The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. S349 of 2014
Claim No. CV2012 -03361

Between

ADANA PAUL

Appellant

And

WELL SERVICES PETROLEUM COMPANY LIMITED

Respondent

PANEL:

N. BEREAUX J.A.
G. SMITH J.A.
C. PEMBERTON J.A.

Date of delivery: July 31, 2020

APPEARANCES:
Mr. G. Saroop Attorney-at-law for the Appellant
Mr. F. Hosein Attorney-at-law for the Respondent

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) This is an appeal from the decision of the High Court on the quantum of

damages awarded. The appellant, is a welder by trade. She was employed by the respondent on a temporary basis. During the course of her duties on 12th September 2006 she fell and injured her back. She brought these proceedings. The judge found the respondent liable. She awarded the appellant at total of one hundred and ninety thousand five hundred and eighty-four dollars ($190,584.00) general damages at six percent (6%) per annum from 12th September, 2006 to 4th December, 2014 and special damages in the sum of three thousand two hundred and twenty-seven dollars ($3,227.00) with interest at three percent (3%) from 12th August, 2006 to 4th December, 2014. The respondent has not appealed.

(2) The appellant had brought an earlier action in 2008 in which she sought damages for personal injuries against the respondent. She withdrew that action without no order as to costs after her application for relief from sanctions (for failing to file her witness statements on time) was dismissed.

(3) The judge awarded the appellant sixty percent (60%) of her costs. She took into account that the appellant had filed and withdrawn the previous action and the respondent's counsel out of sympathy for the appellant, had agreed to forego costs. According to the judge, the matter was not *"expected"* to be re-litigated when the appellant withdrew her initial action.

(4) There was no appeal by the respondent on liability, for good reason. The judge's assessment of the evidence in that regard, was impeccable. The appellant is dissatisfied with the assessment of damages on a number of grounds. The live issues in this appeal are the judge's use of a multiplier of eight, her reduction of the appellant's award by sixty percent to take account of *"tax deductions"* and *"other imponderables"*, her rejection of the evidence of Dr. Kanta Ramcharan, her acceptance of Dr. Rasheed

Adam's evidence and her reduction of the appellant's costs by forty percent.

Relevant facts

(5) The appellant testified that she felt a shocking pain in her back when she fell. She could not get up from the fall for about five to eight minutes. She was unable to continue working because of her pain and eventually left for the day. The following day she was unable to report for work. She reported for duty on 14th September but by 26th September she was experiencing such excruciating pain in her lower back and left side that she could work no longer.

(6) She was instructed by the respondent to attend the office of Dr. Ramesh Mootoo, in San Fernando on 26th September, 2006 at 10:30 a.m. At Dr. Mootoo's office an X-Ray was done. Dr. Mootoo did not consider that she had suffered any significant injury. Indeed he described the X-Ray as *"not significant"*. On 17th October, 2006, Dr. Mootoo referred her to Dr. Kanta Ramcharan for an MRI. The referral was done so that an MRI would dispel any doubts about serious injury. Dr. Ramcharan after reviewing the images advised her to attend his out-patient clinic at the San Fernando General Hospital on 23rd October, 2006. On that date Dr. Ramcharan referred her to the Eric Williams Medical Sciences Hospital for another MRI. On 30th October her employment with the respondent was terminated.

(7) Eight medical reports were put into evidence by the appellant. They were all from doctors to whom she was referred by, or on behalf of, the respondent. These reports are:

(i) Dr. R.D. Mootoo dated the 23rd November, 2006.

(ii) Dr. D. Ramnath dated the 2nd February, 2007.

(iii) Dr. K. Ramcharan dated the 24th April, 2007.

(iv) Dr. Rasheed Adam dated the 3rd July, 2007.

(v) Dr. Rasheed Adam dated the 4th October, 2007.

(vi) Dr. Rasheed Adam dated the 18th February, 2008.

(vii) Dr. P. Maharaj dated the 4th July, 2008.

(viii) Dr. K. Ramcharan dated the 24th June, 2010.

(8) The appellant's particulars of injury are as follows:

(i) Mild spondylosis with fasciculations in the abductor halluces.

(ii) Gastronemius indicating nerve root involvement

(iii) Sciatica of the lower back and side regions.

(iv) Coccyx fracture and pains.

(v) Eighty percent (80%) permanent disability.

The judge's decision

(9) The assessment required the judge to look at and assess the medical evidence, all of which came from the respondent's doctors. She awarded seventy-five thousand dollars ($75,000.00) for pain and suffering and loss of amenities and one hundred and fifteen thousand five hundred and eighty-four dollars ($115,584.00) loss of earning capacity. Loss of earning capacity was calculated by using an amount of thirty-nine dollars ($39.00) per hour on a forty (40) hour work week for one year. Those figures amounted to eighty-one thousand one hundred and twenty dollars ($81,120.00) (40 hours x 52 weeks x $39.00). The judge then applied a multiplier of 8 which amounted to six hundred and forty-eight thousand nine hundred and sixty dollars ($648,960.00). She then proceeded to discount that figure by sixty percent, amounting to two hundred and fifty-nine thousand five hundred and eighty-four dollars ($259,584.00).

(10) From that figure was deducted the appellant's annual income from a government provided disability allowance of one hundred and forty-four

thousand dollars ($144,000.00) leaving a balance of one hundred and fifteen thousand five hundred and eighty-four dollars ($115,584.00).

(11) The judge placed greater weight on Dr. Adam's report which put the appellant's disability at thirty percent (30%), even though he did not testify at the hearing. She rejected Dr. Kanta Ramcharan's evidence. She accepted that the appellant could no longer work as a welder and that as a result of the injury she suffers pain and discomfort.

The question is whether she was plainly wrong in her assessment.

Errors of the judge

(12) The judge made several errors and was plainly wrong.

(i) She did not take any proper account of Dr. Adam's report of 18th February, 2008 or failed properly to consider it. She also failed to take account of Dr. Maharaj's report of 4th July, 2008. She also misunderstood or failed to consider Dr. Ramcharan's medical report dated 24th June 2010, which in fact supported Dr. Adam's report of 18th February, 2008. On a proper review of the medical reports, they showed that the appellant had suffered an injury to her coccyx. This was not picked up by Dr. Mootoo or Dr. Ramcharan, or, initially, Dr. Adam, until Dr. Adam reviewed the appellant's X-Rays in February 2008. Because she did not take any proper account of these reports, the judge did not consider that appellant's back injury in her assessment of pain and suffering and loss of amenities.

(ii) She used a multiplier of eight (8) which was so inordinately low that her assessment was not a true reflection of the measure of the appellant's damage. The judge allocated a multiplier of eight for two reasons (i) the appellant was not permanently employed and (ii) the appellant had what the judge described as *"a peculiar*

health problem" which affected her ability to work as a welder. As to the latter reason (the appellant's *"peculiar health problem"*) it was an obvious reference to the appellant's weight. But Dr. Adam's diagnosis of the coccyx fracture revealed that the true reason for her continued pain was in fact the coccyx fracture. There was therefore no basis for the judge's factoring any *"peculiar health problem"* into the discounting of the multiplier.

(iii) Having used a low multiplier she then applied a sixty percent (60%) discount of the capital sum derived from multiplying the years of purchase (multiplier) to the multiplicand (the annual income). The discount, she said, was intended to *"reflect the fact that the [appellant] was only temporarily employed and to take into account tax and other deductions and other imponderables."* This was plainly wrong. She had already taken the appellant's temporary employment into account in her calculation of the multiplier (at paragraph 34 of the judgment). Secondly, the discounting of the multiplier is itself meant to take account of tax imponderables. See **Hodgson v. Trapp [1989] A.C. 807** per Lord Oliver of Aylmerton at 835 letter A. But the proper approach, certainly in Trinidad and Tobago, in respect of an employee who is subject to the P.A.Y.E. system of taxation, is to use a wage or salary which is net of tax and other deductions. This is the method which the judge should have applied. In **British Transport Commission v. Gourley [1956] AC 185**, the House of Lords settled that taxation is to be taken into account in calculating loss of earning capacity in *futuro* (general damages) and loss of earnings from the time of injury to the time of judgment (special damages). The underlying rationale is that the claimant should be compensated for no more than he would have received if he had continued carrying out his duties. In the case of a P.A.Y.E. taxpayer, what he or she would have received is the weekly wage or monthly salary, net of tax. See Lord Goddard at page 207.

(iv) By the same reasoning, deductions are also to be made from the wage or salary for national insurance and health surcharge charges, as well as union dues. See also **Cooper v. Firth Brown [1963] 1 WLR 418** per Lawton J at 420 applying **Gourley**.

(v) Thirdly, even if the judge were right to discount for tax deductions, a deduction of sixty percent (60%) was disproportionate. The appellant's pay-slips which were admitted into evidence showed varying tax deductions from her weekly wages (as those wages fluctuated). Some had no tax deductions at all. Even using the highest amount of tax deducted (two hundred and forty-five dollars ($245.00)) from the largest weekly wage of two thousand, one hundred and fifty-eight dollars ($2,158.00), the highest rate of tax attracted by the appellant was ten point nine percent (10.9%). When imponderables are factored in, a deduction of sixty percent (60%) is quite excessive.

(vi) She failed to take account of and deduct from loss of earning capacity, the workmen's compensation award of eighty-five thousand, six hundred and sixty-nine dollars and ninety-two cents ($85,669.92).

(vii) The learned trial judge erred in failing to disaggregate the award of general damages with the effect that she awarded interest for future loss, that is, the loss of earning capacity. Interest should only have been awarded on the damages for pain and suffering and loss of amenities.

(13) It follows that we must look at the matter afresh.

The medical evidence

(14) The judge took issue with what she considered to be an inconsistency in Dr. Ramcharan's oral evidence and preferred Dr. Adam's assessment. It related to Dr. Ramcharan's assessment of the appellant's disability which

he had put at eighty percent (80%).

(15) The judge rejected Dr. Ramcharan's assessment and accepted Dr. Adam's assessment of twenty-five to thirty percent (25-30%) disability. She was entitled to do so on the evidence but in so far as the doctor sought to assign a percentage disability, it was of no moment. The use of percentages as an expression of the extent of a claimant's disability has long been disapproved by this court and by the Judicial Committee of the Privy Council. See **Seepersad v. Persad & Anor. [2004] UKPC 19** at page 10. What is relevant is the fact that both doctors considered that she could no longer practise her trade, that is to say, she was totally disabled from the practise of welding. The grounds of appeal had sought to impugn the judge's preference of Dr. Adam's evidence over that of Dr. Ramcharan. Mr. Saroop did not pursue them on appeal however. Indeed, he relied quite heavily on Dr. Adam's final report of 18th February, 2008. In any event, since I have reviewed the medical evidence afresh, I have given weight to Dr. Adam's final report as well as Dr. Ramcharan's final report. The respondent in its defence disputed several parts of the reports of Dr. Adam including his finding that the appellant suffered a fractured coccyx. It questioned why this was not commented on in his earlier reports. Having regard to the overall evidence it is evident that Dr. Adam's finding came after he reviewed the X-Rays initially taken of the appellant. Dr. Adam did not show up to be cross-examined. It is unfortunate. But as Mr. Hosein conceded, Dr. Adam's default simply meant that it is for the court to attach whatever weight it considers, to the report. More importantly, Mr. Hosein, despite his challenge to Dr. Adam's finding did not put this finding to Dr. Mootoo either when he elicited Dr. Mootoo's witness statement or by way of amplification of his evidence on the day of the trial.

(16) The first five medical reports listed at paragraph 7 above suggested mild injury only. Indeed, Dr. Mootoo in his report of 23rd November, 2006

suggested that the appellant was faking, a suggestion which appeared to have resonated with the judge. He noted in his report:

> ***"X-Ray was not significant… Ms. Paul continues to complain of severe pain, she was referred to Dr. K. Ramcharan for M.R.I. to exclude any pathology…I am not convinced that her discomfort is as she claims but the M.R.I. should dispel any doubts one way or the other."***

(17) The MRI of the lumbar spine conducted by Dr. Ramnath on 2nd February, 2007, showed no injury. Dr. Ramcharan's report of 24th April, 2007 speaks in the same terms. He concluded his report by stating:

> ***"It will be useful… to obtain an opinion… from a neurosurgeon and obtain an EMG/nerve conduction study for any objective evidence of direct sciatic nerve injury. The prognosis remains good but this lady is overweight and her job as a welder demands physical fitness. I have asked her to lose weight urgently."***

(18) Dr. Rasheed Adam, was the neurosurgeon to whom she was referred. His examination *"showed her to be overweight, midline low back tenderness but otherwise normal"*. (Report of 3rd July, 2007) He noted that the X-Ray showed *"mild spondylosis"* and that nerve condition studies (advised by Dr. Ramcharan) and EMG showed *"normal condition velocities but with fasciculations … indicating S1 nerve included."* His subsequent report of 4th October, 2007 (a little over one year after the accident) was that her *"clinical condition is unchanged and she still [has] low back pain and left sciatica and her symptoms continued despite a variety of medications and physiotherapy."* He added *"at present she is medically unfit to work as a welder."*

(19) Dr. Adam however reviewed the appellant's case on 18th February, 2008, he said:

> ***"Further to previous Medical Reports dated 3rd July, 2007 and 4th October, 2007. Ms. Paul was further reviewed on 9th February, 2008. She continues to have low back pain and sciatica and in addition coccyx pain. A review of her x-rays of 26th September, 2006 showed a fractured coccyx (my emphasis). Additionally, she has coccyx pain from a coccyx fracture. This area was injected with Depomedrol and Xylocaine. She is medically unfit to work as a welder and her permanent partial disability as a result of injury of 12th September, 2006 is reassessed at thirty percent (30%)."***

(20) It is clear that the appellant's continued complaints of *"low back pain and sciatica and in addition coccyx pain"* prompted Dr. Adam to review her X-Rays of 26th September, 2006. Dr. Mootoo's assessment of the X-Rays as *"not significant"* was as wrong as his conviction that she was faking. It was an error that seemed also to infect the judge's view of the appellant's evidence. She also appeared to have been persuaded by a surveillance DVD in which the appellant was shown to be moving around unaided (and in high heels) at a *"boat party"*. (The appellant had organised the boat party to raise funds to support herself.) In my judgment, Dr. Adam's discovery of the coccyx fracture supported the appellant's consistent complaints about back pain, which complaints persisted even after the first five medical reports showed only mild injuries and negated any suggestion of faking and play acting by the appellant. There was, therefore, nothing inconsistent about Dr. Adam's report of 18th February, 2008. In so far as it expressed a different view from his earlier reports, it was made after a review of the case which was prompted by the appellant's continued complaints of low back pain.

(21) Dr. Adam's diagnosis was confirmed by an examination conducted by Dr. P. Maharaj, with the benefit of a CT scan of the sacrum and coccyx. Dr.

Maharaj's report described the injury to the coccyx as *"an undisplaced fracture"*. His report also refers to spondylosis of L5 vertebral body.

(22) Dr. Mootoo and Dr. Ramcharan both gave witness statements and were cross-examined by the appellant's attorney. Both Dr. Adam and Dr. Maharaj were doctors to whom the appellant had been referred by the respondent after she continued to complain of back pain. Even though neither Doctor Adam nor Doctor Maharaj were cross-examined, their reports were quite relevant to the issue and worthy of significant weight. It is unfortunate however that Dr. Adam's report of 18th February, 2008 and the report of Dr. P. Maharaj were not put to Dr. Mootoo in cross-examination. But as stated earlier, it was also open to Mr. Hosein to put these findings to Dr. Mootoo when that doctor gave his witness statement or even before he began cross-examination.

(23) It is thus left to the Court of Appeal to assess the medical evidence before it and to draw the appropriate conclusions, attaching such weight to the relevant evidence as it considers necessary. As it stands the clear medical evidence is that the appellant did suffer a fracture of her coccyx and that the injury has rendered her unfit to be a welder, a trade for which she is fully trained. Dr. Maharaj's report confirms the coccyx fracture and also confirms spondylosis of the L5 vertebral body. Dr. Ramcharan's report of 2010 also confirms L4 and L5 disc injury. Under cross-examination he explained that the disc between the L4 and L5 vertebrae was "prolapsing" meaning that it was in an abnormal position and was slipping *"posteriorly or anteriorly or laterally"*. The judge failed to consider and assess this evidence at all. I find the appellant's injuries to be a fractured coccyx, spondylosis of the L5, a prolapse of the disc between the L4 and L5 vertebrae as well as sciatica.

The appellant's evidence

(24) The appellant's evidence in so far as her injury is concerned is at paragraph 40 to 48 of her witness statement. Her evidence chronicles her attempts to mitigate her loss as well as her pain and suffering and loss of amenities. She said

> ***"Since the accident I have been unable to resume my duties as a welder. I can no longer sit or stand for long periods without experiencing extreme pain. I cannot function as a welder since I am unable to bend or stoop for long periods without extreme pain.***
>
> ***… At present I receive a disability grant of $1,500.00. I have been receiving this grant towards the end of 2010 a few months after I applied for same.***
>
> ***Sometime during the end of 2012 the Government relocated me from the parcel of land on which I was squatting. Because I had to break and remove my house I was given compensation for my house. I used this money to relocate as well as pay off most of my debts which I had incurred from borrowing money from friends and relatives to survive. I decided to organize a boat party in San Fernando for Christmas. I used the money I had saved to organize a boat party for December 28, 2012. This party did come off but ticket sales were very slow. I was barely able to pay the overheads of holding the party. I did not make any profit from this trip.***
>
> ***I also organized a second boat party for April 01, 2013 due to my severe pains I was not able to be as involved in the organizing of this event as I would have liked to be. Again I was only able to barely make enough money to pay out the expenses. I decided not to do it again. These were the***

only two occasions I held boat parties.

I tried to make extra money by working as a part-time security officer at Diamond Palace in High Street, San Fernando. I was given a job to work Friday and Saturday nights. I had very little to do. I sat down most of the times. I was paid $175.00 per day. I did this for three weeks and I collapsed on the job with back pains. I had to leave the job.

When I am at home and I don't move around too much I am able to walk and generally do most things without extreme pain. Anytime I move around a lot I am in the extreme pain soon after and I have difficulty in standing or walking around.

Prior to this accident I was a very active person. I enjoyed my job. My passion is welding. I always wanted to be a welder. I enjoyed limes and had a very active social life. I enjoyed hiking and I would play the occasional game of football and basketball. After the accident I have lost the ability to do the one job I am trained for and enjoyed doing. I cannot longer enjoy a lime both because of the pain that I would be in and I simply cannot afford it. I can no longer enjoy the simple things I did before such as hiking and football. I love to dance; I can no longer dance because I am in extreme pain if I move my body too much.

I am unable to play any sports with my two children or even go on walks with them without being in pain. I spend most of my days in bed since any activity I do would result in me having so much pain that I would have to rest

for a couple of hours before I am able to do anything again.

I am unable to pay privately for the medical treatment and I am confined to long waits at the out-patient clinic at the San Fernando General Hospital which in itself cause me more pain."

(25) She also testified that she received eighty-five thousand, six hundred and sixty-nine dollars and ninety-two cents ($85,669.92) by way of workmen's compensation.

The assessment

(26) I turn then to the assessment of the appellant's damages. The legal principles require no extensive rehearsal. They are set out under five heads as per **Cornilliac v. St. Louis (1966) 7 W.I.R. 491**. They are:

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

(b) The nature and gravity of the resulting disability.

(c) Pain and suffering.

(d) Loss of amenities.

(e) The extent to which pecuniary prospects are affected.

(27) I shall consider heads (a) to (d) together under the rubric of *"pain and suffering and loss of amenities"* and thereafter consider item (e) - the extent to which pecuniary prospects were affected - under the rubric of *"loss of earning capacity"*. I shall start with the award for pain and suffering and loss of amenities.

Pain and suffering and loss of amenities

(28) The judge awarded seventy-five thousand dollars ($75,000.00) for pain

and suffering. This award took no account of the fracture to the coccyx, nor the injury to her L4 and L5 discs as per Dr. Ramcharan's final report. She accepted that the appellant did suffer pain and discomfort and that *"this affected her ability to enjoy some activities she did before"*. At paragraph 26, the judge stated *"the recording established that, and the claimant agreed, she can drive a car, walk in shoes other [than] flats, and move to music to some extent. She was walking without the aid of a stick. This may have some relevance to my assessment of damages as it does appear to confirm that the claimant is not always in pain and that as Dr. Ramcharan himself confirmed, ... she can walk without a stick"*.

(29) The judge went on to hold *"her injuries at present, … include back pain and discomfort as she described it"* but the judge found out there had been *"a measure of exaggeration … based on what the video showed and indeed from my own observations during the course of the trial"*.

(30) I too have looked at the surveillance DVD recording. The appellant did appear to be able to walk with relative comfort and to stand for a period of time. But her movements were not as unrestricted or as supple when compared to some of the patrons attending the fete. More importantly, it was never the appellant's evidence that she was unable to walk or stand or wear shoes other than flats. Her evidence was when she was at home she did not move around much and that she was able to walk and do most things without extreme pain. However when she moved around a lot she would experience extreme pain soon after and would have difficulty standing or walking around. Similarly, the appellant also complained that she could not sit or stand for long periods. She could not go for walks with her children without being in pain. In my judgment what the judge spoke of and what the appellant said were different sides of the same coin. The DVD evidence was not conclusive of any exaggeration of her evidence. The judge's findings are not in accord with the evidence. But in any event, she did not take account of the

appellant's coccyx injury and on that basis alone the award must be increased to take account of it.

(31) Dr. Adam's final report, along with that of Dr. Maharaj and Dr. Ramcharan's final report, gave truth to the genuineness of the appellant's complaints about pain and to the fact that there was a subsisting back injury.

(32) The appellant's injuries are as set out at paragraph 8. I have considered other awards with similar injuries. In this regard the decisions in **Seeta Persad v. The National Maintenance Training and Security Company Ltd., CV2014-01610**, **Rennie Bissoon v. Absolute Transport Ltd., CV2016-03211** and **Brandon Salina v. Wilfred Ramnath, CV2013-03876** are relevant. I have considered them in assessing the quantum of damages under this head. Each case must be assessed on its own facts however and I consider that those awards are lower than they ought to have been.

(33) In my judgment, the appellant's damages for pain and suffering and loss of amenities should be increased to one hundred and fifty thousand dollars ($150,000.00). This takes account of the coccyx injury, the L4 and L5 disc prolapse as well as to the mild spondylosis in addition to her pain and suffering and loss of amenities.

Loss of earning capacity

(34) The purpose of the award of pecuniary damages is, *"to ensure that the claimant recovers, subject to the rules of remoteness and mitigation, full compensation for the loss that he has suffered"*. See **McGregor on Damages 20th Edition** paragraph 40-057. In this case, the appellant is unable to continue pursuing her trade as a welder, a trade for which she was trained. In **Parry v. Cleaver [1970] AC 1** at page 13 Lord Reid

approached the issue of compensation for the financial loss suffered as a result of the claimant's inability to work, by posing the following questions: *"… what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident, he can no longer get?"* He added that the decision in **British Transport Commission v. Gourley** made it clear, in answer to those questions, *"that it is a universal rule that the plaintiff cannot recover more than he has lost"*.

(35) The method of assessment is the well-established and well known multiplier/multiplicand method. By this method, a claimant's present annual earnings is taken less any amount which he or she can now earn annually (the multiplicand) and multiplied by a figure which is based on the number of years during which the loss of earnings is calculated to last (the multiplier). This latter figure is discounted to allow for the fact that a lump sum is being given now as opposed to periodical payments over a number of years. The multiplicand or the multiplier may require further adjustments to take account of various other factors, including the contingencies of life and the probability of future increase or decrease in annual earnings. See **McGregor 20th Edition** page 1302 paragraph 40.066.

The multiplier

(36) At the time of the accident, the appellant was 28 years old. She is a trained welder. The injury rendered her unable to practice her trade as Doctors Adam and Ramcharan both certified.

(37) The judge considered that a multiplier of 8 was appropriate because the appellant had a *"peculiar health problem"* and she was in temporary employment. She also took account of tax liability. I have already indicated that the tax liability should have been addressed in the

multiplicand by using the net salary. The temporary nature of her employment was relevant. The judge was correct to consider that she was in temporary employment. The appellant was injured during the course of employment with the respondent and her employability for the rest of her life has been affected. The respondent as tortfeasor must compensate her. Such compensation turns on how employable or marketable she would have been but for her injury, after her employment ceased. It is from this perspective that the temporary nature of her employment arises. Was it likely that after her employment with the respondent ended she would have been able to secure employment as a welder? The court must apply its own knowledge of local conditions. In my judgment, the appellant possessed a trade which is highly marketable in Trinidad and Tobago. She was not just a welder but a structural welder, specialized in the construction of tanks and other similar items.

(38) The factoring of the appellant's weight into the discounting of the multiplier in addition to the appellant's tax liability, resulted in a multiplier which was inordinately low. Taking into consideration that the appellant was twenty-eight years old at the time of the injury and using a retirement age of sixty, the appellant would have had at least thirty-two years of working life left as a welder. Allowing for the uncertainties of life as well as the fact that the appellant will be receiving a lump sum payment, I shall use a multiplier of fifteen. I have taken into account that the appellant was in temporary employment and that her earnings would have diminished at some point as she aged.

The multiplicand

(39) Like the trial judge, I shall use the appellant's wages earned at the respondent's employ as the basis for the multiplicand (There was no challenge to the judge's use of these wages as the basis of the

multiplicand). However, I shall use the appellant's weekly wages after deduction of her tax liability as set out in her pay-slips. The record of the pay-slips has been poorly reproduced. The appellant's net weekly wage is always not clearly and consistently discernible. There is the further difficulty is that the various pay-slips tendered showed varying rates of the pay and varying amounts of tax deducted. From what I can discern from the record, there were some twenty-seven pay-slips submitted by the appellant showing her gross weekly wage. Only twenty-four were legible. This wage was subject to deduction of tax, health surcharge, national insurance and union dues. The wage was based on a hourly rate. The appellant's weekly wage fluctuated depending on her hours of work per week. The hourly rate also fluctuated between thirty-seven point seven one dollars and thirty-nine point six dollars ($37.710 and $39.600). As her weekly wage fluctuated so did her P.A.Y.E. tax deductions. There were weeks in which her wages attracted no tax at all. Tax deductions varied from a maximum of two hundred and forty-five dollars ($245.00) to a minimum of zero, when her weekly wage fell below the minimum tax rate.

(40) There were also deductions from the appellant's gross wage for national insurance contributions, the health surcharge and union dues. While there was a variation in the national insurance deduction on at least one pay-slip, these weekly deductions were mostly consistent at thirty-three dollars and thirty-three cents ($33.33), eight dollars and twenty-five cents ($8.25) and fifteen ($15.00) respectively.

(41) I have taken an average of the appellant's gross weekly wage from a total of all of the appellant's legible payslips (24). I have also done the same with her weekly tax deductions which I shall then deduct from the average gross weekly wage along with the national insurance contributions, health surcharge and union dues.

Deductability of the disability assistance

(42) The authorities now suggest that the appellant's disability assistance of $1,500.00 per month must be deducted from the final amount. It has been a process of evolution. In **Parry v. Cleaver** Lord Reid at page 14 opined against the deduction of moneys accruing to a claimant under policies of insurance for which he has paid premiums, as well as moneys received by the claimant from the benevolence of third parties motivated by sympathy for his misfortune. As to the latter payments he stated:

> ***"… It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer."***

(43) In **Bowker v. Rose, The Times, 3 February 1978**, Roskill LJ, relying on an Australian decision, **National Insurance Co. of New Zeeland v. Espagne 105 CLR 569** stated that attendance and mobility allowances should not be deducted. That decision was overruled by the House of Lords in **Hodgson v. Trapp** at page 823. Lord Bridge stated emphatically at page 822 that:

> ***"I find the concept of "the intent of the person conferring the benefit" a somewhat elusive one. Statutory benefits of the kind in question come either directly from the pocket of the taxpayer or from some fund to which***

> ***various classes of citizens make compulsory contributions. The legislation providing for the benefits is prompted by humanitarian considerations directed to meeting certain minimum needs of the disadvantaged, irrespective of their cause. It is, of course, always open to Parliament to provide expressly that particular statutory benefits shall be disregarded, in whole or in part, and section 2 of the Law Reform (Personal Injuries) Act 1948 is the most familiar instance where it has done so. But in the absence of any such express provision, where statutory benefits are payable to one whose circumstances of qualifying need arise in consequence of a tort of which he was the victim, I can certainly discern no general principle to support Lord Reid's tentative opinion "that Parliament did not intend them to be for the benefit of the wrongdoer."***

(44) **Hodgson v. Trapp** confirmed the trend in favour of deduction of social benefits. Prior to that decision several other social benefits *"fell to the axe of deductability"*. See **Nabi v. British Leyland [1980] 1 WLR 529** - unemployment benefit. **Gaskill v. Preston [1981] 3 ALL ER 427** - family income supplement and **Lincoln v. Hayman [1982] 1 WLR 488** - supplementary benefit. None of these decisions is binding on us but they are highly persuasive.

(45) My research has produced no legislation in Trinidad and Tobago which expressly provides that a particular benefit should be disregarded when assessing a victim's damages and certainly not in this case. The appellant's disability assistance is paid pursuant to section 11A(1) of the **Public Assistance Act Chap. 32:03** which provides:

"Notwithstanding any provision of this Act, a person is entitled to receive disability assistance if -

(a) his total income does not exceed twelve thousand dollars per annum;

(b) he -

(i) is a citizen or resident of Trinidad and Tobago as defined in the Immigration Act; and

(ii) has been continuously resident in Trinidad and Tobago for a period of three years preceding the claim for disability assistance, except that he has not been absent from Trinidad and Tobago for a period exceeding six months in the aggregate;

(c) he has attained the age of eighteen years; and

(d) he is in the opinion of the Local Board so disabled that he is unable to earn a livelihood and has been certified by a Medical Officer as being so disabled."

The Act is silent on whether or not the assistance should be disregarded in an assessment of damages. Nevertheless, the intention gleaned from section 11A (1)(d) of the Act and regulation 3(1) of the **Public Assistance Regulations** made pursuant to section 16 of the Act is that the allowance is geared toward persons *"so disabled that he is unable to earn a living."* In the instant case, whatever the legislative intention behind the payment, the assistance is paid because of the injury which was certified by Dr. Ramcharan as having caused her disablement. It thus falls within the principle that the claimant should not gain double compensation and must be deducted.

(46) Given that the Appellant is in receipt of a disability assistance of $1,500.00 from late 2010, this sum must be annualized for the purposes of assessment. If her medical position does not improve then she is likely

to qualify for the assistance until at least the age of sixty-five – some 33 years into the future having regard to the Appellant's age at trial **(see Regulation 3A of the Public Assistance Regulations**). Bearing in mind the vicissitudes of life, the multiplier of 15 should be maintained.

The calculation

(47) I have calculated the appellant's average gross weekly wage at one thousand, four hundred and seven dollars ($1,407.00). The average tax deduction is seventy-six dollars ($76.00). Also to be deducted are national insurance payments (thirty-three dollars and thirty-three cents ($33.33)), health surcharge (eight dollars and twenty-five cents ($8.25)) and union dues (fifteen dollars ($15.00)). Net of deductions, the appellant's average weekly wage was one thousand, two hundred and seventy-four dollars and forty-two cents ($1,274.42). When multiplied by fifty-two weeks (one year) the multiplicand amounts to sixty-six thousand, two hundred and sixty-nine dollars and eighty-four cents ($66,269.84).

(48) Applying a multiplier of 15 - $66,269.84 x 15 = $994,047.60

(49) From that is to be deducted her disability assistance and her workmen's compensation award. The appellant testified that she began receiving a disability assistance of fifteen hundred dollars ($1,500.00) per month for years. The appellant also testified that she received a workmen's compensation award of eighty-five thousand, six hundred and sixty-nine dollars and ninety-two cents ($85,669.92).

(50) $$994,047.60 less $270,000.00 (annualized disability assistance) less $85,669.92 (workmen's compensation award) = $638,377.68

(51) The award for loss of earning capacity is six hundred and thirty-eight

thousand, three hundred and seventy-seven dollars and sixty-eight cents ($638,377.68).

Costs

(52) The judge granted the appellant only sixty percent of her costs. The authorities are clear that an appellate court must be deferential to the judge's discretion unless she is plainly wrong. I entertain no doubt that she was and that we must review the costs assessment.

(53) Part 66.6(1) provides that if a court decides to order costs, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. Part 66.6(3)(a) gives the court power, in particular, to order a person to pay only a specified proportion of another person's costs.

(54) The judge appears to have exercised her discretion pursuant to part 66.6(3)(a). Her reason for doing so was that the appellant had withdrawn an earlier action and the defendant's counsel, out of sympathy, had agreed to forego substantial costs which the defendant has incurred. The formal order made in those earlier proceedings was no order as to costs. The judge stated (in these proceedings) that *"at the time of the withdrawal, it was not expected that the matter would be relitigated. But it was, and I do not think it unreasonable to take that factor into account"*.

(55) Part 66.6(4) of the CPR mandates a court in deciding who should pay costs to have regard to all the circumstances. Part 66.6(5) sets out what factors the court should have regard to. These are:

(a) The conduct of the parties;

(b) Whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;

(c) Whether it was reasonable for a party –

(i) To pursue a particular allegation; and/or

(ii) To raise a particular issue;

(d) The manner in which a party has pursued –

(i) His case;

(ii) A particular allegation; or

(iii)A particular issue;

(e) Whether a claimant who has won his claim caused the proceedings to be defended by claiming an unreasonable sum; and

(f) Whether the claimant gave reasonable notice of his intention to issue a claim.

(56) Part 66.6(6)(a) defines *"conduct of the parties"* to include *"conduct before, as well as during, the proceedings …"*.

(57) The judge stated that *"it was not expected that the matter would be relitigated"*. She did not indicate from whence did this *"expectation"* came. More specifically, whether it came from any conduct or undertaking on the part of the appellant. In the absence of any such evidence her order cannot be justified.

(58) Further, the appellant was entitled to pursue her claim afresh. Her first claim was not decided on its merits. She had failed on purely technical grounds. Her pursuit of her fresh claim could not at all be described as unreasonable or unreasonable conduct. I note that the judge did not find it unreasonable for the claimant to pursue her second claim or any part of it as per part 66.6(5)(c).

(59) The first claim was withdrawn because it was doomed to fail. It was doomed to fail because witness statements, a mainstay of any claim, were not filed in time and her application for relief from sanctions in

order to file them, had been dismissed. The consequence of any tardy conduct on the appellant's part, in respect of the first claim, was that her application for relief from sanctions was rejected. Why should she be prevented from pursuing her rights a second time because the respondent chose not to pursue its entitlement to costs? And after she succeeds, why should she then be punished for successfully doing so?

(60) The general rule is that costs should follow the event. In this case the appellant, as she was entitled, brought her second action in pursuit of compensation for her serious injury. She has succeeded. Consequent upon that event, she must be awarded her full costs.

Interest

(61) The judgment of Kelsick JA (as he then was) in **Joseph Norbert Pampellonne v The Royal Bank Trust Co. (T'dad) Limited CA No. 70 of 1977** sets out the approach taken by this court with respect to award of interest. He adopted the dictum of the English Court of Appeal in **Jefford v Gee [1970] 1 ALL ER 1202** that:

> ***"Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him."***

(62) As to the interest rate to be awarded on general damages before judgment, the Court in **Jefford v Gee** preferred to be guided by the rate on short term investments prescribed by the rules of Court under the UK Administration of Justice Act 1965. They awarded half that rate on special damages.

(63) Kelsick JA opted to follow that approach. In the absence of similar legislation or evidence of the prevailing short term investment rate in

Trinidad and Tobago. He however opted for the conventional rate used by the court (6%) because no evidence was led of the prevailing bank rates of interest. The same approach was taken by Archie CJ in **The Attorney General of Trinidad and Tobago v Fitzroy Brown C.A.CIV.251/2012**. In an unreported transcript of proceedings at page 18 he said that in calculating the rate of prejudgment interest on general damages:

> ***"… it is the court's view that the correct approach should be to align it with the short-term investment rate or the rate of return on short-term investments of which there is some evidence before the court …"***

(64) The result in **Fitzroy Brown** was a reduction on the rate of interest from 9% to 2.5%.

(65) The published Central Bank repo rate which is the bench mark for interest rates set in the commercial system stands at 3.5 percent as of June 2020. Consequently, it is not inappropriate to award pre judgment interest at a rate of 3 percent in this case.

(66) With regard to the rate applicable to special damages, Kelsick JA also agreed with the approach taken by the Court in **Jefford v Gee (supra)** to award interest on the total sum of special damages from the date of the accident (which was the date when the loss occurred and the cause of action accrued) to the date of trial at half the rate allowed on general damages. He noted that *"the justification put forward for the lower rate in personal injury cases is that the loss of earnings accrues from week to week or month to month during that period."*

The relevant passages of judgment of Kelsick JA on this entire issue are pages 32 to 36 of the judgment.

(67) The award made by the Court of Appeal in **Pampellonne** was set aside

by the Judicial Committee. See **Royal Bank Trust Co Trinidad Ltd v Pampellonne and Another (1986) 35 WIR 392**. But it did not affect this issue. In any event, interest did not form a ground of appeal before the Board.

Order

(68) The appeal is allowed.

General damages

(69) The respondent shall pay the appellant the following sums:

(i) One hundred and fifty thousand dollars ($150,000.00), general damages for pain and suffering and loss of amenities with interest at 3 percent from August 16, 2012 (the date of service of the claim) to December 4, 2014 (date of trial).

(ii) Six hundred and thirty-eight thousand, three hundred and seventy-seven dollars and sixty-eight cents ($638,377.68) for loss of earning capacity. This amount shall bear no interest.

(iii) The appellant appealed the award of special damages but this was not pursued. The judge's special damages award is therefore affirmed.

Costs

(70) The appellant's appeal of costs award is also allowed. The respondent shall also pay the appellant's full costs in the high court as well as her costs of the appeal which latter figure shall be two thirds of her costs in the high court.

/s/ Nolan P.G Bereaux
Justice of Appeal

Delivered by Pemberton J.A.

(71) I have read the judgments of my brothers Bereaux and Smith JJA. The facts were detailed in both judgments and I shall not repeat them. I note as well that there has been no appeal on the trial judge's findings on liability or special damages. The appeal therefore centers on the Trial Judge's award of general damages.

(72) The judgments expressed largely deal with the trial judge's treatment of the evidence led at trial and its effect on the trial judge's award of general damages for pain, suffering, loss of amenities, loss of future earnings and the reduction of costs by forty percent (40%).

(73) I agree with both Bereaux and Smith JJA on their conclusions that the trial judge erred on the analysis and findings pertaining to the evidence led and tested at the trial. This led to a gross reduction of the damages awarded. I shall deal with the reversal of the trial judge's order for costs first then look at the trial judge's treatment of the evidence and its effect on the assessment of general damages.

COSTS

(74) As far as the award on costs is concerned, both of my brothers found that the reduction of the award of costs to which Ms Paul was entitled was not justified. I agree with both Bereaux and Smith JJA and I propose to concur with them. I have nothing further to add on this issue.

(75) I shall turn my attention to the following:

1. THE MEDICAL EVIDENCE

(76) My comments will, I hope provide a method of treating medical evidence in a matter such as this. I proffer these suggestions, which I hope will be useful to the future handling of matters such as Ms Paul's.

(77) My view is, in matters such as these, the court should base its findings and decisions on the clearest possible evidence. It would be beneficial to the process if the injured person undergoes medical examination and assessment during a period as close as is reasonably possible to the trial. This will oftentimes secure the best available evidence so as to enable a trial judge to *"deal with cases justly"* as mandated by the overriding objective.[1] To achieve this, the **CPR** provides a trial judge with sufficient tools. **Part 26.1** gives the court wide powers of case management and in particular, the trial judge may *'take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective'*.[2]

(78) Further, the **CPR** allows a trial judge to retain its own expert to assist in complex matters, which call for knowledge and experience that a Court may not possess. In this way, the experts may *'hot tub"* so that a reasonable explanation of an issue is unearthed so that justice will be done to all parties. This case cried out for that approach.

(79) To my mind, such an exercise would have placed the trial judge on a more secure and I daresay objective and scientific evidential footing for a realistic assessment of Ms Paul's damages for pain, suffering, loss of amenities and loss of future earnings. Further, any difficulty that the trial judge had in "*reconciling earlier reports"* may have been alleviated.

(80) I agree therefore with the utterances of my brothers with respect to the medical evidence led and the conclusions drawn as to how the trial judge

[1] See Part 1.1 CIVIL PROCEEDINGS RULES
[2] See Part 26.1 (w)

erred in her analysis and assessment of this evidence with respect to the causation of Ms Paul's injury.

2. PAIN, SUFFERING, LOSS OF AMENETIES AND EFFECT ON PECUNIARY PROSPECTS

(81) I go back to the *locus classicus* in this area, Wooding CJ in the celebrated case of **CORNILLIAC v ST LOUIS**.[3] In that case, the learned Chief Justice summarized the evidence of the appellant under the heading loss of amenities. That summary bears repeating and states,

> *The applicant had been an active, physically fit, outgoing man who was 48 years old at the time of the accident. He used to enjoy playing music… and was full of the zest of a more than ordinarily successful life. He can no longer play. And his outdoor activities must necessarily now be limited. For him, therefore much of the fun and sparkle has gone from living.*[4]

(82) Bereaux JA's judgment reproduced Ms Paul's evidence in some detail. I shall merely summarise some of the salient points. Ms Paul stated as follows:

a. *She was unable to resume duties as a Welder.*
b. *She can no longer sit or stand for long periods without experiencing extreme pain.*
c. *She cannot function as a Welder since she is unable to bend or stoop for long periods without extreme pain.*
d. *When at home and she does not move around too much she is able to walk and generally do most things without extreme pain but experiences extreme pain soon after she moves around a lot and has difficulty in standing or walking around.*

[3] (1964) 7 WIR 491
[4] ibid, p 493

e. *Prior to the accident, she was a very active person; she enjoyed her job.*
f. *Her passion is welding and she always wanted to be a Welder.*
g. *She enjoyed limes and had a very active social life.*
h. *She enjoyed hiking and she would play the occasional game of football and basketball.*
i. *After the accident, she has lost the ability to do the one job for which she trained and enjoyed doing.*
j. *She is unable to play sports with her two children or even go on walks with them without experiencing pain.*

(83) Ms Paul's testimony was unshaken in cross-examination. She even explained to the trial judge that she was the only female welder at the company. She described herself as a structural welder. Structural welders are required to do a certain type of welding, building water tanks for the rigs, platforms for the rigs. She did light poles, among other things. When cross-examined about her life after the accident, she answered that her life was terrible. Her movement was restricted and Dr Adams stopped her from sweeping and mopping. She could not try to find work as a welder because of her injury. She cannot lie on her back or on her belly and has been sleeping on her right side for the six years preceding the trial.

(84) The other evidence that the trial judge took into account was a video tape showing Ms Paul at a social event. This was the defendant's evidence at the trial. Unlike my brother Bereaux JA, I did not view the exhibit. I however had recourse to the videographer's testimony. The witness described himself as a General Insurance Loss Adjuster and Investigator and General Manager of his company. He testified that the Insurance Company retained him and he produced a report of surveillance on Ms Paul. He testified that he made a contemporaneous

recording of Ms Paul *whilst she walked about (unaided) in high heels, welcomed guests, worked in the ticket booth, danced in the ticket booth, enter and drive off"* in her motor vehicle. This was on the night of a social function.

(85) This witness's cross examination was interesting. He stated that the *'actual recording was about 20 minutes'*. He confirmed that Ms Paul was dancing inside the ticket booth and there were at least two persons in the booth while Ms Paul was dancing. When asked how long was Ms Paul gyrating her waist and dancing, the witness answered not more than a minute. He was evasive when it came to a more precise description of the dancing.

(86) The trial judge's findings on her view of the video showed Ms Paul:

> *dressed up in party clothes getting out of a vehicle driver's seat and going into a ticket booth. She is shown moving her shoulders and the lower part of her body. … The recording established that, and the claimant agreed, she can drive a car, walk in shoes other than flats and move to music to some extent. She was walking without the aid of a stick. This may have some relevance to my assessment of damages as it does appear to confirm that the claimant is not always in pain and … she can walk without a stick…'*[5]

(87) The trial judge continued that *'at present, to include back pain and discomfort as she described, but I find that there has been a measure of exaggeration as to the extent based on what the video showed and indeed from some of my own observations during the course of the trial'.*[6] Later in the judgment, the trial judge stated:

> *I accept that the claimant can no longer work as a welder and*

[5] CV2012-3361, [25]-[26]
[6] ibid, [27]

this is a job for which she trained and enjoyed. I accept that as a result of the injury of the claimant suffers pain and discomfort and this has affected the ability to enjoy some activities she did before. But I have found her to have exaggerated the extent of it.[7]

(88) The trial judge had before her a video recording, which lasted for twenty minutes and which depicted Ms Paul dancing for not longer than one minute. Ms Paul admitted that she was dancing so that was not in issue. However the nature of the dancing for no more than the one minute, captured on tape seemed to have coloured the trial judge's mind. Was that a reasonable assessment of the evidence? The trial judge also formed the view that the video established that Ms Paul was not always in pain. It was not that Ms Paul was always in pain. Ms Paul's testimony regarding the impact, which the fall has had on her, was as stated at pages 47 to 52 of the Substituted Record of Appeal. To my mind, the video merely confirmed her testimony. Further, the trial judge buttressed her conclusions of exaggeration from some of her *'own observations'* during the trial. Unfortunately, the trial judge did not share the particulars of these observations. We are therefore left to ask whether Ms Paul's award was adversely affected by a moment in time captured on the video and unexpanded observations by the trial judge.

(89) The trial judge also adverted to a '*peculiar health issue at the time of the accident, which two doctors … mentioned during the course of her treatment. Both felt the claimant needed to address it because it was relevant to her physical fitness for her job'.*[8] It is interesting that on cross – examination Ms Paul's words were '*I wasn't this big, I was slimmer*',[9] when describing herself at the time of the accident. It is interesting to note as

[7] ibid, [33]
[8] CV20212-03361, [34]
[9] p 41 of Substituted Record of Appeal

well that this '*peculiar'* health condition, adverted to by the doctors as Ms Paul being overweight and obese, surfaced in the 2007 reports and were given in relation to her fitness to return to work and recovery from a misdiagonised condition. In any event, having established that Ms Paul suffered a fractured coccyx, was there any evidence of the effect of the '*peculiar health issue'* on the injury itself, which could have reasonably affected the trial judge's assessment of damages? There was no such evidence and one is left to wonder whether the trial judge, in treating with the issue as she did, may have fallen into error. My view is that to treat the condition as a relevant issue on assessment given that there was no evidence of a link between this peculiar health issue and the nature and extent of her correctly diagnosed injury and her ability to go back to employment as a welder may be questionable. I shall go no further, than to say that it is not evident that the trial judge took into account the ample evidence of loss of amenities suffered by Ms. Paul.

2. THE ASSESSMENT OF DAMAGES - THE WOODING APPROACH

(90) Having said that, how is evidence to be treated on assessment and a just award obtained? The trial judge relied on **MARCHONG**[10] and **BENJAMIN**[11] with respect to the sums to be awarded on the assessment. Smith JA opined that those two cases were similar to Ms Paul's case. Given the awards in those cases, the range would have been between seventy thousand and one hundred thousand ($70,000.00 – ($100,000.00) but for the reasons expressed in those judgments.

(91) To my mind, the 2010 award in **MARCHONG** of $60,000.00 may have been depressed as was the 2011 award of $90,000.00 in **BENJAMIN**. Ms Paul's award has to reflect all of the heads of damage to which she is entitled.

[10] Andre Marchong v T&TEC and Galt and Littlepage HC 4045/2008
[11] Marcel Benjamin v Lennox Petroleum Services Limited CV2011-02393

(92) The learned Chief Justice in **CORNIALLAC v ST LOUIS** provided an approach to this exercise:

> *I turn then to my own approach so as to arrive at a proper assessment of general damages. As already adumbrated, the appellant is entitled to be compensated for (a) the injuries inflicted and the loss or impairment of his functional capacity before making such recovery as he has; (b) the physical disabilities which he will have to bear for the rest of his life; (c) the pain and suffering he had to endure; (d) the loss of amenities of which he has been deprived; and (e) the loss of pecuniary prospects in respect both of his employment and of his retirement benefits.* ***I am fully aware that it is not the practice to quantify the damages separately under each head or, at any rate, to disclose the build-up of the global award. But I do think it is important for making a right assessment that the several heads of damage should be kept firmly in mind and that there should be a conscious, even if undisclosed, quantification under each of them so as to arrive at an appropriate final figure….*** *Frequently, the unit factors overlap so that the aggregate of the several amounts which might be allowable in respect of each would be an overassessment of the total damage taking them all together. … the physical disabilities which have become permanent are inextricably bound up with the loss of amenities and of pecuniary prospects.*[12]
>
> (Emphasis mine).

3. LOSS OF PECUNIARY PROSPECTS/LOSS OF EARNING CAPACITY

(93) Using the **WOODING** approach outlined above, that *'the physical disabilities which have become permanent are inextricably bound up with*

[12] Corniallac v St Louis (ibid), p 494

the loss of amenities and of pecuniary prospects',[13] it is clear that the trial judge did not view Ms Paul's evidence of loss of amenities as impacting that significantly on the erosion of her pecuniary prospects and her earning capacity. The multiplier eight (8) was too low. It is now for the Court of Appeal to effect this exercise. I am in agreement with Bereaux and Smith JJA that the Trial Judge's assessment of this type of injury resulting in $70,000.00 bears scrutiny.

(94) I shall not repeat the analyses so ably adumbrated by both Bereaux and Smith JJA, save to say that I agree with their Lordships' analysis and application of the law.

THE MULTIPLIER

(95) As far as the multiplier is concerned, I lean towards the figure and the justification arrived by Bereaux JA. Considering all of the evidence in the round, namely:

(a) the late medical diagnosis of causation;
(b) the fact that Ms Paul could no longer perform at her job as a welder, one that she trained for and that she enjoyed;
(c) Ms Paul was the only female welder on her place of employment;
(d) it was not proved by medical evidence that her '*peculiar health issue'* as identified by the trial judge was indeed linked to her pain and suffering as a result of her correctly diagnosed condition and that the trial judge overstated the issue when coming to her calculations;
(e) Ms Paul could no longer be as active in her social and family life as she was before the injury;
(f) Ms Paul is in receipt of a disability grant,

I am satisfied that the multiplier of fifteen (15) is more in keeping with the justice of this matter.

[13] ibid

THE MULTIPLICAND

(96) I agree as well with the calculation of the multiplicand by Bereaux JA and I cannot usefully add anything. I therefore concur that the figure of sixty-six thousand, two hundred and sixty-nine dollars and eighty-four cents ($66,269.84) is a correct calculation of the multiplicand.

DEDUCTIONS FROM THE AWARD

(97) I should like to give my view on the deductions from the award and the legal basis for these deductions. There is no issue that the sums that Ms Paul received, as an award for Workmen's Compensation must be deducted from the award of general damages. The principle is that damages are compensatory in nature and there should not be a case where an injured party can recover twice or more for the same injury under two or more heads. This was the principle that lay at the basis of cases like **HODGSON v TRAPP**[14] and **SINGH v T&TEC.**[15] The question is should the sums received by Ms Paul as a Disability allowance be similarly treated and be deducted?

(98) Both **HODGSON v TRAPP**[16] used the like-for-like approach. Mendonça JA

[14] [2009] AC 807

[15] (2009) 77 WIR 418

[16] '[I]*t cannot be emphasized too often when considering the assessment of damages for negligence that they are intended to be purely compensatory… [T]he basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages. All this is elementary and has been said over and over again. To this basic rule there are, of course, certain well-established, though not always precisely defined and delineated, exceptions. But the courts are, I think, sometimes in danger, in seeking to explore the rationale of the exceptions, of forgetting that they are exceptions. It is the rule which is fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such…*

[T]he difficulty, which has been widely recognized, is to articulate a single precise jurisprudential principle by which to distinguish the deductible from the non-deductible receipt. As Lord Reid said in Parry v Cleaver [1969 1 All ER 555 at 557, …'The common law has treated

cited and applied Lord Bridge's dicta in the case of **SINGH v T&TEC**. Mendonça JA summarized Lord Bridge thus: '*a benefit paid to the plaintiff may only be set off against a loss that the benefit was intended to compensate'.*[17] In **SINGH**'s case, the court had to consider whether the payments made by T&TEC to Mr Singh out of the insurance fund and in respect of workmen's compensation fell to be deducted from damages awarded to the respondent in respect of the same injuries. In that case, the intention of the fund was to compensate partially disabled workers for loss of earning capacity. The damages awarded in the case did not cover any losses pertaining to earnings or earning capacity. Mendonça JA found therefore that this was not a like for like payment and did not deduct the payments made to the worker with respect to workmen's compensation and out of the insurance fund. In such a situation, there was no need to consider whether there could be any room to apply the exceptions to the general rule.

(99) In this case, Ms Paul is in receipt of a Disability Grant administered and dispensed by the Ministry of Social Development. This is a financial grant given to persons unable to earn a livelihood. Nothing is said about its receipt being contingent upon injury suffered by the grantee caused by the employer's negligence. This is not the intent or purpose of this grant. Can this therefore be like for like with a claim for loss of pecuniary prospects as a result of a negligent act?

(100) In Trinidad and Tobago, the **PUBLIC ASSISTANCE ACT**[18] provides for the

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this matter as one depending on justice, reasonableness and public policy.' pp 819-820 per Lord Bridge of Harwich

[17] Singh v T&TEC, [24]

[18] **Chap. 32:03 LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO**
Section 11A. (1) Notwithstanding any provision of this Act, a person is entitled to receive disability assistance if — (a) his total income does not exceed twelve thousand dollars per annum;
(b) he—

receipt by persons approved under the **Act**, of Disability Assistance from the State. Like the United Kingdom, this **Ac**t is silent on the deductibility of this or any other grant under its purview from damages awarded to a victim of the tort of negligence, whether or not that award reflects compensation for loss of pecuniary prospects. **McGREGOR** opines, '*Yet of the wide variety of benefits made available under the Social Security Acts* [the equivalent of our **PUBLIC ASSISTANCE ACT**], ***it would be inappropriate to take them into account against any award made to a physically injured plaintiff for loss of earning capacity. Rather they are relevant to fatal injuries***'.[19] The modern approach however is to examine the nature of the benefit received and the intent of the legislature in advancing the benefit.

(101) **Section 11A (1)(d)** of the **Act** clearly states that the person entitled to receive this assistance must be *'unable to earn a livelihood…'* In other words, since it is given to someone fitting that description, disability assistance must be treated as like for like with the heads of damage that an injured person secures as a result of a successful court action. The words of the **Act** are clear and admit only to that conclusion. The facts of Ms Paul's case do not place her in one of the exceptions recognized by Lord Reid in **PARRY v CLEAVER**[20] that will exempt these payments from deduction on the ground of public policy.

(102) I therefore conclude that the sums that Ms Paul received as disability assistance from the State must be deducted from her award of general

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(i) is a citizen or resident of Trinidad and Tobago as defined in the Immigration Act; and

(ii) has been continuously resident in Trinidad and Tobago for a period of three years preceding the claim for disability assistance, except that he has not been absent from Trinidad and Tobago for a period exceeding six months in the aggregate;
(c) he has attained the age of eighteen years; and
(d) he is in the opinion of the Local Board so disabled that he is unable to earn a livelihood and has been certified by a Medical Officer as being so disabled.

[19] See **McGREGOR ON DAMAGES** 16th ed. 1997 para. 1641.
[20] [1970] AC 1

damages.

(103) In the premises, I would concur with the Bereaux JA's Order that the appeal be allowed. Ms Paul should therefore be awarded the sum of one hundred and fifty thousand dollars ($150,000.00). This sum represents general damages recoverable for her pain and suffering and loss of amenities. Ms Paul should receive an award in the sum of six hundred and thirty eight thousand three hundred and seventy-seven dollars and sixty-eight cents (638,377.68) for loss of earning capacity/pecuniary prospects. The award of special damages by the trial judge stands in the sum of $3,227.00.

4. INTEREST

(104) I agree with Smith JA that the trial judge erred when she awarded interest at the rate of 6% on general damages from August 12, 2012 to December 04, 2014, without disaggregating the award of damages. **JEFFORD v GEE**[21] laid down the applicable principles to be applied with respect to the award of interest on sums assessed as damages. Singh JA applying these principles in **ALPHONSO AND OTHERS v DEODAT RAMNATH**[22] stating that,

> *The general principle is that interest ought only to be awarded to a plaintiff for being kept out of money which ought to have been paid to him. With regard to general damages, no interest should be awarded before judgment on loss of future earnings. On damages for loss of amenity and pain and suffering, interest should be awarded from the date of the service of the writ to the date of trial at the rate payable on money in court placed on short-term investment. Regarding special damages, interest should be awarded for the period from the date of the accident*

[21] [1970] 1 All ER 1202
[22] (1997) 56 WIR 183

to the date of trial at half the above rate (see Jefford v Gee [1970} 1 All ER 1202)

There was no evidence led as to the rate of interest on a short-term investment. In deciding the issue of the rate of interest before judgment therefore, I propose to use the statutory rate of 5 per cent per annum as the yardstick and the awardable rate. And, in deciding the issue of what interest should be awarded under the respective heads in this matter, I propose doing so in accordance with the guidelines afore-mentioned.[23]

(105) Both Bereaux and Smith JJA, agree that the trial judge's order for general damages must be varied. I too agree. Applying the above dicta the variation will contain the following:-

(a) the sum one hundred and fifty thousand dollars ($150,000.00), awarded for general damages for pain and suffering and loss of amenities together with interest as determined by Bereaux JA, from the date of the service of the claim form (16th September 2012) to the date of trial, 4th December 2014;

(b) the sum of three thousand two hundred and twenty-seven dollars ($3,227.00), representing special damages, together with interest at 3%, from the date of injury, 12th September, 2006 to the date of trial, 4th December 2014;

(c) the sum of six hundred and thirty eight thousand three hundred and seventy - seven dollars and sixty - eight cents ($638,377.68) for loss of earning capacity/pecuniary prospects shall not attract interest.

COSTS

(106) For the reasons as advanced by both Bereaux and Smith JJA, Ms Paul will

[23] ibid, p 195 In Jefford v Gee [1970] 1 All ER 1202, the court used published short-term interest rates. The court used the half rate approach as between the awards and this was followed by Singh JA

recover the full costs of the action from the Respondent in the High Court calculated on the prescribed costs scale. The costs of this appeal shall be assessed at 2/3 of the costs to be recovered in the High Court shall be paid by the Respondent to Ms Paul.

/s/ Charmaine Pemberton
Justice of Appeal

Dissenting judgment delivered by Smith J.A.

(107) The Appellant was employed as a welder by the Respondent. This employment was "on a temporary basis" in the sense that she was engaged to work for the Respondent "as and when work was available."

(108) On 12 September 2006, the Appellant fell while working for the Respondent. She suffered a back injury and she successfully sued the Respondent for damages for negligence arising from her fall.

(109) After a trial, the trial judge awarded the Appellant special damages in the sum of $3,227.00 with interest; general damages in the sum of $190,584.00 with interest; and 60% of her prescribed costs. Neither party has appealed the findings on liability nor has there been any contest as to the award of special damages.

The Appellant has appealed the award of general damages contending that it is too low.

Specifically, the Appellant raised four issues in respect of the findings of the trial judge, namely:

i. Was the trial judge plainly wrong in her assessment of the medical evidence?

ii. Was the trial judge plainly wrong in her assessment of general damages for pain, suffering and loss of amenities?

iii. Was the trial judge plainly wrong in her assessment of loss of future earnings and more particularly, the choice of a multiplier?

iv. Was the trial judge wrong to reduce the Appellant's award of costs by 40%?

(110) I am of the view that:

i. There were some reviewable flaws in the assessment of the medical evidence and as a result,

ii. The general damages for pain, suffering and loss of amenities ought to be increased to $100,000.00;

iii. There were some reviewable flaws in the assessment of the loss of future earnings and the award should be increased to $$608,348.08; and

iv. The award for costs should not have been reduced by 40%.

(111) I would allow the appeal and make the awards for damages to reflect my findings above.

(i) The assessment of the medical evidence

(112) At paragraphs 27 and 33 of her judgment, the trial judge accepted that the Appellant could no longer work as a welder as a result of the injuries she suffered. The trial judge also accepted that the Appellant suffered pain and discomfort which affected her ability to do some of the activities that she enjoyed before the accident. However, based on (a) the trial judge's assessment of the medical evidence; (b) video evidence of the Appellant that was shown to the trial judge; and (c) the trial judge's own observations of the Appellant during the course of the trial, the trial judge concluded that the Appellant exaggerated the extent of her

injuries.

(113) The Appellant contends in essence that the trial judge's conclusion that she exaggerated the extent of her injuries is flawed. This is because the trial judge failed to properly analyse the medical evidence.

(114) The Respondent supported the conclusions of the trial judge and contends in summary that the trial judge was entitled to look at the shortcomings in the medical reports and to find the true extent of the Appellant's injuries as she did.

(115) I have analysed the medical evidence of the five doctors that the trial judge examined and I noted two specific issues which were not adequately addressed in the trial judge's judgment. This caused the trial judge to attach undue weight to certain aspects of the reports and to downplay some material and cogent evidence. These two issues are the (a) reason for the discrepancies between earlier medical reports and later medical reports; and (b) the nature of the evidence presented at the trial.

(a) Discrepancies between earlier and later medical reports

(116) The trial judge had before her the medical reports of five doctors on the dates as follows:

i. 23 November 2006- the report of Dr. R.D. Mootoo
ii. 02 February 2007- the report of Dr. D. Ramnath
iii. 24 April 2007- a report of Dr. K. Ramcharan
iv. 03 July 2007- a report of Dr. Rasheed Adam
v. 04 October 2007- a report of Dr. Rasheed Adam
vi. 18 February 2008- a report of Dr. Rasheed Adam
vii. 04 July 2008- a report of Dr. P. Maharaj
viii. 24 June 2010- a report of Dr. K. Ramcharan

(117) The first five reports listed above all seemed to suggest that the Appellant suffered no abnormal or permanent back injury as a result of her fall. They suggested muscular pain and sciatica and that the Appellant's weight may have contributed to this condition. In fact, Dr. Mootoo stated that "I am not convinced that her (the Appellant's) discomfort is as she claims". Dr. Ramcharan suggested that she lose weight "urgently" to pursue her job as a welder.

(118) However, the latter three reports indicated a different analysis and prognosis. In his report dated 18 February 2008 (number vi above), Dr. Adam reviewed an earlier x-ray report of the Appellant and he noted for the first time, a fractured coccyx which could cause coccyx pain. He declared the Appellant medically unfit to work as a welder as a result of her injury of 12 September 20016 (the date of her fall on the Respondent's premises). On 04 July 2008, the CT scan report of Dr. P Maharaj (number vii above) confirmed an undisplaced fracture of the coccyx of the Appellant. The five earlier medical reports failed to pick up on this undisplaced fracture of the coccyx and coccyx pain. However, the undisputed evidence before the court was that the Appellant did suffer coccyx injuries which continued to cause her pain. Further, in a very concise report made on a short standard form which was used to apply for a disability grant (number viii above), Dr. Ramcharan noted for the first time the disability of the Appellant as "backpain and disc prolapse L4/L5" and suggested eighty per cent (80%) permanent disability. Although this disc prolapse was not mentioned by Dr. Ramcharan in his earlier report on 24 April 2007 (number iii above), he confirmed it both in this later report and in his cross-examination. Further, at paragraph 30 of the judgment, the trial judge did accept that the injury as now reported by Dr. Ramcharan "...**did indeed flow from the accident**".

(119) In spite of these uncontested, new findings of a coccyx fracture and disc

prolapse that had been missed in the five earlier medical reports, the trial judge "**had some difficulty reconciling the earlier reports**"[24] to the later reports and actually preferred the disability assessments of the earlier and now clearly flawed reports. In doing so she erred.

(b) The evidence at the trial

(120) While the Appellant presented the medical reports of the five doctors listed at paragraph 7 above in her witness statement, only two of these doctors gave independent witness statements (namely Dr. Mootoo and Dr. Ramcharan) and presented themselves for cross-examination at the trial. Interestingly, Dr. Adam, who gave a witness summary, did not attend for cross-examination. This led to an unsatisfactory situation where the medical evidence was not fully presented or tested. Specifically, there was no medical confirmation of important information such as:

- whether at the time of the trial the coccyx fracture which had been 'dismissed' some six years earlier, had healed or resolved itself or not.
- the extent of the pain caused by the coccyx fracture.
- the extent of the disability and loss of amenities attributable to this or any coccyx fracture.

Further, the cross-examination of both Dr. Mootoo and Dr. Ramcharan was uneventful. It did not purport to resolve the obvious conflict between the five earlier medical reports and the three later ones.

Neither was Dr. Ramcharan seriously tested on his later medical conclusions.

(121) That being the case, of the two doctors who gave evidence at trial, the later and tested evidence of Dr. Ramcharan who is a specialist in

[24] See paragraph 29 of the trial judge's judgment.

neurology, remained unaffected by the earlier and slightly contradictory conclusions of Dr. Mootoo, who is a general practitioner and whose report predated both the discovery of the undisplaced coccyx fracture and the disc prolapse that were both linked to the accident in question.

(122) There was no tested and explored evidence to contradict Dr. Ramcharan's conclusion that the Appellant continued to suffer back pain as a result of a disc prolapse L4/L5 which caused her some serious permanent disability (85%).

(123) In spite of this, the trial judge rejected Dr. Ramcharan's testimony in favour of the untested and unexplored conclusions of Dr. Adam with respect to the extent of the Appellant's injuries. In doing so she erred.

(124) Further, the trial judge appears to have misconstrued the evidence of Dr. Ramcharan to the effect that he was unable to specifically recollect examining the Appellant in 2010 and to conclude that his evidence of the Appellant's disability was "**less credible**".[25] Dr. Ramcharan clearly stated that if he did a report then "de facto" he did an examination of the Appellant. This appears to confirm Dr.Ramcharan's otherwise unassailed evidence of the Appellant's condition, and to affirm his conclusions with respect to the Appellant's serious permanent disability.

(125) In conclusion, while the trial judge may have noticed some exaggeration of her injuries, the credible and tested medical evidence presented on behalf of the Appellant did in fact confirm that she suffered serious and permanent injury and any "exaggeration" was not as significant as the trial judge found.

(ii) General damages for pain and suffering and loss of amenities

[25] See paragraph 30 of the trial judge's judgment.

(126) Before I delve into this issue, I will restate the five well-established criteria used in this jurisdiction for assessing general damages for personal injuries as stated in the decision of Wooding CJ in **Cornilliac v St. Louis** (1965) 7 WIR 491. They are:

a) The nature and extent of the injuries sustained.
b) The nature and gravity of the resulting disability.
c) The pain and suffering endured by the victim.
d) The loss of amenities of the victim.
e) The extent to which the pecuniary prospects of the victim are affected.

(127) Items (a) to (d) above are normally considered together as general damages for pain and suffering and loss of amenities and I will deal with these items here. The item at (e) will be considered later in this judgment.

(128) Further, a court assessing damages for pain and suffering and loss of amenities should be guided by the trends in recent, similar cases when deciding on a sum to be awarded.[26]

(129) The trial judge awarded $75,000.00 to the Appellant as general damages for pain and suffering and loss of amenities. In summary, at paragraph 33 of her judgment, she noted that:

> "**...the claimant can no longer work as a welder and this was a job for which she was trained and which she enjoyed. I accept that as a result of the injury, the claimant suffers pain and discomfort and that this has affected her ability to enjoy some activities as she did before. But I have found her to have**

[26] See **Aziz Ahamad Ltd v Raghubar** (1967) 12 WIR 352 and see also, Civ App Nos 136 and 137 of 2002 **Theophilus Persad & Capital Insurance Limited v Peter Seepersad** at page 10.

exaggerated the extent of it."

Also, in deciding on the actual figure of $75,000.00, the trial judge looked at two cases which she felt were fairly similar to the present matter, namely, **Andre Marchong v Trinidad and Tobago Electricity Commission and anor**[27] and **Marcel Benjamin v Lennox Petroleum Services Limited**[28].

(130) The Appellant contends in summary that having regard to the current trends in other cases, the changing economic climate, the need to update awards and catering for a more serious disability than the trial judge considered, the award for this head of loss should be in the range of $170,000.00 to $200,000.00.

(131) The Respondent contends in summary that the award of the trial judge represents a proper estimate of the loss suffered and was well within the wide ambit of her discretion and ought not to be overturned on appeal.

(132) The well-accepted principles of appellate caution in reviewing an assessment of damages which have been applied in this jurisdiction[29] are reflected in the statement of Greer LJ in the case of **Flint v Lovell** (1935) 1 KB 354, 360 where he stated that an appellate court:

> **"...will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.** (or I suggest a greater sum) **In order to justify reversing the trial judge on the question of the amount of**

[27] CV2008-4045
[28] CV2011-2393
[29] See Civ App Nos 136 and 137 of 2002 **Theophilus Persad & Capital Insurance Limited v Peter Seepersad at page 5** and the Privy Council decision in the same case **Seepersad v Persad and anor** (2004) UKPC 19 at paragraph 10.

> **damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it ... an entirely erroneous estimate of the damage to which the plaintiff is entitled**."

(133) Further, an appellate court allows a certain margin of discretion or a range within which the award of the trial judge would not generally be reviewed since the range reflects a trend in awards of a similar nature.[30]

(134) In the present matter, the trial judge referred to two similar cases which she felt provided her with assistance in estimating the general damages for pain, suffering and loss of amenities, namely, **Andre Marchong v Trinidad and Tobago Electricity Commission and anor** and **Marcel Benjamin v Lennox Petroleum Services Limited**.

(135) In **Andre Marchong v TTEC**, the claimant fell from a swivel chair while at work and the defendant was held liable for same. The severity of his injuries had been originally misdiagnosed as lumbar spasm and soft tissue injury and it was felt that there was no long term, permanent injury. However, a few months later, a neurosurgeon "discovered" narrowing of the lateral recess at the L4 and L5 with possible impingement of the traversing L5 nerve root with disc degeneration at the L5-S1 level. The claimant complained of continuing pain and suffering and loss of amenities very similar to this present matter, but the trial judge concluded that the claimant was "exaggerating the effect of the

[30] See Civ App Nos 136 and 137 of 2002 **Theophilus Persad & Capital Insurance Limited v Peter Seepersad at page 10** and the Privy Council decision in the same case **Seepersad v Persad and anor** (2004) UKPC 19 at paragraph 10.

pain that he suffered and continues to suffer."[31] After citing recent similar cases, the trial judge awarded $60,000.00 as general damages for pain and suffering and loss of amenities on 21 May 2010.

(136) In **Marcel Benjamin v Lennox Petroleum Services Limited**, the claimant was struck by a piece of machinery described as an "elevator horn". He suffered cervical and lumbar nerve root irritation secondary to neck and low back strain and spondylosis. He claimed to have suffered serious continuing pain, suffering and injury very similar to this present appeal but a video recording provided to the court put the trial judge in serious doubt about the extent of such injury. After citing several authorities on the trends and ranges of similar awards, the trial judge awarded the claimant the sum of $90,000.00 as general damages for pain, suffering and loss of amenities on 17 April 2014.

(137) These two cases are indeed very similar to the present matter and do indeed suggest that an award of general damages for pain, suffering and loss of amenities for the Appellant in 2014 (the time of the assessment of damages) would have been within the range of $70,000.00 to $90,000.00. More particularly, the trial judge's observations of the Appellant at paragraph 27 of her judgment were apposite. In paragraph 27 of the judgment, the trial judge stated that "**...there has been a measure of exaggeration as to the extent** (of her injuries) **based on what the video showed and indeed from some of my own observations during the course of the trial**." These are findings of fact which on the authorities, would be difficult to overturn.[32] However, given the misinterpretation of the medical evidence by the trial judge as stated

[31] See paragraph 49 of **Andre Marchong v Trinidad and Tobago Electricity Commission and anor**.

[32] See **Beacon Insurance Company v Maharaj Bookstore Limited** (2014) UKPC 21

before in this judgment, the trial judge's assessment of the "exaggeration" of the long term injury of this appellant was overstated and the judge's award of $70,000.00 was not a proper estimate of the loss suffered by this Appellant especially with respect to factor (b) of **Cornilliac v St. Louis** (above) namely, the nature and gravity of the resulting disability. If this factor is properly taken into account, I suggest an award of $100,000.00 would be appropriate in this case.

(138) While the Appellant relied on several authorities as guides of a trend of award in the range of $170,000.00 to $200,000.00, these cases were not as relevant as the two cited by the trial judge. Further, these cases cited by the Appellant (i) exhibited generally more serious injuries, pain suffering and loss of amenities than this Appellant; and (ii) were older cases where a straight line increase of awards for inflation caused these awards to be over-inflated. Such an approach has been discouraged (see **Civil Appeal 159 of 1992 Bernard v Quashie** at page 7).

(iv) Loss of future earnings

(139) This aspect of the appeal relates to category (e) of **Cornilliac v St. Louis**, namely the extent to which the pecuniary prospects of the Appellant are affected.

(140) The traditional method of estimating this loss is the multiplier/multiplicand approach (**Seepersad v Persad and anor** (2004) UKPC 19 at paragraph 16). A useful statement of this approach was adopted from McGregor on Damages by the Court of Appeal in **Persad & anor v Seepersad** and I cite it for its relevance:

> "**The Courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the Plaintiff has been prevented by the injury from earning in the future. This amount is**

calculated by taking the figure of the Plaintiff's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has now come to be referred to as the multiplicand. Further adjustments, however, may have to be made to multiplicand or multiplier on account of a variety of factors, viz. the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation…."

See McGregor on Damages 14th Ed. Para. 1164"

(141) At the time of the trial in the present matter, the Appellant was 36 years old. The trial judge seriously discounted the multiplier to 8 instead of 16 as suggested by attorney for the Appellant in the court below. The Appellant suggested a multiplier of 16 since it was the multiplier used in similar cases for persons of a similar age to the Appellant.[33] The trial judge felt that the Appellant had a **"peculiar health issue at the time of the accident"** which she **"needed to address ...because it was relevant to her physical fitness for her job"** [34] and as a result, she felt compelled to discount the multiplier to 8.

(142) With respect to the multiplicand, the trial judge garnered from the Appellant's payslips that she could work for 40 hours a week at $39.00

[33] See the **Peter Seepersad** case where a multiplier of 16 was felt appropriate for a claimant aged 37 years at the time of trial.

[34] See paragraph 34 of the trial judge's judgment.

per hour for 52 weeks a year, giving her a multiplicand of $81,120.00 per annum.

(143) When this multiplicand of $81,120.00 per annum was multiplied by 8 (the multiplier), it gave a figure of $648,960.00.

(144) However, the trial judge further discounted this figure of $648,960.00 by 60% "**to reflect the fact that the claimant was only temporarily employed and to take into account tax and other deductions and other imponderables**".[35] This left the sum of $259,584.00 from which the trial judge deducted the disability allowance that the Appellant was receiving, calculated at $144,000.00. This left the Appellant with $115,584.00 as the award of general damages with respect to the loss of future earnings.

(145) The Appellant suggested that based on the present authorities such as the **Peter Seepersad** case (Privy Council decision) and considering the vicissitudes of life, a proper multiplier should be 16.

(146) The Appellant then suggested that this head of loss should be computed as follows:

40 hours per week x 52 weeks x $39 = $81,120.00 per annum (the multiplicand) x 16 (the multiplier)	=	$1,297,920.00
Less 25% for taxes and other contingencies		$324,480.00
		$973, 440.00
Less disability allowance $1500.00 x 12 x 16		$288,000.00
		$685,440.00
In later submissions filed after arguments, the Appellant accepted that Workmen's Compensation ought to be deducted from		$85,664.92

[35] See paragraph 36 of the trial judge's judgment.

this figure (see **Civ App No 180/2008 TTEC v Keith Singh**).

The Appellant's suggested award under this head is $599,770.08

(147) The Respondent defended the trial judge's assessment of the loss of future earnings in the sum of $115,584.00.

(148) The trial judge accepted that the Appellant could no longer work as a welder (see paragraph 33 of the judgment) yet proceeded to further discount the multiplier for the weight/health factor which she felt the Appellant needed to address because "**it was relevant to her physical fitness for her job**"[36] (my emphasis). If the Appellant could no longer work in her job as a welder, there was no need to consider any weight loss for her fitness to perform the job as a welder. This was an unwarranted consideration and amounted to a punishment of the Appellant for her weight. Further, as stated before, the credible medical testimony from Dr. Ramcharan suggested a permanent and serious disability for the Appellant which entitled her to receive a disability grant from the state. This grant is usually a lifetime grant. In these circumstances, a reduction of the usual multiplier from 16 to 8 caused an erroneous estimate of the Appellant's loss. On the other hand, there was (a) a real possibility that had the Appellant continued working as a welder, she may have been subject to more of the vicissitudes of life than another more physically fit welder. Further, (b) I considered the accepted fact that this Appellant was employed "on a temporary basis". In fact, when I examined the pay slips which the Appellant submitted, it seems that she worked an average of three weeks every month. These two

[36] See paragraph 34 of the trial judge's judgment.

factors suggested to me the need for some reduction of the multiplier to cater for the special vicissitudes of life that applied to the Appellant.

(149) Bearing all this in mind, I suggest that a proper multiplier that is more in keeping with the Appellant's circumstances is 13.

(150) With respect to the multiplicand, both the trial judge and the Appellant proffer the figure of $81,120.00 as the annual earnings or multiplicand. However, this multiplicand is based on a gross rate of earnings without taking account of (a) mandatory deductions from pay for matters such as income tax, national insurance and health surcharge contributions; and (b) voluntary deductions from the Appellant's pay for union dues.These deductions must be made to the Appellant's net pay since this net pay represents the true loss of earnings of this Appellant (**see generally British Transport Commission v Gourley** (1956) AC 185).

(151) I have examined nine (9) legible payslips of the Appellant and I have made an assessment of the average rate of deductions from the Appellant's pay in the table below.

Week Ending	**Gross Pay**	**Deductions**	**Deductions as a % of Gross Pay (approx.)**	**Net Salary**
1. 10/08/2206	2059.20	277.58	13.5%	1,781.62
2. 09/24/2006	1465.20	128.58	8.8%	1,336.62
3. 09/03/2006	1123.38	56.58	5%	1,066.80
4. 08/20/2006	1960.92	252.58	12.9%	1708.34
5. 05/28/2006	1282.57	404.69	31.5%	877.88
6. 05/07/2006	1095.86	56.58	5.1%	1039.28
7. 05/14/2006	1710.00	189.58	11%	1520.42
8. 04/30/2006	1371.86	130.58	9.52%	1241.28

9. 08/13/2006	2158.90	301.58	13.97%	1857.32

(152) The table suggests an average rate of deduction of 12.4% which rounds off to 12% from the Appellant's pay. When applied to the multiplicand of $81,120.00, a deduction rounded off at $9,734.00 should be applied to the multiplicand. The multiplicand which I suggest for this Appellant is as follows: $81,120.00 - $9,734.00 = $71,386.00.

(153) When the figure of $71,386.00 (the multiplicand) is multiplied by 13 (the multiplier), the potential claim for loss of future earnings is $928,018.00.

(154) Since I had previously discounted the multiplier to take the special circumstances of this Appellant into consideration, I do not propose any further discount of the potential claim of the Appellant by 60% as the trial judge had done since this would amount to a double deduction which would operate as a punishment of the Appellant. Further, the Appellant's suggested discount of the award by 25% for "taxes and other contingencies" is too high since (a) I have more accurately measured the discount for taxes (and other deductions) at 12%; and (b) I have already discounted the multiplier to take account of the vicissitudes or contingencies that apply to this Appellant.

(155) As both parties accepted, the figures for (a) disability allowance and (b) workmen's compensation had to be deducted from the award (see **Civ App No 180/2008 TTEC v Keith Singh**).This would result in the following deductions:

(a) disability allowance- $1500.00 x 12 x 13 = $234,000.00

(b) workmen's compensation= $85,669.92

Total= $319,669.92

Giving an award of $928.018.00 - $319,669.92= $608,348.08 under this head.

(156) Therefore, the total award of general damages for this Appellant should

be $608,348.08 (loss of future earnings) + $100,000.00 (pain and suffering and loss of amenities) = $708,348.08.

(157) There has been no appeal on the trial judge's award of interest on the award of general damages. However, interest is only awarded on past loss and not on prospective loss of earnings.[37] Insofar as the trial judge awarded interest on the entire award of general damages (which included of loss of future earnings), she erred. Consequently, the sum of $100,000.00 will bear interest at the rate of 6% per annum from 16 August 2012 (date of service of the claim form and statement of case) to 04 December 2014 (date of the judgment).[38]There will be no award of interest on the award for loss of future earnings.

(iv) Costs

(158) At paragraph 38 of her judgment, the trial judge noted that the Appellant had brought a prior claim against the Respondent and that that prior claim had been withdrawn with no order as to costs. The trial judge indicated that at the time of the withdrawal, "**it was not expected that the matter would be relitigated**". As a result, the trial judge ordered that the Appellant would only receive 60% of her prescribed costs.

(159) Under Part 66.6(1) of the Civil Proceedings Rules, 1998 (as amended) (CPR), the general rule is that the unsuccessful party in the litigation must pay the successful party's costs of the litigation.

(160) In the present matter, after a hard fought and full contest on both liability and quantum, the Appellant succeeded on both aspects of the claim. This should entitle her to a full award of costs on the prescribed scale.

[37] See **Jefford v Gee** (1970) 2 QB 130 CA and see McGregor on Damages, 19th Edn, at 38-061.
[38] See **Jefford v Gee** (1970) 2 QB 130

(161) While a court may consider the conduct of the parties and the conduct of the litigation before and during the proceedings when varying the usual entitlement to costs (see Part 66.6(5) and (6) of the CPR), the conduct of the parties in the prior action was not a relevant consideration here since:

a) The prior action was withdrawn for a procedural defect (failure to file witness statements on time).

b) This withdrawal of itself gave rise to no undertaking, agreement, understanding or estoppel against bringing a fresh action to cure the prior irregularity.

Therefore, it was not a factor which ought to have denied the Appellant a full award for costs.

(162) In the circumstances, the order of the trial judge for costs is reversed and I would order the Respondent pay to the Appellant the full costs of the trial in the High Court on the prescribed costs scale, and 2/3 of those prescribed costs as the costs of this appeal.

Order

(163) The appeal is allowed. The Respondent shall pay to the Appellant the following amounts:

a) Special damages in the sum of $3,227.00 with interest at a rate of 3% per annum from 12 September 2006 to 04 December 2014;

b) General damages in the sum of $708,348.08;

c) Interest on the sum of $100,000.00 (general damages for pain and suffering and loss of amenities) at the rate of 6% per annum from 16 August 2012 to 04 December 2014; and

d) Costs of the trial in the High Court on the prescribed costs scale,

and 2/3 of those prescribed costs as the costs of this appeal.

/s/ Gregory Smith
Justice of Appeal