

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L. S. 279 OF 1992

BETWEEN MARK SCOTT PLAINTIFF  
A N D JAMAICA PRE-PACK LIMITED DEFENDANT

Janet Taylor for the plaintiff

Alexander Williams for the Defendant

HEARD ON: February 22nd,  
25th and 26th October 1993

JUDGMENT

COURTENAY ORR J.

On 13th December 1986, the plaintiff who was then an employee of the defendant was injured while on the job. His right index finger was amputated at the base of the middle phalanx while he was cleaning a mincing machine, and a fellow employee turned it on. He is right handed.

This is the assessment of damages in the action brought by the plaintiff to recover compensation for the injury received.

In the indorsement to the writ, the plaintiff claims for:

- (a) Breach of Statutory duty under the Factories Act.
- (b) Negligence
- (c) Breach of the Occupiers Liability Act.

The plaintiff himself and Dr. Christopher Rose, FRCS (Canada) Consultant Orthopaedic Surgeon gave evidence in support of the plaintiff's case. The defence called no witnesses.

The Court found the following facts:

The plaintiff was 19 years of age when he was injured and had been working with the defendant for only three (3) months. Upon being injured he was taken to the Medical Associates Hospital and treated but was not admitted; and regrettably although he

took the piece of of his finger which had been severed, the doctor was unable to join it to his hand again. He experienced much pain and still feels pain.

The Plaintiff returned to work on 27th February, 1987 was engaged in weighing items for two days, after which he told his boss Mrs. Young Kong that the was still experiencing a lot of pain and that he was unable to cope. He was told to go home and not return to the premises. He then left and has not worked since.

#### THE EXTENT OF THE DISABILITY

The amputation has left the plaintiff with just the first joint of his index finger. The tendons which control flexing are no longer functioning. He cannot hold anything properly with the right hand as the right index finger is a crucial finger second only to the thumb. His hand is not rendered totally useless but its effectiveness is limited because he is unable to lift heavy objects as this requires power. Again being unable to bend the remaining stump means that it gets in the way, for example, when he puts his hand in his pocket, and it is constantly being knocked against objects.

He currently has a grade 5 power grip, that is a normal grip, only in so far as it relates to the ability to hold one hand with another and be unable to pull out the hand that is being held.

The plaintiff has been experiencing tenderness along the volar aspect of the second metacarpal with tenderness extending along the volar aspect of the stump. Tenderness and pain is accentuated when the wrist and index finger is in the flexed position.

The pain which he is now experiencing is due to the tethering of the severed flexor digitorum profundus tendons, which is preventing the normal gliding motion of the flexor digitorum superficialis tendon which is partially intact. The flexor digitorum tendon was severed at the time of his traumatic

amputation and the proximal end has migrated into the palm of his hand. This has increased his disability and made him unable to use his hand as well as he would if this pain were absent. His current disability is 13% of the whole person. The problem of the pain in his hand may be rectified by an operation to excise the redundant flexor digitorum profundus tendon. After the operation he would have a permanent disability of 11% of the whole person.

The fees for the surgeon and anaesthetist will amount to \$5350.00. This does not include the hospital fee.

The plaintiff was totally disabled from 13th December 1986 to 17th February 1987.

The loss of the major portion of his finger has proved to be a handicap in his relations with members of the opposite sex. He is embarrassed by the injury and endeavours to hide it from women. They in turn cease to visit him when they discover his disability.

The plaintiff made a number of efforts to obtain other employment. At first he tried to learn carpentry, but this was unsuccessful: he could not manage to do the work properly. He also applied for jobs at Jamaica Flour Mills, West Indies Glass, the Cement Company, and Desnoes and Geddes. In all cases he did not succeed.

#### SPECIAL DAMAGES

There are six items of special damages in the statement of claim.

The first four have been agreed by the parties. The fifth and sixth items are for loss of earnings. They read as follows:

"Loss of earnings from April - September 1987 - 26 weeks at \$150.00	
\$150.00 per week	\$3,900.00
Partial loss of earnings from October, 1987 at \$100.00 per week up to 23/3/93- 227 weeks	\$27,700.00

Miss Taylor explained that the splitting of the claim for loss of earnings was done on the basis that the plaintiff

was entitled to compensation in full for the first period, and for the second period, she had deducted 1/3 on the ground that the plaintiff ought to mitigate his loss.

Mr. Williams noted that no evidence had been led concerning the period from the date of the accident to 17th February 1987, nor had loss of earnings for the period been pleaded. He submitted that 6 years was an unreasonable period to claim for the loss of earnings in this case. I do not agree. The plaintiff has given evidence of various unsuccessful attempts made by him to obtain employment, and moreover, the claim from October 1987 has been reduced by 1/3 which I regard as very reasonable having regard to the plaintiff's handicap, the high rate of unemployment and his attempts at obtaining work. I shall therefore award him the sums as claimed, that is, \$3,900.00 for loss of earnings and \$27,700.00 "for partial loss of earnings."

The award for Special Damages is therefore \$34,320.00 with interest of 3% from 13th December 1986. The details are as follows:

Medical Report	\$100.00
Paid Dr. Rose: Office Visit Aug. 6 - September 3, 1992	420.00
Medical Report Sept. 1992	1,100.00
Physiotherapy August/ September	1,100.00
Loss of Earnings (as above)	3,900.00
Partial Loss of Earnings (as noted above)	<u>27,700.00</u>
	<u>\$34,320.00</u>

#### GENERAL DAMAGES

##### (a) Pain and Suffering and Loss Amenities.

Two cases were cited, one by each counsel. I have updated the awards cited by using the table at Page 245 of

Mrs. Ursula Khan's digest of recent Personal Injury Awards Vol. 3, and the latest consumer price index All Jamaica All Groups, published by the Statistical Institute of Jamaica. The index for August 1993 stands at 481.9.

(1) LEROY MILLS vs ROLAND LAWSON & KEITH SKYERS

Reported at page 124 of Vol. 3 of Mrs. Khan digest (supra).

Award made January 1989.

Plaintiff 43. Right handed. Mechanic

INJURIES:

- (a) Fracture of all digits of the right middle finger
- (b) Compound dislocation of the middle phalanx of the right index finger.
- (c) Compound fracture of the distal phalanx of the left second and third toe.
- (d) Posterior dislocation, of the distal inter-phalangeal joint of the right ring finger.
- (e) Laceration across the middle, ring and index fingers.

DISABILITY:

Deformity of distal phalanx of right index finger.

Reduced power in right hand. Permanent partial disability of the right upper limb assessed at 20%.

Dr. Emran Ali, Orthopaedic Surgeon was of the opinion that the plaintiff would have difficulty in using tools such as a wrench in his occupation.

AWARD:

\$50,000 for pain and suffering and loss of amenities and \$60,000 - for handicap on the labour market.

This award when updated amounts to \$215,500 approximately.

(2) WAYNE GRIFFITHS vs DUNCAN BECKFORD & THE ATTORNEY GENERAL

Reported at p. 114 Vol. 3 of Mrs. Khans Digest

Award made 4th October 1989.

Plaintiff 28 year old chain saw Operator and farmer.

**INJURIES**

- (a) Loss of distal phalanx of right 4th finger.
- (b) Laceration to right foot.
- (c) Swollen and bruised right jaw.

**RESULTANT DISABILITY:**

Permanent disability and loss of function of right hand but not to a major degree. Awarded \$15,000.00 for Pain & Suffering and Loss of Amenities. This is equivalent to approximately \$59,495.00 today.

Mr. Williams submitted that the injuries in that case were greater and suggested that an award of \$42,000.00 is appropriate. I do not agree. I find that Mr. Scott's injuries are greater having regard to the very specific finding of the 11% disability of the whole person, and I regard the index finger as more important than the 4th finger which was the finger injured in the second case cited.

In addition to the cases cited I also considered the case of **EVERALD SLATER vs ADOLPH SPARROW** (Reported at p. 129 of Vol. 3 of Mrs. Khan's digest (supra)).

Award made 5.3.90. Plaintiff Security Officer Messenger. Left handed.

**INJURIES**

- 1. 2½ laceration of left index finger.
- 2. Comminuted fracture to the proximal phalanx of the left index finger.
- 3. Stiffness of the proximal and terminal interphalangeal joints of the left index finger.
- 5. Permanent partial disability of 10-15% of the left hand.

**DISABILITY**

Plaintiff now found writing to be more laborious than before. Would be unable to use gun with dexterity if called upon; but was not then using

a gun in his occupation.

Award \$35,000 for Pain and Suffering and Loss of Amenities; \$8,000 for Handicap on the Labour market.

Using the table indicated above the award for Pain and Suffering would be worth \$125,125.00 today.

The injuries in that case are less serious than those of Mr. Scott as there the plaintiff merely suffered a shortening of his index finger and consequently his disability was less.

The range indicated by these awards is from \$54,495.00 in Griffiths case to \$215,500.00 in Leroy Mills, case.

In the Mills case, the disability to the right upper extremity was assessed at 2% more than that of the plaintiff in this case. But I think this difference is counter balanced by the long period of pain (6 years), the need for a further operation and the social rejection of females. I am of the opinion that an award of \$125,00.00 is appropriate in the instant case and I award the plaintiff Mark Scott accordingly.

#### PROSPECTIVE MEDICAL EXPENSES

A statement of the fees chargeable by Medical personnel to perform the corrective surgery needed was tendered by consent, and I award the plaintiff the sum of \$5,530.00 as stated therein.

The parties were unable to agree on the hospital fees. The information given to the Court on which both parties were agreed is that a spokesman for the hospital had indicated that the fee payable for one days use of the hospital is between \$2,000.00 and \$3,000.00 and that the hospital requires a deposit of \$3,000.00 to \$4,000.00. In this certainty Mrs. Taylor asked for \$3,000.00 while Mr. Williams submitted \$2,500.00 is adequate. I am of the opinion that it is more likely than not, that the fee will be \$3,000.00 and I am fortified in this opinion by the fact that the hospital requires a deposit which may exceed this

monetary terms the loss which he will suffer in prospective earnings. In O'Keefe vs John Stewart Shipping Co. Ltd. [1979] 1 Lloyds Report 182, Kenneth-Jones, J, said that there were two methods of assessing loss of future earnings in a case such as this, where there is little evidence which one may use as a basis for estimating future earnings. Each method starts by considering the amount properly due to him by taking his present loss of earnings on an annual basis and applying to that figure an appropriate multiplier for a man of his age and with his working life expectancy.

Kenneth-Jones J, further explained the methods, at page 189. He said:

"The first of those two methods would be to deduct from that total figure [i.e. the annual loss at date of assessment] a sum representing my estimate of his chances of gaining and maintaining remunerative employment .....; or the other method would be to regard his chances of obtaining and maintaining such employment as an additional matter of which, account should be taken in determining the multiplier."

Mrs. Taylor favours the first method, she submitted that the Court should find that his present earnings if he had not been injured would be \$600.00 weekly. She then suggested that this figure should be halved on the assumption at the current minimum wage of \$300.00 per week. She would then apply a multiplier of 16 years purchase. The resulting equation would be  $\$300.00 \times 52 \times 16$  which would amount to \$249,600.00.

Like Kenneth-Jones J, I prefer the second. I regard his reasons for that choice as tailor-made for this case, and quote and adopt them. He said at pages 189-190:

" I have practically no firm evidence upon which to pass any estimate of his future earnings or upon which to form a completely reliable view as to his chances of obtaining such employment in future and keeping it if did obtain it. I therefore find myself quite unable to adopt the first of these two alternative methods. I shall therefore adopt the second, and take account of his

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chances of obtaining employment in the future in selecting the multiplier to be applied to his present earnings."

Kenneth Jones J, having found that the "usual multiplier for the plaintiff in that case was 10, then went on to reduce it to 7 to account for all the variables. That plaintiff was 45 years old with a working life of 20 years.

Having decided on the method of computation, I must now arrive at an estimate of the plaintiff's current loss of earnings, and then choose an appropriate multiplier.

In Blair vs. J.F.C. Bailey (Marine) Ltd. 1981 Scots Law Times 90 at page 92, the Second Division described their task in that case in the following words:

"Except in cases where there are figures which can provide mathematical certainty, the assessment of wages in a non-existent situation where there are imponderables on both sides must of necessity be a somewhat arbitrary figure arrived at by using a broad sword with a blunt edge."

The Court held that it was legitimate to compute the pursuer's loss of wages to the date of trial on what a labourer could have earned since the date of the accident. There the pursuer had lost an arm in an accident at work and had been employed for only a brief period as a general message boy since the accident. He was unemployed at the time of the trial.

I adopt this principle and consider that the current minimum wage of \$300.00 per week forms a proper basis for calculating this plaintiff's loss of future earnings, as that figure represents the minimum he could be earning today. His present annual loss is therefore \$15,600.00. Of course I am well aware that he may well have been earning much more than this if the accident had not happened, and I take this possibility into consideration in fixing the multiplier. I think that a multiplier of 14 is appropriate. I therefore award him \$15,600.00 at 14 years purchase. This amounts to \$218,400.00.

HANDICAP ON THE LABOUR MARKET

I agree with Mrs. Taylor's submission that the plaintiff should also be given an award under this head. She advocated the use of a multiplier and multiplicand. Mr. Williams, on the other hand submitted that a modest lump sum of \$10,000 to \$15,000.00 was the appropriate award. I regard Mr. Williams's submission as totally unsupported by the facts of this case and the relevant law. It is very 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. His, is not merely a risk of unemployment, but a fact, and as Browne L. J pointed out in Cook vs 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.

In view of the paucity of evidence concerning this plaintiff's earning ability and prospects, and the many uncertainties involved, and the fact he had only worked for a short time, I am of the opinion that the multiplier/multiplicand approach is inappropriate in the instant case, and will therefore give the plaintiff a lump sum. In doing so I take into consideration his age, his working life expectancy which I have already found to be 40 years, the nature and extent of his disability, his qualifications, the limitations which his disability has placed on the types of jobs which he may do, and the unemployment situation. I have also taken into account the disadvantage and disappointment to the plaintiff of not being able to pursue his chosen career, the chance of his not succeeding in it or even surviving the course in food and nutrition and business management.

(See Comer vs Bolton 187 CL Y 1159). I might also add that I find that for the rest of his working life he is likely if employed at all, to be employed at a very low remuneration.

In all the circumstances I think a sum of \$70,000.00 is appropriate.

In summary, the decision of the court is as follows:  
Damages assessed at \$546,070.00 being special damages of \$34,320.00 with interest of 3% from 13th December 1986 and General Damages of \$511,750.00 of which \$215,000.00 for pain and suffering and loss of amenities shall bear interest at the rate of 3% from the service of the Writ, 27th January 1993. Costs to the plaintiff to be taxed if not agreed.