

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON SUIT

SUIT NO. C.L. 1992/H194

BETWEEN NEVILLE HOWITT PLAINTIFF
AND VANGUARD SECURITY FIRST DEFENDANT
COMPANY LIMITED
AND ANDREW FRANCIS SECOND DEFENDANT

Mr. M. Frankson for the Plaintiff, instructed by Messrs. Gaynair and Fraser

Mr. E. Delisser for the First Defendant.

Heard on May 13, 1999 and May 20, 1999

CORAM N.E. McIntosh, J. (Ag).

This matter has proceeded to assessment of damages consequent upon the entry of judgment, in default of appearance, against the first defendant only, on the 14th of May, 1993 and the order to proceed to assessment of damages which followed on the 14th of July, 1993. Liability is therefore not in issue.

The plaintiff, who is now sixty (60) years old, was shot in his right leg, in the area of the calf, on the 23rd of May, 1992. He was taken to the Kingston Public Hospital where he received medical treatment and he gave evidence

of the expenses he incurred as a result. He also attested to the pain and suffering he endured over a period of four (4) years as a result of the gunshot injury. He was a taxi driver at the time and he was unable to work because he was unable to use his right foot to drive. He felt pain in his leg when he walked and by 1996 he had to go back to the hospital for further treatment. Up to the time of this hearing he was still experiencing pain in his right leg. He had tried to resume his occupation as a driver about two (2) years ago, but had to discontinue his efforts because of swelling and pain in the big toe. Sometimes he had to remove his right foot from his shoe.

The medical evidence in support of the plaintiff's case is contained in three medical reports which were admitted into evidence, without objection, as Exhibits 3a 3b and 3c. The first of these is a report from a Dr. Jarrett, dated September 9, 1992, to the following effect.

The Plaintiff was examined on June 1, 1992 and was found to be a-

“Middle aged male comfortable” with a:-

“Bullet entry wound to medical aspect of right leg, no exit wounds were seen X-Ray 11383 metallic foreign body to right calf ...”

“He was again seen on June 22, 1992 and was noted to be symptom free. He was discharged from the fracture clinic on July 20, 1992, from Orthopaedic care. He should suffer no permanent disability from his injuries.”

It is unclear just what the doctor meant by 'comfortable' when the patient had a foreign body in the leg and had an injury which needed to be dressed twice weekly.

Dr. Jarrett said that the plaintiff was symptom free on June 22, 1992 but he did not indicate his condition on the date of discharge. On the other hand, Dr. Dixon, in the second report, dated June 7, 1995 said that at that time, that is, the date of discharge, the plaintiff complained of varicose veins of the right leg. He was seen again on October 10, 1994 and "there was enlargement of the varicose vein which had become very painful." Dr. Dixon's Report continued:

"Examination revealed that the varicose veins were not due to incompetence of the sapheno femoral valve.

A venogram was done, which showed chronic thrombosis, limited to the anterior communicating veins."

Dr. Dixon described the treatment prescribed and then added:

"Neville Howitt sustained a gunshot wound to the right leg on May 23rd 1992 which has led to the development of varicose veins of the right leg."

It is often regrettable in matters of this nature that the medical experts are not called to give viva voce evidence and the Court is left to interpret a report without benefit of expert guidance. In the instant case, it is my view

that when Dr. Dixon ruled out "incompetence of the Sapheno Femoral Valve" and gave the result of the Venogram, what the doctor was actually stating was the basis for his finding that the gunshot wound which Mr. Howitt sustained on May 23, 1992 "led to the development of varicose veins of the right leg." The gunshot wound caused the thrombosis and this resulted in varicosity and the plaintiff had complained of Varicose Veins from as early as July of 1992.

Doctor Jarrett and Doctor Dixon appear from their reports to be qualified in the specialized field of Orthopaedics. The author of the third report, however, Doctor Banbury, is a general practitioner. His report is dated January 13, 1999, although his examination was conducted from 1996, at the request of the Defence. He has given no account of any tests done to disclose the cause of the varicose veins which he found to be in both legs, more so in the right leg. He found mild swelling of the right leg and stated that the plaintiff complained of "pains on and off since the incident." According to Dr. Banbury, radiological evaluation done in 1998, two years after his examination, revealed "a 10mm bullet fragment lying deep in the muscle of his right calf."

The Defence contends that the Plaintiff's claim is exaggerated and that the injury he sustained cannot be considered as a serious one. According to Mr.

DeLisser, the plaintiff suffered an injury and is entitled to something but he is unable to understand how anyone could refer to the injury as serious and "keep a straight face." In his view, the medical evidence is totally out of line with the evidence of the plaintiff from the witness box and he pointed out that Dr. Jarrett reported him to have been symptom free from June of 1992. Furthermore, Dr. Banbury's Report casts some doubt on Dr. Dixon's Report as to the cause of the varicose veins, since in 1996, the former found varicose veins in the left leg, thereby raising the possibility that the condition may have developed independently of the injury. An assessment of the damages to be awarded in this case should therefore not take into account the development of the varicose veins.

In Mr. DeLisser's opinion, an award in the region of One Hundred Thousand Dollars (\$100,000.00) for general damages, would be appropriate, taking into account the devaluation in the Jamaican Currency. To this end, he cited two (2) cases for the Court's consideration:-

1. Dorothy Coombs v. Kingston & St Andrew Corporation (Suit No. CL1984/C242).
2. Paul McEwan v. The Attorney General for Jamaica (Suit No. C.L. 1987/M501).

In the first case, the plaintiff suffered a 3cm. laceration on the mid thigh anterior aspect of the right leg and a 4cm. Laceration on the anterior aspect of the right distal third of the right leg with ugly scarring on the right leg. In October of 1986 a sum of Seven Thousand Five Hundred Dollars (\$7,500.00) was awarded to the plaintiff as general damages. That award would today amount to Ninety-five Thousand Eight Hundred and Sixty-four Dollars and Twenty-three cents (\$95,864.23).

In the second case, the plaintiff sustained a gunshot injury to the left thigh causing muscle hernia and damaging underlying muscle with a partition gap in the fascia lata. He was awarded Twenty-five Thousand Dollars (\$25,000.00) for general damages in October of 1990, and that today would amount to One Hundred and Ninety-one Thousand Three Hundred and Forty-three Dollars and Four Cents (\$191,343.04).

Mr. Frankson urges the Court to accept on a balance of probabilities that the plaintiff's injury was a serious one resulting in a permanent disability, as the plaintiff is liable to suffer the consequences of the injury for the rest of his life. In his view the case of *Renford Blake v. The Attorney General for Jamaica* (Suit No. C.L. 1991/B046) offers better guidance to the Court in arriving at an appropriate award for general damages, although he conceded that the injuries in that case were more serious than in the instant case. The

plaintiff there suffered a gunshot wound. There was an entry wound to the midshaft posterior aspect of the left thigh, with no exit wound; swelling and tenderness over the area of the wound; left drop foot secondary to nerve damage and compound comminuted fracture of midshaft of left femur. The sum of Four Hundred Thousand Dollars (\$400,000.00) was awarded as general damages in October of 1990 which today would be in the region of Four Hundred and Sixty-one Thousand Two Hundred and Eighty-three Dollars (\$461,283.00). According to Mr. Frankson the award in the instant case should be in the range of Five Hundred Thousand Dollars (\$500,000.00) at the lower end and Nine Hundred Thousand Dollars (\$900,000.00) at the upper end.

I find on a balance of probabilities, that the gunshot injury to the plaintiff's right leg has caused him pain and discomfort and continues to do so up to the present time. It still becomes swollen from time to time. There is a metal fragment which remains deeply embedded in the muscle of his right calf and is most probably causing pain and swelling so that I do not agree with defence counsel that the plaintiff is trying to fool the Court about the effects of his injury, as was suggested to him in cross examination.

Further, I accept the evidence contained in the Medical Report of Dr. Dixon and find his report to be more comprehensive and more reliable than that of

Dr. Jarrett. The latter makes no reference to the plaintiff's complaint of varicose veins at the time of his discharge. Dr. Dixon not only reports the plaintiff's complaint in July of 1992, but further reports that the veins had enlarged by 1994. In 1992 Dr. Jarrett said the plaintiff should suffer no permanent disability from his injuries, but, in 1994, Dr. Dixon was not prepared to comment on his final condition as he was to have been reviewed again in May, 1995.

Dr. Banbury's Report is of little assistance as it serves only to confirm the condition of the right leg, including the proneness to swelling and the retention of the bullet fragment in the said leg. It mentions the existence of varicose veins in the left leg, but gives no assistance as to its cause and offers no challenge to Dr. Dixon's findings. I do not accept that Dr. Dixon's findings on the cause of the plaintiff's condition are in any way impeached, because varicose veins have now developed in the left leg. There is no evidence before this Court as to what caused the varicose veins in the left leg, but there is unchallenged evidence as to its cause in the right leg.

Based on Dr. Dixon's Report, I find on a balance of probabilities that the development of varicose veins is the result of the gunshot injury, and is an important factor to be considered in assessing the general damages to be awarded to the plaintiff. Further, although the medical evidence is unhelpful

as to the degree of disability and its likely duration, (due, it seems to the Plaintiff's failure to return to Dr. Dixon for a final evaluation), in my view, an injury sustained in 1992, with resulting pain and swelling which still continues some seven (7) years later, is to be classified as serious. The injury and its consequences have seriously impaired his ability to pursue his occupation as a driver and, as Mr. Frankson put it, may well be "liable to be permanent."

A comparison of this plaintiff's condition with that of the plaintiffs, in the cases to which I have been referred has led me to conclude that an award of Four Hundred Thousand Dollars (\$400,000.00) is appropriate in this case.

With regard to the Plaintiff's claim for special damages, he gave evidence of damage to the pair of pants which he was wearing at the time of the incident and gave its value as Twelve Hundred Dollars (\$1,200.00). However, in item one of his pleadings under this head he has claimed the sum of One Hundred and Fifty Dollars (\$150.00) for the damaged garment. On a balance of probabilities I accept that the garment was damaged in the incident, and that it had a value which may well have been Twelve Hundred Dollars (\$1,200.00), but he is entitled to no more than he has claimed in his pleadings. Accordingly, he is awarded One Hundred and Fifty Dollars (\$150.00) as claimed.

No evidence was led as to item two which claimed transportation expenses so that claim fails. Item six suffers the same fate as no evidence was led about the cost of the medication which was prescribed.

The defence consented to the admission of eight (8) receipts for sums paid to cover expenses incurred at the Kingston Public Hospital and for the medical report. The pleadings are therefore amended as sought to reflect the resulting total sum of Two Thousand Four Hundred and Seventy Dollars (\$2,470.00).

All that remains to be determined under this head of damages is the plaintiff's claim for loss of earnings. His evidence that he was a taxi driver at the time is unchallenged. The injury to his leg prevented him from driving as the foot kept swelling up when he tried to use it, and it was painful. He could not even walk without the foot swelling and becoming painful. In 1996 he had to return to the hospital for further treatment. According to Dr. Dixon, in October, 1994 the plaintiff was seen in the Orthopaedic Clinic with enlarged and very painful varicose veins. He was treated with analgesics and a supportive bandage and was set for review in May of 1995. In July, 1996 he presented with swelling in the leg when seen by Dr. Banbury, and he was still complaining of pain. Therefore, on a

balance of probabilities, I accept the plaintiff's testimony that he was unable to pursue his occupation for the space of four (4) years from the accident.

His statement of claim pleads "Loss of earnings at \$1,000.00 per week for five weeks and continuing." However, he gave evidence that he worked six (6) days per week and earned Five Hundred Dollars (\$500.00) per day, which would amount to Three Thousand Five Hundred Dollars (\$3,500.00) per week. This resulted in a submission on behalf of the defendant that the plaintiff ought not to succeed in his claim for loss of earnings as he can offer no explanation for the difference between the figure claimed, and that indicated in his evidence. The submission continued that in light of this difficulty, it would be difficult for the Court to award him any amount as there is no basis on which the Court can say that he earned One Thousand Dollars (\$1,000.00) per week.

There can be no question about him earning an income from his employment as a taxi driver, and in his evidence he explained how it was earned. The taxi was owned by a private individual to whom he was obliged to give a certain sum each day and whatever he earned in excess of that sum belonged to him. As he put it, "I work to pay myself." Therefore, it is highly probable that he earned Five Hundred Dollars (\$500.00) per day as he testified. When he was asked if he saw the sum in the claim he answered in

the affirmative and would have continued to say more, but he was interrupted. He was asked if he could explain how the figure claimed was in his pleadings and he truthfully answered that he could not. Clearly, he was saying that the instructions that he gave were to the contrary. Sometimes, according to his testimony, he earned even more than Five Hundred Dollars (\$500.00) per day, because after his employer's sum was earned, it was up to him to earn as much as he could for himself. On a balance of probabilities therefore, I find that he earned a sum in excess of the sum claimed in his pleadings. However, since no application was made for an amendment to his claim, the sum of One Thousand Dollars (\$1,000.00) per week, remains for the consideration of the Court in calculating the award under this head of damages.

Ultimately, the plaintiff's claim is for loss of earnings for two (2) years at the rate of One Thousand Dollars (\$1,000.00) per week and, on the totality of the evidence adduced, I accept this as a reasonable claim. Accordingly, the sum of One Hundred and Four Thousand Dollars (\$104,000.00) is awarded.

The total sum awarded as special damages is therefore One Hundred and Six Thousand Six Hundred and Twenty Dollars, (\$106,620.00) comprising the following:-

150.00 - pants
104,000.00 - loss of earnings
2,470.00 - agreed medical expenses
\$106,620.00,

with interest at the rate of three percentage (3%) from the 23rd of May, 1992 to the 20th of May, 1999.

The plaintiff is also to have interest at the rate of three percentage (3%) on the sum of Four Hundred Thousand Dollars (\$400,000.00) awarded as general damages for pain and suffering. This interest is to be calculated from the 26th November, 1992 to the 20th of May, 1999.

Finally, a stay of execution of this award is granted, for the space of six (6) weeks from today.

W. J. ...
✓ (Ap)