 1128/1980**, delivered 22 years ago, although it is less than the award in the *Roger Phillip* case, in respect of a younger person who sustained the **above the knee** amputation injury **preretirement**, and who was apparently far **more physically active** and athletic than the instant claimant.

5. The extent to which the plaintiff's pecuniary prospects have been affected

Loss of Income

41. At the time of the accident the claimant was already 67 years old. He is now around 76 years old. He says he was earning about \$1000.00 per week operating the backhoe. This court found on the evidence that he was an employee. He had already retired from his full time job. The defendant's evidence, that in fact it was the claimant who used to pay him for the use of his backhoe, was not accepted.

42. The best evidence of what the defendant was paid was \$4000.00 per month. The amount claimed is not unreasonable. It is not supported by any documentation whatsoever but this state of affairs was addressable by the defendant, whose employee I find that he was, if instead of attempting to portray the claimant as an independent contractor for whom he had no responsibility, he had disclosed, in accordance with his discovery obligations, the true state of the claimant's employment status, and remuneration.

43. There is no evidence to show for what period he could have continued working as a backhoe operator. He was already past the retirement age of 65. He had already been in an accident involving another backhoe. The period for which he could have continued to work as a backhoe operator at his age would have been limited in the normal course of things by his age. In the circumstances any award beyond one year's earnings would be speculative.

44. The estimated remaining working life of the defendant would, more likely than not, have been no more than 12 months, making his loss of earnings at \$4000.00 per month - a total of \$48,000.00.

Loss of earning capacity

45. His compensation for loss of earnings takes him to the end of his working life. While the claimant would definitely have lost earning capacity were he of working age, in this case any award which compensates for future earnings would necessarily therefore duplicate any award for loss of earning capacity.

Special Damages

46. These must be pleaded and strictly proved.

47. The principles in the various Court of Appeal cases in relation to degree of proof required for special damages were summarised in **CV2007-02193 Raghunath Singh & Company Limited v National Maintenance Training And Security Company Limited** as follows:-

1. The principles revealed by the cases are that special damages must be particularized and pleaded. (*See Ramesh Seebalack v Charmaine Bernard LPR of the Estate of Reagan Bernard [2010] UKPC 15*)

2. Special damages must be proved by evidence.

3. The degree of proof varies depending on

(i) The circumstances,

(ii) The nature of the claim,

(iii) The difficulty or ease with which proper evidence of value might be obtained, and

(iv) The value of the item involved. (*See Sookoo v Ramdath CA Civ43/1998*)

4. Even prima facie evidence may, in some instances suffice if not rebutted or challenged, and common sense must be applied in deciding whether such evidence can reasonably be expected to be available to the claimant. – (*Uris Grant v Motilal Moonan Ltd CA Civ 162/1985, Guinness v Lalbeharry CA Civ 41/1980*)

Future medical expenses

48. The medical report of Dr. Toby states that: “*At presentation on the 13th July 2006 he was still in a healing process and will need stump preparation and a below knee prosthesis. The cost of which is sixty thousand dollars.*” This is the only evidence of the cost of the prosthesis and it is clearly not satisfactory. It does not amount to proof; far less strict proof of what is a non trivial amount. Since Dr. Toby suggested that the claimant be fitted for a prosthetic leg a sum of \$60,000.00 is claimed. While the court would have been quite prepared to grant such a claim, the basis of that figure is not provided. It is simply a hearsay statement in an agreed medical report without sufficient foundation or corroboration.

49. At paragraph 23 of the claimant’s witness statement he states - *‘I say that I requested a prosthesis leg the cost of which varies from \$50,000.00 to \$250,000.00. I am unable to afford this’* In cross examination he simply said *he was just told the cost. He never paid for it.* The reason for a 400 % variance between the upper and lower costs of a prosthesis is not explained. These figures thrown at the court do not provide an adequate basis for an award in this regard.

50. This claim has not been strictly proved by a pro forma invoice, evidence that the claimant even wants this prosthesis now, evidence of the current cost of such prosthesis, evidence that any sum awarded for this will in fact be used for this purpose, or evidence that it is not available through the public hospitals or through the public health care system. Such evidence was available in the *Roger Philip* case, as well as adequate specific evidence to justify an award in respect of a prosthesis. That evidence simply does not exist here.

Transportation Costs - \$750.00

51. There are no bills, receipts or statements for these. I find that transportation would have been necessary for the claimant, that he would probably have had to hire a vehicle, and that he would have incurred expense.

52. The evidence that he would have done so on at least 10 occasions, and the bare statement in his witness statement that the cost of transportation was \$1500.00, are not compatible. The figure claimed is an exact one, while the number of occasions is clearly an estimate. I find that the figure claimed in his witness statement is therefore in all likelihood also an estimate, and is not proved.

53. I award the sum of \$750.00 claimed in the statement of case, despite there being no evidence of the cost per trip or the number of trips, as it would not be reasonable to expect receipts for all the claimed transportation expenses, and it is, on a balance of probabilities, likely and reasonable that some similar expense would have had to be incurred.

54. **Domestic Assistance** - costs claimed in respect for nursing care / domestic assistance by the claimant's daughter were not supported by evidence from his daughter that she in fact had agreed to look after him at a cost of \$1500 per month. In his statement of case he claims this as a continuing sum. In his witness statement he claims that he paid her for 12 months. This contradictory claim amounts to \$18,000.00 at minimum. This is a substantial sum, proof of which was required. It is simply not proven.

Workman's Compensation

55. The defendant indicated that a claim for workman's compensation had since been filed by the claimant. If such compensation had been filed and awarded before this assessment such sum would have been deductible from the instant award for loss of earnings. See **T&TEC v Keith Singh CA Civ.180/2008**. See also **Marcelle Benjamin v Lennox Petroleum Services Ltd CV2011-02393** delivered 17th April 2014 paragraphs 158-162.

Delay and interest

56. The delay occasioned in the assessment of damages was occasioned by the defendant's actions. Damages therefore fell to be assessed. The claimant took issue with the necessity for the amputation and claimed that this was the result of negligence in medical treatment, resulting in sepsis and necrosis which could have been avoided.

57. Apart from the fact that the medical reports had been agreed at trial as to the truth of their contents, no medical evidence whatsoever existed for this purported issue, apart from counsel's submissions and inferences drawn from the medical reports.

58. It was postulated that the effect of this non issue was to significantly reduce the liability of the defendant. The position taken by the defendant ensured that damages could not be agreed despite the fact:

- a. that there are a limited number of cases in this jurisdiction on amputation injuries,
- b. the medical reports had been agreed,
- c. liability had been determined by the date of delivery of the judgement of the Court of Appeal.

59. An application of the limited number of relevant cases, to the matters established in the agreed medical reports, in accordance with the standard analysis in this jurisdiction based on the principles set out in *Cornilliac v St. Louis*, could have resulted, as it does in a large percentage of similar matters in this jurisdiction, in an agreement on the appropriate quantum.

60. That issue was finally laid to rest by the agreed further expert report of an orthopaedic expert who examined the medical report and confirmed the reasonableness of amputation in the face of infection, in the circumstances of a contaminated crush injury. Even then, this did not result in a realistic reappraisal of the quantum to which the claimant would have been entitled.

61. Compensation for delay in payment of monies to which a claimant is found legitimately entitled is effected by the mechanism of an award of interest to compensate for the loss of use of the money in the interim. The rate of interest is discretionary. In this case the rate of interest on

the general damages awardable should be 6 % from September 3rd 2007 (date of service of claim) until **May 8th 2013** -date of judgment of the Court of Appeal.

62. Interest thereafter is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter. Thereafter interest is to run on the principal sum of the general damages - \$175,000.00 at the rate of 12 % from **May 9th 2013** until July 16th 2014 and continuing thereafter at the statutory rate of 12 %.

63. Interest is to run on the special damages totalling **\$25,650.00** (\$24,000.00 comprising 50 % of the lost earnings, plus proven special damages of \$1650.00) at the rate of **6%** per annum **from** 29th October 2006 (6 months after the accident) - (at which point the full amount of lost earnings and proved special damages would have accrued and been due and payable), **until May 8th 2013** (date of judgment of the Court of Appeal).

64. Interest is to run on the special damages continuing thereafter at the rate of 12 % per annum from date of judgment of the Court of Appeal **May 9th 2013** until **July 16th 2014**. (Interest is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter.

CONCLUSION

a. Damages for pain and suffering, loss of amenities

65. The medical reports were agreed at trial. The evidence at trial was in respect of both liability and quantum. Damages are assessed, with a reduction of 50% to be applied thereafter, as follows:

Based on the assessment of:-

- i. the claimant's **pain and suffering**, and
- ii. **loss of amenities**, and
- iii. having regard to **trends** set in relation to awards in respect of similar leg injury as well as those of lesser severity,

a reasonable award in the circumstances in respect of general damages for pain and suffering and loss of amenities as a result of the amputation of his left leg below the knee would be **\$350,000.00**. Discounted by 50 % for contributory negligence, that award would be **\$175,000.00**.

b. Loss of earnings/ Loss of pecuniary prospects

66. In this case the claimant's likely working life could not be assumed to have been significantly greater than one year. He was 67 years old and had already retired from his full time job. With or without the intervention of the accident his future earnings, taken from the date of the accident, would not have been likely to exceed 12 months earnings, although he has clearly lost those earnings. There would therefore be no further post trial losses of earnings or further loss of pecuniary prospects.

67. A further award for loss of earnings in the sum of **\$24,000.00** (50 % of \$48,000 - earnings for 12 months) would be appropriate. Since the claimant was found to be **50%** contributorily negligent, **\$199,000.00** is awarded for pain and suffering, loss of amenities and loss of earnings.

c. Special damages

68. **Proven Special damages - \$1650.00**

(Cost of prosthesis – not proven

Domestic assistance – not proven)

d. Interest

69. i. Interest is to run on the principal sum of the **general damages** - \$175,000.00, at the rate of 6 % per annum from September 3rd 2007 (date of service of claim) until **May 8th 2013** -date of judgment of the Court of Appeal.

ii. Interest is to run on the principal sum of the **general damages** - \$175,000.00 thereafter at the rate of 12 % per annum from date of judgment of the Court of Appeal **May 9th 2013** until July 16th 2014. (Interest is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter.

iii. Interest is to run on the special damages totalling **\$25,650.00** (\$24,000.00 comprising 50 % of the lost earnings, plus proven special damages of \$1650.00) at the rate of 6% per annum from 29th October 2006 (6 months after the accident) (at which point the full amount of lost earnings and proved special damages would have accrued and been due and payable), until **May 8th 2013** (date of judgment of the Court of Appeal).

iv. Interest is to run on the special damages continuing thereafter at the rate of 12 % per annum from date of judgment of the Court of Appeal **May 9th 2013** until **July 16th 2014**. (Interest is to accrue at the rate of 12 % per annum as the defendant should not benefit from any delay in payment of compensation thereafter.

e. Costs

70. Costs are payable by the defendant on the basis prescribed by the Civil Proceedings Rules calculated upon a claim in the total sum above inclusive of interest.

Post script - On the morning of delivery of the judgement the claimant was not present in court. His son appeared and informed the court that his father was diabetic and had Alzheimer's disease. No medical report was produced.

ORDERS

71. Accordingly the defendant is to pay directly into court for the benefit of the claimant the following:-

- i. The sum of **\$175,000.00** for general damages for pain and suffering and loss of amenities.
- ii. Interest on this sum at the rate of **6 % per annum** from **September 3rd 2007** (date of service of claim) to **May 8th 2013** (date of judgment of the Court of Appeal).
- iii. Interest at the rate of **12 % per annum** on the sum of **\$175,000.00 from May 9th 2013** to July 16th 2014.
- iv. The sum of **\$25,650.00** (\$24,000 plus proved special damages -\$1,650.00), together with interest at the rate of **6%** per annum from 29th October 2006 (6 months after accident) to **May 8th 2013** (date of judgment of the Court of Appeal)
- v. Interest at the rate of **12 % per annum** on the sum of **\$25,650.00 from May 9th 2013** to July 16th 2014.

The defendant is to also pay the following:

- iv. Costs payable on the basis prescribed by the Civil Proceedings Rules calculated upon a claim in the total sum above inclusive of interest.
- v. Liberty to apply.

Dated the 16th day of July, 2014

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Peter A. Rajkumar
Judge

The court is indebted to Judicial Research Assistant Ms. E. Ali for her contribution to this judgment.