JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 109 of 1991

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	OWEN FRANCIS	PLAINTIFF/APPELLANT
AND	CORPORAL BAKER	1ST DEFENDANT/RESPONDENT
AND	CONSTABLE BENTLEY	2ND DEFENDANT/RESPONDENT
AND	ATTORNEY GENERAL	3RD DEFENDANT/RESPONDENT

Gordon Robinson and Norman Harrison instructed by Bert Samuels for plaintiff/appellant

Frank Williams instructed by Director of State Proceedings for 3rd defendant/respondent

July 6, 7 and November 16, 1992

WRIGHT, J.A.:

This appeal challenges the assessment of damages made by Langrin, J. on July 31, 1991, whereby he awarded damages against the three respondents in the sum of $600,280 to the appellant who had claimed damages resulting from injuries inflicted by the Police at his home on June 16, 1985. The seven grounds of appeal filed are as follows:

"1. The Learned Trial Judge erred in law in awarding only $40,000.00 as compensation for the Plaintiff's handicap on the labour market as this award was inordinately low in the circumstances of the severity of the Plaintiff's said handicap.

2. The Learned Trial Judge erred in law in failing to make an award for exemplary damages as was sought by the Plaintiff as the circumstances of the incident made it appropriate for such an award.

"3. The award for aggravated damages (if such an award is the appropriate one) was inordinately low in the circumstances.

4. The award generally, and particularly the awards for handicap on the labour market and aggravated damages, was unreasonably low in light of the evidence.

5. The Learned Trial Judge erred in refusing to make an award for Loss of Future Earnings in the circumstances where the evidence which he did not find credible, was admitted by consent and clearly indicated the Plaintiff's settled intention and ability to improve his situation on the job market.

6. The award of $400,000.00 for pain and suffering and loss of amenities is unreasonably low, taking into account -

(a) the multiplicity of injuries suffered by the Plaintiff;

(b) the loss of a kidney and the life threatening infection to the other;

(c) the permanent partial disability suffered, particularly the greatly reduced mobility and internal difficulties.

7. The Judgment of the Learned Trial Judge was unreasonable in light of the evidence."

Eventually Ground 5 was not argued.

No evidence was adduced by the respondents before Langrin, J. What he had before him were the Statement of Claim, the oral testimony of the appellant and six medical certificates which were admitted by consent of the parties. The Statement of Claim will be set out seriatim the better to be able to deal with the complaints.

STATEMENT OF CLAIM:

"1. The Plaintiff was at all material times a Telephone Operator, employed to The Jamaica Defence Force who resides at 32 Harcourt Road, Kingston 10 in the Parish of Saint Andrew.

2. The First and Second named Defendants were at all material times members of the Island's Constabulary Force, servants

"and or agents of the Crown/Commissioner of Police acting in the execution of their duties.

3. The Third named Defendant is the person appointed by Law to be sued in Civil Proceedings against the Crown Proceedings Act.

4. On or about the 16th July, 1985, the first and second named Defendants, while acting in the execution of their duties, maliciously and without reasonable and probable cause jointly and or severally assaulted the Plaintiff in that they opened gunfire on the Plaintiff, hitting him who was carrying out his lawful business at his private home at 32 Hardcourt Road, Kingston 10 in the parish of Saint Andrew.

5. Alternatively the first and second named Defendants acted maliciously and without reasonable and probable cause in that while acting in the scope of their duties so negligently carried out their said employment by opening fire on the Plaintiff, hitting him.

PARTICULARS OF NEGLIGENCE

(a) Failing to make any or any sufficient enquiry of the Plaintiff or any other person before opening gunfire on him.

(b) Failing to carry out any or any sufficient investigation before opening gunfire on the Plaintiff.

6. By reason of the matter set out in paragraphs 4 and 5 hereof, the Plaintiff has sustained severe injuries, suffered loss damage and has been subjected to humiliation and suffered great mental anguish and stress.

PARTICULARS OF INJURY

1. Gunshot wound to left chest at the left Costal Margin in the anterior axillary line.

2. Damage to his left kidney; spleen; left hemi-diaphragm; left lung and pleura and small intestines.

3. Blood in the peritoneal cavity.

4. Loss of left kidney.

5. Loss of the spleen.

6. Damage to spinal cord.

7. Traumatic paraplegia at the level

" between the twelfth thoracic and first lumbar vertebrae on the left side.

8. Traumatic paraplegia at the level of the fifth lumbar vertebrae on the right side.

9. Total disability from the 16th of June, 1985 to the 30th of September, 1985.

10. Inability to walk.

11. 50% disability.

PARTICULARS OF SPECIAL DAMAGE

1.	Travelling expenses to and from hospital	= $ 160.00
2.	Items of clothing lost: Shorts - $40.00 Brief - $15.00	= $ 55.00
3.	Cost of Medical Certificates	= $ 160.00
4.	Cost of household helpers since 7th of August, 1985 @ 700.00 per month	= $ 1,400.00
5.	Cost of wheel chair	= $27,000.00
	TOTAL	$28,775.00

AND THE PLAINTIFF claims damages on the footing of aggravated damages and or exemplary damages with interest thereon as this Honourable Court deems fit."

In order that it may be available for reference later in this judgment the defence on file is included as well.

DEFENCE OF THE THIRD DEFENDANT:

"1. Paragraph 1 of the Statement of Claim is not admitted.

2. Save that the 1st and 2nd Defendants are members of the Jamaica Constabulary Force paragraph 2 of the Statement of Claim is not admitted.

3. Paragraph 3 of the Statement of Claim is admitted.

4. Paragraph 4 of the Statement of Claim is denied. On or about the 16th day of June, 1985 at about 9:00 a.m. the 1st and 2nd Defendants were on mobile patrol in the parish of Kingston, when acting upon information received they proceeded to premises 32 Harcourt Road in the parish

"of St. Andrew. On arrival at this premises they observed one man who later turned up to be the Plaintiff on a roof of a building in the premises and two other men in front of the said premises. The Plaintiff on seeing the police jumped from the building and joined the other two men. The Second Defendant then proceeded to the gate of the premises and was immediately met with gun fire from these men. The Second Defendant then fired back at these men and they escaped. Later that same day the 1st and 2nd Defendants searched the premises and saw the Plaintiff suffering from a gun shot wound. They also found implements of house breaking on the roof of the said building. The Plaintiff was subsequently charged with shooting with intent but failed to attend the Gun Court due to his injuries.

5. In the premises the First and Second Defendants acted in reasonable self defence using no more force than was reasonable necessary in the circumstances. Further the Third Defendant denies that the First and Second Defendants acted either maliciously or without reasonable or probable cause.

6. Paragraph 5 of the Statement of Claim together with the Particulars of Negligence is denied the Third Defendant repeats paragraphs 4 and 5 hereof.

7. Paragraph 6 of the Statement of Claim together with the Particulars of Injury and the Particulars of Special Damage is denied.

8. Save as is hereinbefore expressly admitted the Third Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set out and traversed seriatim."

The claim arose out of Police conduct which cannot escape the label raw brutality. The appellant, a telephone operator living at 32 Harcourt Road, St. Andrew, was atop his roof at about 2:30 a.m. on June 16, 1985, installing an antenna to facilitate the viewing of a television show that same night. The area was well-lighted by street lights. While thus engaged, he observed that a black car pulled up about twenty feet away. Two men alighted from the car each with a gun in his hand - M16s. No questions were asked; they just opened fire on him. His shout saved him at least for the moment. "Hey man, you mad? This is my house." The shooting stopped and he was ordered to "come down",

which he did unhesitatingly by jumping down although the ladder by which he had climbed up was still in place. With both hands held up high, he approached the Mid-bearers. By this time the two men had entered the premises and stood by the gate. He enquired of them what had happened. Then in answer to their queries he gave his name, told them that was where he lived and even pointed to his open door. Their response was a loud explosion as a bullet from an M16 - later identified to be Corporal Beadley's gun - ripped through his lower chest and he fell. Startled by the explosion a resident on the premises came out and enquired what was happening and it was from their reply "Police" that Mr. Francis was to learn that he had been dealing with the police. His mother and the rest of his family next came out and after she had identified him the Police took him away to the Kingston Public Hospital where he underwent surgery and was detained roughly for two weeks. It wasn't long before the police realised what Langrin, J. eventually declared that "there was no reasonable evidence as to why the police fixed on the plaintiff" and no time was lost in launching a massive cover-up calculated to land the plaintiff in prison as a criminal on very serious charges. While the appellant was still suffering from the double trauma of the bullet-injury and surgery he was informed that he would be prosecuted for Shooting with Intent, Illegal Possession of Firearm and Burglary and he was put under "Police guard." The first two charges carry a maximum sentence of imprisonment for life while on the third the maximum sentence is twenty-one years with hard labour.

On July 2, 1985, he was transferred on a stretcher to the Mona Rehabilitation Centre and two weeks later two detectives were there to press formal charges and haul him off to the Gun Court. But he did not go to Court. Professor John Golding withstood this obviously oppressive act. The appellant spent one month in that institution.

The evil in the cover-up is aggravated by charging the appellant with burglary of his own residence and this must have seemed so preposterous to counsel who drafted the defence that he omitted that charge as well as the charge for illegal possession of firearm from paragraph 4 which related the events of that fateful night in the light of which paragraph 5 sought to justify the use of force as well as deny malice or absence of reasonable or probable cause. The failure to prosecute this defence is of greater credit to the respondents than would have been any perjured endeavour so to do.

Handicap on the Labour Market

Ground 1 of the grounds of appeal criticizes the award of $40,000 for handicap in the labour market as being inordinately low in the circumstances of the severity of the plaintiff's handicap. From being an athletic person who engaged in swimming, badminton, track as well as gym activities, who before the incident weighed 160 lbs. the appellant at the time of trial was reduced to 80 lbs., and could not walk nor indulge any of those former activities. To move about he had to swing his hips with the aid of a pair of caliphers. He suffered severe pains from his spine down to his right leg obviously related to injuries numbers 6 and 8 in the Particulars of Injury (supra). Consequently he had to resort to the use of a wheel chair.

Other facts relevant to the question of handicap on the labour market are:

1. Loss of one kidney.
2. Loss of spleen.
3. Traumatic paraplegia at the level between the 12th thoracic and 1st lumbar vertebrae on the left side.
4. Recurrent bladder infection.
5. Recurrent need for kidney dialysis.
6. Weakening of his voice resulting from a weakening of the muscles of the lower abdomen.

7. Permanent disability of the total bodily function initially assessed at 50% but now 35%.

Indeed, Mr. Francis testified that all the lower parts of his body including his buttocks had wasted away.

In resisting the claim for an increase under this head, Mr. Williams submitted that the award is adequate and demonstrates no error on the part of the trial judge in applying any principle of law. Further, he submitted, the appellant did not demonstrate a high degree of risk of being put out on the labour market. To my mind, however, this latter submission ignores the high probability of any one or more of the injuries sustained renedering him incapable of continuing in his job. Take, for example, the weakening of his voice. As a telephone operator that must be a matter of crucial importance because he could on that account alone be rendered unfit for the job. And, whereas the condition of some injuries is fixed, eg. the loss of kidney, the loss of the spleen and the paraplegia, there are recurrent ones such as the bladder infection and the need for the kidney dialysis which could embarrass his presence on the job so as to deny his continuance. It is not difficult to imagine the prospects of the appellant in competition for a job with a person suffering from none of his disabilities.

The headnote of **Moeliker v. A Reyrolle and Co Ltd** (1977) 1 All E.R. 9 correctly sets out the basis on which damages should be awarded for loss of earning capacity where, as in this case, the plaintiff is still in employment at the date of the trial. It reads:

> "In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present

> "value of the risk of the financial damage the plaintiff will suffer if the 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 if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, are only slight, a low award measured in hundreds of pounds, will be appropriate."

There is absolutely no doubt in my mind that this appellant is confronted with a real risk of losing his job prematurely and qualifies for a substantial award. Accepting the fact that there is such a risk the trial judge said:

> "The plaintiff may, however, be handicapped in finding good paying jobs in the field of his choice due to the lack of facilities arranged for his kind of disability. In the circumstances I make an award of $40,000 for handicap on the labour market."

The criticism is that this award contemplates not a handicap generally but refers specifically to employment as a telephone operator. The contention seems to me to be correct because it is well nigh impossible to think of a job situation in which his handicap would not seriously prejudice his being employed.

Two cases were cited for assistance: **CL 1984 C437 Henry Carter v. Jamaica Inn Ltd and others** Khan's Personal Injury Award Vol. 3 p. 225 (15/2/90) and **CL 1982 S199 Deborah Salmon (bnf L. Salmon) v. Kiskimo Ltd and others** Ibid p. 101 (23/6/89). Carter, a farmer, whose major injuries were severe concussion and compound fracture of the right tibia and fibula was awarded $120,000 for loss of earning capacity which in 1991 at the date of the trial of the instant case would be $240,000. These injuries are less severe than in the instant case. Deborah Salmon a thirteen year old school girl who sustained several injuries of a greater severity than this appellant was in June 1989 awarded $450,000 for loss of earning capacity. The 1991

equivalent of this award would be $1.14m. Judging by the value of these two awards the appellant with a 35% disability of the whole person merits an award much higher than the $40,000 awarded, which I agree is inordinately low. I would make an award of $250,000.

Pain & Suffering & Loss of Amenities

In addition to the injuries already mentioned the appellant testified that his injuries have left him impotent - a source of great embarrassment - which has not been relieved even with medical aid.

The trial judge in making an award of $400,000 under this head was guided by the award in Suit CL 1986 G006 **Donald Gray v. The Attorney General for Jamaica and anor.** Khan's Personal Injury Awards Vol. 3 p. 150 (3/2/89) in which under this head the sum of $352,000 was awarded. Mr. Robinson complained that Langrin, J. erred greatly in placing reliance on this case which he regards as an orthopaedic case. However, as Mr. Williams pointed out, this case is not purely orthopaedic because paraplegia was also present. The two cases are by no means identical. Although both were very severely injured and although **Carter's** total disability was assessed at 60% as against Francis' 35% it is evident that Francis has to deal with trauma which is absent from **Carter's** case because of the several organs which have been adversely affected. There were, as well, multiple perforation of his intestines.

It seems beyond a peradventure that the awards made by the trial judge reflect the restraint with which he approached the case. Said he:

> "There is no evidence before me as to why the Police fired on the plaintiff but a reasonable inference for such conduct appears to be that the Police was too caught up in the pursuit of serious crimes. There was a definite failure to carry out any significant investigation before opening gunfire on the plaintiff."
>
> (Emphasis supplied)

To my mind, this view betrays a sympathy for the Police action which is adverse to the appellant's rights and totally unjustified by the evidence.

According to the Consumer Price Index figures supplied to the Court, at the date of the award in this case the award of $352,000 to Carson would have more than doubled. Against that background, I think the appellant's complaint is justified and that an award of $500,000 is most reasonable.

Aggravated Damages

It is to be observed that although there was a specific claim for exemplary damages as well as for aggravated damages an award was made for aggravated damages without any reference being made to exemplary damages. It is now contended that the award for aggravated damages is inordinately low but before us no effort was expended on this contention. Aggravated damages are compensatory and totally different from exemplary damages which are punitive. As Luckhoo, J.A. said in his discussion of Lord Devlin's speech in **Rookes v. Barnard** in his judgment in **Brinkman Douglas v. Marjorie Bowen** (1974) 22 W.I.R. 333 at page 339G:

> "So Lord Devlin suggested that in future a clear distinction ought to be made between compensatory (or aggravated) and **punitive** (or exemplary) damages the former reflecting what the plaintiff has suffered materially in wounded feelings, the latter the jury's (or judge's) view of the defendant's conduct where they aggravate the injury done to the plaintiff."

In that case it was also held that Lord Devlin's categorisation of cases for the award of exemplary damages should be adopted in Jamaica.

Where counsel has not seen fit to press his claim for increasing the award for aggravated damages I will not be astute in finding a basis for so doing.

Exemplary Damages

By far the most hotly contested area of this appeal

relates to the question of exemplary damages. As I have observed earlier, there was a specific claim under this head but it was not specifically dealt with. Mr. Williams took the view that if the award for pain and suffering were increased by, say, about $10,000 the appellant would be adequately compensated for the over-zealous conduct on the part of the Crown servants and in that event he doubted that there need be any award for exemplary damages. His second stance was that the award for aggravated damages obviated the need for exemplary damages.

Not only is this position contradictory but it does not come to grips with the basis on which exemplary damages are awarded. However, there is a basic admission on his part, viz. that the appellant is deserving of better compensation. But neither an increase in the award for pain and suffering nor in the award for aggravated damages, both of which are compensatory, takes care of the claim for exemplary damages where such can properly be awarded, except possibly where the awards under those heads are so high as to meet the justice of the case.

The claim for exemplary damages falls to be considered under the first of Lord Devlin's two categories in **Rookes v. Barnard** (1964) 1 All E.R. 367 at p. 410F-H:

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. ...the servants of the government are the servants of the people and the use of their power must always be subordinated to their duty of service."

What, then, is the conduct of the servants of the government being complained of? Without any justification whatsoever one policeman shoots the appellant at close range while he was answering questions in an effort to allay the initial apprehensions of the officers that he was a felon. He gave his name, he told them that where they saw him was his home. He pointed to his open room door. They make no enquiry within. He was shot, then out came his mother and other family members who

confirmed the information he had given. With that knowledge, they take him off to the hospital where he has surgery and while still suffering post-operative discomfort they inform him of criminal charges to be preferred and then announce to the world that he is a criminal sufficiently dangerous to be guarded, by placing him under police guard. Criminal process was then issued and while he was in the helpless position to which they had reduced him they arrive at the Mona Rehabilitation Centre to which he had been transferred insofar on having him accord Court to answer charges which could only be supported by the sort of perjured evidence reflected in the defence filed.

If criminal action ending in total acquittal had been taken it could be contended that at least an effort had been taken to see that justice was done. But that was not done. And if the matter had been allowed to pass silently into the pages of a worsening relationship between the police and the citizenry our government could well be accused of being reckless of the citizen's rights. But that is not what happened. The Court was informed by counsel that in those circumstances the officer who fired that could not only was promoted while efforts were made to deny the appellant any redress by accusing him of being a felon. Counsel for the Attorney-General was present and did not demur. How must the government's attitude be regarded in those circumstances? In my opinion, the government cannot escape the accusation of affixing the stamp of approval, even if unwittingly, to conduct which properly bears the label of police brutality. In my mind, there is absolutely no doubt that the conduct of the two police officers, in addition to those who sought to further their contention without any or any sufficient investigation, qualifies as being oppressive, arbitrary and unconstitutional and ought not to be glossed over. Of course, there is this objection that exemplary damages partake of the nature of criminal penalties inasmuch as the civil law is being made to do the work of the criminal law. But, be that as

in my, exemplary damages are in appropriate circumstances justifiable and are not unknown to our legal system. See CL 1579/1972 & 1580/1972 **Phyllis Walker & Richard Millingen v. Attorney General et al** in which Carey, J. (as he then was) awarded exemplary damages for conduct by the police which is regarded as "humiliating, outrageous and irregular." Even if the epithet "malicious" were added to this list the conduct of the police in this case would not have been sufficiently described. Accordingly, I have no difficulty in concluding that this case qualifies for the award of exemplary damages. What caused me some concern is the award of aggravated damages the quantum of which, though the award is different in nature, is not, in my opinion, adequate to meet the need for a solatium. Should the award of aggravated damages prevent an award for exemplary damages where the former is inadequate and the award of the latter is manifestly just?

In discussing the distinction between aggravated damages and exemplary damages in **Rookes v. Barnard** (supra) Lord Devlin said this to say at p. 411F-H:

> "Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damages differ essentially does not necessarily mean that there should be two awards. In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum. If a verdict given on such direction has to be reviewed on appeal, the appellate court will first consider whether the award can be justified as compensation, and, if it can, there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is in all the circumstances excessive. There may be cases in which it is difficult for a judge to

> "say whether or not he ought to leave to the jury a claim for exemplary damages. In such circumstances and in order to save the possible expense of a new trial, I see no objection to his inviting the jury to say what sum they would fix as compensation and what additional sum, if any, they would award if they were entitled to give exemplary damages."

I regard this treatment of the law by Lord Devlin as sufficient authority for the conclusion that the two awards are not necessarily mutually exclusive but that in appropriate circumstances, such as he instanced, both awards can be made. It is my considered opinion that the instant case falls within the application of the principle enunciated. What must be borne in mind is that with the exception of the almost nominal award for aggravated damages the awards made do not reflect any element of aggravation let alone being exemplary but were made on a comparative basis with previous awards. Accordingly, there has been no punishment for the indisputably outrageous conduct of the respondents towards an unoffending citizen. I think that in the circumstances of this case an award of $100,000 would be justified.

I would, therefore, allow the appeal regarding the awards under the heads (1) Handicap on the Labour Market (2) Pain & Suffering & Loss of Amenities (3) Exemplary Damages. To that extent the award is varied. There will be interest at 3% on the award for Special Damages of $2,615 from 16th June, 1965 to today and interest on $500,000 at 3% from the date of service of the writ to today. The appellant is to have the costs of the appeal to be taxed if not agreed.

DOWNER, J.A.:

I agree.

MORGAN, J.A.:

I agree.