

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1995/F-181

BETWEEN	DEVON FENTON	CLAIMANT
AND	LEONARD ANTHONY BLAIR	1 <sup>ST</sup> DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2 <sup>ND</sup> DEFENDANT

Mrs Jacqueline Samuels-Brown and Miss Thalia Maragh for claimant.

Miss Annaliesa Lindsay and Miss Julie Thompson instructed by the Director of State Proceedings for defendants

Heard: March 17, 18, and May 14, 2004

JONES, J.

Disregard for human life and sheer recklessness are the commonplace themes that pervade this tale of violence and police excess set in the small district of Sandy Bay, in the parish of Clarendon. On November 25, 1994, thirty-eight year-old Devon Fenton was having a drink with his friends at a night club in Sandy Bay. Constable Leonard Blair and a group of policemen entered the premises. Some men who were gambling at the back of the premises ran. Devon Fenton stood up to ascertain the reason for the disturbance. Constable Leonard Blair opened fire. A few seconds later, Devon Fenton lay momentarily unconscious, paralysed from the waist down. The entry wound on the right side of his neck showed that he was shot by Constable Blair.

He was taken to the May Pen Hospital, and the following day transferred and admitted to the Kingston Public Hospital. He remained hospitalized until December 5, 1994.

Liability is not in issue as on October 24, 2003, by consent, judgment was entered for Mr. Fenton with damages to be assessed together with interest and cost. The extent of his compensation in general and special damages is the singular purpose of this contested assessment of damages.

### EVIDENCE OF INJURIES

The injuries received by Devon Fenton are set out in the medical reports by Dr. Dixon and Dr. Bennett. In his report Dr Dixon said:

*“Devon Fenton was allegedly shot in the neck on November 26, 1994. He was admitted to the Spanish Town Hospital where it was noted that he had paraplegia of both lower limbs. He was referred to Kingston Public Hospital (KPH) for further management. Examination findings on transfer:*

- *Febrile temperature 101°F.*
- *Vital signs stable.*
- *Entry wound to posterior aspect of neck at the right side.*
- *Normal power and sensation in upper limbs.*
- *Paraplegia of the lower limbs.*
- *Inability to pass urine.*

*X-rays showed a fracture of the pedicle of the seventh cervical vertebra with a metallic dense foreign body noted in the neck. He was treated with anti-tetanus toxoid, analgesics and antibiotics. He was treated with steroids and the neck supported in a hard collar. An indwelling urethral catheter was passed.*

*His condition remained stable and he was discharged home on December 5th to be followed up in the fracture clinic with an appointment to the Physiotherapist. He was not seen again until May 29, 1995 although he was to be reviewed in January. He had grade three power in both lower limbs, normal bladder and erectile*

*function and normal power in the upper limbs. He was advised to continue physiotherapy and is to be reviewed in six months.*

*Devon Fenton sustained a gunshot wound to his neck which rendered him paralysed. He has begun to show signs of recovery and is continuing physiotherapy. His final status will be assessed when he returns to the clinic”.*

In his report on the condition of Mr Fenton, Dr. Bennett said:

*“...He allegedly developed a blocked catheter on December 9, 1994, and was re-admitted and his catheter changed. The catheter was removed a few days later on December 12, 1994, and the patient noted to be passing urine per urethra. He was subsequently sent home to be followed up in the urology clinic.*

*On May 13, 1995, he was seen in the urology clinic where he was found to be continent of urine and faeces despite his paraplegic state. At his second clinic visit on September 11, 1995, he was assessed as being continent with a neurogenic bladder and urine microscopy and an abnormal ultrasound was ordered. He will be reviewed at his next visit where a final assessment of his urological problems will be made.”*

Mr. Fenton was also treated by Dr. Ffrench, a general practitioner, in 2001. His examination confirmed that there was a gun shot lodged to the upper body. He said that Mr. Fenton suffered upper motor neurone spinal cord damage, in addition to the following injuries:

- *Wasting of the muscles of the left lower limb*
- *Scaring of the right supra scapular area (the site of entry of the bullet)*
- *Back pain*
- *Swelling of the legs after standing for long periods*
- *Sustained clonus of the left ankle*
- *Hyper—reflexia at both knees*
- *Weakness in both limbs assessed at 50% loss of power in the left lower limb and 20% loss of power in the right lower limb.*
- *50% loss of ability to extend the left and right arms at the elbows*
- *Shortness of breathing on exertion and difficulty in breathing*
- *Starting to develop osteoarthritis of the right knee and right ankle*

Under cross examination from Miss Lindsay, Dr. Ffrench maintained that Mr Fenton's injuries were consistent with spinal cord damage and that they were permanent and continuous. He said that Mr. Fenton has reached his maximum medical improvement for his injuries with a permanent disability of 40%-50% of the whole person.

Miss Lindsay contended that Dr Ffrench's evidence suggested that Mr Fenton's visits were primarily to acquire medical reports for this case. Firstly, Mr. Fenton was never referred for orthopaedic or urological problems. His only referral was in 2002 for the purpose of removing the bullet. Miss Lindsay asked the court not to rely on the evidence of Dr. Ffrench as his evidence covered areas in which he had no specialised training.

Secondly, Mr Fenton showed no difficulty in extending both arms and legs during his in-court demonstration of water therapy. This demonstration contradicted the 50% loss of ability to extend his left and right arms at the elbows found by Dr. Ffrench.

Thirdly, Mr Fenton used a cane for support on some visits to Dr Ffrench, while on other visits did not require the cane. This showed that there was some physical improvement in his condition.

#### GENERAL DAMAGES

On the issue of general damages, Miss Thalia Maragh submitted a number of cases. Firstly, in **Anthony Wright v. Lucient Brown** reported in Khan's Volume 4 at page 201 damages were assessed by Mr Justice Reid in March 2000.

The claimant had an entry and exit wound on the right and upper arm, entry wound to right chest, and fracture of the rib on the right and thoracic vertebra. There was no motor or sensory nerve response below the level of the thoracic segments i.e. he was paraplegic.

The X-Rays confirmed that the bullet after passing through the arm and chest eventually lodged in the spinal cord which it also damaged. He was confined to a wheel chair without the use of his lower limbs. He had no fecal or urinary control and was impotent. He was assessed to have a total permanent disability at 70% of the whole person. Damages for pain and suffering and loss of amenities were awarded in the sum of \$8,000,000.00. This figure when updated using the March 2004 CPI amounts to \$11,290,004.00. The extent of the paralysis in this case was far more severe than in the instant case. In addition, this award is clearly at the higher end of compensation for this type of case.

Secondly, in **Mark Smith v. Roy Green and Dennis McLaughlin** reported in Khan's Volume 4 at page 118 damages were assessed by McIntosh J (Ag.) on November 21, 1995. The claimant was a tractor operator aged 28 years old and injured on June 6, 1992, when he collided with a tractor. The claimant underwent treatment for two and a half years and was left handicapped. Pain and suffering and loss of amenities were assessed at \$3,000,000.00. When updated using the March 2004 CPI it amounts to \$6,515,850.00.

Thirdly, in **Wellington Williams v. Black River Upper Morrass Development Company Limited** reported in Khan's Volume 4 at page 203,

damages were assessed before Mr. Justice Granville James on April 9, 1997. The plaintiff was a security guard, aged forty-two years old and was injured on February 13, 1985, when he slid on morass and fell. He had a prolapsed intervertebral disc and was hospitalized for six weeks. He was left with:

- (1) *Irreversible impotence.*
- (2) *Decreased sensation along L5/S 1 dermatomes in the right leg.*
- (3) *Permanent damage to left L4/L5.*
- (4) *Left thigh 1 cm smaller than right thigh.*
- (5) *The absence of reflexes bilaterally in both lower limbs.*
- (6) *Permanent partial disability assessed at 10% whole person.*

He was awarded the sum of \$1,980,000.00 for pain and suffering and loss of amenities. When updated using the March 2004 CPI, this amounts to \$3,471,717.50

Fourthly, in **Natalie Williams v. Robert Stephenson** reported in Khan's Volume 4 at page 122 damages were assessed before Mr. Justice Algie Smith on November 19, 1996. In that case the plaintiff was a thirty-one year old banker who was injured on March 8, 1990, when he was shot in the abdomen. The plaintiff suffered the following injuries.

- (1) *Shock with haematuria and haemoperitoneum.*
- (2) *Sensory loss in lower limbs.*
- (3) *Gunshot wound to abdomen - in the left flank below costal margin (entry) and in the right lower chest posterolaterally (exists).*

Clinical evidence suggested that there was neuropraxia of the spinal cord with dysaesthetic pain. An MRI scan showed a focus of spinal cord demyelination between the 9th and 12th thoracic vertebrae most likely related to the trauma from the bullet.

Pain and suffering and loss of amenities were assessed at \$2,500,000.00. When updated using the March 2004 CPI it amounts to \$4,526,979.5

Miss Lindsay referred the court to the case of **Smyth v Walker & Anor** reported in Harrison's Assessment of Damages at page 91 as an appropriate starting point for the assessment of damages in this case. In that case the plaintiff was shot through the right side of his chest and the bullet lodged in his thoracic vertebra. Permanent disability was assessed at 60% of his normal bodily function. He was unable to move his lower extremities and was incontinent. General damages were awarded on January 17, 1990 in the sum of \$333,000.00, which when upgraded using the CPI for March 2004 of 1808.8 is \$4,647,611.00

In this case, Mr Fenton was paralysed in both lower limbs, and was initially unable to pass urine. However, he showed some progress with ongoing physiotherapy. On May 23, 1995, (six months later) Mr Fenton was continent of urine and faeces even though he was still paralysed.

Miss Lindsay argued that the updated damages in **Smyth's case** should be discounted by 70% as there was improvement in Mr Fenton's injuries. In particular, he was now able to sit up, walk and is continent. There was also no supporting evidence of erectile dysfunction in this case. The court took the view that this was a far too dramatic a discount.

**SPECIAL DAMAGES:**

The following items amounting to \$1,126,760.00 were pleaded as special damages in the Further Amended Statement of Claim served on March 15, 2004:

(a) Accommodation in Kingston Public Hospital (26/11/94 –5/12/94) & (9/12/94-14/12/94) 16 days at \$150.00 per day	\$2,400.00
(b) Costs of Urine Catheter and dressing	\$3,700.00
(c) X-ray	\$ 200.00
(d) Hospital Drugs, IV Fluids & Injections	\$4,240.00
(e) Hospital Physiotherapy	\$ 300.00
(f) Hospital Consultants Fee	\$ 600.00
(g) Hospital Miscellaneous costs	\$ 280.00
(h) Cost of Exercise Bars US\$20 at J\$35-US\$1)	\$ 700.00
(i) Physical Therapy (home visits –10 @\$500.00)	\$5,000.00
(j) Medication	\$1,700.00
(k) Cost of Domestic Assistance from (5/12/94-30/9/95) 44 weeks at \$500.00 per week	\$24,640.00
(l) Cost of transporting therapist to home (10 @\$500.00)	\$ 5,000.00
(m) Wife's visits –taxi fare to hospital	\$14,000.00
(n) Loss of Earnings to date \$2,000.00 per day (26/11/94-30.9.95) and continuing	<u>\$1,064,000.00</u>
<b>Total</b>	<b><u>\$1,126,760.00</u></b>

Miss Maragh contended that all the items (a) to (l) have been proven satisfactorily. As far as the claim for Mr Fenton's wife's transportation expenses incurred in travelling to the hospital to visit him, she urged the court to accept that they were reasonable and should be allowed.

In addition, she argued that Mr. Fenton's evidence regarding his income of \$2000.00 per week at the time of the accident is unchallenged. There is also evidence that the average income per day of a taxi driver today, is approximately \$4,000.00 - \$5,000.00 per day. Had it not been for his injury he



would have been earning \$4,000.00 per day. Having regard to Mr. Fenton's permanent disability and the fact that he is no longer able to drive his taxi, she submits that he should be awarded future loss of earnings.

The law requires Mr. Fenton to prove his special damages strictly. In **Murphy and Mills (1976) 14 JLR 119** the Court of Appeal of Jamaica held:

*"In any action in which a Plaintiff seeks to recover special damage the onus is on him to prove his loss strictly. It is not enough for a Plaintiff "to write down particulars, and so to speak throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."*

The receipts for items (a) - (g) were misplaced by Mr. Fenton and no duplicate bills were provided. However, the court accepted that the claimant was hospitalised and treated, and as the sums claimed were reasonable they can be accepted.

There were no receipts for the taxi fare covering Mr Fenton wife's visits to the hospital. As this is a substantial item, stricter proof is required, and it will not be allowed. The receipts for physiotherapy treatments carried out at Mr Fenton's home are acceptable.

Even in the absence of receipts, the claim for medication in the sum of \$1,700.00 is reasonable and will be accepted. In addition, there are nine receipts for the transport of the therapist to Mr Fenton's home in Sandy Bay and back to May Pen for \$500.00. These are acceptable.

The general rule is that a claimant, who is wronged, has a duty to take all reasonable steps to mitigate his or her loss. Damages will not be allowed for

any loss, which is due to his neglect to take reasonable mitigating steps. In **British Westinghouse Co. v Underground Ry [1912] AC. 673 at 689**, Lord Haldane held:

*“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable step to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”*

The evidence in this case was that Mr Fenton owned and operated his own taxi. He said that his wife was unable to drive, and he has not been able to find someone to operate his taxi. This court cannot accept that Mr Fenton could not reasonably mitigate his loss over the past ten years. He ought to have mitigated his damage by hiring someone to operate his taxi during the period claimed for loss of earnings. As a result, the court will limit Mr Fenton’s claim for loss of earnings to a maximum of 365 days from the date of the accident. This represents the period in which he ought properly to have mitigated his damage for loss of earnings. In the absence of documentary evidence, the court was prepared to accept the amount of \$2,000.00 per day after expenses as a reasonable figure for the earnings from Mr Fenton’s taxi.

The general rule is that the claimant cannot recover more than he has lost, which would be what would have remained with him after the payment of tax: See **British Transport Commission v Gourley [1956] AC 185**. Accordingly, the amount for loss of earnings has been assessed at 365 x \$2,000.00 which amounts to \$730,000.00. This amount after the deduction of

25% for income tax amounts to \$547,500.00. The court accepted items (a) to (g), (i) (j) (k) and (l) for nine visits, of the schedule of special damages, as proved to its satisfaction. This amounts to \$47,560.00.

Accordingly, damages are assessed as follows:

General Damages -

Pain and suffering and loss of amenities - **\$3,500,000.00**

Interest on the sum of **\$3,500,000.00** at the rate of 3% per annum from the October 3, 1995, to July 14, 1999, and at the rate of 6% from July 15, 1999 to today's date.

Special damages - **\$595,060.00**

Interest on the sum of **\$595,060.00** at the rate of 3% per annum from November 25, 1994 to July 14, 1999 and at 6% per annum from July 15, 1999 to today's date. Accordingly, there shall be final judgment for the plaintiff in the sum of **\$4,095,060.00** together with interest, and cost in accordance with Table 1, Appendix B of CPR 2002.