[2012] JMSC Civil 59

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. A-052 of 2000

BETWEEN	LAVERN ANDERSON	CLAIMANT
A N D	MARKSMAN LIMITED	1ST DEFENDANT
A N D	KAISER BAUXITE COMPANY AND JAMAICA BAUXITE MINING LIMITED t/a KAISER JAMAICA BAUXITE CO. LTD.	2ND DEFENDANT

Lord Anthony Gifford Q.C. and Mrs. Helen Coley-Nicholson instructed by Gifford, Thompson & Bright for the Claimant.

Mr. Maurice Manning and Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co. for first Defendant.

Mr. Walter Scott, Miss Anna Gracie and Miss E. Salmon instructed by Rattray Patterson Rattray for second Defendant

EMPLOYER DUTY OF CARE TO EMPLOYEE OWNER – OCCUPIER – FOR CRIMINAL ACT OF THIRD PARTY – OCCUPIER'S LIABILITY – DEFENCE OF CONSENT OF RISK OF CONTRACTOR – THE EFFECT OF INDEMNITY CLAUSE IN CONTRACT – LIABILITY OF CONTRACTOR – OWNER – DAMAGES – LOSS OF SIGHT IN LEFT EYE – PSYCHOLOGICAL INJURY – PTSD – LOSS OF MEMORY – HANDICAP ON LABOUR MARKET

Heard: February 3, 4, 5; March 5, April 7 & October 7, 2010 & May 25, 2012

DAYE, J

[1] Some thirteen years ago in the early Monday morning of the 4th May 1998, which was in the night, Mrs. Lavern Anderson a senior security guard employed to Marksman Limited received gun shot injuries to the left side of her face, neck and mandible (jaw) from an unknown and unidentified assailant. She has lost sight in her left eye as a result of one of these injuries and has endured physical, mental and emotional pain and loss since that grave misfortune.

[2] At the time she was shot she was on the 7:00 p.m. to 7:00 a.m. shift doing mobile patrol as observer and supervisor in a pick up truck driven by another security guard. This vehicle was on the premises of the mining area of Kaiser Jamaica Bauxite Company, the second defendant now called St. Ann Jamaica Bauxite Partners, at Water Valley, near Brown's Town in the parish of St. Ann.

[3] She was actually at the maintenance area of this Mining premises and particularly the truck maintenance area, over to where she was driven to in order to respond to a call she received on her portable radio from another security guard in that area. She was unarmed as this was the usual condition in which she performed her mobile patrol duties on instructions by her employer Marksman Limited that she was working for 2 years prior to this shooting.

[4] She was equipped with a portable radio, which was working, an helmet, safety glasses, safety boots, dust mask called balaclava. She was not provided with a firearm by Marksman even though she claims she requested one before the shooting incident. Nor was she provided with any guard dog, rapid response or panic button/alarm system or protective clothing such as a bullet proof vest at time of the shooting.

[5] Mrs. Lavern Anderson was employed in 1996 to Marksman Limited as an unarmed guard (Exhibit 2 Application to Marksman Limited dated 17th April 1996). In January 1998 Marksman renewed its contract with Kaiser Jamaica Bauxite Company to provide security services on a 24 hour basis.

Her guard/driver on mobile patrol was not fit for the job, she claimed, due to his age, his alcohol drinking, and the long hours he was working. Further, she says, the pick-up she works in was old and it took 45 minutes for her to drive and respond to the call. She then raises the issue that Marksman did not have sufficient guards armed or unarmed to man the Mine premises.

Her employer, Marksman Limited Mrs. Anderson alleged failed to provide her with the means to ensure her safety and did not exercise reasonable care for her safety as is reasonably required in all the circumstances. Therefore she contends Marksman, her employer, is liable separately and jointly with Kaiser Jamaica Bauxite Co. Ltd. for the injury she sustained that night and ought to compensate her.

[6] She asserts that night the state and condition Kaiser Mine premises were in compromised her safety and the other security guards assigned there. She identified the following defects and deficiencies: inadequate lighting inside the enclosed area and along the perimeter fence, unrepaired holes in section of the perimeter fence, some section of the perimeter fence were too low and near street level and certain sections of the perimeter fence was covered in bush. This it was contended facilitated access to the premises by unauthorized persons. Kaiser it was alleged did not have at the time any surveillance or closed circuit television system (CCTV) or any intrusion detection system or security warning system or motion sensor. Mrs. Lavern Anderson also contends the absence of such system by Kaiser Partners exposed her to the risk of danger of harm by unauthorized persons entering the premises for unlawful purposes. She contends the company breached the duty to take reasonable care for her safety. Therefore the company was equally responsible, that is, liable for the injury she sustained that night.

[7] It is useful to understand the location where Mrs. Lavern Anderson was required to perform her duties. Mr. Ruel Thompson the area manager of Marksman Limited in 1998 supplied this information. He stated that the building on the premises the Claimant was guarding consisted of: maintenance service bays, warehouses, offices, a canteen and fuel pumps. He stated further the Claimant was shot in the maintenance area of the premises and this area contained by estimation two (2) acres. (Response to request for information dated 25th August 2003).

[8] Lieutenant Colonel Bruce Bartley visited and inspected the mine area eight (8) years after the shooting. He gave evidence as an expert on behalf of the Claimant. He gave his opinion about the security of the mine area in his report dated 5th October 2006 (Exhibit 4). It was, "the physical protection of the compound is considered poor". His findings were:

"Protection

At the time of the incident (May 4, 1998) there were no armed guards or canine for the required protection of life and property.

The security officers are not issued with protection at, among other places, the "Mining area to include Mine maintenance, production areas, water valley and Tobolski." (Exhibit 2 : Contract dated February 13, 1998).

Under the contract the scope of the work is described as follows:

"B Mines Area

1. **Maintenance – main gate**

   2 x unarmed guards – round the clock

2. **Production**

   2 x unarmed guards – round the clock

3. **Mines Patrol**

   2 x mobile patrol – round the clock

   1 x supervision – round the clock

   1 x senior unarmed guard – round the clock"

(Appendix A of Contract)L

Lt. Col. Bruce Bartley other findings were:

Response Capabilities

There was no panic alarm system to alert or signal whenever there is a crisis.

Observation

The view from cover is blocked by a storage of container close to the wall.

Some area of the fence was covered with bush.

Vulnerability

Several holes in the perimeter fence and some areas are too low or are without the required three strands of barbed wire at the top. The top of the bathroom near the service bay is not fenced."

[9] Captain Lloyd Smith was present with Lt. Colonel Bartley as also Mrs. Lavern Anderson at the site inspection of the mine area 5th October, 2006. He was then in charge of security for Kaiser Jamaica Bauxite on the night of the shooting. He was also named as administrator of the contract Kaiser signed with Marksman in January 1998. His opinion was that:

> "...we [Kaiser] had adequate resources appropriately deployed under the direction and guidance of Marksman to deal with the security threat as presented themselves at the time. Obviously, because security is constantly changing one has to continuously review and what is appropriate today may need reviewing tomorrow..."

[10] He agreed during cross-examination by counsel Mr. Manning, that the circumstances would vary the appropriate strategy, so although the Claimant Mrs. Lavern Anderson was employed to Marksman Limited as an unarmed guard, and though Marksman Limited had deployed her as an unarmed supervisor on the night of the shooting, it does not mean that the circumstances she operated could be of such that she was exposed to a risk of real danger to her safety and security to warrant Marksman supplying her with a firearm and/or increasing the numbers of guards to prevent any injury to her from that risk of danger. Equally it does not mean that since Kaiser had contracted for one unarmed supervisor on mobile patrol on a 24-hour basis the condition and physical state surrounding the premises could be of such that warranted them using armed guards on mobile patrol and also increasing the amount of guards

on their premises. Capt. Lloyd Smith said security is constantly changing and had to be reviewed continuously.

Issues

There are issues of facts and law drawn between Mrs. Lavern Anderson and Marksman Ltd. the first defendant, and Kaiser Jamaica Bauxite Company the 2nd Defendant on their separate amended pleadings.

The issue between Marksman Ltd. and the claimant are as follows:

(a) Did Marksman Ltd. as employer owe its employee a duty to take reasonable care to prevent injury and harm from the criminal act of a third party?

(b) If the employee was exposed to the risk of danger and voluntary consented to accept such risk is the employer relieved of its duty of care?

(c) Was the employee on mobile patrol exposed to a real risk of danger from intruders who entered the premises on occasions before the shooting of May 4, 1998?

(d) Did intruders enter Kaiser premises where the employees were on duty several times before May 4, 1998?

(e) Did Marksman Ltd. know or ought to know of any unlawful entry on the premises prior to May 4, 1998.

(f) Did heavily armed intruders enter Kaiser premises about 3 weeks before the employee was shot on May 4, 1998?

(g) Did Marksman Ltd. know or ought to know about this unlawful entry if this happened?

(h) If so, was this a condition that exposed the employee to a real risk of danger?

(i) Did the unarmed employee requested from Marksman Ltd. firearms for their protection?

(j) Did her employer recommend to Kaiser Bauxite Company second defendant that unarmed guards doing patrol be issued with firearms?

(k) Did the 2nd Defendant refuse this recommendation on policy rounds?

(l) Was the failure to provide the security guard a firearm the cause of the shooting that lead to the injury she sustained?

(m)Did the employer request that the employee use guard dogs with trained handlers?

(n) Was the failure to provide guard dogs a cause of the shooting that lead to the employee injury?

(o) Did the employer provide sufficient security guards to man the maintenance area?

(p) Were the equipment supplied to the employee adequate in the absence of a rapid response or panic alarm system?

(q) Were there adequate lighting outside the perimeter fence and inside the perimeter fence of the building?

(r) Were the measures adopted to improve security after the shooting showing the conditions of the premises at the time of the shooting as not being safe for the employee to perform this duty?

Injury

[12] (a) Are there 68 gunshot pellets still lodged in the left side of the claimant face and hand?

(b) Is certain spinal injuries osteophytes formation ,sclerosis and spondylosis caused by the gunshot injury?

(c) Is the complainant suffering from memory loss due to brain injury?

(d) Does she suffer from psychological injury that impair her normal function?

(e) Is her hypertension caused by the gunshot injury?

[13] The issues between Kaiser Jamaica Bauxite Company and the claimant are as follows:-

(a) Do they owe the claimant a duty to take reasonable care for her safety against the criminal act of a third party?

(b) Do they owe the claimant a common duty to take reasonable care for her safety as occupiers of Kaiser Mining premises at Water Valley, St. Ann?

(c) Did they breach any duty of care to the claimant?

(d) Did Marksman Ltd recommend to them that armed security guards were needed for the maintenance area?

(e) Did they refuse armed security guards as a result of its policy?

(f) Did they fail to provide adequate light at the maintenance area in May 4,1998?

(g) Did they fail to provide and maintain proper fencing of the perimeter of the maintenance and the mining area of May 1998?

(h) Did they fail to install an intrusion detector or alarm system for the protection of the guard against intruders whether armed or unarmed on the 4th May, 1998?

(i) Did the measures adopted to improve the security of the mine area after the shooting on the 4th May. 1998 indicate the maintenance

area was not in a reasonable safe state and condition on the night of 4th May, 1998?

(J) If Kaiser did not discharge their duty of care to the claimant are they protected by any exclusion or Indemnity clause in their contract with Marksman Ltd. (Ext 20)

Employer/Employee duty of care

[14] At common law an employer has a duty to his employee to take reasonable care for his safety in all the circumstances of the case. It is a personal duty and non-delegable. It involves the provision of a safe system of work. The employer has a duty to take reasonable care "so to carry on his operations as to not subject those employed by him to unnecessary risk." **Smith v Baker & Sons** [1891] AC 325, per Lord Hershell. In **Wilson & Clyde Construction Co. Ltd. v English** [1937] 3 All ER 628 Lord Wright approved this statement of the employer's duty. Then in **Harris v Bright Contractor Ltd.** [1933] All ER 395 and 397 Slade J, explained that the duty of the employer is:

> ***"...not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved."***

So the test of foreseeability is relevant to the employer's duty of care. The facts are that the plaintiff, an asphalter, had sued his employer for failing to provide a safe system of work. The asphalter had to remove an asphalt-drip edge from a flat roof. He had to walk and lean forward 9 inches from the edge of a flat roof to do the job. He fell through an adjoining asbestos roof 2 feet below and 13 feet to the factory floor below and sustained serious injuries. The court found that the asphalter was subject to a risk that the employer could foresee and reasonably could guard against.

Safe System of Work

[15] The learned authors of ***Charlesworth and Percy on Negligence*** (11th edition) ch 10:66 explain that "safe system" of work mean (i) the organization of the work; (ii) the way in which it is intended the work shall be carried out; (iii) the giving of adequate instruction (especially to inexperienced workers); (iv) the sequence of events; (v) the taking of precaution for the safety of the workers and at what stages; (vi) the number of such person required to do the job; (vii) the part to be taken by each of the various persons employed; and (viii) the moment at which they shall perform their respective task. It may include the physical layout of the job as also modification and improvement.

Liability for Criminal Act of Third Party

[16] The extent of the employer's duty may extend to the criminal act of a third party. In **Lillie v Thompson**, 332 U.S. 459 (1947) The U.S. Supreme Court had to decide if a railroad Company employer had a duty of care to its telegraph operator for the criminal act of a third party.

The facts of this case were that a telegraph operator who was employed to the Railroad Company was beaten with a long piece of iron and seriously and permanently injured by a man. This unknown man entered the one room from a building she was working that night as she opened the door to let the person who knocked on it. She had no other means to identify any one who knocked on the door as there was no window to the building to assist her to see workmen who had to attend at the building to receive messages. The building was in an isolating part of the employer's rail road yard. The yard was frequented by dangerous characters. The lighting of the building and surrounding area was not good. There was no guard for the building on patrol for the yard.

[17] The court found the employer was aware of the condition that created a likelihood of the very injury this young woman sustained. The court found that it was irrelevant that the foreseeable danger was from an intentional and criminal

misconduct. The employer had a duty to make reasonable provision against it. Breach of the duty was negligence. The case is persuasive authority.

[18] Lord McKay who delivered the judgment of the House of Lords in **Smith v Littlewood Organization Ltd.** [1987] 1All ER 710 and adopted the statement of the principle of negligence in the **Wagon Mound** (No. 2) [1966] 2 All E.R. 704 to 718

> ***"the general principle that any person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a risk and not a mere possibility which would never influence the mind of a reasonable man".***

Lord Reid explained that this principle was qualified as a person may be justified in not taking steps to eliminate a real risk if it is small and if a reasonable man in the circumstances would neglect taking any steps regarding safety of his neighbour.

In **Littlewood** case the House of Lord had to deal with a claim by a neighbouring church (St. Paul) which was destroyed by fire, where the owners of a cinema building had left their property empty temporarily, and fire was started by vandals who entered their building. In considering that the owner had a duty of care to their neighbours for the criminal acts of the third person Lord McKay examined the test of foreseeability laid down by Lord Reid in **Home Office v. Dorset Yacht Co. Ltd. [1970] 2 All E.R. 294 at 300.** He said that if a person foresee that the intervention of another person was likely to take place as a suspect of his wrongful act he is liable for the ruin or damage done by that person whether it is tortuous or criminal. Liability was also grounded in **Home Office v. Dorset Yacht** case because the officers of the state had a duty to control the conduct of the escaping borstal trainees. There was one of the special relationships that give rise to liability for the act of a third party. Lord McCay opinion was that the conduct of the human action or intervention between the wrongdoer and the

injured party must be foreseen as highly probable or highly likely or the reasonable person will conclude it is only a mere possibility (page 721. paragraph (f) b (9). So this is the test to apply and one has to bear in mind the particular circumstance must be taken into account. This case was not about the duty of care of an employer. It was about duty of care of the owner and occupier of property towards neighbour who received damage by the wrongful act of a third person. It dealt with the scope of the test of foreseeability which is an essential thought, not the only element of liability. To this extent the case is relevant to **Kaiser Jamaica Bauxite** position as owner or occupier of the mining premises where the claimant in this instant case was injured.

[19] The court found on the facts of **Littlewoods** that the company did not know of the vandalism in the area or of the previous attempts to start fires and the events which occurred were not reasonably foreseeable by the respondent and they owed no such specific duty to the owner of St. Paul's Church.

[20] The Circuit Court in the District of Columbia in Washington U.S.A. had to consider the liability of landlord for the criminal act of a third party committed on a tenant in **Kline v. 1500 Massachusetts Avenue Apartment Corporation 439 F. 2d 477 (D.C. Cir., 1970).** About 10 p.m. November 1966 Miss Kline was assaulted and robbed just outside her apartment by an intruder on the first floor above the street level of 585 unit apartment building. This occurred two (2) months after another female tenant had been similarly attacked on the same common way.

[21] In an action by the victim against the apartment cooperation for breach of duty of care by not taking action to prevent this criminal act, the court found the risk of criminal assault and robbery on a tenant in the common hall way of the building was predictable. It found the same risk occurred on a number of occasions over a period of several months prior to this incident. It was a risk whose prevention and minimization was almost entirely within the power of the

landlord. The court found the landlord had every reason to expect a likely crime to happen again.

[22] Here also the test of reasonable foreseeability of the harm to the tenant as being very likely was applied. There was also the feature too that the landlord had control over the area the crime occurred and this implied a special relationship between the landlord and the tenant that gave rise to the exercise of care for the safety of the tenants against the wrongful act of a third party.

[23] Counsel Mr. Manning for the first defendant Marksman Limited, relied on several authorities that he submitted demonstrated the claimant did not prove what was required to show his client Marksman failed to provide or take steps to prevent the risk of the claimant's injury. The first was **Yorkshire Traction Co. Ltd. v. Walter Searby [2003] EWCA Civil 1856**. Here a bus driver was assaulted by a passenger on a night shift in 1998 in South Yorkshire. He suffered physical injury and post-traumatic stress disorder. The bus driver was punched by the passenger when he was seated and the passenger was leaving the bus. He sued his employer the bus company for failure to protect him from foreseeable injury by not installing a protected screen between the passenger and the driver in the bus. It was accepted that it was foreseeable that the driver faced the risk of assault from passengers in public buses particularly in urban areas. However the court held that statistically the risk was low. Also the court found that protective screen had disadvantages and other risks to safety. It was not settled between the bus company and the Union for the drivers that the screens would protect the risk of assault. Therefore in these circumstances the court held there was no duty on the bus company to install protective screen. The case is useful when one considers the specific pleadings that the first defendant, i.e. Marksman Ltd. failed to provide armed guards, guard dogs, security vests and electronic security devices for the claimant and other security guards.

In **Collins v. First Quench Retailing Ltd. 2003 S.L.T. 1225** a female employer was working alone at an off license wine shop on the 12th June 1998 as the manager at the branch of the Company in Edinburgh. Two men burst into the shop, assaulted her and robbed the shop at knife point. As a result of this incident she suffered psychological injuries, post-traumatic stress disorder (depression) and compulsive depression disorder. The measures that the employer had in place for the safety of the staff was two panic buttons linked to the local police station, a closed circuit television system and the employment of two (2) members of staff in the evening. The employee did use the panic button when she was attacked. After the incident the employer introduced portable personal panic button.

[24] The employee contended her employer was liable for this criminal act of a third party because they failed to introduce a security screen and or double manning. The employee had requested improved security, including security screens. The shop had a history of serious reports of assault and robberies prior to the attack. Another female employee was the victim of armed robbery at the shop one month before the attack. The shop was a soft target for robbery due to type of business it operated.

[25] It was not disputed that the operators of the shop owed a duty to those employed to the shop to take reasonable care to protect them from the action of criminals and violent customers even though the risk cannot be entirely eliminated. The court found that the shop was one where physical violence against staff was or ought reasonably to be anticipated. Again the case is useful when one considers the specific assertions by the claimant that **Marksman** did not provide for the claimant armed guards, guard dogs, protective vests and certain electronic security devices.

[26] The court found that having more than one person in the shop was not just a deterrent to robberies but to all form of physical attack, or even simply verbal

abuse. The judge's opinion was that the employment of two members of staff on the premise where physical attack might be anticipated is a step which materially reduced the risk of such an attack or robbery. The failure to double man by the employer was a breach of duty of care to the employee for which it was held liable. In contrast to this case in **Martin v. Tate Bookmakers** where the court held double manning was not required at the opening of a bottling shop because there was adequate physical and electronic security method of deterring robberies, particularly of the casual type but not a complete answer to determined criminals. However, these were a deterrent to customers and were likely to have an adverse effect on trade. The judge found the employer's policy to install several screens as a last resort and only where there was a high level of risk was reasonable. He concluded that failure to install security screen did not amount to a breach of the employer's duty of reasonable care.

[27] Certain factors emerged from these decisions about the employer's duty to provide reasonable care and precaution for the safety and security of the employee. One is that the security for the employee has two dimensions;
measures for the protection from physical injury or avoidance of risk of injury i.e. prevention of harm to the person and for deterrence of risk of injury or harm to the person. Secondly, the measure taken for the safety of employees or other persons in a special relationship with another cannot ensure absolute prevention or deterrence or risk of injury or harm. The measure should raise the prospect that there will be a material reduction of the risk or a substantial diminution of the risk. Thirdly the reasonableness of the policy that guides an employer or occupier about its risk-assessment is relevant to its liability.

[28] In the Jamaica case **Leslie Powell v. Guardsman Ltd. Suit No. C.L. P049 of 1999** delivered 3rd October 2007, Marsh J, did not find the employer Guardsman Ltd. failed to provide a safe system of work for an armed security guard employed to them who had received gunshot injuries by an unknown assailant while detailed on an assignment at Cremo Ltd. The learned judge

found the employer had a safe system of work in that armed security guards were employed to the premises including the claimant with portable radios. The claimant had left his post without instruction and without informing anyone. He went alone to the back of the premises and positioned himself in the way that exposed him to the risk of danger. The Judge found that this guard brought the danger on himself even though there might have been one armed security guard short and the claimant may not have been supplied with a radio. The facts of this case is distinguishable from Mrs. Lavern Anderson's claim, not simply because she was an unarmed security guard and **Powell** was armed, but there is no claim that she caused or contributed to her injury i.e. contributory negligence. There are some pleadings by the 2nd defendant that the claimant had proceeded beyond the scope of her duty in the fenced maintenance area while her assigned duty was mobile patrol with responsibility for field equipment. But the employer Marksman Limited did not allege contributory negligence. They did raise the issue that she consented to the risk with full knowledge of the dangers. My view is that Mrs. Lavern Anderson's attendance at the maintenance area of Kaiser Jamaica Bauxite premises, as a senior security guard supervising mobile patrol, and whose response to another security guard call, was generally within the scope of her duty. Specifically she had to do checks at the maintenance area that night because the other supervisor Mr. Cole reported sick.

[29] In another Jamaica case **Hanna v. University of the West Indies** delivered October 19, 2004 the court did not find that the employer of the contractor to build a chemistry laboratory on the University premises, Mona, could reasonably foresee gunmen from the adjoining area invading the construction site in broad daylight and shooting the contractor even though men from the adjoining community came to the construction site before attempt and to extort money from workers.

Occupiers' Liability

In addition the court found that the University did not breach the common duty of care it owed as the occupier under the **Occupiers' Liability Act 1969.** The

decision of this authority may be more applicable to Kaiser Jamaica Bauxite Company than Marksman Ltd.

But in any event the principle involved was the application of the test of reasonable foreseeability in the particular circumstances and taking into account the occupier's risk evaluation and contractual obligation. Counsel Mr. Walter Scott who appeared for the claimant Mr. Hanna in that case against the occupier now appears for occupier against claimant in the instant case. He now resists the claim that Kaiser Jamaica Bauxite Co. Ltd. as occupier owes the claimant a duty of care in the circumstances.

[30] The same principle would be applicable to the employee of the contractor. In Hanna's case an employee of the contractor was shot and killed in the same incident. But it would have made no difference to the result if the owner/occupier could not have reasonably foreseen the risk of real danger to the contractor or his employee as highly likely. The court did not have to decide on any action brought by the estate of the worker killed against the contractor against the University as owner occupier. Denning M.R., addressed this issue in the Court of Appeal of England in **Roles v. Nathan [1963] 2All ER 908** under the **Occupier's Liability Act, 1957** which is similar to the Jamaica Occupier's Liability Act 1969. The wives of two brothers who were chimney sweepers who were killed by carbon monoxide fumes from a boiler they contracted to clean, sued their employer for breach of their common duty of care to their husbands. Denning M.R. state that where a visitor who was skilled was invited to do a job which had special dangers then the Act provided that the occupier did not breach his duty to take reasonable care for that person as the skilled person is expected to use his skill to address danger arising from the job. Denning M.R. explained that provision of the Act was based on the principle in **Christmas v. General Cleaning Contractor Ltd**. [1952] 1 All E.R. 39 that an owner/occupier is not liable for an independent contractor who did not use reasonable care. In the case the two deceased brothers were reportedly warned by an engineer on behalf of the company not to enter the chimney when boiler was lit. But they

disregarded these warnings so the court by a majority did not find the employer liable. This conduct of these two brothers is not analogous to the claimant in the instant case.

[31] **The Evidence**

Intruders – Request for Firearm - Guard dogs

Mrs. Lavern Anderson evidence is that she observed there were a lot of break-ins when she was assigned at the main gate as a guard of the maintenance area. This was before she commenced mobile patrol as a senior security guard in late 1997. Items were stolen from the maintenance area: tyres, vehicle parts, alternators, batteries, head lights and petrol from the vehicles and the storage area. Guards, mobile patrol supervisors and other supervisors had to make written reports of items stolen. These reports were sent to operation manager of Marksman at the main office. Reports were also sent to Kaiser Security Manager. Kaiser would charge Marksman for these losses and Marksman would deduct payment from wages of the guards on duty at the time of loss. She made a written report of a particular break-in between July 1996 and January 1997 when a lot of thieves broke into the maintenance area one night and some men ran pass her at the main gate in different direction. In that report she requested Firearm and guard dog. Another guard raised an alarm on his radio. She made an oral report early in 1996 to her operation manager, about high level of break-ins and request firearm and a guard dog.

She said that the fences of the warehouse, boneyard and another area cut open when she was on regular security guard duty. The fence to the boneyard was cut out during the period she was shot. The fences were repaired sometimes.

[32] About three weeks before the night she was shot, Mr. McFarlane another security guard made a report to her and another supervisor Mr. March that one "Lotto" pointed a gun at him. Mr. March made a written report of this. She actually ran and caught and tied up one "Kaiser Rat." Who was on the premises

unlawfully and he was handed over to the police (paragraphs 28, 34, 35, 40, 41, 42, 43, 44, 45-51 – witness statement).

Mrs. Lavern Anderson accepted in cross-examination that up to the time of the night of May 4, 1998 no one was shot by intruders at Kaiser Mining area. In further cross examination to counsel Mr. Walter Scott she accepted that she did not see any gunman or gunmen when she realized that she was shot. She only saw a red flash. She was knocked out. Her only account of any gunman was that after the driver Mr. Pinnock had escaped, a man with a shot gun came up to her and threaten to kill her. He then led her to a container in the "boneyard" and locked her in it. She then realized another guard was already locked In the container.

[33] Captain Lloyd Smith the security manager at Kaiser at the time of the shooting gave evidence-in-chief that:

> "there were no incidents or reports of heavily armed persons intruding on the property on numerous occasions"

Under cross-examination he admitted that his view which was contained in a written report was correct:

> "It was customary for thieves to enter this area by cutting its perimeter fence and removing items deemed to be of value"

He agreed he would obtain written report and sometimes oral report from the security supervisors on duty at Kaiser about break-ins at the maintenance area prior to May 1998. He said he did get a report of an incident about February or March 1998 from a security guard McFarlane that he accosted one "Kaiser Rat" in the backyard of the warehouse area. This area is enclosed within the perimeter fencing of the mining area. Captain Lloyd Smith's view was that the gun that "Lotto" had was not for use against the guard on duty but to enable the intruders to escape from the premises.

He agreed also in cross-examination that security guards on duty at Kaiser would sometimes detect thieves when they enter the area. Captain Lloyd Smith insists there was no formal request or recommendation from Marksman Ltd that armed guards should be used on the premises. He however agreed that there was informal discussion between Mr. Ruel Thompson the area manager of Marksman Ltd. and himself about the need for armed guards and a suggestion that Kaiser should permit armed guards. These discussions took place as part of the review before the renewal of the annual contract in January 1998 between Marksman Ltd. and Kaiser. He accepted that armed guards would be a deterrent to intruders on the premises.

Lt. Col. Bartly was called as a security expert for the claimant. He also agreed that armed guards would be a deterrent to intruders though not an absolute deterrent. He agreed with Counsel Mr. Manning that any strategy implemented for security would not guarantee against any shooting like what happened that night.

[34] Mrs. Lavern Anderson testified that she knew of cases where police stations, banks guarded by armed persons were held up by robbers. Lt. Col. Bartly also acknowledge that police stations and banks have been held up and officers have been relieved of their firearms. Returning to Captain Lloyd Smith's evidence, he denied that Kaiser had a policy that armed security should not be used at the mining area because the company did not want any disruption in its production due to protest by community if there was any shooting of intruders. He maintained that Marksman Ltd suggestion that armed security should be deployed in the mining area was not substantiated though there was the incident at the warehouse where an intruder pointed a gun at a security guard. In his view the nature of the risk to the property and the intrusion by thieves did not require armed guards to be deployed at the mine area.

[35] **Findings of Facts**

In light of this evidence and bearing in mind the admission and concession of the respective witnesses I find on a balance of probability that:

(a) Prior to the shooting of the complainant on night of the 4th May, 1998 that intruders enter Kaiser mining area at night including the maintenance area on several occasions.

(b) These intruders were not heavily armed

(c) These intruders were thieves who targeted the maintenance area to steal various motor vehicle parts and equipment.

(d) That on or about March 1998 a known intruder in the company of an associate entered the warehouse area with a hand gun and was accosted by a security guard. This incident cannot be viewed as an intrusion at Kaiser by heavily armed men.

(e) That the incidents of trespass and larceny and break-ins at Kaiser plant were reported to Marksman Ltd. by their guards and supervisors.

(f) That the same incidents were also reported orally or in writing to Kaiser by Marksman guards and or supervisors.

(g) Marksman Ltd. knew or ought to have known of these incidents.

(h) Therefore Kaiser knew or ought to have known of these incidents.

(i) Although the main purpose of the intrusion on Kaiser mine area was to steal the company's property and equipment their frequency and repetition resulting in encounters with the security guard at the premises threatened the safety of the security guard who was unarmed.

(j) It was reasonable foreseeably that intruders who cut open fences to achieve their objective would use violence including a gun or guns to overcome any obstacles and to resist detection and or apprehension. So that in May of 1998 the unarmed security guard employed to Marksman Ltd. and performing their duties at Kaiser Mine were exposed to a real risk of danger of harm to their persons which was very likely.

(k) Mrs. Lavern Anderson did request from Marksman Ltd. firearm for unarmed security guards at Kaiser before the shooting on May 4, 1998 which they neglected or failed to provide.

(l) Mrs. Lavern Anderson did request guard dogs (canine) from Marksman Ltd. for the unarmed security guards at Kaiser before the shooting on May 4, 1998 which they neglected and failed to provide.

(m)Marksman Ltd. did request and recommended to Kaiser that armed security guards should be deployed to Kaiser Mine area before the shooting on May 4, 1998 which they neglected and failed to provide.

(n) That Kaiser neglected or failed to respond to the requests and recommendations of Marksman Ltd. on the grounds of policy which involved some security concerns about possible shooting of local residents or trespassers in the adjoining area and the possible protest by them which would disrupt their business.

(o) The policy was based on some risk assessment and was not unreasonable.

(p) I am unable to conclude that the failure of Marksman to provide firearms or protective clothing to their security guard, including the claimant, such as bullet proof vests would have prevented the shooting of the claimant. Nor would the provision of these materially reduce the risk of harm to these security guards.

(q) Similarly, I do not think the failure of Kaiser to permit Marksman to deploy armed security guards at the mine area in 1998 would have prevented and/or caused the shooting of the claimant.

(r) It is otherwise with the failure to provide or permit guard dogs by Marksman Ltd. and Kaiser respectively.

(s) I do not accept the conditions in the maintenance area that is grease and chemicals was so difficult that no guard dogs could be provided in the area such as the "boneyard", warehouse and maintenance area – haulage truck area that thieves targeted. Mrs. Lavern Anderson say guard dogs would alert the security guards to the intruders. I agree.

(t) The warning that guard dogs give would enhance the guard's response to danger and the knowledge of the existence of such warning would be a deterrence. The failure to provide these was a breach of Marksman's duty of care to their employee including the claimant.

(u) The absence of the rapid response or panic alarm system in the possession of the security guard substantially diminished the deterrent element of the risk the security guards were exposed to. The supply of portable radio provided some communication in time of danger but the frequency of break-ins by thieves through the perimeter fencing required an alarm system beyond a portable radio.

(v) The nature of the break-ins, even though there was no use of firearm prior to March 1998, warranted the introduction of an advanced alarm system. I agree the installation of a close circuit television (CCTV) system for the building in the mine area and an intrusion monitor would increase the deterrent capacity of Kaiser in 1998.

(w) In my view these systems were available to Marksman Ltd. and Kaiser in 1998. These systems would not be an absolute deterrence.

(x) Marksman Ltd. and Kaiser did not take the steps to deter known intruders that were a real danger to the security guard.

(y) One such intruder shot Mrs. Lavern Anderson, the very thing that was likely to happen. The shooting of Mrs. Lavern Anderson was not a mere possibility, it was highly probable in 1998.

(z) Therefore Marksman the employer failed to take reasonable care to provide a safe system of work for Mrs. Lavern Anderson

Sometimes sections of the perimeter fence was cut open. This permitted access to the maintenance area.

Sometimes the damaged fence was repaired. But there was no regular inspection of the fence.

[36] Kaiser's failure to provide a detection and surveillance system in the circumstance known in 1998 was a breach of the duty to take reasonable care for the safety of the guards against the criminal act of a third party.
This breach was a contributory cause to the injuries Mrs. Lavern Anderson sustained. I have considered Counsel Mr. Walter Scott's submission based on the High Court of Australia decision. **Adeelees Palace Pte. Ltd. v Moubarak et al** [2009] HCA 48 that the "but for" test of causation was not established by Mrs. Lavern Anderson. In other words Mrs. Lavern Anderson would not have been injured but for the breach of duty of the owner /occupier Kaiser.
In this case two (2) patrons at a restaurant which was a place of public entertainment was shot by a gunman on New Years eve of 2002. They sued the operator of the business for failing to have licensed security personnel or crowd controllers to prevent this man from re-entering the premises and to have bouncers to supervise and intervene in anti-social behavior outside the restaurant. The court found the presence of security could not prevent a man determined to harm someone out of revenge and at random. It also held there was no history of violence before at the restaurant that would alert the owners of a danger of the kind that happened.

[37] It is my view the system which was not provided would have deterred access to Kaiser's premises by gunmen. Further Mrs. Lavern Anderson and other security guards would have a warning so that she would not have proceeded to the source of attack unarmed or without more security.
I find the Hong Kong Court of Appeal decision **Won Wai Ming Hospital Authority** [2001] HKCA helpful. There the court upheld the claim of a psychiatric nurse who had been attacked by a visitor to the centre. The court found that there was a real risk which the Authority should have appreciated that nurses might be attacked. There were precautions the Authority should reasonably have taken to reduce the risk of injury to its nurses the court found.

The court found that since the attack on the nurse the reception area was enclosed, a protective screen installed and a push button panic alarm system introduced around the reception counter and treatment area.

The court explained that these steps taken after the event were not admission of liability. However the steps were relevant in demonstrating that it was practical to take these measures before the attack.

The facts of the case were that a visitor who came to the psychiatric hospital to see her daughter and was spoken to by a nurse first sprayed and then threw the contents of a bottle which she took out of her bag on the nurse. He came from around the counter when he saw her about to reach for the bottle in order to move the persons in the waiting area away from the visitors. The container was drainpipe cleaning fluid consisting sulphuric acid. The nurse sustained serious injuries which caused scars to his face and body.

[38] I have to consider whether the breach of the duty of care by the occupier is affected by any policy or other circumstances that may be reasonable. The restriction of the use of armed guards based on the need to preserve peace and stability in adjoining communities that may launch protest over fatal shootings is not unreasonable .But this reason cannot apply to Kaisers' failure to provide a detection intrusion system or a rapid alarm system in 1998 on their premises.

Occupier's Liability

[39] I do not find that Kaiser as occupier breached it's common duty of care to Mrs. Lavern Anderson under the Occupier's Liability Act 1969.

In Hanna's case (supra.) the Supreme Court, I accepted the principle which Campbell J. A. explained in Rose Hall Development LTD. v **Robinson and J.P.S. Co. Ltd.** (1984) 21 J. L. R. 76 at 92 paragraph F as follows :

"(a) Only the occupier of premises has the statutory duty of care under The Occupier's Liability Act to his visitors be they invitees or licensees; (b) Two or more persons may be in occupation of premises at the same time each on separate and individual basis…

(c) The duty of care owed to a visitor is the 'common duty 'of care which is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. The relevant circumstances for the purpose of this duty of care include the degree of care against and want of care which would ordinarily be looked for in the visitor. Thus a stevedore would be expected to look for and guard against slipping on oily patches on a ship .As such the occupier would not be liable for his injury caused thereby.

(d) The duty of care owed to a visitor by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to be done by himself and others for whose conduct he is under a common law duty.

(e) The occupier may not be held to be under any duty of care to the visitor due to the fact that the danger to which the visitor is exposed on the premises is risk incident to his said calling provided the occupier leave him free to guard himself against the same.

(f) Where the danger has been created by an independent contractor who have done work on the premises the occupier is not liable to a visitor injured thereby unless he knew of the danger so created. He would have discharged his duty under the Act once he has satisfied himself of the independent contractor competence."

[40] Kerr J.A. said the main purpose of the Occupier's Liability Act (p.81 ibid.) was:

" ... to provide new rules and institute a common duty of care by the occupier to all visitors and thereby replace the common law rules under which the duty of the occupier of premises differed according to whether the person was an invitee or licensee At common law the categorizing of a visitor often resulted in fine and pendantic distinctions. In that regard, the Act, Sec.2(3) expressly state that the rule shall apply in like manner and extent as the principle

applicable to the common law to an occupier and invitee or licensee would apply."

[41] These principles are applicable to the issues of liability between Kaiser Jamaica Bauxite Ltd. and the claimant. I now refer to **Roles v. Nathan** (supra) which interpreted sec.2(2),3(b) and 4(a) **Occupier' s Liability Act 1957, U.K.** which is that an occupier is not liable for the breach of a competent independent contractor he employed. Further the occupier is not liable for the risk which a visitor consent to take or if a visitor enter premises by virtue of his calling and he did not guard against special risk inherent in that calling. Marksman company duties to provide security service for Kaiser had .special risks. They were experienced in the business. They were expected to take steps to guard against dangers that the guards were exposed to on the premises of Kaiser.

[42] Marksman Ltd. was an independent contractor and Kaiser is not liable for harm done to the contractor's employee for their failure to take care for their safety.

Indemnity Clause

[43] The liability of Kaiser as owner/occupier has to be considered under Exhibit 20 i.e. the contract with Marksman Ltd. to see if they were protected by any exception or indemnity clause.

An occupier is free to restrict, modify or exclude his common duty of care to visitors by contract under Section 3(1) **of Occupier's Liability Act 1969**. Clause 9 of contract of 1998 between Kaiser and Marksman Ltd. reads:-

> **"The contractor shall indemnify and save Kaiser Jamaica Bauxite Company harmless and keep it fully and effectively indemnified from and against all claims, proceedings, liabilities, losses, damages expenses and cost arising out of**

any accident or injuries to the contractors employee which may occur during the performance of the contract".

And then clause 11 reads:

"If losses are established due to proven negligence, the contractor will be required to indemnify Kaiser Jamaica Bauxite Company."

The General Conditions for Standard Contract which is part of the agreement, provides :

" 8 Indemnity

(a) Contractors shall indemnify owner against any loss, damage, claims or liability however caused arising directly or indirectly out of the performance of the work under the contract.

(b) In addition to the obligation imposed by paragraph (a) above. Contractors shall indemnify from claims by contractors' employees or the employees of contractor's subcontractor including claims for damage, injury or death alleged to have been caused by the negligent act or omission of owner or its Agent or employees; provided, however that the indemnity under this paragraph shall not extend to any liability or loss arising out of the gross negligence or willful act of Agents or employees"

[44] The Court of Appeal in **Kaiser Bauxite Company v. Consolidated Engineers Ltd. (1985) 22 J.L.R 182** addressed the effect of an indemnity clause in a rental agreement between Kaiser Bauxite Company as Lessee of a tractor from its owner as Lessor. The tractor was used to push bauxite around at the company's site. The bauxite was then fed into a conveyor belt that took it to the loading ship for export. The tractor got damaged on the conveyor belt due to the negligence of Kaiser. Kaiser sought to escape liability from this damage by relying on indemnity clause which states:

"any loss thereof or damage thereto arising from any cause whatsoever shall be borne by the lessor"

Carberry J.A. who delivered the unanimous judgment of the court held that the clause did not protect the proferens, i.e. the party seeking to rely on this clause, to exclude liability for its own negligence. He examined another indemnity clause in the same agreement and found in the context of the whole contract, it dealt with the possibility of Kaiser incurring liability to third parties for breaches committed by the lessor.

Carberry J.A. applied to the indemnity clause in question the three tests formulated by Lord Merton in **Canada Steamship Lino v. The King [1952] 1All ER 44 . The** tests are summarized as follows:

(1) If the clause contain language which expressly exempts the person in whose favor it is made (hereafter called(the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision

(2) If there is no expressed reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.

(3) If the words are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than that of negligence. The existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

[45] The court accepted that the burden on the party relying on an indemnity clause to indemnify himself from liability for negligence is higher than on a party seeking merely to exclude liability for negligence in an exemption clause.

I will now apply the three tests respectively to indemnify clauses 9,11, 8(a) .in the contract between Kaiser and Marksman Ltd. In clause 9 the words do not expressly indemnify Kaiser against liability for its own negligence or of it agents or employee. The language contemplate there may be instances of an injury or an accident to the contractor's employee caused by the negligence of the contractor. It is then not necessary to decide if the second and third test is satisfied. It means that Kaiser would not be responsible for the injury to Mrs. Lavern Anderson as she was an employee of Marksman Ltd.

[46] Clause 11 refers to proof of negligence and then that the contractor is required to indemnify Kaiser. It is implied that the negligence that must be proved is that of the contractor which is Marksman Ltd .and not that of Kaiser. Kaiser would not be liable for the negligence of Marksman Ltd. under this clause. One would have to apply the second test before concluding that the negligence in question relates to Marksman and not that of Kaiser. Under this clause Kaiser would not be liable for the negligence of Marks man Ltd.

[47] Clause 8(a) states the contractor shall indemnify the owner against any Liability however caused. The words of this clause do not expressly exclude indemnity of Kaiser for negligence. Thus the next stage is to go to the second test. It is doubtful the embracing words 'however caused' is wide enough to cover .the negligence of Kaiser itself or its servants or agents. Therefore the words of the clause cannot be interpreted to indemnify Kaiser for its own negligence. Further the kind of .damage to be covered is not solely liability for contract but it could include liability in tort. So Kaiser would not be indemnified against any liability of Marksman Ltd. due to its negligence or its servant or agent.

[48] Clause 8 (b) commences with a recital that the provision under that clause is additional to clause 8 (a). This would suggest there is a difference between the meanings of both clauses. Beyond that the words expressly indemnify the

owner i.e. Kaiser for it own negligence and of its employee or agent. On the basis of the first test effect must be given to the clause.

[49] So Kaiser would not be liable for its breach of duty of care to the employee of Marksman that is Mrs. Lavern Anderson. I indicated that Kaiser would also escape liability for any injury to Mrs. Lavern Anderson as she was an employee of a competent independent contractor.
Looking at the contract (I) one found in clause 8 of the main contract, which precedes clause 9, the provision for Kaiser's indemnity. It reads that it was "a condition precedent to the contract, the contractor provides evidence of adequate insurance for their .employees. Then condition 9 of the contract lists the types of policies of insurance the contractor must have: national insurance, workmen compensation insurance and comprehensive Public Liability insurance.

[50] These clauses indicate, in my view, indemnity of Kaiser from liability due to negligence by third parties. Further the parties must have reasonable contemplated that the clause or indemnity was an important and fundamental terms of the contract. This explains the requirement that the contractor produce evidence of adequate insurance as a condition precedent to the contract.

[51] Therefore clause 8 (b) would indemnify Kaiser from liability to Mrs. Lavern Anderson due to a failure to take care for her reasonable safety on the 4th May, 1998 at the maintenance area of their premises at Water Valley, Brown Town, St. Ann.

DAMAGES -INJURIES

[52] The injuries Ms. Lavern Anderson allegedly received as a result of being shot on the 4th May 1998 are listed under her pleading. They are contained in her third further Amended Particulars of Claim, headed "Particulars of Injuries:

(i) Multiple pellet wounds to her face, neck and eye including both upper lids;

(ii) Early hard movements acuity in left eye;

(iii) Moderate chemosis with small subconjunctival hemorrhage laterally in right eye;

(iv) Small vitreous hemorrhage superiority in right eye;

(v) Penetrating injury with associated severe chemosis and sub conjunctival hemorrhage in left eye.

(vi) Total hyphaema, vitreous hemorrhage and retinal detachment in left eye.

(vii) Two small lacerations to the claimants upper lids;

(viii) The claimant had marked swelling to the left side of her face;

(ix) The claimant had exquisite tenderness on the left side of her face;

(x) The claimant had difficulty in opening her left eye;

(xi) Superior sclera locomotion representing possible entry site;

(xii) Prominent posterior subcopsular cataract in left eye.

(xiii) Prominent retina detachment with sub-retina blood in left eye.

Then the Pleadings itemize the following:

(i) The claimant has completely lost the sight in her left eye;

(ii) The claimant has completely lost the use of her left eye;

(iii) The claimant's left eye is off centre and the eye lid is drooping;

(iv) The claimant has some 68 gunshot pellets still lodged in the left side of her face and head including behind her left eye in her mandibles;

(v) The claimant suffered from constant, severe pain on the left side of her face and head and in her left eye for over one year and a half from date of the incident in May 1998 until about December 1999;

(vi) The claimant now suffered from a somewhat reduced level of pain due to her present medication Clotan 250 mg twice daily. However when the medication wears off the claimant suffers severe pain and has to take her medication again.

(vii) The claimant has lost her distance vision.

(viii) The claimant has lost her depth perception.

(ix) The claimant's right eye vision is dark occasionally, especially when the claimant is suffering from a headache;

(x) Mild to moderate spasm from C4 down;

(xi) Early oestophytes formation/sclerosis from C4 down;

(xii) Narrowing of disc space at C5 – 6;

(xiii) Moderate to marked spondylosis;

(xiv) Weakness;

(xv) The claimant suffers from a moderately severe loss of memory;

(xvi) When the claimant reads, she forgets the paragraph that she has just read;

(xvii) The claimant suffers from hypertension for which the claimant must take constant medication;

(xviii) The claimant has suffered from an enlarged heart;

(xix) The claimant developed a popping sound to her neck on her right side with accompanying tightness;

(xx) The claimant suffers from a sharp pain when she turns her head to the right and this triggers off headaches;

(xxi) The claimant has to perform all her tasks including her domestic job slowly otherwise the claimant gets severe headaches;

(xxii) The claimant can no longer play netball;

(xxiii) The claimant has put on weight;

(xxiv) The claimant cannot exercise because any moderate activity brings on severe headache;

(xxv) The claimant can no longer assist her son in doing his homework;

(xxvi) The claimant can no longer engage in her pre-shooting sporting, domestic and sexual activity."

NATURE AND EXTENT OF INJURY

LEFT EYE

[53] Mrs. Lavern Anderson's testimony, which is contained in her witness statement, is that:

> ***"I am now completely blind in my left eye. I see nothing but blackness from it."***

This evidence describes the physical injury she sustained from the gun shot blast in her face and neck. Her evidence as to this injury is supported by the expert evidence called on her behalf. They are as follows:

On March 6th, 1999 Dr. Donovan Calder, Consultant Ophthalmologist reported to Marksman Ltd. (Exhibit 13):

> ***"Mrs. Anderson continues to have only hand movements vision temporarily in her left eye."*** And then
>
> ***"In summary Mrs. Anderson is legally blind in her left eye."***

On December 18, 2006 in a final medical report (Exhibit 19) Dr. Calder's opinion about Mrs. Anderson's eye was:

> ***"She has no vision in her left eye. Her optic nerve was totally wiped out or atropic."*** And then
>
> ***"In summary Mrs. Anderson has lost the vision in her left eye secondary to gun shot blast to her face."***

On 22, September 2006, Professor Henry W. Flynn (Exhibit 18) who performed corrective surgery on Mrs. Anderson's eye on May 21, 1998 (Exhibit 8) reported that Mrs. Anderson's

> ***"... left eye is totally blind and cannot be helped with any further treatment."***

SURGERY

[54] Injuries (vi) which was prominent retina detachment to the left eye with sub-retina blood in the left eye required surgery. So too did the vitreous hemorrhage to the left eye. Professor Flynn operated on Mrs. Anderson's left eye under local anesthesia with sedation. The operative procedure was: pars plana lensectomy, vitrectomy, membrane peeling, fluid air exchange, endolaser

treatment and silicone eye injection in left eye. Complete retina reattachment was accomplished and there was no complication from the surgery. The doctor recommended further visits to remove pellets from her left eye lid. He also recommended she did a CAT scan to determine if any pellets were in the orbital region. There is no evidence that that was ever done.

So based on that evidence I find Mrs. Lavern Anderson lost sight in her left as result of the shot gun blast to her face on the 4th May 1998 by an unknown gunman at Water Valley, St. Ann.

RIGHT EYE

[55] Particulars (iii) and (iv) of her pleaded injuries and (ix) of her Particulars of Disability describe the injury and the effect of these on her right eye. These Particulars of Injuries to her right eye are really part of the injuries that Dr. Zoe Wynter and Dr. Donovan Calder observed on Mrs. Anderson when she was seen on the 4th May 1998 of the Ophthalmology Department of the University Hospital of the West Indies (Exhibit 6 and 8).

Mrs. Anderson now has glaucoma to her right eye. Dr. Calder in his expert report to the court of December 18, 2006 recommended that she wear protective glasses as there way a possibility she was having glaucoma to her right eye (Exhibit 19). Professor Flynn in his letter of September 22, 2006 (Exhibit 18) stated Mrs. Anderson's right eye had advanced glaucoma and this condition was treated with eye drops. The medical evidence does not suggest that the existing condition of Mrs. Anderson's right eye was caused or accelerated by the shot gun blast to her face. Therefore I find if there was physical injury to Mrs. Anderson's right eye. But I am unable to find there is a casual connection between the recent condition of the right eye and the shot gun blast that affected the face. This does not mean that the court will not take into account at all the injuries she sustained to her right eye. I will consider this in relation to the pain she has suffered and to the overall loss of amenity.

[56] The specific injuries that Mrs. Anderson received in her face, eye and neck as a result of multiple gun shot pellets are enumerated as injuries (i) to (xiv) in the Particulars of Injuries. These injuries are reproduced from the medical reports of Dr. Zoe Wynter, Dr. Donovan Calder and Prof. Henry Flynn (Exhibit 6, 7, 9) and were not challenged by the defendants; what the defendants challenged is the claimant's complaints of the effect of those injuries. I therefore find these injuries proved on a balance of probability.

[57] Mrs. Anderson claim is that 68 gun shot pellets is still lodged in the left side of her face and head included behind her left eye and in her mandible. There is no evidence that any CT scan was done on Mrs. Anderson. Dr. Donovan Calder found and reported in May 21, 1998 that an ultrasound done on Mrs. Anderson's left eye was "inconclusive because of the number of reflections from radio-opaque pellets." Professor Henry Flynn caused an ultrasound to be done on Mrs. Anderson's left eye. It confirmed Dr. Calder's finding about the vitreous hemorrhage and retina detachment of that left eye.

[58] It was Dr. Derrick Aarons to whom Dr. Calder had referred Mrs. Lavern Anderson for psychological counseling who stated that in October 1998 (Exhibit 14) he caused a radiology to be done for Mrs. Anderson's neck. The reason for this is that she attended at his office complaining about headache and a "popping sound in her neck (right side) and tightness". The radiology showed that there was gunshot pellets remnants in soft tissue to the left side of her face and mandible." There is no proof by the medical evidence about any specific number of pellets i.e. 68, lodged in Mrs. Anderson's neck or head. Some gunshot pellets remnants still remain in the soft tissue of the left side of her face. This aspect of the claimant's injuries must be assessed under her claim for psychological injury.

[59] The X-Ray results showed apart from the gun shot pellets remnants in the soft tissue to the left side of her face, injuries to her spine listed at items (x) to

(xiii) of Particular of Disability. There is no evidence to establish any caused connection between these injuries and the shot gun blast Mrs. Anderson sustained to her face. So those injuries are excluded from our assessment of damages.

[60] Neither is there any causal connection between Mrs. Anderson's present hypertension and condition of enlarged heart with the shot gun blast she sustained to her face and neck. So then these injuries must be excluded from any award of damages. The excluded injuries all reproduced from the medical report of Dr. Derrick Aarons dated November 9, 1999 (Exhibit 14) and September 13, 2000 (Exhibit 17). In this latter report Dr. Derrick Aarons said he saw Mrs. Anderson on the 8th November 1999. He said she complained of still having headaches and thought they were caused by pellets logged inside her. He physically examined her. He found tenderness over her right forehead with possible pellet felt under the skin of forehead. He then diagnosed her "headache due to shot gun pellets" and then prescribed Clotan tablets.

[61] This aspect of Dr. Aarons medical evidence does not add any further proof that 68 pellets are still lodged in the claimants head. It shed some light on complaints of pain and suffering Mrs. Anderson may be experiencing psychological loss as a result of the physical injuries leading to the loss of her eyesight.

PRESENT PAIN AND SUFFERING

[62] Mrs. Lavern Anderson's evidence is that she is now having dreadful headaches to the left side of her head since she was shot and from her surgery on her left eye. She gave evidence on affidavit she has headaches everyday. The pain is not now severe as the pain killer the doctors prescribe help. But they are not as effective over time. When the pain tablets wear off the headache returns. She further complains that when headache comes on it grips her body and immobilizes her. This affects her from doing her regular domestic duties

such as washing and hanging out her clothes (paragraph 126 – 130 Witness Statement).
She specifically gave evidence on affidavit that she felt pellets under her skin and they hurt her. She says pellets feel like pins sticking her. She attributes the pain she feels from the pellets to the fact that 68 gun shot pellets are still lodged in her face, jaw and brain.

[63] The court found there is no evidence to support the fact that 68 gun shot pellets still remain in her face, jaw and brain. However some gun shot pellets remain in her neck. Both Dr. Wendel Able Consultant Psychiatrist and Dr. Dennis Edwards, Consultant Clinical/Neuro Psychologist were vigorously cross-examined by counsel for the respective defendants that they did not conduct or order any radiological test to support any opinion about surgery on deficit to the claimant's brain. The same line of cross-examination was pursued by each counsel for the defendant about the opinion they expressed that she had short term memory loss. Each expert admitted they had not requested X-Ray of the claimant's head. Therefore there is merit in the defence submission that the expert's opinion does not prove the specific complaints.
[64] While the expert's evidence on this aspect of injury is limited it is not wholly unreliable. It assists the court as it gives a picture of the claimant's psychological status. It related to the claimant psychological well-being and this in turn affect her normal every day activity. So this aspect of her evidence is also interrelated to her claim for loss of amenities.

[65] Even though Dr. Dennis Edwards did not produce the result of the test he conducted on Mrs. Lavern Anderson for malingering I accept his findings, having observed the claimant in the witness box for two days, that she is genuine and truthful about her complaints of the various pains she describe to the court.

[66] **PAST PAIN AND SUFFERINGS**

At the time Mrs. Lavern Anderson was shot she describes she felt "excruciating" pain all over her face and head. She felt pain in every nerve and every part of her skin, she says, on the way to the Alexander Hospital, St. Ann. Between the times she was at the hospital and when she was transferred to University Hospital of the West Indies, continued to feel pain and had to get an injection to relieve the pain.

She further woke up to pain after a few days after she was taken to the University Hospital where she was admitted. She experienced pain and fright during the two weeks she was admitted in this hospital. She was treated consecutively with pain killers when she was admitted.

She experienced pain after the surgery to her left eye on the 26th May 1998 at the Bascom Palmer Eye Institute of the University of Miami School of Medicine, Florida where Dr. Calder had referred her to Dr. Flynn. She says "I felt like my head had been crushed by a truck." She had to sleep face down after the surgery and this position caused her more pain (paragraph 86, 92, 94, 99, 107 Witness Statement).

One aspect of the treatment during surgery to the left eye was injection of silicone oil in her eye. She experienced pain as a result of this up to 2004 and had to consult Dr. Calder who removed this oil. She found this procedure very painful.

In 2005 she continued to have pain in her left eye and Dr. Flynn conducted assessment on her left eye at Bascom Palmer Eye Institute. Dr. Flynn's opinion in September 2006 is that only the removal of Mrs. Anderson's left eye could reduce the pain to that left eye (Exhibit 18). But he did not recommend this based on other risks involved.

Mrs. Anderson's injury to her left eye was therefore very painful and she would continue to experience some degree of pain to her left eye. Based on the

treatment plan of the doctors she will have to rely on pain killer to manage her pain. None of the five expert witnesses who treated her medically ventured any opinion as to any permanent, partial disability (PPD) to the person of Mrs. Anderson as a result of this injury to her eye. So the court has to assess her damage in order to identify it among other factors, based on the extent of the pain she describes.

PSYCHOLOGICAL INJURY

POST TRAUMATIC STRESS DISORDER (PTSD)

[67] In view of the fact that it is my view that part of the physical pain Mrs. Anderson was experiencing is due to her psychological status, it means that some psychological injury of the claimant was foreshowed in the preceding evidence. What is in issue is the extent of this injury. The evidence on this aspect of her case must be considered before addressing the evidence on loss of amenities.

[68] I am mindful of Ms. Cathrine Minto's submission on damages for 1st Defendant that there was no pleadings for psychological injury in spite of the several amendments to the claimant Particulars of Claims over the years. I am also mindful that counsel for each defendant objected at the commencement of the hearing that Dr. Dennis Edwards should not be permitted to be called as an expert witness about the claimant's psychological injury. I understand the full effect of this submission is that the court should disregard any evidence about psychological injuries and find there is no proof of such injuries. I am unable to accede to the defendants' submission. The reason is that I am constrained to take a holistic view of the evidence. It is part of my function to draw reasonable inference from the direct evidence on the totality of the evidence presented.

[69] Although certain psychological injuries of the claimant were not pleaded as a distinct and separate head of damages once there is credible evidence to support any of these injuries the court is entitled to assess this damage. There is

precedent for a court to award an additional sum for psychological impairment under the head of general damages to a claimant. Straw J. in **Ventura Lee v Petroleum Company of Jamaica Ltd. and Juici Beef Ltd.** 2003 HCV 1517 (Relied on by claimant) awarded damages for post traumatic stress disorder and major depression under general damages in the sum of $300,000.00 on the 16th December 2004 to a 24 year old female who was badly burnt by the explosion of a gas cylinder caused by the negligence of her employer. She found that claimant suffered psychological impairment due to the trauma of the incident.

[70] She based this finding on medical evidence of Consultant Psychologists Dr. Wendel Abel and Dr. Ruth Doobar that the claimant had depression, memory impairment, recurrent nightmares and post traumatic stress disorder. In giving an award for psychological impairment her Ladyship followed and applied **Alfred Thomas v Pastry Specialist, Harrison, Assessment of Damages for Personal Injuries** (1993) 227 which the burn injuries. For psychological injuries she relied on **Marva Protz – Marcocchio v Earnest Smith** Vol. 5 Khan, p.284 where the claimant was awarded $ 100,000.00 in April 2002 for post-traumatic stress disorder .There was evidence that the claimant suffered from severe phobia anxiety ,withdrawal and avoidance to dogs due to a dog bite.

[71] The co-worker of Ventura Lee was awarded $340,000.00 in April 2007 for Post Traumatic Stress Disorder by McDonald –Bishop(Ag.) for injuries arising from the same explosion.

[72] This award was given in **Angeleta Brown v. Petroleum Co. Ja. Ltd. Claim No. 2004 HCV 1061**

In the instant case Dr. Wendel Abel noted the patient reported these psychological problems

(1) Feeling of inadequacy and poor self-esteem

(2) Avoided any trigger that reminds her of the trauma she sustained

(3) Uncertainty about the future

Dr. Wendel Abel diagnosis of Mrs. Lavern Anderson is contained in his medical report (Psychiatric Report dated September 22, 2006 Exhibit 3):

Post-traumatic Stress Disorder (PSTD)

Major Depression

Severe Neuropathic pain

Memory impairment seizure disorder

[73] In a follow up letter of response to client's Attorney (Exhibit 3A) he stated that Mrs. Anderson had some cognitive impairment. This was due, he said, to possible trauma to the brain. Thus a possible link between the injury to Mrs. Anderson's face and her mental and psychological condition was introduced. He recommended that she sees Dr. Dennis Edwards as part of the treatment plan for the claimant. Dr. Dennis Edward's diagnosis of Mrs. Lavern Anderson is as follows (Exhibit 20):

[74] "Mrs. Anderson is currently experiencing significant problems in memory and concentration as well as marked depression in her emotional state. This is contributed to neurological, neuropsychological insults accompanying post traumatic stress disorder."

It was his view that her cognitive functioning has deteriorated as a result of brain injury. He recommended further monitoring by a psychiatrist to mange her depression and chronic pain. I accept this evidence. There is the limitation about this opinion about brain damage or the absence of other test. But I find the evidence is considered with the claimant's behaviour from the very time she was injured. I find Dr. Edwards to be an independent expert witness. His independence is not destroyed by the fact that he knows Major James is the brother of Mrs. Lavern Anderson. Major James played an active part in securing the expert witness Lt. Col. Barley who is also former army officer. But I do not find this connection in spite on the forceful challenge in cross-examination of the witness by counsel for the defendants has destroyed the evidence of psychological injury. .

LOSS OF EARNING CAPACITY/HANDICAP ON THE LABOUR MARKET

[75] Then the claimant claims for loss of earning capacity. Under this head of claim she asserts that she is completely incapacitated from work. Further she says she was born on the 1st January 1959 and she was 41 years of age at the date of filing the claim and expected to work until her retirement at the age of either 60 or 65 year.

[76] Sykes J, considered the claims for loss of earning capacity in a series of assessment of damages; **Christopher Gayle v. Mark Wright and Ronham and Associates- Suit C.L. G050 of 2001** (del. September 20, 2004}.
Vincent Schoburg v. Michael Fletcher, Suit C.L. 2001/5(del. September 23, 2004.
Kenroy Biggs v. Courts Jamaica Ltd., Claim HCV 00054/2004, (del. January 2010)
Andrew Ebanks v. Jephter McClymont,Claim HCV 2172/2004 (del. March 5, 2007).
Osbourne Bernard, Claim 2009 HCV294, (del. February 17, 2006) ne
Powell v. Bells Trucking, Claim HCV0897 of 2003, (del. February 16, 2006)

[77] He went on to review in the abovenamed cases, the English Court of Appeal decision, as well as a few Jamaican Court of Appeal decisions and Australian Hugh Court decisions, that. applied the principles on which this head of damages are based. The English cases were: **Ascroft v Curtin [1977] 1W.L.R. 1731, Gladys Smith v. The Lord Mayer Alderman and Citizens of Manchester 17, M. Fairley v. John Thompson (Design and Construction Division Ltd). [1973] 2L, Moeliker v. A. Reyrolle [1977] 1 W.L.R. 132, Cooke v Consolidated Industries [1977] I.C.R 635, Nicholls v. National Coal Board [1976] I.C.R266 Money Ltd. v Mitchell and Grimes S.C.C.A 83/96 (del. December 15, 2003) Dennis Walker v. Hensley Pink S.C.C.A 158/01(del. June 14, 2007).**

[78] The principles extracted from these cases, in my view are as follows:-

(a) There is a distinction between the head of damages, loss of future earnings, (special damages) and loss of earning capacity (general damages)

(b) Loss of earning capacity is the substantial risk of a claimant losing current job before the end of his/her working life due to the injury sustained and the consequential disadvantage or uncompetitiveness he/she faces on the open labour market to secure a similar job and earn the same income.

(c) The loss of earning capacity exists even though the claimant was not working at the time of the accident which caused injury.

(d) The loss of earning capacity exist even though the claimant was not working at the time of .assessment of damages.

(e) Loss of earning capacity should be quantified separately.

(f) It is the personal value of the loss of earning that must be compensated.

(g) There are two methods of quantification of the loss that are used in practice:-

(i) the multiplier/multiplicand (per .Scarman L.J. in **Gladys Smith**):

" Loss of future earning or future earning capacity is usually compounded of two elements. This is when a victim of an accident finds that he or she ,as a result f the accident ,no longer earns his or her pre- accident rate of earnings. In such a case such an existing reduction in earning capacity can be calculated as an annual sum .It is then perfectly possible to form a view of the working life of the plaintiff and taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure that is considered to be the appropriate number of years purchase in order to reach a capital figure."

This factor known as the multiplier has always been less than the number of years for which compensation is to be provided, since it is scaled down to account for the fact that the plaintiff is receiving the compensation in advance as a lump sum.

The method in theory provide a lump sum sufficient when invested for the purpose, to produce an income equal to the lost income over the relevant period ,when the interest is supplemented by withdrawal of capital.

(ii) Lump sum approach

Fix a reasonable sum then increase the award to include an unspecified sum which is then depreciated.

The method appears to depend whether the risk of financial loss is immediate or can be reasonably determined in the future.

Quantification of Claimant's loss of earning capacity

[79] Mrs. Lavern Anderson has not been employed since the shooting in May. In May 1998 she was 39 years old at the time. She was 51 years old whenshe filed her final amended particular. 60 years old is the age of retirement for women. Her remaining years of work from date of shooting is 21 years. One of the main reasons she has not worked is because of the psychological impact of the shooting event on her but a person who has lost an eye is certain to be at a disadvantage on the labour market in the security industry in comparison to a person with both eyes.

The parties agree that her net income was $ 7,956.OO per fortnight. Her weekly income would be $ 3,978.oo per week Multiply this sum by 52 weeks and this gives a multiplicand of $206,856.oo A multiplier of 7 based on Table A of Vol. 5 Khan on Personal Injuries is used to multiply the annual sum to arrive at $1,447,992,oo loss of earning capacity.

Assessment of Damages

[80] The purpose of an award of damages to the claimant for injuries(s) sustained is to place that person in the same position he or she would have been, in monetary terms, before the injury occurred.

An award of damages should be reasonably fair and comparable to – awards of like injuries.

The latest award on the loss of an eye, which was referred to by all parties, was Pat Bellinfanti v. National Housing Trust and George Rainford and the Attorney General 5 Khan, Recent Personal Injury Award 221. In 1993 the plaintiff who was a public relations consultant lost his right eye at age 47 in a motor vehicle accident. His right eye was ruptured and the content of his left was missing. He had to wear prosthesis, i.e. artificial eye for cosmetic reason.

In February 1997 he was awarded $1,000.000.00 general damages for pain, suffering and loss of amenities.

At date of trial of October 2010 the present value of award would be $3,855,195.00 and in December 2011 $4,188,988.60. the formula used to calculate this value is percent, consumer price index divided by consumer price index at date of award times award.

[81] Mrs. Helen Coley-Nicholson submits the claimant's injuries are more serious than Bellinfanti though she did not lose her left eye. Further, she submits that the claimant still has 68 pellets embedded in her head. Consequently, she asked that the present value awarded be updated by fifty percent (50%) and the claimant awarded $5 million for general damages.

[82] Miss Carlene Minto submits orally and in writing on behalf of the 1st defendant, Marksman Ltd. that Bellinfanti's injuries are more serious than the claimant. She says that award is distinguishable and inapplicable. She proposes an award of $1.8 million for general damages (Defendant's written closing submission dated October 1, 2010 paragraph 34-39). Harrison J, who assessed the damages in Bellinfanti's case considered, reviewed and updated

each of the previous awards of claims for loss of sight between 1989-1994. Both counsel for the claimant and the defendants relied on these awards for their submissions on quantum.

[83] These cases were reported in Harrison, Assessment of Damages for Personal Injuries (1997-2002) pages 229-241 and in different volumes of Khan's Recent Personal Injury Awards.

The award or cases are:-

Margot Thompson v. Foster Trucking
Mavado Wilson v. Caribbean Arrival Group Jamaica Ltd.
Samuel Thomas v. BRC Jamaica Ltd.
Williard Tulloch v. Fitz Henry

In **Margot Thompson v. Foster Trucking**, the plaintiff in March 1992 a female student was hit in her face while walking on the road by a piece of steel protruding from a loaded truck. She fell and injured her eye. She had surgery under general anesthetics in hospital where she was admitted.
In September 1994 she was awarded a global figure of $250,000.00 for general damages for pain and suffering and loss of amenities for 89% loss of vision in her right eye.
In December 2011 the present value of award would be $1,462,718.50 and $1,574,205.00.
Then in **Mavado Wilson v. Caribbean approval Group Jamaica Ltd**. a 42 year carpenter/mason in 1987 lost his left eye when a mixture of acid and water was flashed in his left eye while he was at work. His left eye was removed and he was fitted with a socket prosthesis. He complained of pain on showering when soap gets into the socket. In December 1989 he was awarded $60,000.00 general damages for pain, suffering and loss of amenities.
At October 2010 the value award would be $1,856,603.00
At December 2011 the present value would be $2,006,000.80.

In **Samuel Thomas v. BRC Jamaica Ltd.** the claimant a 42 year old casual worker loss 100%vision to the left eye or 45% total visual loss. He received multiple facial lacerations when a crank handle dislodged and struck him in the face. In June 1990 he was awarded $80,000.00 general damages for pain and suffering and loss of amenities. At October 2010 at time of the value of award would be $2,230,342.00. In December 2011 it would be $2,462,176.20.

In **Williard Tulloch v. Fitz Henry** the claimant who was a 50 year old labourer was struck with a bottle on the 23rd February, 1983. He lost sight in his right eye.
In October 1990 he was awarded $65,000.00 general damages.
In October 2010 value of award is $637,686.00
In December 2010 value of award $1,801,399.70

In **Jillian Cameron** (b.n.f. Yolando Hutchinson v. Basil Wilson the plaintiff in January 1992 was awarded $180,000.00 general damages, pain, suffering and loss of amenities for the total loss of visual acuity to his left eye. He was a passenger in a motor which collided in a culvert along a main road. The plaintiff's injury included laceration to the left eye, cornea - laceration and total hyphema of the left eye. The value of award in October 2010 was $2,250,000.00. In December 2011 the present value of this award would be $2,444,817.00.

[84] There is one feature of the claimant's injuries that is absent from the above awards. These other awards do not reveal evidence of psychological injury. The claimant adduced medical evidence of Dr. Wendel Abel and Dr. Dennis Edwards that Mrs. Lavern Anderson had symptoms of post-traumatic stress disorder and major depression and severe neuropathic pain. I accept their evidence that this was due to the gun shot injury to her face.

[85] Harrison J, after reviewing all these awards took the approach that compensation to an injured party should be based more on the effect of the injury to the party than comparable award for the same type of injury involved.
In **Bellinfanti** he placed weight on the fact that the particular claimant was a journalist and the loss of his sight hampered his ability to read which was vital to his work. What stand out for claimant is the effect of the psychological pain and harm she experienced as a result of loss of her sight.
In Julian **Levy v. Swire Rochester the Attorney General of Jamaica (Suit No. C.L. 1994 L-226).**
An unemployed domestic helper was awarded a global sum of $5 million general for pain and suffering and loss of amenities. She was also awarded a separate sum for future psychotherapy and medication. She brought a claim for assault, battery exemplary and aggravated damages against the government and three police men who raped her and one whom buggered her in December 1993 at a police station where she went for refuge.

[86] It is my view that on principle psychological injury is an aspect of general damages. Once credible evidence is presented to the court, usually medical, about the specific injury it is open to the court to make an award under this head. It seems preferable to make a separate award for this injury. It serves to show that the court accepts medical science recognition of this type of injury.

[87] The Defendant views it that psychological injuries were not pleaded. However the injuries were foreshowed when witness statements were exchanged and the medical reports served. Therefore a defendant could prepare to meet this claim before trial. Dr. Wendel Abel's reports were dated September 2006 and Dr. Dennis Edwards' report dated March 2009. The defendants had objected to admissibility of Dr. Dennis Edwards' report at the beginning of the trial. It seems to me their main complaint would be that the timing of the reports would statute bar the claimant's claim of psychological injury. There was no application for amendment to add further particulars of

injuries or disabilities. However, I hold that the medical evidence particularized the injuries that were foreshown. So they would not be excluded or statute barred if there was an application for amendment (See **Judith Godmar v. Ciboney Group Ltd. S.C.C.A. 144 of 2001 delivered July 3, 2003)** and **Peter Salmon v. Master Blend Feed Ltd. Suit No. C.L. (1991/S163 delivered October 26, 2007).**

[88] Having regard to the previous awards and submissions, I hold that it is reasonable to award the claimant the sum of $5 million general damages for pain and suffering and loss of amenities. She is also awarded specific sum of $1,000,000.00 for psychological injury, i.e. post traumatic stress depression and major depression. The latter sum should fall under the award for general damages.

In this assessment of damages the claimant adduced medical evidence from a consultant psychiatrist that as a result of this injury she suffered major depression, severe anxiety, severe phobia avoidance, nightmares and flash-backs. These symptoms were diagnosed as post-traumatic stress disorder (See **Jullian Levy v. Rochester, Robinson and the Attorney General, 5 Khan 266**. This award did not specify a separate sum for psychological injury such as P.T.S.D. But it is reasonable to hold that such injury was included in the award of general damage.

[89] This leads me to the submission of the first defendant through counsel Miss Catherine Minto that the claimant should not be awarded any compensation for any psychological injury as this was not pleaded. It is correct that the claimant particulars of injury and disability in the Particulars of Claim filed in 2000 did not claim psychological injury, post-traumatic stress disorder, major depression. Neither did any of the amendments to the Particulars of Claim filed 2001, 2004 and 2007 include any such claim. However, the claimant adduced medical expenses from Dr. Wendel Abel, Consultant Psychiatrist and Dr.

Edwards, Clinical Neuro-Psychologist that support these injuries. I accept these injuries were caused by the shot to the claimant's face.
The claim for psychological injuries are part of the claim for general damages. Therefore the pleadings for general damages covers that claim.

Loss of Income

[90] The claimant in her Third Further Amended Particulars of Claim pleaded she lost income from the date of the shooting in May 1998 to May 1999 when her employment was terminated with Marksman Ltd. The parties agreed during the trial on the 5th March 2010 that her wages was $7,956.00 per fortnight. It was agreed that between the date of shooting and the date her job was terminated she was paid $4,500. Her loss of income per fortnight during this period was the difference between $7,956.00 and $4,500.00 which was $3,456.00 x 26 weeks and amounted to $109,044.00. I accept the sum proved.
She further claimed she is entitled to loss of income from May 1, 1999 the date of termination of employment to November 2010 or the date of Judgment. She calculated this at $7,956 x 26 x 10.5 years and which amounted to $2,281,032.00. I do not accept this sum proved.

[91] The first defendant submits in their written closing submission that the court should make no award under this head of damages. They say no evidence was given as to the effect of the claimant's lost vision or her ability to earn. They say further that the medical evidence from 1998 disclosed she was fit to work – (paragraphs 44 and 45 of closing submission).

[92] There is merit in the submission that there is no supporting evidence that Mrs. Lavern Anderson is unable to work as a result of the shooting. The claim for loss of income is promised on the ground that she cannot continue any employment due to her injury. This same premise seems to be the basis of the claim for loss of future earning.

[93] Dr. Calder's opinion was that although Mrs. Lavern Anderson was legally blind, she needed counseling to assist her so she should go along with her regular life which included working. It is for this reason he referred her to Dr. Aaron (exhibits 11, 17). Therefore there were psychological factors that are interfering with her normal activity and working very early, in her medical assessment.

[94] These appear to be recurring but treatable and so far have not incapacitated her. These factors are relevant to her claim for loss of earning capacity or handicap on the labour market. These are taken into account under that head of damage. Therefore no award for loss of income is made to the claimant for the sum of $2,281,032.00 for the period May 1999 to November 2010 or to the date of judgment. However, she did suffer a reduction in her income for the same period due to the shooting. Therefore she is awarded the sum of $109,044.00 for loss of income for this period.

Loss of Further Earnings/Income

[95] She claim the sum $1,447,992.00 for loss of future earnings. But I explained already that this claim is on the ground that she cannot work in the future. In her witness statement she gave evidence that:-

> "I am completely unable to engage in any form of gainful employment" (paragraph 167)

She makes this conclusion after detailing many physical and psychological ailments. The consultant psychiatrist and clinical neuro-psychologist support her on some of these ailments. But they do not suggest that she cannot function in the labour market. Her capacity is reduced in the labour market and this has resulted in financial loss. This was taken into account and assessed under loss of earning capacity.

Cost of future medical care

[96] Dr. Wendel Able gave an estimate of the cost for future medical care for Mrs. Lavern Anderson. The total estimate cost is $341,000.00 for fee $15,000.00 MRI $60,000.00. Neuro psychology $50,000.00, psychotherapy – 1 year $72,000.00 and psychiatric care – 2 years – $144,000.00.

I accept this evidence as I do accept his evidence that she has neuropathic pain, post-traumatic stress disorder and major depression due to the shooting. I am unable to find on a balance of probability that the claimant's condition of short term memory loss or seizure was due to the accident.

It is only logical that I accept the medical evidence of the psychological injury proved and that the claimant should be awarded the sum claimed of $341,000.00 for future medical care. I am not unmindful of the 1st defendant's submission that "the injuries related to this treatment (psychotherapy) was not pleaded" (paragraph 42).

However, the same rationale the Court adopted to the contentions that no psychological injuries were pleaded under general damages is applicable to this contention.

Conclusion

[96] Judgment for the claimant against the 1st Defendant

Cost to the Claimant against 1st Defendant to be agreed or taxed

Judgment for 2nd Defendant against Claimant

Cost to the 2nd Defendant to be agreed or taxed

General Damages

Pain and Suffering and loss of amenities	-	$5,000,000.00
Psychological Injury – Post-traumatic Stress Disorder and Major Depression	)	$1,000,000.00
Loss of earning capacity/Handicap on the labour market		$1,417,992.00
Total		$7,417,992.00

Interest at 3% from 1st May 2000 to February 28, 2012.

Special Damages

Hospital/Medical Expenses (agreed)	-	$60,400.00
Optical Expenses (agreed)	-	$43,420.00
Pharmaceutical Expenses (agreed)	-	$ 6,493.90
Loss of Income (by court)	-	$109,044.00
Further Medical Care (by court)	-	$341,000.00
Total	-	$560,357.90

Interest of 3% per annum from 14th May, 1998 to February 28, 2012

Cost to claimant against 1st Defendant to be agreed or taxed.