THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Claim No. 2011-04506
C.A. No. 28 of 2011

BETWEEN

DENNIS PETER EDWARDS **Appellant**

AND

NAMALCO CONSTRUCTION SERVICES LIMITED

First Respondent

GUARDIAN GENERAL INSURANCE COMPANY LIMITED

Second Respondent

Panel:

P. Weekes J.A.

A. Yorke-Soo Hon J.A.

R. Narine J.A**.**

Appearances: Mr. K. Ramoutar for the Appellant
Mr. F. Hosein for the Respondents

DATE DELIVERED: 25th July, 2013

I have read the judgment of Narine J.A. and agree with it.

P. Weekes
Justice of Appeal.

I too, agree.

A. Yorke-Soo Hon
Justice of Appeal.

JUDGMENT

Delivered by R. Narine J.A.

1. On 18th February 2006, a collision occurred between TBE 3579 which was driven by the Appellant and TBM 983 which was owned and driven by the first Respondent. The collision occurred along the M2 Ring Road, Debe where both vehicles were proceeding in opposite directions.

2. The Appellant filed an action against the Respondents on 28th November 2007 claiming damages for personal injuries and consequential loss caused by the negligence of the first Respondent which resulted in a collision, causing the Appellant to suffer personal injuries, damages, loss and expense.

3. A Consent Order was entered in favour of the Appellant on 29th May 2009 giving judgment for the Appellant for 65% of his claim for damages with costs to be assessed by the Court. The assessment of damages commenced on 10th November 2009.

4. On 1st April 2010, the parties notified the court that they had agreed the damages to be paid for past medical expenses in the amount of $1,479.35 and travelling expenses in the amount of $400.00.

5. Several medical reports were admitted into evidence at the assessment namely, the medical reports of Dr. Pravinde Ramoutar, Medicine Department, San Fernando General Hospital dated 9th March 2007, 12th May 2008 and 6th November 2009 and the medical report of Dr. R. Maharaj, Surgical Department, San Fernando General Hospital dated 30th April 2007. None of the doctors gave evidence; in fact the Appellant was the only witness that gave evidence at the assessment.

6. At the assessment, counsel for the Appellant made an application to have a report prepared by a medical officer of the Social Welfare Division dated 19th March admitted into evidence. The report stated that the Appellant had suffered a 90% permanent disability and supported the Appellant's assertion that he could no longer work as a result of the accident. However, counsel for the respondent objected to the admissibility of the document as the hearsay notice was filed out of time and counsel for the Appellant withdrew the application. The report therefore did not form part of the evidence at the assessment.

7. In assessing special damages, des Vignes J awarded 65% of the agreed sum of $1,479.35 for medical treatment and medicines, that is $961.58 and 65% of the agreed sum of $400.00 for travelling expenses, that is $260.00 with interest of 6% per annum from the date of the accident to the date of judgment and 12% from the date of judgment to the date of payment on both sums awarded. No award was made for domestic / nursing assistance or loss of earnings as the judge found that there was insufficient evidence to support an award under those heads.

8. After considering the medical reports that were admitted into evidence along with the Appellant's testimony, the judge found that the Appellant's description of his injuries was only partially supported by the medical reports that were produced at the assessment. As such, he found that the sum of $90,000.00 was reasonable for the Appellant's pain and suffering and loss of amenities and made an award of 65% of that sum to the Appellant that is $58,500.00 plus interest of 12% per annum from 28th November 2007 to the date of judgment. No award was made for future medical

treatment and medicines, future travelling, future domestic/nursing assistance or loss of future earnings as the judge found that no evidence was led to support such awards.

9. In summary, the grounds of appeal are as follows:

i. The judge was wrong in law in failing to exercise his discretion under Part 30.8 and failing to adhere to the Overriding Objectives of the Civil Proceedings Rules 1998 (the CPR), to admit into evidence two job letters in support of the claim for loss of earnings and the Medical Report of the medical officer of the Social Welfare Division, San Fernando General Hospital;

ii. The judge was wrong in finding as a fact that the Appellant had failed to adduce evidence that he had suffered loss of earnings and future loss of earnings;

iii. The judge was wrong in fact in finding that the Appellant had failed to prove future medical treatment and medicines;

iv. The judge was wrong in finding as a fact that the Appellant had failed to prove the cost of future travelling;

v. The judge was wrong to award general damages in the sum of $58,500.00 as he failed to consider the full nature, extent and gravity of the injury suffered by the Appellant;

vi. The judge was wrong in failing to accept and rely on the documents attached to the Appellant's witness statement; and

vii. The judge erred in refusing to consider and/or accept and/or rely on standard medical texts to explain and/or clarify the meaning of medical terms used in the medical report.

10. It is curious that counsel for the Appellant has sought to argue the first ground of appeal, as counsel for the Appellant below withdrew the application to have the job letter and medical report from the Social Welfare Division admitted into evidence. In the circumstances, the judge could not have been wrong in refusing to admit the evidence as the hearsay notice was no longer before him for consideration.

11. In any event, even if the job letters were admitted, I am of the view that they would not have taken the Appellant's case any further. It is settled law that special damages must be specifically pleaded and proved as enunciated in **British Transport Commission v Gourley** [1956] AC 185. It is not enough for a Claimant to say that he sustained loss. A party claiming damages must prove his case, and to justify an award of these damages he must satisfy the court both as to the fact of damage and its amount: per Bernard CJ in **Grant v Motilal Moonan Limited and Rampersad** Civ. App. No. 162 of 1985.

12. Counsel for the appellant contends that the job letters support the assertion that he earned $6000.00 per month as a driller at Caribbean Well Services. However, the job letter from Christian Farfan, former Managing Director of Caribbean Well Services states that the Appellant was employed as a rig supervisor and worked for an hourly rate of $17.07. The job letter from Anthony Sims, the Chief Executive Officer of Caribbean Well Services states that if the Appellant could have returned to work his monthly salary would have been in the range of $10,000.00. Neither letter indicates that the Appellant worked for a monthly salary of $6,000.00. The letters are evidence of the fact that the Appellant was employed by the company but conflict as to the amount that he earned whist in their employ. In the circumstances, even if the job letters had been admitted, they would not have assisted the court in quantifying the amount to be awarded.

13. Similarly, if the medical report from the Social Welfare Division had been allowed into evidence, it would not have assisted the Appellant. The report simply states that the Appellant is 90% permanently disabled. It does not give any scientific or factual basis for that opinion. In **Davie v Edinburgh Magistrates** 1953 SC 34, (approved and

applied in **Edmund & Ors v Ralph Morris** Mag. App. 5 of 1973) Lord Cooper set out the role of expert witnesses in relation to a tribunal of fact:

> *Their duty is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of those criteria to the facts proved in evidence.*

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. At paragraph 6 of his witness statement, the Appellant gave evidence that he was a senior driller and that the job of a driller/rigger required heavy lifting, heavy labour and long standing, bending, and climbing. However under cross-examination, he admitted that at the time of the accident he had been acting as a supervisor and had been doing so for two years prior and that his duties involved giving instructions to the drillers, monitoring the work being performed on the floor and operating the elevators. The trial judge found that the Appellant had failed to adduce sufficient evidence to prove that he would be

entitled to either an award for loss of earnings or an award for loss of future earnings. On the evidence there is no basis for interfering with this finding. Accordingly, I find no merit in the second ground of appeal.

17. The Appellant's evidence was that he developed deep vein thrombosis in his leg after the accident and as a result he had to regularly attend clinic at the San Fernando General Hospital. The documentary evidence to support his claim for future medical treatment and medicines consisted of a bundle of receipts and reports for the period up to 11th August 1998. There were no receipts for medical care or the purchase of medicine after that date. On the Appellant's evidence, he attended the Outpatient's Clinic at San Fernando General Hospital and he acquired his medicine from the Hospital via the CEDAP Programme. In the absence of any evidence to support ongoing expenditure for either medical treatment or the purchase of medicines, there is no basis for interfering with the judge's finding that the Appellant had failed to adduce evidence to prove the cost of future medical treatment and medicines.

18. With respect to future travelling expenses, there was also no documentary evidence to support the Appellant's assertions as to the cost of taxi fare to and from the hospital as he did not submit any receipts to substantiate his claim. Additionally, there was no medical evidence on which the court could determine if the need for hospital visits would continue and how frequently they would occur. As such, there was no basis other than the Appellant's testimony to make an award for future travelling. Accordingly, the judge was correct in deciding that the Appellant had not established any evidential basis for such an award.

19. In assessing the amount that that the Appellant should be awarded for general damages, the judge considered the following matters set out in **Cornilliac v St. Louis** (1966) 7 WIR 491:

a) The nature and extent of the injuries suffered;
b) The nature and gravity of the resulting physical disability;
c) Pain and suffering;

d) Loss of amenities; and
e) The extent to which pecuniary prospects were affected.

20. The judge considered the medical reports admitted into evidence and made the following findings:

i. that the Appellant had suffered pulmonary contusion and multiple left rib fractures;

ii. that he suffered a fracture of the left clavicle.

iii. that during his hospitalization, he became hypoxic and required ventilation and developed a pulmonary embolism.

iv. That there was confirmed left common femoral and left popliteal vein deep vein thrombosis secondary to the injuries sustained in the accident.

v. that the appellant had been diagnosed as having recurrent deep vein thrombosis with a history of hypertension and that he was being followed up for long term anticoagulation.

21. The judge also considered the Appellant's witness statement in which he stated that he had sustained broken ribs, a broken collar bone, a punctured lung, and a collapsed lung. He further stated that some of his teeth were knocked out and another was driven into his gum. He complained that he had deep vein thrombosis (which was blood clotting in his leg). The Appellant also asserted that he was unable to return to work as a consequence of his injuries as he continued to experience pain and shortness of breath.

22. The trial judge, found on the evidence that the Appellant must have experienced severe pain and discomfort as a consequence of his injuries. However, the judge also found that the Appellant's description of his injuries was only partially supported by the medical reports that he produced at the assessment. For example, he found that the Appellant's assertion that he could no longer eat some of the foods he enjoyed before

like channa, bhaji, lentils and lettuce, and that he could not even a glass of grapefruit juice, was not borne out by evidence. The judge reviewed the dietary guidelines from the Department of Nutrition and Dietetics of the San Fernando General Hospital that the Appellant relied on in support of this contention and said,

> *"Having considered this document carefully, I do not construe same as restricting the Claimant from eating the foods that he had previously enjoyed but rather as advice to him not to exceed his usual portions of the foods listed therein. I have also observed that the document does not include any restriction in relation to the intake of grapefruit juice."*

23. The judge went on to say:

> *"In my analysis of the Claimant's evidence and the medical reports tendered into evidence, I have taken the following in account into arriving at an award for the injuries sustained by the Claimant:*
>
> *a) The medical evidence adduced by the Claimant with respect to his physical injuries did not support his evidence as to the long term –term effects upon his enjoyment of life and ability to resume work. The only continued ailment appears to be the need for anticoagulant therapy to prevent a recurrence of deep vein thrombosis and I am satisfied that the Claimant has to continue attendance at the Out-Patient Clinic for this ailment;*
>
> *b) In the absence of medical evidence to support his inability to work in the future, the Claimant has not satisfied me that he has acted reasonably in his attempts to either return to work at his former employment or to find alternative employment."*

24. It is clear from his judgment that the trial judge properly assessed the evidence that was before him. There were several discrepancies between the Appellant's evidence of his injuries and the evidence contained in the medical reports. The Appellant exaggerated the extent of his injuries in his witness statement. For example he said in his witness statement that some of his teeth were knocked out, his lung was punctured, his lung collapsed, that he had a hole in his head after the accident and that he had to be re-admitted to hospital about 10 times after the accident. None of these injuries were substantiated by the medical reports in evidence. Additionally, no medical evidence was led to enable the court to make a finding as to the likelihood of the Appellant suffering from recurring deep vein thrombosis in the future or whether it could be attributed to the injury sustained in the accident.

25. After considering the cases submitted by the parties, the judge made an award for pain, suffering and loss of amenities in the amount of $90,000.00. However the Appellant was awarded 65% of that sum in the amount of $58,000.00 pursuant to the consent order entered by the parties dated 29th May 2009. Having regard to awards made for similar injuries in decided cases, I do not find the award made by the judge to be unreasonable or to be a wholly erroneous estimate of the damages suffered by the Appellant.

26. In the sixth ground of appeal counsel for the Appellant contended that the judge was wrong in failing to admit into evidence and rely on the documents attached to the Appellant's witness statement. A witness statement stands as the evidence in chief of a witness on which he will be cross examined. Documents on which the witness relies are unusually annexed to the witness statement. Such documents are subject to the usual rules of admissibility. The mere attachment of a document to a witness statement does not automatically make the document admissible into evidence without the consent of the other side or without fulfilling the usual requirements for admissibility.

27. Part 30 of the Civil Proceedings Rules (CPR) deals with the admissibility of hearsay evidence as follows:

30.1 *(1)* *...*

(2) *"**Hearsay evidence**" means a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated.*

30.2 *(1)* *Any party who wishes to give hearsay evidence which is admissible only by virtue of sections 37, 39 or 40 of the Act must serve on every other party a hearsay notice.*

(2) *A hearsay notice must be served not later than the time by which witness statements are to be served or, if there are no such statements, not less than 42 days before the hearing at which the party wishes such evidence to be given unless the court gives permission.*

Further, Part 33.5 of the CPR sets out the procedure to be followed with respect to the admissibility of expert evidence as follows:

33.5 *(1)* *No party may call an expert witness or put in an expert's report without the court's permission.*

(2) *The general rule is that the court's permission should be given at a case management conference.*

(3) *The court may give permission on or without an application.*

(2) *No oral or written expert's evidence may be called or put in unless the party wishing to call or put in that evidence has*

served a report of the evidence which the expert intends to give.

(3) The court must direct by what date such report must be served.

28. The CPR is clear on what procedure should be followed for documents to be admitted as evidence. Simply attaching documents to a witness statement is not the proper procedure for admitting them into evidence. In the circumstances, this ground of appeal is unsustainable as the documents were not properly before the court and did not form part of the evidence at the assessment. The judge was therefore correct in not taking them into consideration in his deliberations.

29. The seventh ground of appeal is similar to the sixth as counsel for the appellant contends that the court ought to have regard to extracts from medical texts that were annexed to the submissions. Counsel submits that the judge should have taken judicial notice of the extracts and relied on them in the course of his deliberation. The 8th edition of **Black's Law Dictionary** defines judicial notice as follows:

> *"A court's acceptance, for the purposes of convenience and without requiring a party's proof of a well known and indisputable fact; the court's power to accept such a fact."*

The basis for acceptance is that the matter is so notorious or indisputable that it would be a waste of resources to require a party to prove them through evidence: see **Phipson on Evidence**, 17th edition para. 3-02. The nature of deep vein thrombosis and pulmonary embolism is not a well known fact and does not qualify as a matter of which the court can take judicial notice. As such, the information about the nature of deep vein thrombosis and pulmonary embolism can only be considered by the court if it is admitted as evidence though the witness statement or report of a person who by virtue of his training and/or experience may be regarded by the court as an expert in the relevant area of competence.

30. Text books and the material therein are not evidence per se. According to **Phipson on Evidence**, 17th edition para. 33-20:

> *"An expert may refer to textbooks to refresh his memory, or to correct or confirm his opinion: e.g. a doctor to medical treatises...Such books are not evidence per se* ***Concha v Murieta (1889) 40 Ch. D*** *543 though if he describes particular passages as accurately representing his views, they may be read as part of his own testimony."*

The material contained in the medical extracts therefore, would have to be admitted through an expert witness before it can be considered by the court. Accordingly, since the extracts were not tendered into evidence at the assessment through an expert witness, the judge was correct to refuse to consider them.

DISPOSITION

It follows that this appeal is dismissed. The orders of the trial judge are affirmed. The Appellant must pay the costs of the Respondents assessed as 2/3 of the costs awarded below.

Dated the 25th day of July, 2013

Rajendra Narine
Justice of Appeal.