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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2268/2003

BETWEEN	**SHAWN BROWN**	**CLAIMANT**
AND	**BALFOUR DENNISTON**	**DEFENDANT**

Miss Andrea Walters instructed by Palmer & Walters for the Defendant
Defendant unrepresented, not present

Heard: September 19, and 23, 2005

McDonald, J (Ag.)

On January 31, 2002 the Claimant, a police constable was driving a Honda nighthawk 250 motorcycle along Arcadia Drive going towards Barbican Road. On reaching the junction of Torrie Avenue and Arcadia, motor vehicle 8911 AY driven by Balfour Denniston made a right turn unto Torrie Avenue and turned into the path of the motor cycle causing a collision. The Claimant suffered personal injuries, and incurred loss and expense.

As a result of the accident he was admitted to the University Hospital of the West Indies where a full splint was applied to his right hand. He was sent home the following day. About two days later the Claimant visited Dr. Neil at Oxford Medical where x-rays were taken. Two days later Dr. Neil performed surgery and a plaster of paris cast was reapplied to the hand.

Mr. Brown testified that he kept on this cast for 4 –5 months after which a shorter length cast was applied. He experienced numbness in his little finger and ring finger and as a result nerve conduction was effected. He later underwent surgery. After surgery he still had the numbness.

Mr. Brown stated that he has lost about 45% in extension of the full arm. He has lost supination, pronation and flexion of his right wrist. He stated that the Doctor has recommended further surgery to remove implants from the right wrist.

The injuries outlined in the amended Particulars of Claim are as follows:-

> Posterior dislocation of right elbow with a displaced, comminuted fracture of the radial head, slightly displaced intra articular fracture of the distal right radius. Displaced fracture of the waist of the right scaphoid.
> Unstable fracture dislocation of the right elbow and fractures of the right wrist.

Medical report prepared by Dr. Ian Neil dated July 7, 2003 was admitted into evidence as Exhibit 1.

It reads (inter alia) as follows:-

> "He sustained injury mainly to the right upper limb. He was taken to the University Hospital where the limb was manipulated and splinted and he was advised that operative treatment was required. He was however discharged from hospital.
> He was first seen by me on February 4, 2004. The splint was removed and the right elbow was found to be massively swollen and diffusely tender with pain on passive movement. The wrist was also moderately swollen and tender. No obvious nerve or vascular deficits were present..... He

was assessed as having an unstable fracture dislocation of the right elbow and fractures of the right wrist and operative treatment was recommend.

On February 7, 2002, under regional anaesthesia, the right radial head was resected and the elbow joint reduced. The distal radius and the scaphoid fractures were also reduced and internally fixed. This was augmented with a long arm plaster cast. This was kept for four (4) weeks and replaced with a short arm cast which was kept for about two (2) months.

His surgical wounds and fractures healed satisfactorily but he developed severe elbow and wrist stiffness. He was sent for a programme of physiotherapy which was necessarily long and intensive.

During follow-up treatment the patient complained of numbness in his right ring and little fingers and progressive weakness of his grip. Clinical evaluation and confirmatory nerve conduction studies showed that he had developed tardy ulnar-nerve palsy at the elbow. For this, surgery was done, under regional anaesthesia on February 13, 2003 the nerve was transposed anterior to the medical epicondyl. Post operatively there was gradual return of hand strength but the numbness in the finger persisted.

He was last seen on May 5, 2003. The elbow could not extend to the zero position with a fixed flexion deformity of 45^{o} and the elbow could not flex beyond 100^{o} (hence elbow range of motion was $+45^{0} - 100^{0}$) (normal $0^{0} - 140^{0}$). There was forearm pronation of 10 (normal $70^{0} - 90^{0}$) and supination of 60^{0} (normal $70^{0} - 90^{0}$) there was wrist flexion of 45^{0} (normal 60^{0}) and extensive of 20^{0} (normal 60^{0}). His recovery appeared to have reached maximum and he was advised to return to work.

> Mr. Brown sustained serious injuries to his dominant upper limb primarily in a road traffic accident. He required treatment in hospital, major surgical procedures and prolonged out patient care.
>
> He was unable to work from the date of the accident until the beginning of June 2003. He has made significant improvement but continues to have limitation in elbow and wrist function which will be permanent. He is estimated to have 28% loss of upper limb function and 17% whole person permanent disability. He will need to have the implant removed from the right wrist."

Miss Walters placed reliance on three cases in support of this head of damage. These cases are **Hinds v. Robert Edwards & Reginald Jankie** 4 Khans Report 100; **White v Winston Waldron – 5** Khans Report 103 and **Brown v. Jamaica Pre-Mix Ltd**. 5 Khans 99.

The case of Hinds v. Edwards does not offer appropriate guidance in computing an award as the injuries suffered by Mr. Brown far exceed those suffered by the Claimant in that case. In addition the reported case does not specify the nature of the injury to the Claimant's hand.

In White v. Waldron, the Claimant suffered swelling and tenderness of the left elbow and displaced fracture of olecranon process at left elbow. He received emergency treatment of analgesics and an above elbow plaster cast at hospital, and later underwent surgery for open reduction and internal fixation. He was subsequently examined by Dr. Young on June 9, 1995 who assessed this PPD as between 5 – 10% of the whole person.

He was also examined by Dr. Rose on July 31, 1997 who assessed his impairment as 6% of the upper extremity equivalent to 4% whole person. The learned judge favoured Dr. Rose's assessment over that of Dr. Young.

General Damages of $500,000.00 were awarded on May 28, 1999. Such an award would amount to $929,489.3 today. (Using CPI 2213.03 for July 2005).

It is abundantly clear that the injuries suffered by this Claimant are less serious than those suffered by Mr. Brown. However, in my opinion this case provides some base from which one can move to find an appropriate award.

In the case of Brown v. Jamaica Pre-Mix Ltd, the Claimant suffered

> "Pain and deformity of left upper extremity, back pain, fracture of distal third of left humerus and both bones of the left forearm with displacement.
>
> An above elbow cast was applied for temporary stabilization of the fractures and he was admitted to St. Joseph's Hospital.
>
> On July 1, 1997 he had surgical intervention with faciotomy of the left forearm, rush rod stabilization of the left radius, ulna and of the humerus under general anaesthesia at St. Joseph's Hospital.
>
> At surgery it was noted that the forearm compartments were under extreme pressure with severe swelling of the muscles and extreme bleeding in between the tissues as a result of the trauma associated with the fracture. The wounds were left open with serial dressings performed over the next several

days. Subsequent surgery for closure was done on July 7, 1997 and split skin grafting performed. He required transfusion and was discharged on July 20, 1998 for out patient treatment.

On September 9, 1997 he was re-admitted to Hospital for revision of the humeral fracture and a more stable A O internal fixation plate was applied. He was discharged on September 12, 1997. He had recurrent episodes of infection in the left humeral fracture site and had to have implants removed in sequence. The last removal was done on October 14, 1997. He developed osteomyelitis and continued to discharge small spicules of bone from an associated sinus. He had abscesses requiring antibiotics. There was no evidence of infection at the trial and none since his discharge. He had scar revision on January 26, 1999.

His permanent partial disability amounted to 31% of the affected extremity or 19% whole person disability."

Damages were assessed on March 23, 2001, in the sum of $850,000 for pain and suffering and loss of amenities. This sum would amount to $1,378,952.05 today. Miss Walters opined that this award was unduly conservative and she was not sure if the cases of Hinds v. Robert Edwards and White v. Winston Waldron were brought to the attention of the Learned Judge.

She also pointed out that in Dennis Brown's case the Claimant's dominant hand was not injured, whereas in Shawn Brown's case she asked the Court to accept that it was his dominant hand which was injured. Mr. Shawn Brown did not specifically so state in his evidence but Miss Walters placed reliance on Dr. Neil's medical report which stated that Mr. Brown sustained injuries to his dominant upper limb i.e. right upper limb.

After reviewing the authorities cited and taking into account comparable awards and the Claimants injuries I am of the view that 2.1 million dollars would be reasonable compensation for his pain and suffering and loss of amenities.

The Claimant filed and served an Amended Particular of Claim seeking compensation for the cost of future surgery in the sum of $90,000. The projected costs in the sum of $90,842.00 were supported by a statement of Dr. Neil. The sum of $90,000 is allowed for cost of future surgery.

The following claims incorrectly headed Particulars of General Damages are as follows: -

(1)	Extra help		
	February 2002 – June 2003 68 weeks at $14,000 per fortnight	-	$ 476,000.00
(ii)	Transportation		
	Expenses to doctor at $4,500 per round		
	Trip from Drapers Heights (Portland) to		
	Future Medical Centre (Kingston)		$ 540,000.00
(iii)	Cost of x-ray		$ 5,000.00
(iv)	Cost of Physiotherapy		$ 10,500.00
(v)	Cost of Splint Moulding		$ 500.00
(vi)	Cost Arm Slingtotac		$ 580.00
			$1,033,080.00

Extra Help

The Claimant testified that during the time he remained off the job he had to employ a helper Kerry Gordon to look after him as he was unable to cook, wash and sometimes needed to be assisted in the bathroom. He said that the helper worked everyday. It was only his eighty-year-old grandmother and himself who lived at the house.

The Claimant said that he paid Miss Gordon $14,000.00 per fortnight for 68 weeks. He exhibited 31 receipts (Exhibit 4) in proof of this expenditure which amounted to $434,000. This sum is allowed.

Transportation Costs

The Claimant stated that he chartered a taxi on each occasion that he had to visit the Doctor or physiotherapist in St. Andrew. He exhibited 120 receipts (Exhibit 5) from taxi-man Mr. C. Melvin in the sum of $540,000 to support this expenditure. This sum is recoverable.

Physiotherapy

Dr. Neil's medical report speaks to the Claimant being sent for a programme of physiotherapy which was necessarily long and intensive.

Mr. Brown testified that he received physiotherapy treatment from Mr. Robert McDonald for approximately 1 year and 9 months. This is supported by letter from Mr. McDonald Exhibit 3 which states that the Claimant was first seen on March 11, 2002 and physiotherapy sessions were given 2 –3 times per week until November 5, 2003 when he was discharged.

He explained that a part of the physiotherapy costs were covered by Blue Cross and the Ministry of National Security, and those which were not had to come from his pocket.

He exhibited 7 receipts for physiotherapy. The amount of $7,200 paid is allowed.

The costs of x-ray - $9,500 and slingtotac - $580 are allowed.

Judgment for the Claimant in the sum of $3,177,280 being:-

General Damages

Pain and Suffering and loss of Amenities	$2,100,000.00
Cost of future surgery	$ 90,000.00 no interest
Special Damages	$ 989,280.00

Interest is awarded on General Damages of 2.1 million dollars at 6% per annum from the date of service of the Claim Form i.e – 26th December 2003 to the date of judgment i.e – 23rd September, 2005 and on the Special Damages at 6% per annum from the 31st January 2002 to the 23rd September 2005.

Costs to the Claimant in the sum of $40,00 pursuant to Part 65 Schedule A Appendix B of Civil Procedure Rule 2002.

Less $1,000,000.00 paid by the Defendants Insurers Victoria Mutual Insurance Company Limited.