[2018] JMSC Civ.136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 03960

BETWEEN	**ROGER MILLS**	**CLAIMANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Ms. Christine Hudson instructed by K. Churchill Neita & Co. for the Claimant

Mr. Dale Austin instructed by Director of State Proceedings for the Defendant

Heard: June 26, 2014, November 1, 2017 and October 3, 2018.

Judgment on admission- Assessment of Damages– Personal Injury – Gunshot Wound - Loss of Future Earning Capacity.

THOMPSON-JAMES J.

BACKGROUND

[1] March 31, 2005, the claimant, Roger Mills, who was at the material time a Correctional Officer employed, to the Ministry of Justice, was shot and injured, during the course of his employment, at the Tower Street Adult Correctional Centre in an attempted prison break.

[2] The claimant was carrying out sentry duties at the main gate to the cell block at the facility, when he was struck by gunfire in the left shoulder by an unknown assailant who was standing in the area designated for visitors to the inmates. As

a result, he sustained injuries for which he was hospitalised, and incurred damages.

[3] Arising from the gunshot injuries, he was separated from his job as a correctional officer. By way of letter dated May 14, 2008 from the Department of Correctional Services, he was informed that, in relation to his fitness for further service, the Medical Board of the Ministry of Health had recommended that he be retired on medical grounds, with effect from June 2, 2008.

[4] August 16, 2010, the claimant filed this action against the defendant, the Attorney General, seeking damages for negligence. The Attorney General is sued pursuant to the Crown Proceedings Act.

DEFENCE

[5] March 21, 2011 the defendant filed a defence admitting liability but the particulars of injuries in relation to residual disability, treatment, prognosis, special damages loss of future earning capacity and handicap on the labour market were not admitted. The question of quantum now falls to be determined.

[6] The assessment hearing in the matter commenced June 26, 2014 but was adjourned by consent to July 24, 2014 pending the filing of certain documents pertaining to the claimant's case. The hearing continued November 1, 2017.

THE CLAIMANT'S EVIDENCE

[7] Mr. Roger Mills' evidence is that March 31, 2005, he was on duty at the main gate to the Tower Street Adult Correctional Centre. At about 10:15 a.m. he heard a loud explosion and felt a sharp stinging and cramping pain in his back and left shoulder. He fell to the ground. He realized he had been shot. He was taken to the Kingston Public Hospital (KPH) where he was examined by a doctor and X-rays were done. At that time he was feeling terrible pain in his back and shoulder. His chest was very tight. He could hardly breathe. He was given four (4) injections, pain medication, and oxygen to help his breathing.

[8] He spent four (4) days at KPH, during which surgery was done on his chest to insert a tube to drain blood from his lungs. Another X-ray was done, as well as physiotherapy, which entailed breathing in a bottle. He was discharged with a prescription to buy pain medication. He was still in a lot of pain, especially in his chest and back. He also had severe headaches. The physiotherapy was very painful. Whilst at home he had laboured breathing and shortness of breath, despite medication and therapy. He also experienced pain from his chest straight down to his right leg, which got swollen and stiff. He could hardly walk due to the stiffness and pain.

[9] About two (2) weeks after his discharge from KPH, he went for a follow-up visit. An ultrasound was done which revealed he had deep vein thrombosis (dvt). He was re-admitted to KPH and given warfarin and heparin for about six (6) weeks. Throughout the entire six (6) week period, he experienced excruciating chest and back pains, could hardly breathe and felt like he was going to die. The pain persisted as the medication did little to help. He did follow up outpatient clinic visits at KPH, but despite getting medication, his shortness of breath, chest pain and foot pain persisted. All his wounds healed by July of that year.

THE MEDICAL EVIDENCE

[10] The following medical reports were tendered and admitted into evidence in respect of the claimant's injuries:

Report of Dr. Randolph Cheeks, Consultant Neurosurgeon dated February 9, 2008 (Exh. "1")

Report of Dr. Randolph Cheeks, Consultant Neurosurgeon dated May 29, 2008. (Exh. "2")

Report of Dr. Donald Gordon, Family Practitioner, dated November 1, 2011.(Exh."3")

Report of Dr. C. Morris, Consultant General Surgeon KPH dated July 6, 2005 ;(Exh. “4”)

Report of Dr. C. Morris KPH dated 13th June 2012; (Exh. “5”)

Reports of Dr. Morris

The initial report of Dr. Morris dated July 6, 2005 indicates that the claimant was treated by Dr. Granville Smith. He was found to have sustained.

i. a gunshot wound to the left shoulder with a 0.5 cm entry wound on lateral aspect of left shoulder;

ii. a 2cm laceration to the left cheek area; and

iii. a left hemopneumothorax.

He was diagnosed with a gunshot wound to the chest with a left hemopneumothorax, and was treated with a basal chest tube, analgesia, chest physiotheraphy and a dressing to his face. He was discharged from the hospital April 4, 2005 after the chest tube was reviewed and repeat x-rays were deemed satisfactory.

In his later report of June 13, 2012, Dr. Morris noted that the claimant had been admitted to the KPH March 31, 2005 having sustained a gunshot wound to the left shoulder. He noted that the claimant had presented with complaints of pain to the left shoulder and shortness of breath. Diagnosis was as stated in his earlier report. A Doppler ultrasound had been ordered for the his left upper limb and chest ‘physio’ was administered. He was discharged with a two week Surgical Outpatient Department follow-up.

[11] On his two week’s visit, he complained of pain in his right calf, and a Doppler of his right leg was requested. This revealed a deep vein thrombosis. He was readmitted April 19, 2005 to May 25, 2005. He was anticoagulated and put on warfarin.

The claimant was next seen in the surgical outpatient department June 20, 2005, complaining of chest pain and shortness of breath. A ct was ordered and the report showed linear atelectasis or fibrosis in the left lower lobe. Although the claimant had still complained of mild chest pain, Dr. Morris found that his chest was “clinical clear” and wounds were fully healed. He was discharged November 3, 2005. He complained of vague back pain radiating to flanks and legs, and was referred to the pain clinic with a possible neurological consultation.

January 16, 2006, he was readmitted to the KPH with complaints of pain in left lower limb and back, and an inability to walk. He was treated for deep vein thrombosis which had been indicated by a Doppler done on his left lower limbs. He was discharged January 21, 2006 with clinical appointment for one month.

April 28, 2006, he was again admitted to the medical ward, after presenting at Accident and Emergency with complaints of shortness of breath and chest pain. Investigations to rule out pulmonary embolism were done, including a lung scan which showed low probability for pulmonary. He was referred to Neurology for consultation.

The claimant was seen in the Neurosurgery Clinic September 28, 2006, complaining of shortness of breath and chest, back and neck pain. X-rays revealed that a bullet fragment was causing some nerve compression. However, removal was not possible as he was on an anticoagulant. He was therefore referred to physiotherapy and Hope Institute in an attempt to control the pain. Blood investigation revealed that he had a protein deficiency which made him prone to blood clotting. He was seen in the Hematology Clinic and it was decided to give him lifelong anticoagulation.

May 29, 2008, he was seen at the Neurosurgery Clinic still complaining of pain in the lower back, but indicated it was much better. It was noted that he still attended physiotherapy, but only attended the Hope Institute when necessary. He was

prescribed neurontin, lyrica and panadine, and given three months neurosurgery appointment.

Reports of Dr. Cheeks

Mr. Mills was seen by Dr. Cheeks August 18, 2006 pursuant to a request by Dr. Dingle-Spence. Dr. Cheeks recounted the history of the claimant's treatment, and noted that when he saw the claimant about one year after the injury, he presented with mainly persistent severe pains in the interscapular and lower thoracic area of his back with radiation to the right hypochondrium.

Upon examination, Dr. Cheeks found:

i. an area of fullness adjacent to the midline thoracic area that was tender to coarse percussion and manifested hyperaesthesiae to pinprick sensation;

ii. the bullet was still present at its original location in the left paraspinal musculature of the lower thoracic muscles;

iii. minor scarring at the site of the drainage tube.

Examination of the lungs, heart and abdomen was unremarkable, whilst a neurological examination of the lower extremities revealed nothing unusual. An X-ray of the chest showed no evidence of a pneumothorax. Hematological assessment of the coagulation status of the claimant's blood revealed normal coagulation parameters.

He assessed the claimant as having suffered:

i. a single gunshot wound with entry in the right shoulder and no exit wound;

ii. bullet resting in the left thoracic paraspinal musculature, which resulted in the refractory neuropathic pain syndrome

Dr. Cheeks noted that it was possible that removal of the bullet would result in lessening the pain, however surgical removal would present a considerable risk to his life, as such surgery would require cessation of his anticoagulant therapy. Discontinuance of this therapy, given that the claimant had already had two episodes of deep venous thrombosis (suggesting hypercoagulability syndrome), predisposed him to this condition with the possibility of fatal pulmonary embolism. Dr. Cheeks, therefore, recommended that, since the bullet does not pose any threat to the claimant's life, surgery should be avoided and non-invasive measures of pain control pursued.

In the medical report dated May 29, 2008, Dr. Cheeks diagnosed the claimant as having developed "refractory neuropathic pain syndrome following a gunshot wound to his back in which the bullet entered close to the left shoulder and did not exit, instead coming to rest close to the body of the seventh vertebra of the thoracic spine".

The neuropathic pain syndrome developed as a consequence of injury to branches of the thoracic nerves. This condition, he noted, is constant and severe, and the pains have not responded significantly to an array of strong analgesic medications. Dr. Cheeks concluded that, in his view, the pain was very likely to persist. Based on his finding that the pain syndrome derived from the injury to the thoracic spinal nerves is of such nature the claimant is still able to perform his activities of daily living, but requires ongoing medication most of the time.

Dr. Cheeks classified the pain syndrome as moderate and corresponding to a DRE Thoracic Category 2 impairment of the whole person. He further concluded that, in relation to the pain syndrome the patient has reached 'MMI', and assessed the claimant's permanent impairment equivalent to 7% of the whole person.

Report of Dr. Gordon

Mr. Mills presented to Dr. Gordon with complaints of severe and excruciating pains to the back and left shoulder, arising from gunshot wound to the left shoulder. He also complained of recurrent pains and swelling to lower limbs and both ankles. Dr. Gordon noted that the claimant described the pain as burning in character, of great intensity, and present on a 24 hourly basis. On a scale of 1-10, with 10 being most severe, the claimant rated the pain a 10. Dr. Gordon after recounting the history of the claimant's injury, pain and treatment based on the reports issued by Dr. Morris and Dr. Cheeks opined that the claimant had been treated with an array of painkillers and given different modalities of pain management but all failed to relieve the pain.

Upon examination, Dr. Gordon described the claimant as a "young man in a decidedly depressed frame of mind complaining of pains to the back over the left shoulder, extending down to the lower back on the left and around to the chest wall".

He found the Claimant to have:

i. an area of localized tenderness to the back extending from above the left scapula, down to the waist and swinging around the side of the chest;

ii. hyperaesthesia and abnormal sensation; and

iii. swelling in legs with discolouration and scarring from Deep Vein Thrombosis.

He diagnosed the Claimant with:

i. Chronic Neuropathic Pain Syndrome; and

ii. Recurrent Deep Vein Thrombosis to the lower limbs.

He stated that the pain syndrome was caused by injury to the peripheral spinal nerve of the chest wall by the penetrating bullet wound.

In relation to the claimant's prognosis, Dr. Gordon noted that he would continue to have pains for the foreseeable future, which may be intermittent and episodic in nature. He found that the deep vein thrombosis (dvt) would continue to recur, as, although it was initially caused by the claimant's hospitalization and operation. the claimant seemed to have a genetic predisposition for clot formation and would need moderate to strong painkillers, as well as continuous anticoagulant treatment in the future.

He concluded that the claimant had reached "Maximal Medical Improvement" in relation to the injury to the peripheral nerves, and assessed him with a final permanent disability rating of 13%. He arrived at that figure by starting with a 7% whole person impairment. This rating was adjusted to 10% after taking into account the claimant's age at the material time, 'diminished future earning capacity, and an occupational variant to account for the arduous nature of the job', and then readjusted to take into consideration the claimant's recurrent pains in the lower limbs from the AVT episodes.

ASSESSMENT OF DAMAGES

A. *SPECIAL DAMAGES*

The claimant seeks the sum of $6,635,644.14. The defendant submits that the Court ought to be guided by the well-settled principles that (1) special damages must be strictly pleaded and proved, and (2) the claimant has a duty to mitigate.

The following expenses have been pleaded and proved as having been incurred by the claimant:

i. costs to KPH…….....$ 600.00
ii. costs to Dr. Donald Gordon…….....14,300.00
(medical examination)

iii. costs for Medical Report (Dr. Gordon).....13,000.00

iv. costs for Medical Report (Dr. Cheeks)….....35,000.00

v. costs to Caledonia Medical Lab (lab services).....3,480.00

vi. costs to Apex X-ray and Ultra Sound (X-ray).....1,800.00

TOTAL ……..$ 68,180.00

[12] The claimant has also sought special damages for transportation, extra-help and loss of earnings.

TRANSPORTATION

[13] In respect of transportation, the claimant gave evidence that he incurred the following expenses travelling from home to his hospital and doctor's visits:

i. KPH - 10 occasions at $1000 per round trip.....$10,000.00

ii. Hope Institute - 4 occasions at $1000 per round trip.....4,000.00

iii. Dr. Cheeks – 3 occasions at $1000 per round trip.....3,000.00

iv. Dr. Donald Gordon - 13 occasions at $500 per round trip...6,500.00

v. Dr. Ballin – 4 occasions at $500 per round trip.....2,000.00

Total.....$25,500.00

[14] The Court accepts the above evidence of the claimant, despite the fact that no receipts to substantiate same were submitted. It is well settled that the requirement for special damages to be specifically proved will not be insisted upon in circumstances where it would be unlikely for documentary proof to be available. In such cases, the Court will consider an amount that is reasonable in the circumstances (**Desmond Walters vs Carlene Mitchell SCCA 64/91)**.

[15] In Mr. Mills' case, having regard to the fact that taxis in Jamaica do not ordinarily issue receipts, the figures put forward by the claimant, coupled with the fact that the defendant has not objected, I find the sum of $25,500.00 to be reasonable for transportation.

EXTRA HELP

[16] In relation to the costs of extra-help, the claimant has sought **$120,000.00**, at $2,500.00 per week, from April 2005 to December 2005, and January 2006 to May 2006. This sum was not challenged having regard to the medical evidence that the claimant was incapacitated during this period and required extra-help. Both the medical evidence and the claimant's evidence indicate that, in addition to healing from his wound and surgical procedures during this period, the claimant suffered excruciating pain in his legs, chest, head and back, as well as stiffness in his legs. He could barely walk. He also developed complications and had to be readmitted to the hospital on three (3) different occasions during this period. I therefore find that he would have required help, and that the sum claimed is reasonable.(**Michael Thomas vs James Arscott& Anor 1986 23JLR pg 144)**

LOSS OF EARNINGS

[17] The claimant deponed that he did not lose any earnings while working as a correctional officer. He however stated that he got no compensation from being medically dismissed and has received no salary since. At the time he was injured and up to the time of his dismissal, he was earning $46,741.41 per month.

[18] Around June 2010, he started a job as the driver of a public passenger vehicle. He was paid $2000 per day or $8000 per week. He usually worked for four days, but sometimes worked less depending on how he felt. The driving was challenging due to the long hours sitting, and aggravated his condition, causing pain and swelling. Compression stockings prescribed for him at KPH no longer worked. He left this job as it was becoming stressful and taking a toll on his body. He stopped driving public passenger bus in December 2013.

[19] In his supplemental witness statement filed February 6, 2017, the claimant stated that he was 39 years old and was a taxi operator.

[20] In respect of this head of damages, the claimant seeks compensation from the date of his medical redundancy, June 30, 2008 in the sum of $6,421,964.14. The Court is asked to find that, but for the residue arising from the claimant's injuries that resulted in his separation from his job due to ill-health he probably would have continued in his employment as a correctional officer. It is Mr. Mills evidence in cross examination that prior to his assessment by MOH he was assessed at KPH and given a "certificate of fitness" to return to work. Other doctors had assessed him and confirmed that he was medically fit to resume his employment. The above figure was arrived at based on the spread sheet attached to letter of December 20, 2016 from the Department of Correctional Services indicating projected salaries that the claimant would have been earning.

[21] The claimant submits that based on the evidence, he would be earning the sum of $84,922.10 per month had he not been medically separated from his job. For the six months period from April 1, 2016 to September 31, 2016, it was estimated that he would have earned $509,532.63. That figure was divided by six (6) to get the average monthly figure of $84,922.10. Thus calculating loss of earnings from June 2, 2008 to September 2017 at $6,167,197.64, and loss of earnings from October to December 2017 at $254, 766.50.

[22] It is also submitted that the claimant attempted to mitigate his loss by driving a public passenger vehicle, from which he earned $8000.00 per week, or $2000.00 per day for four (4) days of the week. He worked from January 2010 up until December 2013, when he had to give up driving as it aggravated his condition.I have to agree that he sought to mitigate his loss The court is urged to use the $8000.00 figure as the salary earned per week, and calculate the sum earned for that period as $1,266, 564.00 ($8000 x 52 weeks x 3 years). It is submitted, therefore, that the above sum should be deducted from the sum claimed for loss of earnings in the Particulars of Claim ($7,433,761.64), to result in $6,167,197.64.

It is further submitted, that the latter figure should be adjusted to account for loss of earnings from October to December 2017 and continuing up to the date of judgment by adding $254,766.30. The total loss of earnings claimed up to December 2017 is therefore $6,421,964.14.

[23] The defendant has not made any submissions as to this head of damages, other than the general submission on special damages that the claimant has a duty to prove and mitigate damages.

[24] I am in agreement with the submissions of counsel for the claimant in relation to his entitlement to loss of earnings. The medical evidence indicates that the claimant suffered for a protracted period of time from pain and complications from his injury. His medical condition was exacerbated by his continuing to work. The medical board found him unfit to continue his job as a correctional officer. I accept his evidence that when he tried to mitigate his loss by working as a bus driver, his condition was aggravated, causing him pain and discomfort. I note, however, that in his supplemental witness statement filed February 6, 2017,he indicated that he was now a taxi operator. However he gave no details of his earnings, the time he started in that job, nor, how his current occupation affected his conditions

[25] I am not attracted to the formula used by the claimant to arrive at the sum claimed. The aforementioned spreadsheet outlines a breakdown of estimated salaries for various periods (9 periods) from June 2, 2008 to September 30, 2016. He relied on the monthly salary for one period only, that is, the 6 month period from April 1, 2016 to September 30, 2016, to calculate the monthly earnings of $84,922.11. This figure was then used to calculate loss of earnings for the entire period since he was separated from his job in 2008. In my view this does not give a sufficiently accurate or fair representation of what his earnings would have been.

[26] Particularly as the spreadsheet indicates that, in the first month of his redundancy, the claimant's salary would have been $49,334.27. The figures indicate that this amount would have gradually increased over the years from the latter figure to

$49,956.52, $51,978.05, $58,540, $70,744.45, $71,840.70, $73,410.05, $78,131.69, and lastly $84,922.11. The total net pay for that period was estimated to be $6,499,818.49. I will only award the claimant damages for the period commencing October 2016 to January 2017, as, based on his own evidence, by February 2017 he was operating a taxi. Using the last monthly figure of $84,922.11 to calculate the remaining months, this would amount to $339,688.44. bringing the total amount of loss of earnings to $6,839,506.93. Subtracting the money earned as a bus driver, this would amount to $5,572,942.93.

[27] I would therefore award loss of earnings for the period from June 2, 2008, to January 2017, with the relevant adjustments made to take into account the claimant's earnings as a bus driver, in the amount of **$5,572,942.93**.

[28] The Claimant is therefore awarded the sum of **$5,718,442.93** for special damages.

B. *GENERAL DAMAGES*

Pain and Suffering and Loss of Amenities

[29] Mr. Roger Mills testified that he was examined by his private doctor, Dr. Gordon. When medication failed to help the pain, several tests were done at the Heart Institute, including an 'echo' and a lung test. He was referred to both the pain management clinic at Medical Associates Hospital as well as the neurological department at KPH. At Medical Associates, he was seen by Dr. Ballin, a pain management consultant from KPH. Dr. Ballin administered several 'trigger point injections' to help ease the pain in his chest and back, however, despite this, he continues to experience intense and excruciating pain. He only got some ease when he falls asleep, but that too was difficult due to the pain.

[30] In January 2006, he was again admitted to KPH for five (5) days when his left foot became stiff and swollen, so much so that the lower part of both his legs burst open and he could hardly walk. At this time, he was also experiencing severe chest

and upper back pains. He was prescribed special stockings, warfarin, and an increased dose of painkillers.

[31] He made regular trips to KPH and did several tests. He did blood and lung tests at the University Hospital of the West Indies (UHWI). He continues to get medication for the pain. This varies based on the intensity of the pain, but he only gets little relief from them. He also continues to visit KPH for the pain in the back, chest and neck, as well as physiotherapy.

[32] In April 2006, he developed shortness of breath with severe chest, back and neck pain, and was re-admitted at KPH. He was seen by several doctors, including a neurosurgeon, Tests were done for pulmonary embolism. From his discussions with the doctors, he learnt that his pain was due to the position of the bullet lodged in his spinal area, and that the decision was taken not to remove it as it would be too risky to do so

[33] He testified that he visited Dr. Dingle Spence, Consultant Oncologist at the Hope Institute and KPH, who treated him with acupuncture. This brought the pain to a bearable level, but the pain kept returning, although not as intense as before. He did as much acupuncture as he could. He was also treated by Consultant Neurologist Dr. Cheeks, both at KPH and at his private office, who examined him and prescribed medication.

[34] He visited KPH up to 2008, and also saw Dr. Gordon his own doctor on a regular basis. He is still taking warfarin, but relies on panadol and advil, more than the normal dosage, as he cannot afford the expensive pain medication.

[35] Mr. Mills further states that the injury has set him back and has brought his life to a halt. He continues to have pain in his chest, neck and upper back. Some days it is so bad that he cannot sit or stand up. The pain in his chest and back is of a burning nature and it makes his body weak. He also still feels tightness in the chest and shortness of breath, particularly when he does anything strenuous. He continues to do exercises at home and tries to relax his body. His leg only affects

him if he stands or walks for too long. If he does so both his legs swell. He usually gets a massive headache and his vision gets blurry once the pain intensifies. He is not able to exercise or play football. Such activity would irritate his back and leg injuries and cause more pain.

[36] He returned to work in December 2005. However, it was difficult for him to perform his normal duties due to pain in his back and chest. He had to be re-admitted to the hospital due to blood clots in his feet. He returned to work in November 2007 and continued working until June 2008 when he was dismissed from his job as a result of his medical condition. He received two letters from the Correctional Services in relation to his redundancy, dated May 14, 2008 and October 31, 2013 respectively.

[37] There is no doubt that Mr. Mills suffered a harrowing ordeal as a result of the gunshot injury. He was hospitalized on four (4) different occasions, underwent several x-rays, injections, surgeries and other tests procedures and discomfort including having a tube inserted into his chest to drain blood from his lungs when he was first admitted. The removal of the bullet was deemed to be life threatening and hence not recommended. This to me suggests that the cause of the claimant's pain will remain. He was found to have reached 'maximum medical improvement'. He stated that the prescribed pain medications are expensive and he cannot afford them so he takes panadol and advil. In the main his evidence is supported by the medical reports.Therefore I accept his evidence as credible.

[38] In his report of 2008, Dr. Cheeks concluded that the claimant's condition was such that he was 'still able to perform his activities of daily living but required on-going medication most of the time, he classified the pain syndrome as moderate, and assigned a PPD of 7% of the whole person. The evidence reveals, that the claimant was last examined by Dr. Gordon in 2011, six (6) years after the initial injury. He noted that the claimant had presented with severe and excruciating pains in his back and left shoulder, recurrent pain and swelling in both lower limbs and both ankles. The claimant had described the pain as burning in character and of great

intensity, present on a 24 hour basis, and deserving of a rating of 10 on a scale of 1 to 10. Dr. Gordon's report of August 2011, concluded that the claimant's pain from the injury had "somewhat subsided but still persisted with a measurable level of discomfort", and it "continues to be present on a daily basis with exacerbation by the physical activity of daily living". Although it was stated that the pain would subside for about two hours of rest, Dr. Gordon noted that the claimant "will continue to have pains for the foreseeable future which may be intermittent or episodic in nature." Dr, Gordon further stated that he would need moderate to strong painkillers and continuous anticoagulant treatment in the future. Dr. Gordon gave him a final disability rating of 13%.

[39] The claimant's evidence is that in 2013 he still experienced 'a whole lot of pain in his chest and back', which is of a burning nature and which brings on weakness in his body. He also stated that, although his right leg was not so bad now, it would get stiff and numb, particularly when he walks or stands for too long. The evidence suggests that, although the claimant will be in pain for the rest of his life, this pain will not be as constant as it was before, and that the pain worsens depending on his activities. In respect of his loss of amenities, the claimant's evidence is that the injury has set him back in life as he cannot stand or sit for long periods as both his legs swell. If he does anything strenuous he experiences shortness of breath and a tight feeling in his chest. He is no longer able to exercise or play football as this would exacerbate his condition.

[40] In relation to general damages, the claimant has urged that the assessment process be guided by the nature, extent and gravity of the injuries, the treatment undergone, the residual impairment, and the effects of the residue on the claimant's daily activities. It is asserted that "the impairment rating is not the litmus test to be used to determine the level of damages to be awarded..." and relies on the authority of **Pogas Distributors Ltd. et al v McKitty** (unreported) S.C.C.A 13/94 and 16/94, delivered July 1995 (Volume 4 khan Recent Personal Injury Award) The claimant further highlights the principle that there is no doctrine of precedents in these type of cases, and that the Court ought to use comparable

awards only as a guide. In this regard, the claimant relies on the following passage by Author Munkman in the text **Damages for Personal Injuries and Death**, 10th Edition, pg. 188:

> *"There is no doctrine of precedent in fixing the quantum of damages. The Court does not look for precedents but for a general guide and the current range of damages. It looks for assistance in difficult problems not for an inflexible pattern which would confine the Courts within fixed limits".*

Similarly, the following words of Rattray P in **Jamaica Folly Resorts Limited v Thomas Crandal** (unreported) , SCCA 102/98, delivered July 30, 1999 are relied on:

> *"...our limitations however lies is the fact that the admirable compilation of Khan on Recent Personal Injury Awards made in the Supreme Court of Jamaica and more recently the Harrison on the Assessment of Damages of Personal Injuries are rather terse and often do not ensure the exposition of the fullest fact and the rational upon which the award is made. It is in this situation it is very difficult to identify uniformity in general damages awards for pain and suffering and loss of amenities..."*

[41] In relation to pain and suffering and loss of amenities, the claimant suggest as useful guides, the case of **Phillip Granston v Attorney General** (unreported), Claim No. 2003 HCV 1680, judgment delivered August 5, 2009, in which an award of $8,000,000 was made. The defendant relies on **Maxwell Russell v The Attorney General and Anor** (unreported) Claim No. 2006 HCV 4204, delivered January 18, 2008 (pp.204-207, Khan Vol. 6) and **Renford Facey v The Attorney General and Anor** (unreported) Suit No. C.L. 1987 F 0931, delivered November 4, 1994 (pp.201-2, Khan Vol 4.).

[42] In relation to ***Granston***, the claimant concedes that the circumstances giving rise to the injuries in both cases differ, but submitted that there is a reasonable measure of similarity to be found in the pain suffered by both. It is submitted that, although in ***Granston*** the nature of the pain necessitated a pain pump unlike in the instant case. both claimants were assessed as having a prognosis of experiencing indefinite pain. Further, in the instant case, due to the finding that removal of the bullet could be fatal due to its location in the body, it is submitted that the claimant's condition can be considered as irreversible, and it is reasonable to infer that the

pain is a factor he will have to contend with for the rest of his natural life. A further similarity asserted by the claimant, is that both claimants were made redundant on medical grounds as a result of pain which hindered their ability to perform their duties.

[43] The claimant is therefore seeking an award of $13,000,000 for pain and suffering and loss of amenities, and urges the Court not to discount the award in consideration of the pain pump implanted in ***Granston***. and proposes that this should be counterbalanced by the unchallenged evidence in the instant case that the source of the claimant's pain, the bullet, cannot be removed.

[44] I agree that the element of the protracted pain experienced by the claimant in ***Granston*** is similar to the instant claimant. I, however, take into consideration the differences in the two cases. I appreciate that Mr. Granston was injured in a motor vehicle accident, and suffered from soft tissue injuries and significant hyperflexion in both upper and lower limbs. There were no significant external injuries, no hospitalization and no surgeries. Mr. Granston experienced pain and his prognosis was that this would worsen over time. His pain did in fact worsen over time, and he was diagnosed with failed back syndrome. I take also into consideration that Mr. Granston had old fractures and had experienced two other accidents subsequent to the initial injury, albeit that Sykes J found that those incidents were only aggravating factors to the initial injury rather than intervening causes. He was noted as having severe low back pain extended to thoracic and cervical region, and received epidural injections with minimal improvement. The pain was noted to be so severe that a pain pump had to be installed under his skin. At the time of trial he had been in pain for 12 years, and it was expected to continue. He was in constant pain and was constantly on morphine.

[45] I take into account that Mr. Mills did not receive a pain pump, but his pain has been severe and mostly constant from the time of injury up to the time of trial, whilst Mr. Granston's pain started off mild but gradually worsened over time. I also take into account that Mr. Mills pain has subsided, and he has had some relief from

acupuncture, but the fact remains that the cause of the pain, the bullet lodged in his spine, will not be removed. Therefore the pain will likely persist.

[46] In relation to ***Maxwell Russell***, the defendant submitted that the injuries suffered by that claimant are similar to those in the instant claim, in that Mr. Russell was shot in the back and right scapula at the level of T6. He also was found to have a metallic shadow consistent with a bullet in the soft tissue of the right lateral chest wall. Mr. Russell spent 10 days in hospital and attended out-patient clinic as his wound had not healed, and still experienced sharp pains in his shoulder and upper back. Despite relying on the case, the defendant conceded that the ***Maxwell Russell*** case "does not provide the most useful guidance" as it does not indicate an impairment assessment.

[47] In his response to the defendant's submissions, the claimant rejected ***Maxwell Russell*** on the basis that there is no stated impairment rating, no indication of that claimant's period of incapacity and how long he had to follow up at the hospital, and that the gravity of the injuries paled in comparison to those of the instant claimant.

[48] I agree with the claimants stance that although Mr. Russell suffered a gunshot wound to his shoulder with swelling and the bullet appearing to be lodged in his chest, he remained stable and was released from hospital after a week. He did not have any lasting effect or permanent impairment. **Maxwell Russell's** case is notably less serious than the case at bar.

[49] In ***Renford Facey***, Mr. Facey suffered a gunshot wound to the back, with entry in the right lumbar region of his back and exited on the right lower abdomen. He presented with complaints of pain in the lower abdomen and right leg. On examination, both wounds were bleeding and faeces appeared to be coming through the exit wound. He was catheterised and blood was noted in his urine. X-rays showed he had fractures of the L4 and L5 vertebrae. Emergency surgery revealed he had a damaged right kidney and injury to his colon, which required a

nephrectomy and hemicolectomy. He was found to have damage to his spinal nerves which resulted in pain and inability to lift his leg. Mr. Facey had a subsequent operation, necessitated by a subhepatic abcess that had developed. He was assessed as having a 20% impairment with respect to his occupation, although he had been found to have made a complete recovery despite residual pains in the back and legs. As a result of the surgery he had a ten inch long scar from the chest down, and a depression on his right side where the bullet had exited. In respect of amenities, due to pain he could not swim, go to dances, or stand or sit for long. Facey was awarded $500,000 for pain and suffering and loss of amenities in November 1994.

[50] The defendant noted that a distinct feature present in the instant case that was not present in **Facey**, is the diagnosis of refractory pain syndrome. The claimant rejects ***Renford Facey*** on the basis that, although that claimant suffered gunshot injuries that resulted in the loss of a kidney and had two surgical procedures, his injuries were not as grave as Mr. Mills. Facey had completely recovered except for residual pain which did not translate into any impairment of permanent disability. It is asserted that ***Renford Facey*** has become outdated due to the long passage of time.

[51] I disagree that the injuries in ***Renford Facey*** were not as grave. Whilst, Mr. Facey was eventually found to have fully recovered, he suffered an agonizing ordeal, which resulted in an impairment rating of 20% albeit of his occupation and the loss of a kidney. I agree that the case may well be outdated insofar as I find that the award appears to be on the low side.

[52] Using the CPI for August 2018 of 252.80 the award of $8,000,000 made in ***Granston*** in August 2009 updates to $14,054,204.31; the award in ***Facey*** of $500,000 in November of 1994 updates to $4,419,580.42; the award of $500,000 made in ***Maxwell Russell*** in January of 2008 for general damages for assault and battery updates to $1,058,626.47. These are disparate figures. *The awards in* ***Facey*** *and* ***Russell*** *are indeed low.*.

[53] In arriving at an appropriate award in the instant case I take into account the awards in both ***Granston*** and ***Facey***, reducing the award in ***Granston*** to account for the minor improvement in Mr. Mills' condition and the absence of the pain pump, and increasing the award in ***Facey*** being on the low side. I, find an award of **$10,000,000.00** to be reasonable in the circumstances for pain and suffering and loss of amenities.

LOSS OF EARNING CAPACITY/HANDICAP ON THE LABOUR MARKET

[54] In his third further amended Particulars of Claim the claimant sought damages for loss of future earning capacity/handicap on the labour market. However, submissions were made in relation to loss of future earnings, which case law indicates is a similar but separate head of damage. In his reply to the defendant's submissions, the claimant made reference to "loss of future earning capacity".

[55] The claimant submitted that the evidential burden for an award of loss of future earnings has been satisfied as he has lost his employment and has to now compete with able bodied men on the open labour market. He seeks the sum of $11,209,717.20 based on calculations using the multiplier/multiplicand approach adopted by the Court in ***Granston***, which the claimant submits is the most suitable approach to calculate his loss. Given that the claimant was 41 years old at trial, a multiplier of 11 years is recommended. It was noted that in the ***Granston*** case, the claimant was 43 years old and a multiplier of 10 was used. The claimant contends that based on the evidence, he would have been earning a monthly net income of $84,922.10 had he not been made redundant. This sum was arrived at based on the figures on the spreadsheet from the department of correctional services mentioned earlier..

[56] For the six (6) month period from April 1, 2016 to September 31, 2016, it was estimated that the claimant would have earned $509,532.63. He divided that figure by six (6) to get the average monthly figure of $84,922.10. This monthly figure was then multiplied by 12 (months) to get the annual net income (the annual

multiplicand), which was then multiplied by the multiplier, 11 (years). The total sum sought by the Claimant for loss of future earnings is, therefore, $11,209,717.20.

[57] The defendant made submissions in respect of loss of future earning capacity and handicap on the labour market, relying on the Court of Appeal case of **Monex Limited v Mitchell and Grimes** (unreported), SCCA No. 83/96, delivered December 15, 1998, for the distinction between 'loss of future earning capacity' and 'handicap on the labour market'. In respect of handicap on the labour market, the defendant accepted as correct the statement of law, the principles outlined in **Kenroy Biggs v Courts Jamaica Ltd and Peter Thompson** (unreported), Claim No. 2004 HCV 00054, delivered January 22, 2010.

[58] It is well established by case law, that loss of future earnings and loss of earning capacity/handicap on the labour market are treated as distinct heads of damage, and are therefore calculated separately. This distinction was noted by Harrison J.A in ***Monex Limited***, at pages 12 to 13, of the judgment as follows:

> *Loss of future earnings to a victim as a consequence of disability suffered due to the action of a wrongdoer, may arise in various ways, and attract a varied categorisation.*
>
> *Loss on the Labour market, handicap on the labour market, loss of earning capacity, in my view, may be regarded as synonymous terms. They represent a specific categorisation. This head of damages arises where the said victim:*
>
> > *(a) resumes his employment without any loss of earnings; or*
> >
> > *(b) resumes his employment, at a higher rate of earnings,*
>
> *But because of the injury he received, he suffered such a disability that here exists the risk that in the event that his present employment ceases and he has to seek alternative employment on the open labour market, he would be less able to vie because of his disability, with an average worker not so affected: (See Moeliker vs A. Reyvolle &Co. Ltd [1977] 1 All ER 9).*
>
> *Loss of future earnings represents a distinctly different circumstance where the victim who, earning a settled wage, has suffered a dimunition in his earnings on resuming his employment or assuming new employment, due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable, in such circumstances.*

[59] The learned Judge of Appeal then went on to cite the words of Lord Denning in **Fairley v John Thompson (Design and Contracting) Ltd** [1973] 2 W.L.R. 40 (at page 42) as follows:

> *"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for dimunition in earning capacity is awarded as a part of general damages."*

[60] In **Gravesandy v Moore** (1986) 40 WIR page 222 The court of appeal after citing the above passage from ***Fairley v Thompson*** with approval (at page 224), stated the following:

> *"In the case of loss of future earnings, the court is therefore concerned with quantifying an item of special damage, which, provided that the evidence is adduced, is comparatively easy to assess. Loss of earning capacity is an item of general damage co-terminous with pain and suffering. What the court is being asked to assess is the plaintiff's reduced eligibility for employment or his risk of future financial loss".*

[61] How should the Court proceed considering the divergence in pleadings and submissions of the claimant? In my view, only loss of earning capacity should be assessed. The claimant has failed to plead loss of future earnings in his third further Particulars of Claim, which, as an item of special damage (see paragraph 79 above), is required to be specifically pleaded. Although loss of earning capacity is pleaded, which, was not required being an item of general damages. Although the pleadings raise the evidence of the claimant that due to his injuries he was discharged from his job and his competitiveness on the labour market has been diminished, I believe that it is loss of earning capacity that is applicable.

[62] Loss of earning capacity, which, is synonymous with handicap on the labour market, is an assessment of a 'diminution' in a claimant's ability to earn as a result of the relevant tort.

[63] In ***Moeliker***, at page 15, paragraph b, the Court stated:

> *"This head of damage generally arises where a plaintiff is, at the time of trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting*

> *another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of trial."*

[64] It has been accepted in our jurisdiction, that this head of damage should be assessed in accordance with the principles laid down in the ***Moeliker*'s** case. Such a was stated by the Court of Appeal in ***Gravesandy,*** per Carey JA, (at pages 224-225), after which he cited the following from the headnote of ***Moeliker***:

> *" " In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable...*

[65] At page 226, the Court outlined as factors in determining the risk, 'the degree, nature or severity of the injury and the prognosis for full recovery', as well as the 'length of the remainder of the claimant's working life, the nature of his skills and the economic realities in his trade and location'.

[66] The ***Moeliker*** formulation was more recently approved by the Court of Appeal in the decision of **Thompson and Smith v Thompson, Gordon, Brooks and Stewart** [2013] JMCA Civ 42 (paragraph 74)

[67] In calculating an appropriate sum as compensation, a Court may utilize either a lump sum method, or the multiplier/multiplicand method depending on the circumstances of the particular case. In ***Thompson and Smith*** a case in which the Court of Appeal had to determine whether the use of the multiplier/multiplicand method by a trial judge in assessing this head of damage had been wrong, the Court had this to say about the proper method to be used:

> *"...once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries. Although the claimant's employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is*

> *evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity. This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account. As Browne LJ observed (at page 15) in Moeliker, restating the oft-stated, "the facts of particular cases may vary almost infinitely".*

[68] In the case at bar, there is no doubt that the claimant's ability to compete on the open market with able bodied men has been considerably diminished. The risk spoken of in ***Moeliker*** has in fact materialized, as the unchallenged evidence is that the claimant was relieved of his duties as a correctional officer owing to his poor medical condition arising from the tort. The claimant 's evidence is that after the incident, he returned to work in December of 2005 but had difficulty performing his normal duties due to the pain in his back and chest. In fact, during this time he had to be readmitted to the hospital due to blood clots in his feet. He thereafter returned to work in November 2007, and worked up until June 2008, when he was sent off due to his condition. He tried to mitigate his loss by driving a bus, but the constant pain and swelling in his foot, chest and back, impeded his ability to work.

[69] The bus driving job he attempted only served to aggravate his condition. Despite his supplemental witness statement of February 6, 2017, in which he stated his profession as a taxi driver, I could not find that his ability to work has not been greatly affected by the injury, although there is no evidence financial or otherwise as to the circumstances surrounding his occupation as a taxi driver.

[70] The medical evidence is that the claimant has neuropathic pain syndrome and will more than likely be in constant pain for the rest of his life. His evidence is that the pain medications do not give any significant relief, and although acupuncture brought the pain to a bearable level, it keeps coming back. His evidence is that sometimes the pain is so bad that he cannot sit or stand up. He experiences tightness in the chest shortness of breath, and weakness in the body. If he sits or stands up for too long, his legs swell, and once the pain intensifies he gets a massive headache and his vision gets blurry.

[71] In ***Granston***, in response to the submission that that claimant could take on less physically demanding work in order to mitigate his losses, Sykes J (as he then was) was of the view that that submission 'overlooked the fact that Mr. Granston was in constant pain. The pain was so severe that a pain pump that administers the powerful drug of morphine was inserted in his body'. Although Mr. Mills did not receive a pain pump, and also that statement was made in relation to loss of future earnings, I am of a similar view and find that the claimant is entitled to compensation for loss of earning capacity.

[72] In calculating compensation for this loss, despite the documentation in evidence as to the claimant's prospective earnings, I find it more appropriate to use the lump sum method rather than multiplier/multiplicand method. I feel constrained to do so due to the admission made by the claimant in his supplemental witness statement (filed February 6, 2017) that he was a taxi operator. There is no evidence before the Court as to what he was or is earning, how long he has been working for or if he is still working, how the work is affecting his condition and the likelihood of him being able to continue working. It is my view that the Court cannot compensate the claimant based on the full sum he would have been earning per month as a correctional officer for the rest of his working life, if he is able to work and earn. That may well result in him being overcompensated. Further, the Court cannot speculate as to the amount he is earning so as to reduce the award accordingly.

[73] In ***Granston***, Sykes J awarded a figure of $524,430.38 for loss of earning capacity. In ***Kenroy Biggs*** a sum of $500,000.00 was awarded. Those figures update to $921,306.46 and $828,309.31 respectively. Given the circumstances of this case, I would award the sum of **$2,000,000.00** . In arriving at the sums awarded I took into consideration the objective as well as the subjective circumstances surrounding Mr. Mill's case.

ORDER

1. Special damages awarded in the sum of **$5,718,442.93** at 6% interest from March 31, 2005 to June 21, 2006 and 3% interest from June 22, 2006 to October 3, 2018.

2. General damages awarded in the sum of **$10,000,000.00** for pain and suffering and loss of amenities at 3% interest from August 17, 2010 to October 3, 2018.

3. Loss of earning capacity awarded in the sum of **$2,000,000.00** .

4. Costs to the claimant to be taxed if not agreed.