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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/04

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH, JA.
THE HON. MRS. JUSTICE McCALLA, JA (Ag).**

BETWEEN MALCOLM CAMPBELL APPELLANT/DEFENDANT

A N D MARSHA PAGE RESPONDENT/CLAIMANT

ORAL JUDGMENT

January 18, 2006

McCALLA, J.A(Ag.):

In this appeal the sole issue relates to the quantum of general damages awarded by the learned trial judge.

The ground of appeal is that the award of damages for pain and suffering and loss of amenities is excessive having regard to the injuries suffered by the claimant and previous awards made by this Court for comparable injuries.

As liability is accepted it is only necessary to state that the injuries were sustained by the respondent in a motor vehicle accident on February 21, 2001. From the medical report of Dr. Mark Minott dated 11th January, 2002, her injuries were stated, to be :

- (i) numerous soft tissue injuries;

- (ii) no neurological deficits;
- (iii) laceration on right side of face and neck;
- (iv) neck movement limited by pain;
- (v) upper left limb had numerous abrasions and lacerations on exterior aspect;
- (vi) left knee has a three centimeter by two centimeter laceration over the patella;
- (vii) left ankle had pain and tenderness with movement; and
- (viii) left humerus had a displaced fracture of the neck of the humerus.

The report of the consultant plastic Surgeon, Dr. Rajeev Venugopal in March, 2003 from paragraph 2 onwards reads:

"...Miss Page now presents to the plastic surgical clinic with concerns of the appearance of the scars. There was no other significant change of the scars over the last year. There was no other significant medical history.

There is a multiple hypertrophic scar located on the right anterior triangle of her neck; the largest that measured 1.5 x 1.0 cm,
1.0x 0.5 cm
1.5 x 0.5 cm

There is 12.0 x 0.2 cm hypertrophic scar along the anterior border of the right sternocleidomastoid and 0.5cm located on the right helix of the ear.

The posterior aspect of the left arm has a hypertrophic scar that is 5.0 x 2.0 cm along with 12.0 x 4.0 cm scar on the dorsum of the proximal left forearm.

There was no functional defects caused by these soft tissue injuries but these are permanent scars.

The improvement by scar revision may offer a 30% improvement on the scar.

This can be done with scar revision followed by superficial radiotherapy treatment."

In making the award of \$1.7M the learned judge relied on the case of ***Jamaica Telephone Company Ltd. and Barrymore Hill and Tisha Ann Daley*** SCCA 126/96 judgment delivered on July 31, 1998.

The injuries recorded in that case, as stated on page 8 of the judgment were :

- "1. Scarring over right cheek and lower jaw;
2. Multiple small raised hypertrophic scars over the right preauricular and lower cheek areas;
3. Four (4) multiple small hypertrophic hyperpigmented scars over the dorsum of left hand;
4. Approximately 20 small scars raised, hypertrophic and hyper pigmented over the outer aspect of the right thigh;
5. Fracture of the right superior ramus;
6. Partial avulsion of the inferior ends of the collateral ligaments of the right knee."

The assessment and prognosis detailed in a further medical report as recorded on page 9 revealed the following:

"The patient is left with permanent scarring of her left cheek, left hand and right thigh following a

Road Traffic Accident on July 6, 1992. The scarred areas of her face and thigh are quite obvious due to the multiplicity of scars and the raised nature of most of them.

She will experience intermittent itching and tenderness in the scars over approximately a two year period. During this time there should be some gradual improvement in the nature of the scars.

Corrective surgery will provide partial improvement for some of her scars. The more obvious raised scars over the left cheek and right thigh can be revised using local anaesthetic and a hospital stay of one day. This would provide approximately 70% improvement in these areas."

In 1996, the surgical improvement of the scars were assessed at 60%. The value of the award in that case at the time Sykes J assessed damages in this case was in the region of \$1.5M.

In making the award in the instant case, Sykes J acting as he was at that time, at page 7 of his judgment said:

"By comparison and contrast, in the instant case, there is only a 30% chance of improvement in the scarring after treatment (see report of Dr. Venugopal). Also there was no evidence in the **Jamaica Telephone Company** case, as there was here, that the plaintiff was experiencing pain continuously since the accident and any inability to carry heavy objects. Neither was there evidence of the plaintiff suffering from any emotional anxiety caused by her appearance. I recognize that in the instant case and the **Jamaica Telephone Company case** different parts of the body were fractured but the persistence of pain in the case of this plaintiff makes the difference."

The medical evidence showed that there was no significant permanent impairment except for the cosmetic appearance of the scarring on the outer side of her right thigh, her left hand and the right side of her face.

Before us Mr. Campbell complained that the learned trial judge should not have used the **Jamaica Telephone Company** case as a guide. He referred in particular to the injury to the hip (ramus) and the ligaments of the knee as being more serious than the injuries sustained by Miss Page. If used, he said the figure should have been discounted instead of being increased.

Mr. Campbell submitted that the case of **Pauline Williams v Fitzroy Hamilton** suit No. CL [1987] W244 (damages assessed on June 20, 1990) ought to have been relied on by the learned judge. There, the plaintiff sustained: (a) fracture of the right humerus with deformity and tenderness of the right buttocks and outer quadrants, (b) laceration over the left palm, (c) multiple bruises over the left side of the body and an inability to extend the right elbow for some time.

She also had pains in her arm when she lifted heavy objects. Mr. Campbell conceded that the award made in that case which when converted amounted to \$500,000.00 would have had to be upgraded. The figure he suggested was \$800,000.00.

Referring to the passage at page 7 of the judgment of Sykes J previously referred to, he argued that too much weight was placed on the on the evidence of Miss Page that at times she still suffered pain around the area that had been fractured. He said that there was no medical evidence adduced in support of that assertion.

We find favour with the submissions advanced by Mr. Williams that there is a difference between the bruises sustained in **Willis'** case as opposed to the scars in the present case.

In cases of personal injury it is highly improbable to find two cases where the injuries sustained are the same and the victims are of the same age and sex and possessed of similar peculiarities. Even in cases of similar bony injuries there are significant differences in the resultant disabilities.

In emphasizing the more serious fracture of the ramus sustained by the plaintiff in the **Jamaica Telephone** case, Mr. Campbell referred to a statement made by Dr. Grantel Dundas, Consultant Orthopaedic Surgeon taken from volume 5 of Mr. Khan's work, commencing at page 312 where he states:

“Finally I would like to make mention of the tendency in the legal fraternity to seek to find comparable levels of injury which may form the basis for assessing the extent of suffering or disability. Almost invariably, one ends up comparing apples with oranges. Engagement in this type of exercise reflects largely a lack of understanding of disease processes and the body's response to trauma or other insults. The pursuit of this line of evaluation is almost certain

to lead to misinformation and misguidance. A tibial fracture cannot be compared to a femoral fracture. A tibial fracture can only be compared with a tibial fracture in the same location and under the same conditions and with the same or very closely comparable levels associated bone and soft tissue injury in like patients. These are at the best of times, difficult to find and evaluate. If, the treatment programmes are not similar for both injuries then the comparison immediately becomes an invalid one. This particular pathway is best avoided."

The above statement highlights the difficulties encountered in seeking to make comparisons even in respect of cases involving similar injuries.

In the course of his oral submissions Mr. Campbell conceded that a bald comparison with the present case of the cost of medical intervention with regard to scarring in the **Jamaica Telephone Company** case and the present case is of no assistance to the Court.

In the case of **Dryden v Layne** SCCA No. 44/87 Campbell JA offered guidance to the effect that:

"Person injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."

It is worthy of note that in the **Jamaica Telephone Company Ltd.** case at page 12 of the judgment in considering whether the amount awarded was inordinately high Forte J.A. (as he then was) said :

"Mr. Batts. Referred us to several cases which in his view demonstrated that the Courts have in

circumstances comparable to the circumstances of the injuries suffered in the instant cases awarded much lower sums.

Ironically, however, it is one of those cases cited that in my view establishes that the award in this case is not inordinately high. In the case of **Wendy Holness v Astley McKie** Suit No. C.L. 1992/HO75, the plaintiff suffered scarring throughout her body as a result of burns. The scars like in the present case were hypertrophic in nature. However, whereas in that case surgery was not advisable as the plaintiff had a tendency to form hypertrophic scars, in the instant case, the respondent has the prospects of having surgery which will result in 60% improvement in relation to the scars, except for the scars over the cheek which cannot be significantly improved with surgery."

In the case at bar, Miss Page, a 23 year old female at the time of the assessment gave evidence which the learned judge summarized at page 4 of his judgment as follows:

"She says that her neck still pains her, especially when she has to lift objects. Her neck-pains prevent her from sleeping on her left side. When the time is hot the scars 'swells and hurt me.' She still suffers from pain in her left ankle. She cannot wear any shoe that rubs her ankle and occasionally she feels pain in her knee. She now feels disfigured. As she goes about her daily life, her scars arouse more curiosity than sympathy. Here are two comments that reflect what she now has to endure:

'Gal yu man burn yu up' or 'Á skatta shat bit yu roun' yu neck?. Her scars are made the worse in appearance, because of keloids.

The learned judge observed at page 6 of his judgment:

"Pauline Willis (supra) is closer to the point but there, the plaintiff was fully recovered by the time of the trial but for the pains in her arm when she lifted heavy objects. She had a fracture of the right humerus but there was no evidence of permanent scarring or keloids. Neither was there evidence of anxiety caused by persistent reference to her appearance."

He concluded at page 7 of his judgment:

"I take into account the injuries outlined above, the pain, suffering, her embarrassment caused by her injuries and the pain she says she still suffers when lifting objects. Her quality of life has deteriorated. She experienced pain since the accident up to this year- this is three years of constant pain and discomfort. In addition to the injuries she has permanently lost something of real value—she will never ever be scar free and without keloids. The scars are permanent and even with medical intervention there may be just a 30% improvement.

We are of the view that the learned judge cannot be faulted for using the **Jamaica Telephone Company** case as a guide. In that case, the fracture did not involve any significant permanent impairment. Whereas there was a chance of 60% improvement of scarring in the **Jamaica Telephone Company** case, in the case of Miss Page there is only a 30% chance of improvement.

With regard to the complaint concerning the lack of medical evidence of continued pain being suffered by Miss Page there is no basis for disturbing the finding of the learned judge on that issue. He had the

advantage of seeing the scars on Miss Page and detailed his observations at page 46 of the record.

In urging us to reduce the award Mr. Campbell cited in the case of **Donald Williams** SCCA 60/91 where Wolfe J.A. (at that time) said:

" to justify reversing the trial judge on the question of the amount of damages the court of appeal should be convinced either that the trial judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it in the judgment of the court an entirely erroneous estimate of the damages to which the plaintiff is entitled."

We are not persuaded that the award of general damages in this case is so excessively high as to warrant interference by this Court.

For these reasons we uphold the sum of \$1.7M dollars awarded for general damages. Accordingly, the appeal is dismissed with costs granted to the respondent to be taxed if not agreed.