

In the Supreme Court of Judicature of Jamaica

In the Civil Division

Claim No. C.L. 1995/L238

Between	Michael Llewellyn	Claimant
And	Gladstone Grant	1 st Defendant
And	Phillip Smith	2 nd Defendant
And	The Attorney General	3 rd Defendant

Mr. Leonard Green for the Claimant

Mr. Jerome Spencer instructed by the Director of Public Proceedings for the 1st, 2nd and 3rd Defendants.

Heard: 28th March, 2007, 29th March, 2007, 29th April, 2010

Gayle, J.

This is an action brought by the claimant to recover damages for assault against the 1st and 2nd Defendants being servant and/or agent of the 3rd defendant.

The 3rd defendant is being sued by virtue of the Crown Proceedings Act.

The claimant is contending that on the 3rd day of December 1994 the 1st and 2nd defendants with out reasonable and probable cause assaulted and beat him and secondly with a firearm shot the Claimant causing him to sustain bodily injuries and suffer pain, damages and loss and to be put into expenses.

The defence is in denial of the allegations by the claimant. That the 2nd defendant fired his service revolver in self-defence and that the action was reasonable and necessary in the circumstances.

The Claimant Case

The claimant gave evidence which is contained in his witness statement (exhibited).

Cross-Examination by Mr. Spencer

The claimant said he was shot whilst he was running away.

The claimant said Mr. Grant did not say he had information against him for housebreaking and larceny and that he was wanted for housebreaking and larceny.

He said Mr. Grant said, "get up bwoy you think a now me a look fe you bwoy, you a go home wid me today."

The claimant said he tried to get away from Mr. Grant and Mr. Grant bawl out Smith, Smith.

He said Mr. Grant gave him a head lock and Mr. Grant call for Smith again.

The claimant said Mr. Grant gun fell whilst he was still in a headlock from Mr. Grant.

The claimant said to how they were struggling he saw the gun as they spin around and he kicked it away.

The claimant denied ever picking up the gun.

The claimant said he can't recall anyone saying the boy had the gun.

He said he was able to escape and ran towards a fence.

He said he attempted to jump the fence and fell about 10 feet from the fence and got up and ran towards the fence.

He said he heard shots firing and Mr. Grant said don't shoot, don't shoot him no have nothing.

The claimant said, he was shot and fell to the ground. He said he was shot to his back and points to the area of his back where he got shot.

The claimant said, he did not pick up Mr. Grant gun and point it at him. He said, he never picked up any gun and squeeze the trigger.

He said he was not squeezing any gun trigger and heard explosion.

The claimant said blood was coming from his back where he got the shot.

2nd Witness

Dr. Francis Lindo Registered Medical Practitioner in Jamaica, Consultant Orthopaedic Surgeon.

That he examined the claimant Michael Llewellyn as patient and issued a medical report dated 29th November, 2006. Report tendered as Exhibit I.

Dr. Lindo said the claimant had gunshot wound to his left buttocks and no exit wound.

That in his opinion the person firing the shot must be behind the claimant.

That the claimant had right below knee amputation.

Dr. Lindo said that he saw the claimant on the 4th December, 1994 and that the injuries of 1994 had a connection with the right below knee amputation.

Cross Examination by Mr. Spencer

He said, he view the gunshot wound on the claimant from behind and this was when the claimant was turned over in the bed on his belly.

He said, the bullet entered abdomen cavity and rest at the spine at Li level and that the bullet wound was from behind.

That the shooter and the claimant were not on the same level.

Case for Defence

Everton Grant Detective Inspector of Police. Witness statement tendered as examination in chief.

Cross Examination by Mr. Green

Mr. Grant said the claimant was sleeping beside the said house he had broken into.

That he saw the claimant laying down and the claimant appear to be awake but lying down.

He said the only way he could restrain the claimant was by holding his neck.

That he attempted to pick up the firearm but the complainant picked it up before him and point it at him.

That he did not hold onto the arm of the complainant that had the gun.

That he attempt to grab the firearm several times and that the complainant moved it away and was backing away from him and the complainant was attempting to squeeze the trigger.

That Mr. Smith was to his left somewhat behind him and about 5 feet from him.

That Mr. Llewellyn was in front of him facing him and pointing the firearm at him.

That when Mr. Llewellyn got shot he was not pointing the gun at him.

Mr. Grant now says the claimant was pointing the gun at him and that he did not understand the question.

Mr. Grant said, that at the time the complainant got shot he was pointing the gun at him.

He said, that the complainant was shot whilst running away from me and the complainant was armed with the pistol.

Reexamination

Mr. Grant said, the complainant back was to him. He then said, it was complainant left side was to him.

2nd Witness

Mark Watt Detective Corporal of Area one Montego Bay. Witness statement tendered as examination in chief.

Cross Examination

He said he saw the complainant with the gun. That when he saw the complainant pointing the gun at Mr. Grant he got frightened and ran.

He said, he heard five (5) explosions but he did not see who fired them.

He said, he never saw what happened when the shots were fired.

He said he was armed with his service pistol and it had in 5 rounds and that it never occurred to him to pull his firearm.

3rd Witness

Philip Smith Sergeant of Police City Centre. Witness statement tendered as examination in chief.

Cross Examination

Said he was armed with a .38 Smith & Wesson Service Revolver.

He said he fired at the complainant on two occasions.

He said the complainant did not run away immediately when he fired first.

He said, the complainant look to the left then to the right and ran away a second after the shot was fired.

He said when he approach Mr. Grant he was standing with both hands in the air. He seems to be in a crouching position.

I saw him in the above position with the complainant pointing the gun at him.

He said no shot was fired from Mr. Grant's gun.

He said he doesn't recall speaking to the complainant and it did not occur to him to say drop it.

He said, all five shots were fired in the direction of the complainant.

He said he fired two shots first when he was about 10 metres away.

He said he ran to where Inspector Grant was and he was slightly behind Inspector Grant to the left.

He said the complainant was running away and pointing the gun at Inspector Grant and him.

He said he went on his knees and fired 3 shots.

He said the complainant had the gun in right hand and cross it over to his left hand.

He was running and pointing the gun at them.

He said the gun was essential for case of illegal possession of firearm.

He said he is not aware of the gun being secured for fingerprint evidence.

Re examination none

To the Court

He said Mr. Llewelyn was facing Inspector Grant and pointing the firearm at Inspector Grant.

That the complainant was a yard from Mr. Grant directly in front of him.

Submissions

Mr. Spencer submitted that the court should accept the defence case over that of the claimant.

Mr. Green submitted that the court should accept the evidence of the claimant and that the defence witnesses are not truthful in their account to the court of how the incident took place.

Liability and Analysis

It is simply a question of fact as to which account is to be believed. The fundamental question is who is responsible for the shooting of Mr. Llewellyn on 3rd December, 1994.

The resolution of this question hinges totally on the evidence of the claimant and his witness Dr. Lindo and the 1st and 2nd defendant and the witness call on their behalf. And is thus a question of fact to be resolved purely on their credibility. In light of this, their demeanour was of critical importance to me and so I have listened to them keenly and observed them closely while giving their testimony from the witness box.

I have examined all the evidence adduced by both sides and after paying due regard to the submissions of counsel on their behalf I have made the following findings.

1. I find that Mr. Llewellyn has impressed me as a witness of truth. He seems more credible and reliable than the 1st and 2nd defendant and their witness. I accept his version of how the incident occurred on a balance of probability.
2. I find that Mr. Llewellyn was sleeping at his home and he was awoken by a kick.
3. I find that the claimant and the 1st defendant was in a struggle and the 1st defendant gun fell and the claimant kicked it away.
4. I find that the claimant was shot in the buttock area whilst running away from the police. The evidence of Dr. Lindo is that the claimant was shot from behind and he saw entry wound to the back and no exit wound. That when he examined the claimant for the first time the claimant was placed on his belly.
5. I find as a fact the claimant did not pick up the gun and pointed the gun at the police.
6. I find that the police was not acting in self defence.

Conclusion

I am satisfied on a preponderance of the probabilities that the defendants acted without reasonable and probable cause which would render them liable to the claimant in damages.

Damages

Having found that the defendants are liable. I now turn to the question of damages. I shall deal with special damages first.

Special Damages

The claimant has alleged that as a result of the incident he incurred expenses and has suffered losses for which the defendants should be held liable.

The onus is on the claimant to prove to the court that the defendants breach has brought about the losses claimed.

The principles and authorities indicate that Special Damages must be specifically pleaded and strictly proven.

The following items of Special Damages were agreed on by the attorneys.

(1)	Medical Expenses	\$10,800.00
(2)	Transportation	\$25,000.00
(3)	Prosthesis	\$25,000.00

Household Help/Extra Help

The claimant has asked the court to consider payment for services given to him in respect of household help.

Mr. Llewellyn said, he needed extra help to attend to his daily personal activities during the time of his recuperation for example the washing of his clothes.

The claimant claimed for 79 weeks at \$500 per week from 3rd December 1994 to June 1996 and for 52 weeks from June 1996 to April 1997 at \$800 per week.

I accept that this help was reasonable and necessary having regard to the claimant's evidence and the medical reports. I therefore award the sum of \$80,300.00 under this head of Special Damages.

Loss of Earnings

Mr. Llewellyn testified that he was a farmer at the time of the incident.

That he would earn the sum of \$3000 per week.

The defence submitted that loss of earnings should be calculated at \$1200 per week for 125 weeks making a total of \$150,000.00.

I find that the sum of \$2000 per week is a reasonable amount for a farmer at the time of the incident. I so do order that the sum of \$250,000.00 for loss of earning.

General Damages

Pain and Suffering and Loss of Amenities.

Loss of Amenities

Mr. Llewellyn cannot run, play football, swim, climb trees, dance, somersault back and front ways. "I fell very embarrassed about my disability because when I am shuffling around people are always staring at me."

His quality of life has further deteriorated when persons are staring at him with the prosthesis.

Pain and Suffering

From his testimony there is no doubt that this was a painful episode for Mr. Llewellyn. His aches and pains have continued from the time of the incident to the date of testifying in the matter. .

In support of his claim Mr. Green relied on two medical reports. One from Dr. San Lewin of Cornwall Regional Hospital and the other by Dr. Francis Lindo.

I now quote from the reports.

Dr. San Lewin's report states:-

- (1). On the 3rd December 1994 claimant was referred from Lucea Hospital and admitted to Surgical ward of Cornwall Regional Hospital.
- (2). Gun shot to left bottom
- (3). Spinal cord injury and intra abdominal injury secondary to gunshot.
- (4). X-ray of 5th December, 1994 showed a bullet lodged at the level of first lumbar spine.
- (5). Claimant had emergency surgery at Cornwall Regional Hospital (laprotomy) 6 hours after admission and the following were found during operation.
 - (i). perforation of small bowel
 - (ii) Through and through perforation of large bowel – splenic flexure colon were found during operation.
- (6). Plaintiff was discharged form Cornwall Regional Hospital on 28th December, 1994 and sent back to Lucea Hospital for

recovery with partially functional legs and colostomy and indwelling catheterization.

- (7). Plaintiff was transferred to Mona Rehabilitation Centre on 28th March, 1995 with colostomy and urethral catheter with a diagnosis of paraplegia secondary to gunshot wound.

Dr. Lindo's Report state-

- (1). Examination on 3rd December, 1994 Claimant showed
 - a. acute tender abdomen
 - b. impaired sensation right and left ankles and feet
 - c. gunshot entry wound left buttock no exit wound.
2. Claimant readmitted at Cornwall Regional Hospital on February 14, 1996 for further operation.
Closure of colostomy. Discharged March 22, 1995.
3. Gunshot wound to spinal cord resulting in loss of sensation in the S2 – S4 dermatides with improved sensation below L.3.
4. Necrotic ulcer of right foot developed as a result of loss of sensation:
5. Claimant readmitted to CRH January 15, 1997; had surgery January 18, 1997 (incision and drainage of abscess of right calcaueoces)
6. Claimant readmitted to CRH May 13, 1997; discharged 3 days later.
7. Claimant readmitted to CRH September 13, 1998 and discharged 22nd September, 1998.
8. Osteomyelitis of the right calcaueoces which resulted in a right below knee amputation (done at Savanna-la-mar Hospital).
9. On examination 17th November, 2006 abnormal gait with right below knee prosthetic leg.

10. Impairment 49% whole person caused by both Cauda Equina lesion (spinal cord) on right below knee amputation.

In relation to assessment of general damages and its subhead, pain and suffering and loss of amenities. The following cases were cited to the court by Counsel in their submissions.

Mr. Spencer for the defendants referred to the following cases.

1. ***Donald Gray v. The Attorney General for Jamaica and Constable Mills. Suit #C.L. 1986 G008 at page 150 of Volume 3 Khan.*** The award in this case when converted is \$7,700,000. Mr. Spencer further suggested that it should be adjusted downward to \$4,500.00.
2. ***Cecil Smythe vs. Special Constable Walker and the Attorney General for Jamaica at page 166 of volume 3 Khan.*** The award when converted is \$6,200,000 there was suggestion by Counsel for the figure to be adjusted downward to \$5,000.000.

Mr. Green for the client referred to the following cases.

1. ***Maurice Francis vs. District Constable Owen and the Attorney General at Volume 4 of Khan*** page 127. Using the April 2009 price index converts to an award of \$16,802.200.02.
2. ***Anthony Wright vs. Lucient Brown*** Volume 5 of Khan at page 201. The award for pain and suffering and loss of amenities was assessed at \$8,000,000. Using April 2009 price index converts to \$20,833.020.04.
3. ***Sylvester Frazer vs. Charles Brown and Michael Ferguson*** found at Volume 5 Khan at page 203 assessed June 1998. An award of \$4,500,000.00 for pain and suffering and loss of amenities which converts to \$13,061,480.55.
4. ***Tyrone Gregory (bnf Alton Gregory) and Alton Gregory vs. Dervan Blackstowe and Richard Kerr*** found at Volume 5 Khan at page 195 and was assessed in April 2000. an award for pain and suffering and loss of amenities was made in the sum

of \$10,000,000 which converts to \$25,789,669.27 using April 2009 price index.

Having reviewed the authorities presented to me. I am prepared to accept the cases submitted by Counsel for the claimant which were in keeping with the injuries received by the claimant and were more current than the cases presented by counsel for the defence. An award to the claimant in the sum of \$20,000,000.00 for pain and suffering and loss of amenities.

Handicap on the Labour Market

Mr. Green submitted that an award should be made for handicap on the Labour Market. He asked for the sum of \$1,000,000.00.

Mr. Spencer raised an objection for an award to be made under this head because according to him, there is nothing to suggest that there is a substantial risk that the claimant will lose his job and would have to sometime in the future compete on the labour market.

The Court relies on the principles as set out in *Moeliker vs. Reynolle and Co. Ltd. 1977 1 W.L.R. 132* and has been followed in this jurisdiction. It is now well established principle of law that for an award to be made under this head. The first issue is whether there is a substantial or real, and not merely fanciful risk that the claimant will lose his present employment as a result of the injuries before the estimated end of his working life and be thrown on the labour market where he is placed at a

disadvantage in getting another job or a equally well paid job as a result of his injuries.

I am of the view that the principles stated in *Moeliker case (supra)* apply to this claimant who is self-employed at the date of assessment.

I disagree with Mr. Spencer's submission. There is some evidential support which would allow me to make such an award. Mr. Llewellyn was a farmer. He therefore, relied on his agility and ability to stand and move to earn his living. Obviously the loss of his leg must result in diminished earning in the future. :

The claimant is 40 years old. He testified that he was unable to work as a farmer for the years 1990 to 2003 even though he tried to find jobs as no one would employ him because of his disability. He said that it was not until 2004 that he started the bike taxi operations and says that were it not for his injuries he would have been able to find a better job. He said that his aches and pains continued from the time of the incident to the date of testifying in the matter.

Dr. Lindo's report states that the claimant impairment is 49% of the whole person caused by both Cauda Equina lesion (spinal cord) and right below knee amputation.

Finally, the use of all the claimant's limbs play an integral part in the performance of his farming and bike taxi operations.

The court is of the view that although the claimant has resumed his employment, his injury is of such a nature that a real risk exists that he may lose his job in the future.

The court now has to determine the method of computing the award. The choice being between using the earning at the date of injury and apply the multiplier/multiplicand approach or the lump sum/global approach for loss of earning capacity.

The claimant said his earnings vary from time to time and most times it is between \$3000 to \$6000.

Using the global approach, I am of the view that an award of \$500,000.00 would be appropriate in the circumstances.

Judgment

Judgment for the claimant against the defendants with damages assessed as follows:

General Damages

Pain and Suffering and loss of amenities	\$20,000,000.00
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Handicap of the Labour Market	500.000.00
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Special Damages

Medical Expenses	\$10,800
Prosthesis	\$25,000
Transportation	\$25,000
Household Help	\$80,300
Loss of Earnings	<u>\$250,000</u>
	\$391,100

Interest on General Damages of \$20,000.000.00 at 3% per annum from the 27th April, 1998 to 29th March 2007.

Interest on Special Damages of \$391,100.00 at 3% per annum from 2nd December, 1994 to 29th March 2007.

Costs to the claimant to be agreed or taxed.