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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M087 OF 1981

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| BETWEEN | DESMOND McLEAN | | PLAINTIFF |
| A N D | YORKWIN WALTERS | 1ST | DEFENDANT |
| AND | CLAUDIUS JOSEPHS | 2ND | DEFENDANT |

David Muirhead Q.C. & Norman O. Samuels for Plaintiff

Dennis Goffe & Douglas Leyes instructed by Myers, Fletcher & Gordon, Manton & Hart for the Defendants.

30th & 31st October, 1st, 2nd & 9th November, 1989.

PATTERSON,J.

On the 27th of May, 1979, the plaintiff, a sergeant of police, suffered serious injuries when a motor truck, owned by the first defendant and driven by the second defendant, collided with a police service vehicle driven by the plaintiff. The question of negligence was resolved in 1985 when the court found that both defendants were liable, and the issue to be resolved before this court is the question of damages.

The plaintiff was taken from the scene of the accident in an unconscious condition and he was admitted to the University Hospital of the West Indies where he remained for some five months under the care of Professor Sir John Golding, F.R.C.S. His injuries included a severe fracture dislocation of the left hip, fracture of the shaft of the left humerus, and small cuts in his face and head. An operation was performed to reduce the fracture of the hip and a plaster cast was applied to the left arm. Traction was applied to his left leg. He was confined

to bed, lying on his back with his left arm suspended. His evidence is that he had to stay "one place in bed", and he could only move if assisted. He was unable to wear clothing, and he remained naked in bed with a sheet thrown over him, up to 2 weeks before his discharge from the hospital. The cast from the left arm was removed after about 2 months and the traction to his left leg lasted for about 3½ to 4 months. He was operated on for a second time to reduce the hip fracture. He was discharged from the hospital in a wheel-chair, and thereafter he was only able to walk with the help of crutches. He resumed duties in the earlier part of 1980, and up until then, and for a further 2 months he was still on crutches.

The plaintiff said he suffered pain from the time of the accident right up to the present time. Whilst in hospital, he suffered "a whole lot of pain", and the pain persisted after he left hospital. He visited the orthopaedic clinic at the University Hospital as an out patient for about 3 months after leaving hospital, and thereafter, for about 14 months, he was an out patient at the physiotherapy department of the hospital. The pain in his left leg persisted, and he visited various doctors in Old Harbour and May Pen for that reason. He could not wear the regulation boots provided for members of the force, because his left foot was tender and his doctor had recommended that he should wear soft shoes. Nor could he wear the regulation cummerbund, as it caused him pain when he did. He said his present physical condition is not the same as it was before the accident. He is now very weak on the left side. He looses his balance easily, and he cannot stand or walk for long periods. He had regular pain in his back, in the left

leg and hip, and his left lower limb is shorter than the right resulting in his walking with a limp.

The plaintiff did not adduce evidence from any of the doctors who saw him during the period of five years after he received the injuries. He produced a report of a joint medical examination by Professor The Honourable Sir J.S.R Golding, C.D., O.B.E., F.R.C.S and the late J.D.G. McNeil-Smith, C.D. F.R.C.S. done on the 24th February, 1984. They confirmed that the plaintiff had a half inch shortening of his left lower limb and that he walked with a limp. The movement of his left hip was restricted, and a view of his X-rays showed "a fracture dislocation of his left hip with considerable new bone formation around the hip". It was agreed that a total hip replacement would be required at some stage, but not then. The plaintiff was 39 years of age, and it was considered that the operation, if done at that time, would carry a "great risk of new bone formation once more degrading the results of the operation."

Dr. Homer E.C. Rose, F.R.C.S a registered medical practitioner and specialist orthopaedic surgeon testified that he first saw the plaintiff on the 15th June, 1988, but he knew that the plaintiff had been seen by Dr. McNeil-Smith prior to that. The plaintiff complained of pain and stiffness in the left hip. Examination revealed that he walked with a limp due to leg-length discrepancy. He had 80° of flexion in the left hip with no internal or external rotation. There was also no adduction or abduction of the hip. He had no flexion contracture of the left hip. X-rays of the left hip revealed masses of heterotopic bone

formation in the soft tissue, mainly on the superior and superolateral aspects of the left hip, and there was irregularity of the acetabulum secondary to the fracture. Also, he had developed osteoarthritis of the left hip secondary to the severe fracture dislocation of the left hip. The various medical terms were explained as follows:- "Flexion" means the ability to lift your hip from the neutral position forward with your knee flexed. The average person's flexion would be 130°. "Abduction" is standing and moving your hip outwards - away from your body. The average is 70° - 80°. "Adduction" is the opposite to abduction, standing and moving hip towards the midline - the average is 20°. "Internal rotation" is turning the toes inwards which involves movement of the hips. The average is up to 30°. "External rotation" is the outward turn of the toes. Average is 35°. "Flexion contracture of the hip" is an abnormality in the hip, and no one should have this. It signifies that the hip cannot be extended to the neutral position. The result of this is that there is a compensatory lumbar landosis. Without a pelvic tilt, the plaintiff could not put his foot flatly on the ground.

Dr. Rose evaluated the plaintiff on the 26th October, 1989 and his findings were as follows:-

> "He continues to have a limp due to a stiff left hip. Over the past year, he has been complaining of lower back pains. This is now due to the increased stress which has been in the Sacroiliac joint and the Lumbo Sacral Spine as a result of the lack of movements in the left hip joint. This is likely to get worse as he gets older. His restrictions have virtually remained the same and the range of motion

in his left hip has not changed significantly since his last visit to me. The following is the range of motion in the left hip - Flexion 90°, abduction 30°, Adduction 10°, Internal Rotation 0° External Rotation 15° and Flexion Contracture of the hip 30°. X-rays of the left hip revealed Heterotopic bone formation situated in the superior aspect of the femoral neck and head. There is also narrowing of the joint space. Mr. McLean's total percentage permanent disability is 20% of the whole person."

The doctor testified that the degree of restriction in the hip joint of the plaintiff will have considerable effect on his work and recreational activities. The limp would limit how fast he can walk, and his ability to run. He would be unable to squat, to kneel, and to cross his legs right over left. He would be unable to put on his socks in the normal fashion. He would have difficulty in getting in and out of a car. Any form of recreational activity would be considerably restricted.

He could sit only by arching his back and that would put more stress on the sacro-iliac joint, causing lower back pain.

The surgeon expressed the view that the only operation which would return the plaintiff to some degree of function is a total hip replacement. This would relieve the pain and increase the function of the hip. However, this operation is complicated by the heterotopic bone formation, it would take much longer and there is at least a 50% chance that the heterotopic bone formation would recur. If the heterotopic bone formation does

not recur after the hip replacement, then the plaintiff would have a very satisfactory result, and his total disability would then be about 6% of the whole person. However, should it recur the total hip replacement would be a failure and it would be pointless doing any other operation. The plaintiff could revert to the former position or it may be worse or not as severe as before.

The plaintiff testified that ever since the accident, he suffered pain, and, having regard to the medical evidence, I accept his testimony on this score. The pain suffered must have been in varying degrees. While he remained in hospital not only did he suffer severe pain, but his discomfort must have been great indeed. He said that after the traction to his leg was removed, the nurse assisted him to get out of bed and tried to make him walk, but it was too painful and he could not walk. The pain did not cease when he left the hospital. More than ten years have elapsed since the plaintiff was injured and he is still suffering pain, with only a 50% chance of relief if the hip replacement operation is successful. If it is not, then it is possible that he will suffer pain for the rest of his life; he was 35 years of age at the time of the accident. The plaintiff has consented to have the hip operation done, even though he is aware of the chances of failure. Dr. Rose has recommended the operation. I am impressed by the learning displayed by Dr. Rose, and I readily accept his judgment in this regard.

I accept the plaintiff's testimony that before the accident he played cricket for Innswood Estate and Area 1 Police Sports Club, and that he also did

fishing and swimming. Since then he can no longer indulge in those forms of sport because of the stiffness in his hip and severe pain at times. Dr. Rose is of the view that even if the proposed operation is successful, it would be unwise for the plaintiff to engage in any form of strenuous sports. The plaintiff testified that his sexual relationship with his wife had been affected, but I accept the evidence of Dr. Rose that pain in the hip would not cause any sexual problems, although patients with back pains have complained about sex problems, On a balance of probabilities, I reject the plaintiff's testimony in this regard.

There has been a vast difference in the amount of general damages suggested by the plaintiff's attorney and the defendants' attorney. Mr. Samuels referred me to the award of general damages in the case of Laing v. Deitritch reported at page 45 of Volume II of what is commonly called "Khan's Reports", and also the case of Freeman v. Central Soya (Jamaica) Limited, reported at page 239 of the said reports. He asked the Court to bear in mind that the value of money in Jamaica had fallen tremendously since the award in Laing's case, and expressed the view that any amount awarded in 1985 should be increased by 50% today. He asked the Court to take into consideration the chances of an unsuccessful operation to replace the hip joint and the consequences that would flow in that event. He suggested that 50% be added to any projected figure, to cover that contingency and he suggested an award of the sum of $375,000.00 under this head.

He referred to the judgment of White J.A. in Kelly v. Bennett S.C.C.A #45/87, delivered on 2nd March,

1968 wherein the Court increased an award made in the Court below in respect of loss of amenities from $6,000 to $60,000. The Court took into consideration "scarring and disability" suffered by the Plaintiff/Respondent, as well as the fact that his movements will be severely restricted - "he will be unable to climb a ladder or stoop in which activities he will be heavily circumscribed if his prospective employment entails either activity. Indeed, the medical evidence is that the more serious injury to the thigh could affect him as an electrician if he has to climb ladders or stoop. He would have trouble to right knee. His ability to play football would be affected. The plaintiff's enjoyment of life has consequently been reduced." Mr. Samuels asked the Court to take into account, in the instant case, the plaintiff's loss of sexual enjoyment through pain and that the injuries would hamper future promotion, but as Mr.Coffe rightly pointed out the evidence does not support this.

As regards future expenses for the operation to replace the hip joint and remove the heterotopic bone formation, Mr. Samuels urged that it was fair and reasonable for the plaintiff to follow the advice of his surgeon and have the operation done at the St. Joseph's hospital. There, the total costs for the operation as stated by the administrator of the hospital and by Dr. Rose, would be:-

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| Surgeon's fee | $11,500.00 |
| Assistant Surgeon's fee | 4,000.00 |
| Anaesthetist's fee | 6,000.00 |
| Implant | 8,000.00 |

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| Hospital fees and nursing care | $12,500.00 |
| | $42,000.00 |

Finally, Mr. Samuels contended that the plaintiff has been and will be handicapped in the labour market and that he should be compensated for that loss. He suggested the sum of $25,000.00 under this head.

To summarise, he has suggested the following amounts for general damages:-

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| Pain & suffering - past present and future | $375,000.00 |
| Loss of amenities | 150,000.00 |
| Future expenses | 42,000.00 |
| Handicap in the labour market | 25,000.00 |
| | $592,000.00 |

Mr, Goffe on the other hand, submitted that as regards general damages, the Court should bear in mind the chances of success of the total hip replacement operation and that if it is successful then the permanent disability of the plaintiff would be only 6% of the whole person. He pointed out that the award of $150,000 in Laing's case under this head included pain and suffering and loss of amenities $40,000.00, and future expenses for the costs of surgery overseas $110,000.00. He applied the 50% increase suggested by Mr. Samuels and arrived at a figure of $60,000.00 for pain and suffering and loss of amenities. However, he agreed that the overall injuries suffered by the plaintiff in the instant case was more serious than that in the Laing's case. He referred to the case of Morgan v. Jamaica Omnibus Service reported at page 8 of Volume 2 of Khan's Reports; where the Court in 1986 awarded $110,000.00 for pain and suffering and loss of amenities in a similar case but where the permanent disability was 40% of the whole person. He suggested that the Morgan award would be $165,000.00

today. He argued that the plaintiff is still working in the same job as before the accident, and that based on the awards in previous cases, $80,000.00 would be an appropriate award in the instant case, but for the heterotopic bone formation, and the chances of its recurrence after the total hip replacement. He suggested that a further $20,000 should be added, making a total of $100,000.00 which would include all aventualities, past present and future.

As regards the future expenses for the proposed hip replacement and the removal of the heterotopic bone formation, Mr. Goffe submitted that the plaintiff was under a duty to mitigate his damage. He referred to the case of Selvanayagam v. University of the West Indies [1983] 1 All ER 824, a decision of the Privy Council, as authority for the principle that, a plaintiff is under a duty to act reasonably so as to mitigate his damage, and that the burden of proving reasonableness was on the plaintiff. He urged the Court to award an amount to cover the costs of the operation to be done at the University Hospital and not at St. Joseph's Hospital, and he suggested an award of $9,500 in this regard.

Mr. Goffe urged the Court to reject the plaintiff's claim for an award for his being handicapped in the labour market as the plaintiff had failed to make out a case for such an award. He pointed out that the plaintiff has acted as an Inspector since the accident and that the slight limp is hardly noticeable to the layman's eye.

In my judgment, there is no doubt that the plaintiff suffered severe injuries and that the pain

and suffering was great indeed for the time that he remained in hospital and for many months after he was discharged. However, the pain and suffering might have subsided somewhat to enable him to return to work. But even then, he must have suffered some discomfort by having to use crutches. I accept his evidence that the pain has not ceased, but there is no evidence to say that it is continuous. Indeed, the evidence discloses that after some 17 months after leaving hospital, he discontinued physiotherapy, and it seems that his visits to a doctor because of the pain were few and far between. The development of osteoarthritis of the left hip and the heterotopic bone formation have both, in my view, contributed greatly to his continued pain, and the stiffness of the hip joint with the resultant loss of movement, coupled with the shortening of his left lower limb, must all add up to be a constant source of suffering over the past years. I accept his evidence that he can no longer take part in sporting activities, and this seems a great loss for a man of his age. If the hip replacement operation is not successful then he will be faced with a continuing permanent disability of 20% of the whole person for the rest of his life. If it is successful, he will still be faced with a 6% permanent disability. There is no doubt that the proposed operation for the hip replacement will create some amount of pain and suffering for some time after the operation. The surgeon's evidence, which I accept is that the patient would remain in hospital for approximately seven days and then he would be sent home with a walker for one month, and thereafter he would graduate to a cane before full recovery.

If the plaintiff satisfies the Court that as a result of his injuries his chances for advancement in the Constabulary force have been affected, then he would be entitled to be compensated for loss in his pecuniary prospects in respect of his employment. The plaintiff has not been promoted in the past ten years, but there is no evidence that his injuries have in anyway contributed to his lack of advancement. He has frankly admitted that "it is possible for a good man to be held down and the bad man go up. Even if accident had not happened, a good man like me may never have gone up -- who knows". But even if the plaintiff should leave his present employment, his evidence is that, given his training in book-keeping and business, it is possible he could do better outside the force. In my view, the plaintiff has failed to show any loss of pecuniary prospects in respect of his employment in the Constabulary force, and accordingly, I will not make an award in this regard.

The claim for an award in respect of the expenses to be incurred in the future for the total hip replacement operation was resisted by the defendants only in so far as the quantum is concerned. I agree with Mr. Goffe's submission that it is the duty of the plaintiff to mitigate damage. I can see no reason why he has chosen St. Joseph's Hospital over the University Hospital for the venue of his future operation. I am bound to give effect to what is reasonable in the circumstances. Dr. Rose testified that he has chosen St. Joseph's Hospital to do the operation, but he has not stated why he has made that choice. He admits that he is a consultant

at the University Hospital, and that there is no medical reason why the operation could not be done at the University Hospital. He testified that the plaintiff would get proper medical care there and he could perform the operation there. The cost of the operation at the University Hospital would be much less than at St. Joseph's. At the University Hospital the charges to the plaintiff would be approximately $4,000 for the implant, and the hospital fees would not exceed $5,000. There would be no charge there for the surgeon's fees but to those amounts should be added approximately $500.00 for physiotherapy, making a total of approximately $9,500.00, I am mindful of the fact that the plaintiff was an inpatient at the University Hospital for many months and thereafter an outpatient for about 17 months. Taking all these factors into consideration, I am of the view that it is reasonable that the plaintiff should mitigate damage and have the operation done at the University Hospital and not at St. Joseph's Hospital. Accordingly, I agree with Mr. Goffe's submission that the award should be in the sum of $9,500.00, but to that I will add a further $1,500.00 to cover unforseen expenses that are likely to develop by the time the operation is done - my award under this head is, therefore, $11,000.00.

I have taken into consideration the suggestions made by both counsel as regards the amount to be awarded for pain and suffering and loss of amenities, and I regard them as being helpful to establish the range within which the Court has in the past made awards in similar cases. However, the assessment of damages under this head must be based on the merits of each case. I have already expressed my views on the evidence, and

based on those views, I will award the sum of $190,000 for pain and suffering and loss of amenities, past, present and future.

I turn now to the plaintiff's claim for special damages and I shall list those items that were agreed between counsel, viz:-

(1) Extra Domestic help 32 weeks @ $40 p.w. - $1,280.00

(2) Cost of X-rays 125.00

(3) Medical expenses 1,380.00

A number of items were not proved by the plaintiff, and consequently, they were struck out at the request of counsel for the plaintiff.

The contested items are now considered seriatim.

(1) "Wife's visit while plaintiff was seriously ill - $12 per day for 2 months $720.00".

The plaintiff testified that he is a married man, and while in hospital, he was visited by his wife on a daily basis for about 2 months. He said she travelled from Old Harbour each day by public transport at a cost of $12 per day. Mr. Samuels urged that this claim is allowable under the head of parasitic damages. Mr. Goffe submitted, and I agree, that the wife's visits were routine and ought to be disallowed. He referred to the case of Johnson v. Browne (1972) 19 WIR 382 as authority. This item is disallowed.

(2) "Travelling to seek medical attention plaintiff - 2 times per week for 14 months - $120 return (Old Harbour to University Hospital) $14,400.00."

The plaintiff's evidence in support of this claim is that for about 14 months he travelled from

his home in Old Harbour to the University Hospital for physiotherapy. He was unable to travel by public transport because of his injuries, and consequently, he chartered a car on each occasion. Mr. Coffe did not challenge the number of trips, but he attacked the credit of the plaintiff as to the amount paid for each trip. He asked the Court to take into account the fact that in the original statement of claim, the amount stated for each trip was $20, and that it was only in October, 1989 that the statement of claim was amended to read $120 per trip. He pointed out that the wife's claim for travelling the same distance was $12 per trip. He urged that having regard to the plaintiff's salary, it was unlikely that he could have afforded to pay that amount on this item alone. He suggested that the Court should allow only one-half of the amount claimed. I have taken into account the distance between Old Harbour and the University Hospital. It was not unreasonable, in my view, for the plaintiff to have travelled by hired transport, and there is no evidence to suggest that the costs were unreasonable or exorbitant, and I do not so find. This amount is allowed as claimed.

(3) "Travelling Expenses

Old Harbour to Dr. McNeil-Smith at Tangerine Place, Kingston 4 times at $120 each time - $480".

The evidence points to three trips only, and for the reasons stated above I will allow $360.00

(4) "Old Harbour to Mona Rehabilitation Centre, Mona - Joint medical examination Dr. J.D.G McNeil-Smith and Professor Sir John Golding -

- once $140.00".

Plaintiff's evidence is that he paid $400 for this trip, because the taxi had to wait the whole day. There was no application to amend, and I will only allow the amount claimed, viz $140.

(5) "Old Harbour to Tangerine Place and Eureka Medical Centre two times at $120 each time $240".

The evidence disclosed that on these occasions, the plaintiff travelled by public transport at a cost of $40 each day. He explained that these trips were made at a time when he was improved and able to travel by public transport. I will allow $80.

(6) "Old Harbour to University Hospital Mona, September 1979 - December, 1979 3 days per week 51 days @ $120 per day $6,120.00"

The plaintiff testified that upon leaving the hospital, he attended the orthopaedic clinic as an out-patient for about 3 months, travelling by a chartered car at a cost of $120 per trip. Mr. Goffe's objection to this amount was as stated in "(2)" above, and for the reasons already stated, I will allow 36 trips @$120 per trip, a total of $4,320.00.

(7) "Loss of Marching Orders estimated @ $70 per month for ten years $8,400.00".

The plaintiff said that as a sergeant, he would be paid on a "Marching order" for duty done outside of his police area. The amount of pay would depend on how far away he went, how long he stayed and for whom he worked. He said he worked at the Caymanas Race Track every race day while he was stationed in the parish of St. Catherine, and for

his services he would be paid $48 for each 4 hour period. When he went on raids outside the parish, he would be paid $35 per day. For attending Court, he would receive 13¢ per mile for travelling outside a radius of 10 miles from his station. The plaintiff was unable to state what was his loss in this regard - from time to time he would receive some extra money on marching orders, but there was no telling when that would be and how much could be earned. Any award under this head would be completely speculative and accordingly, this item is disallowed.

(8) "Loss of allowance for driving J.C.F. vehicle over three (3) years @ $460 per year $1,380.00."

In support of this item, the plaintiff testified that up to the time of the accident he was a "force driver" with an allowance $45 per month. After the accident, he ceased being a force driver and consequently, he lost the $45 per month allowance. It was only in 1986 that he applied and was re-instated a force driver. Mr. Goffe argued that the plaintiff did not say why he did not apply to be re-instated a force driver before 1986, and that nothing should be awarded under this head. I disagree, The plaintiff has claimed for 3 years loss, althouth he had not been a force driver for over 6 years. Obviously, his state of recovery would have had some direct bearing on the time within which he could have applied to be re-instated a force driver. I do not consider three years to be an unreasonable time for him to have been off driving, and I will allow the sum of $1,380 as claimed.

There remains this last claim:-

'Loss of profits operating licensed premises offering food at Darlington Drive, St. Catherine - $350 per week for five years $18,200 x 5 $91,000.00

Mr. Goffe resisted this claim vigorously. He attacked the credit of the plaintiff. He pointed out that this item was included in the claim for special damages only since October 1989 when the statement of claim was amended. Even then, the loss was stated at $350.00 per week, and that was included in the plaintiff's affidavit in support of the summons to amend. Yet the plaintiff testified that he made a net profit of between $600.00 and $800.00 per week. He said he was the proprietor of the licensed premises, but when cross-examined, he said that the spirit licence was not in his name but in the name of one "Whesia Nembhard". Although Miss Nembhard applied for the licence and paid the fees for it each year, she did not receive any of the profits from the business nor did she control its operation. He was the sole operator of the business receiving the returns therefrom. He employed someone to sell in the shop, but he supervised her

Mr. Goffe raised another point. He referred the Court to Section 3 of the Spirit Licence Act which forbids the sale of spirits either by wholesale or by retail except "by persons thereunto duly licensed under this Act, or on their behalf by persons in their immediate employment, and then only in conformity with the terms of the licence held by such persons, as set forth in this Act." A breach of these provisions carried severe penalties of a criminal nature. He submitted that the maxim "ex turpi causa non oritur actio" ought

to be applied in the circumstances and that it would be contrary to public policy to afford the plaintiff the relief sought. He relied on the case of Thackwell v. Barclay's Bank Plc [1986] 1 ALL ER 676. He submitted finally, that in any event, the evidence of the plaintiff was to the effect that he had lost his stock because his servant had credited it out. In such a case there was a "novus actus interveniens", and that the damages would therefore be remote. He asked that no award be made under this item. Mr. Samuels argued that the licensed premises were within the law and that no law had been transgressed. He said the loss flowed directly from the plaintiff's inability to handle his affairs during illness, and since the defendants did not challenge the profit or period of loss, the amount claimed should be awarded.

In my view, it is strange indeed that this item of loss for the substantial amount of $91,000.00 could be over looked for over ten years, and it certainly brings in sharp focus the veracity of the plaintiff. He has thrown up a figure at the Court which differs from the pleadings. He has admitted that the premises were not licensed in his name nor did he pay the licence fees, yet he insisted that the licensed proprietor had nothing to do with the operation of the licensed premises nor did she enjoy any of the profits. This does not appear to be credible testimony. If the plaintiff, a sergeant of police, chooses to operate a licensed premises in the way that he said he did, then I am of the view that this Court should not assist him by awarding damages that would flow from his illegal operations.

The plaintiff must have known or he ought to have known that he was operating the business illegally. Public policy dictates that this item should be disallowed, because otherwise, the Court would be indirectly assisting or encouraging the plaintiff in his illegal activities. But even if I am wrong in the views expressed above, I agree with Mr. Goffe's submission that the damages claimed in this item is remote. The loss complained of, on the evidence, resulted from the act of the servant of the plaintiff, a person who is in no way connected with the defendants. In Weld-Blundell v. Stephens [1920] A.C. 956, (at p.986) Lord Sumner said:-

> "In general (apart from special contracts and relations and the maxim respondent superior) even although A is in fault he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause".

For the reasons stated above, this item is disallowed.

It was submitted that there was unjustifiable delay in bringing the assessment for hearing as the plaintiff had taken no steps in the matter for fully one year and three months, and that interest should be disallowed for at least during that time. I accepted this submission and accordingly, instead of awarding interest up to the date of hearing, I have deducted the period of one year and three months which I consider a reasonable time for the delay, and have accordingly awarded interest up to the 9th August, 1988.

Damages are assessed in the sum of $201,000.00 General damages with interest on $190,000.00 at the rate of 3% per annum from the 22/6/81 to 9/8/88.

And $23,465.00 Special damages with interest thereon at the rate of 3% from the 27/5/78 to the 9/8/88.

Costs to be agreed or taxed.