C.A. Negligence Personal injuries, Liability not in issue) DAMAGES — Assessment on appeal General damages @ whether award for pain and suffering and loss of amenities excessive. (b) whether there was need for reconstructive surgery, and if so where and at what cost — Evidence upon which award to be made.

JAMAICA

Held No basis for disturbing awards for pain and suffering — and reconstructive surgery at particular hospital. APPEAL DISMISSED

IN THE COURT OF APPEAL JUDGMENT OF PANTON J. affirmed.

SUPREME COURT CIVIL APPEAL NO. 34/86

Remedy

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	CENTRAL FIRE AND GENERAL INSURANCE COMPANY LIMITED	
AND	GARY MUIRHEAD	DEFENDANTS/APPELLANTS
AND	MARTIN HARRIS (SUING BY HIS MOTHER AND NEXT FRIEND, LOLA HARRIS)	
AND	LOLA HARRIS	PLAINTIFFS/RESPONDENTS

Crafton Miller and Mrs. Monica Earle-Brown for appellants

Hugh Small, Q.C., and John Graham for respondents

3rd, 4th, 5th June and June 26, 1937

BINGHAM, J.A. (Ag.):

This is an appeal from an award by Panton, J. of $238,350 for General Damages and $12,657.40 for Special Damages arising out of a claim in negligence for Personal Injuries brought on behalf of the infant/plaintiff Martin Harris by the Second Plaintiff and next friend Lola Harris. The claim arose out of an accident in which the infant/plaintiff was hit down by a Motor Vehicle driven by the Second Defendant of which the First Defendants were the insurers.

Before Panton, J. below the question of liability not being in issue the matter fell for assessment of damages.

It is this award with which we are now concerned in this appeal.

The award was made up as follows:-

(1) Special Damages - $12,657.40 (to the Second Plaintiff) with interest at 3% from the date of injury.

(2) General Damages as follows:-

(i) $85,000 for pain and suffering and loss of amenities.

(ii) $550 for shoes.

(iii) $2,800 (for accommodation and subsistence for relative in Montego Bay).

(iv) $150,000 for prospective medical expenses.

There has been no challenge made in the Grounds of Appeal filed in this matter to the award of $12,657.40 for Special Damages and there is therefore no complaint being made in this area.

As to the award for General Damages there is also no complaint raised in any of the Grounds of Appeal as to the Second and Third subheading of the award, namely the sum of $550 for special shoes and $2,800 for subsistence to a relative in Montego Bay in relation to the reconstructive surgery to the infant/plaintiff which has been found to be necessary.

The two main areas of the award which have fully engaged our attention during the three days occupied in hearing this appeal, and which have been seriously challenged by learned Counsel for the appellants are the first and fourth subheads relating to:-

1. the sum of $85,000 awarded for pain and suffering and loss of amenities.

2. the sum of $150,000 awarded for prospective medical expenses.

Of the eleven grounds of appeal filed and argued, grounds 1-9 relate to and are concerned with the award of $150,000 and based upon the submissions advanced before us from either side, it is correct to say that it is in this area that

the real challenge to the award for General Damages has been directed.

It may now be convenient therefore to deal with the award for Pain and Suffering and loss of amenities, as based upon the arguments advanced by learned Counsel for the appellants, this area did not, when examined merit serious consideration.

In seeking to establish that the award of $85,000 was excessive, learned Counsel for the appellants, who incidentally was also engaged in the matter below, contended that the award was out of line with awards for comparable injuries. He relied in support on Supreme Court Civil Appeal No. 45/85 Noel Gravesandy vs. Neville Moore an unreported Judgment of this Court delivered on 14th February, 1986. In that matter an award of $90,000 for Pain and Suffering and loss of amenities was reduced to $50,000.

In that case the medical evidence adduced disclosed that the plaintiff suffered a "crush injury"to the left leg involving bones, tendon and muscles. There was a compound fracture of the tibia and fibula. Although it was suggested that an operation to re-align the bone might have to be performed, an evaluation never took place because the plaintiff had not seen the doctor up to the time of the hearing. There was no evidence as to the percentage of the plaintiff's disability and the doctor testified that there was the likelihood that the leg could even improve between the date of the hearing and the next date of appointment with the doctor.

In the instant case when the injuries suffered by the infant/plaintiff are examined it takes the matter out of the range of the injuries suffered by the plaintiff in the Gravesandy case and is clearly distinguishable from that matter as:-

1. the fracture suffered by the infant/plaintiff was a Class 3 compound fracture of the tibia and fibula which is a much more serious fracture in which the bones had actually protruded through the skin.

2. there had already been six operations performed which included skin grafting. These surgical procedures would of necessity have involved the infant/plaintiff in considerable pain.

3. the infant/plaintiff because of his condition had suffered psychologically as well, and is now subject to asthmatic attacks.

4. the thin layer of skin over the bone had now made the infant/plaintiff highly susceptible to the risk of injury which caused both the Orthopaedic Surgeon Dr. Christopher Rose and the Plastic Surgeon Dr. Jeffrey Williams to recommend that reconstructive surgery be done to the infant's leg as a matter of urgency in order to protect the affected area.

5. this procedure would involve a minimum of at least three with a possible maximum of five operations.

6. there was further evidence of a ten percent permanent disability of the leg.

It is abundantly clear that the pain and suffering thus far endured as well as that involved in the surgical procedures to follow coupled with the extent of the plaintiff's disability; these were factors which the learned judge below fully considered in fixing a basis for the award at which he arrived.

Learned Counsel for the appellants was not altogether unmindful of the very serious nature of the injury with which he was confronted as in his final submissions he suggested an award under this head which varied between $50,000 to a maximum of $70,000. Learned Counsel for the respondents in his rejoinder fixed his minimum sum at $90,000. It is not altogether an uncommon tendency in these cases for learned Counsel for the opposing side to be conservative in fixing an estimate of the award that the Court ought to make to a plaintiff and for learned Counsel for the plaintiff to be liberal in suggesting the sum that ought to be awarded. The learned trial judge opted for an approximately mean average and awarded a sum of $85,000.

The question for us is whether the award having regard to the above facts can be regarded inordinately high?

It appears to us, that when all these factors are looked at and carefully examined, as the learned trial judge must have considered them, we cannot say that there exists any rational basis for so concluding. Although the award may appear on the face of it to be high, we agree with it as being fully justifiable on the particular facts of this case.

In so far as the second area of contention is concerned, two issues arise for determination, namely:

1. Was there the need for the reconstructive surgery, and if so,
2. where and at what cost?

This brings into focus the award of $150,000 for prospective medical expenses. A distinction has, however, to be drawn between:-

a. the sum of $50,000 being the charge for the surgical team in respect of which there was no challenge made by learned Counsel for the appellants, based upon the assumption that Doctors Hospital was the proper institution for the surgery to be done.

b. the remaining sum of $100,000 being the estimated cost of hospitalization and other incidental expenses chargeable at Doctors Hospital.

In relation to the latter sum, consideration has to be given as to its reasonableness based upon the correctness of the finding of the learned trial judge as to the appropriateness of the locality for the operation.

As the learned trial judge found that Doctors Hospital was the proper locality, it is necessary at this stage to examine the evidence upon which he acted in coming to that conclusion. Based upon the evidence of Dr. Christopher Rose, the Orthopaedic Surgeon coupled with the evidence of Dr. Jeffrey Williams, there was the opinion expressed that there was an urgent need for the reconstructive

surgery in order to terminate the ever-present risk of serious injury to the infant/plaintiff's leg. Although Dr. Barrington Dixon, the Senior Medical Officer in charge of the Cornwall Regional Hospital testified that facilities existed at that institution for the operation to be performed there, he respected the opinion of Dr. Jeffrey Williams, the Consultant Plastic Surgeon at the Hospital that it was impracticable to carry out the reconstructive surgery at that hospital: the reason for this being that such operations fell into the category of elective surgery and based upon the situation existing at the Cornwall Regional Hospital, a Public Hospital, there was a minimum waiting period of at least two years. On the other hand, Doctors Hospital being a Private Institution there was every likelihood of the operations being scheduled at once.

On this evidence the learned trial judge found that given the history of the infant/plaintiff's case, it was imperative that the operations be done now. It may be opportune to quote his entire observations. He said:

> "In the instant case, the tort done to the infant plaintiff has exposed him to the constant risk of infection of the relevant area as there is no proper tissue coverage of the bone. Minimal trauma can lead to a breakdown of the area involved. Plastic surgery is the only means of eliminating this risk of infection and putting the infant plaintiff back into the healthy position he once enjoyed in that area of the body.
>
> He has already spent six months in hospital with two more months to come, in addition to five months of physiotherapy. I should have thought that it would be imperative that the operations be done now, and not delayed for a period of two years while a bed is awaited at the Cornwall Regional Hospital. Why should the infant plaintiff live with such a risk of infection and uncertainty for another two years? In my view, the plastic surgery is to be done as early as possible. This is an urgent situation which will require him to be hospitalized at the private hospital referred to in the evidence. The award of damages should take this into consideration".

In the light of the observations of the learned trial judge referred to as well as the history of the infant's condition, we are of the view that the decision of the judge as to Doctors Hospital being the proper locality cannot be faulted.

The remaining question which now needs to be addressed is therefore, if Doctors Hospital, then at what cost?

The learned trial judge made an award of $150,000. This award was based upon the evidence of Dr. Jeffrey Williams who apart from being the Consultant Plastic Surgeon to the Cornwall Regional Hospital, also operates the Doctors Hospital where he is the major shareholder. His evidence as to the estimated cost, which was based upon a minimum of three operations, was not challenged in cross-examination.

He arrived at this gobal sum as being:-

1. $50,000 for a minimum of three operations to be performed by himself and his surgical team. The first operation being the most difficult, being an operation lasting 8 hours in which he would require the presence of at least two Assistant Surgeons and an Anaesthetist throughout. The other two operations would require the presence of at least one Assistant Surgeon and the Anaesthetist.

This sum of $50,000 is not being challenged by learned Counsel for the appellants and is therefore not a matter for any complaint before us.

2. $100,000 for hospitalization, anaesthetist fees, physiotherapy etc. As the cost of the extras these were not broken down, it may be reasonable to infer that these would include such incidentals as accommodation (usually a large proportion of the cost of hospitalization), constant nursing care, the evidence here being that nurses in private institutions earn better salaries than those in public institutions, a factor which is of such common knowledge as to be almost capable of being treated as a notorious fact, and drugs the cost of which is also of common knowledge and an item which is constantly on the increase.

Both the award of $50,000 as well as $100,000 given in evidence by Dr. Williams are estimated. Mr. Miller has

submitted that it is not acceptable for a Plaintiff in claiming general damages to simply put a sum before the Court and say that this is the sum which he ought to be awarded. There ought to be some evidential basis upon which the award sought is grounded. He cited in support Bonham-Carter vs. Hyde Park Hotel [1948] 64 T.L.R. 177 per Lord Goddard, C.J.

This case is based upon a claim for Special Damages. The principle applicable is sound having regard to the nature of the damages claimed but it is clearly distinguishable from a claim sounding in general damages.

Mr. Small on the other hand, submits that apart from Special Damages which he agreed had to be strictly proved, all other damages are general damages and are not subject to precise calculations as Special Damages. In all cases of general damages the Court, he submits, is required to make an estimate of the loss to the plaintiff What is sought is not a perfect award but fair compensation for the injury suffered General Damages are therefore by their very nature not subject to a precise calculation. He relied in support on the decision of the House of Lords in British Transport Commission vs. Gourley [1956] A.C. 185 at 206: [1955] 3 A.E.R. 796 at 804(I) per Lord Goddard.

The extract from this judgment has been relied upon by the learned author of the 12th Edition of Mayne and McGregor on Damages as being a correct statement of the law in this area of damages. At page 11 thereof, reference is made to the decision cited supra, where the learned Chief Justice said that:

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially

> "exact calculation. Secondly, there is general damage which the law implies is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future".

On an examination of the evidence of Dr. Williams the question naturally arises:-

> Was he competent to give the estimate that he has given?

The answer must of necessity be in the affirmative as he is the Doctor who operates this private hospital and as such he ought to be knowledgeable about such matters which touch on and are concerned with the expenses chargeable in that institution.

Having given that estimate as to the costs, as Mr. Small has rightly pointed out, it has not even been suggested to him by learned Counsel for the defendants in the Court below, that this estimate was exorbitant or unreasonable nor was he challenged as to how or on what basis he arrived at this figure.

No evidence was adduced by the appellant below to show what the cost of hospitalization was in comparable private hospitals in order to establish that the sum of $100,000 was way out of line with that chargeable in such other institutions.

When the need for such evidence eventually became apparent to learned Counsel for the defendants, after the plaintiffs case had been closed, an attempt was made in re-examination of Olive Spence, the Director of Nursing Services at Cornwall Regional Hospital, to elicit some evidence as to the cost of nursing care at the Doctors Hospital. As she was, in the light of her earlier testimony, not competent to provide the answer sought, this attempt was abortive.

In determining this question, all the learned trial judge had before him therefore at the end of the day was the evidence of Dr. Williams whose testimony was unchallenged. He was competent to give the estimate which he gave, and once the learned judge found this estimate to be reasonable, there being no evidence to the contrary, he was obliged to accept the Doctor's evidence in this area and to act upon it in making his award.

The appellants sought valiantly both in the Court below and before us to establish that reconstructive surgery, if found necessary,could be done at Cornwall Regional Hospital which was therefore the proper place and in that regard the costs chargeable at that instutition were put in evidence in proof of what were the reasonable expenses of hospitalization. Once that institution was ruled out, however, there was no ready answer on their part to Dr. Williams' estimate.

In the circumstances we can find no basis for disturbing the award made by the learned trial judge in the two areas to which some challenge has been made.

The appeal is accordingly dismissed and the judgment of Panton, J. below is affirmed with costs here and in the Court below to be the Respondents, such costs to be taxed if not agreed.

KERR, J.A.:

I agree.

CAMPBELL, J.A.:

I agree.