JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 114/2004

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	THE ATTORNEY GENERAL OF JAMAICA	APPELLANT
AND	ANN DAVIS	RESPONDENT

Mrs. Julie Thompson-James instructed by the Director of State Proceedings for Appellant.

Miss Sherry-Ann McGregor instructed by Nunes, Scholefield, DeLeon & Company for the Respondent.

February 5, 6, & November 9, 2007

HARRISON, P:

I have read in draft the judgment of K. Harrison, J.A. I agree with his reasons and conclusions and I have nothing further to add.

K. HARRISON J.A:

1. This is an appeal in respect of damages only in a judgment delivered by Beswick, J. on the 29th October 2004. The learned judge awarded the plaintiff (the respondent), under the head of general damages an amount of $100,000.00 reflecting handicap on the labour market; $1,800,000.00 for pain and suffering

and loss of amenities and $820,000.00 for future medical care. The judgment was reduced by $411,900.00 as this sum of money was paid to the respondent prior to the trial. Special damages amounting to US$47,260.71 and J$277,544.93 respectively were also awarded.

The Grounds of Appeal

2. The grounds are stated as follows:

> "(a) The learned judge erred in both law and fact in that she did not have sufficient regard to the statement of Constable Henry (deceased) recounting the occurrence of the accident.
>
> (b) The learned judge erred in accepting the figures stated in the Insurance Claim Form as referring to treatment for injuries in the accident when the said Forms stated that the patient's condition was not related to her employment, an auto accident or other accident.
>
> (c) The learned judge erred in making an award for future medical care when it was not pleaded and when no evidence was provided as to whether an elbow implant was suitable for the Respondent in the current circumstances and if so, at what time it would be suitable.
>
> (d) The learned judge erred in making an award for handicap on the labour market as the evidence did not support such an award.
>
> (e) The learned judge erred in ruling that a previous inconsistent statement made by the respondent and not disclosed in the Appellant's List of Documents, could not be

used to cross-examine the Respondent as there is no such requirement in law.

(f)The learned judge erred in failing to find the unknown third party as the negligent party in all the circumstances and /or assess the negligence of the unknown third party".

Grounds (a), (b), (c) (e) and (f) were abandoned during the course of the appeal. As to ground (d), Counsel for the Appellant argued that there was no evidence to support an award for handicap on the labour market. A counter notice was filed on behalf of the plaintiff ("the respondent"). She seeks to have the awards in respect of pain and suffering and loss of amenities and handicap on the labour market increased to $3,000,000.00 and $250,000.00 respectively because they are said to be inordinately low. The Respondent had also challenged the inclusion of interest on damages for future medical care and handicap on the labour market in the award of General Damages. Counsel for the Appellant readily conceded that no interest should have been included under these heads. There was no need therefore, to argue ground (iii) of the counter notice of appeal.

3. Two issues therefore call for determination in this appeal. They concern: (a) whether an award ought to have been made under the head of handicap on the labour market and;(b) whether the awards in respect of pain and suffering and loss of amenities and handicap on the labour market are inordinately low.

The background facts

4. At the time of trial the respondent was a Records Officer in the Personnel Division, of the Ministry of National Security. On the 28th July, 1997 she was a passenger traveling in a vehicle owned by the Government of Jamaica and driven by Constable Mark Henry when it was involved in an accident and overturned. She sustained extensive wounds to her upper extremities, anterior chest and breast. She was hospitalized for over two months and had to undergo both orthopaedic and plastic surgeries.

5. The fracture of her medial humeral condyle resulted in deformity of the left elbow which resulted in the following disabilities:

(i) Fixed 90° flexion deformity at the elbow;
(ii) 24 ° flexion deformity of the wrist;
(iii) Extensive skin loss with unsightly scars amounting to 24% disability of the whole person;
(iv) Anthrodesis of the elbow and posterior interosseous nerve and ulnar palsy amounting to 79% of the affected extremity or 47% of the whole person.

6. Muscle and skin were taken from her left thigh to assist in replacing her elbow. She developed a severe ulnar claw. The wrist bone had to be removed. A tendon transfer had to be done in order to remedy the claw hand.

7. After her discharge from hospital on September 12, 1997 she resumed duties in October of that year. She attended out-patients' clinics however, for follow-up treatment.

8. There was little improvement after the surgeries were done and Dr. Dundas, an Orthopaedic Surgeon, recommended that she seek further medical assistance abroad. She went to the U.S.A. for consultation and whilst there further surgery was done on her left elbow and fingers.

9. She filed an action in the Supreme Court against the Attorney General on October 25, 2001.

Submissions on the award for handicap on the labour market

10. Mrs. Thompson for the Appellant, submitted that there was no medical evidence to support an award under this head hence the learned judge should not have made an award. She relied on the authority of ***Chan Wai Tong and Another v Li Ping Sum*** [1985] AC 446, a decision of the Privy Council. Lord Fraser of Tullybelton delivering the judgment of the court said at page 460:

> "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. In the present case there is no evidence at all on these matters ..."
> (emphasis supplied)

11. Miss McGregor for the Respondent, submitted that the award under handicap on the labour market was inordinately low and ought to be increased to a figure of $250,000.00. However, at paragraph 43 of her written submissions she submitted that:

> "While there was no evidence of an imminent threat of dismissal from her employment, the respondent's job functions were altered to take account of her diminished capacity. She became a records officer."

12. I turn now to examine the principles in relation to an award for loss of earning capacity or handicap on the labour market. They have been enunciated in the English case of ***Moeliker v A. Reyrolle Co. Ltd.*** [1977] 1 All E.R. 9. Browne, L.J., who delivered the main judgment in the Court of Appeal, Civil Division said:

> "In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise.

> No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate".

In ***Cook v Consolidated Fisheries Ltd.*** [1977] I.C.R. 635 at 640, Browne, LJ., corrected himself by stating that an award of damages for loss of earning capacity did not arise only when the injured person was employed at the date of trial. He said at page 640:

> "In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. .... In Moeliker's case at p. 261 of the report in [1976] I.C.R., I said 'This head of damage only arises where a plaintiff is at the time of the trial in employment'. On second thoughts, I realize that is wrong ... and, when I came to correct the proof in the report, in the All England Reports, I altered the word 'only' to 'generally' and that appears at [1977] 1 All E.R. 9,15".

(Emphasis added)

13. In ***United Dairy Farmers Ltd. & Anor. v Goulbourne (by next friend Williams)*** [unreported] SCCA 65/81 dated 27th January 1984 Carberry J.A. at page 5 of the judgment said in relation to awards:

> "Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however tenuous it may be."

14. In matters concerning damages for handicap on the labour market, the court is asked to assess the plaintiff's reduced eligibility for employment or the risk of future financial loss. Evidence must therefore be adduced in order to

prove the loss even though in arriving at an award under this head of damages there has to be some amount of speculation.

15. In ***Moeliker*** (supra) Browne, L.J., suggested that there are two stages for consideration by the Court, viz:

> "(i) Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life?
>
> (ii) If there is (but not otherwise), the Court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

16. In the instant case, the evidence at trial has revealed that in July 1997 (at the time of the accident) the respondent was a temporary clerk in the Ministry of National Security. However, in her statement to the police dated October 16, 1997 she had stated that she was a typist. As a temporary clerk she was earning $76,000.00 annually but in June 2003 she was appointed a Records Officer 2 and was earning $271,720 per annum. There is no basis therefore upon which Miss McGregor could conclude that the respondent's job functions had to be altered to take account of her diminished capacity. She had said under cross-examination that as a Records Officer the job entailed typing and doing "day to day" paper work in the office. She has not said that her disability had caused her any difficulty to cope with her job. Dr. Dundas who gave evidence at the trial was of the view that the severe ulna claw would not prevent her doing typing or filing.

17. In my view, it is abundantly clear from the evidence adduced that there is no risk of the respondent losing her job before she comes to the end of her working career. She is now on permanent staff in the Government service so her chances of loosing her job appear quite negligible. See ***Chan Wai Tong*** (supra). There was certainly no basis therefore for the learned judge to have awarded the Respondent damages for handicap on the labour market.

The award for pain and suffering and loss of amenities

18. The learned judge awarded an amount of $1,800,000.00 under this head. Counsel for the Respondent contends that this award ought to be increased.

19. In ***Dixon v Jamaica Telephone Co.*** SCCA 15/91 (un-reported) delivered 7th June 1994, Rattray P said:

> "The Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. It requires looking at decided cases in the past with necessary adjustments having regard to inflation and any special features of the injury".

20. In order to ascertain whether the damages awarded are excessive or insufficient, this Court has to examine the method employed by the trial judge in assessing those damages. The Court will only interfere with the award of the trial judge either where he or she acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See ***Dixon (bnf Maxwell) v Jamaica Telephone Co.*** SCCA 15/91 (un-reported) delivered 7th June 1994; ***Nathan Clarke v Gernel Hancel***

SCCA 96/89 (un-reported) delivered December 18, 1992; ***Gravesandy v Moore*** SCCA 44/85 (un-reported) delivered 14th February 1986; ***Dryden v Layne*** SCCA 44/87 (un-reported) delivered 12th June 1989; ***Alcan Jamaica Ltd v Mighty*** SCCA 94/97 (un-reported) delivered 20th December 1999.

21. The learned judge said very little how she arrived at the sum awarded for pain and suffering and loss of amenities. She expressed herself in her judgment as follows:

> "I have considered the authorities submitted, including Taylor v McLormick (CL 1990/T075), Bryan v Hines (CL 1985/B441) and Brown v Jamaica Pre-Mix Limited (CL 1999/B118."

Thereafter followed the damages awarded.

22. In this Court (like the Court below) Counsel on either side referred to a number of cases in order to show the range of awards made by judges in the Supreme Court in respect of similar injuries. The under-mentioned cases were referred to:

> 1. ***Clovis Bryan v Leonard Hinds*** C.L 1985 B/441 delivered January 18, 1990 reported at page 108 of Khan's Assessment of Damages Vol. 3. The plaintiff was a painter/decorator/stock and poultry owner/cultivator who was aged 58 years on the date of trial. He was injured in a motor vehicle accident on February 23, 1980 and sustained the following injuries:
>
> - Laceration to right forearm, dorsum of right hand;
> - Fracture of distal end of right radius;
> - Fracture dislocation of right elbow;
> - Headaches and pain
>
> His residual disabilities were:
> - Mal-united wrist;
>
> Very restricted movement at elbow and;

- Mal-united wrist;

Very restricted movement at elbow and;

- Scarring and disfiguration.

He was awarded $130,000.00 under the head of general damages.

2. ***Dervin Taylor v Logan McLormick and Others*** C.L 1990/T075 was delivered June 17, 1991 and reported at page 255 of Harrisons' Assessment of Damages for Personal Injuries. The facts of that case reveal that the plaintiff had sustained a compound comminuted fracture of the olecranon and distal end of the humerus with disrupted elbow joint. His disabilities were listed as follows:

- Stiffness of elbow (no motion on flexion or extension);
- Stiffness of the hand (unable to make a fist);
- Disrupted left elbow joint with signs of callus; and
- 90% permanent functional impairment of left upper limb.

The plaintiff was awarded $118,550 in respect of pain and suffering and loss of amenities.

3. In ***Dennis Brown v Jamaica Pre-Mix Ltd.*** C.L 1999/B118 delivered March 23, 2001 the plaintiff was a labourer/mason 39 years of age who was injured in a motor vehicle accident on June 30, 1997. He sustained a fracture of the distal third of the left humerus and both bones of the left forearm with displacement. He was dazed for a short while after the accident. He had back pain and there was deformity of the left upper extremity. His permanent partial disability amounted to 31% of the affected extremity or 19% of the whole person. For pain and suffering and loss of amenities he was awarded $850,000.00.

4. ***Hugh Mullings v Constable Cooper and The Attorney General*** C.L 1999/M003 was delivered November 23, 2001. The plaintiff was a Constable. He was 28 years of age and was shot by the first defendant whilst he was a passenger in an un-marked police vehicle. He sustained the following injuries:

- i) left brachial artery injury;
- ii) medial, ulnar and radial nerve injury to the left arm;
- iii) severe soft tissue injury involving skin, subcutaneous tissue
- and muscles of the left arm;

- iv) fracture of the left humerus and;
- v) small gunshot wound to left thigh.

He was admitted to Spauldings Hospital where he underwent emergency surgery to litigate the bleeding artery. He was subsequently transferred to Kingston Public Hospital where further surgery was done. He was transferred to St. Joseph's Hospital where he had four further surgeries and then taken to Tampa Bay Hand Centre under the care of Dr. Cecil Aird. He had microsurgery to his left upper limb as follows:

- sural graft to the median nerve
- multiple tendon transfer to the left hand and wrist
- fillet of index finger and dorsal transfer.

He was left with multiple scars from the surgery and accident. His injuries were assessed to have total overall deficit of 54% of the whole person. For pain and suffering and loss of amenities he was awarded $1,800,000.00.

5. ***Hugh Grant v Sylvanny Gordon*** C.L 1993 C/198 was delivered on July 6, 1995. It is reported at Vol. 4 of Khan's page 116. The plaintiff, a dry goods vendor who was right handed was injured in a motor vehicle accident. He sustained the following injuries and resulting disabiliities:

- Generalized tonic-clonic seizures.
- Tender swelling at occipital region.
- Loss of movement of right upper limb.
- Tender swelling of the right hand.
- Undisplaced fracture base of 2nd metacarpal right ring finger.
- Multiple abrasions to face and head.
- Cerebral concussion
- Loss of normal lordosis.

He was admitted in hospital on 6th February 1993 and remained there for four days. After his discharge he was seen by Dr. Warren Blake, Orthopaedic Surgeon on 3rd July 1995 for medical assessment. He had not regained any appreciable movement of the right upper limb which got smaller with stiff joints. There was no sensation to the arm and forearm. The muscles of the shoulder had also been reduced in size with markedly reduced power to the muscles of the shoulder girdle. There was no spontaneous muscle activity and power to the muscles of the arm and forearm was absent. The limb was flaccid. A diagnosis of complete brachial plexus injury with very limited recovery of shoulder girdle muscles was made – this limited recovery would serve no useful purpose.

His permanent partial disability equated to 100% loss of function of his upper limb equivalent to 60% whole person disability.

He was awarded $1,000,000.00 for pain and suffering and loss of amenities under general damages.

23. When one applies the approach suggested in the cases on assessment the following results would be achieved:

- In ***Clovis Bryan v Leonard Hinds*** the award of $130,000.00 would be equivalent to $1.8M at the time of trial in this case.
- In **Dervin Taylor v Logan McLormick and Others** the award of $118,000.00 would be equivalent to $1.1M.
- The plaintiff in ***Dennis Brown v Jamaica Pre-Mix Ltd.*** was awarded $850,000.00 in respect of pain and suffering and loss of amenities. That sum when updated would value $1.1M.
- In ***Hugh Mullings v Constable Cooper and The Attorney General*** an award of $1,800,000.00 was made for pain and suffering and loss of amenities. That sum valued $2.2M at the time of Davis' assessment of damages.
- The plaintiff in ***Hugh Grant v Sylvanny Gordon*** was awarded $1M for pain and suffering and loss of amenities. That award valued $2.4M at the date when damages were assessed in favour of Davis.

24. Miss McGregor had also referred to ***Donna Engerbretson v Thompson and Attorney General***.CL 1985/E 032 delivered 16th October 1992. In that case the plaintiff was a beautician who was visiting the Island. On 4th March 1984 she was violently attacked by a police officer and was subjected to several knife wounds to the left hand, right arm, right side of her neck and other parts of her body. She was left with a non-functional use of her left hand which disability was assessed at a range of 25% to 30% permanent disability of the whole person. It

took her about five years to recuperate. The learned trial judge in comparing the injuries of the plaintiff with those suffered by the plaintiff in ***Laurel Garrick v Ronald King*** C.L G104/89 said:

> "While the circumstances of this case places this plaintiff into a higher range, a factor brought about as a result of the injury being to her control limb, as well as the long period of her recuperation – around five years this case in July, 1990 would have attracted as award of about $350,000.00. Since July, 1990, however, the steep rise in inflation put at 113% over the last twelve months would cause me to consider an award of $1,000,000.00 as being adequate in all the circumstances of this case."

25. The ***Engerbretson*** case is clearly distinguishable from the instant matter and would not be a useful guide in the assessment of damages in respect of the Respondent's injuries. I am also of the view that the plaintiff ***Hugh Grant*** had also sustained more serious injuries than the Respondent here and that case is also distinguishable.

26. A number of factors have to be considered in the calculation of the Respondent's damages. These include the effect injuries would have on her and whether her enjoyment of life has consequently been reduced. She had sustained extensive wounds to her upper extremities, anterior chest and breast and was hospitalized for over two months and had to undergo both orthopaedic and plastic surgeries. The fracture of her medial humeral condyle resulted in deformity of the left elbow which resulted in the following disabilities:

(i) Fixed 90° flexion deformity at the elbow;

(ii) 24 ° flexion deformity of the wrist;

(iii) Extensive skin loss with unsightly scars amounting to 24% disability of the whole person;

(iv) Anthrodesis of the elbow and posterior interosseous nerve and ulnar palsy amounting to 79% of the affected extremity or 47% of the whole person.

27. Mrs. Thompson, on the one hand, submitted that the respondent's injuries fell between an award of $1,100,000.00 and $1,800, 000.00 so it could not be said that an award of $1, 800, 000.00 was inordinately low.

28. Miss McGregor on the other hand, submitted that the award for pain and suffering and loss of amenities should be increased to $3,000,000.00.

29. In my view, the range of damages for the injuries sustained by the Respondent, are between $1,800,000.00 and $2,000,000.00. I am further of the view that ***Bryan v Hinds*** and ***Mullings v Cooper and the Attorney General*** are useful guides. The claimant in the instant case is a female. The scarring on her chest, breast and upper extremities, could however, increase her damages. In making an award the Court has to do its best to measure the "incomprehensible or the immeasurable" (per Carberry, J.A., in ***United Dairy Farmers Ltd. & Anor. v. Goulbourne (by next friend Williams)*** [supra].

30. In my judgment, an award of $2,000,000.00 for pain and suffering and loss of amenities would therefore be appropriate. The Respondent therefore succeeds on ground 2 in the counter notice of appeal.

Conclusion

31. The appellant should therefore succeed on ground (d) of the Appeal and the Respondent ought to succeed in respect of ground (i) in the counter notice of appeal.

McCALLA, J.A:

I agree.

HARRISON, P

ORDER:

The appeal is allowed in part as it pertains to ground (d) of the appeal. The counter appeal is allowed in part in respect of ground (i). The sum of $1,800,000.00 awarded in the court below is varied and an award of $2,000,000.00 for pain and suffering and loss of amenities is substituted therefor. Costs are awarded to the Respondent to be agreed or taxed.