REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 56 of 2009 -
H.C.A No. CV2007 - 04748

BETWEEN

WAYNE WILLS

Appellant/Claimant

AND

UNILEVER CARIBBEAN LIMITED

Respondent/Defendant

PANEL: **P. WEEKES, J.A.**
N. BEREAUX, J.A.
R. NARINE, J.A.

APPEARANCES: M. Ramkersingh and R. Freeman for the Appellants
K. McQuilkin and H. Alves for the Respondents

DATE DELIVERED: 18 December 2013

I have read in draft the judgment of Bereaux J.A. I agree with it and do not wish to add anything.

P. Weekes
Justice of Appeal

I too agree.

R. Narine
Justice of Appeal

JUDGMENT

DELIVERED BY BEREAUX, J.A.

[1] This is an appeal from the assessment of damages in a claim for personal injury. The appellant (Wills) has challenged the Master's award of general damages, loss of future earnings and future medical expenses. He has not appealed the award of special damages. He was however granted leave to adduce fresh evidence which bears on the Master's award in respect of all of the items under appeal as well as on the quantum of special damages.

[2] The Master ordered as follows:

(i) Special damages in the sum of $102,812.80 less $27,748.22 awarded for Workmen's Compensation, (the balance thus being $75,064.58), with interest at 6% per annum from July 7, 2007 to January 30, 2009.

(ii) General damages in the sum of $75,000.00 with interest at 12% per annum from December 17, 2007 to January 30, 2009.

(iii) Future loss of earnings in the sum of $64,934.40.

(iv) [Appellant's] costs in the sum of $24,750.00.

The appeal was filed on the 4th March 2009. On 16th November 2009 Wills was given leave to adduce fresh evidence by Narine J.A. He filed his fresh evidence on the 26th March 2010 and the respondent filed a response on the 17th January 2012.

[3] There are eight grounds of appeal, from which four broad issues arose;

(i) Was the award of general damages so grossly insufficient as to amount to an error of law by the Master?

(ii) Was the award for the loss of future earnings based on incorrect assumptions?

(iii) Was the Master wrong to refuse to make any award for future expenses?

(iv) Did the new evidence falsify the assumptions made by the Master in respect of the nature of the injury?

Summary of decision

The appeal must be allowed and the Master's award varied because:

(i) The Master gave insufficient weight to the evidence by failing to take proper account of the evidence of Wills and his supporting witness and thus applied too conservative a period to allow for Wills' re-training.

(ii) In any event Wills' subsequent affidavit evidence before this Court, as well as the fresh medical evidence, have falsified the assumptions on which the Master has proceeded in arriving at her decision.

(iii) In assessing damages, the Master wrongly deducted the compensation awarded to Wills under the **Workmen's Compensation Act Chap 88:05**, from the special damages. Such compensation is to be deducted from damages which are of the same or substantially, the same character as the compensation awarded under the Act, in this case, loss of future earnings.

Facts

[4] It is necessary to refer to the facts and evidence in some detail. The injury, though quite serious, happened quite innocuously. Wills was employed by the respondent as a porter. On 6th March 2006, he and another worker were carrying a drum filled with *"wash down"* water down a staircase to be emptied into an *"effluent tank"*.

The drum had two handles on either side. Each worker held one handle. It was their third trip. On this occasion Wills took the lead. He testified that, as he walked down the stairs, *"I slipped and jerked my back. My foot dropped to the ground level. Immediately I felt a burning sensation from my left hip, which ran up my back".*

[5] They completed the task but he continued to feel pain in his back. The following day he was seen by the company doctor and given painkillers. He felt cramps on his left side but was still able to continue to work for the rest of the week. On Monday 13 March 2006, the pains were so severe that he could not go to work. He was referred to Dr. Derrick Lousaing. By this time, he was experiencing severe pain on his left side, from his neck to his feet. He also had cramps on both sides of his body. He could not sleep properly.

[6] Dr. Lousaing initially prescribed medication including pain killers and muscle relaxants. After an MRI was conducted Dr. Lousaing recommended surgery. He performed surgery on Wills on 24 May 2006. Thereafter, Wills attended eleven therapy sessions at Mt. Hope from June 2006 to October 2006. This included electro shock treatment and stretches to his leg, back and abdomen, which he said involved *"a certain degree of pain".* He said it was *"especially painful when I had to do balancing exercises on a ball or to do step ups".*

[7] In October 2006 he suffered a *"severe back spasm"* during sexual intercourse with his wife. In November 2006 he started more intensive physiotherapy at another institution. It included aqua therapy, massage therapy, *"tens and ice, weights and pilates"* Wills stated that during these sessions *"I experienced more pain…"* At the end of these sessions he continued *"strength training on his own".* In all he visited Dr. Lousaing twelve times until May 2007.

[8] From 28th June 2008, he attended yet another institution at which he began acupuncture, thermal massage and heat treatment. He got good results in terms of pain relief. However he chose to continue it at home because it was *"cheaper to buy the equipment and do it at home".*

[9] Wills described his circumstances in the following terms, starting at paragraph 22 of his witness statement:

> ***"22. Since the accident, I have not been able to sleep comfortably. I have a board bed and need a more comfortable bed. I have wooden living room set which is very uncomfortable for my back. I obtained pro forma invoices dated 8th August 2007 from Courts for a King size mattress/bed at a cost of $9,498 and an upholstered living room set at a cost of $6,999 which I have in my possession.***
>
> ***23. I continue to feel a lot of pain in my back. If I am not in a comfortable seating position the pain starts from my neck all down my back. I cannot do anything strenuous. Even sweeping the floor at home gives me pain. I cannot lie down on a soft bed which must be firm. Sexual intercourse with my wife has not been as it was. We do not have intercourse as regular because of the pain I get in my back.***
>
> ***24. I am an ex-national hockey player. I played on the national team from 1992 to 1995. Before the accident I was an active hockey player with Petrotrin Senior Championship Hockey Team, Point a Pierre. I was also an active footballer with St. Mary's United Football Team, Carapachima. I have not been able to resume playing with either team.***
>
> ***25. I used to coach school hockey and football. I have not been able to continue hockey coaching because the bending causes me pain. I have however continued coaching football.***
>
> ***26. After the accident I received $27,748.22 workmen's compensation. I was paid my full salary until 6th July 2007 when my employment was terminated. I have the letter dated 6th July 2007 from the Defendant in my possession. I have not received any income for the past fifteen months and have suffered loss of income of $81,168."***

[10] Wills was deemed medically unfit and his employment terminated because the respondent could not find a suitable post within its organisation in which to relocate him. His last day of work was 6th July 2007.

[11] He has not been able to get a job since the accident occurred. In an attempt to re-train, he obtained certificates as a Medical First Responder and an Emergency Medical Technician (Basic) at a cost of eleven thousand nine hundred dollars ($11,900.00). These qualify him as a driver for which he is unsuited because of his injury. According to Wills, I can *"go on to be a dispatcher but would have to complete other courses which I cannot afford"*. Anthony Searles, who instructed Wills in his course of study, deposed that, given the injury and from his observations, Wills was more suited to supervisory work. But the problem would be that he needs hands on experience in the field in order to get a supervisory job. He said that *"working in the field may present challenges to Mr. Wills due to the stresses of the job. He may have difficulty with manual handling especially lifting victims off and on stretchers at the scene of an accident, which is a mandatory function on a day to day basis. He may have difficulty during for long hours or working twelve (12) hour shifts".*

Post trial - fresh evidence

[12] Part 64.17(2) of the **Civil Proceedings Rules 1998** provides that the Court of Appeal may receive *"further evidence"* in respect of matters which have occurred after the date of the trial or hearing. (The provision is awkwardly expressed and needs to be closely read). In this case the fresh evidence consisted of Wills' affidavit evidence attesting to additional pain and suffering subsequent to the Master's award and to his having to submit to additional surgery which was risky, complex, painful and costly; the affidavit evidence of Dr. Steve Mahadeo who performed the surgery and whose evidence as to the cost, also corroborated Wills'; the affidavit evidence of Sara Washington exhibiting Dr. Mahadeo's medical report dated 1st February 2011 and the affidavit of Dr. Marlon Mencia, filed on the respondent's behalf, exhibiting his report on the examination of Wills and attesting to its competence. There was no objection to the admission of Dr. Mahadeo's medical report.

(i) Wills' evidence

[13] In summary, Wills stated that:

- He was unemployed.

- After the date of hearing he was taking pain killers on a daily basis at a cost of fifty dollars per month.

- On 22nd January 2009 (two months after being cross-examined) he suffered such extreme back pain that he was forced to go to the Couva Health Facility where he was given pain killers and muscle relaxants.

- February 2009 Dr. Lousaing referred him to Dr. Mahadeo.

- On 4th March 2009 he saw Dr. Mahadeo who recommended further surgery. This caused him anxiety because of the pain and discomfort he had in the first surgery.

- On 11th November 2009 he saw Dr. Mahadeo again complaining of pain in both left and right knees, pain down the side of the hip to behind the knee and intermittent pain at the back of his neck and shoulder. He could not sit for more than 15-20 minutes.

- Dr. Mahadeo recommended further surgery, after viewing an MRI.

- On 19th January 2010, Dr. Mahadeo performed the second surgery. He was discharged on 22nd January. During the four days of his hospitalisation he suffered pain and discomfort.

- On discharge Dr. Mahadeo gave him specific instructions that he should not sit for more than half an hour, or bend or lift.

- The total medical expense was one hundred and six thousand, two hundred and seventy-one dollars ($106,271.00) (this includes ninety-nine thousand and seventy-nine dollars ($99,079.00) for the surgery). He has paid eighty thousand, eight hundred and ninety dollars ($80,890.00) for the surgery leaving a balance of eighteen thousand, one hundred and eighty-nine dollars and thirty-one cents ($18,189.31). He has also paid seven thousand, one hundred and ninety-two dollars ($7,192.00) for medication.

- He suffered severe post operative pain in his back.

[14] He concluded his evidence, starting at paragraph 27 of his witness statement, as follows.:

> ***"27. Before the hearing I did send out a job application in Emergency Response. I did not get a reply. I do not believe that I am physically fit for this type of job. I now no longer have any interest in it.***
>
> ***28. Since the date of hearing I have not been able to work. I have not been able to coach football either. I have not therefore received my usual stipend of $1,880 per month for the past eight months. This is because of the pain I was in before and after my surgery. Before surgery I got pain on my left side from my lower back going down my hip and left leg. I got similar pain but not as bad on my right side and behind my right knee. Since the surgery I can't bend or lift anything. I can't sit for more than half an hour (1/2 hour) at a time. I continue to get pain on my left side from my hip down my left leg. I don't know how long it would take for me to recover. I don't know but I hope that I will be pain free.***
>
> ***29. Based on the pain I have suffered over the years and my***

physical limitations and Dr. Mahadeo's advise I do not believe that I will ever be able to do labour work again. Right now I can't even do a sitting job because I can't sit for more than hour (1/2 hour). I am really fed up because I have not been able to have a normal and pain free life for over four years now. Because of this I do not believe that my job prospects are good. My wife and I have talked about starting a day care together at our home. This is something that I can probably help her with"

(ii) Evidence of Dr. Steve Mahadeo

Dr. Mahadeo in his evidence spoke of performing the surgery. He verified Wills' medical expenses and their necessity. In his final paragraph he stated as follows:

"In my opinion the injury that Mr. Wills suffered on March 6, 2005 which was a herniated L4/L5 disc has deteriorated since his initial surgery. For a period of time after the initial surgery his symptoms of pain in his lower back and running down his leg were abated. However sometime after there was a recurrence of these symptoms. It is not uncommon for there to be a delay of recurrence of these symptoms which would go unnoticed for a period of time. Cases like Mr. Wills where the symptoms are not resolved by initial surgery are of the more severe kind. His injury has deteriorated in other ways. He now suffers from pain radiating down his right leg which was non-existent before. He also suffers from lumbar scoliosis which is a degeneration of the spine caused by his injury. Although I cannot give my final prognosis yet, I am of the opinion that Mr. Wills will be restricted to light duties of sedentary type work in the future."

[15] In his report of 1st February 2011 Dr. Mahadeo concluded as follows:

"… Mr. Wills has had a very good result from the lumbar spine surgery performed on January 19, 2010. He is left with residual stiffness in the lower back and accompanying discomfort on performing certain activities especially bending, lifting, sitting on hard surfaces, walking long distances, climbing stairs. Due to the injury to the spine and subsequent necessary surgery there is altered spinal mechanics which will accelerate the degeneration in the adjacent segments. In the future this may require further intervention.

His physical activity is limited to light physical work. He will not be able to bend below waist level, lift objects of more than 50 pounds, climb ladders, run or jog. His permanent partial disability is assessed at twenty-five percent (25%)."

(iii) Dr. Mencia's evidence

[16] Dr. Marlon Mencia was commissioned by the respondent to examine Wills. Specifically his opinion was sought *"as to whether his most recent surgery was indeed necessary and whether the life changes identified by [Mr. Wills] are in fact consistent with his injuries sustained in the work place"*. Dr. Mencia deposed that he examined Wills on 4th March 2011 and issued a medical report. His report affirmed both the necessity for the surgery and his life style changes. Dr. Mencia said that he believed that Wills' "recent surgery in 2010 was clinically indicated given his failure to improve on a full regimen of conservative management following his initial surgery. He added that *"his current life style changes … are consistent with the expected outcome"* of his surgery. Earlier in his report Dr. Mencia stated that Wills' current condition of *"chronic lower back pain following spinal fusion is in keeping with the up to date literature on this subject"*.

[17] Dr. Mencia also noted that Wills' *"present"* complaints (at at the time of examination) were *"persistent severe lower back pain present both during the day and night. The pain is described as being made worse with activity particularly standing and*

even when supine. There is minimal relief with non-steroidal anti-inflammatory drugs…"

[18] The evidence, for the purposes of this judgment, would not be complete without Dr. Lousaing's final report in respect of Wills' recovery after the first surgery. It is relevant to the Master's findings which are challenged by Mr. Ramkersingh. His full report dated 1st May 2007 states as follows:

> ***"This patient was seen for review following his foraminotomy and diskectomy on May 24, 2006. He has had several episodes of recurrence of pain over that period. However, he has improved somewhat with regards to his overall functioning and recovery.***
>
> ***Presently, he has no associated radiculopathy in the left lower limb, but does complain of left abductor pain. He does have some pain at the top of his scar as well as his mid upper back. He is presently using Tytex p.r.n. and Neurontin for pain control.***
>
> ***Clinical examination reveals a lumbar sacral spine with a good range of motion of three-quarter the normal. Straight leg raising is 70 degrees bilaterally with no evidence of sciatic nerve root stretch. There is some scar tenderness, but there were no objective neurological findings in the lower limbs, and his reflexes are all normal and present and equal on both sides.***
>
> ***Clinically, it is my impression that he has post-surgical scar pain, and most of his discomfort related to the back may be myofascial in origin and not diskogenic in nature.***
>
> ***For that reason and because of his present pain level, it would be suggested that he will require a more sedentary-type job, and he will have to avoid periods of heavy lifting and bending. I have expressed that***

fact that he has to maintain a height to weight ratio that is optimal, and he should continue on his pain-altering medication. At this point, his visual analog pain score is 4 and I hope over time, this can be reduced by one or two points.

It is my opinion that his Permanent Partial Disability be assessed at twenty percent (20%) and if a sitting job is considered, then he must be provided with proper seating."

Findings of the Master

[19] The Master found that the medical evidence was comprehensive and gave a good picture of the progress of the injury. She found that Wills' pain was anticipated to be reduced while he continued on medication. She endorsed the doctors' recommendations that he should pursue a sedentary type job and that physical therapy should be continued for three months.

[20] She concluded that Wills seemed set on the career as an emergency medical technician and that it must be presumed that he was willing to bear the risk of continued unemployment following his re-training although it was not his only option. Since no evidence was led as to a salary in the new field, she could not assume he would earn less than he did in his previous employment.

[21] In order to assess his future loss of earnings she calculated his earnings per year in his previous employment as a porter. She adjusted the sum downwards taking into account statutory deductions which coincide with the rate pleaded for future earnings. However she only allowed one year for him to conclude his training and find a job in his new field.

[22] She disallowed all claims for future medical expenses. Wills claimed for the purchase of a new living room set, an orthopedic mattress, orthopedic back support, pillow, seat, therapy and future medical treatment. Her basis for disallowing the first six

items on that list was because of the absence of evidence supporting the need for such items. She added that they were too remote. She concluded that in the absence of evidence of the expenditure incurred for medication she could not properly assess a quantum and so awarded a nominal sum.

[23] She was also not satisfied on the evidence that continued physiotherapy, hydrotherapy, massage therapy or weight training were recommended by a practitioner or that they would be beneficial to Wills.

Law and Conclusions

[24] In **Sookdeo Ramsaran v. Lorris Sandy and Theresa Rampersad Civil Appeal 55 of 2003**, Nelson J.A. at para 14n noted that *"an appellate court is loathe to reverse a trial judge's assessment of damages"*. He then set out the basis upon which an appellate court would reverse a lower court's award of damages as follows:

> ***"There are two broad grounds for the intervention of an appellate court: (1) error of law – where the judge misdirected himself as to the law or gave undue or insufficient weight to the evidence – and (2) an entirely erroneous estimate of the damages".***

In addition to the other challenges to the Master's award, the question also arises as to the effect the fresh evidence has had on it. Part 64.17(2) of the **Civil Proceedings Rules 1998** provides for the receipt of fresh evidence in the Court of Appeal, in respect of matters which have occurred after the date of the trial. It is a matter for the discretion of the appellate court. (See Lord Pearson in **Murphy v Stone-Wallwork (Charlton) Ltd [1969] 2 All ER 949 at 960, [1969] 1 WLR 1023 at 1036**).

[25] Lord Wilberforce's dictum in **Mulholland and another v Mitchell [1971] 1 All ER 307** at page 313 is instructive:

> ***"Negatively, fresh evidence ought not to be admitted when it bears on***

matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted, if some basic assumptions, common to both sides, have been clearly falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal."

I consider that Narine J.A., no doubt, had the considerations expressed by Lord Wilberforce in mind when granting permission. I agree with him. Justice required that this evidence be received by the Court of Appeal.

Future loss of Earnings

(i) Was the award grossly insufficient?

[26] The Master assessed Wills' loss of future earnings by using his annual earnings (net of deductions) while in the respondent's employ, amounting to sixty four thousand, nine hundred and thirty-four dollars and forty cents ($64,934.40). This figure was agreed. The Master noted that Wills had sought to re-train as an emergency medical technician but never stated what he would earn in that capacity. She allowed that a period of one year was a reasonable period to conclude his training and assessed his loss of future earnings in the same amount.

[27] Counsel for Wills, in his written submissions, submitted, inter alia, that the Master did not take sufficient account of the fact that the respondent was itself unable to relocate Mr. Wills to another job within its organization. In his oral submissions, he submitted, further, that the fresh evidence effectively falsified the assumptions upon which the Master proceeded because it showed that Wills' injury was more severe than first thought and that it had deteriorated after the hearing. He added that given that not even his employer could relocate him, Wills' was unlikely to find employment at all. It was

difficult for him as a *"career"* manual labourer to then switch to sedentary labour. Thus, he had limited options available to him and for all intents and purposes was *"crippled on the job market unless he could find some form of self employment".*

[28] Mr. McQuilkin in reply submitted that the Master's conclusion was reasonable having regard to the evidence but candidly conceded that she may have fallen into error by the use of one year as the basis of the award of loss of future earnings. He countered, however, that even if she did, the sum of sixty four thousand nine hundred and thirty-four dollars and forty cents ($64,934.40) should be affirmed by making a **Blamire** award because *"there were serious imponderables about Mr. Wills' future earnings"*. He cited the decision of this Court in **Munroe Thomas v. Malachi Ford & Ors., Civil Appeal No. 25 of 2007** (per Kangaloo J.A.) in which a similar award was made. His reference to a **Blamire** award is to the decision of the English Court of Appeal in **Blamire v. Cumbria Health Authority [1993] PIQR Q1** where because of the *"far too many imponderables"* the Court of Appeal upheld the trial judges rejection of the conventional multiplier/multiplicand approach in favour of the grant of a lump sum after consideration of all the circumstances.

[29] I consider that the Master's award for loss of earnings must be set aside for the following reasons:

(i) The period of one year was far too conservative a period to allow for Wills' re-training.

(ii) She failed to take into account the evidence of Mr. Searles, who stated that it was unlikely that Wills could be employed even if he re-trained in the health and safety field.

(iii) She also failed to take account of Wills' then evidence that his certificates qualify him to be a driver *"which I cannot do because of my injury"*. He added that he could not get any work in the health and safety field because of his injury.

(iv) Wills' subsequent evidence together with the medical reports of both Dr. Mahadeo and Dr. Mencia (in particular) cast doubt on his employability, even at a desk job, given that he cannot sit for more than half hour at a time. It is unclear from the medial reports whether his condition will improve.

[30] The Master fell into error by giving insufficient weight to the evidence and by using too conservative an estimate of the re-training period. She thus arrived at an *"entirely erroneous estimate of the damages"*. In any event the fresh evidence seriously falsified the basis upon which she came to her decision. This Court is therefore entitled to look at the matter afresh and to substitute its own decision.

(ii) A fresh look

[31] Pecuniary loss generally forms the principal head of damage in personal injury actions. It consists primarily of pre-trial earnings and prospective loss of earnings commonly called loss of future earnings. As **McGregor on Damages 18th Edition** states at paragraph 35-056, *"the function of the pecuniary heads of loss is to ensure that the claimant recovers, subject to the rules of remoteness and mitigation, full compensation for the loss that he has suffered".* The general method of assessment is the well known multiplier/multiplicand method applied by taking the amount which the claimant has been prevented by injury from earning in the future (multiplicand) and multiplying it by the number of years during which he was expected to earn it (the multiplier).

[32] The multiplicand is calculated by *"using the figure of the claimant's present annual earnings less the amount he can now earn annually".* See **McGregor on Damages (supra)** at paragraph 35-065 at page 1336. The multiplier is discounted to take account of the fact the claimant is being paid all of the earnings at once rather than over time as would ordinarily occur. The question is whether Wills' employability calls the conventional approach into question such that I should make a **Blamire** award.

[33] In my judgment Mr. Ramkersingh is correct that Wills is effectively *"crippled"* on the labour market. He cannot, in light of the fresh medical evidence, do manual

labour. He cannot bend or lift anything above fifty pounds. Further I am not at all certain of what form of sedentary labour he can perform at all given that he cannot sit for more than half an hour at any given time. Mr. Ramkersingh further submitted that given that Wills is effectively crippled in the labour market, the figure of sixty four thousand nine hundred and thirty-four dollars and forty cents ($64,934.40) should be used as the multiplicand. Mr. McQuilkin's submissions however are that there is no medical evidence to suggest that he cannot work at all. At best the evidence is that he is unable to find a job and for it is this reason that a **Blamire** award should be made.

[34] Courts must always apply the law as practicably as possible. I agree with Mr. Ramkersingh that Wills is effectively unemployable. Mr. McQuilkin submitted, attractively, that, as a second alternative, the sum of sixty four thousand nine hundred and thirty-four dollars and forty cents ($64,934.40) should be discounted by thirty-five percent (35%) to take account of the disability found by Dr. Mencia and to use a multiplier which is also heavily discounted to take account not only of the uncertainties of life and the fact that he is in receipt of a lump sum but also of the uncertainties with respect to his employability. He suggests a multiplier of 4-6.

[35] The submission is attractive but I do not accept it. Wills can no longer do manual labour. He is a *"career"* manual labourer. There is no evidence of his academic qualifications but given his predilection to manual labour, it is unlikely that he has any significant academic qualifications. He certainly has not attested to any. He is not suited even for the health and safety field in which he sought to re-train. Any re-training to a sedentary job is hardly likely at this stage. Self employment is the better option but the likelihood of it given that he was a former plumber by trade is remote without further re-training. It is highly unlikely he can perform any sedentary job with satisfaction. He is unable to sit for long periods - 1 ½ hour at best. The medical evidence does not say whether his sitting ability will improve. I very much doubt that it will. In this regard I refer to Dr. Mencia's report of his examination of Mr. Wills which he conducted on 14th March 2011. He listed Mr. Wills' present complaints as *"persistent severe lower back pain present both during day and night. The pain ranges from 5-9 on a visual analog pain scale with maximum value of 10. The pain is described as being made worse with*

activity, particularly standing or sitting and even when supine. There is minimal relief with non-steroidal anti-inflammatory drugs". I cannot conceive of any sedentary job to which he is suited given those complaints. Neither can I conceive of any business, that will employ him, short of a charity. In my judgment the injury has rendered Wills unemployable. I shall therefore refuse Mr. McQuilkin's attractive offer to employ a **Blamire** approach. I do not consider that there are any imponderables in this case given my conclusion. I shall approach the award in the conventional manner of using the multiplier/multiplicand.

[36] The multiplicand to be applied is his annual wage (net of deductions) at the time of the accident. The Master was also right to use the sum of sixty four thousand, nine hundred and thirty-four dollars and forty cents ($64,934.40) as the multiplicand, but fell into error by using only one year by which to measure it.

[37] Wills was thirty three years old at the time of the injury. He is now forty years old. Ordinarily, as a manual labourer, he would be able to work to at least sixty five. But working at the respondent he would most probably have retired at age sixty. Using the age of sixty, as the benchmark, he would have had another twenty years of working life. I shall discount that figure to twelve to take into account the fact of this receipt of a lump sum and for the uncertainties of life. I thus assess Wills' loss of future earnings at $64,934.40 x 12 = $779,212.8.

(iii) Deduction for Workmen's Compensation

[38] I come to a matter which is not the subject of a ground of appeal but with which I must deal because it is a fundamental error. The Master deducted the compensation awarded to Wills in the sum of twenty seven thousand, seven hundred and forty-eight dollars and twenty-two cents ($27,748.22) under the **Workmen's Compensation Act** from the award of special damages. She did so in error. The deduction should properly have been made from her award of future loss of earnings.

[39] The decision of this Court in **Trinidad and Tobago Electricity Commission v.**

Singh, Civil Appeal No. 180 of 2008, is instructive. The question arose in that case whether an award of workmen's compensation should be deducted from the award of damages. Mendonça, J.A. giving the decision of the Court of Appeal and after reviewing the authorities stated that, as a *"fundamental rule (questions of exemplary and aggravated damages apart) a plaintiff cannot recover more than he has lost. There is to be no double recovery".* After noting that there are exceptions to this rule (which are not relevant to this appeal), he added:

> ***"It is also recognised by the authorities and it is an application of the common law principles of justice and reasonableness that a plaintiff should only give credit for all payments received by him in consequence of his injury against like or equivalent damages he claims so that for instance where a plaintiff is in receipt of benefits that compensate him for loss of earnings those should not be set off against an award of general damages for pain and suffering".***

[40] He then held that the non-deduction of workmen's compensation from an award for pain and suffering did not offend the principle against double recovery because each award was made on different bases and were not of the same character. The compensation awarded under the Act was made on the basis of his permanent partial disability. It was intended to compensate, in some degree, for the victim's loss of earnings. The award of damages was made for pain and suffering endured by the victim and had no relation whatever to compensation for loss of earnings. (See paragraphs 30-32 of the judgment.)

[41] In this case however the evidence is that the workmen's compensation award was made in respect of Wills' disability, then assessed at 20% (see the respondent's letter of 6th July 2007). It was paid to compensate for his future loss of earnings. The deduction should therefore properly be made from the award of future loss of earnings in this case. This brings the award under this head to $751,464.58 ($779,212.80 minus $27,748.22).

Pain and Suffering and Loss of Amenities

[42] The Master awarded the sum of $75,000.00 for pain and suffering and loss of amenities after considering the authorities and the injuries. She found that *"at the end of the day the disc problems brought on by the accident had been resolved but there remained pain which was myofascial in origin"*. I understand that term to mean that the pain came from soft tissue. Mr. Ramkersingh submitted that the figure was inordinately low and that Master did not have proper regard to the evidence, but that in any event the fresh medical evidence revealed that the injury was far more severe and this falsified the assumptions upon which the Master proceeded in making her award.

[43] Certainly the fresh evidence makes it plain that the appellant's injury, from the outset, was quite severe and that it was more severe than originally diagnosed. Dr. Mahadeo, in his evidence and his first medical report, has stated that Wills' injury, given its failure to progress after the first surgery, was of the *"more severe kind'* and that it had deteriorated in other ways. He added that Wills now suffers from pain radiating down his right leg *"which was non-existent before.."*. He also suffers from lumbar scoliosis, a degeneration of the spine caused by his injury.

[44] His final report of 1st February 2011, although upbeat about the result of the surgery, speaks of Mr. Wills being left with *"residual stiffness in the lower back and accompanying discomfort in performing certain activities including bending, lifting, sitting on hard surfaces, walking long distances, climbing stairs"*. The surgery performed on the 19th January 2010 was complex. It involved the removal of bone from vertebrae and the entire discs at L4/L5 levels, followed by fusing the vertebrae with titanium in order to decompress the spinal cord. It also involved the insertion of an interbody cage using pedicle screws and rods. Dr. Mahadeo also states that due to the injury and subsequent necessary surgery *"there is altered mechanics which will accelerate the degeneration in the adjacent segments"* which may require further intervention.

[45] Wills was an active, healthy, man in the prime of his life at the time of his injury.

He is a former national (field) hockey player. He played and coached hockey and football. Up to the hearing before the Master he was still coaching football. He is now unable to coach football. He has been in moderate to severe pain persistently from 2006 up to 25th March 2010 when he swore to fresh affidavit evidence. It is more than likely that he is still enduring pain given Dr. Mencia's report. He has endured two surgeries, both extremely risky. Post operative pain from both surgeries was severe. Lying prone has been difficult. He cannot sit or stand for more than half of an hour. The extract of Dr. Mencia which I cited at paragraph 35 above, makes it plain that his pain is severe ranging from five to nine on a scale of ten and that he got *"minimal"* relief from non-steroidal anti-inflammatory drugs. Sexual intercourse with his wife is painful and not as frequent as before due to his back pain. He had to undergo painful rehabilitative therapy.

[46] The Master's finding that Wills' disc problem had been resolved was consistent with the medical evidence presented to her. It cannot be faulted. But the fresh evidence has in fact eroded the basis of that finding by revealing that Wills' injury was much more serious than initially presented to the Master. The injury also deteriorated significantly, after the hearing. The basis of her assumptions has been eroded by the fresh evidence.

[47] The Court of Appeal can substitute its own award. I have considered the authorities cited quite helpfully by Mr. Ramkersingh. I do not propose to cite them all. But I consider the decision of **Calvin Dipnarine v Attorney General CV 2008-03944** to be a case which is comparable on the facts despite Mr. McQuilkin's persuasive efforts to the contrary. The awards seem to range between $90,000.00 to $200,000.00. They do not define this Court's decision however. Each case must be assessed on its own facts.

[48] The decision of the Judicial Committee of the Privy Council in **Peter Seepersad v Theophilus Persad and Capital Insurance Limited [2004] 64 WIR 378** is particularly instructive. In considering the award for pain and suffering in the case ($75,000.00) to have been somewhat on the low side having regard to the injuries. In any event, that decision is some nine years old. In this case however the injury has been described as one of the *"more severe kind".* Moreover Mr. Wills was not just an active sportsman but one who has performed at the highest level in the sport of hockey for Trinidad and

Tobago. His ability to sit, stand or even lie down for long periods is limited. That in itself must be an extremely heavy cross to carry. Having regard to the authorities, I award the sum of two hundred thousand dollars ($200,000.00) damages for pain and suffering and loss of amenities.

Future Medical Expenses

[49] The Master awarded a nominal sum of one thousand dollars ($1,000.00) for future expenses. She found that the claim for a three piece living room set (estimated to cost six thousand nine hundred and ninety-nine dollars ($6,999.00)), a king size Headboard/Back support De Luxe Divan estimated to cost nine thousand four hundred and ninety-eight dollars ($9,498.00) were too remote. She also found that the claim for the purchase of a Migun Thermal Massage/Healthy Mat estimated to cost six thousand eight hundred Canadian dollars (CAN $6,800.00) was not supported by medical evidence.

[50] Mr. Ramkersingh submitted that the bedding seating claim was a natural and probable consequence of Mr. Wills back pain. Moreover Dr. Lousaing's medical report dated 1st May 2007 in which Dr. Lousaing states that Mr. Wills should maintain *"a physical therapy programme and deep tissue massage".* He added that the Master's award of one thousand dollars ($1,000.00) was grossly inadequate to compensate Wills for future costs of medical expenses including massage therapy at one hundred and twenty-five dollars ($125.00) per visit every month.

[51] In my judgment the Master was entitled on the evidence to reject the claim for the purchase of the furniture. That claim is not supported by the medical evidence. None of Dr. Lousaing's reports indicates that the injury requires the use of a specific type of furniture by Wills. Neither do the reports state that the furniture set/divan are specific to Wills' medical requirements.

[52] The claim for the thermal massage mat also suffers from the same deficiency. Dr. Lousaing's report does not recommend its use. The fact that Wills testified to getting *"good results"* from its use does not render its necessity proven. The medical evidence

does not support it.

[53] As to the claim for monthly massages, there is no specific evidence that he will continue to require monthly massage therapy. However, Dr. Lousaing's report does recommend deep massage therapy and given the fresh evidence, it is a natural and probable consequence that such massages will be required regularly. I expect that this would be continued throughout his life (and not just his working life). He is now 40 years old. Given that life expectancy now extends beyond the biblical three score and ten. I estimate that he would live to seventy five years at minimum. I would discount the multiplier down from thirty-five (35) to twenty (20). The annual cost of massage therapy is one thousand five hundred dollars ($1,500.00) (125 x 12). When multiplied by twenty years, the prospective cost of the massages amounts to thirty thousand dollars ($30,000.00).

Medication

[54] The medical evidence is that Wills continues to endure pain. His own evidence as at 25th March 2010 is that he continued to rely on tablets to control the pain. The written submissions surprisingly made no claim for future medication costs. Moreover as a basis of computation, it is unclear how often he is now required to take Arcoxia and Panadine F tablets or whether he still uses them. It is with great reluctance therefore that I make no further award under this head of damage.

Additional Medical Expenses

[55] Mr. Ramkersingh in his written submissions claims additional medical expenses in the sum of one hundred and six thousand, two hundred and seventy-two dollars ($106,272.00) as additional medical expenses paid by Wills. There was no dispute that these sums were expended and Mr. McQuilkin properly raised no issue as to their authenticity. Wills incurred total medical costs broken down as follows:

MRI and results for 3 months	-	$3,265.00	- 19th November 2009
Medical Consultation (Dr. Mahadeo)	-	$800.00	- 12th December 2009

Medication	-	$3,128.00	- incurred between 22nd January 2010 to 26th February 2011
Surgery	-	$80,890.00	- 19th January 2010
		$88,083.00	

[56] He spent an additional fifty dollars ($50.00) per month on over-the-counter painkillers between November 2009 and January 2010, totalling one hundred and fifty dollars ($150.00) before his first visit to Dr. Mahadeo. This brings his total medical costs to eighty-eight thousand, two hundred and thirty-three dollars ($88,233.00). The bulk of it was incurred on 19th January 2010. I shall award interest on this payment from 19th January 2010 at six percent (6%) to the date of this judgment, representing the balance of the surgery costs. He still has an outstanding bill of eighteen thousand, one hundred and eighty-nine dollars ($18,189.31) in respect of the surgery. The sum of eighteen thousand, one hundred and eighty-nine dollars ($18,189.31) shall be paid to Wills by the respondent. It will bear no interest.

Loss of earnings after Master's assessment

[57] There is one further item which effectively counts as actual pecuniary loss (in this case *"pre appeal"* loss of earnings). In his fresh evidence Wills spoke of being unable to coach football as the result of the deterioration of his injury and of the loss of his monthly stipend of one thousand, eight hundred and eighty dollars ($1,880.00) which occurred from July 2009. There were no details as to taxation but, in my judgment, the sum is far too minimal to have attracted tax. We have had no argument on whether this sum should count as loss of future earnings and as to the period for which it should count as actual pecuniary loss. It is unclear if he is likely to resume coaching. But I shall award him loss of earnings (pre appeal) in respect of this sum for a period of one year from 1st July 2009 to 30th June 2010.

This amounts to a total of twenty-two thousand, five hundred and sixty dollars ($22,560.00).

The Order

The appeal is allowed. The respondent shall pay to the appellant the following sums and the Master's order is varied accordingly:

(1) Special Damages in the sum of $102,812.80 with interest at 6% per annum from 7th July 2007 to 30th January 2009.

(2) Further Special Damages in respect of surgery and related medical expenses (including medication) as follows:
   (i) $88,233.00 with interest at 6% per annum from 19th January 2010 to 18th December 2013 (date of this judgment).
   (ii) $18,189.31 being money still due and owing in respect of the surgery. No interest is payable on this sum.

(3) The sum of $22,560.00 as loss of earnings (subsequent to the Master's assessment but prior to the hearing of the appeal) for the period 1st July 2009 to 30th June 2010 at a rate of 6% from 1st July 2009 to 18th December 2013.

(4) Future medical expenses:
   $30,000.00 as the prospective cost of massages. This sum shall bear no interest.

General Damages

(1) Loss of future earnings in the sum of $751,464.58 ($779,212.80 minus $27,748.22 being the workmen's compensation awarded to the appellant (no interest is payable on this sum)

(2) $200,000.00 for pain and suffering as a result of the injury with interest at 12% per annum from the 17th December, 2007 to 30th January 2009 .

With respect to the interest payable on the award for pain and suffering, that would

ordinarily carry interest up to the date of trial. In this case the award was affected by the fresh evidence which was filed on 26th March 2010. This is subsequent to the Master's assessment. I consider however that in all the circumstances of case the respondent should not be made to bear the burden of additional interest given that in this regard no fault can be attributed to it.

Nolan P.G. Bereaux
Justice of Appeal