



3. The Claimant gave oral evidence. His witness statement dated 8<sup>th</sup> March 2014 stood as his evidence in chief. The cross-examination was extremely short. The witness was shown his claim form and admitted that he had signed it as true and correct. The witness said he had read his medical reports, others had been read to him and that their contents were true and correct. There was no reexamination. The Defence called no witnesses.
4. In his submissions Mr. Ritzen for the Claimant pointed to a recommendation by Dr. Leighton Logan that the Claimant undergo plastic surgery (Exhibit 4). I at that point indicated I had not noticed any scarring. Mr. Ritzen suggested that I observe him again. Mr. Johnson objected as evidence in chief had ended. I overruled the objection and called the Claimant forward. I observed him. I noticed he was bearded and moustached. Such scarring as there was, was not readily visible to me, even on this closer examination.
5. Mr. Ritzen submitted that an award of \$3.2M for pain, suffering and loss of amenities was reasonable. He relied upon *Delroy Beckford v Emilind Doyley Harrison's "Assessment of Damages for Personal Injuries #2" page 209; Nelson, Walters Engineering Ltd. v David Noel, Harrison's Assessment of Damages Personal Injuries #2" page 63; Audrey Jenkins v Dr. Walter Edwards*, Harrison's "Assessment of Damages in Personal Injuries #2" page 376. Mr. Ritzen placed heavy emphasis on the fact that Dr. Andre Foote recommended porcelain crowns with possible root canal surgery. (Exhibit 3) and that the Claimant had received 30-35 stitches to his face.
6. As regards loss of earnings Mr. Ritzen submitted that there had been no cross-examination on that issue. Nor, he submitted, had the Defence filed traversed the claim. He relied upon *Brown v Dunn* and *Hardy v Gillette (1976) VR 392* (27<sup>th</sup> November 1975) for the submission that there having been no challenge to the witness no adverse submissions could be made. He admitted that there was no documentary support for the claim to lost earnings. He relied upon the authorities

of **Shaquille Forbes v Ralston Baker, Claim No HCV 02938/2006**. Unreported Judgment of Frazer J delivered 10<sup>th</sup> March 2011 and **Dalton Wilson v Raymond Reid, SCCA No 14/2005**, Unreported Judgment delivered on the 20<sup>th</sup> October 2007, in support of a submission that even in the absence of documentary support damages are to be assessed.

7. In his submissions Mr. David Johnson asserted that in none of the medical reports was it said that the injury prevented the Claimant from continuing to work as a plumber. He urged the court to have regard to the medical reports when considering the loss of earnings claimed. As regards Pain, Suffering and Loss of Amenities he submitted that the alleged scars were barely visible. The injuries which were the subject of further pleadings were consequent on a basketball game, also that the medicals do not support the alleged lisp. He submitted that the medical evidence affected the credibility of the Claimant's evidence in chief.
8. Mr. Johnson further submitted that \$850,000 was an appropriate amount for Pain, Suffering and Loss of Amenities. He relied upon **Hunter v Brown Khan's Vol. 6 page 56** as representing the upper limit for awards. Of the cases cited by Mr. Ritzen he said: **Jenkins v Edwards** was a consent judgment; **Beckford v Doyley** there was keloid scarring; and **in Nelson & Walters Engineering v Noel** the injuries were far more severe.
9. Finally Mr. Johnson submitted that the cheques without invoices really proved nothing and were in any event inadequate to prove the sums claimed.
10. It should be noted that Mr. Ritzen raised objection to submissions challenging the loss of earnings claim on the basis that there had been no cross-examination of the Claimant on that. It was also submitted that the Defendant had not set out such a challenge in the Defence and ought not to be allowed to submit thereon. I agree that it is best practice to allow a witness an opportunity to respond to critique of his evidence. A failure to put one's case to a witness weakens the

cross-examiner's case. It does not however preclude submissions on the credibility of the witness's evidence. It certainly does not preclude reliance on documentary evidence. At the end of the day it is a matter for the court of trial to look at all the evidence. As regards the statement of case paragraphs 4, 5, and 6 of the Defence give adequate notice of the Defendants intent to take issue. I therefore allowed Mr. Johnson to make his submissions.

11. I am fortified in my decision to do so by the words of Anderson J in **Hardy v Gillette 1976 VR392** (27<sup>th</sup> November 1975) a case cited by Mr. Ritzen,

***“On general principles, where uncontradicted evidence, which is inherently reasonable, probable and conclusive of the matter, has been given, the court is bound to accept it. It is unnecessary to examine the many cases to that effect which are in the reports, and it is sufficient merely to refer to some of them ... There is the qualification, of course, that no judge or tribunal is bound to accept evidence which is in itself inherently improbable and unreasonable which is hesitating, shuffling, inconclusive and unconvincing. (Swinburne v David Syme and Co (1909) VLR at 565) but that is not the position in the present cases.”***

12. In the case at bar the Claimant's injuries are outlined in a series of medical reports. Exhibit 1 is a document entitled "Medical Data" from the South East Regional Health Authority dated 24<sup>th</sup> May 2012. It was signed on the 26<sup>th</sup> November 2012 by Dr. Donaldson. Findings on examination were:

- a). Abrasion right arm and forearm
- b). Dislocation of right thumb
- c). Nasal bridge damages laceration
- d). Abrasion right shoulder and left shoulder

The diagnosis was of a soft tissue injury only. Treatment involved dressing of surface wounds to face and antibiotic cream.

13. Dr. Michael O'Reggio in a report dated 2<sup>nd</sup> May 2012 (Exhibit 2) noted the following:
- a. Healed laceration with suture marks above the left eye extending to the left of the eye, to the nose bridge, above the upper lip, to the front of the left leg just below the knee.
  - b. Large healed abrasions over both shoulders, across the lower back, to the left elbow, to right forearm.
  - c. Tenderness of knee joints and ankle joints with inability to run without pain
  - d. Broken upper incisor teeth

The doctor prescribed analgesics and recommended that patient undergo physiotherapy.

14. Dr. Andre Foote DDS saw the Claimant on the 17<sup>th</sup> May 2012 and gave a report dated 30<sup>th</sup> May 2012 (Exhibit 3). The Claimant's chief complaint was of "chipped front teeth" Examination revealed crown fracture of teeth #8 and #9 (maxillary right and left central incisors) with possible pulpal exposure. The doctor advised that he will need porcelain crowns placed on teeth #8 and #9 and possible root canal therapy in the future. His estimated cost for this treatment is \$248,000. Full recovery after this treatment is expected.
15. Dr. Leighton Logan gave a report dated 14<sup>th</sup> August 2012 (Exhibit 4). This Plastic Surgeon examined the Claimant on the 19<sup>th</sup> July 2012. He had the benefit of reports by Drs. O'Reggio and Andre Foote. He lists the scars he observed as follows:
- i. Lateral to lateral angle of left eye 7 cm. long
  - ii. Left upper lip region
  - iii. Left anterior shin 5 cm. long
  - iv. Left upper knee region 2.5 cm. long traversed
  - v. Left lateral knee 1 cm. long
  - vi. Right elbow region 15 cm. x 4 cm.
  - vii. Right lower back 6 cm. x 2 cm.
  - viii. Right flank 4 cm. x 1 cm.
  - ix. Left shoulder 3 cm. x 2 cm.
  - x. Right shoulder 4 cm. x 1 cm.

xi. Right upper calf 7 cm. x 2 cm.

Treatment would involve extensive scar revision surgery and, re #2 above serial excision because the scar is unstable. An improvement of 60% - 70% is expected, but complete scar eradication is impossible. The estimated cost is \$450,000 (Exhibit 4(a)).

16. A Consultant Orthopaedic Surgeon Dr. Phillip Waite gave a report dated 17<sup>th</sup> April 2012 (Exhibit 6). He saw the Claimant on the 6<sup>th</sup> March 2012. He described the injuries and complaints as follows:
- a. Grade 1 to Grade 2 lateral collateral ligament strain of the left knee.
  - b. Possible lateral meniscal tear
  - c. Multiple soft tissue scarring secondary to road burns
  - d. Soft tissue injury to the right thumb

On the 17<sup>th</sup> August 2012 the Claimant returned and reported that he still had pain and swelling to the left knee. He had pain in right knee and ankle. Dr. Waite references a note dated 18<sup>th</sup> July 2012 from Dr. O'Reggio indicating that whilst the Claimant appeared to be healing normally "he played basketball on the 17<sup>th</sup> July 2012 and the knee became swollen and painful afterwards." Dr. Phillip Waite details his findings on examination and concluded thus:

1. Healed lateral collateral ligament injury left knee
2. Grade 2 ACL strain
3. Chondromalacia right patella
4. Posterior tibial tendinitis to the right ankle

"The patient appears to have had significant improvement of his right knee injuries suffered the 28<sup>th</sup> November 2011 so that he could play basketball on the 17<sup>th</sup> July 2012 as was recorded by Dr. O'Reggio in his referral letter. Based on my examination, it appeared that the lateral collateral ligament suffered on the 28<sup>th</sup> November 2011 had healed at the time of his presentation to me. I therefore cannot ascertain whether these injuries of 24<sup>th</sup> August 2012 were an aggravation of the injuries obtained from the bike accident or are new injuries."

He was unable to assess impairment as "my client has not been fully evaluated." An MRI was recommended as well as further orthopaedic examination."

17. Dr. Pierre-John Holmes of Facial and Oral Surgery Associates gave a report dated 20<sup>th</sup> August 2013 (Exhibit 8). He first saw the Claimant on the 17<sup>th</sup> June 2013. He detailed his examination and observations and concluded thus:

“30 year old involved in motor vehicle accident on November 28<sup>th</sup> 2011 sustaining multiple facial injuries as listed below:

Chipped teeth 8 and 9

Multiple facial scars

The patient is found to have the following permanent disabilities:

Chipped teeth which can be repaired by a dentist

Facial scars – moderately visible at conversational distances

The treatment proposed for Mr. Walters is as follows:

1. Dental crowns as outlined by Dr. Foote
2. Scar revision as outlined by Dr. Logan”

18. Exhibit 9 is an addendum to medical report by Dr. Phillip Waite dated 20<sup>th</sup> October 2013. This document contains responses to questions put to the expert by letter dated 5<sup>th</sup> September 2013 from the Claimant’s attorneys. The following response is of particular interest,

“4(b). It is unlikely that the injuries suffered to the lateral aspect of the knee would have predisposed to ligamentous injuries on the medial side of the knee. What is more likely to predispose to new injuries is playing a game of basketball with an inadequately rehabilitated knee. What is also more likely is that the game of basketball would have created new injuries or aggravated the old injuries to the knee. Basketball is known to cause ligamentous injuries to the knee and it is well known to cause patella-femoral orthopathy (chondromalacia patella)”.

19. In his witness statement dated the 18<sup>th</sup> March 2014, and which stood as his evidence in chief, the Claimant outlined his injuries and his loss of income among other things. He states that on the 28<sup>th</sup> November 2011 he was wearing a helmet and that a car driven by the Claimant changed lanes and knocked him off his motor cycle. He was at the time travelling @ 45 kilometers per hour. He was thrown to the ground and skidded (slid) and rolled. He had injuries to his head, face, left eye, nose, teeth, shoulders, right elbow, right arm, right thumb, back of his trunk, legs and knees. He felt pain all over his body.
  
20. The statement details the fact that blood was pouring down his face. His right thumb (the end) was bent way back in an abnormal position. It was very painful. His skin was torn off from his right arm and it was white coloured underneath. It burned and later bled. A similar thing occurred to his left shin. He had a terrible pain in his left knee and was unable to bend it. He could stand but was unable to walk on his own. He spent 20 minutes at the scene of the accident before being taken to the Kingston Public Hospital.
  
21. At the hospital he was made to wait approximately 30 minutes before being seen by a doctor. In that period his pain intensified. His thumb was manipulated back into position by a member of the hospital staff but this made it hurt even more. His wounds were cleaned and gauze pressed against his eye to stop the bleeding. Stitches were put in his face. He described the pain as the needle anaesthetizing him entered his skin as “terrible”. He described the experience of stitches being inserted as “dreadful”. The process took 20 (approx.) minutes. He received another injection this time to the wound above the upper lip. Stitches were also inserted there. It was “awful” as there was a lot of pulling and tugging. He received stitches to the bridge of his nose, left nostril and front of left leg below the knee. He was bandaged and given medication for pain.



22. He was admitted to the hospital. It was painful to lie down as the pain from injuries on his back was horrible. He describes it as “the worst night of my entire life”. He was unable to eat as his lips and teeth were “burst”.
23. He was discharged on the 29<sup>th</sup> November 2011. His family members were in shock to see the way he looked. His little cousin even ran away from him. The experience was very upsetting to the Claimant.
24. He was unable to do anything at home except sit upon bed. He could not cook, clean or iron. He was however able to use the bathroom and wash himself. The toes on his left foot were curled downwards and prevented his walking normally. For 2-3 weeks he was unable to go outside.
25. He details his visits to the outpatient department of the hospital. He was eventually discharged on the 12<sup>th</sup> March 2012 having made 8 visits in all. He details his visits to each of the doctors who treated him.
26. As regards lost earnings the Claimant stated that at the time of the accident he was employed as a Security Guard/bar porter at a night club. He details the place and named his employer. The job involved lifting. He earned approximately \$6,000 per week, and was paid cash in hand. He received no pay slips. He said he also worked as a plumber. He at first worked with a licensed plumber whom he identified and detailed some of the jobs worked on. He earned approximately \$7,000 per week from plumbing after he ventured out on his own. He did plumbing in the day and security/porter work at night. He earned in total approximately \$45,000 per month.
27. The Claimant stated that he was not well enough to resume work for 3 months after the accident. When he returned to the night club it had closed down. He did not obtain another security/porter job until April 2012.
28. As regards his current disabilities the Claimant states:

“I have suffered permanent scarring and I feel self-conscious and embarrassed by the scarring. I used to consider myself to be very handsome. I was always able to get along with young ladies very easily. I don’t feel the same way about myself now – not at all. Nowadays, I think twice before even approaching any girls.”

The Claimant also says he now speaks with a lisp, that his upper teeth sometimes cut the inside of his upper lip and his two upper front teeth are very sensitive to hot or cold. He has only recently started to play basketball again. He tried in July 2012 but the pain afterwards made him realize he was not ready at that time. He still feels pain in his left knee in the mornings when he gets up.

29. In terms of transportation he said he had to take 20 trips to and from hospital, doctors and physiotherapist. There were several receipts put in evidence for medical treatment received and medication purchased.
30. In my judgment the evidence of the Claimant stood largely unchallenged. I was not afforded an opportunity to observe his response to cross examination and therefore to form a view as to his truthfulness or otherwise. Nor was the witness given an opportunity to comment on any documentary evidence that may have been contrary to that which he gave. This is perhaps not surprising as on perusing the medical reports and other documentation, I have not discovered any direct contradiction of his testimony.
31. The Claimant for example states he was unable to return to work for 3 months after the injury. Dr. O’Reggio (Exhibit 2) states that the Claimant reported an inability to work after 3 months. The doctor makes no adverse comment and goes on to say “Mr. Walters will continue to have muscle and joint pain especially on moderate physical exertion for the foreseeable future”. Dr. Phillip Waite (Exhibits 6, 7 & 9) says nothing to cause one to doubt the Claimant’s inability to work for 3 months after the accident.

32. Mr. Johnson submitted that the Claimant's credibility is affected by the doctor's evidence (Exhibit 9) that the game of basketball is likely to have aggravated his condition. However the Claimant disclosed this in his witness statement. I do not find his general credibility to be affected. I do find, and Dr. Waite's opinion of the 20<sup>th</sup> October 2013 (Exhibit 9) is persuasive on this, that the Claimant "created new injuries or aggravated the old injuries to the knee." This he did by venturing onto the basketball court before fully fit to do so. The fact that he attempted to play basketball on the 17<sup>th</sup> July 2012 is a reasonable indication that by that date he was feeling much better.
33. Against this background I find the authorities of *Hunter v Brown* reported in *Khan's Personal Injury Awards Vol. 6* page 56 of some assistance. That Claimant suffered injury on 9<sup>th</sup> December 1998 and had surgery in April 1999. Her permanent partial disability was assessed at 24% of the whole person. She was elderly and her progress was poor as the doctor felt she would continue to deteriorate. When the award for Personal Injury and Loss of Amenities is updated the award approximates to \$1,727,219 today. I did not find the authorities of ***Delroy Beckford*** (keloid scars), ***Nelson Walters Engineering Ltd.*** (Fractures and lost teeth) or ***Audrey Jenkins*** (torn cruciate ligament to the knee) particularly helpful. The cases were all of some vintage and one was a consent judgment. I am satisfied however and having considered the authorities and the Claimant's evidence, that a fair award for pain and suffering and loss of amenities caused by this accident is \$1.2 million.
34. As regards the claim for special damages I do not accept Mr. Johnson's submission that the documentation is unreliable. Indeed the Claimant has in his evidence in chief buttressed this by expressly referring to the receipts and documents tendered. I find as a fact that they do reflect expenses related to his injuries and which he is entitled to recover this total \$333,455. There was no

documentary support for his claim to transportation. Assuming a modest \$100.00 per trip at 20 trips I award \$2,000 x 2 = \$4,000.

35. Loss of Earnings was the other area strongly challenged by the Defence. I accept and find as a fact that the Claimant lost 3 months' earnings. It is true that he has provided no documentary support for the earnings claimed. However his witness statement was sufficiently detailed to afford opportunities for challenge. Indeed there being no challenge one can only presume that the information was investigated and no inaccuracy found or that the Defence did not investigate. In either event given the nature of the employment the Claimant could hardly be expected to produce documentation or to provide more information. I accept he was a Security Guard/Porter and that he did work as a plumber. \$6,000 per week as a Security Guard/Porter would be 3 nights work assuming he gets \$2,000 per night. This does not seem unreasonable. It would amount to \$24,000 per month. In relation to his plumbing he said it was \$7,000 per week. Again assuming he charged a modest \$1,500 per job for 4 jobs for the week he would earn that amount. This would mean a monthly amount of \$28,000. The Claimant seeks \$45,000 per month as lost earnings. I award that amount for 3 months making a total of \$135,000.
36. I award an amount of \$698,000 for cost of future medical care. This reflects the opinion of the doctors that surgery and dental work are advisable. I do accept that the Claimant's appearance is not as hideous as one would imagine, indeed I found the scarring almost imperceptible. This may be because of the presence of his beard and moustache. As it is I find that the surgeries will improve his situation and therefore I discounted the amount for Pain and Suffering and loss of amenity by \$350,000.00.

37. For the reasons stated therefore Damages are awarded as follows:

General:	Pain and Suffering and Loss of Amenities	\$850,000
	Future Medical Care	\$698,000
Special:	Cost of Medical reports and treatment	\$333,455
	Loss of Employment (3 months)	\$135,000
	Transportation to and from hospital	\$4,000

Interest will run on General Damages at 3% from the 28<sup>th</sup> November 2011 to the date of payment and on Special Damages at 3% from the 20<sup>th</sup> November 2012 to date of payment. Costs to the Claimant to be taxed if not agreed.

**David Batts**  
**Puisne Judge**