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Haynes

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. M 328 OF 1998

BETWEEN PANSY MCDERMOTT PLAINTIFF

AND GARNETT LEWIS 1ST DEFENDANT

AND THE ATTORNEY GENERAL 2ND DEFENDANT

Mr. Lawrence Haynes for the plaintiff

Mr. Cochrane instructed by the Director of State Proceedings for the defendants

Heard: April 25 and May 3, 2002

ASSESSMENT OF DAMAGES

JONES, J (Ag.)

The plaintiff is a higgler by occupation. In May 1993 she lived at Hayfield in the parish of St. Thomas. On May 5, 1993, the plaintiff visited the Bath Police station in response to a request by the 1st defendant, Garnett Lewis. On her arrival at the police station, the 1st defendant drew his licensed firearm and shot her in the upper left thigh.

The plaintiff was taken to the Princess Margaret Hospital in the parish of St. Thomas where she was treated and released the same day. The following medical report was agreed between the parties:



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HOSPITAL (ST. THOMAS REGION)
MANAGEMENT BOARD
PRINCESS MARGARET HOSPITAL
MORANT BAY

TELEPHONE: 0982-2304-6

1998 July 10

MEDICAL REPORT

TO WHOM IT MAY CONCERN

Re: Fansy McDermott

This person was seen in the Accident and Emergency Department of this hospital on the evening of March 5, 1993. She gave a history of being shot in the left thigh by a known assailant a short while before, and complained of pain in the left upper thigh.

Examination revealed a 23 year old female who was obviously agitated and distressed by pain. She was not in shock and was not anaemic. Her abdomen was normal.

Significant findings were confined to the left thigh where she had two puncture wound approximately 15 cm apart. There was an entrance wound anteriorly in the proximal one third of the left thigh and an exit wound medially and in the middle third of the thigh. The exit wound was 15 cm from the entrance wound. Her gait was normal.

The distal pulses and sensation was normal. X-ray examination of the area showed no abnormality in the bones and she was diagnosed as gunshot wound to the left thigh with soft tissue injury only. Appropriate therapy was instituted and she was treated as an outpatient until the wounds healed.

In June 1998, she was reviewed at hospital. The healed entrance wound was 2x5 cm and the healed exit wound 2x2 cm and were unsightly. The area between the two was slightly tender but not inflamed, suggesting the presence of scar tissue below the skin. There was no fistulae or sinus tracts and her gait was normal.

At the time of the incident, the nature of the injuries and the time it took to heal satisfactorily would have kept her away from normal working activities for at least three (3) months.

The tenderness in the area even now prevents her from engaging in activities requiring prolonged standing or walking. The scarring on her thigh has also scarred her psychologically, given the importance of that area for sexual attraction. The damage in that respect is incalculable.

M. J. J. J.

As to the issue of special damages, the 2nd Defendant's attorney referred me to the guidance given by Rowe P in *Hepburn Harris vs. Carlton Walker (unreported)* SCCA 40/90 delivered on December 10, 1990 where he said:

"plaintiff's ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned..."

The statement by Rowe P. should not to be considered an inflexible rule. In this case, although no receipts were provided, the court accepted that the pleaded cost was incurred by the plaintiff, and that she was absent from her usual selling activities for a period of three months. The court also accepted that the plaintiff's income of \$3,000 per week as a higgler, is reasonable. The court also accepted that it is not unusual for there to be a lack of documented proof of income for these small business persons.

In relation to the claim for general damages, the plaintiff's attorney referred me to the case of *Cunningham vs. Maximum Investigators and Covert Action Limited* reported at pg. 79 of Khan's Personal Injury reports. That case involved a gun shot wound to the distal third of the right leg with an un-displaced fracture of the right femur. The plaintiff walked with crutches for two months, and it proved inadvisable to remove the bullet. The general damages award at June 15, 1994, was \$250,000 which converts to \$582,923 in today's dollars. The facts in that case were not sufficiently close to this case to be of assistance.

The defendant's attorney referred me to the case of *Bowen vs. Attorney General of Jamaica* reported at page 7 of *Khans Personal Injury Awards*. In that case the plaintiff was shot and injured by a policeman while standing at a gate speaking to someone. The bullet entered and exited the left leg and lodged in the right leg. He recovered satisfactorily and pain and suffering was assessed at \$200,000 in January 1995. Exemplary damages were assessed at \$500,000 to send a message of deterrence.

I now turn to the claim for aggravated damages. The plaintiff in the Statement of Claim said "*and the plaintiff claims...aggravated damages*". In her evidence she puts it this way:

"I stay away from work for three months, I was ashamed. I was embarrassed by where I was shot...I still am embarrassed by the incident"

Aggravated damages are compensation for hurt feelings, and contain no punitive element. In the well known case of *Rookes vs. Bernard* [1964] 2 WLR 269 at pg. 324 Lord Devlin in defining aggravated damages, expressed himself thus:

"... it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride."

Having regard to the unprovoked nature of the attack by the 1st defendant on the plaintiff; the sensitive area of the body in which the wound was inflicted;

the humiliation and hurt felt by the plaintiff; this court takes the view that aggravated damages are without a doubt, required. As there was no evidence suggesting provocation by the plaintiff, there is no basis on which any reduction can be considered for aggravated damages.

The court found the special damages pleaded and proved by the plaintiff to be \$48,400.

General Damages are assessed as follows:

Pain & suffering and loss of amenities	\$418,853
Aggravated Damages	<u>\$750,000</u>
Total General Damages	\$1,168,853

Interest is awarded at the rate of 6% per annum from the date of service of the writ of summons up to today (May 3, 2002).

Special Damages	\$48,400
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Interest on special damages is awarded on the sum of \$48,400 with interest at the rate of 6% per annum from May 5, 1993, up to today (May 3, 2002).

Judgment for plaintiff for sum of \$1,217,253 with interest as set out above.

Cost to be taxed if not agreed.

Paul Sny Mc Donnell v. Garret Lewis