

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

NO. 2387 of 2000

Between

IAN SIEUNARINE

Plaintiff

And

DOC'S ENGINEERING WORKS (1992) LIMITED

Defendant

Before the Honourable Madam Justice Rajnauth-Lee

Appearances:

Mr. Douglas Mendes instructed by Miss Maxine Williams for the plaintiff.

Mr. Prakash Deonarine instructed by Mr. Imran Khan for the defendant.

Dated: 24th May, 2005.

JUDGMENT

INTRODUCTION:

In this action, the plaintiff claims against the defendant damages for personal injuries and consequential loss caused by the negligence of the defendant, its servants or agents in or about the 18th October 1999, while the plaintiff was employed by the defendant and in the course of such employment.

An Agreed Statement of Facts was filed by Attorneys for the plaintiff and the defendant on the 18th April 2002 and the Agreed Statement reads as follows:

AGREED STATEMENT OF FACTS

- 1) The plaintiff was employed by the defendant.
- 2) On the 18th of October 1999 the Plaintiff was engaged in work at the site of the former Scarlet Ibis Hotel, Eastern Main Road, St. Augustine.
- 3) A supervisor of the defendant company instructed the plaintiff to assist in the demolition of a wall.
- 4) The plaintiff was involved in an accident on the said date at the said site while the plaintiff was assisting in the demolition of the said wall.

PLEADINGS:

In his Statement of Claim filed on the 31st October 2000 and amended on the 18th February 2003, the plaintiff alleged that on the 18th October 1999 whilst in the course of his employment with the defendant, he was instructed by a supervisor of the defendant to complete the demolition of a wall by the use of a sledge hammer and/or a scaffolding pipe. He alleged that the bottom portion of the said wall had already been knocked out (paragraph 2).

At paragraph 3 of the Amended Statement of Claim, the plaintiff alleged that in the course of the activity as instructed, the wall began to fall and as the plaintiff was attempting to scamper away, he slipped on the ground, fell to the floor and was there struck a heavy blow on his head by the falling rubble.

At paragraph 4, the plaintiff alleged that the accident was caused by the negligence of the defendant, its servants or agents.

The particulars of negligence are set out in full as follows:

PARTICULARS OF NEGLIGENCE

- (a) Instructing, causing or permitting the plaintiff to conduct the said work without taking any or any adequate steps to ensure his safety.
- (b) Instructing, causing or permitting the plaintiff to adopt a system of work, which was wholly unsafe.
- (c) Instructing, causing or permitting the plaintiff to hammer and/or pound the said wall when they knew or ought to have known that to do so when the bottom part of the wall had already been knocked out would expose the plaintiff to danger.
- (d) Negligently failing to take sufficient steps to minimise or eliminate the risk of injury.
- (e) Negligently failing to institute or enforce any or any adequate system for the inspection or maintenance of the site floor in order to prevent the accumulation of rubble.
- (f) Causing or permitting the rubble on the site floor to be or become or remain a danger to people on the site floor.
- (g) Failing to cause the rubble on the site floor to be removed.
- (h) Failing to provide and/or maintain a safe place of work.

The plaintiff further alleged that by reason of the defendant's negligence, he suffered severe personal injuries, loss and damage.

By its Defence filed on the 29th November 2000, the defendant denied being guilty of any negligence and alleged as follows:

3. *On the 18th day of October 1999 the plaintiff along with other workers of the defendant were instructed by a Supervisor of the Defendant to commence the demolition of a wall at the site, by the use of a scaffolding pipe measuring approximately 1¼ inches in diameter and 12 feet in length. The bottom portion of the wall had*

not been knocked out and the plaintiff along with the co-workers were instructed to commence demolition of the wall from the top.

- 4. The method of demolition used was by holding the scaffolding pipe at one end at an angle and knocking down the wall block by block with the other end of the pipe. The use of this method was to ensure that the worker handling the pipe was at a safe distance from the wall.*

- 6. While in the process of demolishing the wall, a portion of the wall started to fall towards the plaintiff and fell on the end of the pipe farthest from the plaintiff causing the end nearest to the plaintiff to strike him on his head.*

The defendant also pleaded that the accident was caused and/or contributed to by the negligence of the plaintiff and set out the following particulars of negligence:

PARTICULARS OF NEGLIGENCE

- (a) Failing to take any or any adequate measures for his own protection.
- (b) Holding on to the scaffolding pipe at a time when it was unsafe so to do.
- (c) Failing to observe in time or at all that a portion of the wall had started to fall.
- (d) Failing to remain alert and/or to keep a proper look out.
- (e) Engaging in conversation with a co-worker at a time when it was dangerous so to do.

The defendant also alleged that there was in place a system for the removal of rubble during the demolition of the wall and further contended that it took all reasonable practical steps to ensure the safety of the plaintiff.

On 7th February 2001, the defendant supplied Further and Better Particulars of the Defence. I will set out the third question and answer in full since the allegations therein will feature later in this judgment.

QUESTION:

Of the allegation in paragraph 9 that the Defendant took all reasonable practical steps to ensure the safety of the Plaintiff, state the facts and matters relied upon in support of this allegation.

ANSWER:

In order to ensure the safety of the plaintiff, the defendant had its supervisor on the scene, Mr. Randolph Dipnarine to oversee the operation and ensure that the workers carried out the operation in accordance with accepted practices. The said supervisor ensured that the plaintiff had on his safety gear of hard shoes, goggles and helmet.

In order to ensure the safety of the plaintiff, the defendant adopted an accepted practice of demolishing the wall from the top first by use of a zinc scaffolding pipe (15 feet long x 1 ½ in diameter) to knock out the blocks one by one. This was to ensure a safe distance between the plaintiff and the wall in the event of falling debris from the wall.

ISSUES:

It is agreed on the pleadings that during the course of the demolition of the wall, the plaintiff was injured.

The main issue for determination therefore is whether the plaintiff's injuries were caused by the defendant's negligence in either: (a) not ensuring that the place of work was safe for the plaintiff or (b) in employing an unsafe system of work, in particular, an unsafe system of demolishing the wall.

The crucial issue of fact, which is in dispute in this matter, is the condition of the wall at the time that the plaintiff was instructed to assist in its demolition. Was the bottom part of the wall already knocked out?

THE EVIDENCE:

- (a) The effect of the defendant's failure to call certain witnesses on the value of the evidence led on behalf of the plaintiff.

The plaintiff has placed considerable reliance on the case of Wisniewski v. Central Manchester Health Authority [1998] P.I.Q.R. Volume 7 p. 324.

In that case, the plaintiff who was born at St. Mary's Hospital, Manchester on the 15th January 1988 suffered from athetoid cerebral palsy from birth. It was contended inter alia on behalf of the plaintiff that the defendant's breach of duty was the effective cause of the irreversible brain damage suffered by the plaintiff in the minutes immediately prior to his birth. At the time of the plaintiff's birth, the only medical staff involved in the care of the plaintiff's mother was a midwife sister and the resident senior House Officer. The senior House Officer declined to return from Australia, where he was training as a specialist, to give evidence at the trial. A short written statement in which he stated that he had no independent recollection of his involvement in the case was tendered and admitted into evidence under the Civil Evidence Act 1968. The statement made no reference as to what he might have done if summoned by the midwife. The trial judge placed considerable weight on the House Officer's non-attendance, the absence

of justifiable reason for non-attendance and the failure to make any other arrangement to allow for his cross-examination and inferred that the House Officer, if he had been summoned by the midwife, would have proceeded to rupture the membrane and then to a caesarian, thus preventing the catastrophe which befell the plaintiff.

The Court of Appeal in Wisniewski examined the line of authorities which showed that if a party does not call a witness who is not known to be unavailable and/or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness, the trial judge is entitled to draw an inference adverse to that party and to find that matter proved. The party seeking to rely on such an inference must however establish a prima facie case on the matter in question, (see Mc Queen v. Great Western Railway Company (1875) L. R. 10 Q. B. 569). In Mc Queen, Cockburn C. J. said at p. 574:

“If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that *prima facie* case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced, it would not displace the *prima facie* case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing.”

In Chapman v. Copeland (1966) 110 S. J. 569 in the absence of the defendant driver in a fatal road traffic accident where the plaintiff widow had adduced

evidence of brake and tyre marks by his car on the road surface, the court inferred that he had been at fault. Salmon L. J. said that:

“...as the law now stood there was no obligation on the defendant at the end of the widow’s case to give evidence. However, if he chose not to do so, he could not complain if, on a very narrow balance of probability, the evidence justified the court in drawing the inference of negligence against him ... Where the defendant, quite legitimately, in a case in which there was nothing but accident mathematics, chose not to give evidence to the contrary, he could not complain”.

The Court of Appeal in Wisniewski also examined the case of Herrington v. British Railways Board [1972] A. C. 877. On the issue of the defendant’s calling no witnesses, Lord Diplock made the following observations at pp 930F – 931B:

“The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts, which the defendant has chosen to withhold.

A court may take judicial notice that railway lines are regularly patrolled by linesmen and gangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see.

Anyone of common sense would realize the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realize the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence”.

The Court of Appeal also cited the Australian case of O'Donnell v. Reichard [1975] V. R. 916. In that case Gillard J had conducted a review of earlier English and Australian cases and concluded at p. 920:

“Of course, patently there must be some limitation imposed upon the application of this rule. For example, any party upon whom the burden of proof on any issue is imposed must always adduce a *prima facie* case on such issue to go to the jury, and the failure of the other party to the litigation to call witnesses who may be expected to elucidate the matter cannot fill in any gaps in the proof required (see per Dixon C. J. in *Hampton Court Ltd v. Crooks* (1957) 97 C.L.R. 367 at p. 371; and *Tyne v. Rutherford* (1963) 36 A.L.J.R. 333).”

The case of R. v. IRC ex parte T. C. Coombs & Co. [1991] 2 A.C. 283 was also cited. At p. 300, Lord Lowry observed:

“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the

knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified".

Having examined the line of authorities, Brooke L. J. in delivering the judgment of the Court of Appeal, set out the following principles in the context of the Wisniewski case:

- (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
- (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
- (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.
- (4) If the reason for the witnesses' absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is such credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

In the present case, Counsel for the plaintiff relied on the above authorities and principles and contended as follows:

- (1) The defendant failed to call as witnesses both Mr. Randolph Dipnarine, the defendant's supervisor and Mr. Kerwin Simmons, employee of New India Assurance Company who took the statement of the plaintiff's witness, Rawle Ragoonath.
- (2) Both witnesses were known to be available to give evidence at the trial and no explanation was offered for their absence.
- (3) Having regard to the defendant's failure to call those witnesses, the Court is entitled to draw adverse inferences against the defendant, one such inference being that the evidence of those witnesses would have supported the plaintiff's case.
- (4) The failure to call those witnesses and the consequential drawing of adverse inferences has strengthened the plaintiff's case. Once the plaintiff has established a prima facie case on a particular matter, however weak, by the defendant's failure to call those witnesses, the Court is entitled to find that matter proved in the plaintiff's favour.

Counsel for the defendant contended to the contrary as follows:

- (1) As to the failure to call Mr. Randolph Dipnarine, the supervisor, he was not called as a witness because there was no evidence that Mr. Dipnarine was present at the time of the accident.

The Court wishes to say at the outset that this submission cannot be sustained. As early as the 29th November 2000 when the Defence was filed, the defendant

alleged that its supervisor gave certain instructions to the plaintiff along with other workers to commence the demolition of a wall.

In its Further and Better Particulars filed on 7th February 2001, Mr. Randolph Dipnarine was identified as the defendant's supervisor who was on the scene to oversee the operation and ensure that the workers carried out the operation in accordance with accepted practices. In the Agreed Statement of Facts, it is an admitted fact that a supervisor of the defendant company instructed the plaintiff to assist in the demolition of a wall.

In addition, during the cross-examination of the plaintiff, a gentleman by the name of Randolph Dipnarine was brought into the court for identification by the plaintiff. The plaintiff, while saying that Mr. Dipnarine was not the one who told him how to break the wall, conceded that on the day of the accident, Mr. Dipnarine was the supervisor on the job site.

It is clear to the Court that according to the defendant's case, one of its supervisors:

- (a) gave instructions to the plaintiff as to the demolition of the wall and;
- (b) was on the scene to oversee the operations.

It would appear from all that has been herein set out that the defendant is contending that either Mr. Dipnarine or some other person (known of course to the defendant) was the supervisor concerned. In any event, the defendant has failed to call that witness.

Attorney for the defendant further contended that it was open to the plaintiff to call Mr. Dipnarine as the plaintiff's witness. The Court agrees with the submission in response advanced on behalf of the plaintiff, that since the defendant identified Mr. Dipnarine as a prospective witness, whom it intended to

call, it could not be said in these circumstances that the plaintiff ought to have called him.

Having examined the above contentions, in my judgment, no credible explanation has been given for the absence of Mr. Dipnarine or the supervisor who had given the relevant instructions at the time of the accident and/or was on the scene at the time of the accident.

- (2) As to the failure to call Mr. Kerwin Simmons, Attorney for the defendant submitted that, the statement taken by him having been tendered into evidence without objection through the plaintiff's witness, Rawle Ragoonath, his attendance was not necessary. The Court cannot agree with this submission.

In the cross-examination of Ragoonath, omissions and inconsistencies in his written statement and viva voce evidence were pointed out. In re-examination, Ragoonath sought to explain away the deficiencies in his statement and set out the circumstances in which the statement was given to Mr. Simmons: that it was given in a hurry (he had a "little five (5) minutes" according to his boss); the statement was given in Simmons' car; Simmons asked questions; Simmons wrote the statement and asked Ragoonath to sign. The Court notes that the statement was given to Simmons on the 18th December 2000, more than a year after the accident. The explanation of Ragoonath has not been disputed.

In all the circumstances, the Court is of the view that no credible explanation has been given for the absence of the witness, Simmons.

- (b) Has the evidence led on behalf of the plaintiff established a prima facie case of negligence on the part of the defendant?

In this regard I propose to consider the evidence of Ian Sieunarine, the plaintiff, and of his witness, Rawle Ragoonath.

A. **The Plaintiff's evidence.**

The plaintiff gave viva voce evidence at the trial. According to him:

“We went to break down the wall. We was told to help the other workers break down the wall. I do not remember what happened next.

I remember going to break down the wall. I remember part of the wall was already broken down and we were pushing it down with a pipe; what kind of pipe it is, I don't remember.

I was pushing it down with the pipe. It wasn't me alone. It was a heavy pipe – it had some guys behind me. I don't know how much: to help us shove down the wall with the pipe.

I can't remember what happened after that. I was in the hospital.

The bottom part of the wall was already gone when we went to break down the wall”.

In addition to his viva voce evidence, the statement of the plaintiff given to his Attorney, Miss Maxine Williams, was tendered and admitted into evidence without objection as “I.S. 1” under the Evidence Act Chapter 7:02 and pursuant to Order 38 of the Rules of the Supreme Court, 1975. Whilst the statement “I.S. 1” accords with the viva voce evidence as to how the accident took place, it nevertheless contains several details which were not mentioned by the plaintiff in his viva voce evidence. Some of the details are set out hereunder:

- (1) When the plaintiff went to the wall which was to be broken down, the whole bottom of the wall, the whole of the right-hand side as well as the whole adjoining wall on the right-hand side had already been broken away.
- (2) The remainder of the wall was still there attached to the ceiling and the adjoining wall on the left-hand side.
- (3) They tried to bring down the wall by the use of a sledge hammer and when that failed, by the use of a scaffolding pipe. The plaintiff and two other men were using the scaffolding pipe.
- (4) Rawle Ragoonath sought to assist them by pulling on the pipe line which was protruding from the right side of the remaining portion of the wall.
- (5) After the wall was hit repeatedly with the scaffolding pipe, it appeared that it was coming down. The other two men who had been holding the scaffolding pipe behind the plaintiff both ran and so did Ragoonath. The plaintiff tried to run but slipped and fell on the rubble that had accumulated on the ground and the pipe hit his head. Almost instantaneously, as he was falling, the wall then fell on the pipe, which came down on his head.

In cross-examination of the plaintiff, he admitted that he did not remember giving a statement to his Attorneys or signing such a statement. Once he had been shown his signature on the statement, however, he readily conceded that he did give the statement, but could not remember exactly how he gave the statement to his lawyer and whether he was talking and someone was writing what he said. The plaintiff also said that he could not recollect telling his Attorneys how the accident took place.

During cross-examination, the plaintiff was requested to read the entire statement. Having read the statement, he admitted that “some of the things” he could not remember and “some of the things” he could remember.

The statement “I.S. I” was originally taken into the custody of the Court during the evidence of the plaintiff’s Attorney, Miss Maxine Williams, who had recorded the statement. According to her evidence, she asked the plaintiff questions about the event and he answered. She typed what he had said and when she was satisfied that she had a comprehensive statement, she read back from the computer screen to the plaintiff what she had typed and then finalized the statement.

The Court notes that it has never been suggested to Miss Williams either that she did not accurately record what was stated by the plaintiff or that she had collaborated with the plaintiff to produce a manufactured statement or that the evidence of the plaintiff contained in the Statement “I.S. I” was in any way tampered with.

On the issue of the weight that should be placed on the statement “I.S. 1”, it was contended on behalf of the defendant as follows:

- (1) There was no reference in any of the reports of the Psychologist that the plaintiff had any difficulty recording the incident.
- (2) According to the evidence of Dr. Rasheed Adam, it did not appear that this plaintiff at the time that he was giving the statement could give a statement that could be considered reliable.
- (3) The statement was not a contemporaneous statement.
- (4) Miss Williams had given evidence that the statement was taken verbatim, and although it was not being contended on behalf of the defendant that the statement was not genuine, the Court was asked to

draw such inferences as it should from the fact that the statement could not be a statement given by this plaintiff verbatim.

The Court wishes to express its view at this stage that this last submission does not accurately reflect Miss Williams' evidence. Throughout her evidence, she consistently said that she had asked questions and the plaintiff answered them. In cross-examination she agreed that she was typing verbatim what the plaintiff was saying. I understand the evidence of Miss Williams to mean that she recorded in the plaintiff's statement the answers given by the plaintiff in the context of the questions asked by her. I do not understand her evidence to mean that all the words recorded in the plaintiff's statement were literally spoken by him.

On the other hand, Counsel for the plaintiff examined the provisions of section 41 (3) of the Evidence Act and made the following submissions on the issue of weight:

- (1) The question of contemporaneity was not in the plaintiff's favour since the statement was clearly not contemporaneous. The absence of contemporaneity could no doubt affect memory.
- (2) As to the other factor considered in section 41 (3) of the Evidence Act, that is whether or not the maker of the statement had any incentive to conceal or misrepresent the facts, it was more likely that there would be no incentive to misrepresent facts to one's own lawyer, where matters stated to one's lawyer are absolutely privileged. In fact, the incentive is to tell one's lawyer the whole truth.
- (3) The authors of Phipson on Evidence (15th Edition), in setting out the considerations in the English Act (as amended) alluded to a

situation where Counsel may take a deliberate decision to lead evidence under the Act to avoid having to produce an unreliable witness. In those circumstances, the court might decide that the statement should be given little or no weight. This cannot be said in the present case, since the maker of the statement, the plaintiff, has been put in the witness box and exposed to cross-examination.

- (4) Although it was conceded on behalf of the plaintiff that a relevant factor was the doctor's evidence on the state of the plaintiff's memory, the defendant's submissions on Dr. Adam's evidence were not entirely accurate. The Court thinks it best to set out the relevant portions of Dr. Adam's evidence:

"In my experience, in this type of injury, there is initial loss of memory of the events immediately preceding and after the injury. Sometimes, patchy memory or recall can occur but they tend to be incomplete and inaccurate and the forgetfulness can fluctuate. They can recall things sometimes and forget these very things at other times.

It is consistent with the injury that such a person could recall what happened a few months after the event and not recall it now, a few years after.

He may have been able to recall some things in relation to the accident, but some time after forget these things and recall other things.

In both cases the recall may be inaccurate".

- (5) The matters in the statement have been corroborated extensively by the evidence of the witness Ragoonath (which the Court will examine later), and is consistent in part with the defendant's own pleading. When one examines paragraph 6 of the Defence and page 2, paragraph 1 of the statement 'I.S. 1", there is absolute consistency.

B. The evidence of Rawle Ragoonath.

This witness gave evidence that on the morning of 18th October 1999, he was one of the workers who was assisting in breaking down a wall. According to Ragoonath, about two (2) feet from the whole bottom of the wall was broken off already. This witness testified that the plaintiff and two (2) other workers took up a scaffolding pipe and started to bang against the wall for it to fall. According to him, he was standing on the right hand side of the wall where there was a conduit pipe sticking out of the wall and he was holding onto that. The right hand side of the wall was not connected to anything.

According to Ragoonath:

"They were banging against the wall. Then I heard someone say "run" and I heard "Junior run" and the same time the wall fell.

When I watch back, I saw Ian on the ground".

Ragoonath also testified that after the accident, when he looked at the plaintiff who was there lying unconscious at the time, the supervisor, Randolph Dipnarine was there. This witness Ragoonath, was subjected to rigorous cross-examination on inconsistencies between his viva voce evidence and the

statement taken by the insurance employee, Kerwin Simmons, which statement was tendered into evidence during cross-examination and marked "R.R. 1"

Counsel for the plaintiff, in his closing address, set out the several matters on which Ragoonath gave evidence in chief, albeit these matters were not contained in Ragoonath's statement:

1. that the wall was eight (8) feet long.
2. that the left hand side of the wall was connected to the main wall.
3. that the wall on the right hand side had been broken down.
4. the state of the wall after it fell – whether the whole wall or part of the wall fell.
5. that the supervisor Dipnarine was there.
6. the state of the wall before it was broken down.

Counsel for the plaintiff also examined the various inconsistencies between the written statement of Ragoonath and his oral evidence.

1. In his statement, he says that he was breaking down a toilet wall. In cross-examination, he says that he was not breaking a toilet wall in the discotheque that day.
2. In his statement, he does not say how they came to break the wall. In chief, he says that some of the guys asked "us" for assistance in breaking down a wall.
3. In his statement, he says that they were using a sledge hammer and a scaffolding pipe about fifteen feet long. He observed that they were weakening the wall with a sledge hammer and then breaking it off with the pipe. In cross-examination, he spoke of the use of the sledge hammer to knock out the blocks under the wall before they asked the plaintiff and him to come to help them.

Mr. Mendes, on behalf of the plaintiff, also examined the statement and the oral evidence of Ragoonath and set out the various matters which were consistent:

1. that there was a lot of rubble on the ground.
2. that the wall was twelve (12) feet high.
3. that they started breaking down the wall from the top.
4. someone said "run" and he ran out to the swimming pool area.
5. the state of the plaintiff after the accident.

Having examined the evidence of Ragoonath as a whole, both his statement and oral evidence, this Court bears in mind that Ragoonath's evidence has not been contradicted by any witness produced by the defendant as to:

1. the events which took place at the time of the accident.
2. the circumstances in which the statement "R.R. 1" was taken by Mr. Simmons.

Accordingly, the Court cannot and does not reject Ragoonath's evidence. I agree with Counsel for the plaintiff that the inconsistencies/omissions are not unimportant, and would certainly have affected the Court's assessment of his evidence if the defendant had given evidence putting forward an alternative scenario.

The Court notes however, that the defendant has been surprisingly silent on the events which took place on the day of the accident.

The defendant has produced as a witness one Kimchand Gosine, one of the defendant's supervisors who worked on the Emerald Plaza project, that is, on the old Scarlet Ibis Hotel.

This witness was present on the work site on the 17th October 1999 and again on the 19th October 1999. According to his evidence, he did not work at the site on the 18th October 1999, the date of the accident. He visited the site the day after the accident and he sought to give evidence of what he had been told, “from the supervisors who were working there that day [i.e. the day of the accident], and from where they said the accident took place”. The account given to Gosine by the Supervisors and his observations thereon were not allowed into evidence as being based purely on hearsay. What is clear from this bit of evidence is that there were supervisors who were able to provide evidence as to the details of the accident. They have not been produced as witnesses.

Much was made in this witness’ evidence of the Occupational Safety and Health Administration guidelines (“the OSHA guidelines”), a faxed copy of which had been tendered into evidence through the defendant’s witness, Kenneth Sirju, a Consulting Structural Engineer. According to the witness, Gosine, the document had been taken from the Internet.

It is interesting to note that the witness Gosine admitted in cross-examination that in the four (4) pages representing the OSHA guidelines, there was nothing to tell one what was required to break down a wall.

Counsel for the defendant had also cross-examined the plaintiff’s witness, Gerard Bertram-Dennis, a Contractor, with regard to the OSHA guidelines suggesting to the witness that there were special guidelines for the breaking down of walls.

On being cross-examined on the OSHA guidelines, the witness Gosine was adamant that in accordance with clause 1926.850 (a) of the OSHA guidelines, the defendant had an engineering survey done to determine the condition of the walls and the possibility of unplanned collapse of any portion part of the structure. Although Gosine was adamant that there was such a survey in writing

done by the Engineer, Kenneth Sirju, which survey he had seen one week prior to the start of the demolition, that engineering survey has not been produced. In fact, the witness Sirju gave no evidence of having prepared such a document. Later, in cross-examination, the witness Gosine finally conceded that what he referred to as an engineering survey were drawings, which he described as “normal drawings” which were in the possession of Sirju, the Engineer. He did not know what the drawings were and did not go through the drawings with Sirju.

Counsel for the defendant also argued that on the evidence of Sirju, it is more likely than not, that the wall that the plaintiff was asked to demolish was a non-load bearing wall. Accordingly, the argument went, based on the evidence of Sirju, if the bottom of the wall was knocked out, the wall would have immediately collapsed.

I agree with Mr. Mendes for the plaintiff that there is no evidence as to the composition of the wall and nothing to suggest that a non-load bearing wall is not reinforced. It is noteworthy that the issue whether the wall was load-bearing or not was never put to any of the plaintiff’s witnesses, even to the witness Gerard Bertram-Dennis, the Contractor.

Conclusion:

Having considered the evidence as a whole, the various submissions advanced on behalf of the parties, having carried out the balancing exercise suggested by the authors of Phipson as to the weight of the written statement of the plaintiff, and having examined the evidence of the witness Ragoonath, the Court is satisfied that a prima facie case of negligence has been sufficiently made out.

In the absence of the witnesses Dipnarine and Simmons, the Court is entitled to infer that the defendant has chosen to withhold evidence which would either have supported the plaintiff’s case or at the very least would not have displaced the

prima facie case. Accordingly, the Court finds that the prima facie case has become a strong case in the absence of any evidence to dispute the matters established by the evidence of the plaintiff and his witnesses.

The Court therefore finds as a fact that the bottom of the wall had been knocked out before the plaintiff and his co-workers were asked to assist in breaking it down. Accordingly, the Court finds that the defendant failed to prescribe and operate a safe system for demolishing walls, and in particular, the wall in question.

In the case of McDermid v Nash Dredging Limited [1987] 3 W.L. R. 212, Lord Hailsham stated the law thus at page 216:

“The ‘system’ was therefore not being operated and was therefore not being provided at all. It matters not whether one says that there was no ‘system’ in operation at all, or whether one says that the system provided was unsafe, or whether one says that the system in fact provided was not in use at the crucial stage. In any event, the defendants had delegated their duty to the plaintiff to Captain Sas, the duty had not been performed, and the defendants must pay for the breach of their ‘non-delegable’ obligation.”

The defendant’s witness, Gosine, gave evidence of a system to break down walls which was allegedly in operation on the job site, that is to say, the workers stood on scaffolding of say (6) feet in height, and used a sledge hammer to break down the top of the walls block by block. When the wall was at the height of the scaffolding, that is six (6) feet high, the scaffolding was removed, the area cleared of all debris and the rest of the wall was broken down by the use of a pipe. The Court wishes to note however:

- I. There is no pleading by the defendant that that was the system in operation on the day of the accident; in fact, Gosine's evidence contradicts the defendant's pleadings as to the system in operation on that day.
- II. There is no evidence before the Court that that was the system in operation either on the day of the accident or to which the wall in question was subject.
- III. It was never suggested to any of the plaintiff's witnesses that the system described by Gosine was in operation on the day in question and in respect of the wall that was being demolished by the plaintiff and his co-workers.

DAMAGES

Special damages:

It has not been disputed that the plaintiff is entitled to full loss of earnings from the date of the accident, 18th October, 1999 to the date of this judgment. It is agreed between the parties that the plaintiff was earning a gross hourly pay of \$12.00 and a gross daily pay of \$96.00. The usual statutory deductions, that is to say, National Insurance and Health Surcharge are to be deducted from the gross sum.

The sum of \$124,336.00 less the sum of \$7,267.20 which has been paid to the plaintiff, and less the sum of \$8,300.00 which has been paid by way of Workmen's Compensation and which the parties have agreed ought to be deducted, represents the plaintiff's loss of earnings to date. Accordingly, loss of earnings to date amount to \$108,768.80. The other items of special damages have been agreed. The medical expenses claimed in the Amended Statement of Claim are accordingly agreed as follows:

CAT Scan	-	\$1,320.00
Doctors Visits	-	587.00
Medication	-	1,151.94
EEG	-	400.00
Psychological Assessment	-	<u>7,500.00</u>
		<u>\$10,958.94</u>

General damages:

The plaintiff's date of birth is 14th October, 1976.

The well-known case of Cornilliac v St. Louis set out the considerations to be borne in mind in awarding general damages.

1. The nature and extent of the injuries sustained.
2. The nature and gravity of the resulting physical disability.
3. The pain and suffering which had to be sustained.
4. The loss of amenities suffered.
5. The extent to which the plaintiff's pecuniary prospects have been affected.

In considering the plaintiff's non-pecuniary loss, I have taken into account the evidence of the plaintiff and his witnesses. On being admitted to the Port of Spain General Hospital after the accident, he had emergency craniectomy (bone removed) for a left temporal haematoma and a compound fracture of the left temporal bone. He was dysphasic, was treated in the intensive care unit and a cranioplasty was planned. Subsequent to the emergency craniectomy, an MRI scan in October, 1999 showed a craniectomy with a hemorrhagic contusion, that is bruising of the brain and a small post-operative fronto-parietal subdural haematoma. Since the accident, the plaintiff has had headaches, dizziness,

forgetfulness with poor concentration, personality change, noise intolerance plus blurred vision, slurred speech and impotence. According to Dr. Adam's Medical Report dated 4th June, 2002, as a result of the injury sustained on 18th October, 1999, the plaintiff sustained a depressed skull fracture with underlying haematoma requiring surgery plus a hemorrhagic cerebral contusion with right sided weakness, dysphasia and seizures, plus post traumatic syndrome. He is severely impaired by the injury and its effects and is unable to work, pursue any further studies or any sports, hobbies or social activities. On examination, his eyes were crossed which was related to brain dysfunction.

On 11th March, 2002, the plaintiff had cranioplasty, that is, repair of the bony defect by an acrylic material, but his symptoms did not improve. Dr. Adam assessed his permanent partial disability at seventy percent (70 %). According to Dr. Adam, this assessment was made in relation to his job as a labourer. In the Doctor's view there were limited areas in which the plaintiff could work, such as, as an assistant to a craftsman such as a carpenter, to assist in bringing things or holding things. Even so, according to Dr. Adam, the plaintiff would still be subject to seizures and would be at a disadvantage. According to Dr. Adam, the seizures were a big problem and so were his poor memory and lack of concentration. The Doctor's view was that three (3) years having already elapsed, even if there was to be improvement, it would not be by very much.

According to the Psychological Assessment of Judith Hinkson, Clinical Psychologist, at an interview on the 9th November, 2002, the plaintiff appeared depressed and admitted that he had virtually given up. His memory was poor and he was embarrassed to carry out conversations since he could not recall words easily. At a later visit, he complained of experiencing severe social anxiety and had developed obsessive-compulsive behaviours.

Although the plaintiff can take care of himself, he experiences severe headaches almost on a daily basis and is on medication for his brain, gum ulcers and

headaches. His speech is slurred and the plaintiff has difficulty finding the right words to say.

Before the accident, the plaintiff used to play sports, like cricket and football; he lifted weights; he used to go to parties and danced. He used to read books and play scrabble. The plaintiff's friend, Natasha Ramnarine, described to the Court how much the plaintiff's life had changed since the accident, since he was no longer involved in those activities. That was also the evidence of the witness, Ragoonath. The plaintiff gave evidence that since the accident he no longer played cricket or football, and he could not drive.

I have considered the several cases cited to the Court. Bearing all the above matters in mind and doing the best that I can, the Court considers that a fair award for non-pecuniary loss is the sum of \$200,000.00.

As to the loss of pecuniary prospects, having considered the matters set out above, I agree with Mr. Mendes that there ought not to be any deduction to the multiplicand having regard to Dr. Adams' evidence. I agree with Mr. Mendes that the plaintiff's chances of finding employment are minimal. I have examined the plaintiff's payslips "C.D.1". Accordingly, a multiplicand of \$480.00 per week is fair and just in the judgment of the Court.

Having regard to the vicissitudes of life and the fact that the plaintiff is getting a lump sum, a multiplier of 15 is reasonable and appropriate. Accordingly, the award for loss of pecuniary prospects is \$374,400.00.

ORDER:

1. There will be judgment for the plaintiff against the defendant.
2. The defendant shall pay to the plaintiff the following damages:-

- (a) Special damages in the sum of \$119,727.74 with interest at the rate of 6% per annum from the 18th October, 1999 to the date hereof
- (b) The sum of \$200,000.00 for non-pecuniary loss with interest at the rate of 12% per annum from the 3rd October, 2000 to the date hereof.
- (c) The sum of \$374,400.00 for loss of pecuniary prospects.

3. The defendant shall pay to the plaintiff the costs of the action to be taxed in default of agreement.

4. By consent, there shall be a stay of execution of 49 days.

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MAUREEN RAJNAUTH-LEE
JUDGE