

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. HCV 2761 of 2005

BETWEEN	MICHIKO BAHADUR (by her mother and next friend Dorothy Baker)	1 <sup>ST</sup> CLAIMANT
AND	DOROTHY BAKER	2 <sup>ND</sup> CLAIMANT
AND	DONALD JONES	1 <sup>ST</sup> DEFENDANT
AND	NEILSON JONES	2 <sup>ND</sup> DEFENDANT

Miss Judith Clarke instructed by Judith M. Clarke & Co. for the Claimants.

Defendants not appearing or being represented

Assessment of Damages

Heard: 29<sup>th</sup> May & 1<sup>st</sup> June, 2006

BROOKS J.

On May 27<sup>th</sup> 2004, young Miss Michiko Bahadur, then a high school student, was injured in a motor vehicle crash. She was, at the time, a passenger in the 1<sup>st</sup> Defendant's vehicle, which was being driven by the 2<sup>nd</sup> Defendant. She suffered lacerations to her scalp and ear, a fracture of her left clavicle and a fracture of her pelvis. A judgment was entered against the Defendants, since they filed no acknowledgement of service of the Claim Form. Damages now fall to be assessed.

## **General Damages**

### Pain and Suffering and Loss of Amenities

As is usual with fracture injuries of that nature Miss Bahadur was placed in traction and given bed rest. She was discharged from hospital on June 17, 2004, and by July 13, 2004, the bones had completely healed. The clavicle however had healed with some misalignment and Dr. Delroy Fray, who assessed her on 18<sup>th</sup> April, 2005, described it as “an unsightly malunited fracture of the left lateral clavicle with no functional deficit”.

Dr. Fray also reported (report dated May 3, 2005 – Exhibit 5c) that Miss Bahadur’s left hip elicited mild crepitus but had full pain-free movement. He also reported that she has an antalgic (pain-relieving) gait due to a 1½” shortening of the left leg. He opined that her permanent impairment is 9% of the whole person.

For her part, Miss Bahadur testified that she still feels pain in her hip, especially when she stands or walks for long. She said that she can no longer run as she used to do as a student. She is conscious of her collar bone. She says that it “buff out because it is growing over the other bone”. The court had a look at the collar bones but was unable to detect a marked difference between right and left. At her age however any imperfections

would hold much significance and the court bears in mind the doctor's description, mentioned above.

Miss Bahadur also spoke about feeling pains in her head and that she is unable to read for long because pain results. This evidence was however not supported by any medical evidence and regretfully the court got the clear impression of a witness trying to exaggerate the effects of her injuries.

She is no longer a student. She has entered the working world and is a tour guide. Miss Bahadur testified that because she is unable to stand or walk for long she is unable to handle some of the jobs that her colleagues do. She also testified that she used to do modelling for fun and in fact, just days before she was injured, had interviewed to take part in a modelling event called "Caribbean Fashion Week" put on by "Pulse". She says that she doesn't do modelling any more because her hips are uneven and she cannot wear a swim suit as a result. She says; "it is only (because of) my hip why I wouldn't model (now)". Miss Bahadur however said that she "always wanted to become a flight attendant", and she still is hopeful that she can achieve that goal.

As she walked away from the witness box, the court could observe no obvious limp.

In addressing the issue of General Damages, Miss Clarke on behalf of Miss Bahadur, brought to the court's attention the cases of:

*Melvin Smith and others v. Karen Hyatt Khan* 5 page 34

*Alfred Hinds v. Eric Smith and others Khan* 4 page 27, and

*Lillian Livermore v. Casbert Morrison Khan* 5 page 23.

In *Smith v. Hyatt* the plaintiff Miss Hyatt not only suffered from a limp but also permanent injury to her dominant hand. She was in a cast (of various lengths) for the better part of six months (January – July 1994). The Court of Appeal, though not disturbing the first instance assessment of damages, found it to be “on the high side” (per Bingham J.A.). When updated the award of \$1,500,000.00 made in May 1999 (date of the appeal), would now be worth \$2,900,000.00 using the Consumer Price Index (CPI) for April 2006 of 2323.3.

Mr. Alfred Hinds suffered a closed head injury and fractures of the right tibia and fibula at mid-shaft. He spent almost seven months in a cast and the fracture site healed with a deformity. He was assessed to have a limp due to a ½” shortening of the right leg, bowing of the leg, disability of the left upper limb, (resulting in a 20% whole person permanent partial disability) and hearing loss amounting to an impairment of 29% of the whole

person. The award of \$1,300,000.00 in December, 1996 is now worth approximately \$3,000,000.00 when updated using the April CPI.

In *Lillian Livermore*, the plaintiff suffered a fracture of the right femur and right pubic bone as well as subluxation (partial dislocation) and fractures of the cervical spine C4 and C5, and a cerebral concussion. There was no evidence concerning her whole person disability but on appeal (December 13, 2000) the award was reduced from \$2,000,000.00 to \$1,500,000.00. The latter figure would now be worth approximately \$2,600,000.00 when updated.

Because of the additional features, the injuries in the previously mentioned cases are not close enough to those suffered by Miss Bahadur to make them appropriate guides for the exercise of assessing the award for pain and suffering and loss of amenities.

I am of the view that a better guide for this aspect of the exercise would be the case of *Suzette Campbell v. Wilbert Dillon Khan* 5 page 50. In that case, Miss Campbell was injured in a motor vehicle crash. She suffered, in addition to abrasions, swelling and tenderness, multiple fractures to the right hemi pelvis, a fracture of the pubic bone and a fracture of the acetabulum. After four months and an extended period of complete bed rest and thereafter physiotherapy, she had some occasional pain and a

susceptibility to complications such as osteo-arthritis. Almost a year later, she was again assessed and found to be suffering from a 1½” shortening of the right lower limb, subluxation of the right sacro iliac joint and dislocation of the pelvic ring. The latter condition could affect her in a normal delivery at childbirth. She was, at the time of the later assessment, experiencing pain over the right side on walking. She also was found to have a ¾” scar over the right eyelid, and healed abrasions over the right zygoma (a facial bone). Her permanent partial disability was assessed as being 10% of the whole person. The general damages assessed at \$1,300,000.00 on 5/6/2000 converts to approximately \$2,300,000.00 using the CPI for April 2006.

Miss Campbell’s injuries, though resulting in a slightly higher level of permanent disability were more extensive in terms of the number of fractures. The permanent results of the injuries are however very similar and this is where the emphasis is placed for assessing the monetary award.

Miss Clarke submitted that an award of \$4,000,000.00 would be the appropriate award, but in light of the similar levels of permanent disability to Miss Campbell’s case I find that that sum would be exorbitant. An award of \$2,300,000.00 for pain and suffering and loss of amenities would be more in keeping with the evidence, and I so find.

### Handicap on the Labour Market

Miss Clarke submitted that in light of the evidence concerning the limitations in Miss Bahadur's job, an award for handicap on the labour market would be appropriate. She submitted that a global or lump sum award would be more relevant to this case than a multiplier/multiplicand approach. Her submission was that the sum of \$500,000.00 as was awarded in the Hyatt case, mentioned above, would be an appropriate award.

I find that the evidence in the Hyatt case was more appropriate to a higher level of award. Miss Hyatt was some way along her career path to being a Health Insurance executive and there was clear evidence of a dislocation of that endeavour. Miss Bahadur, on the other hand, has not yet started on her career path. She is currently earning the minimum wage. She still hopes to become a flight attendant and there is no evidence as to the extent to which her limitation will affect her in that job. There is evidence however; that she is affected in her current job and thus an award for handicap on the labour market would be appropriate. In light of Miss Bahadur's recent entry into the world of work, I agree that the global approach is more appropriate, but that the award to Hyatt would not be appropriate for Miss Bahadur.

In *Campbell v Dillon* mentioned above, Miss Campbell was awarded \$70,000.00 under this head of damages. The updated figure, using the April 2006 CPI, would be approximately \$124,000.00. That level of award is consistent with that in the recently decided case of *Andre Clarke v. Alexander Atkinson & anor.* (HCV 5108 of 2005 - delivered April 25, 2006). There, Mr. Clarke, a mason, had a limp due to 3.5cm shortening of one leg after being injured. He had difficulty squatting, bending and lifting heavy objects as a result. These activities were important features of his work. McDonald J. (Ag.) awarded him \$130,000.00 for handicap on the labour market. I find that the sum of \$130,000.00 would be an appropriate sum in Miss Bahadur's case.

Miss Clarke sought to place a great deal of emphasis on Miss Bahadur's evidence that she is unable to do modelling any more. The thrust of the submission was that this should sound in a more robust award for handicap on the labour market. I do not agree with the submission. Miss Bahadur was doing modelling for fun. It is true that she was attempting to enter a modelling contest, but there is nothing in the evidence which hints that she wanted to pursue it as a career. To the contrary; her ambition she said, was to become a flight attendant.

## Special Damages

At the time that Miss Bahadur was injured she was a minor and her expenses were met by her mother, Miss Dorothy Baker. Miss Baker, as the 2<sup>nd</sup> Claimant, seeks compensation for the expenses she incurred. One of those; travelling from Cousins Cove Hanover to Cornwall Regional Hospital in Montego Bay every day to visit and attend to the child, made transportation expenses a significant part of her claim.

The figures for the expenses proved showed some slight differences to those pleaded. Those proved were quite straightforward. They are:

“Medical Expenses (Exhibits 4a-4e, 4g-4i, 4k-4t)	\$ 14,545.37
Medical Report (Exhibits 4f & 4j)	5,000.00
Police Report (Exhibit 3)	1,000.00
Transportation Costs (Exhibit 1a -1o)	22,680.00
Domestic Help (Exhibit 2a -2p)	<u>12,800.00</u>
Total	\$56,025.37

In summary therefore damages are awarded as follows:-

### General Damages – awarded to the 1<sup>st</sup> Claimant

Pain & Suffering & Loss of Amenities	\$2,300,000.00
Handicap on the labour market	<u>130,000.00</u>
Total	\$2,430,000.00

with interest on \$2,300,000.00 at 6% per annum from 27/10/05 to 1/6/06.

Special Damages –awarded to the 2<sup>nd</sup> Claimant \$56,025.00

with interest thereon at 6% per annum from 27/5/04 to 1/6/06.

Costs to the Claimants jointly, fixed in the sum of \$40,000.00.