IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1998/W121

BETWEEN	*GEORGE WILLIAMS*	*CLAIMANT*
AND	*DONALD WEDDERBURN*	*1ST DEFENDANT*
AND	*ERROL THOMPSON*	*2ND DEFENDANT*

Mr. Rudolph Smellie for the Claimant
instructed by Daly, Thwaites & Company

Miss Jacqueline Cummings for 1st Defendant
instructed by Archer, Cummings & Company

Assessment of Damages

Heard: July 4 and September 16, 2005

McDonald J. (Ag).

The First Defendant has conceded liability to the Claimant in respect of a motor vehicle accident which occurred on the 21st August, 1992 involving the First Defendant's motor bus in which the Claimant was a passenger.

The said motor bus collided into a wall on Whitehall Avenue, in the parish of St. Andrew whilst being driven by the 2nd Defendant acting as servant and/or agent of the First Defendant and as a result the Claimant suffered personal injuries.

The Court is only concerned with the assessment of damages as against the First Defendant.

I will first make reference to the claim for general damages.

Dr. Ian Neil, Orthopaedic surgeon testified on behalf of the claimant and stated that he was seen by a team of doctors of which he was a member at the Kingston Public Hospital on 31st August, 1992.

Examination revealed that Mr. Williams had a severely crushed right leg with a large degloving wound to the proximal leg. i.e. top part of leg. He said that there was laceration in the distal leg near to the ankle. The Claimant had no sensation in the toes and there were no pulses in the leg. He had a lot of pain going in the direction of the leg and could not feel the toes.

X-rays showed a comminuted fracture of the proximal tibia and fibula. The fracture in the tibia extended upwards into the knee joint and with displacement of the head of the fibula.

There was also another set of fractures in the distal leg – in the tibia and fibula which were comminuted and displaced.

A fasciotomy was performed in theatre to see if circulation would return to the leg. This was unsuccessful and the claimant became extremely sick and two days later had to be taken back to theatre where a guillotine

amputation was done above the knee, to save his life. The wound was left open and on the 22nd September 1992 a "formal amputation" was done in theatre. He was discharged from hospital on the 28th September, 1992.

Dr. Neil using the American Medical Association Manual assessed the claimant's permanent partial disability as 90% lower limb and 36% whole person disability.

There was no evidence before the Court as to whether the claimant's total disability could be improved with a prosthesis and by what percentage.

The Claimant Mr. Williams testified that on the 31st August, 1992 immediately after the accident his leg felt bad, he felt a lot of terrible pain, he was 'stressing out, trembling out."

He said that after the leg was amputated he felt stressed out, sick. It was not a comfortable situation being unbalanced, something he would never get used to. He said that everytime he got up and did not realize it was there, he would fall down, and he had to keep holding on. Under cross-examination he said that up to recently he fell down at the bus stop.

He said that three months after the accident, he felt like the foot was there and scratching, and when he went to scratch it and it was not there. He said it was phantom pain.

He stated that now, it being so long since the accident, he was trying to get used to it, trying to adjust to live without it.

He told the Court that the loss of his leg makes him feel very bad and sick because he used to dance, play football and cricket which he cannot do anymore.

Under cross-examination he disclosed that the last time that he played cricket was when he was between the ages of twenty-five to thirty years. He last played football when he was thirty years of age and he is now fifty-two years old. This would put him at age forty at the time of the accident.

Although Mr. Williams stopped playing these sports ten to fifteen years before the accident occurred there remains the possibility that he could have resumed playing football and cricket at some date in the future if it had not been for the accident. There is now an inability on his part to pursue those activities in which he had participated before the accident.

Mr. Smellie asked the Court to award $3.5 million under this head of general damages for pain and suffering and loss of amenities.

Miss Cummings submitted that $2 million was an adequate award for pain and suffering and loss of amenities.

Mr. Smellie cited three cases in support. They are:-

1. Frazer v. Tyrell Morgan & Trevor Corroll
   Volume 5 Khan's Personal Injury Awards page 19

2. Espeut v K. Sons Transport Limited et al

   Volume 4 Khan's page 39.

3. Shaw v. Coolit Limited and Glenford Coleman
   Volume 4 Khan's page 41

In **Frazer v. Tyrell et al** the claimant sustained severe crush injury to left lower extremity from middle third of leg to dorsum of foot. X-ray showed grossly comminuted displaced fracture of left tibia and fibula in the midshaft. On examination five months after the accident, Dr. Dundas noted that he had a high below knee amputation with 6 cm stump extension beyond the tibial tuberosity. That it was tender to percussion but he had no pain generally. He had no prosthesis.

It was the Doctor's opinion that the plaintiff had only 7.5 cm of usable stump. He assessed his disability at 80% of the affected extremity or 32% of the whole person.

On the 2nd June 2000 he was awarded $2,000,000 for pain and suffering and loss of amenities. Such an award would amount to $3,274,515.6 today.

In my opinion the injury suffered by the claimant in that case is not as serious as these suffered by the claimant in the present case.

In **Espuet v. K. Sons Transport** et al the claimant suffered compound comminuted fracture of the right leg; amputation of the right leg

above knee; mild phantom leg symptoms and permanent partial disability of right leg 80%. He was awarded $1,501,360.20 for pain and suffering and loss of amenities. This sum would currently amount to an award of $3,089,486.7 (based on the CPI of 2147.1 for May 2005).

This case bears much similarity to the present case although the PPD is less than in the present case and no figure is given for whole person disability.

The claimant in the case of **Shaw v. Coolit et al** suffered head injury and several lacerations to his body and an above knee amputation. His permanent functional impairment was assessed at 70% of his right lower limb. On the 26th July 1995 he was awarded $1,500,00 for pain and suffering and loss of amenities. This sum would amount to $4,274,253.4 today.

I am of the opinion that the injuries in this case are more serious than those suffered by the claimant, in the present case.

Miss Cummings made reference to the same three cases cited by Mr. Smellie as well as the case of Green v. Goshen Block Making Co. Ltd. – Harrison's Assessment of Damages for Personal Injuries at page 360. In that case the Claimant suffered a below the knee amputation and disability of 100% permanent partial disability of the left

lower leg. By consent damages were assessed at $160,000. This sum would amount to $2,507,561.9 today. I do not find this case helpful as the award represents a global figure.

I have reviewed all the authorities cited and in all the circumstances I think it appropriate to award the claimant $3,180,000 for pain and suffering and loss of amenities.

There is no dispute that in 1996 the claimant received $200,000 from the Insurance Company of the West Indies Limited and or the Jamaican Claim's Bureau and signed a Release – Exhibit I in full and final compromise adjustment and settlement of all claims for injuries, losses and damages resulting or to result from the said accident.

Both Mr. Smellie and Miss Cummings were in agreement that the Claimant's award for general damages should be reduced to account for this sum which has already been received by the Claimant but they differed as to the method that should be employed in this discounting process and the amount. Neither of the Attorneys could assist the Court with any authorities in support of their respective proposed methods.

I am of the opinion that the $200,000 should be treated as an interim payment but no deduction made for interest on that sum which ought to enure to the Claimant's benefit.

Mr. Smellie asked the Court to make an award of $624,000 for handicap on the labour market/loss of Earning Capacity.

Loss of earning capacity is given as general damages. The principles guiding the court in an assessment of handicap on the labour market are set out in the well-known case of **Moeliker v. A. Reyrolle and Co. Ltd. (1977) 1 All ER 9.**

The test laid down in this case is whether there is a substantial or real risk that the Plaintiff will lose his present job at sometime before the estimated end of his working life.

What the Court is asked to assess is the "plaintiff's reduced eligibility for employment or the risk of future financial loss" **Gravesandy v. Moore (1986) 40 WIR 222.**

In the present case the claimant testified that he did painting for a living, he no longer does so and he does nothing for a living now.

There is no medical evidence to suggest that the claimant could not have gone back to do any work after November 1992 when he was discharged from total hospital care.

There is no medical evidence concerning any mental condition such as depression or a disposition to depression on the part of the claimant.

In this case the claimant has failed to mitigate his loss. His evidence is that he went to the Mona Rehabilitation Centre to obtain a prosthesis and 12½ years after the accident he still is without one. He told the Court that he automatically changed his mind when he went and took the measurement as the prosthesis was heavy and he did not have a good knee play. The claimant has failed to try and improve his condition to make himself more mobile.

Under cross-examination it was suggested to the claimant that the reason why he is not working today is because he doesn't want to work. He replied that he wants to work, he wants to do something, but he can't do any and everything. He needs something that he can do for himself, not to trust someone to do something and bring money to him. He must be the sole collector.

The claimant gave evidence that he could have gone into the straw and broom making business, but had no money to do so. When asked why he did not use any of the insurance money to start a business for himself he said "I want to live, I was totally sick with facing this in my life, I want to sit down and eat and drink and know that I am alive. I couldn't take the pace of the world – it was going too fast for me."

It was suggested to him that he did not want to work, but to sit down and eat. He said that ..... he couldn't face this world, he couldn't see himself with one foot.

He agreed that a one-legged man could have gone on to work in the construction industry but he limited his answer by saying "all one-legged man is different."

The claimant gave evidence that at some point after the accident he operated a little stall, but it "mash up" he "had to eat the money." He admitted to using the profit from the business.

There is no evidence before the Court as to when and for what period of time he operated the stall or how much he earned from it. The Court does not know if he earned more money than if he was still painting.

The Claimant has given no evidence as to how much he could have earned making straw basket and brooms as opposed to painting and which occupation would earn him more money.

Under this head of damages for loss of earning capacity/handicap on the labour market, for the claimant to recover he must prove with evidence that as a result of his injury he is not able to do the job he used to do and the job he can now do is making him or will cause him to earn less money than his previous job or occupation.

If the court were even to accept the pre-accident earnings as a base figure, with what would the Court compare this figure in order to ascertain that there was a substantial risk that the claimant would be at a disadvantage in the labour market in the future?

There is an absence of evidence on which the Court could base a figure as to how much the Claimant could have earned after the accident to formulate a multiplier in order to arrive at an amount to be awarded for his being handicapped on the labour market.

However, I am aware of the fact that his injury to some extent may be a deterrent to his fully participating in the job market.

He is still employable, although his injury does create a risk of unemployment especially in jobs which require climbing and standing for considerable periods of time.

In all the circumstances I am of the view that an award of $100,000 for his being handicapped on the labour market would be appropriate.

Mr. Smellie in his submissions mentioned that there was scope for an award for loss of future earnings to be made as part of general damages; but he failed to expand on same and no evidence was led to support this claim.

Special damages representing items (1),(2),(3),(4),(5),(6),(7),(8) and (9) of the Statement of Claim plus costs of prosthesis in the sum of $52,000

Special damages representing items (1),(2),(3),(4),(5),(6),(7),(8) and (9) of the Statement of Claim plus costs of prosthesis in the sum of $52,000 were agreed in the sum of $61,241.00. However on the issue of loss of earnings in the Amended Statement of Claim there was dispute.

The Claimant's original Statement of Claim filed on the 22nd April 1998 some 5½ years after the accident, contained no claim for loss of earnings. On the 9th June, 2004, an amended statement of claim was filed and served which included a claim for loss of earnings i.e. $2,000 per week from 1st September, 1992 to ½ 2004 continuing – totally $1,188,000.00.

Miss Cummings submitted that Mr. Williams claim for loss of earnings must fail as he did not obtain the necessary leave of the Court to amend, and the relevant period of limitation has expired. It expired on the 30th August, 1998.

She opined that the limitation period is relevant not only for the cause of action but also for any claim or issue arising out of the cause of action will be barred after the relevant period has expired.

Mr. Smellie said that there was no authority which stated that special damages/loss of earnings cannot be pleaded after the expiration of the limitation period. He said special damages by its very nature can be amended and will inevitably have to be amended after the limitation period

It is incumbent on the Claimant to obtain the leave of the Court to amend the Statement of Claim in these circumstances. There has been non-compliance with Rule 20.1(b) of CPR 2002. The Claimant's failure to obtain the leave of the Court means that it cannot be relied upon and the claim for loss of earnings must fail.

Miss Cummings asked the Court not to award the claimant any pre-assessment interest on the General damages and special damages. She cited Birkett v. Hayes (1982) 1 WLR 175 as authority.

The Court relies on the case of Central Soya v. Freeman (1985) 22 JLR 152 for guidance and declines to accede to this request.

There will be judgment for the claimant George Williams against the First Defendant Donald Wedderburn in the sum of $3,141,241.00 being:-

General Damages		
Pain and Suffering and		
Loss of Amenities		$2,980,000 ($3,180,000 less $200,000)
Handicap on the Labour Market		$100,000
Special Damages	-	$61,241.00

Interest is awarded on the General Damages of $2,980,000 at 3% per annum from the date of service of the writ i.e. 14th November 1998 to the 13th July 1999 and 6% from 14th July 1999 to the 16th September 2005.

Interest is awarded on the Special Damages at 3% per annum from the 31st August, 1992 to the 13th July, 1999 and 6% from the 14th July, 1999 to the 16th September 2005.

Costs to the Claimant to be agreed or taxed.