NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1993/B-361

BETWEEN	PAT BELLINFANTI	PLAINTIFF
A N D	NATIONAL HOUSING TRUST	FIRST DEFENDANT
A N D	GEORGE RAINFORD	SECOND DEFENDANT
A N D	THE ATTORNEY GENERAL	THIRD DEFENDANT

CONSOLIDATED WITH

SUIT NO. C.L.1993/S368

BETWEEN	HEADLEY SAMUELS	PLAINTIFF
A N D	NATIONAL HOUSING TRUST	FIRST DEFENDANT
A N D	GEORGE RAINFORD	SECOND DEFENDANT
A N D	THE ATTORNEY GENERAL	THIRD DEFENDANT

Mr. H. Robinson instructed by Patterson, Phillipson and Graham for Plaintiffs.

Mr. L. Morgan instructed by Nunes, Scholefield, DeLeon and Company for first and second defendants.

Miss A. Ferguson and Mrs. S. Reid-Jones instructed by Director of State Proceedings for third Defendant.

Heard: November 8, 11, 12, 13, 1996 and February 3, 1997

KARL HARRISON J.

Let me first of all apologise for the delay in delivering this judgment. The plaintiffs who have brought their claims against the defendants are seeking to recover damages for negligence arising out of a motor vehicle accident which occurred on the 19th day of March, 1993 along Panton's Hope main road in the parish of Portland. The actions were consolidated by Order of the Master at the hearing of the Summons for Directions.

Both plaintiffs were passengers in a motor vehicle driven by the second defendant and owned by the first defendant. The third defendant has been made a party to these proceedings pursuant to the provisions of the Crown Proceedings Act whereby it is being alleged that a vehicle which was assigned to the Commissioner of Police was being driven by a servant and/or agent of the crown acting within the scope of his duties at the material time of the accident.

The first defendant by way of a counter-claim has alleged that as a result of the negligence of the third defendant's servant and/or agent, the first defendant has suffered loss and damage and incurred expenses. This defendant also filed and served a Notice on the third defendant seeking an indemnity and/or contribution against the plaintiffs' claims. Third Party Directions were issued and it was ordered by the Master of the Supreme Court on the 25th day of July, 1994 that the first and second defendants deliver a statement of their claim to the third defendant and that the question of liability of the third defendant to indemnify the first and second defendants be tried at the trial of this action. The first defendant filed and served its statement of claim against the third defendant whereupon the third defendant served its defence and counterclaimed against the first defendant for the cost of repairs to the service vehicle.

SUMMARY OF THE EVIDENCE

The evidence presented by both plaintiffs show that sometime after mid-day on the 19th March, 1993 Mr. Bellinfanti was seated in the left front passenger seat of the first defendant's motor car whereas Mr. Samuels was seated in the rear. They were on their way to Kingston and were travelling along Panton's Hope main road in the Parish of Portland.

The road surface was wet. The driver was descending a slope and on reaching a point where the roadway is straight, an accident occurred between their vehicle and a motor car driven by a police officer. Mr. Bellinfanti in his testimony, describes how the accident took place. He states inter alia:

> "I could see bend in road in the distance. It was a left hand bend from my direction. We were going reasonably slow because of conditions of the road. I saw an on-coming vehicle coming in our direction. When it was out of the bend....it was partly on our side of the road. I would not say that total width of car was on my side. A significant part of on-coming car was on our part of the road and that's why it struck me.
>
> Driver of my vehicle pulled over to left in as much as he could and stopped.
>
> The on-coming vehicle was veering back to its side of the road but unfortunately he was not able to get back to his side in time and he struck our vehicle."

He also told the court that the second defendant was travelling on his left side of the road before he pulled further to the left. He explained that there was a

precipice to their immediate left hence, that was the reason why his driver had pulled over as much as he could. It was his view that two vehicles could nevertheless pass comfortably at this point.

Mr. Samuels' account of the accident is as follows:

> "....we were opposing each other. My vehicle going towards St. Thomas from Port Antonio direction. The accident happened so fast... suddenly our driver pulled over on the left and stop. In the process of asking him what happened I heard "bang." A red car had come into our car. I never see red car before I heard bang. Where I was I could not see it."

Detective Herrington Forrest who was the driver of the police vehicle was leading a motorcade on the occasion of the visit of The Hon. Edward Seaga to the parish of Portland. He recalls the following sequence of events:

> "I was travelling at approximately 20-25 m.p.h. ahead of motorcade. This about 12:00 p.m....
>
> I was travelling on left hand side of road. The rain ceased and I was travelling up slope of a hill, when reaching a section near to the slope I saw a silver looking car came suddenly over the slope on my side of the road that is the left hand side.
>
> I shadowed my brakes, rested foot over the brake pedal, swerve further to my left to avoid a collision with the vehicle but was unable to as it hit the right hand side of my vehicle to the front.
>
> There is bend approaching slope. It would be a right hand bend for the plaintiff's vehicle. The accident occurred after the plaintiff's vehicle had passed the bend and come up the slope and over..."

The Sergeant admitted under cross-examination that the accident took place on a straight stretch of road about one chain from a bend that he had negotiated. He denied negotiating a right hand bend shortly before the collision. He also denied that he had come around on the right hand side of the road. He said he did not stop when he saw the vehicle coming towards him on his side of the road neither was there enough time for him to have blown his horn nor to have flashed his lights.

Detective Corporal Riley who was a passenger in the right front seat of the police vehicle, testified initially that the accident had taken place at the brow of a hill. Under cross-examination he agreed however, that it had occurred on a

straight stretch of road. He gave the following account of how the collision took place:

> "...As we approached brow of hill immediately I saw a silver colour car came over the hill at 45-50 m.p.h. on our side. I observed car for about two seconds.
>
> It was raining slightly. I could see quite well.
>
> When car came over I realised it would hit vehicle I was in so I braced the dash board and it came over and slam into car I was in."

POSITION OF VEHICLES AFTER ACCIDENT WIDTH OF ROAD AT POINT OF IMPACT AND DAMAGES TO THE VEHICLES

Under cross-examination Mr. Bellinfanti told the court that he was unable to recall the position of the vehicles after the collision. He was hurriedly removed from the scene having regard to injury to his right eye. Mr. Samuels who was also taken to the hospital due to an injured arm testified that the road was blocked after the accident. He said however, that his vehicle was on his left side of the road and that he was pulled out through the right door.

According to Sgt. Forrester, his driver's door was almost resting on the side of a hill. He could barely leave the vehicle from his left front door. He had to walk around the back of the car in order to go to the front because the front was almost resting on the embankment. He also agreed that the road was blocked. He claimed that the front of the first defendant's vehicle was over on his side of the road "unto the front of my vehicle" and the back of the vehicle was over on the left "as if it were across the road." In order to clear the road, the police pushed his vehicle down the road and civilians "bumped" the first defendant's vehicle on to its side of the road.

Corporal Riley testified that after the collision his vehicle was on the left and the first defendant's vehicle was in the middle of the road.

Both Sergeant Forrester and Corporal Riley saw damages to the front windscreen, the right front headlamp, and right front fender of the police vehicle. The right front wheel of that vehicle was punctured. Exhibit 5 which was agreed between the parties reveals that upon inspection of the first defendant's motor car the motor adjusters concluded that the damages were as a result of an impact at the off-side front. The following damaged parts were observed:

Bonnett, wheel arch guard, headlamp, right hand front fender, right hand front door, bumper, chassis leg, grille, side shield, dashboard, wiper blade and corner lamp.

Sergeant Forrester did agree that there was no head on collision and that it was almost a "sideway" collision - his right front and the other vehicle's right front colliding. The damages on both vehicles are therefore supportive of an impact at the "off-side" front.

Sergeant Forrester estimated the width of the road at the point of impact to be between 16-28 ft. No white lines are in the centre of the road. He estimated his car which was a Geo Prizm to be between 4ft. 6ins. to 5ft. wide and the other vehicle, a Toyota Corolla, to be about 8 ft. wide.

SUBMISSIONS ON LIABILITY

Mrs. Jones, Counsel for the third defendant, admitted during her address to the court, that Mr. Bellinfanti was not shaken by cross-examination and that he was an excellent witness. She said, likewise were Sergeant Forrester and Corporal Riley excellent witnesses and not shaken by cross-examination. According to her, the case had to be decided on the sequence of events leading up to the accident and the position of the vehicles after the collision.

She has placed heavy emphasis on the position of the vehicles after the collision and submitted that both witnesses called on behalf of the third defendant have corroborated each other in every material particular respect as to how the accident happened and how the vehicles were positioned after the collision. Unfortunately for Mr. Bellinfanti, he was unable to assist the court on the position of the vehicles. She submitted therefore, that the third defendant's witnesses have been totally unopposed as to the position of the vehicles. It was further submitted that since Mr. Samuels did not see how the collision occurred Mr. bellinfanti's account has not been corroborated.

Mr. Robinson submitted on the other hand, that the plaintiffs have discharged the burden of proof placed on their shoulders and that a case has been made out in negligence against the defendants. He further submitted that Mr. Bellinfanti's evidence was clear and both Mr. Samuels and himself were not witnesses with an interest to serve. The court should on the other hand act cautiously where Sergeant Forrester's evidence is concerned as he could have an interest to serve, he being the driver of the police vehicle. According to Mr. Robinson there were two versions of this accident,

one must be untrue, but there was no middle version.

Mr. Morgan was also of the view that someone was not speaking the truth as to how this accident occurred. Given the speed that the third defendant's witnesses state that the second defendant was travelling at the time of impact, it was his view, that if they were speaking the truth, the probabilities are that the plaintiffs should not be in court to testify. He submitted that the position of the vehicles after the collision was more likely to have occurred on the account given by the plaintiffs.

He was therefore asking for judgment in favour of the first and second defendants claim against the third defendant. The sum of $218,600.78 was agreed by the third defendant being the costs of repairs to the first defendant's motor vehicle and the Assessor's fee.

FINDINGS

I have seen and heard the witnesses and I have had the opportunity to assess their demeanour. I do agree with Counsel for the third defendant that the position of vehicles after a collision can certainly help to demonstrate who is at fault in order to determine liability. However, there are other factors which one must take into consideration, amongst them being, the plausibility of the accounts given by the parties. Is it possible for vehicles which have collided in the manner described by the third defendant's witnesses to have ended in the position seen by them after such an impact?

It was admitted by Mrs. Jones that the force seemed to have been great in order to have caused the right front tyre of the third defendant's vehicle to be punctured. Both Sergeant Forrester and Corporal Riley have put the first defendant's vehicle to be travelling between 45-50 m.p.h. and that their vehicle was going between 20-25 m.p.h. I do believe however, that if two moving vehicles make contact at the respective speeds given, the probabilities are that the third defendant's vehicle would have been thrown violently unto the face of the embankment when, according to Corporal Riley their vehicle was travelling at a distance of 1½-2ft. from the left embankment at the time the vehicles collided. I find this account most improbable.

I accept the evidence of both plaintiffs. I find that both are truthful and very honest witnesses. I reject the accounts given by the third defendant's witnesses on the other hand and find on a preponderance of probabilities the following facts:

1. That the accident took place on a straight stretch of road along the Panton's Hope main road.

2. That this stretch is on the downward side of the slope.

3. That the surface of the roadway was wet and that the second defendant was travelling slowly.

4. That the third defendant's vehicle negotiated a bend and then travelled on its incorrect side of the road and continued in the path of the first defendant's motor car.

5. That the second defendant had pulled further left on his correct side of the road and stopped.

6. That there was a precipice further left to where the second defendant stopped and on the opposite side of the road the terrain forms an embankment.

7. That the driver of the third defendant's motor car veered to his left in order to return to his correct side of the road but was unable to complete that manouvre without colliding with the right front section of the first defendant's motor car.

8. That the collision was as a result of an impact to the off-side front of the first defendant's motor vehicle which was then stationary thereby causing that vehicle to have ended in a slant position, that is, its tail on the left of the road way and the front more to the middle of the road.

I therefore find that the driver of the third defendant's motor vehicle is wholly responsible for this accident and the third defendant is solely liable in damages to the plaintiffs and the first defendant. I must now turn to the question of damages.

SUBMISSIONS ON DAMAGES

BELLINFANTI

General Damages

In respect of pain and suffering and loss of amenities, Counsel for the third defendant placed reliance on the case of **Tulloch v. Fitz Henry** delivered by Marsh J. on the 10th October, 1990 and reported at page 182 of Vol. 3 of Khan's Report. She was of the view that when all things are taken into consideration an award of $600,000.00 would be reasonable.

Mr. Robinson submitted that damages should be at large having regard to the peculiar circumstances of each case. He asked the court to consider the following facts in assessing damages in respect of the plaintiff, viz:

1. The physical contact
2. The pain which accompanied the injury
3. Discomfort experienced
4. The pain for treatment
5. Residual disabilities if any, and
6. The loss of amenities which the plaintiffs have suffered.

In respect of pain and suffering and loss of amenities, Mr. Robinson referred to the following cases:

1. **Thomas v. B.R.C.** before Gordon J. on the 21st June, 1990 and reported at page 177 of Khan's Volume 3 Personal Injuries Awards.
2. **Mavado Wilson v. Caribbean Apparel** at page 179 of Khan's Volume 3
3. **Tulloch v. Fitz Henry** (supra)
4. **Cameron v. Wilson** before Harrison J. on the 20th January, 1992.

He was of the view that an award of $1,000.000.00 would be appropriate.

Counsel for the first and second defendants submitted that the suggested figure of $600,000.00 would be low and $1,000,000.00 was too high. He was of the view that an award of $850,000.00 would be very reasonable.

Special Damages

Special Damages were agreed at $121,402.00.

Future Medical Expenses

This sum was agreed at the sum of $131,200.00.

SAMUELS

General Damages

Counsel for the third defendant referred to:

1. **Clarke v. Baylis** p. 20 of Casenote #2 before Panton J. delivered on the 17th May, 1992.
2. **Daley v. White** Casenote #2 before Morris J. Ag. on the 29th July, 1992.

She was of the view that it would be reasonable to make an award between $173,204.00 and $102,222.00 in respect of pain and suffering and loss of amenities.

Mr. Robinson submitted that for pain and suffering and loss of amenities an award of $300,000.00 would be reasonable. He sought reliance on the following cases:

1. **Willis v. Hamilton** p. 110 of Khan's Volume 3.

2. **Bucknall v. Forrester** p.99 of Khan's Volume 3.

Mr. Morgan submitted that Mr. Samuels had failed to mitigate his losses so any award for pain and suffering and loss of amenities should be for a much shorter period having regard to the medical evidence. In his view an award of $200,000.00 for pain and suffering and loss of amenities would be appropriate in the circumstances.

Special Damages

Special damages were agreed at $2,300.00.

PRINCIPLE OF COMPENSATION

It has always been expressed that assessing damages for pain, suffering or loss of the amenities of life is not an easy task. Romer L.J., said when reviewing an assessment made by Byrne J. in **Robinson v. National Coal Board:**

> "This is a case in which money really compensate at all.....yet compensation must be assessed in money even if it appears to be measuring the immeasurable."

Two questions therefore call for determination at all times. On what basis should an individual be compensated and what is a reasonable sum to compensate such an individual? In **H. West & Son Ltd. v. Shepherd (1964) A.C. 326** Lord Reid has been quite helpful in answering these questions when he states:

> "The man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it, for that and for the mental strain and anxiety which results. There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss if not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am prevented by authority, I would think the ordinary man is, at least after the first few months, far less concerned about his physical

> injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."

Although no two cases are ever precisely the same, justice requires that there be consistency between awards. In **Beverley Dryden v. Winston Layne** SCCA 44/87 (unreported) delivered June 12, 1989, Campbell J.A. had said:

> ".....personal injury should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."

This Court is now faced with the formidable task of compensating the plaintiffs in monetary terms by putting them as early as possible in the same position as they would have been if they had not sustained the injury - per Lord Reid in **H. West & Sons Ltd.** (Supra). In arriving at such a figure one has to be guided not only by what is fair to the plaintiff but is also fair to the defendant.

BELLINFANTI

This plaintiff is now a Consultant to the Minister at the Ministry of Public Utilities. At the time of the accident he was a Public Relations Consultant. He was born on the 17th November, 1949 which makes him approximately 47 years old at the time of trial.

Immediately after the impact he felt an intrusion into his right eye. A part of the car had entered the right eye. He could not see but after a while he started seeing a little. Blood had entered his left eye. He was taken to Port Antonio Hospital where he was treated. He also received cuts all over his face and right hand. His injuries were cleaned and sutured. These cuts have now left scars on his forehead, over the right eye and bridge of nose. He was transported by helicopter to the Kingston Public Hospital the same day of the accident and an operation was done immediately on the right eye by Dr. Albert Lue but it had to be removed completely. He remained over night and the following morning he was taken to St. Joseph's Hospital where he recuperated and remained there for one week. Whilst there he had received medication and was treated.

Medical Reports

The Medical Report (Exhibit 1) of Dr. Albert Lue dated 14th February, 1994 was

agreed and it states as follows:

> "Mr. Bellinfanti was involved in a motor vehicle accident on the 19th March, 1993, and received the following injuries: the right eye was ruptured and the contents of the eye were missing; several lacerations on the right side of the forehead, right brow and right cheek. He underwent an emergency operation at the Kingston Public Hospital. Under general anesthesia all the lacerations were cleaned and sutured and the remnants of the right eye removed. Post operative management was done at the St. Joseph's Hospital. As a result of the accident, Mr. Bellinfanti lost his right eye and this is a permanent situation. He now wears a prosthesis in the right socket for cosmetic reasons."
>
> Sgd. Albert Luc M.B.S.D.O. (UWI) F.R.C.S. (Edin)
> Consultant Ophthalmologist

A further medical report was obtained from Dr. Luc and it was agreed as Exhibit 2. It is dated November 6, 1996 and reads as follows:

> "...The extent of the injury: loss of the right eye. Mr. Bellinfanti is now wearing a 'false' eye. He will now have reduced peripheral vision on the right; he will find it difficult to assess distances; for example overtaking while driving may be risky.
>
> I will need to see him twice yearly to examine the socket as he is now more prone to infection. The prosthesis is now really a foreign body. He has to use medication periodically to keep the prosthesis clean and infection free. The recurring cost is more than $5000,00 annually.
>
> I could not find copies of invoices given to Mr. Bellinfanti because I have relocated my office three times and have misluid them."
>
> Sgd. Dr. Albert Luc

Exhibit 3 is an agreed report from Mr. G. M. Burgess D.M.F. Prosthetist which states inter alia:

> "Mr. Bellinfanti was fitted with a prosthesis (right artificial eye) by me in May, 1993.
>
> The prosthesis lasts on an average five years. Since the original fitting of Mr. Bellinfanti, adjustments were made recently on November 5, 1996 at a cost of $1,500.00.
>
> A new prosthesis is now on order for Mr. Bellinfanti, the cost of which is $17,500.00."
>
> Sgd. G. M. Burgess

Previous Awards

In **Mavado Wilson v. Caribbean Apparel Group Ja. Ltd.** Suit No. C.L.1987/W180, damages were assessed December 13, 1989 before Edwards J. The plaintiff a carpenter/mason, 42 years of age was injured at work when a mixture of acid and water splashed into his left eye on the 16th January, 1987.

On the 22nd April, 1987 under general anaesthesia his left eye was removed and he was referred for left socket prosthesis. As a result of the loss of his eye he has been made vulnerable. He suffered from a cosmetic disability and needed further medical care. He was handicapped in and about his daily and working life. Dr. Leonard Miller who attended to the plaintiff was of the view that an artificial eye never usually fit well and had to be removed daily. He recommended however, acrylic artificial eyes which were made abroad rather than local ones.

The plaintiff was unable to watch television or read as before. At nights he had a focus of 3. He experienced pain when soap got into the socket and had to wear protective glasses to keep off dust. As a result of his injury he became unemployed and although he was a carpenter/mason by trade, he had taken a job as a labourer when he became unemployed. He was awarded the sum of $60,000.00 in respect of pain and suffering and loss of amenities. A sum of $30,000.00 was also awarded for loss of future earnings.

In **Samuel Thomas v. B.R.C. Ja. Ltd.** Suit No. C.L.1988/T004 damages were assessed before Gordon J. June 21, 1990. The plaintiff was a 42 year old casual worker who was injured ont he job on the 18th December, 1987. A crank handle from a crank shaft dislodged and struck his face. He remained unconscious for several hours. He regained consciousness in K.P.H. the following day after surgery.

His injuries included cornea-scleral laceration, laceration of the left upper eye lid, laceration of the left cheek and loss of four teeth. He remained in hospital for one month and upon discharge he was an out-patient for three months. His left eye permanently blind. He was awarded the sum of $80,000.00 in respect of pain and suffering and loss of amenities.

In **Willard Tulloch v. Fitz Henry** Suit No. C.L.1986/T128 March J. assessed damages on October 10, 1990. Here a 50 year old labourer was struck in the right eye with a bottle on the 23rd February, 1983. He sustained an incised wound over the right eye approximately 5" long. 3" laceration below the right eye and extensive

damage to the right eye ball. He was seen by Dr. Hamilton MBBS, FRCS and admitted to hospital on the 27th February. On the 14th March he was discharged. He became an outpatient and was seen in the eye clinic on subsequent dates. He sustained loss of sight in right eye and there was unsightly scarring in area of right eye. He was awarded $65,000.00 in respect of pain and suffering and loss of amenities.

In **Jillian Cameron (b.n.f. Yolando Hutchinson) v. Basil Wilson** Suit no. C.L. 1990/C017 Harrison J. assessed damages on January 20, 1992. She was a passenger in the defendant's motor car which collided with a culvert along Lime Hall main road. She suffered laceration of the left temple above and below the left eye, cornea-scleral laceration and total hyphema of the left eye resulting in total loss of visual activity. She was awarded $180,000.00 for pain and suffering and loss of amenities.

AWARD

I have every reason to believe that the above cases are useful guides in terms of the physical injury and the permanency of the injury. One has to bear in mind however, that Mr. Ballinfainti's occupation and his loss of amenities would make the difference when it comes to quantifying his losses. Thomas and Tulloch were both casual workers at the time of their injuries. Wilson who was a carpenter/mason had resorted to being a labourer after he became un-employed and he could no longer read as he did before. Mr. Bellinfanti on the other hand is a journalist by profession, who although is now a Consultant in the Government Service, still does some freelancing in journalism. Reading then, is required to be done at all times. Reading is also his main recreational activity and he describes himself as a "veracious" reader. The evidence revealed that he can no longer read as much as he did before the accident. He can no longer read as quickly as he did before. He normally reads 3-4 hours per day but this has now been reduced to 2 hours daily. Reading he says is recreational for him and is actually his favourite hobby. He must be careful now how he uses the left eye since he is concerned that there could be a strain on that eye causing a reduction in the quality of vision. There is no doubt therefore, that Mr. Bellinfanti's life has been disrupted. His life-style has changed but it is fact of life that he must move on and see how best he can cope with his deficiencies.

I do agree with Mr. Robinson that he has now been placed in greater danger than

a man who has both eyes. The plaintiff testified that his vision is now different as he no longer has as wide an arc of vision. He can no longer judge distances as capably as he did before the accident. Although he has resumed driving he has a difficulty in judging the distance of on-coming vehicles. He further stated that before the accident he could have seen from both eyes to an angle of at least ninety degrees. That angle has now been reduced to about 45 degrees and this has affected his driving. Overtaking vehicles is now a problem. He has to give a much longer distance to an on-coming vehicle before he attempts to overtake a vehicle travelling in the same direction as himself. He now has a bigger blind spot. He stated:

> "...from time to time without any knowledge. I find vehicle coming out of nowhere to me from behind me and passing on my right side. This has happened a number of times when I have given ample notice that I am going to make a right hand turn. At certain points I have to turn my entire body to look behind to my right to ensure that I am aware of any possible danger."

Night driving has been affected. Whereas, he could previously blink the right eye on the approach of traffic with bright headlights, he cannot do this any more. He is now forced to blink the left eye which could result with catastrophic consequences. So, his night driving has been affected considerably. He usually travel to and from his farm in Trelawny once per week at late evenings but his trips at night have been drastically reduced.

His perception of depth is indeed another disability which the court must bear in mind. Of course, whereas he could reduce his driving, walking is something he will be doing for the most part of his life and the difficulty he now experiences in judging depth in relation to steps and stairs will no doubt get worse as he gets older.

The plaintiff testified that he had to re-adjust himself in going about the normal pursuits of life. This re-adjustment took some 3-12 months. His confidence did enhance however, when he resumed playing lawn tennis. He rarely plays lawn tennis now because of the perception of the ball. Sometimes he mis-judges the line of ball and there is difficulty picking up the ball at times.

Of course one must also take into consideration the cosmetic disability he now suffers. He now has to wear a prosthesis in the right eye socket. There is the constant stare and reaction from persons. Dr. Leonard Miller did opine in the case

of Wilson (supra) that artificial eyes do not fit well and have to be removed daily. Mr. Bellinfanti now has to walk around with a mirror in order to check for secretions that appear on the prosthesis from time time. Because the prosthesis is a foreign body there is always the risk of developing infections so he has to remove it regularly in order to have it washed three to four times daily. On the average of every five years the prosthesis has to be changed. Dr. Lus will need to see him twice yearly in order to examine the socket as he is now more prone to infection.

What then is an appropriate award for this plaintiff? Is compensation to be computed solely on the basis of comparable awards in the case of a person who lost sight in one eye? I think not, because Mr. Bellinfanti's losses in so far as amenities are concerned are greater than those plaintiffs referred to in the above-mentioned cases. Using the consumer price index of 989 as of September, 1996 the following would represent awards made in previous cases, viz:

1. $65,000.00 awarded in Tulloch's case would be upgraded to $416,084.00

2. $80,000.00 awarded in Thomas' case would be upgraged to $568,000.00.

3. $60,000.00 awarded in Wilson's case would be upgraged to $463,000.00.

4. $180,000.00 awarded in Cameron's cash would be upgraged to $564,000.00.

Those awards would no doubt be further upgraded at the time of this judgment. In all the circumstances, I hold that an award of $1,000,000.00 would be reasonable and most appropriate in respect of Mr. Bellinfanti's pain and suffering and loss of amenities.

HEADLEY SAMUELS

This plaintiff is a freelance professional photographer. He testified that his right arm was broken and that he felt "a lot of pain." He was taken also to the hospital in Port Antonio where he was treated and the injured hand placed in a support. He returned to Kingston and was seen by Dr. Warren Blake, a Consultant Orthopaedic Surgeon.

Medical Reports

Medical report dated the 23rd August, 1994, from the late Professor Sir John Golding was agreed and admitted in evidence as Exhibit 4. It states as follows:

> "I examined Mr. Samuels for the purpose of writing this report on the 19th August,

1994. I had available to me X-ray report signed by Dr. W.F.B. Clarke dated 5th July, 1994.

Mr. Samuels stated that on the 19th March, 1993 whilst a back seat passenger in a car he had been injured. Following the injury he had come under the care of Dr. W. Blake who had performed an open operation for a fracture of the shaft of the right humerus on the following day. He had spent two days in the hospital, and since this time has been seen regularly as an out-patient by Dr. Blake.

Mr. Samuels was complaining of a feeling of insecurity at the fracture site which he felt was not soundly united. His main problem was weakness of the right arm, which he found it difficult to manage.

On examination I found that there was a 5" vertical scar over the antro-lateral aspect of the middle third of the right upper arm. This scar was wide and hypertrophic. There was no shortening on measurement. There was a palpable movement at the fracture site. There was also a 10° varus deformity at the fracture site.

The new radiographs showed that the fracture had not united and that there was some new bone formation over the surface of a six hole plate. The bottom screw had broken free and there was evidence of loosening of the other two screws in the lower half of the plate.

I would assess that Mr. Samuels is suffering from a non-union of the shaft of the right humerus. This is unlikely to heal spontaneously and will need further surgery. It is likely that a bone graft will be needed to secure solid union.

Sgd. J.S.R. Golding O.J. Kt. F.R.C.S.

Medical report dated November 11, 1996 from Dr. Warren Blake was also agreed and admitted in evidence as Exhibit 6. It states Inter alia:

"This certifies that I first saw this patient on March 22, 1993. This was some three days after he was involved in a road traffic accident...He was initially seen at the hospital in Portland and a plaster, backslab was applied.

When I examined him I noted that he was immobilised in an above-elbow cast. Movements of and circulation of his fingers were satisfactory. I therefore recommended internal fixation of his fracture and admitted him to the St. Joseph's Hospital for this.

His operation took place on March 24, 1993. Surgery was uneventful and his postoperative

recovery quite satisfactory. He was discharged home on March 25, 1993. He returned to my out-patient office on April 1, 1993 and had removal of his sutures. His improvement thereafter proved satisfactory.

His subsequent care proceeded well, however in July, 1993 X-rays were taken following a complaint of pain at the fracture site. This X-ray revealed the continued presence of the fracture gap as well as lucency around one of the screws. This lucency indicated possible loozening of the screw.

I saw him again on October 11, 1993. At that time there was no tenderness at the fracture site. However motion of his shoulder was restricted. He was advised to return in six months time with X-rays. He did not return to see me.

I next saw him on November 7, 1996 when he returned for a medical assessment. He stated that he had continued to have weak feelings in his right arm. He also indicated that there was a feeling of instability to the right arm, although this had lessened recently. He complained of difficulty in carrying his photographic equipment.

When I saw him I noted that there was some restricted abduction of his right arm. Internal and external rotation to the shoulder was full. Elbow motion was also quite full. No abnormal mobility was detected to his humerus. X-rays were taken. These had the appearance of a non-union of the fracture site. They also revealed that the most proximal screw had broken. The other screws were however not loose at present. There was some amount of bony overgrowth over the proximal end of the plate. I therefore recommend internal fixation and bone grafting of his fracture site. This was in an effort to get the fracture solidly united and restore this gentleman to some useful function. This continued disability will significantly affect his ability to carry heavy luggage on this arm.

Current disability from his stiffness of this shoulder equates to 3% impairment of the upper extremity or a 2% impairment of the whole person. To this must be added the significant impairment of using his arm to do any strenuous tasks. There is also the danger that the continuous use of this arm may result in the implants breaking completely free. Once surgery is done and stability and union restored to this fracture, the only disability that remains should be that of shoulder stiffness."

Sgd. Warren Blake F.R.C.S.

The plaintiff testified that he had his right hand in a support for 3½ months. It was very painful for him especially at nights when he goes to bed. He is right-

handed so he had to get assistance with his photographic equipment when he went out on assignments. To shoot pictures he had to bring his left hand up to the right hand and use the right finger to click the camera. He found this very painful. He also had difficulty lifting his camera bag with equipment which could weigh between 35-40 lbs. At the time of trial, he told the court that his right arm was still not in great shape and he still has to get help to lift certain things. He has to use both hands to get his car into reverse. He has to drive a left hand car now as there is difficulty manoeuvering a right hand drive. He experiences constant fear when he is being driven so he drives himself at all times now.

The medical report of Dr. Warren Blake reveals that the surgery in relation to the internal fixation of his fracture was successful. He made subsequent visits to Dr. Blake and on the 11th October, 1993, restriction in the movement of the right shoulder was noted. He was advised to return in six months time for x-rays but he did not. He was seen on the 7th November, 1996 for a medical assessment and x-ray results revealed that there was the appearance of non-union of the fracture site. The proximal screw for the plate was broken hence the doctor recommended internal fixation and bone grafting of the fracture site. To date he has not had this operation done. The doctor opined that the instability and weakness which he was experiencing in the right arm would continue and it would affect his ability to carry heavy luggage on the arm. He was also advised in 1994 by the late Professor John Golding about the non-union of the fracture site. The problems he now has are no doubt as a result of his failure to do further surgery.

It is my view therefore, that his damages should be reduced due to his failure to correct the problems diagnosed since October, 1993. I have given serious consideration to the following cases:

1. **Delroy Bucknall v. Altimont Forrester** Suit no. C.L.1989/B110 delivered by Reckord J. on January 18, 1990.
2. **Pauline Willis (p.n.f. James Willis) v. Fitzroy Hamilton & Anor** Suit No. C.L.1987/W244 delivered by Harrison J. on June 26, 1990.
3. **Nellie Daley v. Vincent White** Suit No. C.L.1991/D152 delivered by Morris J. Ag. on July 29, 1992.
4. **Ivan Clarke v. Lionel Baylis & Anor** Suit No. C.L.1990/C232 delivered by Panton J. on May 17, 1992.

It is my considered view that the sum of $250,000.00 ought to be awarded to Mr. Samuels in respect of his pain and suffering and loss of amenities.

FIRST AND SECOND DEFENDANTS CLAIM AGAINST THE THIRD DEFENDANT

The first defendant is entitled to judgment against the third defendant in the sum of $218,600.00.

FINAL JUDGMENT

There shall be judgment for the plaintiffs against the third defendant as set out hereunder. There shall also be judgment in favour of the first defendant against the third defendant and in favour of the second against the plaintiffs as set out hereunder.

Plaintiff Bellinfanti

General Damages

Pain and suffering and loss of amenities in the sum of $1,000,000.00 with interest thereon at the rate of 3% per annum from the 28th October, 1993 up to today.

Special Damages

1. Special damages in the sum of $121,402.00 with interest thereon at the rate of 3% per annum from the 19th day of March, 1993 up to today.

2. Future medical expenses in the sum of $131,200.00

Cost to this plaintiff to be taxed if not agreed.

Plaintiff Samuels

General Damages

Pain and suffering and loss of amenities in the sum of $250,000.00 with interest thereon at the rate of 3% per annum from the 14th December, 1993 up to today.

Special Damages

In the sum of $2,300.00 with interest thereon at the rate of 3% per annum from the 19th day of March, 1993 up to today.

There shall be costs to this plaintiff to be taxed if not agreed.

First Defendant

Judgment for the first defendant against the third defendant in the sum of $218,600.00 with interest thereon at the rate of 3% per annum from the 19th March, 1993 up to today and costs to be taxed if not agreed.

Second Defendant

Judgment for the second defendant against the plaintiffs with costs to be taxed if not agreed. It is further ordered that the costs payable by the plaintiffs to the second defendant should be paid by the third defendant.