IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. 1991/B118

BETWEEN	*DENNIS BROWN*	*PLAINTIFF*
A N D	*JAMAICA PRE-MIX LTD.*	*DEFENDANT*

Mrs. N. Khan instructed by Messrs. Khan and Khan for plaintiff.

Mr. David Batts instructed by Messrs. Livingston, Alexander & Levy for defendant.

Heard: November 1, 2000,
January 15,16,17, and March 24, 2001.

HARRIS, J.

The plaintiff's claim against the defendant is to recover damages for negligence and or for breach of Statutory duty.

A defence was filed but was struck out by an order of the Master on May 11, 2000 for failure of the defendant to comply with an order to supply particulars and answer interrogatories. Interlocutory Judgment was entered on June 2, 2000. The damages assessable now fall for consideration.

Leave was granted to amend the statement of claim. The plaintiff claimed general as well as special damages.

The particulars of the plaintiff's injuries were listed as under:-

1. Near unconsciousness/being dazed for a short period.

2. Pain and deformity of left upper extremity.

3. Back pain.

4. Fracture of distal third of left humerus and both bones of the left forearm with displacement.

Particulars of his special damages were stated as follows:-

Paid Dr. Dundas for Medical Report	$5,000.00
Paid Dr. Dundas for Consultation	2,500.00
Addendum Report	3,000.00
Transportation for Treatment	6,000.00
Medicine and Linaments and continuing	1,500.00
Loss of earnings from private work Done weekends ($4000 x 22)	88,000.00
Loss of ¼ pay from 15/7/97 – 106 Weekends at $1,500 net per week	159,000.00
Loss of total basic pay and overtime Earnings from 28/7/99 to 15/1/01 – 75 weeks @ $4,500.00	375,000.00
Household help @ $500.00 weekly from 1/8/97 to 15/01/01 – 163 weeks and continuing	81,560.00

The plaintiff is currently unemployed. On June 30, 1997 he was employed to the defendant Company as a labourer and sustained injuries in a motor vehicle accident while in the process of being transported in the defendant's truck, driven by its servant.

Evidence was given by the plaintiff himself and on his behalf by Dr. G. G. Dundas who saw him on the date of the accident and on several occasions thereafter. When he first saw him he had fractures of the left humerus, left radius and ulna. He carried out surgery on him at that time and subsequent thereto, treated him over a 21 month period, and discharged him from any further care by him on March 19, 1999 with an open appointment for review if his condition so warranted.

I will now address the matter of general damages.

The plaintiff stated that immediately after the accident he became unconscious for a period. When he revived, he experienced pain throughout his body and in particular in his left arm. He then discovered that the arm had become entangled with wires and began to swell.

Dr. Dundas stated that when he first examined the plaintiff his findings revealed gross deformation of his left upper arm and forearm with evidence of fractures of the left humerus and left radius and ulna. An elbow cast was applied to the arm. During the night he had intractable pain caused

by swelling of the forearm. The cast had to be split to relieve the pressure on the arm.

Surgery was undertaken the following day. At surgery Dr. Dundas observed that the forearm muscles were swollen and there was extensive bleeding between the muscle fibres. Blood clots were remove from the muscles. It was also an observation of his that the radial nerve controlling the wrist extension and metapliangeal joints were weak and bruised.

At surgery, the wound was left open. A second surgical procedure had to be done at which time the wound was partially covered by skin grafting. The plaintiff developed infection in the arm and lost approximately 30% pf the skin graft. He was able to heal over the area of the deficit.

He was re-admitted to the hospital on September 8, 1997 as his humeral fracture was not united and the weakness in his forearm bone showed no sign of recovery. The following day he again had surgery. On this occasion, a rod which had been previously inserted in the arm, was removed, a stabilizing plate was inserted and a long graft was done.

At that time a tendon transfer was also done. This was done to compensate for deficit induced by the weakness in the radial nerve

Although Dr. Dundas declared that on examination of the nerves there were no structural deficit, or injury noted be opined that a nerve will become

deactivated without any external evidence of injury. It was also his opinion that an impact of trauma could deactivate a nerve indefinitely.

The Plaintiff developed recurrent infections in the arm, over a period. As a result, he was again subjected to follow-up treatment, minor surgery on October 8, 1998, and major surgery on October 14, 1998, January 18, 1999 and June 26 1999. He also underwent physiotherapy.

An assessment of the plaintiff was carried out by Dr. Dundas on March 19, 1999. He also stated that he had a 35 degree deficit in the range of motion of his left elbow. He could bend it to 137 degree. The normal range is 0 degree 140 – 150 degree. He could pronate, that is, turn the palm down, to a range of 40 degree. He could not supinate, that is turn his palm up. His wrist and shoulders recorded full range of movement. The girth circumference of his arms were equal but the amount of muscles in the left arm was proportionately less than in the right. This, he said, did not appear to be an impediment. His strength with right arm was 53 kg and 31 kg with the left.

He assessed his permanent partial disability to be 31% of the left arm 19% of the whole person

There is no doubt that the plaintiff had undergone great pain and suffering during the time he sustained the injury. He continued to endure

great pain over that period during which he had been subjected to surgical operations and medical procedures. He still feels pain when the temperature is low.

He complained of inability to stretch or straighten the limb, to lift heavy items, to wash his face, bathe or button his shirt, using this limb. He stated he can no longer walk swiftly, run, swim or play dominoes and this I accept. He declared he has ceased going out with his friends. His friends ridicule him about his physical condition.

His life of work as well as his social life has been disrupted. It must be frustrating and embarrassing for him to cope with the disfigurement as well as the inability to have the use of his left arm as he had done prior to being incapacitated.

I will now turn to the matter of an award for his pain and suffering and loss of amenities. Several cases had been cited by Mrs. Khan and Mr. Batts in respect of this head of damages.

The following cases were cited by Miss Khan:-

S.C.C.A 102/98 - Jamaica Folly Resort Ltd. v. Crandall

C.L. 1992/W152 - White v. Waldron

Hinds v. Edwards – Vol. 4 Khans Report page 100

Reference was also made to Jamaica Folly Resorts Ltd. v. Crandall and Hinds v. Edwards. By Mr. Batts. He further cited the undermentioned cases:-

Garwood v. Scott - Vol 4 Khan's Report page 109

James v. Pre-Cast Concrete - Vol 4 Khan's Report page 111

Taylor v. Logan - Harrison's Report page 255

In Jamaica Folly Resorts Ltd. v. Crandall. the plaintiff Crandall sustained injury to an arm when he fell from a chair on which he was sitting broke. He suffered a ruptured of the bicep tendon. He underwent surgery twice. He suffered a heart attack at the time of second surgery was performed. His doctors gave evidence that the heart attack was as a result of surgery. The Court found that the surgery had contributed to the heart attack. His permanent partial disability was assessed at 20% of the whole person. An award of $1,750,000.00 made by the Court below was upheld by the Court of Appeal.

In my view Crandall's case must be distinguished from the present case. Firstly, there is uncertainty whether the injury was to Crandall's left or right arm. The Court of Appeal made reference to the right arm while the Court below referred to an injury to his left arm. Secondly, it is clear t hat the heart attack suffered by Crandall had been factored as a significant and

substantial feature in the Court arriving at the award. The Plaintiff in the present case did not suffer a heart attack. Crandall's case could not be regarded as one which could be used as the standard by which a comparative award could be made in relation to the present case.

Guidance in assessing an appropriate award may be obtained from all other cases which had been cited.

In **White v. Waldron**, the plaintiff was right handed, he sustained injuries to his left arm resulting in a displaced fracture of the olecranon process of the left elbow with swelling and tenderness. The injury left him with a stiff elbow. His resultant disability was 4% permanent partial disability of the whole person and 6% of the affected limb. An award of $500,000.00 for pain and suffering and loss of amenities was made in May 1999. The current value of such an award would be $572,000.00.

The plaintiff in **Hinds v. Edwards**, who was right handed, fell and injured her right hand, when alighting from a taxi. She suffered a 10% permanent partial disability of the arm and 6% of the whole person. An award of $674,414.12 was made on May 12, 1997. This amount when updated, amounts to $858,993.98.

In **Garwood v. Scott,** the plaintiff received injury to the palm, dorsal aspect of his left hand and lacerations to the elbow distal end of humerus.

He had surgery. He developed infections. The wound however, healed well. Skin grafting was done, but this resulted in decreased space at the elbow joint and mal union of the digits. His permanent partial disability was 100% of the left hand and 90% of the whole upper limb. He was awarded $600,000.00 for pain and suffering March 3, 1995. A current award would be $1,109,807.10.

The plaintiff in the case of **James v. Precast Concrete** sustained fractures of the left humerus with deformity and compound fracture of distal radius with deformity, as well as a degloving injury to the palm of left hand. He had lacerations to the left armpit and neck, as well as lacerations and abrasions to the back. His permanent partial disability was assessed at 17%. He was awarded $500,000.00 for pain and suffering in April, 1997. When updated this sum translates into $641,472.85.

In **Taylor v. Logan** the plaintiff suffered compound comminuted fracture of decranon and distal end of the humerus with disrupted elbow joint. There was no motion on flexion or extension of the elbow due to its stiffness. His functional impairment was 90% of the left upper limb. An award of $118,550.00 was made in June 1991 which sum currently amounts to $754,253.72.

A review of these cases demonstrate that the range of awards for injury to the arm or upper limb have remained relatively consistent. These awards currently range between $500,00.00 and $1,109,807.10 based on the nature and extent of the injury as well as the resultant disability sustained. It is also apparent that an injury to a dominant arm would attract a higher sum than one to a non-dominant arm. The injuries suffered by the plaintiff in the case under consideration are to his left, his non-dominant arm. This notwithstanding, his injuries and resultant disabilities are more serious than those of the plaintiffs in all the foregoing cases, save and except that of the plaintiff in **Garwood v. Scott**. It is in my view that the sum of $850,000.00 would adequately compensate him for his pain and suffering and loss of amenities.

I will now turn to the matter an award for loss of earnings and loss of prospective earnings.

The plaintiff was injured during the course of his employment. He was given 75% of his salary from July 15, 1997 to July 28, 1999. From the medical evidence adduced, it is unlikely that he could have done any form of work during this period and would have therefore lost 25% of his income. Exhibit '3' which comprises a salary computation schedule showing his net loss of 25% of salary and average overtime payment for the period July 15

1997 to July 28, 1999 clearly demonstrates that he would be entitled to $117,732.38 and this amount will be awarded to him.

The plaintiff worked as a labourer prior to the date of the accident. At the time of the accident his basic pay and average overtime was $5, 923.64 weekly. His injuries have rendered him incapable of resuming work as a labourer. However, he was under a duty to have mitigated his loss by seeking alternate employment as his injuries have not made him completely incapacitated.

He declared that he sought and obtained a job as a watchman. For this job he was paid $1,500 weekly initially and he stated that this sum was subsequently reduced to $1,200. This job was at a house which was being constructed. He lost the job when construction was completed. He stated he started the job about "Independence time " which could have been August of 1998, and left in December 2000. He also stated that he did not have the job for an entire year. Although there is uncertainty as to the length of time he worked, it will be taken that he had worked from August 2000 to December, 2000.

In addition to his loss of 25% of his income, he would have accrued further loss of income for the period July 29, 1999 to January 15, 2001, but

such income would be reduced by the amount be earned as a watchman. His loss would be as under:-

Basic pay and overtime of $5 923.63 for 76 weeks	450,196.64
Less personal allowance	120,432.00
	329,764.64
Less income tax	82,441.16
	247,323.48
Add personal allowance	120,432.00
	367,755.48
Less amount earned as Watchman – 24 weeks @ $1 500.00 weekly	36,000.00
	$331,755.48

So far as his loss for future earnings is concerned, the extent of his handicap would not preclude him from securing some form of employment. Although unskilled, he could get a job. He once secured a job as a watchman and could seek and secure another job in that capacity. However, there is evidence that he would experience a reduction in his income.

A schedule of the Joint Industrial Council's weekly rate of salary payable to watchman was tendered in evidence as an exhibit. This document reveals the weekly wage of a watchman to be $3 222.90 per week.

As labourer, he would have earned $5 923.64 per week. He would therefore be entitled to the difference between that which he would have earned as a labourer and what he could earn as a watchman.

He is now 39 years of age. A multiplier of 7 as discounted for immediate lump sum payment and contingencies would be appropriate in his case. He would be entitled as follows:-

Future loss of income as a labourer at $5 923.64 x 52 x 7	2,156,204.90
Less income as a watchman @ $3 222.90 x 52 x 7	1,173,135.60
	983,069.30
Less personal allowance	120,432.00
	862,637.30
Less income tax	215,659.32
	646,977.98
Add personal allowance	120,432.00
	$767,409.98

The sum claimed for loss of earnings for weekend work as a gardener has not been proved and is therefore disallowed.

The plaintiff asserted that, since the incident, he had to pay $500.00 weekly for assistance with household chores such as washing and cleaning,

this I accept. He would therefore be awarded $500.0 weekly, from August 1, 1997 to January 25, 2001, which is 163 weeks. This amounts to $81,500.00 .

In light of his disability, he will continue to require household help for sometime to come and an award for future household help will be made. A multiplier of 7 will be applied. His entitlement with respect to future household help will be $500 x 52 x 7, which amounts to $182,000.00.

The sum of $10,500.00 claimed for consultation fees and cost of medical reports from Dr. Dundas is allowed. The cost of $6 000.00 for transportation is also allowed as also the sum of $ 1 500.00 for medication.

So far as his claim for future medical expenses is concerned, he has to purchase pain killers and linament to rub the limb twice daily. The cost of these items amount to $500.00 every three (3) months. The sum of $2 000.00 per annum is allowed for the purchase, the analgesics and linament is allowed. A multiplier of 12 will be used, thus resulting in an award of $24 000.00 for this claim.

A summary of the awards is as follows:_

General Damages

Pain & Suffering & Loss of amenities	850,000.00
Future loss of earnings	767,409.98
Future medical expenses	24,000.00
Future household help	182,000.00
	$1,823 409.98

Special Damages

Loss of earnings	331,755.48
Loss of 25% basic pay	117,732.36
Lost of medication	1,500.00
Medical expenses re consultation & Report	10,500.00
Transportation	6,000.00
Household help	81,500.00
	$548,987.84

Judgment for the plaintiff in the sum of $2,372,397.82 being general damages of $1,823,409.98 with interest on the sum of $850,000.00 @ 6% per annum from the date of the service of the Writ of Summons, the May 18, 1999 to March 23, 2001 and special damages of $548 987.84 with interest thereon at the rate of 6% per annum from January 30, 1997to March 23, 2001.

Costs to the plaintiff to be agreed or taxed.