

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. HCV 02541 of 2004

BETWEEN	PAULINE ELLISON	CLAIMANT
AND	THE ATTORNEY GENERAL	1 ST DEFENDANT
AND	CONSTABLE W. McLEAN	2 ND DEFENDANT

Mrs. Arlene Harrison-Henry for the Claimant.

Miss Tasha Manley instructed by the Director of State Proceedings for the Defendants.

Assessment of Damages

31st May & 2nd June, 2006

BROOKS J.

Miss Pauline Ellison will not easily forget the 11th February, 2004. On that day, she was shot while in bed at her home. The offending bullet emanated from a firearm wielded by a Constable W. McLean who was then on a nearby road having a dispute with persons unconnected with Miss Ellison, about matters with which she was unconcerned. The bullet grazed her right chest wall and lodged somewhere in the vicinity of her right armpit. An attempt to remove the bullet was unsuccessful and two years later the bullet is still in her body, causing her discomfort and pain. She seeks compensation for the injury and wants the Defendants to bear the cost of

having the projectile removed. The Defendants did not contest liability but the latter claim was an issue in the exercise for the assessment of damages.

General Damages

Miss Ellison was treated initially at the Port Antonio Hospital and was discharged on the second day following the incident. The evidence concerning Miss Ellison's medical condition came from a medical report, dated 27th September, 2005, prepared by Dr. Randolph Cheeks a Consultant Neurosurgeon. Dr. Cheeks also gave oral testimony and was extensively cross-examined by Miss Manley for the Defendants. Miss Manley had done her preparation but, her cross-examination of a witness with the impressive qualifications and expertise, as Dr. Cheeks possessed, only served to reinforce the findings and conclusions made by the neurosurgeon.

Dr. Cheeks examined Miss Ellison on August 15, 2005; that is eighteen months after she had suffered the injury. At the time of the examination, Miss Ellison was suffering from cramps affecting the right arm. The cramps were aggravated by physical exertion such as lifting weights; even carrying an every-day item such as a shopping bag. Dr. Cheeks found:

1. a healed scar present at the lower aspect of the right axilla.
Its appearance was consistent with a healed entry wound

made by a bullet. There was no corresponding exit wound. The bullet could be seen by means of X-Ray technology and could be felt on palpation of the area;

2. dysaesthesiae (distorted sensations to normal stimuli) on clinical neurological examination of the right upper extremity. The distortions were in the territory of the medial cutaneous nerve, which is a sensory nerve of the forearm. This nerve is a branch of the brachial plexus nerves, and is partially situated within the right axilla;
3. no other abnormalities affecting the muscles and tendons of the area.

Dr. Cheeks found that the sensory nerve mentioned above was injured by the bullet. He opined that the persistence of the disturbance of its function, eighteen months after the injury, is an indication that the residual nerve injury is permanent. He confirmed that the condition would "predispose (Miss Ellison) to abnormal cramp-like sensations in the right upper extremity indefinitely".

In cross-examination Dr. Cheeks explained the details of the examination which he conducted and the reasons for his conclusions. He explained that Miss Ellison's complaints of cramps and numbness of the

area between elbow and shoulder would be consistent with the injury to the cutaneous medial nerve. He testified that it was unlikely that this nerve would repair itself because of the burning and scarring caused by the bullet. There was no medication that he knew of which would relieve these symptoms when the injury was caused by a gunshot. In respect of a complaint concerning lifting weights, Dr. Cheeks explained that although the muscles still have their normal strength, fairly heavy physical activity pulls on the scarring on the nerve causing aggravation and preventing the patient from continuing the physical activity. He opined that a weight in the region of 15 – 20 lbs. would provide that result.

Pain and Suffering and Loss of Amenities

Mrs. Harrison-Henry brought three cases to the attention of the court and Miss Manley, two. The cases cited were:

Kenneth Richmond v. Caribbean Steel Co. Ltd. Khan 5 page 235;

Laura Hinds v. Robert Edwards and anor. Khan 4 page 100;

St. Helen Gordon and anor. v. Royland McKenzie Khan 5 page 152;

Dawnette Walker v. Hensley Pink Khan 5 page 170.

Ellie Kean v. Bridgette Officer and anor. Khan 5 page 172;

None of these cases involved a bullet injury. They were, in the main, whiplash type injuries, and were cited because of the pain and reduced

sensation reported as affecting those plaintiffs. I found the cases of *Richmond* and *Hinds* unhelpful, due to the fact that the permanent impairment in those cases was significantly more (10% and 6%, respectively) than Miss Ellison suffers.

In *Gordon* the plaintiff suffered a whiplash injury and had to endure pain about the neck and shoulder. She was expected to improve gradually but was assessed as having a 3% whole person disability. Miss Gordon was awarded \$400,000.00 in July 1998. That figure when updated using the Consumer Price Index (CPI) for April 2006 of 2323.3 is approximately \$800,000.00.

Miss Dawnette Walker was injured in a motor vehicle crash. She suffered injury to her neck, right shoulder and upper back. She was treated with physiotherapy, steroid injections and the support of a cervical collar. Her symptoms included painful restriction of the left lateral rotation of the cervical spine, a tender paraspinal cervical musculature, diminution to pinprick sensation at the right thumb, index and middle fingers and a marginally depressed right supinal jerk. There was some damage to the C3-4 cervical intervertebral disc and she was assessed as having a Permanent Partial Disability (PPD) of 5 % of the whole person. Miss Walker was away from work for a year and four months as a result of her injury and

complained of a limitation in the amount of work that she could perform as a result of the disability. On appeal (SCCA 158/01 - delivered 12/6/03) she was awarded \$650,000.00 for pain and suffering and loss of amenities. When updated using the April 2006 CPI the result is approximately \$920,000.00.

In *Kean* the plaintiff suffered injuries in a motor vehicle crash. His symptoms included pain in the neck, cramps in the right upper limb extending to the hand, tenderness on the right cervical spine, swelling of the chest area, reduced power in the right hand and reduced wrist flexion and elbow extension. An MRI of the cervical spine showed disc bulges at C4-5 and C5-6 with no impingement on the spinal cord. At some point Mr. Kean was rendered immobile and was diagnosed with flexion-extension injury of the cervical spine. Mr. Kean was assessed as having a PPD of 5% of the whole person. In May 2001 he was awarded \$850,000.00 for general damages. Updating that figure using the April 2006 CPI results in \$1,400,000.00.

I regard Mr. Kean's injuries as far more serious than Miss Ellison's and so will confine my analysis to the *Gordon* and *Walker* cases. From the cases mentioned above it will be seen that the range for the appropriate award would be between \$800,000.00 and \$920,000.00. In light of the fact

that Miss Walker suffered a 5% PPD, I am of the view that the lower award is more appropriate.

The court also considered the case of *Pansy McDermott v. Garnett Lewis and the Attorney General for Jamaica* Khan 5 page 287. This was a case in which the plaintiff was shot in the thigh by a police officer. There was no assessment of PPD reported, though there was a report of the plaintiff having problems with prolonged standing or walking. Miss McDermott was awarded \$418,853.00 for Pain and Suffering and Loss of Amenities in April 2002. When updated using the April 2006 CPI the result is approximately \$660,000.00.

Mrs Harrison-Henry submitted that Miss Ellison should be awarded \$2,000,000.00 under this head, but I believe that the above analysis shows that figure to be exorbitant. I agree with Miss Manley that the appropriate award should be \$800,000.00 for pain and suffering and loss of amenities.

Special Damages

The parties had agreed all but one item of the special damages which had been pleaded. The agreed items of Special Damages are as follows:

Loss of income	\$115,000.00
Cost of medical reports	19,500.00
Cost of transportation	1,500.00

The item in issue was the cost of the surgical procedure to remove the bullet. The relevant part of Dr. Cheeks' report is quoted in full below:

"Removal of this bullet is unlikely to alter the abnormal sensation she experiences since this sensation is derived from injury to the medial cutaneous nerve of the forearm itself. The PPD resulting to this individual from this nerve injury amounts to 3% of the whole person according to the AMA guidelines for the evaluation of permanent impairment.

A further attempt at surgical removal of the bullet may compound the injury to the already injured medial cutaneous nerve, and it is my view that any such attempt should be carried out under a general anesthetic (sic) using magnification/microsurgical techniques. The total cost of such a surgical operation inclusive of all medical, hospital, radiological, laboratory, nursing and physiotherapy charges is likely to be in the region of \$350,000 Jamaican dollars at today's prices."

In oral examination concerning the procedure Dr. Cheeks testified:

"The only circumstance under which I would recommend removal is if there were a progressive increase in the sensory distortions in her arm, because that would signify progressively increasing scarring caused by metal impurities in the bullet and that scenario would lead to involvement in neighbourhood nerves which are undamaged at this time....

I would only recommend removal under great duress....

If the bullet is removed now it would prevent the (progression of increasing scarring)....

There is a procedure to successfully remove that bullet....

She is at risk of those progressive symptoms occurring."

Miss Manley submitted that the exercise is unnecessary in light of Dr. Cheeks' observation that the removal would not reduce the plaintiff's condition and that he would only do it under duress. However, when faced with the question of what were Miss Ellison's options in the event that there was a deterioration of her condition, Miss Manley conceded that; "some

provision has to be made for the prospective loss”, but that that should be considered in the award for general damages.

I agree that the prospect of the loss must be compensated for in the award to be made to Miss Ellison, but it would not be appropriate for it to be included under the head of general damages. It is a specific procedure with a quantifiable cost. It should therefore be dealt with as an item of special damages.

Concerning the approach for dealing with the future loss, it should be noted that there are different approaches available. In *Trans Trust S.P.R.L. v. Danubian Trading Co.* [1952] 2 Q.B. 297, C.A. it was considered appropriate, in circumstances where a future expense or loss was uncertain, to make an order either, reserving assessment of the uncertain portion for some later time “by the same or another judge”, (the approach of Denning L.J., as he then was, p. 307), or granting “liberty to apply for directions as to the determination of these issues, if any, and quantification of damages under this head as between plaintiffs and defendants, should disputes arise” (the approach of Somervell L.J – p. 303). The learned authors of McGregor on Damages 16th Ed. at para. 369 reported that in *Household Machines v. Cosmos Exporters* [1947] 1 K.B.217:

“the plaintiff was held entitled to a declaration of indemnity limited to such damages as in law were due from the defendant to the plaintiff in respect of

damages which the plaintiff might be held liable to pay and/or might reasonably pay..."

I am not in favour of any of those options, firstly, because the figure involved is already ascertained, secondly because I do not think that the amount involved justifies the costs which would be involved or the further use of the resources of the court, and thirdly, because of Miss Ellison's sense of urgency. Miss Ellison is of the view that the operation will help her, despite the doctor's opinion. She wants to have it done. Since the doctor is of the view that the procedure can be safely conducted, and that it could prevent further deterioration of her condition, I find that it is not unreasonable to have the Defendant's pay for it now. I find that Miss Ellison should be awarded the \$350,000.00 to cover the expense.

Claim for interest

An aspect which arose during the course of submissions is the claimants' demand for interest on the award of General Damages at 12% *per annum* from the date of the service of the Claim Form. Miss Manley, quite properly, objected to the claim. Over twenty years ago the Court of Appeal in *Central Soya Jamaica Ltd. v. Junior Freeman* (1985) 22 J.L.R. 152, stipulated that in the normal case interest awarded up to the date of judgment should be one-half of the rate applied to judgment debts. That principle remains intact. The rate of interest on judgement debts has been

fixed at twelve *per centum* since 1st July 1999 (PRR 92A). I agree with Miss Manley that there is nothing peculiar about the instant action which would justify the rate of interest claimed.

Conclusion

In summary therefore damages are assessed as follows:-

General Damages

Pain & Suffering & Loss of Amenities	\$800,000.00
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with interest thereon at 6% per annum from 29/11/04 to 2/6/06.

Special Damages	\$486,000.00
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with interest thereon at 6% per annum from 11/2/04 to 2/6/06.

Costs to the Claimant to be taxed if not agreed.