**In the Republic of Trinidad and Tobago**

In the High Court of Justice

Claim No. CV. 2008-04072

Between

Wesley Gabriel Claimant

And

Royal Bank of Trinidad and Tobago Limited Defendant

**Before The Honourable Mr. Justice Devindra Rampersad**

Appearances:

Mr. Ken Sagar instructed by Ms. Tara Lutchman for the Claimant
Ms. Sashi Indarsingh instructed by Ms. Reeya Bholai for the Defendant

Delivered on the 8th day of June 2011.

**JUDGMENT**

## Contents

## Statement of Case

1. The Claimant is and was at all material times on the 26th May, 2007 a Contract Employee of the Defendant Bank. On the 26th May 2007, the Defendant held its annual Sports and Family Day at the Trinidad and Tobago Regiment Grounds, Chaguaramas and, according to the Claimant, he participated, at the request of the Defendant, in the Log Race – known as "the Midnight Express" - consisting of employees of the Defendant in rows of approximately 8 persons holding an 8 to 10 feet PVC pipe between their legs with the aim of each row of persons carrying the PVC pipe from the start line to the finish line approximately 50 to 100 metres away. He says that, upon completion of the said Log Race, the row of persons next to his row negligently dropped the PVC pipe on his left foot.

2. The Claimant contends that the Defendant by its servants and/or agents was negligent and/or in Breach of Contract in that it:-

    2.1. Failed to arrange and/or organise a safe system of sporting events;

    2.2. Failed to properly train and/or brief and/or inform the participants of the Log Race as to the sequence/manner/conduct of the said Log Race and the risks, danger and/or probability of danger to the participants;

    2.3. Failed to make adequate arrangements for the placing of the PVC pipe in a safe and secure area upon completion of the Log Race;

    2.4. Failed to have any or any trained/experienced supervising personnel during the said event;

    2.5. Failed to ensure that the said Race was free from risk or injury to participants;

    2.6. Failed to inform/advise the participants of the dangers involved in participating in the said Race.

3. As a result, the Claimant claims to have suffered severe personal injuries, loss and damages.

## Defence

4. The Defendant contends in the defence that the claimant was a contract employee and was employed with the defendant at the material time. According to the defendant, the claimant participated in the log race voluntarily and was not obliged to do so under any requirement of the terms of his contract of employment. The defendant goes on to say that by choosing to participate in the said log race, the claimant knew or ought to have known that the sporting event involved a risk of injury and he chose to participate in the same impliedly consenting to running the risk. The defendant denied the manner in which the race was run as alleged by the claimant and suggested that the log was not dropped on his left ankle but, instead, by reason of his own negligence, he tripped over the PVC pipe which was already on the ground following the completion of the race. The defendant says that the claimant contributed to the injury by:

    4.1. failing to wear any shoes while participating in the race thereby exposing his bare feet to the damage he suffered;

    4.2. failing to pay proper attention to the location of the log upon completion of the race;

    4.3. failing to pay attention to where he was going and to observe the PVC pipe on the ground after the completion of the race;

    4.4. failing to report his alleged injury immediately to the committee members and his zone coordinator;

    4.5. failing to see and/or make use of the medical services provided by the defendant on the compound where the event was held.

5. According to the defendant, it did all that was necessary to ensure that all events, including the log race, was free from risk of injury to the participants and that at all times a safe system for the operation of the events was in place. Consequently, the defendant denies liability for the claimant's injury and says that the injury occurred after the race had been completed.

6. In essence, therefore, the defendant is saying that the claimant voluntarily consented to participating in the log race knowing that there was a risk of injury, that he contributed to his own injury and he failed to report the injury to the committee members and zone coordinator who were at the event.

## The law

7. Mendonca JA in the Court of Appeal decision in Civil Appeal Number 27 of 2003: ***Tajo Beharry v BWIA International Airways Limited*** said:

*"(22) There are three (3) criteria for the imposition of a duty of care and these are foreseeability of damage, proximity of relationship and justice and reasonableness. In **Caparo Industries v Dickman** [1990] 2 W.L.R. 358 Lord Bridge of Harwich (at p. 365) put the position this way:*

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other."*
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> *Lord Bridge went on to observe:*
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> *"… the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."*

*Lord Oliver (at p. 379) was of a similar view when he said:*

> *"Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement by what has been called a "relationship of proximity" between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be "just and reasonable". But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist the conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. "Proximity" is, no doubt, a convenient expression so long that it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists."*

*(23) In this case the question of whether a duty of care exists I think can be answered by the application of the following test which may be found in the speech of Lord Lloyd in* ***Page v Smith*** *[1995] 2 W.L.R. 644, 668-669.*

> *"The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury. If so, he comes under a duty of care to that plaintiff. If a working definition of "personal injury" is needed, it can be found in section 38 (1) of the Limitation Act 1980:*

*'Personal Injuries' includes any disease and any impairment of a person's physical or mental condition' ".*

*(24) The question therefore is whether the Respondent ought reasonably to have foreseen that his conduct would expose the Appellant to the risk of personal injury so as to come under a duty of care to him."*

8. Consequently, the calling cards in respect of whether or not a duty of care exists are the factors of foreseeability of damage, proximity of relationship and justice and reasonableness.

## Volenti Non Fit Injuria

9. With respect to the defence, the defendant relies, *inter alia,* upon the defence of *volenti non-fit injuria* and said that the claimant voluntarily participated in the event knowing that there was a degree of risk attached to it.

10. The defence of *volenti non fit injuria* ('to a willing person, no injury is done') may be raised if an injured person knowingly and willingly puts himself in danger. He cannot sue successfully for all of the damages arising – he is likely to be wholly or contributorily negligent. Lord Herschell in ***Smith v. Baker & Sons*** [1891] A.C. 325, 360 said:

> "*The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong*."

11. ***Morris v Murray And Another*** [1991] 2 QB 6, was a case in which the defence of *volenti non fit injuria* was raised. In that case, the plaintiff and his friend decided to go on a flight in the friend's light aircraft after they had been drinking all afternoon. The plaintiff drove the car which took them to the airfield and he helped to start and refuel aircraft, which was piloted by the friend. Shortly after takeoff, the aircraft crashed killing the pilot and severely injuring the plaintiff. The action was brought against the pilot's personal representatives for personal injuries and the Court of Appeal held that the plaintiff had

willingly embarked upon the flight knowing that the pilot was so drunk as to be incapable of discharging the normal duty of care and he was taken to have fully accepted the risk of serious injury and implicitly discharged the pilot from liability for negligence in relation to the flying of the aircraft and that the defence of *volenti non-fit injuria* applied. Fox LJ said at page 15:

> *"In general, I think that the volenti doctrine can apply to the tort of negligence, though it must depend upon the extent of the risk, the passenger's knowledge of it and what can be inferred as to his acceptance of it. The passenger cannot be volens (in the absence of some form of express disclaimer) in respect of acts of negligence which he had no reason to anticipate and he must be free from compulsion. Lord Pearce in* ***Imperial Chemical Industries Ltd. v. Shatwell*** *[1965] A.C. 656, 687-688, said:*
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> > *"as concerns common law negligence, the defence of volenti non fit injuria is clearly applicable if there was a genuine full agreement, free from any kind of pressure, to assume the risk of loss. In* ***Williams v. Port of Liverpool Stevedoring Co. Ltd.*** *[1956] 1 W.L.R. 551 Lynskey J. rejected the defence where one stevedore was injured by the deliberate negligence of the whole gang (to which the plaintiff gave 'tacit consent') in adopting a dangerous system of unloading. There was an overall duty on the master to provide a safe system of work, and it is difficult for one man to stand out against his gang. In such circumstances one may not have that deliberate free assumption of risk which is essential to the plea and which makes it as a rule unsuitable in master and servant cases owing to the possible existence of indefinable social and economic pressure. If the plaintiff had been shown to be a moving spirit in the decision to unload in the wrong manner it would be different. But these matters are questions of fact and degree."*

12. In ***Gary Christopher Poppleton v The Trustees of the Portsmouth, Youth Activities Committee (a charity),*** [1]His Honour Judge Richard Foster had to consider the instance and claim of the claimant who was injured when he fell whilst participating in "bouldering" which is an indoor activity comprising low level free climbing without ropes on artificial climbing walls with a well cushioned, level, landing area provided comprising shock absorbent matting. The claimant was an inexperienced climber and, as such, was held by the Honourable Judge to be a beginner or novice. The learned judge held that the defendant was under a duty of care to warn the claimant of specific dangers which might not have been known to him and which might be hidden, and that the consent of the claimant to carry out the particular activity was contingent upon that reliance. That specific danger was in placing too much reliance upon the fact that there was a well-cushioned, absorbent matting on the floor thereby leading the claimant to believe that any fall from the wall would not lead to serious injury. The learned judge went on to consider what to my mind is of grave importance when considering the defence of *volenti non-fit injuria*. He said at paragraph 55 that: "*For a claimant to consent to the danger he must know what that danger is*."[2]

13. In ***Uren v Corporate Leisure (UK) Ltd and another*** [3], a claimant sought damages for injuries suffered after an accident in a team game at a health and fun day at an RAF base. The court held that enjoyable competitive activities are an important and beneficial part of the life of the very many people who are fit enough to participate in them. Such activities were almost never risk free, and a balance had to be struck between the level of risk involved and the benefits the activity conferred on the participants and thereby society generally. The court decided that where the claimant had broken his neck after diving head first into an inflatable swimming pool as part of a relay game, the organisers had not been in breach of their common law duty to him by declining to neuter the game of much of its enjoyable challenge by prohibiting head first entry and were not, therefore, liable for his

[1] 2007 EWHC 1567 (QB), 2007 WL 1942905

[2] See also ***Osborne v The London and North Western Railway Company*** [1888] 21 QBD 220; ***Letang v Ottawa Electric Railway Company*** [1926]AC 75

[3] [2010] EWHC 46 (QB), [2010] All ER (D) 132 (Jan).

injuries. In this case, the court accepted the evidence of the defendants' expert witness who was a consultant on health and safety issues, a Fellow of the Institution of Occupational Safety and Health and had practical training as a risk assessor in approved OSH courses. He was an eminently qualified scientist and had worked on a wide range of public safety questions for many years. In particular, he had carried out detailed studies on the safety of sport and leisure activities and had acted as a consultant for many government departments and safety regulators. Consequently, the court accepted the independent expert evidence that the risk of injury arising out of the particular event, especially serious injury, was very low. In deciding whether the event was reasonably safe, the expert impressed the court that "*one must consider the risk of serious injury and also the benefits of the activity. An appropriate trade-off had to be made*."[4] What is of direct relevance to the facts of this case was that the event was one which was held the year before and which had been proceeding for quite some time on the day in question in which other persons had dove headfirst into the particular swimming pool and the several officers and officials who were present, along with the event organizers/coordinator, were all of the view that the practice of diving headfirst was not a dangerous practice.

## The race

14. According to the defendant's witnesses, a committee was formed to organize the Defendant's planned annual Sports and Family Day for the year 2007 which was designed as "*a voluntary non work related activity to bring together members of staff and their families on a social basis and to foster team spirit amongst the employees in a fun and safe environment.*" [5]

15. The committee hired the services of an events co-ordinator – Nicola Young-Jeremiah trading as "Physical Leisure Services Limited " – to set up the programme of events for the

[4] Paragraph 53
[5] See Witness Statement of Ligia Welch – paragraph 1

day and to set up all the materials and things which were required. One of those races was the only event in which the claimant participated and, as a result of that participation, sustained his injury. This race was known as the "Midnight Express" and had never been undertaken before by the defendant in previous Sports and Family Day. It was a totally new event and, quite obviously, was being run for the first time at this Sports and Family Day. As a result, one can quite clearly come to the conclusion in the absence of any evidence to the contrary (and there was none) that the event was not one with which the participants were previously familiar. It was not a well known event at all, as far as the evidence revealed.

16. According to the claimant, the race consisted of 5 teams of 8 men and women who were supposed to hold a PVC pipe, which was between 8" to 10" wide and capped off at both ends, between their legs and walk from the starting line to the finishing line – a distance of about 50 to 100 metres. The first team to completely cross the finish line with the pipe would be the winner. The claimant said that the PVC "log" was filled with an unknown substance and was very heavy and required all 8 people to lift it and move it about. In fact, he said that the race really amounted to them shuffling the distance with the "log" between their legs.

17. The defendant's witness Ligia Welch, who was the witness designated to give the details of the race on behalf of the defendant, seemed to be totally unfamiliar with the event. According to her evidence in her witness statement:

> "*10. One of the events which we organized was an event called "midnight train" or the "log race". This was an event where the members of the team were required to hold a 6 inch PVC pipe throughout the race. Six persons were to participate for each team in this race. Prior to the start of each event, the teams participating were informed of the rules of the race and what they were required to do during the race. The race was such that initially they were to hold the PVC pipe on their shoulders and run for 20 metres and then hold it between their legs for the next 20 metres. For a winner to be selected the entire PVC pipe was to cross the finish line. The PVC pipe was hollow but sealed off on the edges by end caps. For*

*the purpose of the race the PVC pipe was 10 feet in length and weighed no more than 15 pounds. The race took place in the course of the early afternoon*."

18. In cross examination, however, she admitted that:

18.1. She was not in a position to say if the PVC pipe was 6" or 8" wide;

18.2. She did not know if the pipe was filled with any substance. In her witness statement, she said that the pipe "*weighed no more than 15 lbs*" but, in light of her response in cross examination, the foundation for her statement as to the weight seems to be baseless. It seems evident that, in fact, she was unable to speak to the weight of the pipe;

18.3. She was not in a position to deny that 8 persons participated on each team rather than the 6 she mentioned in her statement.

18.4. Her version in her statement of how the race was run differed substantially from the claimant's version in that she talked about the race being run for the first 20 metres with the participants holding the pipe on their shoulders and then it had to be held between their legs for the final 20 metres. Of course, the claimant said nothing about the pipe having to be carried on his shoulder nor quite tellingly, was that version of the race ever suggested to him in cross examination.

19. All in all, this court prefers the claimant's version of the makeup of the PVC pipe, its weight, the composition of the teams and the manner in which the race had to be run as he was not shaken in cross examination at all as opposed to Mrs. Welch whose evidence in chief was shown to be unreliable during cross examination. Examples of that are mentioned in the preceding paragraph.

20. A further telling example was when she said in the same paragraph 10 of her statement quoted above that: "*Prior to the start of each event, the teams participating were informed of the rules of the race and what they were required to do during the race.*" She admitted, during counsel for the claimant's skillful cross examination, that she witnessed the

race from about 40-50 feet away and, although she saw the event coordinator speaking to the participants, she could not say what was said and that, even though she had said in her witness statement that the coordinator explained the rules, she could not say for a fact that that was done.

21. On the other hand, the claimant gave details in his witness statement, which were **unchallenged,** that there were no safety precautions for the race nor was he informed of the risk of damage associated with the race. He revealed in cross examination that the extent of the instructions given were as follows:

21.1. They were told where the starting line was;

21.2. They were told to take the "logs" between their legs and to proceed as fast as possible across the finish line;

21.3. The team that crossed first wins.

This evidence was given with confidence and was delivered with a personal familiarity which exuded the truth of its contents.

22. Consequently, this Court finds that the version given by the claimant as to the manner in which the race was run was in fact the way in which it was conducted. This Court also finds that the extent of the instructions were as given by the claimant and this Court also holds that there was no instruction given as to what was to have been done at the completion of the race or how the dismounting process from the PVC pipes was to have been carried out. This Court also finds as a fact that prior to engaging in the event, the claimant would not have known the weight of the PVC pipe and would have been unable to have foreseen the procedure which was necessary to run this race and to eventually dismount since it had never been performed before and there were no instructions in that regard as to what to expect, especially at the end.

## Did the claimant consent to participating in the event?

23. It is not in dispute that the claimant began to work with the defendant company on 1 May 2007. According to him, he was a trainee teller and he was only there a few weeks before the Sports and Family Day. In cross examination, he said that there was a meeting prior to the sports day. At that meeting, he said that the sports day was discussed and that they were told about a series of events.

24. On the day in question, the claimant said that he arrived at around 1:30 PM and he went to his team's tent. Events were already in progress and he was called about half an hour to one hour after he arrived for the "Midnight Train" event. He went to get something to eat and when he came back it was time to start. He said that he did not know he was going to participate in that race before. When asked if he told the coordinator that he did not want to participate, he said that he did not do so since he felt obligated, being one of the new members of the defendant company. He said that he felt obligated to be part of the team.

25. In this Court's view, this aspect of the evidence was instructive as to the state of mind of this particular claimant. One can understand the feeling of obligation of which he spoke. He was a new employee, on contract, enthusiastic, as any other person similarly positioned would be, to make a good impression. According to his evidence, he was told that he had not participated in anything so far so he "should" participate in that particular event.

26. To suggest that he was not just an employee but was a participant of his own free will would, to my mind, be ignoring the fact of his stated mind set. It is difficult to appreciate, in the circumstances surrounding the events which took place that afternoon – his late arrival, the gentle suggestion that he should participate, his feeling of obligation and the fact that he had been employed as a contract worker for less than a month – that there was no subtle compulsion involved. In fact, this Court finds it more probable than not that, even though he was asked if he could have refused to have participated, to which he responded that he could have, it is inconceivable in the circumstances that he would have. I think the instant is a circumstance which qualifies to oust the plea in certain *"master and servant cases owing to the possible existence of indefinable social and economic pressure.*": ***Williams v. Port of Liverpool Stevedoring Co. Ltd.****, supra*[6]. In that case, a

[6] At para. 11.

stevedore was injured by the negligence of his peers, and the learned judge in rejecting the *volenti non-fit injuria* defence, observed that it would have been difficult for *"one man to stand against his gang"*, negating the free assumption of risk feature necessary for the plea to succeed. In the present case, not unlike the injured stevedore in ***Williams v. Port of Liverpool Stevedoring Co. Ltd.****, supra*, the claimant was not shown to be *"a moving spirit in the decision*" from which the injury resulted- in this case, participating in the Log Race.

27. In those circumstances, this Court finds that the claimant was not "free from compulsion"[7] in participating in the Midnight Express event, but rather did so out of a feeling of obligation as a very junior employee of the defendant company.

## Did the claimant know the risks involved?

28. From the evidence mentioned above, it is obvious that no attention whatsoever was paid in respect of what was expected of the participants at the end of the race and how they were to have arranged themselves to dismount from the PVC pipes without causing injury to the other participants. Instructions as to this procedure ought to have been carefully explained, and possibly demonstrated, to potential participants, and it is not unreasonable to suggest that the need for such instructions should be readily appreciated given that none of the participants was aware of the details of this event beforehand. It may very well have been prudent for the coordinator to have arranged the event in lanes with appropriate instructions given not to cross the lanes and to ensure, at the end, that the dismounting took place in a safe manner in such a way so as to avoid the very same mishap which occurred on the day. This procedure, however, was not stated and the risks associated with the end of the event were not fully explored, discussed or pointed out to the participants in any manner whatsoever.

29. Consequently, especially in this circumstance where the event comprised teams of eight persons – many of whom, it is more likely than not, would not have been able to see what was happening ahead of them since they were arranged in lines necessarily concentrating on keeping this PVC pipe between their legs and relying on the persons ahead of them to guide the direction and speed of the progress - it is obvious that, at the very least, some sort

[7] See ***Morris v Murray And Another*** *supra,* at para. 11

of assistance/stewardship would have been necessary to ensure that there were no collisions at the end.

30. This Court, therefore, is of the view that the claimant was not fully aware of all of the risks involved and, therefore, even if it could be said that he voluntarily participated in the event, he could not have consented to undertaking those risks of which he was unaware.

## The failure to call the event coordinator

31. It is this Court's respectful view that the best person to give evidence on behalf of the defendant about what was told to the participants, that is, what was explained, the extent of the instructions given and the nature and extent of the risk involved was the event coordinator. Remarkably, neither she nor anyone who formed part of her team on that day was called to give evidence.

32. This rather glaring omission, to my mind, resounded to the detriment of the defendant's case as none of the defendant's witnesses could give reliable first hand evidence of the event, its rules and its risks. As the defendant opposes the claimant's case on the basis of *volenti non-fit injuria,* had such evidence been advanced, it would no doubt have had a significant bearing on the strength of this defence. This evidence would have been especially relevant in light of what was stated at paragraph 55 of ***Gary Christopher Poppleton v The Trustees of the Portsmouth, Youth Activities Committee (a charity),*** *supra*[8]**,** "*For a claimant to consent to the danger he must know what that danger is*."

## The finding on liability

33. In the circumstances, this Court finds that the defendant had a duty of care towards the claimant and the defendant failed in that duty. Further, this Court finds that the defence of *volenti non-fit injuria* fails for the reasons given above.

34. With respect to the allegations of contributory negligence, none of the particulars pleaded by the defendant in this regard was proven and this Court cannot find any aspect of contributory negligence which is applicable to the claimant in this matter.

[8] At para. 12

35. The defendant is therefore 100% liable for the claimant's damages.

## The quantum of damages

36. In his statement of case, the claimant particularized his injuries and damages as follows:

> "*PARTICULARS OF INJURIES*
>
> 1. *Left retrocalcaneal bursitis;*
> 2. *Tendinitis of the left Achilles tendon;*
> 3. *Severe pain to back of left heel;*
> 4. *Chronic inflammation of the Achilles tendon fat pad;*
> 5. *Effusion in posterior subtalar joint;*
> 6. *Inability to work properly.*
>
> 7. *The Claimant will claim the following Schedule of Special Damages at the Trial of this Action:*

| | | | |
|---|---|---|---|
| 1. | *Costs of Medication* | - | *$ 960.00* |
| 2. | *Costs of surgery to foot* | - | *$ 32,500.00* |
| 3. | *Loss of Earnings from March 2008* | - | *$ 4,400.00 Per month and continuing* |
| 4. | *Costs of Doctor visits from April, 2008 and continuing* | | *$ 700.00* |
| 5 | *Cost of Physiotherapy session 3 months at $120.00 per session continuing* | | *$ 360.00*" |

37. The medical reports/medical documents were agreed by the parties and entered into evidence by consent. It is not in dispute that the claimant has suffered from retrocalcaneal bursitis as a result of the injury and that he received intra-lesional injection of steroids from one Dr. David Santana. On 20 February 2008, Dr. Santana wrote that an MRI in respect of the claimant had revealed that he had chronic inflammation of the pre-Achilles tendon fat pad and that he required surgery to deal with that problem. The estimated cost of that

procedure was put at $32,500 including surgical fee, estimated hospital fee and the anesthetic fee. That procedure was apparently done on 17 May 2008. For six weeks, the claimant's foot was in a cast and, after the cost was removed, he was advised to stay off his foot for a further 3 to 4 weeks to fully heal.

38. The claimant visited Dr. Toby – the defendant's medical practitioner – on 23 September 2009 and, after his foot was again put in a cast for a week to alleviate the continuing pain, continued with physiotherapy on a monthly basis and had to do exercises twice-daily at home. Up to the date of the witness statement which was signed on 15 April 2010, the claimant said he was still experiencing a great deal of pain in his left foot and leg as well as slight pain in his lower back and he continued to rely on a walking cane to assist him in moving about. He also takes painkillers whenever the pain becomes unbearable and uses an icepack regularly for the pain as well as regular ice baths and occasional therapeutic rubs for his foot. Dr. Toby confirmed the bursitis in a letter dated 2 November 2009, in which he said, "*Bursitis of the heel bone or calcaneous may become chronic and never heal or can take years to heal. It is foolhardy to put an exact time for this as nature simply does not operate like that*."

39. Evidently, even up to the date of the trial, this claimant has been in continuous pain as a result of the injury and the prognosis for relief from this constant pain is uncertain. None of the doctors came to give evidence in this matter and so the court does not have evidence as to how much longer this condition will continue other than that of Dr. Toby mentioned in his letter of 2 November 2009.

40. The defendant has raised the issue that there has been no updated medical evidence from Dr. Santana since 2008. At paragraph 55 of his witness statement, the claimant said that due to the flaring up of pain in his left foot, his loss of appetite and sleeping disorder, he was unable to continue working and he could no longer afford to visit Dr. Santana due to his financial conditions at that time.

41. The claimant has indicated that, after his visit to Dr. Toby, he started attending the clinic at the Port-of-Spain General Hospital and that he continued to visit the outpatient clinic of the Port-of-Spain General Hospital for physiotherapy treatment. He was not cross-examined in

respect of that allegation as to whether it continues to date. However, at paragraph 58, he says that he is still experiencing a great deal of pain.

## The law in relation to quantum of damages

42. 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:

42.1. The nature and extent of the injuries sustained;

42.2. The nature and gravity of the resulting physical disability;

42.3. The pain and suffering endured;

42.4. The loss of amenities suffered; and

42.5. The extent to which consequentially, the Plaintiff's pecuniary prospects have been materially affected.

43. I also rely upon the matters I discussed at paragraph 7 of my judgment in the case of HCA No. 66 of 2002:- ***Debbie Mohammed v Archibald Bellamy, The Attorney General of Trinidad and Tobago and Ramnarine Sookdeo*** .

## The nature and extent of the injuries sustained:-

43.1. I accept that the claimant has suffered an injury which has affected his mobility and which has caused him considerable pain and discomfort from 26 May 2007 and continuing up until the date of trial, at the very least. The agreed diagnosis is that of bursitis and, as a consequence of his injury, the claimant underwent surgery in May 2008.

## The nature and gravity of the resulting physical disability:-

43.2. I accept that the pain has been consistent to the extent that it has caused the claimant great discomfort. That he has not been able to work as a result of it, however, seems a little doubtful. There was very little medical evidence to support the type of disability suggested by the claimant. In his evidence Dr. Santana, in his letter of 5 October 2007, indicated that the claimant was unfit to resume duty until

his problem was resolved. Up to 2009 when Dr. Toby investigated the claimant, his problem had not yet resolved. The increase in pain to the present "severe pain" which the claimant alleges he experiences was not supported by the medical reports. This is symptomatic of the criticism which Kangaloo JA made in the case of ***Persad, Theophilus; Capital Insurance Limited v Seepersad, Peter [C.A.Civ.136/2000] Seepersad, Peter v Persad, Theophilus; Capital Insurance Limited [C.A.Civ.137/2000]*** - the un-helpfulness of the type of medical reports which come before the court. The claimant, however, gave evidence of being so affected by the injury that he was unable to sleep at night, which resulted in him being unable to function at work the next day and therefore retain a job. Once again, this was not corroborated by the medical evidence. The Court was also at the disadvantage of not having the benefit of further evidence of any of the doctors, none of whom was called as witnesses in this matter, so that the Court is left with the claimant's uncontroverted, self-serving evidence and the medical reports which are unhelpful in assisting the court to understand the nature and gravity of the resulting physical disability.

## The pain and suffering endured;

43.3. None of the medical reports which was put into evidence indicated such an extreme level of pain as is alleged by the plaintiff. However, the claimant was a credible witness in relation to his continuous pain and suffering from May 2007 to date.

## The loss of amenities suffered;

43.4. Once again, the Court accepts the claimant's evidence as set out at paragraph 62 of his witness statement in that he is no longer able to play billiards or jog, drive a manual car or swim for long distances. There is uncontroverted evidence that the claimant used to go to parties, gatherings, and clubs to and this Court accepts that were he to attend same, his ability to stand for any reasonable period of time would be deeply affected.

## The extent to which consequentially, the Plaintiff's pecuniary prospects have been materially affected.

43.5. At the time of signing his witness statement, the claimant was 25 years old. He has indicated his inability to work for the reasons given in his witness statement – i.e. that his leg would not be able to stand pressures of work, that he cannot stand on it or walk for long periods in excess of 15 to 20 minutes without experiencing severe pains to his left foot, that he has difficulty sleeping flat on his back as the left foot, especially the heel area, would be aggravated causing it pain and his lack of mobility generally. To say that he would not be able to work for the rest of his life would, to my mind, be a gross exaggeration especially since the doctors are in agreement that whenever the condition settles down, he would be able to obtain relief to the extent that he would be able to continue to work. In the case of ***Parahoo v. S.M. Jaleel Company Ltd. C.A.CIV.110/2001,*** Hamel-Smith JA said that in respect of loss of pecuniary prospect, a claiming party had to show that the injury was of such a nature that it rendered the party incapable of performing the job he was previously performing , or, for that matter, any other form of work whatsoever. If it rendered him incapable of performing the prior job but did not prevent him from doing other work, it was necessary to show that in order to mitigate his loss. The learned Justice of Appeal went on to say that, 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. This court feels that it was incumbent upon the claimant, who was pursuing a claim for loss of pecuniary prospect and loss of future earnings, to have had a comprehensive medical report justifying a finding such as that which he wishes this Court to reach, namely, that his future pecuniary prospects and future earnings would be severely affected. Unfortunately, the evidence was not made available to assist this Court.

44. Bearing in mind the evidence and the authorities referred to by the parties, I award the sum of $ **100,000.00** as general damages in this matter.

45. In respect of the loss of future earnings, this court is cognizant of the fact that Dr. Santana and Dr. Toby have agreed that the claimant's condition may continue for some time. That finding, however, bears no indication that said condition will continue for the rest of the claimant's life. In those circumstances, this Court is minded to allow an award for loss of

future earnings for the period of three years only from the date hereof despite the fact that the medical reports did not hazard a guess as to how long the condition would continue. Using the multiplicand of **$52,800.80** (being the yearly salary he would have been entitled to under contract with the defendant) and a multiplier of three (3), this court awards the sum of **$158,402.40** for loss of future earnings.

## Special Damages:

46. This court accepts the submissions of the claimant's attorney at law in respect of the loss of earnings of $4,400.00 for the 21 months claimed in the claimant's submissions for the reasons set out therein amounting to a total of **$92,400**.

47. The court also accepts the following payments:

| | | |
|---|---|---|
| 47.1.1 | Payment to Dr. David Santana as per invoice dated fifth of October 2007 for | **$890 .00** |
| 47.1.2 | Cost of surgery | **$32,500 .00** |
| 47.1.3 | Physiotherapy services | **$1,690 .00** |

48. The claim for expenditure on pain killers seems rather shaky. The claimant said that he paid between $75.00 to $100.00 per month on pain killers for the two-year period from March 2008 to March 2010. In his witness statement, the claimant said that he could not keep any receipts since the chits were faded and were too small and he was not told he had to keep them. The law is that such evidence is required in a claim for special damages, and therefore,. without some sort of evidence in this regard, the Court cannot make the award that he has claimed or at all.

49. There was no other cogent evidence in respect of any other aspect of special damages. Consequently, the total special damages allowed is the sum of **$127,480.00**

## The Order:

50. Consequently, the Order shall be as follows:

50.1. There shall be judgment for the claimant against the defendant.

50.2. Total General Damages awarded in the sum of $100,000.00;

50.3. Interest to run on General Damages from the 20th of October 2008 at the rate of 9% per annum until the date hereof;

50.4. Total Special Damages awarded in the sum of $ 127,480.00;

50.5. Interest on Special damages to run from the 26th May 2007 at the rate of 6% per annum until the date hereof;

50.6. Loss of future earnings awarded in the sum of $158,402.40

50.7. The defendant shall pay the claimant's prescribed costs assessed in the sum of $65,544.25.

50.8. By consent stay of execution granted until 6th July, 2011.

**Devindra Rampersad**

**Judge**