IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION
G U Y A N A

CIVIL APPEAL NOS. 44, 45 & 49 OF 1998

BETWEEN:

1. **ISHMATTIE GILL**
2. **ULRIC MATHESON**

Appellants/Defendants

- and –

BIBI NAZEELA HUSSAIN, an infant suing herein by her father, guardian and next friend **JAMAL HUSSAIN**

Respondent/Plaintiff

- and –

1. **GUYBRIDGE CIVIL ENGINEERING COMPANY LIMITED**
2. **GENERAL CONSTRUCTION COMPANY LIMITED**

Respondents/Added Defendants

- and –

1. **ISHMATTIE GILL**
2. **ULRIC MATHESON**

Appellants/Defendants

- and –

JAIRAM TEEKRAM

Respondent/Plaintiff

- and –

1. **GUYBRIDGE CIVIL ENGINEERING COMPANY LIMITED**

2. **GENERAL CONSTRUCTION COMPANY LIMITED**

Respondents/Added Defendants

- and –

1. **ISHMATTIE GILL**
2. **ULRIC MATHESON**

Appellants/Defendants

- and –

HAKIM MOHAMED HABIBODEEN

Respondent/Plaintiff

- and –

1. **GUYBRIDGE CIVIL ENGINEERING COMPANY LIMITED**
2. **GENERAL CONSTRUCTION COMPANY LIMITED**

Respondents/Added Defendants

BEFORE

Hon. Madam Justice Desiree P. Bernard - Chancellor
Hon. Madam Justice Claudette M.C. Singh - Justice of Appeal
Hon. Mr. Justice Nandram Kissoon - Justice of Appeal

Mr. R. Stoby, SC with Mr. E. Luckhoo, SC for first-named Appellant
Mr. R. Stoby, SC for second-named Appellant
Mr. A. Chase, SC with Ms. P. Chase for Respondents
Mr. R. McKay, SC with Ms. A. Wong for Added Respondents

2004: January 13, 14, 27
February 12
March 25, 26
April 26, 27
October 29

JUDGMENT

BERNARD, C. delivered the judgment of the Court:

On 5th April, 1989 the Respondents were involved in an accident on the Demerara Harbour Bridge, Access Road, at Schoon Ord., West Bank Demerara, and instituted proceedings against the Appellants and Defendants for damages arising out of the accident.

After a lengthy trial of consolidated actions a judge of the High Court awarded damages against the Appellants and Added Defendants jointly and

severally who have appealed to this Court challenging the award under the various heads of damages.

One of the main challenges by Counsel for the Appellants Gill and Matheson was the inadequacy or absence of reasons by the trial judge for the awards in all of the appeals; he submitted that reasons ought to have been given to show how he arrived at his findings. He contended that a trial judge must enter into, canvas and analyse the issues raised; a mere assertion or conclusion is insufficient. In relation to the Respondents Bibi Nazeela Hussein the trial judge had given no reasons or adequate reasons for reaching his findings, and none at all in relation to the Respondents Habiboodeen and Teekaram. One example in relation to the Respondent Hussein was that the only reason given by the trial judge in respect of her loss of earnings was based on a misconception of the evidence in that he found that she was a Guyanese resident in the U.S.A. and on holiday here when the accident occurred whereas in fact on her own evidence she was residing here with her father whom she assisted in his business.

Challenges were also made against the trial judge's finding that the Respondent Hussein was entitled to an award of damages for loss of future earnings and his failure to apply the correct principles in assessing the claim for loss of future earnings and loss of earning capacity in the result that the awards under both of these heads of damages were excessive. The awards of some of the items claimed as special damages were also challenged. The same challenges were made in respect of the other Respondents except that in the case of the Respondent Habiboodeen there was an additional challenge that the trial judge was wrong in law to make an award of general damages for loss of future earnings or loss of earning capacity in the light of the fact that the Respondent had died before the judgment was given.

There was also an appeal by the Added Defendants against the trial judge's finding of liability by them for the accident which he fixed at 30%. No reasons for this finding are available, and the trial judge himself stated in his judgment that he had written the reasons on this aspect of the case separately, but they could not be found.

In considering the issues raised in these appeals it would be appropriate to determine first the challenge of the Appellants (Added Defendants) to the trial judge's finding of liability for the accident.

As stated above the trial judge's finding on the apportionment of liability between the Appellants is not available. What is available from the record at page 180 is an analysis by the trial judge of the elements needed to be proved by an injured person who seeks to make a defendant liable for damages. No help is forthcoming in assessing the trial judge's reasons for arriving at the proportionality of liability, and as Counsel for the Appellants (Added Defendants) submitted this Court would be in as good a position as the trial judge to make a finding on the facts and draw inferences from them. He made reference to the case of **Benmax v. Austin Motor Co. Ltd. (1955) 1 ALL ER, 326**. In that case it was held that an appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.

An extract from the judgment of **Viscount Simonds** illustrates the reasons for the decision, and fortuitously refers to a case of negligence:

> "All appeals to the Court of Appeal shall be by way of rehearing . . . . . This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence . . . . . A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or nor the defendant had been negligent."

Counsel for the Appellants (Added Defendants) referred to the evidence of Linden Franker at page 60 of the record, who was an employee of the first-named Added Defendants which Counsel submitted was inconsistent and unreliable and ought to have been rejected by the trial judge. There was indeed an inconsistency between Franker's evidence and that of Agnes Benn, a special constable who was stationed at the Demerara Harbour Bridge when the accident occurred. In order to assess the trial judge's evaluation of the evidence led on this aspect of the case I set out below the evidence of Linden Franker and Agnes Benn.

Linden Franker - p. 59, 60, 61

> "On 5th April, 1989 I was employed at Guybridge. I started to work at the bridge one week before. The bus was about 20 ft. away when I attempted to close barrier. Bus was travelling about 15-20 m.p.h. . . . . When I saw bus I pushed the barrier. I did not see Hackim Habiboodeen (ticket collector) that day. I was at work that day. I did not work 2.00 p.m. – 10.00 p.m. that day. I was there at the time of

the accident. I was the ticket collector that day.

Cross-examination
I was supposed to work 10.00 p.m. – 6.00 a.m. (next day) on the day of the accident . . . . . My job was to collect tickets. When I pushed Barrier I was working officially. I was on duty. When there is no police on duty the ticket Collector would remove the barrier. Ticket Collector sometimes assist police in manning barrier even though police are on duty. I was on official duty when I removed barrier."

Agnes Benn - p. 76, 77

"I am Special Constable #7563 . . . . . I have been Special Constable for the past six years. I was stationed at Demerara Harbour Bridge in 1989. My duties were to control traffic, see that vehicles surrender toll tickets, control the barrier-opening and closing barrier. I was on duty at western end of bridge. On 5th April, 1989 I worked from 6.00 a.m. – 2.00 p.m. shift . . . . . I was on duty with toll guard Mohamed Habiboodeen . . . . . The barrier was closed at the time. I closed the barriers. I closed the barrier about 11 o'clock. The bus hit the barrier . . I know Linden Franker. He was nowhere around that day."

From the above it can be discerned that the evidence of Franker and Benn stand in stark contrast to each other. Franker's evidence is that he was at work and at the Bridge when the accident occurred. Benn insists that he was nowhere around that day. To add to this Franker contradicts himself in some parts of his evidence. He said that he was at work that day, but did not work from 2.00 p.m. – 10.00 p.m. Later he said that he was "supposed to work 10.00 p.m. – 6.00 a.m. (next day)", and he went to work one hour before the accident. He also denied that Habiboodeen, a ticket collector and one of the Respondents was at work or at the scene that day.

Habiboodeen of course testified that he was at work on the day of the accident on the 6.00 a.m. to 2.00 p.m. shift. One Douglas Braithwaite, a shift supervisor at the Bridge supported this, but could not say whether Franker was or was not there at that time, and did not know what time he

had come to work. He knew only that he was on the 2.00 p.m. to 10.00 p.m. shift.

On the other side of the coin one Andrew Bowman who was employed at the Security Section on the Bridge testified that Franker was on duty, and both Benn and Franker had spoken with him when he carried out investigations about the accident.

Jairam Teekram who is also a Respondent testified that just before the accident only Habiboodeen, a female guard and himself were at the scene.

This was the state of the evidence which the trial judge had to evaluate and it depended on whom he believed. Was Franker a witness of truth when he placed himself on the scene in spite of apparent inconsistencies in his own testimony? Andrew Bowman supported him on this, but Douglas Braithwaite was of no assistance in this regard. Agnes Benn denied that Franker was ever there even though Bowman said he spoke with both of them. Was she a witness of truth? Teekram identified Benn as being there along with Habiboodeen, but there was no one else.

The trial judge had the advantage of seeing and hearing the witnesses testify and observing their demeanour and manner in which they reacted to or answered questions put to them, a distinct advantage which this Court does not have. We are deprived of any written material as to the manner in which the trial judge dealt with the evidence of Franker or assessed its value. We have to ask ourselves whether we are in a position to decide whether bearing in mind the contradictory state of the evidence concerning Franker's presence or absence at the scene his testimony should be rejected. By parity of reasoning the same applies to the testimony of Agnes Benn.

An observation to be made is that the Appellants' (Added Defendants') contention now that Franker's evidence of his being on duty

and pushing the barrier is unreliable and should be rejected is an attack on the credibility of their own witness whom they admit in their Defence filed in the Court below was their servant on the date of the accident, but whom they deny was operating the barrier in question at the material time or at all.

The pushing of the barrier or its presence in the path of the bus driven by the Appellant Matheson was vital to a finding of negligence on his part or on the part of the Added Defendants. As mentioned earlier the trial judge had the advantage of seeing the witnesses testify and assessing their credibility before coming to the conclusion which he did. We in this Court in the absence of his reasoning are at a distinct disadvantage having regard to the inconsistent state of the evidence. In the circumstances I am of the view that we should not interfere with the trial judge's finding on the apportionment of liability.

QUANTUM OF DAMAGES - RESPONDENT BIBI NAZEELA HUSSEIN

I now turn to the issue of quantum of damages. As mentioned earlier Counsel for the Appellants Gill and Matheson referred to the trial judge's failure to give any or adequate reasons for his awards in all categories of damages, and this alone based on authorities which were cited constitutes grounds for the appeal to be allowed. The main objections by the Appellants are to the award of special damages for loss of earnings, loss of prospective earnings and loss of earning capacity apart from some other items of special damages in relation to the Respondent Hussein. There is no objection to the awards for pain and suffering and loss of amenities.

One of the cases on which Counsel for the Appellants relied in relation to the trial judge's failure to give reasons for his findings is **Flannery et al v. Halifax Estates Agencies Ltd. (2000) 1 WLR, 377** in

which the Court of Appeal in England held, allowing an appeal where a judge failed to give reasons for his decision, that a judge was under a duty to explain why he had reached his decision; that the scope of what was required to fulfil that duty depended on the subject matter of the case; that where reasons and analysis were advanced on either side a judge had to enter into issues canvassed and explain why he preferred one case over the other; that failure to supply reasons in those circumstances offended against requirements inherent in the duty of showing fairness to both parties and of producing a decision soundly based on the evidence, and constituted a good free-standing ground of appeal.

Henry LJ who delivered the judgment of the Court, in the course of his judgment made these comments at pages 381 and 382:

> "The duty is a function of due process, and therefore of justice . . . . . The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. . . . . This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The Rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

I have to ascertain from a perusal of the record whether the trial judge gave reasons or adequate reasons for his findings under each head of award of damages.

Under the head of loss of earning capacity the trial judge at page 200 of the record awarded $80,000 after enumerating and reciting several local and English cases. At page 198 he seems to have considered submissions from both Counsel for the Appellants and the Respondents Hussein and Habiboodeen. This seems to have been interspersed with authorities for loss

of future earnings and the use of the multiplier principle. However, at pages 214 and 230 he awarded to Hussein $1,500,000 for loss of earning capacity without any explanation or reasons. One cannot comprehend how this figure was arrived at. This means that this head of damages will be at large for this Court to decide.

With regard to the award for loss of earnings as special damages the trial judge awarded $7,600 for 32 weeks at $200 per week, i.e. from 5th April, 1989 to 22nd November, 1989 (see page 228). This actually calculates at $6,400. The Respondent had testified that she had assisted in her father's business and was paid $200 per week, but had later changed this to say that her father gave her a pocket piece. Be that as it may the figure should have been $6,400 and the trial judge obviously believed her having seen her testify. This figure represents her earnings in Guyana. There was also partial loss of earnings from employment in the United States of America which the trial judge calculated at $6,937,000 from 1st December, 1991 to 1st December, 1996 at $150 US per week – 260 weeks; he found that she would have earned $350 US per week had it not been for the accident (see pages 213 and 229). It can be concluded that the trial judge accepted the evidence of the Respondent Hussein in toto on this aspect of her claim without stating any reasons for so doing as none has been found.

The Respondent claimed that she left Guyana on 18th August, 1989 and began working as a seamstress in the U.S.A. from December 1991 at her husband's family business having learnt sewing after September 1991 when she got married. For this she was paid $150 US per week for part-time work as she could not work full time due to pain in her leg arising out of the accident; had she been able to work full-time she would have earned $300-$350 US per week. She returned home on 23rd January, 1993, and at the

time of testifying in June 1993 was not employed. Nevertheless the trial judge calculated her partial loss of earnings up to 1st December, 1996 which he claimed erroneously, was the date of trial. The trial ended on 27th April, 1998.

One wonders whether the Respondent Hussein suffered any loss of earnings as a result of the accident since even though injured and without prior skills she was able to earn $150 US per week as a seamstress which was considerably more than she had earned here in Guyana before the accident. As Counsel for the Appellants have submitted what she may be entitled to is loss of earning capacity. This will be considered later in the judgment.

In the circumstances the claim for loss of earnings (apart from the sum earned while she resided in Guyana) both partial and prospective must be disallowed.

I now turn to the other items of special damages. There are certain items to which Counsel for the Appellants have objected, one of these being the award for four artificial legs (prostheses). The main objection was that there was no evidence that the Respondent herself had paid for three of them. Counsel also pointed out that the first prosthesis could have been made locally. However, the technician attached to the Rehabilitation Centre stated that in 1991 the materials for making the prosthesis were not available here, and the person requiring it would have had to import them. Counsel's other objection to this item was that only a photocopy of the bill for it was tendered, and no foundation was laid for its admission; further, Respondent was not physically present when bill was paid at the hospital although she was in the hospital. The trial judge overruled Counsel's objection although no reasons were given, and seems to have exercised his discretion in

admitting the photocopy and permitting the cost to be included as special damages. In the interest of justice I would not interfere with the trial judge's ruling even though not strictly in conformity with the rules of evidence.

It was argued that the Respondent did not require four prostheses, and this is based on the fact that Mr. Wallace Lee, Orthopaedic Surgeon, expressed the view that the surgery for the amputation of the leg was not performed properly which resulted in the prosthesis not fitting as it should. Only one would have been required if the surgery had been performed correctly. He, however, could not estimate how long a prosthesis would last as it depended on the amount of walking which a patient did.

The question arises as to whether the Appellants should be made to bear the costs of four prostheses due mainly to bungled surgery of her leg. It is my considered view that it will suffice if they bear the cost of two – the first and the last.

Another contentious issue was the payment of board and lodging to the aunt of the Respondent Hussein during the time she was receiving medical attention in Canada. The Respondent's evidence is that she agreed to pay her aunt $700 US per week for board and lodging (p. 116D), but no receipts for payments were produced even though she claimed she had a document to this effect. The trial judge accepted the Respondent's evidence on this, but reduced the sum to $600 C per week and granted it for 99 weeks which was claimed in the Statement of Claim i.e. from 17th August, 1989 to 18th July, 1991.

From a perusal of the evidence of the Respondent it seems that she stayed with two aunts – one in Canada and one in the USA. One is at a loss to comprehend with whom the arrangement for $700 US per week was made. In the context in which the evidence on this aspect was given it

seems that the arrangement was with the aunt in the USA. The following evidence is recorded at page 116D:

> "I agreed to pay my Aunt board and lodging; I agreed to pay her $700 US per week. I have a document for this. I stayed six weeks at my Aunt in the States."

At page 116F this is recorded:

> "I stayed from 16/9/93 – 4/11/93, I didn't pay my Aunt $700 US per week, I didn't make paper to establish this, just word of mouth. My Dad made arrangements with my Aunt to repay her, I didn't make those arrangements."

A reading of the above indicates that the $700 US per week claimed was for board and lodging with her aunt in the USA for six weeks, and not for the Respondent's stay with the aunt in Canada. There is no evidence of payment for board and lodging in Canada, and therefore no basis for the trial judge reducing the $700 US which he changed to $700 C to $600 C per week.

Counsel for the Appellants contended that in any event the Respondent could not claim the amount as it was admittedly not paid by her. The Court was referred to the case of **Gage v. King (1960) 3 ALL ER 60**, which is distinguishable from the present one. That case involved the payment of a wife's medical expenses arising out of an accident for which her husband was found to be partly liable, and also the question of a wife's implied authority to pledge her husband's credit for necessaries. The decision seems to have been based on this. **Diplock, J**. found that the husband had made all of the arrangements with the doctors for his wife's treatment, and so he was solely liable for the costs incurred. He was also under a legal duty to provide his wife with necessaries, and she could not claim separately for expenses incurred as there was no evidence that she was

acting as his agent. Perhaps this case may have been decided differently today as the whole concept of a wife pledging her husband's credit for necessaries no longer has any relevance.

The position in the present case is entirely different. There is no agency for pledging of credit for necessaries as this is not a case of husband and wife.

Of more relevance is the case of **Hunt v. Severs (1994) 2 ALL ER, 385** which turned on the question of whether the cost of services voluntarily rendered by a defendant tortfeasor to a plaintiff from motives of affection or duty can be recovered by the plaintiff. In that case the plaintiff was injured in an accident in part due to the negligence of her husband who had cared for her during her illness, and from whom she sought to recover the cost of such care. It was held by the House of Lords that where services in the form of care and assistance were gratuitously rendered by a defendant tortfeasor to a plaintiff injured as a result of the defendant's negligence, the plaintiff could not recover the cost of those services by way of damages. However, **Lord Bridge of Harwich** in the course of his judgment with which the other Law Lords concurred, concluded that the law now ensures that an injured plaintiff may recover the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family, and adopted the view of **Lord Denning, MR** in **Cunningham v. Harrison (1973) 3 ALL ER, 463** that the injured plaintiff who recovers such damages should hold them on trust for the voluntary carer.

The trial judge in the instant case seems to have considered the aforementioned authorities to which he was referred by Counsel. However, one has to have recourse to the evidence of the Respondent Hussein on this aspect of the case to which I referred earlier. She at first gave the

impression that she had made the agreement (in writing) to pay her aunt $700 US per week, but later changed this to say that her father made an arrangement which seems to have been verbal. As in **Gage v. King** (supra) her father may have been under a legal duty to provide for her as she was 17 years old at the time of the accident. However, the trial judge erroneously substituted $700 US for $700 C and awarded $600 C for 99 weeks. This seems not to accord with the evidence. The Respondent spent only six weeks with her aunt in the USA, i.e. from 16th September, 1993 to 4th November, 1993, and may be entitled to claim only for this period according to the evidence. She gave no evidence of the cost of her board and lodging with her aunt in Canada, and although it may have been gratuitous there is no evidentiary basis for assessing an amount to be awarded for this.

I am disposed to award the Respondent the sum of $700 US per week for six weeks' stay with her aunt in the USA and disallow any claim for her stay with her aunt in Canada because of lack of evidence. In accordance with **Lord Bridge's** dictum in **Hunt v. Severs** (supra) the Respondent Hussein will hold the amount of $4,200 US on trust for her aunt who resides in the USA.

In the judgment the trial judge made awards for expenses in Canada reduced from $1,000 C to $800 C per day and calculated at $80,000, but I am puzzled as to what this loss represents. I can find no evidence supporting it. This was separate and apart from an amount of $594,000 awarded for boarding and lodging from 17th October, 1989 to 18th July, 1991 (99 weeks) which he reduced from $700 C to $600 C per week and to which I have already made reference. There has been no objection to the award of $8,000 C for travelling expenses for Ms. Hussein's parents in Canada, but objection

to $1,000 C. for her personal expenses as there was no proof. I see no difference, and accordingly award both amounts.

There was tendered a receipt from Sunnybrook Hospital in Canada representing a consultant's fees of $102.45 C. This was awarded by the trial judge in the sum of $1,020 C. The Appellants offer no objection except as to the quantum which should be $1,020 G. and not $1,020 C. There has also been no objection to other amounts awarded to Ms. Hussein. The total list of items to which there is no objection is:

Air fare from Canada to USA (Ex. H)	-	$193.20 C
Air fare from USA to Canada (Ex. J)	-	$145.80 US
Assessment of leg (Ex. P)	-	$36.57 C
Apparatus for hip (Ex. S)	-	$118.00 C
Physiotherapy (Ex. W)	-	$54.58 C
Payment to Scarborough Hospital (Ex. X)	-	$50.50 C
Fourth artificial leg (Ex. CC)	-	$2,251.20 US
Airfare from Guyana to Canada (Ex. JJ)	-	$30,601.00 G.
Medicines	-	$2,575.00 G
Clothing	-	$3,713.00 G
Travelling expenses of parents	-	$8,000.00 G

The list of other items which I am of the opinion should be awarded is:

First artificial leg (Ex. K1 & K2)	-	$216,860.00 G
Assessment on leg to which there was no objection at trial (Ex. N)	-	$50.10 C
Bandage (Ex. R)	-	$18.04 C
Sleeves and socks (Ex. T)	-	$84.00 C
Personal expenses in Canada	-	$1,000.00 C

On the question of general damages I have to consider the awards made for loss of future earnings and loss of earning capacity. The trial judge awarded Ms. Hussein the sum of $25,480.000 for loss of future earnings and the sum of $1,500,000 for loss of earning capacity. This is challenged by

the Appellants who contend that the Respondent is not entitled to damages under both heads of loss. The Court was referred to several cases, one being **Moeliker v. Reyrolle & Co. Ltd. (1977) 1 ALL ER, 9** in which the rationale for an award for loss of earning capacity was fully discussed. I will not set out verbatim the famous ratio decidendi, but in short summary it is to the effect that an award under this head should be made where the plaintiff is still in employment at the date of trial and only if there is a substantial or real risk that he will lose his present employment at some time before the estimated end of his working life. In the course of his judgment **Browne, LJ** made these comments:

> "Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a speculative or 'fanciful' risk . . . . . In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employers' business; the plaintiff's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any understanding or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no 'substantial' or 'real' risk of the plaintiff's losing his present job in the rest of his working life, no damages will be recoverable under this head."

The Respondent Hussein's evidence is that she returned to Guyana on 23rd January, 1993 while the matter was being heard, and had been employed up to that time. One therefore has to ascertain what is the risk that she will before the end of her working life lose that job and be thrown on the labour market. She claimed that she was employed as a seamstress in her husband's family business. As such there is a slim chance that her services would be terminated although no evidence was led about this. She learnt to

sew while in the business, and began working part time in December 1991 after two months' training. There is no evidence that she had any other skill prior to this. At the date of trial she would have been working for just about two years before returning home. At the date of hearing she was about twenty-one (21) years old, and twenty-six (26) years at date of judgment having been born on 10th June, 1972. No evidence was led as to whether she would continue working in the family business for the rest of her working life which would be approximately another 30-40 years. She complained that because of pain and cramp in her injured hip she could not work for a complete day which involved sitting, and so could not earn a full week's pay which was $300-$350 US.

Mr. Wallace Lee, orthopaedic surgeon, testified as to the Respondent's prognosis which overall seems fair. Her mobility of necessity will be affected by having an artificial leg, and although she can walk she would not be able to swim, play games or have full control of a car. She could ride a bicycle, but may not be able to dance elegantly. On the whole her other functions are normal, and in his opinion, she could do any type of desk job not involving use of the leg. Mr. Lee's opinion was given eleven years ago, and even then the prospects of persons with one leg or any handicap particularly living in a developed society, are not substantially depreciated. The Respondent would and perhaps is more mobile now than at the time she was testifying. She resided and maybe still resides in a developed country and works with her husband's family, and may not be thrown on the labour market.

However, in the event that for some reason not at present discernible the Respondent leaves the family business she would be thrown on the labour market before the end of her working life. The trial judge awarded

the sum of $1,500,000 G for loss of earning capacity. In a decision of this Court given in **Troy Ambrose v. Guyana Stores Ltd. & Christopher Casey (C.A. No. 54/1999)** the sum of $70,000 was awarded for loss of earning capacity where the Appellant was earning more at the date of trial than he was at the date of the accident, and in that case evidence was led through his employers that there was a risk that he would lose his job in the future and be thrown on the labour market without any skills.

As stated earlier no evidence was led of the prospects (or lack of such) of the Respondent Hussein continuing in her present employment and the various "imponderables" which may arise, and as **George, CJ** said in **Johnson v. Sterling Products Ltd. (1981) 30 WIR, 155**, in these circumstances a judge has to do the best he/she can, using his/her general knowledge of prevailing conditions and prospects in order to determine what is fair to both the wronged and the wrongdoer.

I am of the view that no evidence having been led before the trial judge on this aspect of the case the award of $1,500,000 was excessive. Of significant importance is the fact that the Respondent now resides in a country where prospects for better employment even for a one-legged person are eminently better than for someone within our jurisdiction. She earned much more after the accident than she did at the time of the accident. Of course, one has to look at all of the conditions which prevail where she now resides. Taking all of this into consideration and doing the best I can in the circumstances I would reduce this award to $750,000.

In relation to the award for loss of future earnings I refer again to **Moeliker v. Reyrolle & Co. Ltd**. (supra), and the judgment of **Browne, LJ** to the effect that if a plaintiff is in employment at the date of trial and is then earning as much as or more than he was earning before the accident he has

no claim for loss of future earnings; if he is earning less than he was earning before the accident he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis.

Since the Respondent Hussein was earning more than she was earning before the accident ($150 US per week compared with $200 G per week) she cannot sustain a claim for loss of future earnings. This could only have been awarded if she had been earning less after the accident. Therefore the question of applying a multiplier does not arise. Accordingly there was no legal basis for making an award of $25,480,000 for loss of future earnings.

The trial judge made an award of $5,618,480 for four prostheses which the Respondent would require in future, and he ma de reference to the medical document of Dr. Bruce O'Brien (Ex. 'GG') who recommended that she acquire a "flexi-foot" prosthesis which is lighter and would provide her with greater movement. The total cost for fitting this was $10,033 US which calculated to $1,404,620 G. In error the trial judge awarded $5,618,480 for four prostheses instead of the flexi-foot. The Appellants have raised no strong objection to an award for the flexi-foot.

There was also no objection to the amount awarded to this Respondent for pain and suffering, i.e. $800,000.

The judgment for the Respondent Bibi Nazeela Hussein will be as follows:

SPECIAL DAMAGES

(i) Loss of earnings in Guyana for 32 weeks at $200 per week	- $6,400.00 G
(ii) Cost of two prostheses (Ex. K1 & CC) ($1,549 + $2,251.20 US)	- $3,700.20 US
(iii) Airfare from Canada to USA (Ex. H)	- $ 193.20 C
(iv) Airfare from USA to Canada (Ex. J)	- $ 145.80 US

(v) Assessments on leg (Ex. N & P) ($50.10 C and $36.57 C)	- $ 86.67 C
(vi) Medical supplies e.g bandages (Exs. R,S & T)	- $ 220.04 C
(vii) Physiotherapy (Ex. W)	- $ 54.58 C
(viii) Medical treatment in Canada (Ex. X)	- $ 50.50 C
(ix) Consultation in Canada (Ex. Z)	- $ 102.45 C
(x) Airfare from Guyana to Canada (Ex. JJ)	- $30,601.00 G
(xi) Medicines	- $ 2,575.00 G
(xii) Clothing	- $ 3,713.00 G
(xiii) Travelling expenses for parents	- $ 8,000.00 G
(xiv) Personal expenses for Respondent in Canada	- $ 1,000.00 C
(xv) Boarding and lodging due to aunt in USA	- $ 4,200.00 US

GENERAL DAMAGES

(i) Cost of flexi-foot	- $ 10,033.00 US
(ii) Loss of earning capacity	- $750,000.00 G
(iii) Pain and suffering	- $800,000.00 G

As some of the items of special damages were incurred in a foreign currency the question of the rate at which they should be converted into Guyana dollars is relevant. In the case of **Bibi Shamina and Another v. Sampat Dyal and Others (1993) 50 WIR, 239** this Court held that where a court assesses an award of damages in a foreign currency, the date at which the award must be converted into national currency is the date on which the judgment debt is actually paid. **George, C** who wrote the judgment of the court reasoned it this way at page 254 b:

> "In my opinion there is no compelling principle of law that would require that the conversion date from the foreign currency entitlement to Guyana currency should depend upon whether the claim is brought in the former or latter currency. What should be of paramount importance is that there should, as far as possible, be "restitutio in integrum" to the aggrieved party. In other words when the

> plaintiff comes to recover his judgment, so long as any part of it is to be first determined in a foreign currency he should recover enough of the equivalent local currency as to permit him to convert it back into the foreign currency that according to the calculation he has lost or is otherwise entitled to".

In the circumstances all items of special damages incurred in US and Canadian currencies will be converted into Guyana currency at the rate of exchange prevailing at the date of payment of the judgment.

The total judgment to the Respondent Hussein will have to be quantified at the date of payment when the exchange rate of the Guyana dollar against the US and Canadian dollar is ascertained.

QUANTUM OF DAMAGES – RESPONDENT JAIRAM TEEKRAM

The trial judge made an award of $5,240,100 G to this Respondent, but as has been conceded by both Counsel for the Appellant and the Respondent there is nothing in the record which reflects how this amount was arrived at. In the circumstances this Court will have to apply its mind to determine the quantum of damages to which the Respondent is entitled and whether the trial judge's award was reasonable or excessive.

The Respondent Teekram was born on 19th December, 1968, and was 21 years old at the time of the accident, and 26 years old when he testified at the trial. He alleged that he bought and sold "greens" as his occupation from which he earned $900.00 per week according to the Statement of Claim. He was unable to work up to March 1992 due to injuries sustained in the accident. His loss of earnings should be calculated from 5th April, 1989 (date of the accident) to May 1992 at $900 per week. However, I see recorded at page 116 Q of the additional record that he stated that he made $3,600 per week profit. I cannot be sure whether this was true or meant to be $3,600 per month which would accord with $900 per week as set out in his

Statement of Claim. From a perusal of the record it seems as if Counsel for Teekram sought an amendment of his Statement of Claim to claim loss of earnings of $3,600 per week less $1,500 per week which he said he earned from other employment from May 1992 to December 1992. In February, 1993 he obtained other work earning $1,500 per week, and but for the accident he would have earned $6,000 per week. His loss was therefore $4,500 per week from February 1993. It is not quite clear, but it seems that the amendments sought in all of the claims by each Respondent were granted by the trial judge.

In the circumstances the Respondent's loss of earnings would be $3,600 per week from 5th April, 1989, the date of the accident. He claims that he could not work up to March, 1992. His injuries according to the medical report of Dr. Aaron (Ex. OO) were a displaced fracture of the left humerus, compound fracture of the left fibula, and fracture of the pelvic ring. He was also seen by orthopaedic surgeon, Mr. Lee. He was hospitalised for about three weeks with a cast. Counsel for the Appellants drew the Court's attention to similar injuries sustained by the Respondents Birajie Persaud in the case of **Bibi Shamina and Another v. Sampat Dyal and Others (supra)** whom the doctor assessed as having a 20% permanent partial disability. Mr. Lee in relation to Teekram issued a report (Ex. EE) on 18th February, 1992 which indicated that the fractures of the left humerus and left fibula had united, the muscles of the left arm were weak and wasted, and movements of the left hip were painful and slightly restricted. He recommended a permanent partial disability of 20% and when cross-examined expressed the opinion that Respondent with the same care he no doubt had exhibited he could return to his earlier occupation of selling

"greens". He had also testified that the Respondent's temporary disability would be for six months.

Indeed when one reads the judgment of **George, C** in the **Bibi Shamina Case** there are striking similarities between Birajie Persaud and the Respondent Teekram. Both were vendors of "greens", both were assessed at 20% permanent partial disability, and both complained of arthritic pains in the hip joint; also neither had made efforts to sell after the accident. **George, C** reduced the trial judge's assessment of eighteen months' incapacity to eighteen weeks, and awarded 20 % loss of earning capacity.

Mindful of the fact that Mr. Lee indicated that Teekram's temporary disability would be for six months I would allow a period of twelve months, and 20% loss of capacity to earn. There seems to be no reason why Teekram could not resume his "greens" vending having regard to the fact that he worked as a mechanic in a workshop and by the end of seven months he was walking unaided.

His loss of earnings based on earnings of $3,600 per week which it seems Counsel sought to have amended and which the trial judge granted would be calculated from 5th April, 1989 to 4th April, 1990 (twelve months), a total of $187,200.00. A 20% incapacity to earn fully will be considered for the period May, 1990 to May, 1992, and calculated at earnings of $3,600 per week will give a loss of $720 per week for 104 weeks giving a total of $74,880.00. From June, 1992 to June, 1998 (date of judgment (34 weeks)) his earnings would have been $2,100 per week, i.e. $3,600 less $1,500 which he earned from his employment in the workshop. A 20% incapacity will result in a loss of $420 per week, giving a total of $152,880 for 364 weeks.

At the time of judgment Teekram was nearly 30 years old, and in calculating loss of future earnings I would use a multiplier of 15 years. This gives a total of $327,600 calculated at $21,840 per year. I shall award the sum of $200,000 for pain and suffering and loss of amenities. The other items of special damages will be $9,000 for travelling expenses, $1,000 for medicine, $2,500 for clothing and $250 for medical certificates.

The award to the Respondent Teekram is as follows:

SPECIAL DAMAGES

1. Loss of earnings from 5/4/89 – 4/4/90 at $3,600 per week for 12 months	-	$187,200.00
2. Loss of earnings occasioned by incapacity to earn fully from May, 1990 to May, 1992 – $720 per week for 104 weeks	-	$ 74,880.00
3. Partial loss of earnings occasioned by incapacity to earn fully from June, 1992 to June, 1998 - $420 per week for 364 weeks	-	$152,880.00
4. Travelling expenses	-	$ 9,000.00
5. Medicine, clothing and medical certificate	-	$ 3,750.00
TOTAL		**$427,710.00**

GENERAL DAMAGES

1. Loss of future earnings	-	$327,600.00
2. Pain and suffering and loss of amenities	-	$200,000.00
TOTAL		**$527,600.00**

The total award for Teekram will be **$955,310.00.**

QUANTUM OF DAMAGES – RESPONDENT HABIBOODEEN

As was pointed out in the case of the Respondent Teekram the record similarly does not reflect the reasoning of the trial judge in relation to the award of $1,423,625 to the Respondent Habiboodeen. The quantum of damages is therefore at large, and can be reassessed by this Court.

The Respondent was employed at the Harbour Bridge as a labourer at the time of the accident earning $2,500 per fortnight ($1,250 per week) and was 28 years old. He claimed in evidence that he did not work for two years after the accident, but returned to work at the bridge doing the same job for which he received $2,000 per week. This calculates to more than he received at the time of the accident. He would be entitled to loss of earnings for the two years he did not work, and this would be calculated at $1,250 per week for 104 weeks giving a total of $130,000. He claimed that he planted a kitchen garden from which he earned about $600 per week; after deducting $200 per week for use by his family this leaves earnings of $400 per week.

The medical evidence and certificates tendered indicate that the Respondent sustained injury to his head, back and left knee. He complained of attacks of epilepsy since the accident, and Mr. Wallace Lee, orthopaedic surgeon assessed his permanent partial disability at 50%. Dr. Walter Ramsahoye opined that the epilepsy could have developed as a result of the head injury.

Significantly the Respondent died in 1996 before judgment was given. Therefore any amounts awarded to him will be for his estate of which his brother has been appointed administrator. The deceased was laid off (not dismissed) on 20th August, 1994, i.e. made redundant, and thereafter became involved in cultivating "greens", but complained about difficulty bending. He would be entitled to an award for loss of earning capacity to an extent of 50% according to the medical evidence for the period September 1994 to April 1996. Leave was granted by the trial judge to amend the Statement of Claim to claim loss of earnings from 20th August, 1994 at $7,000 per week, but I can find no evidence which supports this.

In relation to the death of the Respondent Habiboodeen I found an excerpt from **McGregor on Damages, 16th Edn., para. 1545** very appropriate and enlightening. It was discussed under the heading "**Changes Before the Decision of the Court of First Instance**", and is to this effect:

> ". . . . . all ameliorations in the damage are relevant to the assessment of the damages whatever form the amelioration may take. But the most dramatic illustration in practice of this type of event is, ironically, the death of the potential plaintiff. This makes for an amelioration of the loss suffered in the sense that the death acts as a deliverance for the victim, wiping out all future damage by way of pain, loss of earning capacity and medical expenses.

Reference was made in the text to the case of **Williamson v. John Thornycroft & Co. Ltd. (1940) 4 ALL ER, 61** where it was held that in assessing damages in an action for negligence, the court should take into account every material event which had happened up to the date of the trial.

The passage quoted above may seem callous, but the point being made is that the death of a plaintiff before judgment may have the effect of lessening or reducing any sums which may have been awarded for loss of earning capacity or compensation for continuing pain and suffering and loss of amenities.

The Respondent Habiboodeen, however, having lived for seven years after filing his action is entitled to an award for pain and suffering, medical and other expenses and loss of earning capacity.

In the circumstances I make the following awards:

SPECIAL DAMAGES

Loss of earnings calculated at $1,250 per week for 104 weeks, i.e. from April 1989 to May, 1991	-	$130,000.00
Loss of earnings from planting garden ($600 less $200 per week=$400 for 104 weeks	-	$ 41,600.00
Medical expenses	-	$ 1,625.00
Loss of clothing & boots	-	$ 1,550.00

Travelling expenses		- $ 4,500.00
Medicine & nourishment		- $ 800.00
Medical Certificates		- $ 300.00
	TOTAL	**$140,375.00**

GENERAL DAMAGES

Pain and suffering and loss of amenities		- $250,000.00
Loss of earning capacity from September 1994 to date of death		- $180,000.00
	TOTAL	**$330,000.00**

The total award for the estate of Habiboodeen will be **$470,375.00.**

The appeals are hereby allowed, and the orders of the trial judge varied as stated earlier in the judgment.

Interest is awarded on the special damages of each Respondent from the date of filing of the action to the date of judgment at the rate of 6% per annum, and on the general damages from the date of judgment to the date of payment at the rate of 4% per annum.

This has been an unusually long and tedious matter spanning fifteen years from the date of the accident to its final determination in this Court during which time there was the demise of one of the parties, the trial judge and former Counsel for the Plaintiff. I wish to commend all Counsel involved for their cooperation in ensuring a satisfactory determination of the appeals.

D. P. Bernard

Desiree P. Bernard
Chancellor of the Judiciary.

Dated the 29th day of October, 2004.