Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R.009A/1985

BETWEEN	OSWALD REID	PLAINTIFF
A N D	CONSTABLE ERROL THOMPSON	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL	2ND DEFENDANT

SUIT NO. C.L. E.032/1985

BETWEEN	DONNA ENGERBRETSON	PLAINTIFF
A N D	ERROL THOMPSON	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL	

SUIT NO. C.L. E.038/1986

BETWEEN	DONNA ENGERBRETSON	PLAINTIFF
A N D	AMERICANA JAMAICA CORPORATION	DEFENDANT

SUIT NO. R.115/1988

BETWEEN	OSWALD REID	PLAINTIFF
A N D	AMERICANA JAMAICA CORPORATION	DEFENDANT

CONSOLIDATED CLAIMS FOR ASSAULT, NEGLIGENCE AND BREACH OF STATUTORY DUTY.

Gordon Robinson, David Henry, and Lowell Morgan for the Plaintiff Donna Engerbretson, instructed by Jeffrey Mordecai of Nunes, Scholefield, DeLeon and Company.

B.E. Frankson and Jacqueline Cummings for Oswald Reid instructed by Arthur Kitchen of Gaynair and Fraser.

Evan Oniss, Douglas Leys and David Johnson instructed by the Director of State Proceedings for the Attorney General.

David Muirhead Q.C. and Wendel Wilkins for Americana Jamaica Corporation instructed by Mrs. Michaelene Lattore of Clinton Hart and Company.

HEARD ON JANUARY 27, 28, 29, 30, 31 and OCTOBER 16, 1992

JUDGMENT

BINGHAM,J

These four actions, consolidated as a result of having had their genesis arising as they did out of the same incident were heard over an interval lasting five days. The final oral submissions, were not completed on the fifth day and it was mutually agreed by counsel engaged in the matter to allow counsel the opportunity to furnish written submissions of their reply to the arguments and authorities not covered by their final addresses. These written submissions were furnished by counsel for the female plaintiff did not come to hand until 10th April, 1992. This accounts for the delay in preparing the Judgment.

The Facts

The facts in this matter are not in dispute. On 4th March, 1984, the female plaintiff a beautician and an American National then vacationing in Ocho Rios, Saint Ann at a small hotel known as Inn on the Beach attended at the Discoteque at the Americana Hotel in the same town for the purposes of entertainment. When the activities there came to an end at around 3a.m. the following morning and on visiting the Ladies Room on the ground floor of the hotel she was there accosted, robbed and brutally assaulted by the first named defendant, a police constable then assigned on special duty in an area including the Americana Hotel for the purposes of "removing smugglers, drug pushers, pimps and prostitutes".

To this end the first defendant had been supplied with a fully loaded revolver for his protection, which instrument he made use of in the process of carrying out the vicious attack on his hapless victim.

When following her desperate screams for help the second plaintiff an unarmed security guard then on duty in the lobby and

within earshot of the Ladies Room hurried to her assistance he was shot at and seriously injured by the first defendant.

The violent attack on the female plaintiff was carried out as she attempted to seek cover from her assailant in a cubicle of the Ladies Room during which she was subjected to several knife wounds to the left hand, right arm, right side of the neck and other parts of her body.

The male plaintiff received bullet wounds to both buttocks one of which penetrated his abdomen resulting in a perforation of the small intestines.

The plaintiffs were rushed to the Saint Ann's Bay Hospital where they were admitted and treated. The female plaintiff returned to the United States of America shortly after where the treatment to her left hand, this being her control limb continued. This treatment which involved several surgical procedures and constant medical attention continued up to 1990. She has now been left with a non-functional use of her left hand which disability has been medically assessed at a range of 25% to 30% permanent partial disability of the whole person.

The male plaintiff was more fortunate. His recovery has been described as being remarkable as apart from slight and intermittent pain in the lower body, he was able to resume normal work activity after a period of three and a half months.

As a follow up to this tragic incident criminal proceedings were successfully instituted against the first defendant Errol Thompson. Writs were then launched by the plaintiffs against the first defendant, The Attorney General and The Americana Hotel Corporation to recover damages. These claims were founded in Assault, Negligence, and Breaches of Statutory duty under the Occupiers Liability Act.

<u>The Claims</u>

The plaintiffs each claim against the first defendant Errol Thompson and The Attorney General representing the Crown in its

capacity as the employer of the first defendant by virtue of section 13 of the Crown Proceedings Act.

Similar claims were launched against the hotel authorities seeking to recover damages for:-

1. Assault and or
2. Negligence

As to the claims for Assault, paragraph 3 and 4 of the amended Statement of Claim allege:-

The Engerbretsen Amended Statement of Claim

Paragraph 3

> "On or about the 4th of March, 1984 the Plaintiff was in the Americana Hotel, Ocho Rios in the parish of St. Ann when the first Defendant, the servant and/or agent of the second Defendant did maliciously and/or without reasonable or probable cause wrongfully assault, wound and beat the Plaintiff by striking her on the side of her forehead with his revolver and by cutting her on the left palm, right arm, right side of her neck and other parts of her body with a knife".

Oswald Reid's Amended Statement of Claim

Paragraph 4

> "On or about the 4th day of March, 1984, at the Americana Hotel, Ocho Rios in the parish of St. Ann the first named Defendant maliciously and without reasonable or probable cause assault and beat the Plaintiff by pointing a loaded firearm at the Plaintiff and discharging same as a consequence whereof the Plaintiff sustained injuries and has suffered loss and damage and incurred expenses".

In so far as the claims against the hotel authorities allege an assault these were grounded upon an implied duty of care on their part resulting in the acts committed by the first defendant Errol Thompson.

The Claim in Negligence

The particulars of Negligence in relation to the second defendant The Attorney General at paragraph 4 allege inter alia:-

> "(a) Providing inadequate and/or unsatisfactory entry requirements for membership in the Jamaica Constabulary Force.
>
> (b) Failing to implement or satisfactorily implement the said entry requirements in the case of the first defendant.
>
> (c) Failing to screen or satisfactorily screen applicants for membership in the Jamaica Constabulary Force.
>
> (d) Permitting the first Defendant to perform functions of a special and sensitive nature in a particular sensitive area despite the fact that it was manifestly unsafe so to do.
>
> (e) Failing to properly supervise and/or monitor the functions of the first defendant.
>
> (f) Failing to so manage, administer and regulate the operations of the Jamaica Constabulary Force so as to avoid the assault and wounding of the Plaintiff by the first Defendant, a member of the said force".

In respect of the Claims against the Americana Hotel Corporation the plaintiffs further contend that there was a breach of an implied duty of care owed by the hotel authorities to the plaintiffs under The Occupiers Liability Act. Section 2(2) of the Act defines this duty of care as being:-

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he/she is invited or permitted by the occupier to be there".

<u>The Defence</u>

From the pleadings no defence was filed by the first defendant. In the defence of the second defendant the Attorney General apart from admitting that the first defendant was a police constable it is alleged at paragraphs 2 and 4 of the Defence inter alia that:-

> "The acts complained of were not done by the first defendant in the course of his employment as a police constable and not within the scope of his

> employment and was wholly unauthorised by the Crown".

The particulars of negligence are also denied. Save and except for the traverse in the terms as set out above the legal representatives for The Attorney General adduced no evidence electing instead to rest upon the legal submissions in support of the allegations in the defence.

Section 13 of the Constabulary Force Act in enacting inter alia under the caption "Duty and Powers of the Police" that -

> "The duties of the Police under this Act shall be to keep watch by day and night and to preserve the peace, to detect crime....."

Would tend to lead one to infer that a constable is always on duty. The onus here being on the police authority in the particular locality to establish to the contrary. There being no such evidence lead in this regard and proceeding on the basis that the first defendant Errol Thompson was on duty, it may be convenient to examine the law in this area in disposing of the question of liability.

Carberry J.A. in S.C.C.A. 22/85 Hamlet Bryan v George Linde an unreported judgment of the Court of Appeal delivered on 5th May, 1986, an appeal resulting from an incident in which the defendant a Soldier purported to be acting under The Emergency Powers Regulation then in force, unlawfully shot and injured the plaintiff, and in considering the question of vicarious liability of a Master for the acts of his servant, a situation somewhat akin to the instant case, had this to say:- (pp 14 - 16)

> "A Master may be liable for the wrongful act of his servant though clearly the servant was not acting in the execution of his duty or intended execution of his duty".

In support of the above statement the learned judge cited from Salmond on Torts 14th Edition, page 658, paragraphs 194 and 196 under the Captions The Course of Employment and Wilful wrong doing by Servant".

"194. The Course of Employment

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. 'In all these cases', said Willes J., delivering the judgment of the Court of Exchequer Chamber in Barwick v. English Joint Stock Bank, 'It may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in".

On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authourised to do at all".

Also relied upon was Halsbury's Laws, 4th edition (1976) volume 16: Employment which considers the law relating to Vicarious Liability at paragraph 746. Nature of Tort immaterial and paragraph 747 Employer's Liability in tort for employee's criminal act.

"746. Nature of Tort immaterial

Where the liability of an employer is otherwise clear, the nature of the act committed by his employee is immaterial and the employer is liable,

> Whether the tort is an assault, a false imprisonment or arrest, a conversion, a trespass, an infringement of a patent, a nuisance or a breach of statutory duty. An employer, including a corporation, is liable even where the tort involves malice or guilty knowledge, as, for instance, in the case of malicious prosecution, libel or slander or fraud.
>
> 747. Employer's liability in tort for employee's criminal act.
>
> In accordance with the principle that an employer is liable for the acts of an employee when acting within the scope of his authority, an employer is not exempt from liability in tort because his employee's act amounts to a crime, provided it is an act for which he would otherwise be liable. Thus if an act is done by employees in the course of their employment, as where they steal goods entrusted to the employer under a contract of carriage, the employer is responsible irrespective of his negligence, the sole test of his responsibility being whether the act was done in the course of the employment. The mere fact that a loss is due to theft by a stranger does not of itself necessarily lead to the consequence that the loss is too remote for the negligence of an employee, which made possible the theft, to result in the employer being vicariously responsible for the loss.

The learned judge then asked the rhetorical question, for which he posited an answer:-

> "When, if ever, is a master liable for deliberate criminal action of his servant? And a study of the cases seem to show that the master may be so liable if the act is one which arises either in the course of the servant's employment or within his real or ostensible authority or is so closely connected "with the work that the servant is employed to do that it may fairly be regarded as wrongful and an unauthorised way of doing it".
>
> (emphasis supplied)

The evidence adduced in support of the claims against the first defendant Errol Thompson and The Attorney General were bolstered by the unchallenged testimony of the female plaintiff in particular who deponed to being present at the criminal trial and hearing the first defendant under cross examination say:-

"I am usually there (meaning the Americana Hotel) on special security detail?"

"I was there on duty in its truest sense. I was working in a special section of the Force and we were assigned in a special section of the Force and we were working in an area from The Americana Hotel to Turtle Towers. I was part of a team. The duty involved removing smugglers, from the Hotel premises and street area.

By smugglers I mean drug traffickers, whores and pimps.

I did remove smugglers that night. I can't recall how many I removed but I removed both male and female because it was my duty to do so. I removed them because the majority were soliciting. Others were selling drugs".

"I removed them from the hotel area and the beach area. I removed them before I went into the disco room".

As the decided authorities show therefore, for a master (employer) to be held liable for a servants (employees) acts they do not have to be authorised. Provided they are closely connected to the acts which the servant is authorised to perform as to be an unauthorised mode of doing something which the servant is authorised to do then that is sufficient to found liability in the master. The policy of the law here can be seen as a situation in which the master (employer) is best able to stand up to the consequences of a successful claim for damages arising from the tortious act(s) of the servant (employee) and who can afford to pay compensation to the victim.

Where the servant has the means to pay compensation the employer can resort to recouping himself for the damages he might pay to the successful plaintiff from the employee. Vide Lister v Romford Ice and Cold Storage Limited [1957] A.C. 555.

On the basis of the evidence as to the role of the first defendant on the night of the incident which account has not been countered by any evidence from the defence, I hold that there is credible

evidence affording a basis for concluding that the first defendant committed these acts while in the course of his duty as a constable and on the issue of liability therefore the claims for assault succeed against both defendants.

Even if I am wrong in so concluding the facts here would equally support an alternative finding in favour of the female plaintiff, on the alternative claim in negligence as the evidence led in support to establish the claim indicates that the first defendant Errol Thompson, a constable of some three years experience was entrusted with a loaded firearm and left to work on his own without adequate supervision. The female plaintiff Miss Engerbretson in describing his conduct during her ordeal testified that:-

> "He appeared very angry, agitated and violent also very threatening".

Earlier on during the incident he had said to her that:-

> "He needed money to buy drugs".
>
> (emphasis supplied)

This evidence prompted learned counsel for this plaintiff to submit that if his client could have observed these symptoms in the defendant Thompson's conduct, a competent superior officer ought equally to have observed them. The test here being one of forseeability in my opinion there was a want of reasonable care on the part of Thompson's superiors in rank in supervising him, which resulted in his being left at large to be able to perpetrate the kind of acts which occurred at the Americana Hotel on the night in question and the liability for which the Crown as his employers ought therefore to be held responsible.

The Americana Hotel Corporation Claims.

The plaintiffs here have advanced similar contentions: They allege in particular that:-

(1) The defendant Errol Thompson was a servant or agent of the

hotel.

(2) The acts done to the plaintiffs were occassioned by:-

(a) A breach of an implied term of the contractual relationship between the parties.

(b) A breach of the defendant's duty under The Occupiers Liability Act.

In so far as the pleadings (Statement of Claim) sought to allege that Errol Thompson was a servant or agent of the hotel authorities this was lacking in evidential support. Having regard to the evidence this allegation is a non sequitur and is clearly misconceived. The evidence adduced supporting the fact that the defendant Errol Thompson was a servant of the Crown. On the evidence he was acting in his capacity as a police constable on a special assignment. As the hotel authorities (defendants) had neither the right nor the authority to control what he did or the manner in which he discharged his public functions, this being the acid test in determining the relationship of master and servant and being absent, no such relationship could arise.

As regards the allegations relating to breaches of Contract or Statutory Duty, such a determination turns on the facts and circumstances in which the acts were committed.

<u>The Evidence</u>

At the time of the incident there were four security guards on duty. The male plaintiff was seated at a desk in the lobby leading to the ladies room along with his supervisor and four other members of the hotel staff.

Moreover the following facts also fall for consideration:-

(1) At the time of the incident at 3a.m. all social activities at the hotel has ceased.

(2) The female plaintiff has visited the hotel premises for the purposes of entertainment on a number of occassions prior to the

to the night in question without incident.

(3) The tortfeasor Errol Thompson was someone who as a police constable was assigned with the special task of protecting visitors including the female plaintiff from harassment by 'pimps', drug pushers and prostitutes in an area which included the hotel in question.

(4) The defendant Errol Thompson was described by the plaintiff Errol Reid as being cast in the role of 'back-up security". Given this role his presence in the lobby area and in the vicinity of the ladies room would not ordinarily be a subject of enquiry by anyone including the security personnel.

(5) The defendant Errol Thompson had in the past assisted in removing unauthorised persons from the hotel precints and investigated incidents there.

(6) he was seen on duty by the discoteque on the very night of the incident.

Given the above summary there would be nothing on the facts of an unusual nature in the defendant Errol Thompson going to the Americana Hotel on enquiries that night as a part of his functions as a constable.

The Law

The duty of care required by the hotel authorities towards the plaintiffs being one of the exercise of reasonable care in the light of the above the crucial question is whether it was reasonably forseeable that such acts could have been committed by a police officer?

On the basis of the test laid down by Lord Atkin in Donnoghue v Stevenson it is necessary to ask whether any reasonable hotel authority would have had the acts carried out by the defendant Thompson in their contemplation?

I would answer this question in the negative. It would be

extremely difficult for the hotel authorities to guard or protect the plaintiffs against acts which were neither forseeable or contemplated by them assuming they were acting as a reasonable hotel authority ought to have so acted. On the particular facts of this case liability is made more difficult as the defendant Thompson was someone who was habitually present at the hotel. On these facts the incident could properly be categorised as being in the nature of unusual danger, a standard which is no longer applicable since the passing of The Occupiers Liability Act, there being now only one class of persons formerly referred to as contractors, invitees or licensees termed lawful visitors who are owed a common duty of care.

Learned Counsel for the female plaintiff sought to contend that the absence of a latch in a cubicle of the ladies room where the female plaintiff sought refuge from her assailant as being a want of care amounting to negligence on the part of the hotel authorities. This contention is in my view untenable. Having regard to the physical condition of this facility, such a device being intended to afford privacy and not protection, which can be effected even in the absence of a latch.

In this regard the submission of learned counsel for the Hotel Corporation founded on a similar premise gains some measure of support from a statement by Lord Goddard C.J. in Bonham-Carter v Hyde Park Hotel [1948] 4. T.L.R. 177 at 178.

Once the forseeability test goes, the claims against the defendant Hotel Corporation for breaches of contract and or statutory duty must fail.

Conclusion

Given the unchallenged evidence of the role assumed by the first defendant Errol Thompson in the area which included the Americana Hotel and the possession by him of a loaded revolver in

performing this assignment, a revolver which he was in possession of at the time of the incident, the inescapable inference can be drawn that the defendant Errol Thompson was in fact on duty as a constable at the time of the commision of the vicious acts on the female plaintiff and the unlawful shooting of the male plaintiff. The evidence of the defendant Thompson as to the nature of his role on the night in question as well as he being cast in an active role by the discoteque can be regarded as so closely connected with the events which followed in the ladies room as to lead me to regard that event as being in the nature of an unauthorised mode of doing something which the first defendant in his capacity as a police constable was authorised to do. His acts therefore were such for which the crown as his employer through its legal representative the Attorney General was liable.

The Americana Hotel Claims

Here as has been clearly shown there can be on the facts and the law no question of the relationship of master and servant or agency arising as between the principal tortfeasor Errol Thompson and the hotel authorities.

On the issue of liability of the hotel for assault and/or negligence the standard of care is that of the common law. The Occupiers Liability Act in laying down a common duty of care to lawful visitors a category which would include the plaintiffs fixes no higher duty of care than is applicable to claims in negligence.

Given the special status that the defendant Thompson enjoyed as a police constable, the time of the incident and the security system then in place, there is no evidence to lead me to conclude that there was a want of reasonable care on the part of the hotel authorities in making the ladies room at the hotel safe for the purposes for which it was intended. The presence of a police

constable on special assignment in the ladies room per se did not lead me to conclude that the hotel security was negligent having regard to the purpose for which the defendant constable was on the hotel premises. I would on the issue of liability accordingly find in favour of the defendant hotel on both claims with costs to the defendant to be taxed if not agreed.

Damages

This falls to be considered under two broad heads of:-

(1) Special damages

(2) General damages

C.L. E.032/1985

In setting about the task of assessing damages in respect of this claim I share the view of learned counsel for the plaintiff that the fact that the period of over six years during which the plaintiff was recuperating from her injuries has resulted in this case being without any known parallel within this jurisdiction in the history of claims for special damages. To that extent it is unique.

As regards the approach to be adopted in determining the quantum of special and general damages, while I too share the general concern expressed by counsel and would wish to express to both plaintiffs my deepest sympathy for the tragedy which has befallen them, I must commend the female plaintiff for the immense courage shown in overcoming an handicap which is not of her own making. Where lesser mortals placed in her situation would have been content to wallow in a sea of despair she at a time when her control limb was still in the process of healing sought every opportunity to engage herself in gainful employment. The end result is she was able to successfully complete a process of re-training in a new vocation as an x-ray specialist with dual national qualifications of excellence in the fields of X-ray and Radiation

Therapy. This factor, regrettably has to be taken into consideration in determining whether there exists a basis for additional awards for loss of earning capacity and loss on the labour market. The cardinal rule here being that a plaintiff should take steps to mitigate his loss. These two heads of her claim in damages, however, is best left to be considered in dealing with the matter of the possible award for pain and suffering and loss of amenities in assessing general damages. This will be considered after the issue of special damages have been dealt with.

Special damages

The following items fall to be considered under two broad heads being:-

(i) Loss of earnings

(ii) Medical expenses

A third item falling under (iii) and claimed in the particulars of special damages for "damage to clothing" U.S. $798 was not supported by the evidence and accordingly attracts no award.

Loss of earnings

The period claimed in the particulars of special damage covers from "17th March 1984 to 30th June 1991, and continuing", being 63 months totaling U.S. $275,248.00.

The evidence, however, disclosed that the plaintiff resumed full employment on 1st June 1990 following the completion of her re-training, at a Cancer Care Centre in Minnesota. For the remainder of 1990 she earned $13,040.00. Her loss of earning therefore ceased as at 31st May, 1990.

Between 1984 and 1989 her earned income was as follows:-

1984	U.S. $6,270
1985	U.S. $ 750
1986	Nil
1987	Nil

1988	U.S. $ 933
1989	U.S. $ 678

The plaintiffs actual income for the period under review was therefore U.S.$21,673 which sum falls to be deducted from her estimated income as a beautician during the period that she was incapacitated as a result of her injuries.

Before the incident the plaintiff testified to working a 32 hour week at a department store knownas Daytons. Her basic wage was U.S. $3.25¢ per hour. She choose to work this shorter period rather than 40 hours per week so that she could spend more time with her teenaged son. The amount claimed for loss of earnings in the particulars was calculated on the basis of a 40 hour work week. The plaintiff's evidence support this claim. She testified that as she was pregnant with her second child at the time of the incident in March 1984 she had intended to opt for a longer working week when she went back to work. As she was pregnant at the time of the incident and subsequently had a third child, had she still been employed at Dayton's the possibility of her working a 40 hour work week seems unlikely. The evidence suggests to me at any rate that in all probability with a second child on the way, but for this unfortunate incident she would have continued to work a 32 hour week.

In assessing her loss of earnings therefore her income for this period will be calculated on that basis.

Given the fact that the plaintiff earned U.S. $3.25 per hour, she would have earned a basic salary of U.S. $104.00 per week which would yield an annual basic income of U.S. $5,408.00. The plaintiff gave evidence of a 5% accretion being added to the basic wage but no documentary proof was tendered in support of this fact. Given the maxim id certum est quod certum (that is certain which can be

made certain), Mr. Muirhead's contention that such evidence fell within the realm of being speculative has merit. The principle applicable here is that the court ought not to speculate where there exists the means of it being informed as to the true facts. This evidence which was available from Dayton's was not brought and as special damages, strict proof being the principle by which to assess the evidence it did not measure up to the required standard and ought not to be accepted.

Not in issue was the evidence that the plaintiff earned U.S.$1,350.00 per month for commissions (the mean figure) based on an estimated sum of $1,200 - $1,500 per month which would yield $16,200 per annum. She also earned $80 per week for tips which when annualised would amount to $4,160.00.

On her evidence her proven gross estimated income therefore would amount to U.S.$25,768.00.

From this sum, an amount of $350 per month falls to be deducted for federal tax and social security. This results from the principle laid down in British Transport v Gourley [1956] A.C. 185. The damages being for pecuniary loss it is subject to deduction for tax purposes in arriving at the net award to be made.

In support of the above statement the learned editor of McGregor on Damages (15th Edition) at paragraphs 4 - 65 in a citation from the dictum of Lawton J in Cooper v Firth Brown Limited [1963] W.L.R. 418 at 420 in following the principle laid down in British Transport v Gourley (Supra), the learned judge said:-

> "It seems to me that the object of damages is to compensate the plaintiff for what he has lost and what he has lost is what would have been in his pay packet when he took it home. .....and it seems to me what when special damages are being calculated there should be deducted the amount of any national insurance contributions

> the plaintiff would have had to make if he had remained in work".

The learned editor had earlier said (same paragraph) in citing dicta from Lyndale Fashion Manufacturers v Rich [1973] I.W.L.R. 873 that:-

> "In assessing loss of earnings the plaintiff's tax liability must be considered. It is the net amount of the earnings only that can be awarded, since the applicable principle is restitutio in integrum. For the purpose of calculating the plaintiff relevant tax liability the sums in question must be treated as those lying at the top layers of his earned income. So, the amounts of deductions to be taken into account will be based on the effective rates of tax which are applicable to these slices of his earnings. The assessment can be made on broad lines and it is not necessary to do so with mathematical accuracy".

In the light of the above, the plaintiff would have earned the following net estimated income up to the 31st May, 1990.

(1)	1984		U.S. $16,348
(2)	1985		U.S. $20,818
(3)	1986		U.S. $21,568
(4)	1987		U.S. $21,568
(5)	1988		U.S. $20,635
(6)	1989		U.S. $20,890
(7)	1990	(to 31/5/90)	U.S. $10,049.16¢
			U.S.$131,876.16¢

The total sum recoverable as loss of earnings therefore is U.S. $131,876.16¢.

Medical Expenses

The amount of U.S. $10,444.75¢ was claimed for medical expenses. The evidence of the plaintiff however, limited this sum to $10,400.

Issue was taken by learned counsel for the hotel in his final submissions as to the claim. The plaintiff's evidence was that she was covered under a group insurance policy while working with Dayton's from which policy she obtained full medical benefits for treatment following her injury and this continued up to the time that she was released by their doctors in around 1989. After her release the plaintiff continued to pay the premiums. She also testified to paying premiums all along and during the period of her treatment. She admitted under cross examination that even if she had not made the payments she would still have got the benefits available under the policy. Although it is not quite clear as to what portion of the total medical expenses Daytons paid, there is no evidence to refute the testimony of the plaintiff as to the actual sum paid by her in this area of her claim. To the extent that her evidence supports a payment by her of $10,400 therefore there is a justifiable grounds for an award on that basis.

The total sum recoverable for special damages therefore is U.S. $142,276.

General damages

The approach of the courts in assessing general damages based on non-pecuniary loss is that where a plaintiff, such as in this case, has experienced serious injury, the award ought to be on a higher scale based on the principle of restitutio in integrum being in the nature of compensating the plaintiff as far as can be possible in monetary terms to put her back in as similar a position to what she was before the injury.

There is no issue that there exists a clear basis for an award under the head of Pain and Suffering and Loss of Amenities. Learned counsel for the plaintiff has endeavoured, however, to advance claims for additional awards for:-

a. Handicap on the Labour Market.

b. Loss of earning capacity.

As it is in this area of the claim that a serious challenge has been mounted it may be convenient to consider these two areas of the claim at this stage. Mr. Muirhead has submitted that on the facts in this case these heads of the claim would tend to overlap. I am in agreement with the views expressed by counsel. The two heads of the claim for general damages can be justified only on the basis that on the evidence either that there has been a diminution in the earning capacity of the plaintiff or that her present condition renders her susceptible to being displaced at sometime in the foreseeable future on the labour market.

As to the former the bald facts indicate, as learned counsel Mr. Muirhead has contended, that in the recession-hit United States of America where the plaintiff lives and works and who now as a result of her re-training now has obtained dual National qualifications of excellence in X-ray and Radiation Therapy. She has in a very short period of time risen to a degree of prominence as a specialist being the Chief technician in her new field of endeavour, as a Supervisor at a cancer Cure centre in Minnesota. Despite her obvious lack of fine motor skills the result of the disability to her left hand, she has nevertheless managed to hold her position as supervisor at the Cancer Cure Centre. She is earning at present a salary of U.S. $33,280.16¢ per annum, a sum far in excess of the base figure she received as a beautician at Dayton's.

Learned counsel for the plaintiff for his part contends that as a result of the disability to her left hand the plaintiff has now lost the chance of realising her life's ambition of going into business as a beautician. Although the plaintiff testified to having entertained such hopes there is, however, no evidence coming from her of any plans being put into effect towards making her

desired goal a reality. The evidence being that of a 37 years old single parent who was pregnant at the time of the incident and who had worked at a Department Store for the past 16 years during which time she took no positive steps towards setting up her own business. Even if she did have this idea in contemplation there is no evidence as to what were the likely prospects, what were her projected estimated income, and how she proposed to raise the necessary capital for the business. The data to provide the basis for supporting an award on either of these two heads of general damages is in my opinion totally lacking and accordingly there exists no justifiable basis for an award in this area of the claim.

Pain and Suffering and Loss of Amenities

This leaves the very important question as to what sum ought to be awarded to this plaintiff the victim of what was without question a brutal assault from someone who as a "peace officer" far from being a marauder ought to have been her protector?

On examination of the evidence and in this regard the medical reports of Doctors Warren Wilson, Allen L. Van Beek and Joseph B. Stein, (Exhibit I) in particular as well as the medical report of Dr. Guyan D.L. Arscott dated 24th January, 1992 (Exhibit 2) a report prepared just prior to the commencement of the hearing of this matter are all important in determining the nature and extent of the plaintiffs condition both following the incident of 4th March, 1984 and as at present.

From these reports there can be no question that the plaintiff suffered a very serious injury to her left hand, her control limb, an injury which the medical evidence has assessed as being within a range of 25% (Dr. Arscott's report) to 30% of (Dr. JOseph Stein's report), permanent partial disability of the whole person. This variation as to the assessment in these two reports from my own experience in assessing damages in personal injury cases is due more

to the conservative approach of the British trained specialist (Dr. Arscott) as against the more liberal approach of his North American counterpart Dr. Stein. This area of the claim has not been challenged. Learned counsel for the plaintiff has suggested a sum of $1,250.000 as being a reasonable award under this head of the claim. Learned counsel Mr. Henry has frankly admitted to being unable from his own researches to discover any similar or comparable case with this jurisdiction.

My own researches have, however, been somewhat more rewarding.

In C.A. G.104/89 Laurel Garrick v Ronald King an unreported judgment of this Court delivered on 12th July, 1990, the plaintiff a specialist teacher and a University Graduate was seriously injured in a motor vehicle accident on June 20, 1986. She suffered spinal injury and permanent damage to her left arm which condition has now left her arm virtually useless. Her condition was assessed at 25% permanent partial disability of the whole person. Despite having to wear a cervical collar and with the ever present danger of her wasting left arm being rendered useless she has since the incident successfully completed a Masters degree in the United States of America and continues to teach. This latter fact resulted in no claim being made for loss of earning capacity or for loss of income on the Labour Market. An award of $170,000 for general damages for pain and suffering and Loss of Amenities was accepted by the parties.

While the circumstances of this case places this plaintiff into a higher range, a factor brought about as a result of the injury being to her control limb, as well as the long period of her recuperation - around five years this case in July, 1990 would have attracted an award of about $350,000. Since July, 1990, however, the steep rise in inflation put at 113% over the last twelve months would cause me to consider an award of $1,000,000 as being adequate in all the circumstances of this case.

The Oswald Reid Claim

Special Damages

This head of the claim relies for its basis on the particulars of special damage as pleaded and for its success on the evidence adduced in support of the particulars as alleged and strictly proven.

The following particulars were alleged:-

(1)	Loss of earnings for 12 weeks at $102 per week	$1,244.00
(2)	Travelling expenses	840.00
(3)	Medical expenses	349.00
(4)	Employment of a helper for 14 weeks at $80 per week	1,120.00
		$3,553.40

The Evidence

The male plaintiff Oswald Reid suffered two bullet wounds to both buttocks. Following the incident he was taken to the St. Ann's Bay Hospital where he was admitted. The medical report of Dr.Warren Wilson the Senior Medical Officer dated July, 19, 1984 (Exhibit 6) disclose the following:-

> "Re Oswald Reid
>
> This is to certify that the above named was admitted to the Saint Ann's Bay Hospital on March 4, 1984 at 4:10a.m. after he was allegedly shot by a policeman. On admission the patient was in a state of shock, abdomen distended and there were two entrance wounds on both buttocks. On the left side there was a wound approximately two inches below the left anterior illiac spine. On examination the patient was in obvious pain and after treating the shock he was transferred to the operating room where surgery was performed. At Laparotomy there was a lot of blood in the abdominal cavity. The small intestine was found to be perforated in eight places. This damaged portion was removed and the intestine joined (anastomosed) end to end. The length of intestine removed was approximately twelve inches.

> On March 13, 1984 he was again taken to the operating room for the removal of a bullet from left buttock. He was discharged on the following day".

The male plaintiff testified to experiencing intense pain in the lower area of his body. After his discharge from hospital he continued receiving treatment as an out patient at the hospital clinic twice weekly. This continued for two and a half months (twelve weeks). He was unable to work for a total period of fourteen (14) weeks. Of this period he received a salary (for two weeks) from his employers and was according out of pocket and without an income for the remaining twelve weeks. He then earned a salary of $102,00 per week.

The plaintiff also testified to paying a total of $846.00 for travelling expenses in visiting the clinic for treatment, $340.00 for medical expenses and $80 per week for employing a helper for 12 weeks. All this during the period that he was recuperating at home.

No challenge was made to the plaintiff's evidence in respect of the sums claimed and expended falling under the head of pecuniary loss. The only variance arising from the pleadings and the evidence led in support being in the area of the claim for extra help where the evidence was limited to 12 weeks as against 14 weeks claimed in the particulars. That apart the other items claimed have been proven to the required standard.

The total sum recoverable under this head is therefore $3,373.

General Damages

Apart from the medical report (exhibit 6) the court in assessing damages under this head was also assisted by a follow-up report from Dr. Wilson dated October 26, 1984 (exhibit 6A). This report reads as follows:-

"Re Oswald Reid"

This is to certify that I examined Oswald Reid today. He has recovered very well with the exception of some residual pain in the left pelvis. This is due to damage to the pelvic bone and it is quite likely that he will continue to have pain in this region for some time to come, because of the resection of his small intestine. It has to be concluded that there is permanent damage, although there is permanent damage, this should not affect him to any great extent".

The general damages falls to be assessed on the basis of the nature and extent of the injuries suffered by the plaintiff under the heading of pain and suffering and loss of amenities with an additional sum to be awarded for aggravated damages. The evidence being that the plaintiff was laid up following the incident for over three months of which two weeks were spent in hospital and involving as it did two operations, one which qualifies as major surgery. Although from the medical report he has recovered very well he has continued to experience residual pain, a condition the result of a resection of the small intestine and this condition was likely to continue for some time in the future. During the hearing of the actions the plaintiff testified to be still experiencing cramps in his right hip at intervals of about once to twice per week.

Given the facts learned counsel for the plaintiff submitted that a reasonable award for general damages ought to be about $300,000. He relies in support for this submission on the following awards:-

1. C.L. P.148/1986 Donovan Pummells v George Edwards et al p.138 of Volume 3 of Mrs. Khans "Recent Personal Injury Awards". The plaintiff a 49 year old meat vendor with an income of $400 net weekly was injured in a motor vehicle accident and unable to work for 6 months. On recovery he was unable to lift weights or endure heat or smoke or do much manual labour. He migrated to the United States of America and eventually secured a job as

a Security Guard. Malcolm J on 13th March, 1990 awarded the plaintiff $245,000 for general damages of which $140,000 was for pain and suffering and loss of amenities, the remainder being in respect of loss of future earning capacity.

2. Gail Rankine (by next friend Victoria Lewis v Kenneth Smith et al p.145 of the same volume (referred to supra). The plaintiff an eleven year old child who on 26th January, 1984 was injured in a motor vehicle accident when a vehicle overturned killing four persons including her mother and injuring her in the head, abdomen and spleen.

She was totally disabled up to 23rd February, 1984 and suffered a 15% permanent partial disability of the whole person.

An award of $70,000 inclusive of costs by way settlement was approved by the court.

These two cases being awards made in respect of personal injury arising from motor vehicle accidents, are distinguishable from the instant case as the plaintiffs suffered a reduced earning capacity and a permanent partial disability whereas the plaintiff here has made what could be considered a complete recovery.

Learned counsel for The Attorney General relied on C.L.401/81 Selvin Johnson v Acting Corporal Gresford Hines and The Attorney General p.10 of the same volume (referred to supra) a judgment of this Court.

The plaintiff in that case a Club Proprietor was on 27th November, 1988 unlawfully shot and injured in the chest, both legs including a fracture to the right leg. He was unable to walk properly as a result of the injuries to his leg.

He was awarded in February, 1988 for Malicious Prosecution, Assault and False Imprisonment a total of $56,000 in respect of General damages of which $40,000 was for Assault. Learned counsel for The Attorney General submitted that in light of the above awards a reasonable sum for general damages ought to be in the range of $100,000.

While I am minded to follow Johnson v Bines et al (supra), the facts being more in the nature of those in the instant case the award, in my opinion, fails to take into account the diminution in the value of the currency due to inflation in particular over the preceding twelve months.

Taking this factor into consideration I would regard a reasonable award at present as general damages for pain and suffering and loss of amenities ought to be $250,000.

In the light of the above the result is as follows:-

1. C.L. E.032/85

Judgment for the plaintiff for (a) special damages - U.S. 142,276.00 (subject to conversion into Jamaican dollars at the going market rate at the date of delivery of judgment).

b. General damages for pain and suffering and loss of amenities $1,000,000. Costs to be agreed or taxed.

2. C.L. E.038/86

Judgment for the defendant with costs to be agreed or taxed.

3. C.L. E.009A/85

Judgment for the plaintiff against both defendants for $253,373 being:-

a.	Special damages	$ 3,373.00
b.	General damages for pain and suffering and loss of amenities	$250,000.00
		$253,373.00

Cost to be agreed or taxed.

4. C.L. R.115/88

Judgment for the defendant with costs to be agreed or taxed.

Costs ordered to be paid by Plaintiffs to defendants in C.L. 1986/E038 and C.L. R.115/88 to be borne by defendants in C.L. E.032/86 and C.L. R.009A/85.

Interest awarded to the plaintiffs in C.L. E032/85 and C.L. R009A/85 on Special Damages at 3% from 4/3/84 to 16/10/92 and on General Damages at 3% as from 1/3/85 to 16/10/92 and 14/1/86 to 16/10/92 respectively.