

*Filing Cabinet*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. CL. 2001/ T 026

BETWEEN	JOTHAM TREASURE	CLAIMANT
A N D	THOMAS BONNICK	FIRST DEFENDANT
A N D	TYRONE EDWARDS	SECOND DEFENDANT
A N D	DONOVAN GRIFFITHS	THIRD DEFENDANT
A N D	ANDREW CHAMBERS	FOURTH DEFENDANT

Mr. Christopher Samuda instructed by Samuda and Johnson for the Claimant  
Mr. Charles Campbell for the Third Defendant  
The First Defendant was never served  
Second and fourth defendants not appearing or being represented

**Practice and Procedure – Whether the owner of a vehicle is able to defend claim  
when default judgment previously entered against driver – Whether owner entitled  
to participate in assessment of damages if defence struck out  
Assessment of Damages – Personal Injury – Fracture of right clavicle – Deformity  
resulting - Pain enduring several years later – Quantum to be awarded**

**March 10, 11 and 28, 2008**

**BROOKS, J.**

Sergeant Donovan Griffiths found himself in a very unusual situation when this matter came on for trial. He was prepared to place his defence before the court but was stymied by the fact that a judgment in default of appearance had already been entered against the driver of his vehicle which was involved in the collision which caused injury to Mr. Jotham Treasure. The question which faced the court was, did Sgt. Griffiths, who was not an eye-witness to the collision, and did not intend to call such a witness, have a real prospect of success in defending the claim.

In the absence of any such prospective evidence I ruled that the Sergeant's defence be struck out as an abuse of the process of the court. The claim would therefore proceed as an assessment of damages. Mr. Samuda for Mr. Treasure, at that time objected to Sergeant Griffiths' counsel Mr. Campbell cross-examining Mr. Treasure or making submissions in respect of the damages to be awarded. I ruled that the judgment against Sergeant Griffiths should be treated as a judgment on admission and that Mr. Campbell could so participate. Upon further reflection, perhaps it would have been more appropriate for summary judgment to have been ordered, leaving the aspect relating to damages in place. (See *Dummer v Brown and another* [1953] 1 All E.R. 1158)

In considering the appropriate award for damages, I shall first address the question of general damages, in particular pain and suffering and loss of amenities and handicap on the labour market.

### **General Damages**

#### Pain and Suffering and Loss of Amenities

Mr. Treasure was seated on the rear seat of Sergeant Griffiths' vehicle when the collision occurred on the 10<sup>th</sup> June 1999. He suffered a brief loss of consciousness at the time of the collision. He consulted with, and received a medical report from, Dr. Francis Lindo a Consultant Orthopaedic

Surgeon. The report, which is dated January 21, 2000, stated that Dr. Lindo first saw Mr. Treasure on 13<sup>th</sup> August 1999. At that time Dr. Lindo observed that Mr. Treasure had a healed fracture to his right clavicle (collar-bone). There was also visible and palpable lump on the collar-bone at the fracture site. Dr. Lindo prescribed analgesics for Mr. Treasure's then pain, and his assessment was that Mr. Treasure "has no measurable impairment and an excellent prognosis for normal function".

Mr. Treasure's experience, on his evidence, was very different from that positive assessment. He said that he felt pain to his shoulder when working and when sleeping in certain positions. The pain lasted for some eight months after the injury was sustained. He said that as a result of the pain he had to leave a job which required him to wash cars and take another job at a cabinet making establishment. At the time of giving his witness statement he gave his occupation as an apprentice mechanic.

His evidence was supported by a medical certificate by Dr. Lloyd Brooks dated October 12, 2007. Dr. Brooks does not seem to have any specialist training in orthopaedics. He saw Mr. Treasure on 15<sup>th</sup> September 2007. Dr. Brooks then found Mr. Treasure to be "having severe pains in the right shoulder, the movements are reduced and his right arm is weak thus causing him to be unable to perform his normal functions".

Dr. Brooks noted the deformity in the region of the claviculo-acromial joint of Mr. Treasure's right shoulder. The doctor prescribed anti-inflammatory medication for the pain and recommended that Mr. Treasure "see me on regular intervals for follow-up".

Mr. Samuda stressed the fact that almost nine years after the injury was first sustained Mr. Treasure was still experiencing pain as a sequel. He submitted that the case of *Mahtani v Wright and Vault Realty Co. Ltd.* 5 Khan 94 provided a good guide to the level of damages to be awarded under this head. Mr. Mahtani suffered fractures to both clavicles but was left with no functional disability. There was a bony prominence on one of the clavicles and he "experienced discomfort at the site of the bony prominence". The award of \$350,000.00 made in May 1999 updates to just over \$843,500 using the January 2008 Consumer Price Index (CPI) of 119.4. Based on the extended period of Mr. Treasure's suffering, Mr. Samuda submitted that the appropriate award under this head would be \$1,200,000.00.

Mr. Samuda highlighted Dr. Brooks' statement that Mr. Treasure should see Dr. Brooks at regular intervals. He said that that statement made it "absolutely clear that [Mr. Treasure] will suffer for the rest of his life". I do not share Mr. Samuda's conclusion. The statement has no such

implication. Had that been the situation the doctor could have easily said so. There has been no medical diagnosis given by the doctor. This is perhaps because the injury and its sequela are outside his area of expertise.

Mr. Campbell referred to *George Mykoo v Andrea Blake* Harrison's Casenote issue 2 page 13. Mr. Mykoo suffered the fracture of one clavicle and had his arm in a sling for two months. There was a resultant 10% partial disability of the left upper limb. An award of \$55,000.00 made in July 1992 converts to approximately \$395,000.00 in today's money. Bearing in mind the extended period of time, Mr. Campbell submitted that a sum of \$650,000.00 would be the appropriate award.

I have also considered the case of *Turkhiemer Moore v Elite Enterprises Ltd. and Brown* 5 Khan 96. In that case Mr. Moore suffered unconsciousness, multiple bruises and a fracture to the right clavicle as a result of being hit by a motor vehicle. He consulted an orthopaedic surgeon a year after the injury was sustained, because of the persisting pain. He was assessed as having a 2% whole person disability. When giving evidence six years after the date of the injury, Mr. Moore said that he was still feeling pain in the shoulder, and that he had had to leave a previous employment as a result of the injury. The award of \$275,000.00 made in February of 2000 converts to approximately \$620,000.00 using the January 2008 CPI.

I find that in relation to the injuries, the *Moore* case and the instant case are very similar. I would however, accept Mr. Campbell's submission, based on Mr. Treasure's longer period of suffering, that the figure of \$650,000.00 is an appropriate award for pain and suffering and loss of amenities.

#### Handicap on the Labour Market

Mr. Samuda made a strong submission that an award for handicap be made to Mr. Treasure. The bases for the submission were:

- a. the fact that Mr. Treasure has had to leave one job as a result of his injury and;
- b. Dr. Brooks' recommendation that Mr. Treasure sees him at regular intervals for follow-up.

I do not accept that there is any medical support for a claim for handicap on the labour market. I have already given my opinion of the interpretation of Dr. Brooks' report. It does not satisfy the requirement that there be "medical evidence confirming the likelihood" of Mr. Treasure being "thrown out on the labour market because of his injury", or of his being "at a disadvantage in competing for a job with other injury-free persons". (See the judgment of Harrison P. (Ag. as he then was) in *Dawnett Walker v Hensley Pink* SCCA 158/01 (delivered 12<sup>th</sup> June 2003) (page 11).) Mr.



