THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2011-02393

BETWEEN

MARCEL BENJAMIN

Claimant

And

LENNOX PETROLEUM SERVICES LIMITED

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. K. T. Berkeley for the Claimant

Mr. Richard Jagai instructed by Ms. S. Narine for the Defendant

JUDGEMENT

BACKGROUND

1. The claimant claims damages for personal injury and consequential loss arising from an accident on February 9th 2009 when he was struck by an "elevator horn". The accident is undisputed, as is the fact that he sustained injury as a result.

2. What is disputed is the extent and severity of the injuries he sustained and the effect of those injuries on his life, on his earnings, and on his future earning prospects /earning capacity.

ISSUES

3. It is necessary therefore to establish:-

a. what injuries the claimant sustained,

b. the effect of those injuries generally, and specifically, the effect of those injuries on his ability to work and /or ability to earn.

c. whether the claimant should be awarded compensation for the cost of future surgery in the estimated sum of $250,000.00.

d. the quantum of special damages.

e. interest.

FINDINGS AND CONCLUSION

4. The evidence of Dr. Narine that the claimant has sustained injuries to his neck and to his lower back is accepted.

5. I accept that those injuries may cause intermittent pain. I accept that they appear to be slowly resolving, as set out in his reports dated June 14th 2010 and May 19th 2011.

6. I do not accept that the suggested figure of 60 % permanent partial disability is reliable as a guide to the actual effects of the injuries on this claimant, both as a matter of law and as a matter of fact.

7. That assessment, even for purposes of Workman's Compensation, appears to be excessive in light of the actual findings in the agreed medical expert, as set out below.

8. I find that no adverse inferences can be drawn from the use by the claimant of a walking stick or cervical collar, or his occasional failure to use these assistive devices. The latter was medically recommended and probably provides relief, support or comfort. The former may provide comfort and support, and in any event does no harm, even if its use is not mandatory.

9. I am satisfied that it is clear on the evidence of the agreed medical expert that the claimant cannot return to his former employment as a Derrickman, and that any equivalent strenuous physical labour would be unwise, even if possible.

10. I am also satisfied, for the reasons set out hereunder, that the claimant is not a witness whose credibility can be relied upon. I accept the defendant's submission that the claimant was less than forthright on material aspects of his evidence, even to the point of being untruthful to the court, especially with regard to his current symptoms, physical abilities, and his ability to work in alternative employment.

11. I am satisfied that the claimant could do far more than he tried to give the impression that he was capable of doing, for example in terms of his ability to sit for extended periods, his ability to drive, his ability to work, his current level of pain, and his intention to undergo recommended surgery.

12. The evidence is that:-

a. He could sit for relatively long periods in a car.

b. He could drive, and does drive, despite medical advice to the contrary.

c. He could walk without difficulty.

d. He could go about daily life activities, such as going to the market, and going to visit friends and the dentist.

13. I am satisfied that the evidence confirms that the claimant was not the pain ridden individual whose earning capacity had been completely demolished by the accident, as he sought to portray.

14. I find that the claimant has definitely not demonstrated or established any case that he is unable to work at all.

15. I find that he is able to work, and is capable of light sedentary work, as identified by the agreed medical expert Dr. Narine. In light of his evidence that he can sit on a stool, and sits forward, not requiring any back support, it is clear that the ergonomic chair, which it was recommended should be supplied for the claimant's use should he be employed, may not be the necessary pre condition to his ability to work, as suggested.

16. The claimant has failed to provide any evidence of having explored alternative forms of employment, and has failed to establish unsuitability or inability to work in alternative employment.

17. I find that the claimant has demonstrated that the recommended surgery is not a priority for him, and that in any event, should he now choose to undergo it, it is available at the public hospital free of charge.

DISPOSITION

18. The claimant's damages are assessed as follows:-

Pre trial loss -Special damages

Loss of earnings at full rate of earning from February 9th 2009 to March 14th 2010 -- **$279,462.30.**

Loss of earnings at reduced rate March 15th 2010 – April 15th 2014 – (discounted by two thirds to take into account the claimant's earning capacity, failure to mitigate and exaggeration of symptoms and disability) - **$285,130.90.**

Total pre-trial loss of (post tax) earnings – February 9th 2009 to April 15th 2014
$279,462.30 plus $285,130.90.

General damages - Total **post trial** loss of (**post tax)** earnings - (multiplier 2.5) - **$198,728.25.**

Total of Pre trial loss and post trial loss of **earnings - $763,321.15.**

Less Workmen's Compensation paid	**$619,116.28**
Balance payable	**$144,205.12**

19. There will be no Interest on this sum, as at the date of payment of the Workman's Compensation amount, (December 15th, 2011), the claimant had been compensated for in excess of the amount of his loss of earnings up to that time. Further, the payment of Workman's Compensation has, even up to date of judgment, exceeded the award for loss of earnings. The claimant having therefore, since on or around December 15th 2011, already been in receipt of full compensation for his loss of earnings to the date of judgment, does not need to be compensated by interest. Interest would only be applicable if that money had been unavailable to him.

ORDERS

20. The defendant is to pay to the claimant the following:-

i. The sum of **$144,205.12** being the balance of assessed loss of earnings.

ii. The sum of $90,000.00 for general damages for pain and suffering and loss of amenities. Interest on this sum at the rate of 6 % per annum from date of **service** of claim form filed on 29th June 2011 to date of judgment.

iii. The sum of $34,403.50, for special damages as claimed by the claimant
Interest on this sum at the rate of 3% per annum from **February 9th 2009 -** date of accident.
(The defendant claims to offset the sum of $5000.00 already paid. If that sum has already been paid in respect of doctor's visits represented by any of the sums above then it need not be paid again. This is a matter that can be resolved between counsel).

iv. Liberty to apply.

v. Stay of Execution 28 days.

vi. Costs reserved.

COSTS

21. In light of the claimant's exaggeration on the main issues in this case – the effects of the injuries and his ability to work thereafter, **no costs are awarded**. The majority of the costs of the

assessment were the result of the presentation of a grossly exaggerated claim, of almost $2 million, primarily for loss of earnings based on a claimed complete inability to work. This would have minimized the prospect of a negotiated settlement, and ensured the need to test the validity of that claim. In the result it has been found that that claim was not supportable.

ANALYSIS AND REASONING

Injuries sustained

22. On the 9th of February 2009 the claimant was struck by a piece of machinery and sustained injury.

23. The Claimant's injuries and the current effects thereof have been described by, Dr. R. Narine, the agreed joint medical expert in this matter, in his agreed Medical Report of 25th June 2012.

24. Those injuries are described in the report. It is necessary to set out the material parts of that report in full, as much depends on a careful analysis of the claimant's present condition and his ability to work.

Agreed Medical report

25.

> ***Re:Marcel Benjamin*** *Age 50 (M)*
>
> *Further to the medical report by myself dated 19th May 2011, Mr. Benjamin was reviewed on 10/08/2011, 23/11/2011, 03/4/2012 and most recently on 13/06/2012.*
>
> *"He continues to experience intermittent midline* ***neck*** *and medial* ***periscapular pains radiating*** *to the left posterior auricular area with* ***paraesthesiae*** *over the bilateral* ***trapezii****. There is also* ***intermittent low back pain*** *with* ***radiation to the bilateral thighs*** *L > R.*
>
> *Examination reveals* ***decreased range of motion of the neck*** *with* ***loss of the last 5º of flexion****,* ***extension*** *and* ***bilateral rotation****.* ***Straight leg raising is limited to 60º bilaterally****.* ***Muscular tone and power in all four extremities are normal.***
>
> ***Upper limb reflexes are normal****, but bilateral* ***ankle reflexes*** *are* ***absent****.*

His findings continue to be ***consistent with cervical and lumber*** ***<u>nerve root irritation</u>*** *secondary to neck and low back* ***strain*** *on spondylosis.*

In light of his persisting and persistent symptoms, ***surgery****:*

1. ***Anterior Cervical Fusion and Plating*** *and*
2. ***Lumber Laminectomy*** *with* ***L4 L5 and L5 S1 Discectomies*** *continues to be advised."*

As previously stated in the report of 19th May 2011, post operative physiotheraphy may be required for up to six (6) months. Due to increases in instrumentation and hospitalization costs, the ***estimated figure*** *of two hundred thousand dollars ($200,000.00) is revised to two hundred and fifty thousand dollars (/250,000.00).*

His ***permanent partial disability*** *is maintained at* ***sixty per cent (60%).***

With respects to the questions on page 3 of your letter dated 18th April, 2012, please be advised:-

1. *There were no previous radiographs or scans of the patients' cervical or lumbar spines prior to trauma. He was 47 years old at the time of the injury and his occupation was highly strenuous. Degenerative (spondylotic) changes can occur in the human spine as early as the 30's and* ***accelerated*** *by repeated minor/moderate trauma such as load bearing, bending and strenuous physical activity. Comittant* ***severe trauma*** *can* ***further damage*** *already degenerative tissues- liagaments, intervertebral discs, so* ***worsening*** *radicular* ***symptoms****.*

.

2. *THE "Radiology Consultation Report" of February 2009 is that of a CT scan of the Cervical spine and of the abdomen and pelvis. A herniated intervertebral disc cannot be detected on a CT scan of the cervical spine. This is why if one suspects nerve root compression 2º to intervertebral disc herniation, an MRI scan is requested. Both the MRI scans of the lumbosacral spine from St. Clair MRI Centre (08/04/2009) and that of the cervical spine are in agreement with my clinical findings.*

   I note that the MRI report of 28/04/09 from the Southern Medical Clinic confirms the findings of the MRI scan of 8/04/09.

3. *Mr. Benjamin was in fact referred for physiotherapy to the neck and lower back. This was necessary in order to obtain symptomatic relief of his radicular symptoms and his neck and low back pain. These measures are a standard non invasive method to try to obtain symptomatic relief of* ***nerve compressive and muscular symptoms****. It may not always be successful, and if done by properly trained/certified professionals usually does not do any harm to the patient.*
4. *The surgical recovery process of both the cervical and lumbar operation is generally well tolerated by the vast majority of patients, with post operative pain well controlled by over the counter medications on discharge from hospital. The operations are both performed under general anaesthesia and usually require 2-3 days stay, in case of the neck and 3-4 days the case of the lumbar operation.*

5. *As it currently stands, Mr. Benjamin suffers from intermittent* ***neck*** *and* ***low back*** *pain,* made worse *by* ***prolonged sitting*** *or* ***standing****. He requires the use of a cervical collar when mobilizing. Hence,* ***driving a vehicle is not advised****.*
   He may be able to do ***light sedentary work****, if he is allowed to* ***wear a collar****,* ***use a well supported ergonomic chair****, and* ***allowed to take short breaks*** *to* ***avoid prolonged sitting*** *(> 20 minutes).These duties of course would depend on his level of academic capability. He is* ***definitely unfit for strenuous physical activity.***

6. ***If neck surgery*** *is performed, he* ***would benefit with respect to pain relief*** *and ameliorate the need for the wearing of a cervical collar.*
   His permanent partial disability would need to be re-evaluated one (1) year post his last surgery.

7. *He has* ***greater than a fifty percent probability that his low back symptoms would improve*** *and an* ***approximate seventy-five probability that his neck pain would improve****.*

8. *Mr. Benjamin **may resume a working life post surgery subject to those conditions outlined in (5) above**. It is doubtful that he will be able to resume a strenuous outdoor occupation whether he has surgery or not.*

9. *In the long term, he is **unlikely to improve**, and **may even worsen** neurologically **without surgery**. He has on the whole, **greater than a fifty percent chance that his quality of life will improve with surgery**. (All emphasis added).*

26. The evidence as to the **effect** of the injuries comes primarily from the claimant. The credibility of his testimony must therefore be assessed, particularly in light of the agreed medical evidence and the undisputed facts. See **Horace Reid v Dowling Charles and Percival Bain PC Appeal No. 36 of 1987 at page 6**

> *.... However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to **check that impression against contemporary documents**, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions **in light in particular of facts and matters which are common ground or unchallenged,** or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.*

27. I am satisfied for the reasons set out hereunder that the claimant is not a witness whose credibility can be relied upon. I accept the defendant's submission that the claimant was untruthful, and less than forthright in his testimony, on material aspects of his evidence, even to the point of being untruthful to the court.

Abilities of the Claimant

28. I am satisfied that the claimant could do far more than he tried to give the impression that he was capable of doing.

i. He could drive, and chose to do so, despite medical advice and concern as to the possibility of aggravating his condition.
ii. He could sit for long periods in a car.
iii. He could walk freely.
iv. He could lift and carry light objects.
v. He could go about daily life activities such as going to the market, and going to visit friends.

29. He was not the pain ridden individual that he sought to portray, whose earning capacity had been demolished by the accident.

30. I accept that this claimant hesitated in answering simple questions, repeating them to buy time to answer, and repeatedly had to admit that answers he gave were untruthful.

Video recording evidence

31. The defendant produced a video recording which clearly showed the claimant walking, driving, and shopping. The wearing of a neck brace and the use of a stick did not diminish the impression of an active individual who was effectively quite mobile and capable of driving.

32. His claim to suffer dizzy spells and weakness of grasp were incompatible with a desire to drive, application by him to renew his driver's permit, and actual driving. Those alleged symptoms are not accepted. In fact the claimant was clearly sufficiently confident that he could ignore his doctor's advice, and even seek alternate medical certification of his fitness to drive a vehicle with no restrictions.

33. The recorded activities of the claimant certainly did not reveal, and in fact were incompatible with, an individual who suffered such pain, suppressed only by use of pain killers, that it restricted those activities.

ANALYSIS OF THE EVIDENCE AT TRIAL

34. In relation to matters for which the doctor did not have to rely upon the claimant for input, and in relation to his expert findings, the court must, and does, accept his findings as the agreed joint expert.

35. It was submitted in effect that, having seen the claimant, and the video recording of the effects of the injury on the claimant's actual life, the court should consider the real possibility that Dr. Narine may have been misled in relation to subjective matters reported by the claimant, as to the effects of pain, suffering and/or symptoms of the Claimant, and the possibility of unreported improvement in his condition.

36. The following was absent from the doctor's expert report:

(i) Mention of sexual dysfunction;

(ii) Mention of **dizzy spells**;

(iii) Mention of **weakness in the Claimant's grasp**; and

(iv) Mention of complaints and/or reports of constant headaches.

37. As to (ii) and (iii) I have found these to be incompatible with the claimant's driving. They would have rendered driving risky and the claimant would not in that case, as a reasonable man, run the risk of putting both himself and his wife in foreseeable and unnecessary danger.

38. The Court of Appeal in the decision of **Dennis Peters Edwards v Namalco Construction Services Limited and Guardian General Insurance Company Limited** C.A. No. 28 of 2011 at paragraphs 13-16 of its judgment per the Honourable Justice of Appeal Narine stated:-

> *"14. In my view the medical report was insufficient to discharge the evidential burden placed on the Appellant. It did not state the factual basis on which the opinion was premised. It does not assist the court in assessing the extent of the Appellant's alleged disability.*

15. In fact, none of the medical reports that were admitted into evidence made any reference to the Appellant's inability to work. ***The onus was on the Appellant to prove his loss.*** *In order to prove his loss in respect of pre trial loss of earnings* ***the appellant had to show that the injury had rendered him incapable of performing any work from the date of his injury to the date of trial****. Medical evidence as to the nature of the injury and the residual effect that the injury may have had on the Appellant's* ***ability to work*** *is imperative in discharging this onus: see* ***Seudath Parahoo v S.M. Jaleel & Company Ltd.*** *Civil Appeal No. 110 of 2001.*

16. In the absence of the job letters and any other medical evidence indicating that the Appellant was in fact ***unable to work*** *as a result of his injuries, the court was constrained to rely on the Appellant's testimony with regard to his alleged inability to work.* ***The Appellant's evidence*** *in this regard* ***was unreliable to say the least****. …*

39. The medical evidence here is that the claimant is able to perform light sedentary duties.

Marcel Benjamin's evidence

Unreliability

40. The Claimant initially stated in cross-examination that he never knew that the recommended operations were available free at the public hospital. Both the cost of these operations and the alleged need for them are a significant part of the claimant's claim. The amount claimed in respect of them is **$250,000.00.**

41. After being referred to his evidence-in-chief (in his primary Witness Statement), he eventually accepted that he knew the surgery was available at the public hospital. The extract of cross - examination provides a flavour of the type of evidence of this witness:-

"Question: one of the suggestions of Dr Narine was to do surgery?

A. – Yes

Q. Since 2009?

A. yes

Q: *Surgery was with respect to the effects you were having?*

Answer: *Yes*

Q: Mostly pain?

A. Yes

Question: … *were you aware, from the date of your accident* ***to today's date*** *that* ***this surgery was available for free at the hospital****?*

Answer: no, nobody ever told me that*.*

Question: You are certain*?*

A. *Yes*

(Shown para 27 of witness statement)

(Letter dated 15th of January, 2010)-

A. I did see it.

Question: *Did you know that the surgery was available?*

Answer: <u>Yes</u>.

Question: *So when you tell me earlier, that you didn't know it was available was it true or not true?*

Answer: It was not true."

42. In fact his case was supposed to be that he only became aware that the surgery was free at the hospital upon disclosure on September 10th 2012 of a response to letter from the defendant's attorneys, not that he still does not know this.

43. The Claimant stated in his supplemental Witness Statement that he was at the Life Centre for forty-five (45) minutes. See at paragraph 4 of his Supplemental Witness Statement filed on the 18th day of October, 2012:-

"*4. At this time although **it was uncomfortable driving** I **could still manage it** especially given the errand at hand. While at the Life Centre we must have been there about 45 minutes. I do not accept the statement that my wife and I were there for two hours. My wife and I must have stopped at the market on our way back home."*

Under cross-examination, the claimant accepted that the journey to the Life Centre was 42 minutes, that he drove, and that he stayed about 2 hours there.

44. Dr. Narine specifically stated in his medical report dated 04th day of April, 2013 at page 2:-

> "*With respect to section F of your letter of 14/12/2012, Mr. Benjamin was indeed **advised to avoid driving** and to use his collar while being driven since:*
> *(1) His range of movement of his neck was impaired, hence placing him at increasing risk of being involved in a motor vehicular accident where due to **decreased neck mobility**, he **may not be able to respond** in tune to changing traffic conditions.*
> *(2) In the event of an accident, he may aggravate or further injure his neck and lower back.*
> ***He did indicate that he was not driving at that time**.*
> *Should he continue to drive, as I gather he must be doing, this **may increase his neck and lower back pain to variable extent**, depending on journey time, vehicle type and the terrain being traversed; in addition to 1 and 2 proceeding." **[Emphasis added]***

Alleged inability to read

45. The Claimant apparently intended that the court accept that he could not read. However, this was to support his claim of inability to find alternative employment because of the combination of injury and illiteracy making him unsuitable for the "light sedentary" duties for which Dr. Narine indicated he could still be suited. The Claimant was able to find the relevant part of his Witness Statement when directed to paragraph 26 and even began to read it before apparently remembering that he supposedly could not read.

46. It is clear that the claimant has numerous training certificates. His assertion that they were simply true/false quizzes, all 17 of them, from different bodies, is not credible. Obviously the claimant is not as illiterate and unsuited for work as he attempted to portray. Equally obvious is the fact that the claimant was prepared

a. to exaggerate his alleged inability to read and the effect of his injuries at the time of trial, and

b. to mislead as to the date when he became aware the recommended surgery was available at hospital to explain the fact that he did not pursue it, yet persist in a claim for its cost in the sum of $250,00.00.

47. The Defendant clearly gave the impression that, even for the simplest questions, he was trying to buy time to work out the answer most helpful to his case, rather than provide a straightforward truthful answer. The general level of evasiveness did not inspire any confidence as to the truth of the answers.

> ***Answer:*** *we write an exam. (for the courses). I can't really read but the amount of experience I have - The exams I write is just true and false.*

48. One wonders how the claimant, even after receiving 17 certificates, could claim not to be able to read. Without being able to read, the importance of critical signs like "danger", "inflammable", or "hard hat area", would all have been lost on him, if his evidence is to be believed. It is not accepted. It was noteworthy, and noted by the court, that the claimant did begin to read paragraph 26 before he remembered that his case was that, as he could not read, he was unemployable other than in his former job. On his own evidence of illiteracy, however, if accepted, it is questionable whether he would even have been employable in that former job.

49. This witness's evidence gave the impression of acting, with the intention to portray primarily:

a. illiteracy – hence unemployability, and

b. significant disability – hence the inability to work for the rest of his life.

50. The evidence of the claimant conveyed a willingness to exaggerate such disability as existed. However the degree of disability sought to be portrayed was completely inconsistent with the video recording of a person walking, albeit with a stick and a neck brace, shopping, driving for long periods, and generally going about his normal life.

51. The person portrayed in the video recording was quite capable of performing light sedentary duties, as Dr. Narine himself confirmed. While it was suggested that such duties could have involved training persons in the industry, the point is taken that there is no evidence that such duties were offered to the claimant as alternative employment. Nor is there any evidence that he would be certifiable as a trainer. However there is no evidence that the claimant looked for alternative employment or was even interested in such employment.

52. The option of working even as a car park attendant, watchman, or within the oil industry or at other duties was simply not explored, and no sufficient reason has been suggested as to why he so failed to mitigate the claimed loss of future earnings.

53. It is clear that the claimant has exaggerated his alleged disability. He can clearly drive a motor vehicle. He can do so for a period in excess of the 20-25 minute "average" that he gave for his ability to sit. He was clearly comfortable in ignoring his doctor's express instructions and advice not to do so.

54. The logical inference is that either he was constrained to do so in an emergency or that the level of disability or pain occasioned by these activities was not sufficient to cause him to desist.

55. It is clear that the occasion to plan a remembrance service on March 18th 2010 in the course of which he drove to the market and did errands, could not be characterised as an emergency.

56. His evidence was that his wife could drive. It can be logically inferred that if it were an emergency, she would have been able to drive, or someone in his household, e.g. Chris, could have driven, or he could have hired a taxi.

57. That video recorded trip was clearly more in the nature of routine. Further, he has been driving since then.

58. He can clearly go about errands. He can clearly lift light bags. He can clearly tie a knot in a plastic bag. He can clearly sit for longer periods than he is willing to admit to.

59. It was submitted that the doctor's advice is based on the risk such an activity may pose to the Claimant and not that the Claimant is unable to, or could not drive due to his injuries. While this may be so it is significant that the claimant feels able to drive, can drive, and does drive. It demonstrates in a tangible manner the actual level of his disability or lack thereof, in practical terms.

60. It was submitted by the claimant that under **section 3 Motor Vehicles and Road Traffic Act chap 48:50**("MVRT Act") Dr. Chin, to whom the claimant went to obtain a certificate of fitness to drive when renewing his Driver's Permit, would have had to have been satisfied that the Claimant's **vision, hearing and bodily and mental fitness** enabled him to be fit to drive.

61. It was also submitted that his findings are not in any way contradictory to the accepted medical evidence of Dr. Narine, as Dr. Narine does not state that the Claimant would be precluded from driving or that he is medically unfit to drive due to his injuries.

62. In fact, it actually is contradictory. The claimant, in a better position to know his level of pain, and the level of mobility restriction of his neck, clearly does not share Dr. Narine's concerns about his driving, and in fact he actively sought certification of his fitness **including bodily fitness**, to drive and operate a motor vehicle on public roads.

63. In summary, the claimant has clearly exaggerated the effects of his injuries both in his witness statement and to the court, and did not survive cross examination with his credibility intact.

Evidence of Otis Aguilera and Lyndon Hollingsworth

64. While I accept the video recording of these witnesses and their observations about his movements, and the claimant himself accepts these, I prefer not to place weight on the evidence of Hollingsworth as to the incriminating statements allegedly made by the claimant to him. These alleged statements, oddly, were not all in his witness statement. The attempt to embellish the alleged statements deprived this evidence of credibility.

65. There is no reason why the claimant, if he had been alert to persons investigating him, as they claim, would have made a statement like "***they will never catch me without this neck brace"*** to complete strangers.

66. In any event the cervical collar is of little significance. The medical report is clear that the claimant suffered neck injury. I find that while the cervical collar may have been of assistance or comfort, its use was not mandatory, and no adverse inference can be drawn from the claimant's choosing or not choosing to wear it on occasion. The evidence of those and similar alleged statements is rejected.

67. The court was asked to make the following findings:

(1) The Claimant pretended to have difficulty in reading when he found himself in some difficulty in the cross-examination;
I so find.

(2) The Claimant is an unreliable witness prone to exaggeration and omission of matters that did not tell in his favour;
The evidence is clear that this is the case.

(3) The Claimant's account of the impact of the injury is tainted by the fact that he has seriously exaggerated and/or attempted to mislead the court in relation to his injury;
I expressly find that this is also the case.

(4) The court was asked to find that apart from being a Derrickman, he has all the qualifications for a Health and Safety Officer (which included seventeen (17) courses) and is capable of performing supervisory work.

While I find that it is the case that the claimant has significant experience and training, his **employability** in a supervisory or training position has not been established.

Claim for surgery

68. It was submitted that the claimant had the option of surgery recommended to him since 14th September 2009. In fact two operations were recommended. Neck surgery for his more severe neck symptoms and possible back surgery. (See the report dated June 14, 2010).

69. He did not pursue that option either -

a. at the public hospital where the neck surgery was free, or

b. after he received in excess of $600,000.00 in Workman's Compensation, including a lump sum of $444,752.00, on 15th December 2011, at a time when the estimated cost of both operations and physiotherapy was significantly less than the $250,000.00 now claimed at current prices.

70. The effect of this is:-

a. That it may be inferred from his inaction that the surgery was not a priority and that the claimant, aware of his actual level of pain and his ability to cope with it, clearly had decided not to undergo either operation when nothing prevented it.

b. Further, the defendant suggests in effect that, that conscious decision having been taken, that the defendant was not liable to compensate the claimant for the full effects of his injury, but rather for the likely remaining symptoms post surgery that he would have had, had surgery been undergone.

The defendant suggests that as the claimant's condition was likely to have resulted in 50 % improvement in back symptoms and a 75% improvement in his neck symptoms, that the defendant should not be liable to compensate the claimant BOTH for the cost of surgery, AND for the degree of disability and symptoms that the claimant now allegedly manifests without the

surgery. That would in effect be double compensation and the claimant should not be compensated for a level of symptoms and disabilities that are not likely to continue at the same level if he were to mitigate his disability and undergo the surgery.

(This however is not the effect of Dr. Narine's advice, which actually is *"He has* ***greater than a fifty percent probability that his low back symptoms would improve*** *and an* ***approximate seventy-five probability that his neck pain would improve."*** The doctor does not speculate as to the specific extent of the likely improvements).

c. that the claimant, regardless of medical advice that he should not be doing so, has been driving and still drives, with the possibility that by so doing he is worsening his condition.

Whether the Claimant is entitled to cost of surgery

71. I consider that the claimant is fully entitled to make a decision not to undergo surgery. That decision would be based on his knowledge of his own condition, and the risks versus the benefits that he perceives would be likely as a result. Any such choice in this case to not have pursued surgery on the areas of his lumbar and cervical spine must be respected.

72. However, if that was his choice the claimant is not entitled to the cost of surgery. Furthermore I find that if the claimant now wishes to have the operations performed they are available to him at the public hospital at no charge.

73. He became aware of this yet made no effort to avail himself of it. If he wished to do so privately, he received sufficient Workman's Compensation to pay for the operations and seek reimbursement. The fact is these operations for which he now claims $250,000.00 have not been a priority for him. His condition has not compelled him to seek or pursue surgery despite having the funds available for them, and despite them being available in the public hospital at no cost.

74. Having regard to the issues of credibility raised by the claimant's testimony there must be serious doubt as to whether this claim in the amount of $250,000.00 for future surgery, will, if awarded, in fact be utilized for such surgery.

75. I also find, even apart from this, that the likely continuing effects of the claimant's injuries are, on the evidence, and on a balance of probabilities, not as severe as he would like to portray.

76. It is the Claimant's choice not to undergo surgery. If he declines to do so he cannot affix on the defendant liability for possible deterioration of his condition as a result, especially if aggravated by his own actions in driving contrary to medical advice. Neither can he now claim the cost of surgery, when on a balance of probabilities he was sufficiently satisfied with his condition as to not make surgery a priority. The strong inference is that his symptoms did not and do not trouble him sufficiently to make such surgery a priority or a choice. If they did, pursuit of surgery, especially if it related to major continuing symptoms such as the alleged continuing pain, would be expected to have been a priority.

77. In this case as both operations are available at no cost at the Port of Spain General Hospital, the Claimant can follow the procedure to obtain the surgery there in the future if he actually requires it at this stage.

78. The claim to entitlement to compensation in the sum of $250,000.00 for operations recommended since 2009 cannot be justified, when
a. the claimant has not pursued them to date or made them a priority, and
b. if he is at all interested in having the operations performed he can avail himself of them free of charge.

79. The likelihood, on a balance of probabilities, that the claimant will continue his inaction and not undergo the surgery, while retaining any sum provided for it, is real and cannot be ignored in the current circumstances.

80. The argument that the claimant was waiting until awarded compensation for those operations in order to pay for them is rendered less credible by the fact that:
a. he received sufficient funds from his Workman's Compensation settlement to pay for such surgery and seek reimbursement thereafter. As liability was not in issue, reimbursement of costs paid for medically recommended surgery could have been readily pursued.

b. the operations were available at a public hospital free of charge. Even if there had been a waiting list there was sufficient time since 2009 to have signed up for and undergone such surgery if it had been a priority.

81. The issue of whether the claimant was told of this or not is not particularly relevant. For one thing he could have himself asked the question of whether it was available anywhere other than Westshore Private Hospital, especially if he particularly needed the level of pain relief that he claimed.

82. For another, even on the claimant's case, the claimant has known since September 10th 2012 that the surgery was available at no cost at the Port of Spain General Hospital.

83. Finally, the claimant since December 15th 2011 had received sufficient Workman's Compensation to himself pay for the surgery privately if he really needed or wanted that surgery. He did not pursue it, and given that he was able to walk, drive, go to the market, dentist, and to visit friends and church, it did not appear to be a priority.

84. I find on a balance of probabilities that it was not a priority, that both operations are available free of charge at the Port of Spain General Hospital, (see medical report dated April 4th 2013), and it is unlikely that the claimant seriously intends to utilise any award in respect of future surgery to actually undergo it.

COMPENSATION FOR THE INJURY

85. The standard analysis begins with the framework identified in **Cornilliac v St Louis** (1965) 7 WIR 491, by 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 injury

86. In report dated 14th day of June, 2010, Dr. Narine indicated inter alia the following upon examination:

- **Cervical and lumbar nerve root compression secondary to cervical and lumbar spondylosis with resolving neck and low back strain**;
- Left **L5 and S1 nerve root compression**;
- Diffused disc **bulges** at **C3-C4, C4-C5, C5-C6, and C6-C7** with **moderate** foraminal **stenosis** at C3C4, C4C5 and C6C7;
- L4-L5 and L5-S1 **disc herniation**;
- **Neck tenderness with decreased bilateral rotation** and decreased sensation **over the left C6;**
- Spondylotic condition(s) **may** well have **predated** the accident of 09th February, 2009;
  (No significance is ascribed to this, as I find that it is beyond doubt that **the accident** rendered the conditions severely symptomatic, at least initially).

87. His most recent assessment is in Dr. Narine's report of June 25 2012 **set out in full above**.

(ii) The nature and gravity of resulting physical disability; and (iii) Pain and suffering endured

88. The Claimant's account of the impact of the injury is set out at paragraph 26 of the Claimant's primary Witness Statement as follows: - [all emphasis added]

*"Since the date of the accident and till now **I still have pain** and so have to take **pain killers three times a day**. I have **difficulty in bending** and something as simple **as putting on my shoe is hard**. **Picking up something** is very **difficult**. I am **unable to sleep properly because of pain** and only get some relief with the pain killers and lying down on the floor with my legs up. I often sleep on the floor. I almost always **have to have on the collar for the pain in my neck.** I **cannot lift my legs too high**. I simply cannot have a normal marital sex life because of my back pain and limited movement. I walk with the aid of a walking stick as **sometimes I get dizzy spells**. I find that I **need to sit on a hard surface** as cushions*

*or t**ravelling in a vehicle raises my pain**. I **can't clean my yard or garden or do any chores around my home. I can't lift anything too heavy**. Anything I do physically I pay for it after for the pain is unbearable at times. I c**annot stand or walk for too long or sit for too long**. My life as I know it has changed. I get **constant headaches**. When I sit down I have trouble getting up. I **have some weakness in my grasp**. I have been advised nonetheless and I do my best to still try to move a little when the day come as not doing anything could be even worse. I had been advised to try to move around a little instead of staying in one place as this would be good for the muscles."*

89. I accept that most of what the claimant here deposes to would be the expected initial effects of the neck injury and the back injury. However, the evidence of the video recording does not portray a person who now appears greatly inhibited in his activities by the injuries.

90. The use of a neck brace according to the claimant afforded him pain relief. It is reasonable to infer that, even if that injury is not the source of constant pain, the injury to the claimant's neck would be less likely to be aggravated if neck movement is restricted.

Current medical condition - medical evidence

91. The final agreed medical report does not refer to:

(i) dizziness;

(ii) headaches;

(iii) weakness of grasp- (In fact muscular power of all four extremities is **normal**); or

(iv) sexual dysfunction.

It refers to **intermittent** neck and back pain.

92. These are all significant matters. In fact the first – dizziness, and the third – weakness of grasp, would directly affect the ability of the claimant to safely drive on a public road.

93. I find on a balance of probabilities that the claimant would not have taken such a serious risk as driving himself and his wife on a long non emergency type journey if he in fact seriously

suffered from dizziness and weakness of grasp, both of which had the potential to put them both at grave risk.

94. Despite being significant matters they were not recorded in the medical reports. This leads to the conclusion that they were not reported to the doctor at the time of any of the examinations culminating in the medical reports. I find that this is because they did not exist as symptoms to be then reported or recorded, and these symptoms are, on a balance of probabilities, an afterthought.

95. The Claimant knew of the medical advice that he not drive. He knew it could have exacerbated his alleged condition. He drives anyway. In fact he took the positive step of seeking a medical report from another doctor that certified that he was fit to drive, and continued to drive up to the time of trial.

96. The possibilities are that:-

a. the claimant, despite knowing that his condition is likely to be exacerbated by driving, drives nonetheless, and that *this may increase his neck and lower back pain to a variable extent.* Any such exacerbation by ignoring medical advice cannot be attributable to the defendant, and any award must take into account that pain so caused should not feature in any award of compensation.

b. that the claimant in fact has recovered to the extent that he felt that he could safely ignore the advice not to drive, as he knew that he did not in fact feel the degree of neck and back pain, or restriction of neck movement, that he complained of and that led to that advice.

97. On a balance of probabilities I consider this to be likely, especially when coupled with the failure to pursue recommended surgery, and the video recorded evidence of his activities.

Ability to sit

98. The claimant sat quite comfortably in court, for a period of 48 minutes. In fact, according to the court's note, it was only when the issue of the period that he could comfortably sit was raised that he remembered to make it an issue and asked to stand at 10.23 am. On the video recorded evidence he can sit for equally long periods even while driving.

JUDICIAL TRENDS

99. Based on the level of disability as found above the following cases were suggested as relevant:

Dexter Sobers v The Attorney General of Trinidad and Tobago CV 2008 04393 Judgment delivered on the 27th May, 2011

The Claimant sustained a loss of **lumbar lordosis**, disc desiccation and **annular tear** at **L4/5 and L5/S1 levels**; diffuse disc bulge with posterior central propensity indenting thecal sac with **no neural compression**; diffuse **disc bulge** with propensity to left and posterior left paracentral **small disc protrusion impinging** on left S1 traversing **nerve root**.

The Claimant there experienced **back pain**, which radiated down the left leg following the accident. The doctor found that the Claimant's straight leg raising **was** greater than 90 degrees bilaterally, with a **negative sciatic stretch** test. **Power, sensation and reflexes** were **within normal limits.**

The doctor was of the opinion that there were findings to support the Claimant's complaints of "left sided sciatica" and recommended spinal surgery if the Claimant's symptoms failed to improve. General Damages were awarded in the sum of $80,000.00.

I find that these injuries are **less severe** as there was **no involvement of the neck vertebrae** in this case.

Gillian Isaac v Shaun Solomon and Motor and General Insurance Company Ltd CV 2007-04400 Delivered **17th December, 2009** Before The Honourable Mr. Justice Des Vignes

100. According to the medical report, the Claimant appeared to ambulate with a normal gait, **lumbar spine flexion was reduced**, the **cervical spine** had a **severe restriction of motion** in all planes to about only 30% of that which was expected. There was moderate cervical muscle spasm, the paravertebral **muscles of the neck and lower back** were very **tender** with **muscle spasm** which was also noted on **the lumbar area**.

X-rays of the cervical spine showed a reversal of normal lordosis with degenerative narrowing of the C6/C7 disc space and posterior osteophytes. The thoracic spine x-rays appeared normal. Lumbar spine x-rays showed loss of the normal lordosis and a mild scoliosis. The findings were consistent with moderate soft tissue injuries to the cervical and lumbar spine. Three weeks later on a second examination the Claimant complained that her neck pains worsened and there was no improvement in her back.

There were mild spondylotic changes, endplate changes and osteophytic lipping at C6/C7 level. There were osteophyte disc complexes indenting the anterior epidural fat at the C4/C5 and C6/C7 levels but **no evidence of cervical cord or nerve compression** was seen. The MRI of the **lumbar spine** showed **loss of lordosis** consistent with muscle spasm. There was **mild bulging** of the L5/S1 disc with **no impingement of the nerve roots**.

New MRI scans of the **whole spine** showed **loss of the cervical lordosis** and some L5-S1 disc degeneration.

In a more recent medical report, it was reported that the Claimant developed **chronic neck and back pains** secondary to her whiplash injuries.

General damages for pain and suffering and loss of amenities were assessed at **$40,000.00**. It was found that in that case the claimant's current condition and loss of amenities had been exaggerated. The injuries complained of in that case are similar to those of the instant claimant in that they resulted in restriction of back and neck movement and some pain,. However the instant claimant complains of greater resulting disability, greater need for pain relief, and has symptoms of nerve compression

I find that the injuries as found were **less severe** than those of the instant claimant.

Selwyn Charles v The Attorney General of Trinidad and Tobago H.C.A No 2092 of 2002: Date of Judgment: 25th June, 2000

101. The Plaintiff in this case was awarded the sum of $50,000.00 by this court in June 2008 for General Damages. However the medical report was found to be inadequate. These injuries

appear similar to those of the instant claimant, save that the instant claimant does not exhibit spasticity.

> *He was transferred to the Port of Spain General Hospital where he was warded for five days and discharged on 25th June 2001.*
>
> ***Medical evidence***
> *The examination revealed tenderness and* ***decreased range of movements*** *of the* ***cervical,*** *thoracic and* ***lumbar*** *spine and* ***early spasticity*** *of the* ***lower limbs***. ***Sensation and power were normal***. *These findings suggest* ***spinal cord injury*** *at the* ***cervical level****."*
> *"On the 3rd day of September 2001 I sent Mr. Charles for an MRI scan and the scan revealed injuries at* ***C5-6, C6-7, C7-D1***. *On* ***29th November 2001*** *surgery was done. The surgery involved* ***cervical laminectomy*** *and* ***cervical cord decompression***. ***Post-op was uneventful***. *Mr. Charles was started on swimming, back exercises, anti-inflammatories and further therapy. On 6th May 2002 Mr. Charles was sent for another MRI. This MRI showed injuries to* ***D8 and D9 vertebrae with no cord injury****."*
>
> *"The evidence is that the Plaintiff sustained some injury but the extent has not been sufficiently detailed. On the nature and gravity of the resulting disability, it appears that there is some limitation of movement. In respect of* ***pain and suffering which had to be endured,*** *there is little evidence in this regard. Without explanation by Dr. Bedaisie, the significance of early spasticity of the lower limbs could not be demonstrated. There is no evidence of any* ***loss of amenities suffered".***

The evidence in that case was not as cogent or specific as in the instant case.

102. In the case of **Gerard Jadoobirsingh v Bristow Caribbean CV 2005-00784** delivered by the Honourable Justice Dean Armorer on **20th November 2007**, (referred to in **Charles** above, cited by the defendant), an award of **$80,000.00** was made. In that case, that plaintiff supplied medical testimony that his injury consisted of mild protrusions at four locations on the spine. He testified as to **the nature and gravity of the resulting physical disability** and, in

particular as to his **pain**, the fact that he was forced to tender his resignation on account of his inability to work, his inability to sit at his desk for more than 30 minutes or to write for more than 15 minutes, the development of numbness and pain on sitting or attempts to write. In that case, the claimant also produced medical testimony that certified a diagnosis of post traumatic stress disorder, unlike in the instant case. Evidence was also led of his **loss of amenities**, and sexual dysfunction was proved – unlike the instant case.

I find the injuries in that case were more severe than in the instant case and the evidence more cogent.

103. In the Privy Council decision of **Peter Seepersad v Theophilus Persad, Privy Council Appeal No. 86 of 2002**, (also referred to in **Charles** above, cited by the defendant) the appellant had sustained wedge compression fractures of the L1 and T12 vertebrae which were healed. The L5 S1 disc was prolapsed leading to **continuing pain and incapacity**. In that case, the Privy Council declined to interfere with an award of **$75,000.00** in respect of general damages. The injuries in that case and the continuing effects thereof were comparable with the instant case. **Seepersad** was delivered on April 1 2004.

104. Finally, in the case of **Christopher Pierre v TTEC, High Court Action No. 243 of 1996**, (decision of the Honourable Justice Ventour delivered on 17th December 1999, also referred to in **Charles** above , cited by the defendant), the Second Plaintiff suffered a whiplash injury and sustained **neck injuries**. The plaintiff suffered from **weakness** and parasthesia of the **left side of the body** and **diminished sensation on the right side of body**. She had a restricted range of neck movement and continued to wear a cervical collar. She also suffered injury to her left ear and suffered mild **hearing loss** in that ear assessed at 28.95%. She testified as to the pain and numbness that she suffered as a result of the accident and she was diagnosed, after an MRI was performed of the cervical spine, with **lateral recess syndrome at the C3, C4 and C5 levels**. She claimed that her pain comes and goes, that when it comes it is very severe and it may last for two or three days but then goes away for as long as two or three weeks.

105. In the **Christopher Pierre** case an award of general damages was made of $**70,000.00**. I find that the effects of her **neck injuries** in that case were **more severe**. Weakness and hearing loss were a feature although there was **no back injury** as in the instant case.

FINDINGS

106.

i. **Pain and suffering – initially severe, slowly resolving, now intermittent, controlled by analgesics.**
ii. **Nature and extent of injury sustained as in the agreed medical report.**
iii. **Nature and Gravity of resulting physical disability**

It is clear from the video recording that the claimant's disability is nowhere near that which he seeks to portray. The Claimant can drive and has been driving relatively for long distances; he is able to visit friends and family members; carry out routine activities such as going to the market, and to the dentist. The level of activity displayed in that video, including driving, walking, carrying a bag of fruit, and tying the bag, is that of someone able to function relatively normally, albeit with some restrictions on neck movement and ability to lift heavy objects.

Loss of amenities

107. See Witness Statement at paragraph 26 therein:-

"I can't clean my yard or garden or do any chores around my home."

"Any chores" is much too vague, especially in light of the video recording. I accept that the claimant cannot do heavy yard work or heavy lifting but even his own evidence of alleged loss of amenities is vague and unsatisfactory. It is unclear whether he even used to clean his yard himself before the accident.

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 $90,000.00 as general damages for pain and suffering and loss of amenities would be appropriate.

Loss of pecuniary prospects – alleged inability to work

108. The Claimant's evidence was that he could not work at all. It was the Claimant's responsibility to prove that the nature of the injury he received was of such a nature that it rendered the Claimant incapable of performing his duties as Derrickman, or any form of work.

109. See the decision of the Honourable Hamel-Smith J.A at paragraph 8 in **Seudath Parahoo v S.M Jaleel & Company Limited Cv A No. 110 of 2001** Delivered February 20th 1998

> "*8. It is appropriate at this juncture to consider the onus placed on the appellant to prove his loss. In order to prove his loss in respect of pre-trial loss of earnings and loss of pecuniary prospects the appellant had to show respectively (i)* ***that the injury had rendered him incapable of performing any work****, whether as an electrician or otherwise,* ***from the date of his injury to the date of trial*** *and (ii)* ***that the injury was of such a nature that it rendered the appellant incapable of performing his duties*** *as an electrician or, for that matter,* ***any other form of work whatsoever****.* ***If it rendered him incapable of performing as an electrician but did not prevent him from doing other work, it was necessary to show that in order to mitigate his loss****. In discharging this onus,* ***medical evidence as to the nature of the injury and the residual effect that the injury may have had on the claimant's ability to work is imperative."***

110. It is fully accepted that the claimant cannot resume his job as a Derrickman, or strenuous physical activity, especially involving lifting or neck movement. However the medical evidence is that the Claimant is capable of working:-

> "*He may be able to do* ***light sedentary work****, if he is allowed to wear a collar, use a* ***well supported ergonomic chair****, and allowed to take short breaks to avoid prolonged sitting (>20 minutes). These duties, of course, would depend on his level of academic capability."*

111. However the claimant's own evidence in his supplemental witness statement is that he does not require back support and that he can sit on a stool with no back, as he was in fact observed to have done. He can also drive on occasion, as he was in fact observed to have done. It is clear that he can do more than he led Dr Narine to believe that he could.

Illiteracy

112. The Claimant's evidence is that he has been unable to work since the incident. He states that he left school at age 13 and only attended up to Standard Three level. The Claimant indicated for the several certificates he obtained he simply had to answer true or false. This is simply not credible. It defeats the purpose of any certification. If true he would only be able to read important documentation or signage if someone reads it to him. This is inconsistent with the references and certifications that he supplied.

Alternative employment

113. It was submitted that it was unrealistic and unreasonable to contend that the claimant could now find work as a trainer. This is certainly accepted. But this is not the end of the matter. The suggestion that the claimant could secure alternative employment in training others in view of his experience and training is simply an example of one such option. It actually is for the claimant to prove that he is completely disabled – 100 %- from working. He has made no real attempt to do so, relying merely on his assertion that he cannot work, while omitting any evidence of an interest in or any attempt to do so. It is certainly accepted that the claimant is not suited any longer for any physically strenuous work. But Dr. Narine has indicated that he may be suited to light sedentary work - (See Joint medical expert, Dr. Narine, of 25th June 2012). If the claimant is not so suited then he has to demonstrate that that is the case.

114. See judgement of the Honourable Mr. Justice of Appeal Hamel-Smith in the matter of **Sookhoo** Civ App. 21 of 1993 del. February 20th 1998), where he considered the issue of loss of earning, and stated at pages 6-7 of the judgment:- (all emphasis added)

> *"I now return to the claim of loss of earnings, both actual and future. The main complaint is that the evidence led on behalf of the respondent was that he was* ***capable of some sedentary (clerical) work. I have already shown that it was the duty of the respondent to prove that he has been totally incapacitated and that his actual earning power had been completely eroded as a result of the injury in order to justify a claim for total loss of future earnings****. Given Dr. Collymore's evidence, it is evident that he had failed to do so.*

*It is true that a man may be **disabled for heavy work**, that he has **no talent** for anything else and is **unable to find** light work. Such a man has obviously lost all his earning capacity and it is only fair that he be compensated on the basis of total loss. But can this be said of the respondent? The respondent himself said very little on his future prospects of working. He was content to say that since his termination he had not worked. Dr. Collymore, on the other hand, was emphatic that he was not totally disabled but that he **was fit for sedentary** (clerical) work. All else is left in the air. **Did the respondent make any effort to find an alternative job** along the lines prescribed by Dr. Collmore? **There is nothing to suggest that he did** and save for Dr. Collymore's opinion that he was fit to do some work **no attempt was made to establish that he had no talent for anything else.** It is true that **he did say that he could not work his garden** but that was in the line of manual labour. Counsel did submit that his **education was limited** and that Dr. Collymore's evidence was predicated upon the respondent having the requisite education to perform such work. I must confess that I can find no evidence to support this submission. Had Dr. Collymore qualified his evidence on the issue in that way it may have been otherwise.*

*As much as one can empathise with the respondent's predicament it is difficult to ignore **the medical evidence** on this **earning power**, albeit **reduced**, and the **absence of any evidence that he had made attempts to secure alternative clerical employment or was unable to do such work**. He had on a previous occasion applied for a clerical job with the appellant. That he was unsuccessful in that application is of no moment but it certainly confirms that he himself had formed the view that he could perform such work.*

*In the circumstances the trial judge was wrong to treat the case on a total loss basis as he did. **He had to approach his assessment, in my view, on the basis of partial loss.**"*

(It may be noted in passing that the claimant sought to rely on the first instance decision in this case).

See also the judgment of the Honourable Mendonca J.A. in **Ramnarine Singh, Ganesh Roopnarine, The Great Northern Insurance Company v Johnson Ansola CA Civ 169 of 2008.**

> *67. It was, of course, **not sufficient** for the Plaintiff to give **oral evidence** of the injuries allegedly sustained by him and the effect upon him. In establishing his claim to pretrial loss there had to be **medical evidence** as to the nature of the injuries he sustained **and the residual effect that they may have had on his ability to work**. Per Mendonca JA*

115. This Claimant has had over twenty-seven (27) years of experience in the oil industry, yet he has provided no evidence that he sought alternative employment within it. In fact there is no evidence whatever about efforts made by this Claimant to obtain any alternative employment.

116. It is for the claimant to prove that he cannot work, that he sought employment but was refused, or that he has no talent for working at anything whatsoever other than being a Derrickman.

117. Instead the only material in this regard is the claimant's assertion that, despite obtaining 17 Certificates primarily in health and safety, he cannot read. The court is skeptical of this claim. The claimant appeared able to find paragraph 26 of his witness statement and appeared on the brink of reading it when he remembered that he was supposed not to be able to read.

118. He never volunteered that he could drive and was actually driving. Only after the witness statement of investigators was produced, with video recorded evidence, did he seek to explain this away.

119. If it were not for this evidence being available it appears that the claimant would have been quite content to leave his doctor, and the court with the impression, (from his original witness statement), that he was incapacitated to the extent that he could not drive, or sit for long periods, despite knowing that that is exactly what he was doing - sitting and driving for long periods, going about his daily routine, visiting friends, and going to the market.

120. While his improvement may be a matter for gratitude, it is a matter that would operate to reduce the level of compensation payable.

121. The claimant was not candid in his testimony or in his approach to this matter. He has been found to have exaggerated the level of his disability,

a. definitely in relation to driving,

b. probably in relation to the extent to which he is really illiterate, despite his numerous certifications, and

c. on a balance of probabilities, in relation to his level of pain, discomfort and current disability, given his ability and willingness to drive, and the lack of urgency in pursuing surgery which had the potential to alleviate his alleged symptoms and improve his quality of life.

122. The inference from that lack or urgency or interest in the surgery, and the expansion of the claimant's current activities to include driving, sitting for long periods, and interaction and socializing as normal, is that the slowly resolving condition described by Dr. Narine throughout his medical reports, may be resolving at a sufficient rate and to a sufficient extent to account for that lack of urgency, and that expansion of the range of activities.

123. The claimant cannot have it both ways however. He cannot in the face of these matters maintain that he is still unable to work, and provide no evidence of any search for alternative, even if lower paid employment, and no evidence, despite his considerable experience in the oil industry, and his numerous certifications, that he is **unable to work**,

i. despite being clearly and demonstrably being able to walk, drive, and sit for long periods while driving; and
ii. despite being able to visit friends and socialize, and generally to all appearances, function normally.

124. It is not doubted that he would have some restrictions on his neck movements and back movements, and possible occasional pain or discomfort. This is a different matter from disability rendering him completely unable to work. In **Johnson Ansola v Great Northern Insurance** H.C.A 3487/2003 and in **Dave Leon Moore v Dexter Lewis & The Attorney General** H.C.A. 988/2009 this court found the claimants there were totally unable to work.

125. In the case of **Dave Leon Moore** his injuries were such that he had reduced power in all limbs.

126. In **Ansola** the claimant was an upholsterer and joiner. 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. It was in those circumstances that he was found unable to work.

127. These claimants were able to demonstrate their disability by consistent medical evidence, untainted by the shadow of having been caught out in an attempt to exaggerate and deceive a court, unlike the claimant here.

128. The issue of a ***Blamire*** award arises. There are two possibilities. One is that given the uncertainties and imponderables in assessing what the claimant's actual loss of earnings would be if he had sought alternative employment, an award should simply be made of a lump sum. A ***Blamire*** award – based upon the case of *of* ***Blamire v South Cumbria Health Authority*** *[1993] 2 PIQR Q1* was explained by the Honourable Mendonca J.A. at paragraphs 103-107 in **Johnson Ansola v Great Northern Insurance CA Civ 169/2008 (** all emphasis added)

> *103. The* ***Blamire*** *award gets its name from the case of* ***Blamire v South Cumbria Health Authority*** *[1993] 2 PIQR Q1. In that case the Court of Appeal of England held that the Judge was entitled to reject the conventional multiplier/multiplicand approach in favour of a global broad brush approach* ***given the number of imponderables****. To appreciate the decision of the Court of Appeal, it is appropriate to have an understanding of the facts of the case.*
>
> 104. *That case involved a claim by a plaintiff for damages for personal injuries. The plaintiff, a nurse, injured her back while lifting a patient. The injury had left her back vulnerable - a condition that she would endure into the foreseeable future - as a consequence of which she could not continue in a nursing job that involved lifting patients and in all probability would have to* ***fall back on her second skill*** *which was secretarial work. The trial judge summarized his views on the issue of future loss of*

earnings as follows (see Q4): "I believe from what I have seen of her that, when she does obtain ***secretarial work****, she will do it efficiently and give satisfaction to her employers. Her personality is such that I think she would be an asset in any office, and I see her as attractive to potential employers. But that it is going to be significantly* ***harder for her to get such work*** *than were she a nurse, I have no doubt. That this is so at the present time is established; I feel justified in finding that the same would probably be true for the whole of her working life. In any event it is likely to be harder to find a working environment which she finds congenial. It is reasonable to expect some* ***recurrence of back trouble*** *during the rest of the plaintiff's working life, and if she should* ***lose a job through long absence with back trouble*** *it may be difficult to get another. I must take account of the possibility that she might be* ***unable to get any suitable secretarial work*** *and may, accordingly* ***have to seek part time light nursing work*** *of the kind which she was doing in the residential home. That, of course, would enable her to earn something but would leave a substantial shortfall in comparison with her earnings were she still able to be a full-time nurse.*

105. The trial judge did not apply the multiplier/multiplicand approach but awarded a lump-sum. On appeal by the plaintiff the Court of Appeal said that there were two issues facing the trial judge: a) What was the ***likely pattern*** *of the plaintiff's* ***future earnings*** *had she not been injured; and b) What was the* ***likely pattern for the plaintiff's future earnings given the fact that she was now injured****?*

106. The Court of Appeal said that there were ***uncertainties in respect of both questions****.* ***Steyn L.J.*** *in his judgment, with which the other Judges were in agreement, stated (at Q5): "First, there was uncertainty as to* ***what the plaintiff would have earned over the course of her working life if she had not been injured****. It is not necessary to mention all the difficulties which confronted the plaintiff. One was the possibility that she might have more children. Another was the fact that she clearly would like to have done part time work rather than full time work…. The* ***second aspect was the uncertainty as to the likely future pattern of her earnings, and here the uncertainties were very great****. Bearing in mind that the burden rested throughout on the plaintiff, it is in my judgment clear that on*

the materials before him the judge was entitled to conclude that the multiplicand/multiplier measure was not the correct one to adopt in this case."

*107. The **Blamire** case is very different to this one. There is not present in this case anything of the uncertainties that existed in the **Blamire** case. The critical question before the Judge in this case was what was the future earnings of the Plaintiff had he not been injured. There is **no real uncertainty as to the likely future pattern of the Plaintiff's earnings**. Before the accident he worked as an upholsterer/joiner. This was his only skill and there could be little doubt that had he not been injured he would have continued in those trades in the future. In every case there will be the possibility that things may not remain the same in the future. As Counsel for the owner submitted, there is a possibility that the Plaintiff's income may fall and that he may have no work at times or may go bust or be unemployed. This is so in all cases and the way that the Courts deal with such possibilities is to make an adjustment in either the multiplier or the multiplicand. I therefore do not accept Counsel's submission that this was an appropriate case for a **Blamire** award. It was susceptible to the conventional approach which the Judge used.*

129. **Loss of future earnings** is what must be considered. In particular whether this case is appropriate for an application of the multiplier/ multiplicand approach, or the lump sum approach. The latter is only applicable where sufficient uncertainty exists as to justify a more rough and ready approach to the calculation of loss of future earnings. Such uncertainty for example may arise from evidentiary difficulties or difficulties with the medical evidence which make it difficult to predict the claimant's earnings path. See the Honourable Kangaloo JA in **Munroe Thomas v Malachi Ford and RBTT CA Civ 25/2007** at page 29 -32 (delivered April 6th 2011) There are no such difficulties here in relation to past earnings. However there are difficulties with respect to the claimant's earning ability in alternative employment.

130. Due to the lack of material in evidence as to attempts to find alternative employment, or the level of earnings in a position for which he might be qualified, or even the minimum wage for positions such as watchman or dispatcher, or car park attendant, or sales clerk, it may be

argued that as there are so many uncertainties as to the course of his future employment and employability, that a lump sum award such as in the case of **Blamire** should instead be made.

131. If the former approach is used it carries the risk of doing injustice and under compensating the claimant as any such figure would be little more than guess work, and any such figure much above $50,000 would be difficult to justify on the authorities. (See also judgement of the Honourable Justice Smith in CV 2006 – 00574 – **Reshma Choon and Methanol Holdings).**

132. The court is reluctant to do so for the simple reason that the range of such awards, in the vicinity of $50,000.00, carries the risk of under compensating a claimant who would have been making that, prior to the accident, in less than 3 months. Even a sum in excess of this – e.g. $75,000 would face the same difficulty – representing less than 4 months earnings. The alternative of a Blamire award carries the real risk of under compensating this claimant.

133. The other possibility is that the court do the best it can in the circumstances and estimate the discount to be applied to the claimant's pre accident net earnings to take into account the fact that he can work in alternative employment and earn **at the lowest** the minimum wage and **at highest** an unascertained wage in the industry where he has developed expertise and a track record. In those circumstances the multiplier/ multiplicand approach, utilized by the Privy Council in **Seepersad** and in similar circumstances by the Honourable Hamel Smith JA in **Sookhoo** will be adopted.

134. Though the multiplier/multiplicand approach will be adopted, a discount can be and will be applied to net earnings to reflect the real possibility that the claimant is quite capable of earning in the oil industry, based on his experience and training, well in excess of minimum wage. A discount set at 66 2/3%, will reflect that possibility. A lower discount carries the risk of over compensation, (by underestimating the chance of comparably compensated employment). A higher discount carries the risk of under compensation (by over estimating the chance of comparably compensated employment). Such a percentage discount of course carries with it the risk of arbitrariness. It should really be based on evidence of likely earnings by the claimant in

employment for which he is now suited. But the claimant claims he is not suited for any employment, and this claim is not accepted.

135. In the circumstances, where the alternative to an award of a 66 2/3 % discount on previous earnings is an award of a lump sum of $50,000 - $75,000 the less unsatisfactory multiplier/multiplicand approach is adopted, with a discount that balances the possibilities of under and over compensating the claimant, recognizing that an award is very often a very rough estimate of damages (per Lord Reid – British Transport Commission v Gourley [1956 AC 185 at 212], and that a claimant is entitled to fair, not perfect, compensation. (per the Honorable Kangaloo JA - supra at page 28)

136. The court simply has to do the best in the circumstances. See the Honourable Mr. Justice Hamel-Smith in **Sookhoo** (**supra**) at page 7 of 10, (third paragraph):-

> *"This is where the difficulty begins. It does not appear that the respondent had taken into account the evidence of Dr. Collymore* ***in respect of the partial retention of his earning power****.* ***No consideration was therefore given for the need to adduce evidence as to what the respondent may have been capable of earning*** *or to what extent that earning power had been reduced in terms of dollars and cents.* ***Accordingly, there is nothing before this court that would assist in assessing the loss of future earnings on a partial loss of earning power****. But this does not mean that an assessment is not possible.* ***One simply has to do the best one can in the circumstances*** *and that I propose to do".* ***[emphasis added]***

Earning capacity

137. I am satisfied that the claimant has not even attempted to find other work, and that the claim that he was entitled to be considered as 100 % disabled is exaggerated and misleading. The claimant has the ability to do other types of work. For example, he has certificates as a fork lift operator.

138. His alleged inability to work stems from the fact that he can no longer lift heavy objects, which I fully accept, and that he cannot sit for long periods, which I do not. It is alleged by Dr. Narine that if he is required to sit he would need an ergonomic chair and breaks every 15 -20

minutes. The latter is not supported by the evidence. The claimant has been observed sitting for longer than that, and on a stool without back support.

139. When confronted with that fact he responded by claiming that he needs to sit forward so back support is not necessary. Clearly he can sit for long periods and drive, as he was observed to do exactly that. As he can sit, lift light objects, walk, and drive, he has not established his alleged complete incapacity to work.

140. The assertion that the defendant has not given evidence that it offered him alternative employment is not an answer. The claimant had to establish, by evidence, his claim of 100 % inability to do alternative work. On the evidence he has failed to do so.

141. The discount is set at 66 2/3% because

(a) The claimant has exaggerated the current impact of his injury and his level of illiteracy.
(b) The failure to undergo surgery corroborates this. In the alternative it constitutes a failure to mitigate his condition and compensation must be adjusted to reflect his condition if mitigated.
(c) The claimant is probably employable at light sedentary duties, especially in light of his experience within the oil industry.

Special Damages - Pre judgment earnings of the claimant

142. The evidence as to the earnings of the claimant was scanty. It was also contradictory and misleading. The claimant in his statement of case alleged that he earned $33,000.00 per month.

143. In his witness statement he claimed that his monthly earnings were $25,000.00, to which must be added overtime, shift and duty allowances and cost of living allowances. In addition he asks the court to take into account expected salary increases based upon the collective agreement and negotiations for a new collective agreement. Yet in his Workman's Compensation claim he accepted compensation on the basis of monthly earnings of $21,497.10.

144. I propose to use this figure, as the other figures are simply either false or misleading. The figure of $33,000.00 is based on the claimant's TD 4 form for 2009. In fact it represents his

entire earnings for 2009 up to the date of the accident – February 9th and therefore is NOT his monthly earning.

145. The figure of $25,000.00 **cannot**, based on his weekly salary slips, be his basic monthly salary, BEFORE adding overtime, shift and duty allowances and cost of living allowances. At highest that would be the monthly figure – for some months – after these are **all** taken into account.

146. He exhibits his last 3 salary slips. These show variable weekly net earnings of $6,400.00, $6500.00, and $5,400.00. They clearly illustrate that a significant part of the claimant's earnings came from his shift and overtime allowances, and his net weekly figure would therefore be dependent on whether he got overtime work and allowances for shifts which would have augmented his basic pay. His TD 4 slips for the last 3 years could have been supplied so that his average yearly earnings could have been calculated.

147. One possible reason for not doing so would be to portray an exaggerated non representative rate of weekly earning, with overtime allowances and shift allowances for then available offshore rig work, so that that non representative figure could then be used by the court to calculate post accident loss of earnings. This is corroborated by the fact that the claimant and his employer signed off on a Workman's Compensation calculation based upon the lower rate of monthly earnings of $21,497.10 which suggests that the extra allowances (overtime, shift, or duty) were dependent on the type of work available.

148. This attempt to exaggerate the claimant's claim pervades the entire claim - from an exaggeration of his actual earnings, to his alleged complete inability to work.

149. In light of the claimant's attempt to mislead the court, both as to his earnings, and as to his inability to work, the court declines to accept the further calculations as to likely increases in salary.

150. The absence of evidence from the claimant as to his possible earnings in alternative employment means that the figure used for this is necessarily an approximation. To augment the figure for his future earnings by possible increases is to give the benefit of the suggested

increase, without taking into account that his potential earnings for alternative employment may be higher than assumed.

151. The calculation for loss of earnings ought to be as follows:-

Special Damages

a. Loss of earnings at full rate of earning

Loss of Earnings at $21,497.10 for

7 months (09.02.09 to 14.09.09 the date surgery was recommended) $150,479.70

I would consider compensation at the **full rate of earning** for 6 months after that date to take into account that the claimant would have needed time to mobilize for surgery, and then to recuperate therefrom if he had chosen to undergo it.

That would give a loss of earnings figure until **March 14th 2010** – a further amount of **$128,982.60**

Total - Loss of Earnings from 09.02.09 to **March 14th 2010 -- $279,462.30.**

12 months earnings - (that is $257,965.2) less personal allowance - $60,000.00 – $197,965.20

Tax to be deducted – (25 % off $ 197,965) - $49,491.30.

Post tax earnings from 09.02.09 to **March 14th 2010** – total earnings – ($279,462.60) less tax provision $**49,491.30- $251,368.10**

(Recognizing that tax should ideally be calculated for the full 13 month period).

Post tax earnings from 09.02.09 to March 14th 2010 - $251,368.10

b. Loss of earnings at reduced rate March 15th 2010 – April 15th 2014

March 15th 2010 – April 15th 2014 – 49 months - $1,053,357.90

Tax for 4 years calculated at 25% - on annual gross of $257,965.20 less personal allowance of $60,000.00 per year - **$49,491.30** per year or **$197,965.00** (for 4 years)

49 months earnings Net of (4years) - 48 months tax - **$1,053,357.90** less **$197,965.00**

49 months Earnings Net of tax – $855,392.70

(The tax calculation is necessarily inexact but would produce a slight excess in favour of the claimant)

This is **discounted by two thirds** to take into account the claimant's ability to work, failure to mitigate and exaggeration of symptoms and disability - giving

Loss of earnings at reduced rate March 15th 2010 – April 15th 2014 - $285,130.90

c. Loss of future earnings

Multiplier

152. The Claimant's date of birth is 16th January 1962. He was forty-seven (47) at the date of the accident (9th February 2009). At the date of the judgment of this matter he was fifty-two years old. His mandatory retirement age is sixty (60) years. The Claimant's remaining working life from date of judgement was less than 8 years.

153. Where, as here, there is less than 8 years of working life post judgement, a multiplier of 3-4 would normally be appropriate taking into account various contingencies of life that may have intervened and prevented the claimant from enjoying the receipt of income for his full working life, and the probable reduction in overtime and shift work the claimant was likely to utilize as he approached his mandatory retirement age of 60.

154. This multiplier, like the multiplicand, is further discounted for the following reasons.

a. the possibility that had the claimant elected to undergo the surgery that was more likely than not to have resulted in an improvement in his condition so that his ability to work and earn would not be so impaired as if he remained without the surgery.

b. the real possibility that the claimant has exaggerated his current condition and that, though he may still be unable to perform physically strenuous activity to the same extent as before, (and there is absolutely no reason to believe otherwise), he can perform physical activity to a greater extent than he admits or has led the court or his doctor to believe.

c. The real possibility based on the video recording and the claimant's lack of inhibition in movement and driving, that the "slowly resolving" condition that Dr Narine describes, is in fact resolving at a greater rate than expected.

Accordingly, a multiplier of 2.5 is used in this case for the reasons stated above, namely, the claimant's probable ability to work, failure to mitigate, and exaggeration of symptoms and disability, as it takes into account not only the normal contingencies of life, but the attempt by the claimant to present an exaggerated claim.

Multiplicand

155. The multiplicand cannot simply be the net earnings of the claimant. It needs to be discounted to take into account the following:-

a. the fact that the claimant has exaggerated the extent of his disability and is capable of some level of work, ranging from basic minimum wage work such as shop attendant, watchman, car park attendant, - to some activity in the industry in which he worked previously but of a more sedentary nature than Derrickman.
b. The fact is that he had a duty to mitigate his losses, that there is no evidence that he has made any attempt to look for employment, and that a person who can engage in the activities depicted on the video recording, including light lifting, walking, driving, and conversation, is definitely capable of working.

156. Using the monthly salary of $$21,497.10, his entitlement taking into account the matters relating to his ability to work and failure to mitigate by either seeking employment, or undergoing the recommended operation, a deduction of two thirds is applied as there is less risk of under compensation by this method than if a Blamire award of a lump sum is made. A deduction of two thirds gives the monthly sum of $ 7165.70.

157. This would then give an annual multiplicand of **$85,988.40.**

Tax would be approximately 25% of 25,988.40- (**$85988.40 less $60,000.00) or $6497.10**

Taking tax into account and deduction of **$6497.10** gives an annual figure of **$79491.30**

This then gives the calculation of the Claimant's loss of future earnings as:

$79491.30x **2.5** = **$198,728.25**

Total pre trial loss of earnings – February 9th 2009 to April 14th 2014.

a. **$279,462.30 plus $285,130.90**

b. Total post trial loss of earnings **$198,728.25**

c. **Total - $763,321.15**

Workmen's Compensation

158. The Claimant's evidence was that he received $619,116.28 in Workmen's Compensation. The sum of

a. **$198,728.25** loss of future earnings, as well as

b. the sum of **$279,462.30** (full loss of earnings- post tax up to six months after date surgery recommended) as well as

c. the sum of **$285,130.90** – (being one third of the post tax loss of earnings, between the period from six months after surgery was recommended, up to April 14th 2014),

must all be set off against the Workmen's Compensation payment.

See **T&TEC v Keith Singh** CA Civ.180/2008 wherein the Court of Appeal held that Workmen's Compensation shall be deducted from any component of an award for damages that comprises damages/ compensation for loss of earnings resulting from the accident. This is to avoid a claimant's benefitting from double recovery.

159. As stated by the Privy Council in **Allsop v Petroleum Company of Trinidad and Tobago** 2005 **UKPC 34** in relation to Workman's Compensation,

> "*More importantly, however, the provisions show that, in a case of permanent disablement, Parliament's overriding concern is that the workman should receive a lump sum to* ***compensate****, to some degree at least, for his* ***future loss of earnings***. (all emphasis added)

160. Although the focus there was on the importance of a lump sum payment being made under the Workman's Compensation Act, it is clear that the purpose of the lump sum payment of Workman's Compensation was to compensate for future loss of earnings, that is, loss of earnings resulting from injury and disablement. Accordingly this must encompass both the pre trial and post trial aspects of a loss of earnings claim. An award of damages for loss of earnings, pre trial

and post trial, must therefore take into account, and deduct therefrom, any payment for Workman's Compensation. If this is not done then the claimant who receives Workman's Compensation – which compensates for loss of earnings as a result of disability, will benefit from double recovery when he receives an award by the court for damages for loss of earnings, whether pre trial or post trial. They both encompass compensation for the same thing – loss of earnings resulting from accident and injury.

161. The award is as follows:-

Pre trial loss - Special damages

Total pre-trial loss of post tax earnings – February 9th 2009 to April 14th 2014

	$279,462.30 plus $285,130.90
General damages - Total **post trial** loss of **post tax** earnings	**$198,728.25**
Total -	**$763,321.15**
Less Workmen's Compensation paid	$619,116.28
Balance payable	**$144,205.12**

162. There will be no interest on this sum, as at the date of payment of the workman's compensation amount the claimant had been compensated up to that date for in excess of the amount of his loss of earnings (to that date), and in fact the payment of workman's compensation, has exceeded the award for loss of earnings up to date of trial. The claimant was therefore, since on or around December 15 2011, in receipt of full compensation for his loss of earnings even up to the date of judgment.

Permanent partial disability

163. The claimant referred to and sought to rely upon the assessment of permanent partial disability by Dr. Narine. This carries the potential to be misleading.

In the case of **Peter Seepersad v Theophilus Persad and Capital Insurance Limited Cv App. No 137 of 2000 per the Honourable Kangaloo JA:-**

> *"On the issue of "permanent partial disability" I have noted that doctors generally in their medical reports resort to an assessment of a plaintiff's disability in terms of a percentage figure. I have no doubt that the origin of this practice is to be found in the*

Workmen's Compensation Act where the amount of compensation payable to a workman injured at work is determined by a mathematical formula, one element of which is the percentage of incapacity caused by the injury. In the Act the term used is "partial disablement" which is defined solely by reference to earning capacity. ***'Permanent partial disability' is not a term of art in the context of the assessment of damages at common law*** *and one wonders whether* ***doctor****s have a common understanding of what it means as they* ***tend to give percentage assessments which differ markedly****, as in the instant case. The case of* ***Victor Cornilliac v Griffith St. Louis*** ***(1965) 7 WIR 491*** *sets out the matters to be considered by a Court in assessing damages for personal injury.*

They are as follows:

(a) The nature and extent of the injuries sustained;

(b) the nature and gravity of the ***resulting physical disability****;*

(c) the ***pain and suffering*** *endured;*

(d) the ***loss of amenities suffered****; and*

(e) the ***extent to which consequentially, the plaintiff's pecuniary prospects have been materially affected****.*

The "permanent partial disability" percentage is relevant to consideration (e) and possibly in a very general way to (b). An explanation of the effect of injuries on a person's earning capacity in words as opposed to figures, would be of greater use to the Courts in their assessment of damage at common law. It is ***suggested*** *respectfully that doctors set out in their reports,* ***together with the basis for their conclusions****, their opinion* ***on how the injury suffered is likely to affect the lifestyle and earning capacity of the injured Plaintiff****, and leave percentages of incapacity for Workmen's Compensation cases."*

These statements are clearly applicable in the instant case.

164. The Defendant's contention is accepted, that it is the impact of the injury here that has to be considered, namely, *inter alia*:-

Despite a permanent partial disability figure of 60% given by Dr. Narine the actual effects of the injury on the claimant are revealed by his actions namely:

(a) Driving, though being advised not to so do;

(b) Assertions of constant pain yet:-

i. Despite a recommendation for surgery for relief of alleged pain in neck and back years ago, the Claimant never chose to undergo it.

ii. Sitting and driving for relatively long periods;

iii. Shopping in the market;

iv. Visiting friends and attending church; and

v. Going to the dentist.

Special damages

Medical Expenses/ Incurred Expenses

165. The Claimant is entitled to an award of special damages in the sum of $33,264.30 relating to his claims for medical expenses, doctor's visits, medical scans and prescription drugs.

Cost of MRI (28th April 2009)	$ 3,400.00 (agreed)
Cost of MRI (30th April 2010)	$ 5,900.00 (agreed)
Surgi-Med Clinic	$ 1,800.00 (agreed)
Consultation with Ian Pierre	$ 250.00 (agreed)
Visits to Doctors (total)	$ 5,100.00 (agreed)
Cost of medication (total)	$ 14,164.30(agreed)
Cervical Collar (x 2)	$ 650.00(agreed)
Recliner (chair)	$ 2,959.20
Walking cane	$ 180.00

166. The last two items are not agreed. I find that, on a balance of probabilities, they were, necessitated as a result of the injuries to the claimant's back and neck arising from the accident, the use of the former probably being more necessary in the immediate aftermath. Reimbursement of their costs is awarded. The award for special damages is as claimed by the claimant in the sum **TOTAL of $34,403.50**.

167. The defendant claims to offset the sum of $5,000.00 already paid. If that sum has already been paid in respect of doctor's visits represented by any of the sums above then it need not be paid again. This is a matter that can be resolved between counsel.

DISPOSITION

168. The claimant's damages are assessed as follows:-

Pre trial loss -Special damages

Loss of earnings at full rate of earning from February 9th 2009 to March 14th 2010 -- **$279,462.30**

Loss of earnings at reduced rate March 15th 2010 – April 15th 2010 – (discounted by two thirds to take into account the claimant's earning capacity , failure to mitigate and exaggeration of symptoms and disability) - **$285,130.90**

Total pre-trial loss of (post tax) earnings – February 9th 2009 to April 15th 2014
$279,462.30 plus $285,130.90

General damages - Total **post trial** loss of (**post tax)** earnings- (multiplier 2.5) - **$198,728.25**

Total of Pre trial loss and post trial loss of **earnings -**	**$763,321.15**
Less Workmen's Compensation paid	**$619,116.28**
Balance payable	**$144,205.12**

169. There will be no interest on this sum, as at the date of payment of the Workman's Compensation amount (December 15th, 2011), the claimant had been compensated, up to that time for in excess of the amount of his loss of earnings, and the payment of Workman's Compensation has exceeded the award for loss of earnings even up to date of judgment. The claimant having therefore, since on or around December 15th 2011, already been in receipt of full compensation for his loss of earnings to the date of judgment, does not need to be compensated by interest, as that would only apply if that money had been unavailable to him.

ORDERS

170. **The defendant is to pay to the claimant the following:-**

i. the sum of **$144,205.12** being the balance of loss of earnings .

ii. the sum of **$90,000.00** for general damages for pain and suffering and loss of amenities.
Interest on this sum at the rate of 6 % from date of **service** of claim form filed on 29th June 2011 to date of judgment.

iii. the sum of **$34,403.50** for special damages as claimed by the claimant (credit to be given for any sum hereby paid in this regard)
Interest on this sum (or balance unpaid) at the rate of 3% per annum from date of accident.

iv. Liberty to apply.

v. Stay of Execution 28 days.

vi. Costs reserved.

Dated this 17th day of April, 2014

……..

Peter A. Rajkumar

Judge