IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. B 70 OF 2001

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| BETWEEN | KENNETH BROWN | PLAINTIFF |
| AND | MICHAEL PHILLIPS | 1ST DEFENDANT |
| AND | FORTUNE CORP. | 2ND DEFENDANT |
| AND | WAYNE GAYLE | 3RD DEFENDANT |
| AND | DONOVAN CHAMBERS | 4TH DEFENDANT |

Mrs. Sharon Gordon-Townsend for the plaintiff
No appearance for 1st , 3rd and 4th defendants

**Heard July 8 and July 15, 2002**

**ASSESSMENT OF DAMAGES**

Sykes J (Ag)

It was approximately 10:00 o'clock on the morning of July 20, 1998 when Mr. Kenneth Brown, the plaintiff, boarded a taxi, in Spanish Town, St. Catherine, one of the oldest settlements built by Europeans in this hemisphere, located on the banks of the Rio Cobre. He wanted to get to Kingston, the capital city, that was established after the devastating earth quake in Port Royal. The taxi left Spanish Town on its journey into Kingston. It travelled along Spanish Town Road. At the intersection of Spanish

Town Road and Weymouth Drive a bus turned across the path of the car. The inevitable accident occurred.

The taxi was owned by the first and second defendants and driven by the third defendant. The bus was owned and driven by the fourth defendant. The plaintiff is now seeking to recover damages from the first, third and fourth defendants only on this assessment. The second defendant is contesting liability.

The plaintiff who was sitting behind the driver of the taxi was injured and taken to the Kingston Public Hospital. His right shoulder was injured. He was in pain, much pain. He was admitted and stayed there for four days before he was discharged. The pain was so excrutiating that sleep deserted him during the first night of his sojourn in the hospital. He received pain relieving injections approximately every three hours that, he says, were of little help.

He experienced pain in his right shoulder. On impact, the rear right door of the car squeezed his right shoulder which then became "cramped" from shoulder to wrist.

The medical report of Dr. Rory Dixon dated October 9, 2000 confirms that he received pain killers (analgesics). The X rays revealed a "severely comminuted fracture of head of the right humerus (shoulder) and a fracture of the right scaphoid (wrist)". The report is consistent with the plaintiff's evidence that his right arm was "cramped" from shoulder to wrist. Obviously what he felt but did not know at time was the result of the fracture to the head of the humerus and the fracture of the wrist. Dr. Dixon recommended that the arm should be placed in a sling.

After he was discharged he went back seven times for physiotherapy. He said he was off work for four weeks.

Apparently he went back to work after the four weeks and worked until February 2001. He said that after the accident he could not work because of his injury yet he says that got four weeks sick leave and was working until last year February. I interpret his evidence to mean and I so find that in fact he went back to work after four weeks and worked from that time until last year February. Counsel's final submissions did not suggest a different view of the evidence. His job was that of spraying mosquitoes. He did this by using a hand-operated spray pan.

The plaintiff said his eye sight started fading in 2000. He is now totally blind. The report of Dr. Mark Minott dated March 13, 2002 states that the plaintiff is now legally blind because of angular glaucoma.

**INJURIES AND ASSESSMENT**

Dr. Dixon's report states that the plaintiff's shoulder healed with significant stiffness that prevented movement in all directions but he improved with physiotherapy. In April of 2000 when he was last seen he was able to comb his hair. He had permanent limitation of movement of his shoulder. The report did not indicate that any assessment was done of whole body percentage impairment.

Dr. Minott in his report found that "the right shoulder had only a jog of motion about a fixed deformity in five degrees of external rotation, fifteen degrees of flexion and forty-five degrees of abduction". The plaintiff also had "Grade IV power in the flexors and extensors of right elbow and hand".

Dr. Minott in summarising his findings found that the injuries to the right upper limb (i.e. shoulder and wrist of right hand) had "healed with permanent impairment". He does not believe that there are neurological injuries. The doctor said that he does not "believe that there will be any significant improvement of the right upper limb by any form of treatment". The permanent impairment is estimated at twenty percent (20%) of the whole person.

Dr. Minott's report was done after the plaintiff stopped working. The report makes the important finding that the plaintiff, at the date of the report, was "legally blind because of angular glaucoma".

This strongly suggests that the plaintiff stopped working because he was blind and not because of the injuries he received. As noted above the plaintiff said his eye sight began fading in 2000. This fact coupled with the finding by Dr. Minott that glaucoma is the cause of his blindness leads me to conclude and I so find that his loss of vision was caused by glaucoma and not the accident.

**DAMAGES**

**(a) general damages**

**(i) loss of earning capacity**

The plaintiff claims $850,000.00 in general damages. He claims this under the head of pain and suffering, loss amenity and loss of earning capacity. The plaintiff can certainly claim compensation for pain and suffering and loss of amenity. There must however be an examination of

the law and evidence to see if the claim loss of earning capacity can be sustained.

The case of ***Moeliker v A. Reyrolle & Co.*** [1977] 1 W.L.R. 132 has set out the principle. Browne L.J. said at page 140:

> *This head of damage **generally only arises** where a plaintiff is at the time of the trial in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.* (My emphasis)

The principle laid down in ***Moeliker's case*** (supra) was approved by the Judicial Committee of the Privy Council in the case of ***Chai Wai Tong v Li Pung Sum*** [1985] 2 W.L.R. 396, 404-405 per Lord Fraser of Tullybelton:

> *Counsel for the plaintiff submitted that she was entitled to at least a conventional award under this head, without any evidence being required. But that submission rests on a misconception. A claim for loss of future earning capacity **usually arises** where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The court has to evaluate the present value of that future risk: see Moeliker v. A Reyrolle & Co. Ltd. [1977] 1 W.L.R. 132, 140 where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. **If he is, and has been for many years, in secure employment with a public authority the risk may be negligible.** In other cases the degree of risk may vary almost infinitely, depending on inter alia the*

> *claimant's age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant's earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.* (My emphasis)

***Moeliker's case*** (supra) was approved and applied by the Court of Appeal of Jamaica in the case of ***Gravesandy v Moore*** (1986) 40 W.I.R. 222. In that case Carey J.A. said at page 223

> *Loss of earning capacity is an item of general damages co-terminous with pain and suffering. What the court is being asked to assess is the plaintiff's reduced eligibility for employment or his risk of future financial loss.*
>
> Further at page 224
>
> *The claim for loss of earning capacity is* ***more likely than not*** *to arise in cases where the plaintiff is in employment at the time of trial or assessment…*(My emphasis)

Carey J.A. said that before an award can be made under this head of damage there must be evidence of (i) the length of the rest of the plaintiff's working life; (ii) the nature of his skills and (iii) the economic realities of his trade and location. All these are necessary so that the court can assess the chances of obtaining other employment or continuing in some other business. None of these was proved in the present case.

These cases show that loss of earning capacity arises primarily in cases where the plaintiff is working at the trial or assessment because this head of damage is seeking to compensate the plaintiff for the diminution of the plaintiff's ability to compete in the market place if he should lose the job he presently has **before the end of his working life.** This is why this head of damage is so speculative. It is trying to see into the future. It is trying to determine whether the nature of the injury is such that there is a real risk that he may lose his present job and the difficulty that may be experienced in obtaining another job given his handicap. If there is such a risk then an attempt must be made to assess and quantify the value of the risk.

I note that the judgments use phrases such as "***generally only arises***" (***Moeliker***), "***usually arises***" (***Chai***) and "***more likely than not***" (***Gravesandy***) to refer to the usual type of case in which the assessment arises. These are cases where the plaintiff is working at the time of trial. The cases do not say that the principle cannot apply to persons who are not working at the time of the trial or assessment. This view is supported by the judgment of Courtnay Orr J in ***Mark Scott v Jamaica Pre-Pack Ltd*** [Suit No. C.L. 1992/S279] (unreported((delivered October 26, 1993). The plaintiff in that case was unemployed at the time of the assessment. His Lordship said at page 11:

> *It is obvious that the plaintiff is suffering and will continue to suffer for the rest of his life a very real handicap on the labour market, or put another way, a loss of equal standing on the labour market. His injury has created a serious weakening of his competitive position.* [In the present case] ***His is not merely a risk of unemployment, but a fact, as Browne***

> ***L.J. pointed out in*** *Cook v Consolidated Fisheries Ltd.* ***(The Times, January 17, 1977) a plaintiff is just as deserving of compensation under this head even if he is not employed at the date of trial.*** (My emphasis)

In the instant case the plaintiff resumed work after four weeks and was employed until he stopped working last year. The evidence clearly shows that he stopped working because of his blindness and not the injury he received. In this case the risk of losing job his as a seeing person because of the injury never materialised. The injury was undoubtedly a handicap. He was employed to the Ministry of Health, a public body, to spray mosquitoes. This is not a highly skilled job and so he could be classified as a labourer.

Lord Fraser pointed out in the cited passage above from ***Chai's case*** (supra) that the risk of loss of employment with a public body may be negligible. It is well known that public bodies tend to be benevolent employers, hence the reduction of the risk of loss of employment. All this highlights the necessity for evidence if the plaintiff is seeking an award under this head of damage.

In my view the claim fails from an evidential standpoint because there was no evidence concerning the matters identified by Carey J.A. in ***Gravesandy's case*** (supra) as necessary for a claim under this head. There was no evidence of his age, how long he had left to work, any other skills he may possess other than broom making. The fact that he is legally blind from a disease and not from the accident would suggest there must be some kind of evidence of the job prospects of blind person generally. The court would then have to take account of his injury. It may be that the assessment in this case would be even more

speculative because the injury itself reduced his competiveness and his blindness reduced it even further. The court would therefore be assessing the reduced job prospects of a blind person with a 20% permanent impairment of the whole person. If the court were to make this kind of award the approach may be that the court should assess his loss of earning capacity of the plaintiff as a seeing person with the disability arising from the injured arm and then adjust the sum to take account of the fact that he is now blind from a disease that was not caused by the accident.

I therefore conclude that the plaintiff cannot receive any compensation for loss of earning capacity.

**(ii) pain and suffering and loss of amenity**

Counsel for the plaintiff referred to the case of ***Delroy Bucknall v Altimont Forrester*** [Suit No. C.L. 1989/B110], Harrisons & Harrisons, *Assessment of Personal Injury Awards*, at pg 248. The damages were assessed on January 18, 1990. The plaintiff was awarded $50,000.00 for a fractured humeral head of the left shoulder, pain and swelling of the left shoulder, six inch incision scar over right eyebrow, laceration to the left forearm and laceration over right eye brow. The disabilities were abduction of shoulder limited to 80 degrees, wastage of deltoid muscle and restriction of external and internal rotation and forward flexion. The permanent partial disability was assessed at 15% - 20%. The present value of this award using the consumer price index for April 2002 (1475.9) and the consumer price index at the time of the award (129.6) is $569,405.86.

Mrs. Gordon-Townsend also referred to the case of ***Leroy Robinson v James Bonfield and Conrad Young*** [Suit No. C.L. 1992/R 116], Khans, *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica*, Volume 4, page 99. The assessment was made on September 23, 1996. The plaintiff suffered multiple abrasion to left hand, tender swelling to left elbow, abrasions to eyebrows and fracture of right wrist. No permanent disability was expected but he was left with a slight deformity of wrist and was in pain. He received $269,438.00 for pain and suffering and loss of amenities. The present value of this award is $402,086.49 The consumer price index at the time was 989 and the April 2002 index was 1475.9

The whole person of the plaintiff in this case is 20% permanently impaired. He suffered a fractured wrist and a severely factured shoulder accompanied by much pain and suffering. The loss of amenity is obvious. I would think that he must be awarded more than the plaintiff in **Robinson's case** (supra). The plaintiff in the instant case suffered an additional injury that the plaintiff in ***Bucknall's case*** (supra) did not suffer, namely a fractured wrist. I believe that an award of $650,000.00 is appropriate in the circumstances of this case. This is the sum awarded. This is for pain and suffering and loss of amenities. Interest is awarded at the rate of 6% from the date of service of the writ to July 15, 2002.

(b) special damages

The plaintiff claims as special damages the following:

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| (a) | medical expense | $ 600.00 |

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| (b) | sling for arm | $ 300.00 |
| (c) | medical report | $1,750.00 |
| (d) | transportation | $2,700.00 |
| (e) | loss of income for 4 weeks at $3402.77 per fortnight | $6,805.54 |
| (f) | Cost of police report | $1,000.00 |

The medical expenses refer to the treatment he received at the Kingston Public Hospital after he was discharged. This expense is supported by receipts.

The cost of the sling though not supported by evidence is consistent with the Dr. Dixon's report that stated that the plaintiff's arm should be immobilised in a sling.

The loss of income is accepted as proven despite the absence of pay slips or any other form of documentation.

The cost of the medical report and police report are not recoverable since these expenses were incurred in preparation for trial and not as a part of medical care. They can be recovered as costs.

Mrs. Gordon-Townsend during the hearing applied to amend the statement of claim to include the cost of the plaintiff's hospital stay. This bill only came to light after the writ and statement of claim were filed. The bill is date stamped March 27, 2001. That was over a year ago; more than ample time to apply to amend the statement of claim. However the defendants were not informed by way of a notice that the plaintiff intended to increase his claim for special damages. I do not think that this would be fair to the defendants who may well have decided not to incur the expense of retaining counsel if they accepted

liability. They may have made a decision based upon what was actually declared in the statement of claim. The amendment was not allowed.

The sum awarded for special damages is $10,405.54. Interest is awarded on this sum at the rate of 6% from July 20, 1998 to July 15, 2002.

Costs to the plaintiff in accordance with Schedule A of the Rules of the Supreme Court (Attorney at Law Costs) Rules 2000.