

*Judge*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H 055/98

BETWEEN                      OSWALD HYDE                      PLAINTIFF  
AND                              THE ATTORNEY GENERAL        DEFENDANT  
    FOR JAMAICA

Mrs. Ursula Khan for the Plaintiff.

Mrs. S. Reid-Jones for the Defendant instructed by Director of State Proceedings.

**Heard: 11<sup>th</sup> January, 2001, 3<sup>rd</sup> April, 2001 and 19<sup>th</sup> June, 2002**

**DUKHARAN, J**

This action came before me for assessment of damages, consequent upon interlocutory judgment entered on the 23<sup>rd</sup> October 1998. Liability is not an issue. My main task therefore is to make an award for Special and General Damages. The Plaintiff is also claiming Punitive Aggravated and/or Exemplary Damages.

On the 19<sup>th</sup> day of July 1997 at about 4.00 a.m. the Plaintiff was cleaning his pig pen on his own property in St. Catherine when he sustained a gunshot wound to his left leg just below the left knee. He told the Court that he had been raising pigs for 15 years at the back of his land. He said he normally cleans his pens at 4.00 a.m. each morning. He was about to come

out of the pen when he heard a sound and felt a stick under his left knee. He was shot. He said he bawled out. He heard a voice saying to come out of the Pen. The person who shot him was a policeman in uniform. He spent 3 days in hospital and walked with crutches for 3 months.

The injury resulted in a compound undisplaced fracture of the fibula of the left leg. The bullet remains lodged in the calf muscle. Since the incident he has an unstable knee. He now walks with a limp and experiences pain and tenderness sometimes.

The Plaintiff was examined by Dr. R.C. Rose, a consultant Orthopaedic Surgeon on the 27<sup>th</sup> November, 1997. The significant findings of Dr. Rose were confined to the lower limb in which the left calf was 5 cm smaller than the right. A defect is palpated in the fascia beneath the scar. He also found decreased sensation along the dorsum of the first web space and also slight restriction in dorsi flexion of the ankle along with 5 degrees of inversion and zero degrees of everseon of the subtalar joint.

In a subsequent report Dr. Rose indicated that the Plaintiff suffered some permanent impairment as a result of the injury. He stated thus;

“The restriction in subtalar joint movement has left him with a permanent partial impairment of 7% of the lower extremity. This is equivalent to 3% of the

whole person. The grade 4 power of the extensor hallucis longus muscle of the left foot has left him with a 2% impairment of the lower extremity. This is equivalent to 1% of the whole person”.

“The swelling which appears in the leg and ankle after standing and walking (lymphoedema) has left him with a permanent partial impairment of 5% of the lower extremity. This is equivalent to 2% of the whole person”.

Dr. Rose is of the opinion that the Plaintiff's total partial percentage impairment as it relates to the whole person is 6%.

The Plaintiff was also examined by Dr. W. Chutkan, a consultant Orthopaedic Surgeon on the 20<sup>th</sup> July, 1999. His findings were similar to Dr. Rose's report. However Dr. Chutkan estimated that the Plaintiff has about 12% permanent disability of the left lower limb which translates to 5% permanent disability of the whole person.

How has this injury affected the Plaintiff? At the time of giving evidence, he is 59 years old. He has indicated that his leg gives him a lot of trouble, his calf swells and he still experiences tenderness in the calf and knee area and sometimes the knee “gives away suddenly”. He said he has to

wear a knee brace and has difficulty in walking too far. He needs the assistance of a stick for support and cannot stand for long periods.

The main task here is to determine what the Plaintiff is entitled to under the heading of General Damages. Before doing this, Particular Of Special Damages was pleaded. Evidence was given by the Plaintiff as follows:

X-Rays	\$ 1,500
Medical Reports	1,000
Dr. Rose Reports	7,500
Boots	1,000
Loss of earnings	14,580
Transportation	3,000
Cost of	<u>2,000</u>
	\$ 30,580

There was a claim for loss of pigs and loss of pig pens. There is no evidence to suggest that pigs were actually lost. Likewise there is no evidence to suggest that the pig pens were lost or damaged. Nothing will be awarded therefor for the loss of pigs and the pens.

The Plaintiff is entitled to Special Damages in the sum of \$30,580. With regards to General Damages I will deal first with Pain and Suffering and Loss of Amenities.

The resulting disability of the Plaintiff involves the entire leg from the knee to the foot. Mrs. Khan for the Plaintiff has urged the Court to accept Dr. Rose's assessment and should be preferred over Dr. Chutkan's. I am inclined to do so as Dr. Rose's assessment of a 6% whole person disability is more detailed than Dr. Chutkan's report.

The Court therefore has to look at comparable cases to arrive at an award. Mrs. Khan cited the case of **Derrick Isaacs vs Evan Jones and Ranger Security Co. Ltd.** C.L. 4/97 (unreported). In this case a security guard was shot under his right armpit and in the right upper limb resulting in a fractured rib. He had surgery. These were serious injuries where the Plaintiff had a complete recovery. In the opinion of the doctor there was no permanent impairment. The Court made an award of \$850,000 for General Damages (Pain and Suffering and Loss of Amenities). In **Cunningham vs Maximum Investigators and Covert Action Ltd. and Douglas** (Khan's volume 4 p. 79) a security guard received a gunshot injury near his ankle in 1991 resulting in a fracture of the femur. His whole person disability was assessed at 2%. He was awarded \$250,000 which when updated is about \$540,000 at present value.

In **Francis v. Pagon et al** (Khan volume 4 at page 52) a household helper with injury to left knee and likely to develop osteoarthritis and with a

10% P.P.D of the whole person was awarded \$350,000 in June 1974 with its present value at over \$751,500. Also in **Powell vs O'Meally and Allen** (Khan's Volume 4 Page 56) the Plaintiff sustained a severed legamentum patella resulting in a 4% whole person disability. She was awarded \$450,000 in June 1997 with the present value at \$583,568.

It was submitted that the range of awards for this type of injury is between \$600,000 and \$1,000,000 and the injury suffered by the Plaintiff in the instant case favour the higher end of the scale.

Mrs. Jones for the Defendants cited the case of **Douglas vs Reid** (Khan's volume 4 page 61). In that case the Plaintiff sustained a compound fracture of the ~~right~~ ankle and right fibula. His fractures healed. The permanent partial disability of function of the right leg was assessed at 10 – 15%. The Plaintiff was awarded \$240,000 in 1999 which at the present value is over \$400,000.

It was further submitted that the pain and suffering in the cases cited were far worse than in the instant case and the Plaintiff is not entitled to more than \$350,000 for pain and suffering and loss of amenities.

In relation to handicap on the labour market and loss of earning capacity it was submitted that the Plaintiff has lost one year of his working life as a mosquito sprayman by being asked to retire at least one year early.

Because of his physical disability of his left knee he would be severely handicapped on the labour market. From the medical evidence he is otherwise healthy apart from the impairment to his left leg. The Plaintiff is a mosquito sprayman and it is unlikely that he can continue to carry out that function. He has testified that after retirement workers are recalled on a temporary basis sometimes. Because of his impairment he wont be recalled. Because of his impairment he can no longer rare pigs at the level he used to do before.

In **James v. Caribbean Steel Co. Ltd.** {CLJ 340/93) a labourer who was 69 years old in 1998 was awarded the sum of \$200,000 in 1998 for Handicap on the Labour Market.

With today's financial constraints it is likely that many persons in the category of the Plaintiff who is reasonable physically healthy would work beyond seventy (70) years. Since the Plaintiff has not given a figure as to what his true earnings would be the Court would choose the minimum wage as the datum figure. At the time when the Plaintiff gave evidence the minimum wage was \$1,200.00 weekly at \$62,400 annually. With the possibility that the that the Plaintiff might have worked for a possible eight (8) years to ten(10) years, it was submitted that a conservative multiplier of five (5) should be used taking into account the vicissitudes of life. I am of

the view that a multiplier of five (5) in the circumstances is reasonable. The Plaintiff is therefore entitled to the sum of \$312,000 under the heading Prospective Earnings/Handicap on the Labour Market.

With respect to Loss of Prospective Earnings up to age sixty (60) the Plaintiff provided two birth certificates. Mrs. Jones for the Defendant has asked the Court to say that the Plaintiff retired because of age and had nothing to do with his injuries. There is some doubt as to the Plaintiff's true age as to whether he was born in 1940 or 1942. In any event I accept the evidence that he was retired on the grounds of age and that he was born in August 1940. The normal retirement age being 60 years this he would have reached in August 2000. The Plaintiff served as a sprayman from the 28<sup>th</sup> April 1970 to 18<sup>th</sup> August 2000. I find that he was not sent on early retirement and is therefore not entitled to potential earnings from his projected salary earnings by having retired in August 2000.

In relation to Future Medical Expenses the Plaintiff has given evidence that he has to use painkillers and linaments to rub his leg. He says the monthly cost is \$1,500.00. Two years after his injury Dr. Rose observed swelling in the leg and ankle as a result of standing and walking. With a 5% permanent partial impairment of the lower extremity it is likely the Plaintiff will continue to experience periodic pain and difficulty in standing and



walking for long periods. He says his estimated cost of medication is \$1,500.00 monthly. Since he is likely to live another ten to 15 years I would select a multiplier of three (3). I would therefore make an award of \$54,000.00 for future medical expenses.

The Plaintiff is also claiming Punitive, Aggravated and/or Exemplary Damages. Exemplary damages are punitive in nature and are awarded where there has been oppressive, arbitrary and unconstitutional action by servants of the Crown.

The police officer who shot the Plaintiff was allowed to give evidence as to how the shooting took place. Constable Paul Henry testified that as a result of a report he received he went to a premises at 4.00 a.m. in a volatile area. It was very dark and as he entered the premises he took out his gun. He said he saw the beam of a flashlight, he stumbled and fell and his gun went off. He heard someone cried out that he was shot. He said he sought assistance for the Plaintiff who was taken to the hospital.

It was submitted by the Defendant that this was not high handed and unconstitutional action by the police officer and that there is no basis for an award for exemplary damages.

The authorities clearly show it should only be awarded where compensation which the Court proposes to award is inadequate.

I am of the view that this is not a case which calls for an award of exemplary damages. The Plaintiff will therefore not be awarded anything under this heading.

Having looked at the various headings under General Damages for Pain and Suffering and Loss of Amenities the Plaintiff is now handicapped and is not now able to lead a full and normal life. He can no longer walk for long periods and is not able to rear pigs as he did before.

Taking into account the injury sustained by the Plaintiff the sum of \$650,000 will be awarded for Pain and Suffering and Loss of Amenities.

In summary the Plaintiff is awarded as follows:

Special Damages

\$30,580.00 with interest at 6% per annum from the 19/7/97 to 19<sup>th</sup> June, 2002.

General Damages

(1)	Pain and Suffering and Loss of Amenities	-	\$650,000
	with interest @ 6% per annum from 6 <sup>th</sup> April,		
	1998 – 19 <sup>th</sup> June, 2002		
(2)	Handicap on the Labour Market	-	\$312,000
(3)	Future Medical Expenses	-	<u>\$ 54,000</u>
	Total		\$1,016,000

Costs to the Plaintiff to be taxed if not agreed.

Certificate for Counsel granted for one.