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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002/D081

BETWEEN LINNETTE DUNCAN-WALKER PLAINTIFF
A N D CLEAR CLARKE 1ST DEFENDANT
A N D IAN ANTHONY GOLDING 2ND DEFENDANT

Mr. Garth Lyttle for Plaintiff.

Defendant not appearing or being Represented.

Assessment of Damages

Heard: 9th April, 2003 and 15th April, 2003

Brooks, J.

Although the heading indicates that the Defendants in the action did not appear and were not represented, counsel instructed by the Attorneys-at-Law on record for both Defendants did attend during the hearing of the evidence in the matter but well after the Court had commenced hearing the evidence of the Plaintiff.

The attorney Miss Wilkins applied for the assessment hearing to be adjourned because her instructing attorneys wished to have their names removed from the record as appearing for the Defendants. The application to that effect had only been filed on the same morning as the hearing.

Counsel indicated that an adjournment would allow the Defendants to be made aware of the matter and to retain other counsel to represent them if they so desired.

The application was refused on the basis that the date for the hearing had been fixed with the Defendant's counsel being present and with her consent, and that in any event the assessment hearing had already started. Upon the application being refused counsel for the Defendants withdrew with the consent of the Court as she said that she had no instructions on which to conduct a cross-examination.

I now turn to the events giving rise to this action in which the Plaintiff entered on Interlocutory Judgment against the Defendants on 24th April, 2002. The Plaintiff testified that on 26th July, 1998 at approximately 4:00 p.m. the right hand drive motor car which she was driving at the time along the Portmore Causeway in the parish of Saint Catherine, was hit by a motor bus. The bus proved to have been owned by the 1st Defendant and driven by the 2nd Defendant. As a result of the collision the Plaintiff was rendered unconscious and she testified that she did not regain consciousness until some time later. There is independent confirmation of the fact of the unconsciousness but not of the time period.

Mrs. Duncan-Walker testified that when she awoke she was in a lot of pain, her right arm (her dominant side) was in a bandage, it was elevated and some strings were holding it up.

She says her whole body was in pain and she couldn't move and couldn't cough or chew because of the pain. She experienced headaches all the time, her vision was blurred, and she wasn't able to recognize people whom she knew.

She suffered lacerations to her face and head, and scars from those cuts are still visible.

As a result of those injuries she has had to undergo five separate surgical procedures in respect of her arm and her face and has had to consult some seven doctors including psychiatrists and psychologists to assist her with the process of healing.

Doctor Ian Neil, the consultant orthopaedic surgeon on her case, reported that Mrs. Duncan-Walker had suffered:

- significant head injury
- fractures of ribs 4-6 of the right chest with a small haemopneumothorax
- mild subluxation of C6 & C7 cervical vertebrae
- a fracture of the lamina of C6

- extensive crushing and laceration to the right elbow extending proximally onto the arm and distally onto the forearm. The wound was grossly contaminated with skin, muscle and bone loss
- loss of portions of the triceps, the common extensor origin and the brachioradialis muscles along with most of the lateral condyl of the humerus
- swelling and deformation of the whole arm and forearm
- segmental fractures of the shaft of the humerus as well as intrarticular fracture of the distal humerus
- displaced fracture of the mid-shaft of the right ulna

The major aspects of her treatment included the stabilization of the fracture with metallic implants and the Plaintiff testified that at some point in time she could see metal protruding from inside her elbow.

Her permanent disability in respect of the right arm is a 40% impairment which translates into a 24% whole person impairment. In addition to that she also has a permanent whole person impairment of 5% resulting from her neck injury. Added together, as recommended by Dr. Neil should be done, these make a total of 29%.

The head injury mentioned above was detailed in a medical report from Dr. Hansaranie Sankar (dated March 11, 1999 as follows:

- amnesic disorder/depression disorder
- Traumatic Brain Injury
- loss of independent functioning. Inability to drive, impairment of ability to take care of herself, moderate impairment in the ability to perform parenting duties and the ordering of a household.
- Memory Impairment
- difficulty in naming objects
- difficulty in judging time sequence
- depression
- insomnia
- impaired libido

There were confirmed by Dr. Ivor Crandon consultant neurosurgeon who also treated the plaintiff. Dr. Crandon assessed her permanent disability as being 8% of the whole person and opined that this disability was to be added to the disability arising from the orthopaedic impairment.

The final report to which I shall refer is that of Dr. Guyan Arscott a plastic surgeon who treated Mrs. Duncan-Walker and assessed that she had

permanent scarring over the right forehead, right arm and elbow and a permanent flexion deformity of the right elbow. He opined that further surgery would only produce minimal improvement.

Mrs. Duncan-Walker in describing the effect of the injury on her from day to day testified that she is unable to handle excess pressure. She said that even the testimony in Court had resulted in her having a headache. She is unable to lift weights with the right hand. She can write with the hand but not for long. She had also ceased driving.

She says the arm provides constant pain. She is unable to dress as she would before the injury and some personal grooming tasks such as combing her hair have proved challenging.

The limitations caused by her arm have prevented her from doing some household chores such as washing and also affected her effectiveness at work. That, along with problems with concentration, had caused her to resign from her job in December 2002 because she was not able to cope with her duties.

She also testified that she sometimes has blurred vision and as a result was unable to read clearly and had to get glasses.

Mrs. Duncan-Walker said that she goes to bed in pain and wakes up in pain. She testified that she has difficulty sleeping and relies on not only pain

killers but also sleeping tablets. The pain has resulted in her being depressed most of the time she said.

Finally she testified that she was embarrassed by the scars on her elbow and arm and as a result she no longer goes to parties or to visit friends.

I shall first address the matter of special damages. Of the \$396,329.00 pleaded only \$82,280.00 was proved.

The former sum included a claim for lost earnings but it proved that her employer at the time the Government of Jamaica paid her salary during the time of her complete disability. Counsel therefore did not pursue that aspect of the claim.

In respect of General Damages I shall first address the matter of Pain & Suffering and Loss of Amenities.

Mr. Lyttle on behalf of the Plaintiff referred the Court to the cases of *Dennis Brown vs. Jamaica Pre Mix Ltd.* reported at Volume 5 Khan, page 99 and *Brian Rigg vs. Icybell Boswell* reported at page 44 of Harrison's Assessment of Damages for Personal Injuries.

In the former case the Plaintiff suffered only near unconsciousness and did not suffer the head injuries which Mrs. Duncan-Walker suffered.

The orthopedic injuries suffered were somewhat similar though less severe than hers and Mr. Brown was assessed at having a 19% whole person disability flowing from the injury. Mr. Brown was awarded \$850,000.00 for pain and suffering and loss of amenities on March 2001. This figure converts to \$967,000.00 today.

In the *Rigg* case the Plaintiff was a 12 year old child suffering from significant crania – facial injuries resulting in mild brain damage. He had considerable disfigurement resulting from unsightly as well as facial asymmetry from an uncorrected displaced fracture of the left cheekbone.

I did not find this case very helpful because in reading the report I am of the view that the majority of the award arose from the facial disfigurement.

In the case of *Clovis Bryan vs. Leonard Hinds* reported at Volume 3 Khan page 108 the Plaintiff Mr. Bryan suffered lacerations of the right forearm, fracture of the distal end of the radius and a fracture dislocation of the right elbow. He also had headaches and pain. The permanent disability included a mal-united wrist, very restricted movement at the elbow and scarring and disfiguration. The award of \$120,000.00 in January 1990 is worth \$1,437,000.00 today.

The two cases from which guidance is derived do not however address the head injuries suffered by Mrs. Duncan-Walker. Though researches failed to unearth a case which was closer to her situation, some guidance was found from the case of Nicholas Sergeant (b.n.f. Princess Brown) vs. Livingston Muirhead reported at Volume 5 Khan at page 178. In that case the Plaintiff was a child of 12 at the time of the injury being inflicted but was 20 years old at the time of trial. He suffered unconsciousness, and fractures of his skull and right fibula and a metacarpal of his right hand among his major injuries. As a result of his recent memory deficit emanating from the injury, he was left with a 5% whole person disability with a 15% risk of delayed onset of epilepsy.

He was awarded \$750,000.00 as General Damages for Pain & Suffering on April 24, 1998. The equivalent today is \$1,040,214.00.

Since the authorities make it quite clear that awards for personal injuries cannot be segmented and then added together, the Court now has to look at Mrs. Duncan-Walker as an individual with a 37% whole person permanent partial disability who has suffered severe injury and pain and continues to suffer pain as a result of those injuries.

The Court cannot ignore however that she functioned effectively in giving evidence, handling the large number of documents being tendered into evidence with efficiency and ease of movement.

Taking all those things into account the Court finds that her injuries were far more serious than the injuries in any of the other cases mentioned above. An award of \$2,500,000.00 is considered an appropriate award in the circumstances.

Mr. Lyttle in his final submission asked the Court to make an award for loss of future earnings as well as a sum for handicap on the labour market. Whereas the Plaintiff gave evidence as to her net earnings at the time of resigning her job as being \$18,900.00 per month, she had given no evidence as to any attempts at finding other employment.

She had been employed as an Assistant Procurement Officer as well as Inventory Manager. I am not satisfied that she has made any effort to mitigate her loss and on that basis and relying on the approach to be taken in assessing loss of future earnings (per Lord Denning in *Fairley v. John Thompson (Designs and Contracting Division Ltd.)* (1973) 2 Ll L. Rep. 40) I am not prepared to make an award in this area.

It is clear however that the Plaintiff will have some difficulty in performing in particular types of jobs bearing in mind her inability to write

for but short periods and inability to concentrate for long periods without headaches, as well as with her recent memory loss. As a result I am prepared to make an award for handicap on the labour market using the approach of Cooke J, as reported at Volume 5 Khan at p. 122 in the case of *Anthony Campbell vs Level Bottom Farms Ltd. & Paul Samuels*.

I approach the task as follows:

At 39 years of age a multiplier of 7 for Mrs. Duncan-Walker is reasonable. Applying that to an annual salary of \$226,800 the result is \$1,587,600.00. Since the Plaintiff's disability is 37% she would be awarded 37% of that figure resulting in an award of \$587,416.00 as an award for handicap on the labour market.

In Summary therefore damages are assessed as follows:

Special Damages	-	\$ 82,280.00
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with interest thereon at 6% per annum from 26th July, 1998 to the 15th

April 2003

General Damages

Pain & Suffering & Loss of Amenities -	\$ 2,500,000.00
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Handicap on the Labour Market	-	<u>587,416.00</u>
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Total	\$ 3,087,416.00
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with interest on \$2,500,000.00 at 6% per annum from 26th July, 2001 to 15th April, 2003.

Costs to the Plaintiff in the sum of \$52,000.00 as per part 65 of the
Civil Procedure Rules 2002.