IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 0897 OF 2003

BETWEEN	**MORRIS POWELL**	**CLAIMANT**
AND	**BELL'S TRUCKING AND HEAVY DUTY EQUIPMENT LTD**	**FIRST DEFENDANT**
AND	**SORN HILL AGGREGATE LTD**	**SECOND DEFENDANT**

Mr. Pierre Rogers for claimant
Miss Tenneshia Watkins instructed by Vaccianna and Whittingham for both defendants

February 2 and 16, 2006

ASSESSMENT OF DAMAGES, INJURY TO FOOT, LOSS OF EARNING CAPACITY, LOSS OF FUTURE EARNINGS

SYKES J

1. Mr. Morris Powell describes himself in his claim form as a 32 year old labourer of Sorn Hill District, Myersville Post Office, St. Elizabeth. His claim is that he was injured by the negligent driving of a front end loader operated by an unnamed employee or agent of the first defendant. The injury occurred on December 9, 2000, while Mr. Powell was working at a quarrie operated by the second defendant. Judgment was entered against both defendants on September 23, 2004. This trial is one of an assessment of damages.

2. The circumstances that led to the injury are these. On December 9, 2000, Mr. Powell was at the quarrie. He was asked to take some water to fill the radiator of the stone crusher. As he held up a container with the water, the

operator of the front end loader dropped the bucket of the loader on his right foot. He said that his foot "mash up"

The nature of the injuries sustained

3. Mr Powell said that the great toe on his right foot was broken and there was degloving of the skin of his right foot. He was first taken to the Mandeville Public Hospital and then transferred to the Kingston Public Hospital (KPH). There are two medical reports. I now refer to the first one.

Report of Dr. Trevor McCartney, Senior Medical Officer, KPH

Mr. Powell was admitted to the KPH on December 11, 2000. The injuries were confined to the right foot which showed the following injuries

i. 15 x 15 laceration on the dorsum of the foot with damage to the extensor tendon of the lateral toes;

ii. deformity of the right great toe with an open fracture of the head of the first metatarsal bone.

He was in the hospital for some time. There was debridement of the right foot. Mr Powell suffered several bouts of infection. On January 11, 2001, he had an operation to K – wire his fracture. A skin was done. Skin was removed from his right thigh and used to replace the lost skin on the right foot. The report says that both procedures were successful. His degree of disability could not be assessed at that time.

Report of Dr. Melton Douglas, Consultant Orthopaedic Surgeon

This report is dated September 5, 2005. This report contains an error. It refers, on the first page, to an injury to Mr. Powell's left foot. It is agreed by all the parties that the injury was to the right foot. This error was corrected in the rest of the report where there is reference to the right foot. In addition to perusing x rays done on September 2, 2005, Dr. Douglas conducted a physical examination of Mr. Powell after he (Powell) complained of the following:

i. pain and burning of the right foot;
ii. pain in the right ankle;
iii. swelling of the right foot;

iv. on walking he had increasing pain and swelling of the foot. He could not walk at a rapid pace. Neither could he run;
v. inability to do farming because of problems with the right foot;
vi. mild limp.

The physical examination is best stated in the doctor's own words. The doctor wrote

Mr. Powell walked with a vaguely detectable limp. Relevant findings were confined to the right foot. The right foot was deformed. The great toe was significantly shorter than the 2nd toe. There was a scar over the dorsal aspect of the foot in line with the 3rd, 4th, and 5th toes. It measured 9cm by 2.5 cm. The extensor tendons were tethered to the skin. Over the dorsal aspect of the 1st metatarsal bone was a surgical scar measuring 7 cm. Over the plantar aspect of the bases of the 2nd and 3rd toes was an ulceration of 2cm x 2cm. This was in keeping with excess pressure transfer over the heads of the 2nd and 3rd metatarsophalangeal joint.

The peripheral circulation was adequate.

There were stiff joints in all toes. The ranges are as listed below:

Joint	1st toe	2nd toe	3rd toe	4th toe	5th toe
Metacarpohhalangeal	+5-+10	10-0	20-5	20-5	10-10
Proximal/Distal Interphalangeal Flexion		stiff	stiff	stiff	stiff
Interphalangeal +5-+5 Of great Toe					

(sic)

Plain radiographs of the right foot taken on September 2, 2005 revealed a healed fracture of the 1st metatarsal bone. The bone was shortened up to 2 cm less when compared to the 2nd metatarsal bone. There was a healed fracture of the tip of the 3rd toe.

The doctor's diagnosis was

metatarsalgia
malunited fracture of the 1st metatarsal
bone ulceration of sole

The gravity and extent of resulting physical disability

4. The doctor's diagnosis and assessment were

Mr. Powell has reached maximum medical improvement. His injuries are considered serious. The findings are in keeping with a severe crush injury. The pain experienced in the right foot is as a result of the residual effects of the injury. The shortening in the great toe has altered the normal biomechanics of the foot shifting the strain away from the great toe to the 2nd and 3rd metatarsal heads. The ulceration on the sole of the foot alludes to the excess strain the shift has caused.

He will require the use of an orthotic to help to correct this biomechanical fault and reduce the effects of the strain on the outer aspect of the foot. The cost of the Biomechanical assessment and the orthotic would total $20 000. He would need to be reassessed and have the worn orthotic replaced every 2 years.

He was assessed as having a permanent impairment rating of 19% of the lower extremity and 8% of the whole person.

From this extract there can be no doubt that Mr. Powell has suffered serious life lasting injury.

The pain and suffering endured and loss of amenity

5. Mr. Powell testified that when he was first struck with the bucket his foot felt as if it had no life. When his foot "start getting back life" it began to pain him. He testified that the skin for the graft came from his right thigh. When he was discharged from KPH he could not walk. He moved with the aid of crutches. His foot had on a cast which was removed after a few weeks. I did not form the view, from the evidence, that Mr. Powell suffered much pain at the time of the injury. It was more numbness in the limb than pain. He

added that even now he experiences numbness.

6. From my reading and understanding of the medical evidence, Mr. Powell now has to walk with the outer aspect of his right foot bearing most of the weight because of the shortening of the great toe. The ulceration of the sole of his right foot is the direct result of placing more weight on the second and third metatarsal heads than on the great toe. It is therefore not surprising that he complained of pain when walking. Naturally too, his foot would pain him when he stands for any period of time.

7. He is unable to enjoy the pleasures of walking to visit his friends. His foot pains him if he walks a lot. He can no longer farm because he would need to walk to his farm which is located off the main road and apparently it is only accessible on foot. Mr. Powell cannot run and needless to say, jumping is out of the question.

8. The suffering of Mr. Powell is both mental and physical. The ulceration of the sole of his foot and the pain of trying to ambulate in a manner that compensates for the shortening of his great toe are evidence of how serious his injuries are. There is the mental anguish from the fact that he will never be whole again and he will be constantly reminded of his disability. I cannot do better than to cite Lord Reid in ***H. West & Sons Ltd v Shephard*** [1963] 2 All ER 625, 628E

> *If there is no curtailment of his expectation of life, 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. But ... a brave man who makes light of his disabilities and finds other outlets to replace activities no longer open to him must not receive less compensation on that account.*

Mr. Powell has lost a body free of the injury that has now befallen him. His body is scarred by the skin graft which had to be done.

Effect on pecuniary prospects

Loss of earning capacity

9. There can be no doubt that his earning capacity has been impaired. From his speech and life to date, there is no evidence that Mr. Powell has the ability to perform any other task than that of a labourer. Given his

impairment, he is certainly at a disadvantage with other labourers who are not injured. Mr. Powell, because of his injuries, could not possibly hope to compete on the open labour market with other labourers. Mr. Powell said he cannot do any construction work or other labouring work because of his foot. These are the kinds of jobs he obviously believes he is qualified to do. To use the words of Scarman L.J in ***Smith v The Lord Mayor, Aldermen and Citizens of the City of Manchester*** (1974) 17 K.I.R. 1 there has been a weakening of the claimant's competitive position. The concept of loss of earning capacity was captured accurately by counsel for Mrs. Smith in ***Smith's*** case when he said that his client did have the same chance at fresh employment after the injury as she had before the injury.

10. I must set out a passage from Scarman L.J.'s judgment in ***Smith's*** case. I do this for two reasons. First, it is the foundation of the now well-known ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 W.L.R. 132. Second, it clearly demonstrates that loss of future earnings are separate and distinct from loss of earning capacity, despite the infelicitous choice of expression by Scarman L.J in the first line of the passage I am bout to cite. His Lordship said at page 9

> *Loss of future earnings or future earning capacity is usually compounded (sic) of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure. Fortunately in this case there is no such loss sustained by the plaintiff because, notwithstanding her accident, she has continued with her employment at the same rate of pay and, as long as she is employed by the Manchester Corporation, is likely, if not certain, to continue at the rate of pay appropriate to her pre-accident grade of employment. That element of loss, therefore, does not arise in this case.*
>
> *The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her*

chances of obtaining comparable employment in the open labour market? The evidence here is plain:-- that, in the event (which one hopes will never materialise) of her losing her employment with the Manchester Corporation, she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a "possible" loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.

11. The first paragraph is dealing with loss of future earnings and the second is dealing with loss of earning capacity. The difference between the two being that loss of future earnings is an award for an actual loss of earnings in the future while loss of earning capacity is a reduction in the claimant's ability to compete in the open labour market because of the injuries received. A loss of earning capacity does not necessarily mean that there is a loss of future earnings. This means that in an appropriate case there can be an award under both heads. Mrs. Smith did not receive an award for loss of future earnings because she was in fact employed at the time of the trial and her earnings had not in fact reduced. However she received an award for loss of earning capacity because her ability to compete on the open market had indeed been reduced, which was described as an existing loss.

12. It has been said that loss of future earnings or loss of earning capacity are alternate awards, that is to say, if one is awarded then the other is not, leading to the ultimate conclusion that both are not to be awarded in any case. But the fallacy of this thinking was exploded by Lord Justice Scarman. The opening words of the first of the two passages make this clear. He made the point that both awards are concerned with the future. This is why he said, "*[l]oss of future earnings or future earning capacity is usually compounded of two elements.*" He then went on to explain that the first component of what he called "future earnings" can be calculated using the multiplier/multiplicand method. He explained that the claimant in ***Smith*** would not be awarded a sum for loss of future earnings **because** her employers had retained her **at the same pre-accident rate of pay**. The

second component is the loss of earning capacity which was described in ***Smith*** as an existing loss which would affect her ability to compete in the future. What may have caused the confusion is the use by Scarman L.J. of the phrase "future earning capacity" as another way of saying "loss of future earnings".

13. Similarly in ***Moeliker*** the claimant continued his employment with his employers **at the same pre-accident rate of pay**. This meant that there could be no award for loss of future earning because he had not suffered any diminution in earnings but only loss of earning capacity for which received a substantial sum. After the decision of the English Court of Appeal in ***Zielinski v West*** [1977] C.L.Y. 798 it is surprising that the argument is still made that the court cannot make both awards. It is still being said that the award must be either loss of future earnings or loss of earning capacity. In ***Zielinski*** the Court of Appeal dismissed the appeal and affirmed awards for both loss of future earnings and loss of earning capacity.

14. The final point that needs to be made is that it is not accurate to say that loss of earning capacity can only be awarded if the claimant is working at the time of the trial. This source of this error was Browne L.J.'s statement in the ***Moeliker*** case as reported at [1976] I.C.R. 253, 262 where he said that the problem "only arise" where the plaintiff is working at the time of the trial. Browne L.J. removed the word "only" and replaced it with "generally" in the versions of the case reported at [1977] 1 W.L.R. 132, 140G and [1977] 1 All ER 9, 15f. This explanation for the differences in the reports was given by Browne L.J. in ***Cooke v Consolidated Fisheries Ltd*** [1977] I.C.R. 635, 641.

15. When Browne L.J. had made the over broad statement in ***Moeliker*** (I.C.R. version), he said so because in three earlier cases that firmly established loss of earning capacity as a proper head of damages the claimants were in fact working at the time of the trial and this led him into the error to which he later confessed (***Moeliker, Smith*** and ***Nicholls v. National Coal Board*** [1976] I.C.R. 266). The error in logic was obvious. If the

person's competitiveness on the open labour market has in actuality been reduced, what difference can it make whether the person is working or unemployed at the time of the trial? Browne L.J.'s correction was applied by Courtney Orr J in ***Mark Scott v Jamaica Pre-Pack Ltd*** [SUIT NO. C.L. S 279 OF 1992] (delivered October 26, 1993). His Lordship made both awards to the claimant who was unemployed at the time of the trial. The English Court of Appeal in ***Cooke*** made a very important statement. That is, the amount awarded for loss of earning capacity ought not to be reduced or affected by the sum awarded for general damages.

16. Mr. Powell has an impaired foot. It cannot be said that Mr. Powell has the same chance of employment after the injury as before. Having decided that he is to be compensated for this loss, the question is how should it be measured? I do not believe the method of simply including a sum for this head in the award for pain and suffering is correct because it goes against the modern trend of itemizing awards. I shall make a lump sum award. It has to be a substantial sum. I take my cue from Scarman L. J. in ***Smith's*** case. The Lord Justice increased the award from £300 to £1000 because the claimant must have substantial compensation for a real though immeasurable risk of loss of employment. I therefore award the sum of $500,000. I would only add that in the case of Mr. Powell, it is no longer a risk but a reality.

Loss of future earnings

17. Mr. Powell testified that he earned $2000 per fortnight, although he pleaded $2,500 per week. He also said that he earned $30,000 every three months from his farm. His loss as a labourer is $56,000 per year. His loss as a farmer is $120,000 per year. His total loss for the year is $176,000. I shall use this figure as the multiplicand.

18. There was no clear proof of age but the defendants seemed to have accepted the assertion in the pleadings that he 32 was years old, at least in 2003, when the claim was filed. This would now make him 35 years. In examining Mrs. Khan's work (Recent Personal Injury Awards Vol. 5) where

she has a collection of cases indicating multipliers used in different cases I believe that a multiplier of 13 is appropriate. This yields a figure of $2,288,000.

Cost of future medical care

19. Mr. Powell's biomechanical fault he will need an assessment and an orthotic. The cost of the assessment and orthotic is $20,000. Dr. Douglas says that he will need this every two years. If he is now 34 years old, with a life expectation of at least forty more years, he will have twenty assessments and replacements. This gives a total of $400,000.

Pain, suffering and loss of amenity

20. Mr. Campbell now suffers a 19% permanent impairment of the lower extremity and 8% of the whole person. The medical evidence already cited need not be repeated here and so I examine the cases cited by counsel for the claimant.

21. In ***Travis Thomas & Stoner v Shaw & Smith*** [Suit No. C.L. 1988 T 157] assessed July 20, 1999 (Khan's volume 5 page 63) the claimant was an 11 year old boy who suffered abrasions to both knees, bruising to elbow, damage to foot. He had a skin graft. There was degloving. His permanent partial disability was 2% of the whole person. He was handicapped in his ability to play games. He was unable to walk or run bare feet or experience discomfort even when wearing shoes or slippers. He was awarded $750,000 general damages. The current value of the award using the December CPI of 2293.8 is $1,409,083.46. The differences between this case and Mr. Powell's suggest that Mr. Powell should receive a higher award.

22. The case of ***James v Caribbean Steel Company Ltd*** [Suit No. C.L. 1993 /J 340] (assessment completed November 30, 1998) (Khan Volume 5 page 63) is too dissimilar to the instant one to be of value.

23. In ***Marriot v D & K Farms*** [Suit No. C. L. 1990/M278] (assessed July 24, 1991) (Harrison's page 382) the claimant's foot was injured when he was struck by a motor car. He suffered fractures and dislocation of the right

foot and toes; laceration of the right foot, haematoma and abrasions on the right elbow. There was a 10 % permanent partial disability of the right foot with arthritic changes. The report does not say what the whole person disability was. He was awarded $120,000 as general damages. The current value is $1,255,729.93.

24. Mr. Rogers also cited ***Swaby v The Attorney General*** [Suit No. C.L. 1988/S092) (Harrison's page 381). This case is too far from the one I am assessing to be of much help.

25. I am of the view that an award of $1,500,000 is appropriate for this case.

Special damages

Pre-trial loss of earnings

26. Mr. Powell claimed $2,500 per week for twelve months. As already noted the evidence is that he earned $2000 per fortnight. He can only recover $56,000.

Medical bills and costs

27. All the bills were agreed. This was $31,800. He has already been compensated in this sum by his employers and so no award will be made.

Conclusion

28. I have made the following awards

a. general damages
    i. pain, suffering and loss of amenities - $1,500,000 at six percent interest from the date of the service of the claim form to February 16, 2006;
    ii. cost of future medical care - $400,000 – no interest;
    iii. loss of future earnings - $2,288,000 – no interest;
    iv. loss of earning capacity $500,000 – no interest;

b. special damages
    i. pre-trial loss of income - $56,000 – at six percent interest

from December 9, 2000 to February 16, 2006.