JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 38/90

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	GEORGE EDWARDS MOSES MORRIS	DEFENDANTS/APPELLANTS
AND	DOVAN POMMELLS	PLAINTIFF/RESPONDENT
	FITZRITSON GORDON	3RD PARTY/RESPONDENT

W.K. Chin-See & John Givans for Defendants/Appellants

Ursulla Khan for Plaintiff/Respondents

February 25, 26 & March 22, 1991

GORDON, J.A. (AG.)

At the conclusion of the hearing of this action Malcolm J., found for the plaintiff against the defendants and for the third party on their counter claim against the defendants. He awarded general damages in the sum of $245,000.00 with interest at 3% on $140,000.00 and special damages $4,470.00 to the plaintiff on the claim. The general damages included $105,000.00 awarded for loss of earning capacity. Against this decision the defendants appealed but before the matter came on for hearing, the appeal against the judgment in favour of the third party and that as against the plaintiff in so far as it concerned liability, was withdrawn. The only issue therefore that was left to be heard was the quantum of damages awarded.

The plaintiff was injured in a motor vehicle accident on 19th January, 1986 in the parish of St. Ann. He was admitted to the St. Ann's Bay Hospital, received emergency treatment and thereafter he was transferred to the University Hospital.

The report of Dr. Jadusingh dated 4th June, 1986 admitted in evidence as exhibit II showed that on his admission to the University Hospital:

> " ..... he was found to have a 15cm irregular transverse laceration, 3cm above the supra sternal notch (which was sutured at St. Ann's Bay Hospital); 3cm laceration to right chest, 1cm laceration to right eye brow, 1cm laceration to right forehead and abrasions to both elbows. An endotracheal tube was in place. The patient was taken to the Main Operating Theatre shortly after admission and a tracheostomy performed.
>
> Over the next two days the patient was stabilised and prepared for theatre. On 22nd January 1986, the patient was taken to the Main Operating Theatre and under general anaesthesia his neck laceration was opened and explored. The findings at that time were:
>
> cut strap muscles
>
> shattered cricoid cartilege - anteriorly
>
> trachea exposed
>
> lacerated thyroid isthmus
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> A silastic strut inserted in the subglottis and the mucous was closed. The other soft tissue injuries were repaired and the skin closed. The patient had no post operative problem and he recovered remarkably well."

The respondent remained in hospital for approximately eight weeks in which period he underwent a number of operations and after his discharge he had follow up treatment for six months.

Dr. Halda Claudius Shaw was the consultant ENF specialist under whose supervision Dr. Jadusingh worked as a resident. The plaintiff came under his care and he last examined him on 9th January 1990. He observed:

(a) some degree of shortness of breath upon exertion

(b) grossly disfiguring scar to neck approximately 10 cm in length

(c) mild hoarseness aggravated by voice use - prolonged use.

The injury to the larynx on healing resulted in a narrowing of the airway and this in turn gives rise to the shortness of breath. The hoarseness and shortness of breath upon exertion is a permanent disability.

The plaintiff was 49 years old when the trial commenced on 15th January 1990. He had for six months up to 30th December 1989 been employed in Brooklyn in the United States of America as a security guard and he took leave without pay and came to Jamaica on 5th January 1990 to testify in this case. At the time he was injured he was a meat vendor, he dealing in chicken and pork. The meat he prepared by what is now popularly called "jerking". After his recovery he could not take the heat involved in jerking nor, he said, could he lift the meat. He employed a paid helper at $40.00 per week. He earned $400.00 per week from this employment. He sold his business and migrated to the United States.

On the award for loss of earning capacity Mr. Chin-See in a well structured and lucid presentation submitted that:

(a) there is absolucely no evidence that the plaintiff/respondent at the date of trial was suffering any loss of earnings, a burden clearly cast upon the plaintiff;

(b) there is no evidence that he is likely to lose his job although he said that he was on leave and did not know if his job would be held;

(c) there is no evidence his employer thought that his disability affected him in terms of his employment;

(d) plaintiff has failed to put before court evidence of his earnings as a security guard and court is obliged to assume his earnings are equal to or exceed his pre-accident earnings.

(e) on the basis of his (assumed) earnings at the time of trial, the plaintiff has not proved his entitlement to handicap on the labour market.

The Court must consider, he further submitted, if there is a real risk of the plaintiff losing his job and if so what are his chances of getting another job.

Loss of earning capacity is a recognized head of damages and awards are made to successful plaintiffs on a variety of bases. There are three recognized approaches to the calculation of this award. In some cases a multiplier/ multiplicand is used, in some cases the award is a component of the global award for general damages and in yet others the courts have determined a fixed and relatively moderate sum, S.C.C.A. 61/89 **Kiskimo Ltd vs. Deborah Salmon** (unreported) 4th February, 1991. The award of $105,000.00 is not a relatively moderate sum. It was awarded as part of general damages amounting to $245,000.00 but it bears a remarkable approximation to a multiplier/multiplicand based on the earnings of the plaintiff at the time he was injured. He said he then earned $400.00 per week and with a multiplier of 5 years applied to this sum one gets a total of $104,000.00.

In arriving at an award for loss of earning capacity there must be some amount of speculation but there must also be some basic fact or facts upon which a Court can make a forecast. Where an infant is involved the amount of speculation is high as there are many imponderables. It is otherwise in the case of an adult who has been or is in the labour market. What the court is asked to assess is the "plaintiff's reduced eligibility for employment or the risk of future financial loss". **Gravesandy vs. Moore** (unreported) S.C.C.A. 44/85 delivered 14th February 1986. Loss of earning capacity differs from compensation for loss of future earnings as explained by Denning M.R. in **Fairly v. John Thompson** (Design & Contracting Division) Ltd 1973 2 W.L.R. 40 at page 42. This latter loss can be quantified at the time of trial

on evidence which proves the loss. Loss of earning capacity is given as general damages.

The principles which will guide the court of trial in an assessment of this loss of earning capacity are clearly stated in **Moeliker v. A Reyrolle and Co Ltd** (1977) 1 All E.R. page 9 at page 176 by **Browne L.J. thus:**

> " ..... The consideration of this head of damages should be made in two stages. (1974) 17 KIR 1. 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? (1976) ICR 266. 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".

In that case the plaintiff aged 45 years, employed by the defendants, was on 27th April 1973 injured on the job and suffered the traumatic amputation of about ½ inch of his left thumb and 1½ inches of his left index finger. He is right handed. He was a skilled and valued employee and had been with the defendants for over 30 years. He sustained no loss of wages but there was evidence that his disability would be a disadvantage on the open labour market. The award of £750 which was six months wages, was allowed by the Court of Appeal to remain but general damages of £2,250 for pain and suffering and loss of amenities were increased to £3000. The approach of **Boreham J.,** to the assessment of damages for loss of earning capacity was approved by the Court of Appeal. He considered first the likelihood of the plaintiff losing his job, this he thought was remote but possible, next he considered his chances of gaining

similar employment based on his skill. This he considered was very good. The learned trial judge here engaged in a high degree of speculation but it is considered that this area of award is at times at best speculative. **Stephenson L.J.** in his judgment indicated how the quantum should be arrived at based on the approach of **Boreham J.** At page 19c he said:

> "..... The extent of each risk varies with the circumstance of every case. If (as will be rare) both are negligible or fanciful (I avoid 'speculative' because this head of damages can really be nothing else), no award should be made: **Browne v. James Broadley Ltd,** 16th July 1975 an unreported decision of **Crichton J** at Manchester. If one or both are real or substantial, but neither is serious, the award should not be a token or derisory award, but should generally be in hundreds of pounds: **Roberts v. Heavy Transport (EEC) Ltd** 14th July 1975 unreported a decision of this court referred to by **Browne L.J.** The risk of a plaintiff's falling out of his present job may be serious or slight, and so may be the risk of his losing much or little if he does fall out of it, because he may be expected to have little or much difficulty in getting equally or less well paid work. If both risks are serious, the compensation should generally be in thousands of pounds."

It is instructive to look at other cases where this head of damages was considered. In **Smith vs. Manchester Corporation** (1974) 17 KIR Kemp & Kemp Quantum of Damages Law and Practice Special Edition (1956) 5-009/7/61 the plaintiff aged 49 while working as adomestic worker at an old peoples home slipped on something deposited on the floor and fell sustaining injuries to her right elbow. She developed a frozen shoulder as a result of prolonged strapping up and the movement of her right arm was permanently impaired so that she was under a disability in her day to day tasks and normal social activities. She was off work for 14 months but then returned to light work at the pre-accident pay. In her action for damages her employers

undertook to retain her services as long as they properly could. She was awarded £300 for loss of future earnings but this amount was increased on appeal to £1000 because there was a "permanent reduction in her earning capacity for which she must be genuinely compensated".

In **Herod vs. Birds Eye Food Limited** (1975) C.A. Kemp & Kemp (supra) 5-009/7/6/2. the plaintiff was aged 46 at the time of the accident and 49 at the trial. He had suffered no loss of status or salary or of employment as a result of the injury and the trial judge did not forsee any such loss. He declined to make an award for loss of earning capacity. The Court of Appeal per Megaw L.J. said:

> "In all the circumstances here, having regard to the absence of evidence, without in any way derogating from the principle that where the evidence warrants it the court ought to award damages for loss of earnings capacity, I find myself unable to quarrel with the conclusion reached by the learned judge on this matter, that he was unable to regard loss of earning capacity as a significant factor in the circumstances of this case".

In **Nicholls vs. National Coal Board** Kemp & Kemp (supra) 5009/7/6/4 the plaintiff, a coalminer was awarded £2000 for an injury to his back, a mild disc prolapse accompanied by degenerative changes in the lumbar spine. After recovery he continued working with the defendants at £40 per week but had on occasions to be off work. The award representing one year's salary was approved by the Court of Appeal. Browne L.J. expressed the view that he was worse off than Mr. Moeliker.

Mrs. Sanguinette-Steele was a solicitor in private practice in Jamaica. Due to the defendant's negligence she sustained an injury to the hyoid bone with haemorrhage into the right vocal chord with a slight lowering of the vocal chords resulting in permanent substantial partial loss of voice. She

was awarded under this head ≠6,500. **Sanguinette-Steele vs. Irons and Others** (1965) 8 W.I.R. 112.

In **Eaton vs. Concrete (Northern) Ltd** (1979) C.A. Kemp & Kemp Vol 1 Supplementary Material 14012 the plaintiff a crane driver suffered injuries which precluded him from pursuing his vocation. He obtained employment at a loss of about ≠6 per week on his pre-accident employment. The award of ≠2,008 based on a multiplier of 9 years and a multiplicand of $312 per year was increased by the Court of Appeal to ≠7000. The Court was of the view that based on the evidence there was a very serious risk of periods when he would be out of work because of his injury.

In **Fairly vs. John Thompson** (supra) the Court of Appeal set aside an award of ≠250 per year based on the fact that before the injury was sustained the plaintiff did work of a different nature. The plaintiff after injury had returned to work with his employer at no loss of wages and was so employed at the time of trial. The Master of the Rolls held that there had been no actual loss of earnings. The plaintiff could not continue in his former skill as a fitter erecter but worked as a fitter at the same wages he worked before. **Denning MR** held: "His loss is not a loss of future earnings but a loss of earning capacity. His compensation for it comes under the heading of general damages. It is included in the ≠2250 general damages."

The cases so far reviewed relate to the situation where the plaintiff was employed at the time of trial. In this case the plaintiff had taken leave from his employment so he falls in the category of a person in employment at the time of trial. **Moeliker's** case (supra) indicates at page 16 how the Courts approach the assessment of damages in similar circumstances:

> "Where a plaintiff is in work at the date of trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? ..... But if the court decides that there is a risk which is 'substantial' or 'real', the court has somehow to assess this risk and quantify it in damages. ..... The Court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This state of the assessment will not have been reached unless the court has already decided that there is a 'substantial' or 'real' risk that the plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider (a) how great this risk is and (b) when it may materialise, remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job and then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market, that is what would be his chances of getting a job, and an equally well paid job. ....."

These cases show that the starting point is the plaintiff's earnings at the time of trial and there is no evidence of loss on his pre-accident earnings.

The evidence is that he worked as a security guard and at the end of a full eight hour shift he is tired. To my mind there is nothing unusual in this condition. Anyone who works conscientiously should be tired at the end of an eight hour shift. The plaintiff has to show that as a result of the injury there is a substantial risk of loss of employment in the future. There is no evidence that he will have difficulty in finding alternative employment. There is no evidence that any subsequent employment would result in a diminution of earnings.

Mrs. Khan sought to support the award urging that the learned trial judge had used as the basis for his award the pre-accident earnings of the plaintiff and that there was enough evidence for the judge to find a real risk of handicap on the labour market.

While the authorities show that in the assessment of damages under this head there must be some speculation, they also show that there must be some evidential support for the excursion into the realms of conjecture. The principles to be applied are clearly set out in the judgments in **Moeliker's** case and the starting point should be the plaintiff's earnings at the time of trial. The learned trial judge used the pre-accident earnings as a base figure. But with what did he compare this figure to ascertain that there was a substantial risk that the plaintiff would be at a disadvantage in the labour market in the future? The deliberate decision of the plaintiff not to adduce any evidence of his earnings in the United States of America cannot lead to an inference in his favour that his earnings are likely to fall in the future or that he will be unable to obtain or retain future employment. When the authorities refer to substantial or real risk of the plaintiff losing his job this risk must be occasioned by the handicap the plaintiff has suffered as a result of the injury. This case is starved of evidence from the plaintiff in support of these essential aspects of his case. The medical evidence did not disclose the percentage extent of the permanent disability caused by the injury to the plaintiff's vocal chords. There was no evidence of the types of employment for which the plaintiff would be unsuited in the United States, except that he would have to avoid lifting heavy objects. I am therefore of the opinion that

this is adverse to the plaintiff and must result in the substantial award for loss of earning capacity being set aside.

Mr. Givans submitted that the award for general damages, pain and suffering and loss of amenities of $140,000.00 was excessive and should be reduced by at least one third. He referred to Dr. Halda Shaw's evidence and the report of Dr. Jadusingh, submitting that although Dr. Shaw indicated permanent disability he did not give a percentage. He contrasted the case of **Priestly vs. Vincent Forbes** S.C.C.A. 25/72 dated 18th June, 1974 with this case.

Mrs. Khan submitted that the award was appropriate and should not be altered. She contrasted the awards in **Sanguinette-Steele vs. Irons** (supra) and **Priestly's** case as being at the lower and upper ends of the awards scales and said that **Pcmmells'** case fell between them. The Court "should be bold and take a leap upwards". **Housecroft v. Burnett** (1986) 1 All E.R. page 332.

Dr. Jadusingh's report showed that the plaintiff "had no post operative problems and had recovered remarkably well." Dr. Shaw found he had -

1. shortness of breath upon exertion;
2. a grossly disfiguring scar to his neck;
3. hoarseness which can be the result of singing shouting or talking. Any activity professionally or socially that requires any increased rate of breathing or oxygen flow into the lungs will result in the plaintiff having shortness of breath. This will also occur when plaintiff has sexual intercourse;
4. there was narrowing of the plaintiff's airways in the healing process. This condition is permanent.

This plaintiff had had operations extending over a period of three months. When his case is compared with that of **Priestly** it will be seen that Mrs. Priestly's injuries were more severe.

Mrs. Priestly a 27 year old policewoman and housewife on 18th December 1968 sustained injury to the thyroid cartilege and scarring immediately above the vocal chords and a blocked airway. She was in and out of hospital up to 17th July 1969 and underwent many operations. She suffered residual narrowing of the airway, shortness of breath on exertion and her voice was weak more in the nature of a whisper. She had a severe disability. Even a slight cold infection caused serious airway problems and on one occasion she had to be readmitted to hospital because of respiratory embarrassment caused by a cold. She had to take precautions beyond the ordinary. No further improvement in her condition seemed possible and her disability was considered permanent. An award of $19,000 was increased to $29,000 by the Court of Appeal in 1974.

Mrs. Khan submitted that the award to Mrs. Priestly would today attract a multiplier of 11.6643 using figures supplied by the statistical institute.

There is no doubt that the injuries Mrs. Priestly sustained are more severe than those of the plaintiff. Mrs. Sanguinette-Steele's injuries fall short of the plaintiff's so I accept Mrs. Khan's submission that the plaintiff assumes a median position. In considering the award made in **Housecroft v. Burnett** (supra) there appears this dicta extracted from the judgment of **O'Connor L.J.** who delivered the judgment of the Court:

> "The task of updating awards for non-economic loss in personal injury cases to compensate for the fall in the value of money is not and cannot be a precise art, and because of the variability of the human condition it is generally impossible to set a tariff for awards for personal injuries. Moreover the bracket which emerges from decisions of the Court of Appeal will necessarily have a spread because the Court of Appeal will not interfere with such an award unless it is manifestly too high or too low or it can be shown

> "that the judge has erred in principle in relation to some element that goes to make up the award. Furthermore, cases decided before 1978 do not offer a true comparison for the purpose of updating the level of awards; more recent awards are a better guide because they are net of sums assessed separately which in fact compensate for loss of amenity in part". (Emphasis mine)

Adopting and applying this approach to the instant case it cannot be said that the award of $140,000.00 for pain and suffering and loss of amenity is manifestly too high and it has not been shown that the judge erred in principle in making this award. I therefore would allow the appeal in part and dismiss it in part. The award for loss of earning capacity is set aside the award of $140,000.00 for general damages is affirmed.

The appellant is to have his costs to be taxed if not agreed.

ROWE, P.

I agree.

FORTE, J.A.

I agree.