

[3] The claimant stated that he had been employed to Trout Hall Ltd. and a letter dated 30th May 2008 from that company was admitted without objection as Exhibit 5.

[4] Exhibit 6 was an estimate from the physiotherapist dated 16th April 2012. The parties indicated that the following was agreed:

Cost of Transportation \$12,500.00

Loss of Earnings \$1,192,000.00

[5] The claimant showed his arm to the court. It appeared entirely lifeless and disfigured. He obviously can't raise it or use it.

[6] In his witness statement he stated that he is 39 years old. On the 13th March 2007 he was standing along the sidewalk in Majestic Gardens where the police were carrying out spot checks. While standing he was talking to two ladies when he saw a police vehicle drive up and stop half a chain away. A police officer came out of the car and asked who rode a bike. Someone named Clive who was the bike's owner spoke to the police. The claimant's back was slightly turned to the police officer who was speaking with Clive.

[7] The claimant then heard a loud sound like a gun shot and immediately his right hand felt lifeless and was bleeding heavily. He felt severe pain in his right hand and chest and was taken to the Hunts Bay Police Station by a worker and then to the Kingston Public Hospital (KPH).

[8] At KPH he was given pain killers and injections and an IV. X-rays were done. He had four (4) wounds from the shot. One to his upper back one below arm pit one to inner side of upper arm and outer part of upper arm. A tube was placed in his right chest and notwithstanding pain killers he still felt pain.

[9] After two (2) days in hospital surgery was done. A piece of iron called an external fixator was clamped to the bone from his shoulder to elbow. He had this for six

(6) months. The fixator made sleeping at nights very difficult as he had to sleep on his back or left side. He also was in “no ends” of pain.

[10] On leaving hospital he was given a hand sling which he used for two (2) years. He had to visit the KPH outpatient clinic. His hand remained numb and weak and he could not use it and had to get assistance from his family to cook wash and tidy.

[11] The external fixator was removed in September 2007. The hand was still weak and had no power. He could not move his hand up or down. Another surgery was done in January 2008. In February 2008 he started physiotherapy. About a month after surgery the wound started to drain pus. He feared the hand would be cut off.

[12] In March 2010 he went to see Dr. Dundas. Surgery was recommended but he did not have the money so he returned to KPH and in March 2011 further surgery was done. This was to remove the pins and after that the draining stopped.

[13] Since then he is now able to move the hand slightly. It has no power to lift. He has to use his left hand to raise his right hand. He still has pain but it is much reduced.

[14] He is not able to do any washing either for himself or the children. His girlfriend left him 2 years after the accident. He paid Sharon Burke \$1,200.00 per day to wash and clean. She came twice weekly. His family helped him out when he had no money. Prior to the injury he used to wash and cook. Now he can do neither. He can't button a shirt or tie his shoe lace.

[15] He describes himself as a general labourer. He left Pembroke Hall Secondary School at grade 10 with no subjects. He cannot read very well and has never worked in an office. At the time he got shot he was working at Trout Hall Limited as a casual worker. He started there in 2001 and his duties involved selecting fruits, loading containers for export. It was seasonal work every six (6) months but out of season he hung around the plant and did odd jobs like washing cars or cutting lawns and ledges.

[16] He earned \$7200.00 per week at Trout Hall. His statement details his medical related expenses and transportation expenses.

[17] When cross examined the claimant indicated that he had tried to get employment since the incident. He indicates that “they say mi mus go sell bag juice”. He applied to Trout Hall to try to get work there. He also went to the Agricultural Marketing Corporation (AMC) food complex. He spoke to a Miss Rita there but she said she could not help him because he did not have two sound hands.

[18] He thought he might be able to do security work like opening a gate to let people in. Vending would be difficult for him as it would be difficult to move around and sell with one hand. He said his father took care of him as his girlfriend had taken the children and left him.

[19] The medical reports indicate the injuries and sequelae to be as follows. On the 13th March 2007 he presented at the Orthopaedic Clinic Kingston Public Hospital with a history of having sustained multiple gunshot wounds to the right upper back and right arm on the 13th March 2007. His complaint was decreased sensation right upper limb and an inability to move same. Findings on examination were entry exit wounds right upper back and absent radial and ulnar right UL with decreased sensation to C7 C8 T1 dermatome. Diagnosis was multiple gunshot wound – grade 3C open fracture right humerus. Treatment was exploration right arm and repair of brachial artery, insertion of external fixator, closed locked humeral (18th January 2008). There was follow up treatment in outpatient department, no improvement in the nerve injury and he appears to have developed osteomyelitis. [see medical report date stamped 26th June 2009 Exhibit 1).

[20] The reports of Dr. Grantel Dundas cumulatively reveal the following:

- a) On 3rd November 2010 the claimant presented with swollen right arm, pain in right arm, weakness in right upper extremity, draining sinus in right arm.

- b) On 3rd November 2010 examination revealed a psychologically depressed young man “moaning” his fate in life. In respiratory system he had scars from gunshot entry and exit. Entry wound was marked by a keloidal scar 8 cm from the midline at T9. The exit wound was at the posterior/lateral chest wall 8 cm lateral and 4 cm distal to the inferior angle of the scapula with no associated tenderness. There was gross wasting of the right shoulder girdle muscles. Shoulder movements were very weak and rated at grade 1 on scale of 1 – 5. There was a draining sinus. Distal third of right arm was swollen and indurated. There were surgical scars. He had 26° flexion contracture of right elbow and could flex only 44°. In wrist flexion was 55° extension 10°, radial deviation 11° and ulna deviation 25°. Full supination but loss of about 15° of pronation. He had a simeon hand. Gross wasting of thenar and hypothenar muscles and wasting of 1st dorsal interosseous muscles. There was blunting of sensation to monofilament testing in distribution of the median and ulna nerves. The ulna one and one half digits were more profoundly affected.
- e) On 3rd November 2010 the diagnosis was:
- Osteomyelitis of the right humerous
 - Atrophy of the right shoulder girdle muscles
 - Median and ulnar nerve damage in right arm
- f) In his report of the 4th November 2011 Dr. Dundas indicated that the claimant reported that “the hardware had been removed from his right humerous in March 2011”. Pain had subsided and drainage had ceased. He however still had mild elbow pain. There was otherwise no major measurable change in his status. The continuous drainage from the Osteomyelitis had been averted but the nature of chronic Osteomyelitis is such that it might recur anytime and without warning. The presence of bullet fragments in the arm further increases the risk. Using the American Medical Association Guides to the Evaluation of Permanent Impairment 6th

Edition measurement of residues remain at 87% of the affected extremity or 52% whole person impairment.

- g) By reports dated 27th February and 29th May 2012 [Exhibited 2c and d), Dr. Dundas stated he had a joint medical consultation with an Orthotist/Prosthetist. A prosthetic device was recommended which:
- Would not reduce measured residues
 - Would make the claimant much more functional in terms of domestic and work related chores but not activities related to personal hygiene
 - Light manual labour would be significantly enhanced but he should not do heavy lifting.
 - There will be additional costs associated with the fitting of the device such as socks, regular follow up visits, additional physical therapy.
 - The shoulder/elbow portion of prosthesis may need replacement in 5 years and the hand portion in 2 – 3 years.

[21] A report from Dr. Hope Julal dated 17th July 2012 details the cost of the prosthesis and the associated costs involved.

[22] Miss Christine Hubson for the claimant submitted that implants remained in the claimant until March 2011. Draining occurred for 3 years. Dr. Dundas recommended a prosthesis which would cost approximately \$500,000.00. The claimant has a 52% whole person impairment. She submitted an award of \$8.5 to \$10 million for pain, suffering and loss of amenities, relying on the authorities of **Paul Collins v Calbros General Security Ltd. - Khan** vol 5 page 92 and **Anthony Campbell v Level Bottom Farms Ltd. - Khan** vol 5 page 122.

[23] For Handicap on the labour market or lost earning capacity counsel advocated for a multiplier multiplicand approach. She used his income at the date of the accident \$7,200.00 per week for 6 months in the year and a multiplier of 10.

[24] Extra help she estimated at \$100,000.00 per year (minimum wage for 2008, \$ 3,700.00 per week) and a multiplier of 12. For future help she used \$2,500.00 with a multiplier of 12.

[25] The prosthesis cost \$500,000.00 and would need replacement every 2-3 years. She used a multiplier of 8 and suggested that the total be reduced to take account of the lump sum payment.

[26] For exemplary damages counsel submitted that the Court of Appeal had capped this at \$250,000.00 and asked for that.

[27] Mr. Alder for the Crown relied on **Hugh Mullings v Cons. Cooper** from Harrison's assessment of damages page 116, (and **Khan** vol 5 page 110). \$5.6 million was the updated award. He also cited **Hugh Grant v Sylvanny Gordon Harrisons** page 117 and **Paul Collins - Khan** vol 5 page 92. He submitted that the range of awards was \$1.8 to \$ 4 million.

[28] Mr. Alder also submitted that if an award was made for the prosthesis the amount for pain and suffering would need to be reduced. As regards loss of earning capacity he submitted that the multiplier approach of \$ 7,200.00 per week was supported by authority. In relation to the cost of voluntary care he submitted that the figures ought to be the minimum wage for 2007. He believed \$2,500.00 per week was the appropriate award. Mr. Alder agreed that exemplary damages was capped by the Court of Appeal and suggested \$200,000.00.

[29] I have considered the authorities cited. I note that in the **Hugh Mullings** case, the right handed claimant had received the injury to his left arm. His injury was

sustained on the 28th August 1997 and by the 11th November 1998 he had improved movements with complaints of minimal pain. Therefore although they both suffered gunshot wounds and their ultimate assessed whole person deficits were similar it is manifest that the claimant in the case before me has suffered for much longer. He contended with a draining sinus for years and several surgical procedures. The injury also is to his dominant hand. His power was measured at grade 1 whilst in the **Hugh Mullings** case it was grade 5 (for the shoulder).

[30] With regard to the case of **Anthony Campbell v Level Bottom Farms** that claimant similarly had an arm which “hung in a flail” manner: His Permanent Partial Disability amounted to a 60% whole person impairment. He also had several surgical interventions and difficulties and his upper limb motion was a grade 0. The case is quite similar and that award of \$1,500,000.00 in February 1998 when updated equates to \$6,165,000.00.

[31] The **Paul Collins v Calbros General Security** case, was cited by both counsel and is also of great assistance. This was a gunshot injury to the non-dominant hand. A left elbow amputation was performed. A prosthesis was recommended and an award in United States dollars made for its purchase. His whole person loss of function was assessed at 57%. There is no indication that he suffered from the draining sinus or many years of pain and discomfort as did the instant claimant. The award in **Paul Collins** was \$2,500,000.00 in July 2000 which today updates to \$8,602,000.00.

[32] In my judgment for pain, suffering and loss of amenities Lloyd Morris would be entitled to an award of \$8.5 million. However, a claim has been made in respect of a prosthetic device. This the experts opine will not reduce his assessed residual permanent partial impairment. Counsel for the Attorney General submitted that if an award is made for the prosthesis then the general damages ought to be reduced. This I agree with. The prosthesis will reduce the loss of amenity and the suffering to the extent it makes his daily life more convenient.

[33] The experts say that it will enable him to be much more functional in domestic and work related chores. That after all is the rational for obtaining the device. I therefore award \$7 million for pain, suffering and loss of amenities.

[34] I also award \$500,000.00 for the cost of the prosthesis. It will need replacement every 5 years for one part and every 2 - 3 years for the other. These recurring costs will occur for the rest of the 39 year old complainant's life. Applying a multiplier of 8 I award \$4 million dollars with respect to the future replacement of the device.

[35] In respect of handicap on the labour market I accept that, given the gravity of the injury and the fact he is not now in a job, a multiplier multiplicand approach to this aspect is appropriate. I bear in mind that I am assessing the difficulty he will have in obtaining employment due to his injury. His income at the date of the accident was \$7,200.00 per week for 6 months in the year. I apply a multiplier of 5, to take account for contingencies and the fact he will receive a present lump sum. The award for his head is therefore $\$7,200.00 \times 26 \times 5 = \$936,000.00$.

[36] As regards the claim for future help I will apply the minimum wage of \$3,700.00 per week 52 weeks and a multiplier of 8. This totals \$1,539,200.00.

[37] For extra help costs already incurred, I accept the claimant's evidence that he paid someone \$1,200.00 per day twice weekly. No doubt of course his father as he stated assisted him also but that is a recoverable expense. I therefore for the period March 2007 to December 2012 award $\$2,400.00 \times 52 \times 5 = \$624,000$.

[38] Both counsel agreed that exemplary damages are capped. In this regard therefore I award \$250,000.00.

[39] There will therefore be judgment for the claimant as follows:

General Damages

i)	Pain suffering and loss of amenities	-	\$7,000,000.00
ii)	Handicap on the labour market	-	\$ 936,000.00
iii)	Future medical care being cost of prosthesis and its periodic replacement and associated costs-		\$4,500,000.00
iv)	Cost of future help	-	\$1,539,200.00
v)	Extra Help already incurred	-	\$ 624,000.00
vi)	Exemplary Damages	-	\$ 250,000.00

Special Damages

i)	Medical related expenses	-	\$1,232,700.00
ii)	Transportation costs	-	\$ 12,500.00
iii)	Loss of earnings	-	\$1,192,000.00
iv)	Extra help up to date of trial	-	\$ 998,400.00

[40] Interest will run at 3% on general damages from the 13th March 2007 to the date of this judgment and on special damages from the 2nd November 2009 (being the date of service of the claim form) until the date of this judgment.

Costs to the claimant to be taxed if not agreed.

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David Batts
Puisne Judge