IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1989/A022

BETWEEN	DERRICK ANDERSON	PLAINTIFF
AND	RALPH HOLNESS	DEFENDANT

Orrin Tonsingh for Plaintiff.

Dennis Goffe instructed by Myers Fletcher & Gordon for Defendant.

OCTOBER 12, 1990, MARCH 6, 7, 8, 14, 15, 1991 AND JULY 31, 1991.

ASSESSMENT OF DAMAGES

CLARKE, J.

This matter comes up before me for assessment of damages awardable to the plaintiff. The liability of the defendant is not in dispute. It arises out of a road accident on or about 5th June, 1988 in which the plaintiff sustained serious injuries when his motor cycle he was riding collided with a car owned and driven by the defendant. The plaintiff was thereupon taken to the Mandeville Hospital and was shortly afterwards transferred to the University Hospital of the West Indies. There, doctors clinically examined him and found the following injuries:

1. multiple lacerations to the anterior chest wall, left forearm and both thighs;
2. fractures of the left clavicle and left 1st rib;
3. a comminuted fracture of the left femur;
4. left brachial plexus damage;
5. damage to left axillary artery;
6. contused left lung.

At surgery in the main operating theatre where he was taken there was evidence of extensive damage to the brachial plexus. The doctors, led by Dr. A. McDonald, consultant surgeon, attempted to repair the left axillary artery but as this proved to be technically impossible they ligated the artery. They effected a debridement of the wound on his left thigh and

inserted a Steinman pin in the left leg. They also performed a tracheotomy to facilitate positive pressure ventilation which was applied to the plaintiff for approximately five days in the Intensive Care Unit. The orthopaedic staff then applied traction to the left leg and at the time of his discharge from hospital on 18th August, 1988 his entire left leg was in a cast.

Dr. McDonald opined that the plaintiff's injuries were very serious and should result in severe disabilities: injury to the left brachial plexus would result in a 100% loss of function of the left upper limb; the fracture of the left femur would likely result in shortening of the left lower limb, and the laceration would result in permanent scars.

That forcast is confirmed by Dr. Emran Ali, consultant orthopaedic surgeon, who examined the plaintiff on 31st May, 1989 for the purposes of medical certification.

In the opinion of Dr. Geoffrey Williams, consultant plastic surgeon, who saw the plaintiff on 21st April, 1990 the cosmetic disability will be largely removed if cosmetic surgery is done to correct the unsightly scars on the lower part of the front of the neck and across the chest.

The plaintiff said that after the impact he lost consciousness and that when he came to, he found himself in the University Hospital. He found that he could not move his left arm and left leg and could only breathe by means of a contraption connected to his neck. He remained in hospital for over two months. He is aware that his left leg is shorter than his right leg. If he walks half mile his left knee pains and his leg at the point of fracture becomes swollen. His left arm, significantly smaller than his right arm, has no power and the fingers of that hand pain him.

The plaintiff is 28 years old. He lived with his girlfriend and their young child until some six months after the accident when his girlfriend left him and the child. He was an enterprising and resourceful young man. Up to the time of the accident he pursued three occupations viz., motor mechanics, ice cream vending on Sundays, and farming, earning an income from each. Because of the injuries he cannot himself work as a mechanic or farmer or ride a motor cycle around to sell ice cream on Sundays. Nor can he perform

do-it-yourself chores at home as he was wont to do before the accident. Prior to that he used to swim, play football and run. He also would ride his motor cycle to do business and to fulfil social engagements. He cannot now engage in those activities.

The two categories under which the damages are to be assessed are:

1. Special damages.
2. General damages.

SPECIAL DAMAGES

Doctors fees and the cost of medical reports have been agreed at $1,500.00. As Mr. Tonsingh concedes the claims for both the cost of medication and transportation of relatives to and from hospital have not been proved. The value of the loss of the plaintiff's motor cycle has been proved as claimed and so I allow that sum together with the assessor's fee less $40.00. The $40.00 is the cost of photographs but those were unnecessarily taken. Except for the claims for loss of earnings, extra help, do-it-yourself chores and additional transportation expenses, all the other items of special damages have been proved to the full extent claimed. The special damages thus far shown to be proved or agreed add up to $11,564.00.

(a) Loss of earnings

The plaintiff pleaded in his particulars loss of earnings at the rate of $1,000.00 a week. Mr. Tonsingh submitted that on the evidence I should find that the plaintiff's earnings from the date of the accident to now should be computed at the rate of $538.00 a week before tax, on the basis that the plaintiff would have earned $88.00 a week from ice cream vending, $350.00 a week from work as a motor mechanic, and $100.00 a week from farming.

In testifying as to his pre-accident earnings as an ice cream vendor the plaintiff said he would sell about two boxes of ice cream per Sunday. He did, however, make it clear that he would sometimes sell 95 cones out of a possible 100 cones per box. That would work out to 190 cones from the two boxes. As Mr. Goffe said in argument, that gross income of $88.00 a week is predicated on the incorrect assumption that the plaintiff would sell 190 cones of ice cream every Sunday without fail. It was not the plaintiff's evidence that he was able

to do that. I agree that it would be more realistic to treat the sale of 190 cones of ice cream as an optimum sale which the plaintiff would achieve only on some Sundays. Bearing that in mind I would substitute the more likely sum of $60.00 in the round as the plaintiff's pre-accident profit from his Sunday ice cream vending.

The plaintiff derived his main source of income from his work as a motor mechanic at Joe Nehmiah's Garage in Littiz, St. Elizabeth. He said that Mr. Nehmiah would pay him $350.00 a week and sometimes $1,000.00 a week depending on how the jobs came in. He said that he would be paid an average weekly wage of $350.00. He did not adduce evidence as to how the average was arrived at. Although his evidence about his weekly wage is uncontradicted it does not follow that it is credible. It lacks sufficient particularity. I agree with Mr. Goffe that as the plaintiff has not given evidence of sufficient instances of the quantum of weekly earnings it would not be reasonable to accept his evidence that $350.00 was his average weekly wage as a motor mechanic. In the circumstances I have to do the best I can by putting on my "jury cap". That done, I allow the sum of $250.00 a week as the average.

Since before the accident the plaintiff and a partner have been operating a farm and sharing the profits of that joint venture. Prior to the accident both he and his partner would plant peanuts on the farm. He would sometimes do two days a week manual labour. This he has been unable to do since the accident. Since then there has been an additional expense of $100.00 weekly arising from the need to hire a labourer to work an extra two days in place of the plaintiff. Mr. Goffe submitted that that loss must be borne not by the plaintiff alone but by the joint venture. I do not agree. The labourer does the extra two days' work in place of the plaintiff who, but for the accident, would perform that task as part of his contribution to a joint venture in which his partner would also render his share of manual work. Since the accident the plaintiff makes his contribution by engaging the labourer to do the extra two days on his behalf. So the cost of paying for the additional work is a loss that the plaintiff alone bears and for that he ought to be compensated. In quantifying his loss I bear in mind the nature of the work involved and the fact that the evidence shows that it is not every week that the two additional days are worked. I find that, allowing for all

the factors, one additional day's work per week worth $50.00 is reasonable.

Adding up the incomes from the three sources the total comes to $360.00 a week. Taking away one sixth for income tax the net figure is $300.00 a week. Therefore the plaintiff's loss of income from 5th June, 1988 to now is $300 x 163 weeks = $48,900.00.

(b) Extra domestic help

The plaintiff did not employ domestic help prior to the accident. Since his discharge from hospital in August 1988 a domestic helper has been assisting him for three days a week at $50.00 a day.

Mr. Tonsingh divided the claim for extra domestic help into two periods. (i) the first six months after discharge when the plaintiff would be completely incapacitated and (ii) from the end of the first six month period until now.

With respect to the first period the plaintiff claims $3,900.00 and this has not been challenged. That sum represents the cost of paying his domestic helper $50.00 a day for three days a week over that six month or 26 week period.

For the second period Mr. Tonsingh asked the court to award $50.00 a day for two days and not three days a week, on the basis that, if the accident had not occurred, the plaintiff would need domestic help for one day a week in the absence of his girlfriend from the home. Mr. Goffe submitted rightly, in my view, that the plaintiff can justify no more than one day a week because account must be taken of the need to have someone look after the plaintiff's infant son, a need that did not result from the accident, but from the departure of the child's mother from the home. So, in any event, a helper would have been required to look after the child. Therefore with regard to the second period I hold that a helper for one day a week is reasonably attributable to the plaintiff's own needs as distinct from the child's needs. So I allow for this period $6,850.00 (50 x $137).

I award therefore the sum of $10,750.00 ($3,900.00 plus $6,850.00) with respect to the claim for past extra domestic help.

(c) Cost of do-it-yourself chores

It is true that the 100% functional disability of the left upper limb is not that of the dominant upper limb. In fact, the evidence shows that with his right hand he can, for instance, use a cutlass to chop a standing tree, or paint a wall with a roller. He, however, also has a permanent partial disability of 20 to 25% of the left lower limb. Because of his disabilities he has lost the ability to do certain tasks such as to 'chop' his yard. I accept his evidence that he has had to hire someone to 'chop' his yard twice a month at a cost of $20.00 each time. He has also proved that he had to pay someone $200.00 to repair a window of his house damaged in September 1988 by Hurricane Gilbert, a task that he would have been able to do were it not for the accident.

So, I assess the past loss of do-it-yourself chores at $40.00 a month for 37 months plus $200.00. That comes to $1,680.00.

(d) Claim for additional transportation expenses

The plaintiff can no longer ride a motor cycle. He experiences pain and discomfort, when he walks half mile. He takes public transport three miles from his home in Warmington, St. Elizabeth, because that is the nearest point from his home where the service is provided. So he says he takes a taxi from his home to that point and then takes public transport to attend the cinema in Santa Cruz, or to visit relatives in Mandeville or to travel to Kingston. He returns home by public transport save for the last three miles when he travels by taxi.

The plaintiff has not satisfied me that his post-accident transportation costs exceed his pre accident costs of operating and maintaining his motor cycle. I therefore make no award under this item of special damages claimed by him. However, his loss of the ability to ride a motor cycle is, as Mr. Goffe submitted, a loss of amenity which must be taken into account under the head of general damages for pain and suffering and loss of amenities.

In the result the special damages proved total $72,894.00.

GENERAL DAMAGES

General damages awardable to the plaintiff fall under two broad heads, namely (1) non-pecuniary loss and (2) future pecuniary loss.

(1) Non-pecuniary loss.

The plaintiff is entitled under this broad head of damage to be awarded fair and reasonable compensation once and for all on the basis of the physical injuries he sustained resulting in pain and suffering and loss of amenities past, present and future.

He sustained three sets of injureis: (1) injuries to the lower limbs, (2) injuries to the left upper limb and (3) injuries to some other parts of the body.

It will be recalled that the injuries to his lower limbs comprised lacerations to both thighs and a comminuted fracture of the left femur. As a result there is anterior bowing of the left leg and flexion of the left knee is limited from 0-70°. The left lower limb is 2 inches short and he walks with an obvious limp. All that has led to a permanent partial disability of 20-25% of the functions of that limb. If those and their attendant physical consequences stood alone Mr. Tonsingh submitted that an award of $200,000.00 would be appropriate. Bennett v. Gibson & Anor. (noted in Khan's Vol. 2 at p. 6 and cited by Mr. Tonsingh) is comparable to the instant case in terms of the particular injuries and resultant disability now under discussion. I will use that case as a guide to determine an appropriate quantum of compensation if the injuries in question and their physical consequences were all that the plaintiff suffered.

In Bennett's case a compound fracture of the lower third of the right tibia and fibula as well as a compound comminuted fracture at another section of the tibia and fibula resulted in a 3/4" shortening, stiffness of the ankle, a limp and a permanent partial disability of 25% of the right lower limb which would be 15 to 20% if he had undergone a certain orthopaedic operation. Vanderpump J. assessed general damages for pain and suffering and loss of amenities at $40,000.00. The learned judge made the assessment in November 1981.

Now, in the absence of evidence of the precise effect of inflation upon the value of money since 1981 or any subsequent date, the $40,000.00 award in Bennett's case would now in my judgment, be worth some $130,000.00.

See Junior Freeman and Anor. v. Central Soya of Jamaica Limited and Anor. (Unreported S.C.C.A. 18/84) and Hepburn Harris v. Carlton Walker (Unreported S.C.C.A. 40/90) where the Court of Appeal provided in each case an elastic percentage yardstick for measuring the depreciation of the Jamaican dollar - 75 to 100% between 1978 to 1984 in the Junior Freeman case and in the Hepburn Harris case an upper limit of 150% increase in 1990 upon a 1986 award for a similar injury.

As to the second set of injuries (the injuries to the left upper limb) it will be remembered that the plaintiff sustained lacerations to the left forearm and, more importantly, damage to the left brachial plexus and to the left axillary artery. That has led, as Dr. Ali found, to a complete left brachial plexus palsy with a useless frail upper limb. In the words of Dr. McFarlane the plaintiff's "left arm is grossly wasted (loss of muscle tissue) paralysed and useless." The plaintiff himself deposed that he cannot move his left upper limb which he said pains him. When shown a pen and asked by Mr. Goffe to hold it with his left hand, not only did the plaintiff say he couldn't do so, but it appeared that he couldn't even attempt to do so. All that is consistent with the medical evidence that he suffers 100% functional disability of the left upper limb. Mr. Tonsingh found no Jamaican cases involving injury to the brachial plexus and so he thought that that justified recourse to English cases. I agree with Mr. Goffe that what would be more helpful are Jamaican or West Indian cases where plaintiffs have lost either completely or substantially the function of an upper limb. I will look at three such cases noted in Khan's Volume 3 as I regard those as helpful.

The first case is Aston Fitten v. Michael Black Limited and Anor. (Khans Vol. 3 pp. 97 and 98). There the plaintiff, aged 37 years, sustained in an industrial accident a traumatic amputation through the middle of the right humerus resulting in 100% disability of the right upper extremity (above elbow amputation) or 57% permanent partial disability of the whole man. He became unable to play cricket or swim and suffered a loss of libido. Wolfe J. awarded him $53,000.00 general damages for pain and suffering and loss of amenities.

In the second case, Carlton Smith v. Jasper Adams and Others (Khan's Vol. 3 pp. 95 and 96) the plaintiff, a right handed man, sustained extensive damage to his right upper limb. Though his brachial artery was repaired the arm became septic and had to be amputated. The resultant disability was 100% of the right upper extremity or 60% permanent partial disability of the whole man. He could no longer play cricket or football or take part in athletics. In October 1988 Patterson J. assessed general damages and loss of amenities at $180,000.00.

The third case is Winston Shaw v. Franklyn Francis (Khan's Vol. 3 pp. 93 and 94). There the main injury of the plaintiff, aged 24 years, was a compound fracture of the right upper arm which led to an above elbow amputation of the right upper limb and to 100% disability of that extremity. No longer could he play football or do anything that required the use of both arms. In November 1989 Reckord J. awarded the plaintiff $125,000.00 general damages for pain and suffering and loss of amenities.

Again, in the absence of evidence of the effect of inflation upon the value of our currency since those awards were made I would say, applying the Harris v. Walker adjustable percentage yardstick, that those awards would be worth respectively in the money of the day $180,000.00, $250,000.00 and $190,000.00 in the round. I arrive at those sums by allowing for depreciation of 100% of the value of the 1987 award, 75% of the value of the 1988 award and 50% depreciation of the value of the 1989 award. These awards would show an average of $210,000.00 in the round, a sum that would, in my opinion, be fair and reasonable compensation to the instant plaintiff for the injuries to his left upper limb and the physical consequences of those injuries. It is to be observed that in the Carlton Smith case, where the highest award was made, that plaintiff was right handed and lost his right arm.

In the instant case, however, it is the left upper limb of the plaintiff, a right handed person, that is completely disabled. His right hand, the dominant hand, appears to be healthy and strong. Yet, those factors are balanced by this: the fingers of his useless, frail and unsightly left upper limb pain him frequently.

The third set of injuries involve no real disability and so are compensable in terms of pain and suffering. Those injuries include a fractured clavicle with a bony deformity over the fracture due to mal-union. Wounds to the neck and chest and lower thigh have produced scars. Cosmetic surgery will be done to remove prominent and unsightly scars on the neck and across the chest. When that is done the plaintiff's appearance will improve. I take that into account as well as the fact that the cost of removing these scars will be allowed under a separate head of damage. If the injuries of the third set were the only ones he sustained I would assess general damages for pain and suffering at $45,000.00. See, for instance, Beryl Wilson v. Ernest Evans (Khan's Vol. 2, p. 127) where in 1982 Wright J. (as he then was) assessed general damages at $7,000.00 on the basis that that plaintiff suffered a fractured left clavicle and rib.

While I must take into account the nature and type of the whole range of injuries sustained by the plaintiff, it is their physical consequences which measure the loss under this head of damage for which he is to be compensated. So where as here injuries are itemised and a sum is assessed for each set of injuries, I am mindful of the danger of overlap or even duplication in arriving at the total sum. But as the first two sets of injuries involve significant and permanent disabilities, it is appropriate, I think, to add the calculations made in respect of those two sets. That would come to $340,000.00. As the third set of injuries will involve no permanent disability and resulted mainly in pain and suffering I would instead of adding the full $45,000.00 add only $10,000.00 to the $340,000.00.

I therefore assess general damages at $350,000.00 for the plaintiff's injured and disabled left upper limb and left lower limb, total pain and suffering and loss of amenities.

(2) Future pecuniary or financial loss

Under this broad head of damage the plaintiff will receive, all at once, compensation for losses spread over many years to come. He is, however, only entitled to receive the present value of the prospective loss which can only be a broad estimate based on the facts and probabilities of this case.

See British Transport Commission v. Gourley [1956] AC 185 at 212, per Lord Reid. I will assess these damages under four heads namely (i) future loss of earnings, (ii) cost of future do-it-yourself chores (iii) cost of future domestic help and (iv) cost of future medical treatment.

(i) Future loss of earnings

The plaintiff suffers an actual and demonstrable net loss of earnings at the rate of some $300.00 a week at the date of assessment and this rate of loss is likely to continue into the future. Though he was trained as a motor mechanic he cannot himself work as one. As Mr. Tonsingh pointed out, if he employs a trained mechanic he will most likely have to pay that mechanic in the region of what he himself was paid as a trained mechanic. And while he must mitigate his loss he is not required to be an entrepreneur blessed with great business acumen.

So, taking into account the circumstance that the type of work for which he was trained is no longer open to him, that he is otherwise unskilled and uneducated and that he is significantly permanently disabled, I consider him to be a person with virtually no earning capacity. He is 28 years of age. There is no evidence that his injuries have reduced his life expectancy. However, in determining the appropriate multiplier I must also allow for contingencies and imponderables and the fact that an immediate lump sum payment will be made. In all the circumstances I take a multiplier of 12 years purchase. Applying it to the multiplicand of $300 a week, damages for future loss of earnings come to $187,200.00 ($300 x 52 x 12).

(ii) Cost of future domestic help

Extra domestic help for one day a week at $50.00 is reasonable in the circumstances. This comes to $2,600.00 per year. The multiplier to be used is based on the plaintiff's life expectancy and not on his would-be working life because necessary domestic help will normally be required beyond a person's working life.' See Daly v. General Steam Navigation Company Limited [1980] 3 All E.R. 696. While there is no evidence of the plaintiff's life expectancy there equally is no evidence that his life expectancy has been reduced. So, having regard to his age I take a multiplier of 18 and arrive at $46,800.00 (50 x 52 x 18) damages under this head.

(iii) Cost of future do-it-yourself chores

I find that the plaintiff will be unable, or will find it extremely difficult, to do certain chores in or around his house. He would, as he said, find it difficult to put hammer to nail, to cut the grass in his yard or to paint. Other chores are likely to arise that he will not be able to do around the house and which will put him to expense to have done. Using as a base the $40.00 per month he pays since the accident to have his yard brushed I estimate that $50.00 a month by way of expenses is the present value of what the future loss under this head is likely to be. Applying a multiplier of 18 (as in the case of the cost of future domestic help) I arrive at $10,800 damages ($50 x 12 x 18) as the cost of future do-it-yourself chores.

(iv) Cost of future medical treatment

The plaintiff will incur a cost of $22,525.00 for surgery to remove the large and ugly scars from his neck and chest. I award that sum as the final item of the plaintiff's future financial loss.

Summary of Award

Special damages		$ 72,894.00
General damages:		
(a)	Injured and disabled left upper limb and left lower limb, total pain and suffering and loss of amenities	350,000.00
(b)	Future loss of earnings	187,200.00
(c)	Cost of future domestic help	46,800.00
(d)	Cost of future do-it-yourself chores	10,800.00
(e)	Cost of future medical treatment	22,525.00
	Total general damages	$617,325.00

I award interest at 3% per annum on the special damages of $72,894.00 from 15th June, 1988 to today. I also award interest at 3% per annum on general damages on $350,000.00 at (a) above from 4th March, 1989 the date of the service of the writ, until today.

The defendant must pay the plaintiff's costs which are to be taxed if not agreed.