

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO.. CL 1989/S 123

BETWEEN	ALPHANSO SMITH	PLAINTIFF
A N D	THE ATTORNEY GENERAL FOR	DEFENDANT
	JAMAICA	

Mr. Robin Smith for Plaintiff

Mr. John Francis for Defendant instructed by the Director of
State Proceedings.

Heard: July 11 and 19 2001

MCDONALD J (Ag)

There is no issue as to the defendant's liability herein.
Judgement has gone by default with damages to be assessed.
Evidence has been given by the Plaintiff and submissions made by
Counsel for the plaintiff and defendant on the issue of damages.

I will first make reference to the claim for general damages.
The particulars of injury pleaded are as follows:-

- (a) Gunshot wound to the right chest in
the ninth right intercostal space in the
posterior axillary line.
- (b) Gunshot wound to right arm
- (c) Damage to the kidney and liver
- (d) Right haemopneumothorax
- (e) Large laceration to the right hemi-diaphragm
- (f) Fracture of right tenth and eleventh ribs

The plaintiff testifies that as a result of the injuries he

spent 14 days in hospital and was bedridden for 6 months. He asserts that he still cannot use his right hand properly, he cannot do any hard work, and if he lifts up anything heavy the it pains him. He suffers from shortness of breath his lungs 'bothe him and he cannot do any running.

Mr. Smith contends that before the injury he was a healthy person. He also testified that the injury has affected his sex life which he states "is the greatest thing" to him. He states: "I don't have any nature for a woman and that is what I don't li

He testifies that at the time of the injury he was 33 years and earned a living by higglering. Since the injury he has had light work by sitting and selling. Subsequent to discharge from hospital he has visited three doctors and is currently being trea by a Dr. Nash who is a general practitioner and whom he last visi 3 weeks ago.

Medical report of Dr. Trevor McCartney DM: FRCS., was admitt as Exhibit I and reads as follows:-

"Alphanso Smith was admitted to the Kingston Public Hospital at 1.25 p.m. on May 18, 1988, having been allegedly shot to his right chest. He was in cardiovascular shock on arrival".

The injuries listed in the medical report are the same as tho enumerated earlier under the heading particulars of injury.

The medical report continued as follows:-

"He was prepared for surgery immediately and a right thoracostomy tube inserted and attached to underwater

sealed drainage.

At operation the right kidney was found to be shattered and was removed. The liver was also shattered, but, was repaired. The laceration to the diaphragm was repaired. He was transfused with eight units of blood.

"After a stormy first three days, the patient's condition gradually improved and he was discharged from hospital in good condition on June 1, 1988. He should recover completely without permanent defects, however it should be noted that he now only has one kidney".

I now turn to the issue of general damages. Mr. Smith place reliance on three cases in support of this head of damages. These cases are Cecil Smythe v Walker and Anor - Harrison's Casenote issue 2 page 91; Carl Brown (b.n. f Williams) v Parkinson and Anor Harrison Casenote No. 2 page 52; Algie Moore v Mavis Rahman - Harrisons revised Edition of Casenote No. 2 page 164.

Mr. Francis made reference to the following cases:-

Norman Rose v Llandovery Development Ltd and Anor - Harrison's Revised Edition of Casenote No. 2 at page 292 and Eroy Willary v Happy J's Transport Ltd - Harrison's Revised Edition of Casenote No. 2 page-95.

Both Counsel informed the Court that they had been unable to find any Jamaican case dealing with an award for the loss of kidney. Subsequent to delivery of judgment Mr. Smith submitted Natalie Wil v Robert Stephenson CL 1992 W048 - 4 Khan's Report page 122.

In my opinion the nature of the injuries and resultant disabilities in the case of *Smythe v Walker and Anor* and *Algie Moore v Mavis Rahman* experienced by the respective plaintiffs make them incomparable to the present case.

Mr. Smith asked the Court to regard the damages in the instant case as being serious, permanent and ongoing, but he failed to state a sum which he considered as appropriate or adequate to award the plaintiff for his pain and suffering and loss of amenities.

Mr. Francis referred the Court to *Norman Rose v Llandovery Development Ltd and Anor* CL 1986/R045 where damages were assessed by Patterson J on 10.10.90.

The plaintiff was shot in the abdomen at close range. Injuries: large gunshot entry wound on the right upper quadrant with multiple penetrating wounds in the chest and abdomen. There was also extensive damage to the left thumb and to the liver. The right lung and gall bladder were contused. There were perforations in the pyloric area of the stomach with haematoma of the colon. He was hospitalized for 10 days. His left thumb was amputated; the liver lacerations sutured and pyloric end of the stomach was also sutured. Disability - 50% permanent disability of the left hand. General damages - pain and suffering and loss of amenities - \$90,000. Such an award would amount to \$804,000 today.

In *Eroy Willary v Happy J's Transport Ltd* CL 1986/W430, the plaintiff received multiple right sided rib fractures and right hemothorax. He had no permanent disability. Pain in the chest persisted for 6 - 8 months. General damages - pain and suffering and loss of amenities - \$50,000. Such award would amount to \$314,872.20

today (using CPI 1380.4 - May 2001).

Mr. Francis submitted that the Court should consider an award between \$315,000 and \$800,000 and opined that \$400,000 would be appropriate award.

I consider the cases of Eroy Willary v Happy J's Transport, Natalie Williams v Robert Stephenson CL 1987/D176 4 Khan's Report page 122 and Margaret Dunn v Linwood Howell & Ors CL 1987/D176. Harrisons Revised Edition of Casenote No. 2 at page 185 as giving some assistance in calculating an award in this case.

In Natalie Williams v Robert Stephenson the plaintiff suffered:

- A.
 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 (exit).
- B. She was taken to Medical Associates Hospital and transferred to the University Hospital that same evening. Emergency abdominal exploration was performed. The left kidney was shattered, there was perforation of the descending colon; perforation of the left diaphragm and large retroperitoneal haematoma were also noted. Bilateral tube thoracostomies were placed and left nephrectomy performed. The injury to the colon was converted to a loop colostomy in the left flank.
- C. Post operatively she did well at first but she developed left flank abscess which required drainage. She was

returned to the operating theatre because of haemorrhage from the flank wound; a faeces fistula was noted in the wound. She began to lose weight. She was transferred to Florida USA for a course of parental nutrition and investigations. After her nutritional state was stabilized her colonic fistula was resected and primary end to end anastomosis performed.

Her pancreatic fistula was also managed.

D. She did well except for a small abscess at the site of colostomy closure and was discharged for follow-up by Dr. Ivor Crandon, Neurosurgeon.

E. Dr. Joseph M. Brandy DM (Surg) FRCS (Ed), Consultant Surgeon considered her injuries very serious and life threatening. He thought her long term prognosis was good but that she was at risk for abdominal adhesions as she lost one kidney.

F. She had been complaining of a burning sensation in the lower limbs as well as a sensation of pins, needles. The clinical evidence suggested neuropraxia of the spinal cord with dysaesthetic pain. MR 1 scan provided evidence of a focus of spinal cord demyelination between the 9th and 12th thoracic vertebrae most likely related to the trauma from the bullet.

Dr. Crandon thought that her pain and discomfort may settle in time but no time period could be given - though it was possible for the disability to be permanent.

G. She was left with unsightly permanent scars over her abdomen and chest. Dr. Guyan Arscott, Consultant Plastic Surgeon was of the opinion that corrective plastic surgery would provide 60% - 70% improvement in the scars.

Award - General Damages -

Pain and suffering

and loss of amenities \$2,500,000. This sum would currently amount to an award of \$3,454,454.2 (using CPI - .999.01 for Nov.

I am of the opinion that the injuries suffered by the plain in the above-mentioned case are more serious than those suffered the plaintiff in the present case. Although Natalie Williams suffered no liver damages, there is evidence of spinal cord injury, perforation of the colon and left diaphragm, a colostomy had to be attached as she developed abscess at site of colostomy closure. Dr. Brandy considered her injuries very serious and life threatening. He thought her long term prognosis was good but that she was at risk for abdominal adhesions as she lost one kidney.

In Margaret Dunn v Linwood Howell & Orr assessed on 18. 7. 89 by Malcolm J - the plaintiff was injured on 3. 3. 87 in a motor vehicle accident.

Injuries:- unconsciousness; head injury with cerebral concussion; acute severe hemorrhagic shock; multiple right ribs fractures of right 4th, 5th, 6th and 7th ribs; fractured pelvis and right iliac; closed fracture of lower 4th right tibia and fibula above ankle of right

leg; blunt trauma to abdomen with lacerations and maceration of the postero inferior, third of right lobe of liver; laceration with total contusion of right kidney with retro-peritoneal hemorrhage; hemoperitoneum of 2.8 litres of free blood in the peritoneal cavity; subsequent unmasking of a retrograde amnesia in the post concussional syndrome.

Disabilities:- clinical jaundice - liver dysfunction - 15" vertical scar to chest and abdomen - 8" horizontal scar to abdomen - 7" scar on right leg - 2 1/2" scar on right knee with tendency to keloid - numerous small scars on lower right thigh and scalp - 1 1/2" shortening of right leg. Permanent Partial Disability assessed at 30% - inability to have more children, temporary sexual dysfunction.

General damages - pain and suffering - loss of amenities.

Cosmetic disability and inability to have children - \$500,000
This would currently amount to an award of \$5,680,658 (using 121.5 Sept. 1989).

In the present case, there is a noticeable absence of a recent medical report on the plaintiff and there is no follow-up medical report to the one tendered in evidence as Exhibit I. Dr. McCartne medical report dated 7.9.89 is the only medical evidence placed before the Court and which I have given due consideration.

In the final paragraph of the report the doctor states:-

"after a stormy first three days; the patient's condition gradually improved and he was discharged

from hospital in good condition on June 1, 1988.

He should recover completely without permanent defects, however, it should be noted that he now only has kidney".

The plaintiff has given evidence of still suffering from the effects of the gun shot injury. He testified that he was healthy person before receiving the injuries, and inferentially he is stating that the problems he is now having are either directly or indirectly caused by his injuries. However, in the absence of medical evidence connecting the injury with his loss of a kidney, the Court cannot make a finding that this problem is attributable to the injury. The Court is mindful of the fact that although the plaintiff is functioning with one kidney should any problems arise there, he would have been deprived of the use of his other kidney, as a result of the gunshot injury. Further medical clarification would have been helpful in explaining how a person having lost a kidney can recover completely without any permanent defects.

Although the injuries suffered by the plaintiff in Dunn's case include some of the injuries suffered by the plaintiff in the present case, I find that the injuries in Dunn's case far exceed those suffered by Alphonso Smith.

Having regard to the nature of the injuries received and loss of amenities I make an award of \$1,850,000 for pain and suffering and loss of amenities.

I now turn to the head of special damages. The particulars under this head have been agreed except for loss of earnings for 6 months and continuing.

The plaintiff testified that after the injury he was bedridden for 6 months. I accept this evidence. There is no evidence as to when the plaintiff resumed his higglering, and there is no evidence that he has been unemployed in excess of 6 months or that after the said period as a result of the injury he suffered incapacity or diminished capacity to earn a living. I therefore allow the sum of \$14,015.00 for special damages.

Damages are assessed as follows:-

General Damages:

pain and suffering and loss of amenities - \$1,850,000.

Special Damages - \$14,015.00.

Judgment for the plaintiff in the sum of \$1,864,015 being general damages of \$1,850,000 with interest thereon at the rate of 3% per annum from the date of service of the writ to date of this judgment; and Special Damages of \$14,015 with interest thereon at the rate of 3% per annum from the 18th May, 1988 to date of this judgment. Costs to the plaintiff to be agreed or taxed.