



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.G107/81

BETWEEN	WINSTON GRAHAM	PLAINTIFF
A N D	LASCELLES DALEY	FIRST DEFENDANT
A N D	THE KINGSTON AND ST. ANDREW CORPORATION	SECOND DEFENDANT

Mr. Hugh Small instructed by Thwaites, Watson, Fairclough & Company for Plaintiff.

Mr. John Vassell instructed by Dunn, Cox & Orrett for both Defendants.

Hearing on: July 27 and 29, 1983.

JUDGMENT

ALEXANDER J:

Winston Graham was born on November 1, 1946. He became a Fireman by joining the Fire Service on 25th February, 1967. He took an exam in August, 1973, was promoted to the Rank of Corporal in September, 1976 and to that of a Sergeant in September, 1979.

He has a common law wife and children. He played Inter-Department cricket for the Fire Department and for the Upsetters Youth Club, Yallahs, St. Thomas. He played Division 3 football for Fire Brigade and in the National League for Upsetters Youth Club.

As a Sergeant he is assigned to the Hose Room, where he supervises repairs and maintenance of the hoses. Periodically he would be called out on "fire duty" some of which earned him overtime pay.

He was a good Officer possessing all the qualities necessary for a promotion. His next post would be that of District Officer. However, there are only fifty three of those posts which are normally filled by Sergeants who number eighty one.

Of the eighty one Sergeants, the Plaintiff by virtue of seniority was 54th in line. There are 6-10 of those however, who he was likely to be considered for promotion ahead of.

This then was the Plaintiff's situation when he unfortunately was in an accident while on duty, involving the Fire Unit he was riding in

along Windward Road in Kingston at about 10 p.m. on 25th November, 1980.

THE MEDICAL EVIDENCE:

Dr. Dundas saw the Plaintiff at the Kingston Public Hospital, where he had been admitted on 25th November, 1980.

He found the following:-

- 1. A deep degloving injury of the left forearm.
- 2. A compound fracture of the left ulna.
- 3. Multiple lacerations of the left leg.

PLAINTIFF'S GENERAL CONDITION:

The forearm wound was very contaminated. There was a lot of blood loss. He could communicate, but somewhat disoriented.

He fluctuated - became more confused over the next week or so, but gradually perked up due to blood transfusion and treatment.

The confusion lasted to December 12, 1980.

TREATMENT:

He was operated on, on 27th November, 1980. General anaesthetic with cleaning debridement of both the forearm and leg. Skin of forearm died as anticipated. Rest of his forearm had a marginal blood supply. Regular dressings had to be done to get rid of infection.

Skin graft done on left arm on 2nd January, 1981. Skin taken from his right thigh. 85% successful i.e. 85% caught on.

DONOR SITE:

Wide area of scarring which would be permanent. Healing would give an appearance of a Keloid on his leg. The size of the area was unknown.

SITE OF GRAFTING:

Coverage of the raw area is satisfactory.

PRESENT CONDITION AND PROGNOSIS:

a) The ARM -

In relation to movement, a lot to be desired. There is a tendency to have a Keloid appearance, accompanied by itching, pain and restriction of movement.

The skin in that area is without normal sensation. It is unlikely that he will regain a vein system in the skin.

The arteries which bring blood to the limb have not been destroyed and they are the ones now bringing blood to the limb, without the aid of veins.

There will be restriction of forearm activities markedly - the main function being rotation. The elbow has lost part of its range of movement.

There will be circulatory problems by the loss of veins. This will cause recurrent swelling of his fingers and hand, and this will be permanent.

WEATHER CONDITIONS:

The weather will have only a marginal effect on the limb. It could cause pain, but in the city it is hard to see any marked effect.

The greatest problem is holding the arm in its normal position. To restrict the amount of blood that accumulates at any one time in the limb, the Plaintiff wears a special type of bandage. It is expected that this would be for the rest of his life. These are changed every three months.

The Plaintiff having suffered a compound fracture there was a recurrent infection of the bone, which interfered with the healing of the skin graft.

This could cause a problem in the future as the fracture has not united. This is because of the infection.

There is then a possibility that the arm may have to be amputated.

b) The LEFT LEG :

The lacerations cut through one of the nerves. Once this happens, the effect is permanent in that a neuroma is formed at the end of the nerve which is usually oversensitive to touch and therefore painful.

The area it supplies with feeling and or sensation is without feeling or sensation. Numbness of the knee, if complained of, would be consistent with his condition. Stiffness, on the other hand, cannot be readily related to this injury.

PERMANENT DISABILITY:

- a) Left arm - 50%
- b) Left leg - 10%

RECOMMENDATIONS:

Hardly fitted for anything more than sedentary work. A protected sort of job is recommended, e.g. an office job.

The Plaintiff cannot undertake anything involving climbing ladders or going up heights. He cannot lift heavy weights.

The playing of cricket or football, not advised. If his life depended on his left upper limb, he would be in grave danger of losing his life.

There is a claim under Special Damages for a number of items which were not challenged. These are:-

- | | | |
|----|-------|-------|
| a) | Pants | \$ 50 |
| b) | Shirt | \$ 50 |
| c) | Belt | \$ 38 |
| d) | Shoes | \$ 80 |
| e) | Watch | \$200 |

f) Transportation was broken down into two segments -

1) Travelling to and from the Hospital for dressing for which a sum of \$48 was claimed and

2) Attending the Physiotherapist for six months at \$2 per week, or a sum of \$48.

There is also a claim for the Special bandage the Plaintiff has had to use as a result of the injury to his left arm.

The claim reads "Cost of 2 JOBSTVENOS @ \$72.24 (Ja) and continuing."

The medical evidence clearly indicates that the Plaintiff will be in need of these bandages for the rest of his life. He would need two at a time and they are expected to last for three months. They are not available in Jamaica, and Foreign Exchange will be needed to purchase them.

On this basis Mr. Small submitted, and I agree with him, that a multiplicand must be used.

To arrive at a proper multiplicand, Mr. Small submitted that the Plaintiff being 34 years of age now, and his life expectancy being 70 years or another 36 years, a multiplier of 15 would be reasonable.

Mr. Vassell agreed in principle with Mr. Small, but submitted that the multiplier should be 10 instead.

A Life Expectancy of 65 years instead of 70 years seems more in keeping with the Jamaican situation today, and therefore a multiplier of 12 seems appropriate.

The cost of the bandage as shown by Exhibit 1 is \$40 U.S. per set. The Plaintiff would need 4 sets per year or \$160 U.S. It was agreed that the parallel rate of exchange should be used or \$2.6 Ja. per U.S. dollar. This then would bring a figure of \$416 (Ja) per year.

Using a multiplier of 12 would then bring a figure of \$4,992.

The award for Special Damages will therefore be:-

- a) ~~Pants~~ \$50
- b) Shirt \$50
- c) Belt \$38
- d) Shoes \$80
- e) Watch \$200
- f) Transportation \$96
- g) JOBSTVENOS (bandages) \$4,992

Interest @ 4% will be awarded in addition in relation to items a-e as of 25th November, 1980 to date of Judgement.

PAIN AND SUFFERING/LOSS OF AMENITIES:

It was generally agreed on both sides that these two heads could be conveniently dealt with together.

Mr. Vassell, as would have been expected, sought to minimize the quantum that should be awarded as much as he could within the accepted guidelines and cited some cases reported in Mrs. Khan's recently published book "RECENT PERSONAL INJURY AWARDS MADE IN THE SUPREME COURT OF JAMAICA" to support his submissions.

One of them was HENRY V. BROWN reported at page 75. In that matter the Plaintiff was left handed, male, single, aged 20 and lost his right arm from the middle of the right upper arm.

An award of \$20,000 was made and this was in February, 1981.

Another was GILZENE V. PAVEMENT AND STRUCTURES LTD. reported at page 76. The Plaintiff had his left arm severed at elbow joint - amputation

-6-

was complete.

An award of \$12,500 was made, and this was in March, 1980.

A third was JACKSON V. DERRICK DHU AND S.S. CARIBBEAN LTD. at page 79. The Plaintiff was female, single, had one child and was a Sales Clerk. There was amputation of the right index finger, right middle, right ring and right little fingers, all to the level of the proximal phalanx. She had severe cosmetic disability and a 60% permanent disability in the use of the right hand, the dominant hand.

An award of \$22,000 was made on September 23, 1981.

Perhaps nearer to this matter before me is the case of BARRETT V. THOMAS AND V.W. LEE & SONS LTD. reported on page 85.

The Plaintiff had -

- 1) Comminuted fracture of lower third of right humerus.
- 2) Comminuted fracture of upper third of right ulna.
- 3) Dislocation of head of radius.
- 4) Multiple lacerations, abrasions and contusions.

The Court of Appeal on October 8, 1981 awarded \$6,000 for Pain and Suffering and Loss of Amenities.

Mr. Vassell submitted that in the cases of HENRY V. BROWN and GILZENE V. PAVEMENT AND STRUCTURES LTD., the Plaintiff in each case suffered a complete loss of an arm, and the awards were \$20,000 and \$12,500 respectively.

In the matter of JACKSON V. DHU AND S.S. CARIBBEAN LTD., there was amputation of the right index, middle, ring and little fingers of a right hander all to the level of the proximal phalanx.

The Plaintiff is now unable to perform her household chores, to grip things as formerly, unable to write with stump without pain and unable to perform efficiently as a Sales Clerk. She shuns parties and shows. She is unable to play badminton or sew or go fishing as formerly.

The award there was \$22,000.00.

In BARRETT V. THOMAS AND V.W. LEE & SONS LTD., among the injuries suffered were a fracture to the lower third of the right humerus and a fracture to the upper third of the right ulna.

There was permanent damage to the right ulna nerve and permanent disfigurement of the right arm.

There was permanent partial disability assessed at 25% of the right arm.

The award, \$6,000.00.

Applying these guidelines to the matter at hand, it is clear, Mr. Vassell concluded, what the range ought to be, not taking into account the rate of inflation.

Mr. Small, on the other hand, submitted that those awards are very low by ^{any} standard and although helpful, should not be rigidly adhered to.

He cited a number of English authorities to show the difference in the approach of the English Courts to the Jamaican ones, and urged that those be looked at and adopted and not the local authorities.

Be it English, local or otherwise, what is clear is that no two cases are identical. This therefore leads to variations up or down and each award is therefore one which is felt to be suitable to the particular case.

This case is no exception.

Another look at the medical evidence is therefore necessary.

The Plaintiff suffered:-

- 1. Deep degloving injury to the left forearm and arm
- 2. Compound fracture of his left ulna
- 3. Multiple lacerations to his left leg

The forearm wound very contaminated. Lot of blood loss. He could communicate, but somewhat disoriented. He fluctuated, became more confused over a period of a week or so, but gradually perked up due to blood transfusion and treatment. The confusion lasted to 12th December, 1980, the accident having occurred on 25th November, 1980.

He underwent an operation. Skin on forearm died. Rest of forearm has a marginal blood supply. Regular dressings had to be done to get rid of infection.

A skin graft to the forearm was done on 2nd January, 1981. The skin for that purpose was taken from his right thigh. It has been 85% successful.

THE DONOR SITE:

Wide area of scarring which will be permanent and an appearance of a Keloid on the leg. However, the area of scarring will lessen with the passage of time.

THE SITE:

The coverage of the raw area is satisfactory, but a tendency to have a Keloid appearance. There will be itching, pain, and restriction of movement.

The skin in that area is without normal sensation. It is unlikely that the area will regain the vein system in the skin. There will be circulatory problems, resulting in recurrent swelling of the fingers and hand, which will be permanent.

There is also the necessity for the Plaintiff to wear a special bandage for the rest of his life, to minimise the pain and swelling.

The Plaintiff had a recurrent infection in the bone which interfered with the healing of the skin graft. This infection also prevented the fracture from uniting.

The recurring nature of the infection necessitates treatment as and when it occurs, but there is the possibility that the arm may have to be amputated.

In relation to the left leg, the lacerations cut through one of the nerves - a neuroma developing. This has caused an oversensitiveness to the touch in the area which is painful, and the area this nerve supplies with feeling and or sensation, is without feeling and or sensation. There is permanent disability of 50% in the left arm and 10% in the left leg. He cannot lift heavyweights, fitted for no more than sedentary work and is not advised to play cricket nor football.

The Plaintiff has had a great deal of pain, suffering and inconvenience. Pain and inconvenience will be his lot for the rest of his life.

-9-

With 50% permanent disability in the left arm and 10% permanent disability in the left leg, the Plaintiff will never be the same again.

An award of \$20,000 seems adequate in all the circumstances, and that is what is awarded.

The head I wish to consider next is Loss of Prospective Earnings.

In relation to this, Deputy Superintendent Leslie Cameron of the K.S.A.C. Fire Brigade, gave invaluable assistance to the Court. It must be remembered that at the time of the accident, the Plaintiff had reached the rank of Sergeant.

He reached that position in September 1979, having joined the service in February 1967 at the age of 17 years and 3 months. His salary at the time of the accident was \$8,514 per annum.

Up to the time of the accident, the Plaintiff was assigned to the Hose Room of which he is in charge. His duties inter alia are general upkeep and maintenance of all buildings, the compound, equipment, civilian staff and occasionally fire duties.

Since the accident, he is no longer able to undertake fire duties. There are 81 Sergeants, and the next grade for purposes of promotion would be that of District Officer. Those number 53.

Of the 81 Sergeants, 53 are senior to the Plaintiff. The criteria for promotion are:-

- a) Discipline of person
- b) Job knowledge
- c) Loyalty to service
- d) Punctuality
- e) Attitudes to work
- f) Seniority

It follows that seniority is the least of the considerations on the question of promotion, but a consideration nevertheless.

-10-

Mr. Cameron had this to say about the Plaintiff in relation to his work up to the time of the accident.

"He is a good Sub-Officer. I see nothing in his personal qualities, but for this accident which would not make me recommend him for promotion. His next post is District Officer. Of the other fifty three, some are very good, some are good, some are mediocre, some are poor. There are about six to ten who I would have recommended Graham over for purposes of promotion. Of the others, I would then have to resort to seniority in relation to Graham and therefore he may not get it over any of those."

In relation to opportunities for promotion to the grade of District Officer, Mr. Cameron said:

"Vacancies are few and far between. The average age of District Officers at present is about mid-thirties."

It follows therefore that at best up to the time of the accident, the Plaintiff was forty third in line for a position numbering fifty three in all. The average age of the incumbents being mid thirties and his age being thirty one.

Of his present prospects for promotion, Mr. Cameron had this to say:-

"I would regard him as a person whose prospect for promotion is limited. He would be likely to be by-passed."

Mr. Cameron continued:-

"His chances for promotion are slim. However there are other areas for example Accounts, Personnel, for which he may still be eligible. One would have to see whether he has the requisite qualifications or the capacity to be trained for it."

Mr. Cameron also stated that the Fire Department is now due for review for reconstruction. If that happens there is the possibility that the Hose Room could be upgraded and the Plaintiff could benefit from that.

Retirement is at age 60 years old or after $33\frac{1}{3}$ years if reached before age 60. Retirement would give to the Officer a lump sum payment and $\frac{2}{3}$ of the Officer's salary as pension. This would be so even if the Officer by virtue of the Medical Board passed out unfit.

The Plaintiff seems to have been better than average and taking everything into consideration ought not to have ended his career in the Fire Department as a Sergeant.

As to how much further he would have gotten was extremely speculative. He certainly was not on the verge of promotion, and would have had to work for some time for an appointment to his next grade.

Being 43rd in line for the next grade comprising of 53 Officers, and with the grade immediately over that one, that is Assistant Chief Officer, numbering only 12, it seems more than reasonable to conclude that the Plaintiff being aged 31 at the time of the accident may not have gone beyond the post of District Officer.

As a result of the accident, the Plaintiff has not lost in pay nor position. What he seems to have lost are his chances for promotion, even though not entirely.

Apart from that there are still opportunities for him to advance in other areas of the service as well as the possibility that his post may be upgraded.

Finally, although hopefully not, if found to be unfit he could go on early retirement with a pension.

The situation seems to be that on one hand, the Plaintiff is not losing any income, still has a chance of getting to the next grade, and still has the opportunity of upgrading himself by equipping himself to move into other areas of the department.

On the other hand, his chances for normal promotion have been substantially impaired, and although it appears that before the accident he would have a very long wait, it seems now because of the accident, it may never materialise.

As of July 1, 1983 the pay scale for Sergeants is as follows:-

- Year 1 - \$10,230 x \$300 to \$10,530
- Year 2 - \$11,509 to \$11,846

In relation to District Officers:-

- Year 1 - \$11,730 x \$300 to \$12,030
- Year 2 - \$13,196 to \$13,534.

-12-

In round figures there is a \$1,500 difference per annum in the income of the two groups. I would estimate that he would have reached the grade of District Officer by age 40.

Since retirement is at age 60, this means that the Plaintiff would have earned that much extra for a period of 20 years.

$$\$1,500 \times 20 = \$30,000.$$

I would then reduce this by half, since promotion or upgrading is not entirely removed or remote.

I would then scale this down by $\frac{1}{3}$ to take into account deductions of one form or another.

This then brings a total of \$10,000 which I award.

I am satisfied that with reasonable care the Plaintiff should remain employed until he reaches retirement age.

The infection although recurring can be treated, can be controlled and there has been success in 90-95% of the cases. The swelling which is of a daily occurrence is reduced by the use of the bandage. The wearing of the bandage will increase the efficiency of the limb.

By doing sedentary work also reduces the possibility of further harm to the arm.

In short the Plaintiff despite his severe injuries can still be an asset to his department up to his normal age of retirement.

However, what then. Surely a 60 year old with a 50% permanent disability in the left arm and a 10% permanent disability in the left leg, must be at a disadvantage compared to a normal 60 year old.

Under the head of Diminution on the Labour Market I would award a token sum of \$2,000.

The awards then are as follows:-

1. SPECIAL DAMAGES

a) Pants	\$ 50
b) Shirt	\$ 50
c) Belt	\$ 38
d) Shoes	\$ 80
e) Watch	<u>\$200</u>
	<u><u>\$418</u></u>

- 13 -

Interest @ 4% per annum from 25th November, 1980 to date
of Judgment.

2.	Transportation	\$ 96
3.	Special Bandages	\$ 4,992
4.	Pain and Suffering and Loss of Amenities	\$20,000
	with interest @ 8% from the date of filing of the Writ.	
5.	Loss of Prospective Earnings	\$10,000
6.	Diminution on the Labour Market	\$ 2,000

There will therefore be Judgment for the Plaintiff against
both Defendants in the sum of \$42,072 with costs to be agreed or
taxed.

JUDGE.