IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G097 OF 1991

BETWEEN	DOREEN GRAY	PLAINTIFF
A N D	IVANOE RICKETTS LIMITED	1ST DEFENDANT
A N D	DONAVON FRANCIS	2ND DEFENDANT

Ainsworth Campbell and L. Campbell for the Plaintiff

David Henry and W. G. Somers instructed by Nunes, Schofield DeLeon & Co. for the Defendants.

Heard: December 1, 2, 3, 6, 16, 1994 and February 23rd, 1995.

Pitter, J.

In this action the plaintiff claims damages arising out of a motor vehicle accident along the Walks Road in the parish of Saint Catherine on the 4th February 1991, in which she was seriously injured. Liability is not contested by the defendants and the matter comes before me for assessment of damages.

The plaintiff's evidence is that at the time of the accident she was a pastry-maker and dressmaker, 48 years of age. That as a result of the accident she suffered a broken leg, broken left arm, broken hip, fracture of the right knee and numerous cuts to the head, ears, jaws, right arm, elbow and left leg. She was admitted to the Spanish Town Hospital where she spent two days and was subsequently transferred to the Kingston Public Hospital where she was admitted for ten weeks and was treated by several doctors including Doctors Ali, Blake, Collins and Meena. Subsequent upon her discharge from the Kingston Public Hospital she was seen by Doctors Meena, Collins and Dundas. She testified that she could not do any household chores and on returning home she had to employ the services of a domestic helper. She was unable to continue her pastry-making i.e. the making of patties because of the resultant condition of her leg and left arm.

As to her dressmaking she is limited to making one dress per week as her right leg is very weak and it hurts when pressure is applied in operating the machine. The injury to her knee would cause her to fall unexpectedly bringing further injuries to her.

Doctor Alphanso Meena treated the plaintiff at the Kingston Public Hospital after her being referred from the Spanish Town Hospital on 7.2.91. On examination he found her left arm in plaster cast, a 6" x 4" abrasion over the posterior aspect; the left knee had a 6 cm. infected open wound over the medial aspect; the right lower limb was held with a splint; swelling and tenderness with no neuro-vascular deficit. X-ray examination showed a spiral fracture of the left humerus with a 1/3 fragment displaced over the distal third i.e a longitudinal fracture around the bone; a third fracture was a long piece of bone separate from the two main bones - a comminuted fracture; the right lower limbs, right hip, intertrocantary fracture displaced and comminuted; the right femur had a comminuted fracture at the midshaft with displacement. She was treated by means of close manipulation, close reduction to her left arm (application of plaster cast). There was an insertion of a pin to her right tibia for escalatory traction of the hip. There was cleaning and debridement of the wounds and abraisions and infected parts cut out. Anti-biotics, anti-toxoid and pain killing drugs were administered. He regarded the injuries as serious.

On the 17th March 1991 the plaster to the left arm was removed. The fracture site was solid and psysiotherapy started. Escalatory tracking was removed on the 11th April 1991 and the s-pin removed on the 15th April 1991 when she was discharged from the hospital to be followed up by clinic.

On the 27th May 1991 she was seen at clinic and at that time all her fractures were solid and she was partial weight-bearing on crutches. On the 2nd November 1992 she was further examined and she complained of tenderness of the left arm sometimes. There was pain over the right hip on walking sometimes, pain over the right knee and weakness over the same knee.

Dr. Meena on examination of her left arm found no tenderness on touch, range of motion and movements at shoulder joints moderately restricted in all directions - power and sensation were normal. There was no tenderness to the right hip on touch and the range of motion was slightly restricted in all directions at the hip joint. She walked with a significant limp and has problems climbing steps or hills, as a result of the accident her right lower limb is 1½" shorter than her left lower limb. The assessment then was that the plaintiff suffered permanent functional impairment of 10% to her left upper limb and 40% to the right lower limb.

Dr. Meena's latest examination was on the 1st November 1994 and he found the left upper limb and left humerus fracture site solid with some degree of varus deformity also demineralisation of the bone with the result that the bone is weaker than normal and more easily fractured. The inter-trocautary fracture was solid with good alignment. The fracture of the mid-shaft of the femur was also solid with healing in overlapping portion. There was varus deformity at the fracture site (angulation). There were signs of demineralisation and asteo-arthritis in the knee joint. He assessed her permanent partial disability to be 10% of the left upper limb and 45% of the right lower limb. There was crepitus sounds on flexion of the right knee joint which is symptomatic of osteo-arthritis taking place in the joint secondary to prolonged immobilisation of the joint. This condition causes pain from time to time and can only be temporarily alleviate with pain killers. He says that corrective surgery could be done to the plaintiff's right leg to improve her condition which would necessitate hospitalization and a period of convalescence for 5 - 7 days and at home for about 3 - 4 months. With physiotherapy she should be back to normal within 7 - 8 months. If the corrective surgery is accomplished, this would reduce the permanent partial disability to 30%. The cost of hospitalization and surgery is estimated to cost $80 - $90,000.

In so far as the left upper limb is concerned, power and sensation is normal but the plaintiff would have some limitation in lifting load because of the fracture and the slight weakness.

At the end of Dr. Meena's cross-examination and the recall of the plaintiff, Mr. Campbell asked for an amendment to the Statement of Claim for the permanent partial disability to read 45% instead of 43%. Mr. Henry did not appose and the amendment was allowed. He also asked for a further amendment to the Statement of Claim to add a further paragraph to read "Development of osteo-arthritis in the knee". Mr. Henry opposed on the ground of surprise stating he would need some time at which point Mr. Campbell withdrew the application and closed the plaintiff's case.

Dr. Dundas a consultant orthropaedic surgeon testified that he saw and examined the plaintiff on the 4th March 1993 and prepared his report which was admitted in evidence. He found that as a result of being involved in a motor vehicle accident on the 4th February 1991 she sustained a multiciplicity of lacerations to the scalp, forearms, legs and left foot and that she also sustained fractures to the left humerus and right femur. Dr. Dundas' report corroborates essentially with the evidence of Dr. Meena. In his viva voce evidence, Dr. Dundas in addition says that he evaluates the plaintiff's suffering 43% partial permanent disability in right lower extremity 20% partial permanent disability of the whole person and 5% left upper limb, that X-ray examination suggested that there was a crack to the right hip joint - on the acertabulum - the cup of the right hip joint - which did not appear to have healed at the time of his review. However, X-rays done on the 1st November 1994, showed no evidence of the fracture which is completely healed. The plaintiff, he said, should have operative surgery to correct alignment of the right lower limb. This would entail evaluation of the status of the knee joint, through a process of arthoscopy, repairing of the deficiencies in her muscles and an osteophoney and lengthening of the right femur using a devise known as an external fixator which would allow for the restoration of the length in the femur. These procedures would require two separate undertakings. It is his opinion that if everything went perfectly, the residual problems which she could have relate to the rotational defect in her hip as well as the deficiency in range of movement of her knee - a somewhat uncertain quality.

At best, he anticipates a residue of 18% of the effected extremity or 7% of the whole person. The more likely outcome however would leave the plaintiff with 26% permanent partial disability of the right lower extremity or 19% of the whole person. If appropriate lines of therapy were taken at the beginning, then surgery would not have been necessary. This type of operation would have been practical within a week. He estimated the total cost of surgery including hospital medication and sundries to be $230,000.

The X-rays showed signs of osteo-arthritis changes which resulted in the narrowing of the medial compartment. The osteo-changes of such small proportion in relation to the deformity. Osteo-arthritis is very painful and puts great restriction on ambutation. It cannot be healed and the process is progressive and irreversable. Medication to alleviate the pains would cost a low of $6 - $7 per day to a high of $35 - $45 per day.

At the end of Dr. Dundas' evidence and after the close of the defendant's case, Mr. Campbell sought a further amendment to the Statement of Claim to read as a new paragraph the following:

> "(xx) The development of osteo-arthritis in the knee that will need further surgery."

Mr. Henry opposed the application on the ground that he had closed his case and was now taken by surprise. The application for amendment was dis-allowed.

The evidence discloses that the significant injuries to the plaintiff are the fracture to the humerus, the fracture to the femur, and the fracture to the trocantur and the numerous lacerations to various parts of her body. Mr. Henry contends that if appropriate lines of therapy and treatment were administered there would be no need for further surgery today. That had she been treated properly at the hospital her permanent partial disability to the right lower limbc would have been only 30% therefore 15% would be attributed to the deficncy of her treatment at the hospital, and having regard to the evidence, the Court can properly attribute blameworthiness to the defendant as well as the hospital.

The defendant would therefore be responsible for 30% if treatment had been appropriate.

The evidence suggests nothing of the kind. The plaintiff from the moment of her injury, was admitted to hospital where she received treatment. She attended the clinic after her operations where she received further treatment.

Dr. Meena said that as a result of the injuries received in the accident, she had a 45% permanent partial disability of the right lower limb and 10% to the left upper limb. Corrective surgery could be done to the right femus to improve her condition which would require further hospitalization and psysiotherapy. It is hoped that once corrective surgery is done her status would improve and the likely disability would be reduced to 30%. I note the uncertainty in the result. Dr. Dundas said that if corrective surgery was done and if everything went perfectly, at best he would anticipate the plaintiff to have a residue of 18% of the right lower limb or 79% of the whole person, however the more likely outcome would be 10% of the whole person respectively.

She consulted Dr. Dundas with regards to her corrective surgery in March 1993. She also sought advise from Doctors in U.S.A - no malingering. I do not find that the need for corrective surgery is due in any way to the negligence of the hospital. From the evidence of both doctors, the outcome of surgery is very uncertain and nothing in the evidence suggests that the treatment administered contributed to the need for corrective surgery. There is no evidence however to explain why she has not done the operation up to now. Mr. Henry suggests that there should be a cut-off point for which the defendant should be made liable and from that date the liability should be only 30%. Defendants should only be called upon to pay the cost of surgery as it would have been in April 1993. He concludes however, that there should be no award for cost of surgery as there is no proper basis on which the Court could make this award having regard to the evidence.

As regards general damages Mr. Henry referred to the case of Donald Williams v. Ennette Cope S.C 60/91 where an award of $130,000 was made in September 1990 for the following injuries:

1. Lower body was swollen and tender over the right lumbar region.

2. The pelvis was painful on touch over the symphis pubic - swollen.

3. Left lower limb had abrasions to the lateral interior aspect of the knee (right side of knee)

4. 10 cm. abrasion to right leg - anterior aspect.

5. Small puncture wound over anterior aspect distal turn of left leg.

6. On X-ray the pelvis was seen to be fractured to the roof of the right acetabulum. There was separation of the pelvic symphis. There was displacement of the right sacro-iliac joint.

7. The left lef had a compound commimuted fracture of the tibia and fibula.

There is a 15% disability of the whole man.

Applying the current consumer price index, today's award would be $600,000. He says that as there is likely to be some improvement to her condition then the award should be $500,000. If however the Court accepts culpability y on part of the hospital the award should be $450,000.

The case of Gloria White v. Mark Fletcher Suit C.L. W192/90 was also referred to, where in October 1993 an award of $500,000 was made, which, translated to today's value, applying the current consumer price index, would be $650,000. Applying blameworthiness of the third party would reduce the amount ot $500,000.

The injuries cited were:

1. Three inch (3") laceration to posterior aspect of head.

2. Tenderness of the left side of chest.

3. Swelling and deformity of both thighs.

4. Swelling and deformity of the right leg.

5. Six inch (6") laceration to right groin.

6. Abdominal tenderness.

7. Fracture of right femur.

8. Fracture of left femur.

9. Fracture of right tibia.

10. Development of necrosis to anterior aspect of the right thigh.

11. Development of skin necrosis to the anterior aspect of left thigh.

As regards to handicap on the labour market, Mr. Henry submits that the evidence does not support an award. He however suggests that if such an award is made, it should only be a nominal sum not exceeding $10,000. Under heading future los of earning, he submits also that no award should be made in light of the medical evidence. In support he cites the case of Robinson & Co. v. Lawerence (1969) 11 J.L.R at page 453 where Hercules J.A (Ag.) in delivering judgment referred to the judgment of Lord Goddard in Bouhan-Carter v. Hyde Park Hotel Ltd. (1948) 64 T.L.R at page 178 who declared:

> "On the question of damages, I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask to give me these damages'.
>
> They have to prove it".

This principle is set out in Stroms Bruks Aktie Bolag v. Hutchinson (1905) 525, 526 when Lord McNaughton declared:

> "Special damages are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly".

Mr. Campbell in reply observed that the injuries taken together have left the plaintiff greatly incapcitated, suffering greatly with the prospect of continual suffering. That she is extremely vulnerable to hazards or the physical surroundings in her effort to go about her ordinary business inspite of her exercising caution and care. Her evidence speaks to this where she said that her right knee gave way under her and on the last occasion she fell and sustained a laceration to her frontal scalp.

On general damages he contends that the case of Williams v. Coke Supra is not applicable as in that case the injury was to the pelvic region only. He discounts the amounts suggested by Mr. Henry for both General and Special damages. As regards the award of pain and suffering he submits that a figure of $1.1M to $1.2M be awarded. To support this he cites the following cases as a guide to an assessment:

(1) Harris v. McKenley (1989) reported at Khans Vol. III at page 8.

The injuries stated were:

(a) Swelling of the middle and lower third of both thighs.

(b) Puncture wound left tibia.

(c) Fracture of both femur.

(d) Shortening of both legs resulting in bowing particularly on left leg.

The resultant disability were 10% - 15% permanent partial of the right lower limb and 20% - 25% permanent partial of the left lower limb.

An award of $280,000 for pain and suffering was made in March 1989 which when converted that sum is now $81.68M approximately.

(1) In the case of Clifton Edwards v. Valvin Brown (1990) reported in Khans Vol. III page 228 as follows:

(a) Unconsciousness for a short period - laceration over the distal third of right leg.

(b) Compound communicated fracture of right tibia and fibula.

(d) Disfigurement and deformity of the right lower limb.

(e) Blow to the back.

(f) Permanent partial disability of 30% of the right lower limb which could be reduced 15% - 20% if an operation is successfully undertaking.

An award of $150,000 for pain and suffering and loss of amenities was made.

Using the consumer price index this would translate to $608,000 today.

(3) The case of Bryan v. Hines (1990) reported at page 108 of Khans volume III the injuries were as follows:

(a) - Laceration to right forearm, dorsum of right hand.

- Fracture of distal end of right radius.

- Fracture dislocation of right elbow.

- Headaches and pain.

Residual disability:

- mal-united

- very restricted movement at elbow

- scaring and disfiguration

The sum of $120,000 was awarded as general damages in January 1990 which when converted amounts to $21,000.

(4) In Wayne v. Beverley Dryden (1987) Khans vol. III page 71 the injuries were as follows:

- Badly crushed right lower limb with compound fracture of the right tibula and fibula, shock and substantial loss of blood.

Residual disability:

- scar over anterior aspect of right leg

- deformity of the leg (fracture had not been reduced)

- scaring at fracture site (10" x 2") with 2 incision scars above and below this scar.

- scar (9" x 2") to the posterior and lateral side of leg .

- growth disturbance with overgrowth of right leg which was bigger and ½" longer than left leg

- Corrective surgery could be undertaken but it was uncertain as to whether the disability would be removed.

- permanent partial disability 15% of right lower limb.

The Court of Appeal confirmed the award of the Lower Court of $70,000 for pain and suffering and loss of amenities. Converted today the amount would be $506,000.

It is Mr. Campbell's contention that given the totality of the injuries suffered by the plaintiff the sum to be awarded is conservatively $1.2M.

In the case of Gloria White v. Mark Fletcher/to which Mr. Henry made reference, the permanent partial disability amounted to 15% to the right lower limb and 10% to the left lower limb. Clearly this compared with the plaintiff's disability is far less serious.

The case of Edwards v. Brown (supra) appears to be more helpful in relation to injuries to the lower limb and resultant disabilities. Having regard to the injuries to the plaintiff's left upper limb, right lower limb coupled with the multiplicity of lacerations over her entire body and the resultant disabilities, all the injuries taken together would attract in my view the sum of $750,000 for pain and suffering and loss of amenities

Cost of surgery

Dr. Dundas' evidence is that corrective surgery will cost $230,000. Mr. Henry suggests that the award for surgery should be allowed only to extent as to what it should have cost in April 1993 although there is no evidence as to the cost at that time. I can find no reason for so doing. The amount of $230,000 is accordingly awarded.

Future Travel

The evidence supports the claim of $5,500 under this head and which is awarded.

Loss of earnings

The plaintiff's evidence is that she is a pastry-maker engaged in the patty business and also an accomplished dressmaker. In her patty-business she employs a man who makes the dough but not the patties. She said that because of the injuries to her left upper limb and her right lower limbs she was unable to continue the patty-business since September 1992. This because the making of patties requires her to lift heavy trays and place them in the oven. To carry out this exercise she would stand for long periods and this she could no longer do. It was suggested to her that the same person she employed to help her could do the lifting and placing of the trays in the oven. She countered that there is more to the making of patties than the making of dough, but she did not say what "more" was required in the making of patties that a hired help could not do. Since the accident she has not made any attempt to restart the business. I am of the view, as suggested by Mr. Henry, that in an effort to mitigate her losses, the plaintiff could have continued in the patty-business by employing extra help which would obviate the need for her to do the physical aspect of it. This being so, her claim for loss of earnings will be limited for the period up to September 1992. Again he relies on the dictum of Lord Goddard in Houham-Carter v. Hyde Park Hotel Ltd. (supra). The plaintiff said she earned a net profit of $2,400 per week. However, detailed cross-examination revealed that the figures she gave would place her in a position where her net profit would be in the region of over $4,000 per week. She kept no books. It is well known that persons in the position of the plaintiff, operating from her kitchen as she did, are not given to keeping accounts and be able to extract an audited balance. She however knows she makes a profit and she gave figures to support this. Should she be deprived of an award in this area merely because the figures she gave, although in her favour, are not precise? Great injustice would have been meted out to her if she is denied her claim on this basis. Surely 'strictly proven' in the above dictum could not be taken to mean beyond reasonable doubt and the standard of proof remains on a balance of probabilities. I am satisfied from her evidence that she did make a profit in the region of $2,400 per week from her patty-business.

As to her dressmaking skills, she never seemed to employ them until February 1994 when she no longer continued her pastry business. I will allow for her loss of earnings which is confined to the patty-business and which will be calculated from the date of the accident until the 30th September 1992 which amounts to $206,400 (86 weeks @ $2,400 per week).

Handicap on the labour market

The plaintiff's handicap is her inability to stand for long periods and to lift heavy loads as also the limitation in using the sewing machine which affects her dressmaking skills. Her evidence is that she earns $200 per week from this latter exercise and this only since February 1994. Up to that time she was only able to make one dress per week due to her disabilities. There is no evidence showing how much she would have earned as a dressmaker had she not suffered the disabilities. Mr. Campbell under this heading, seeks an award of $200,000 on the basis that the plaintiff could not continue her business. In light of the foregoing and the real possibility that corrective surgery will allow the plaintiff to return to her occupation, and, bearing in mind that an award for corrective surgery has already been made, again, I find favour with Mr. Henry's suggestion that a nominal sum of $10,000 be awarded. Accordingly the sum of $10,000 is awarded under this head.

Loss of future earnings

Mr. Campbell submits a figure of $936,000 under this heading. This is based on $2,400 per week using a purchase of 10 years she being 48 years old. The Court having found that there should be a cut-off point in the claim for loss of earnings, no further award will be made to embrace future loss of earnings as the evidence does not support this.

Special damages

Amount of $13,600 for household help is awarded as pleaded. The following items under this head are agreed on:-
Transportation $2,600, glasses $1,040, psysiotherapy $370, shoes $180, girdle $180, dress $210, watch $320, slip $144, brassiere $180, medical bill $5,410.

The other items of claim I find proved are the loss of:-
3 bags flour $408.33, 30 lbs. Patty meat $360, 30 lbs. sweets $210, 4 lbs. patty spice $42, 21 lbs. egg powder $110, 30 lbs. escallion $105, 10 lbs. thyme $100. The amount of $1000 is also awarded for medication.

The total amount awarded for special damages is $232,959.33.

General damages

Pain and suffering and loss of amenities	-	$750,000
Future medical expenses (corrective surgery)	-	$230,000
Future travel	-	$ 5,500
Handicap on the labour market	-	$ 10,000
	Total:	$995,500

In fine, damages are assessed in the sum of $232,959.33 for special damages with interest at the rate of 3% p.a. from the 4th February, 1991 to the 23rd February, 1995 and in the sum of $995,500 for general damages with interest on $750,000 at the rate of 3% from the 10th June, 1991 to the 23rd February, 1995.

Cost to the plaintiff to be agreed or taxed.

Cases referred to
(1) [illegible] v [illegible] Cape [illegible] 60/91 – Sept. 90
(2) [illegible] W 192/90 – Oct. 93
3 [illegible] (19[illegible]) [illegible] L.R. 4[illegible]
4 [illegible] (19[illegible]) [illegible] 1[illegible]
5 [illegible] Khan Vol III p 8
(6) [illegible] (19[illegible]) Khan Vol III p 2[illegible]
(7) [illegible] v [illegible]
8 B[illegible] (19[illegible]) [illegible]
(9) Wayne v B[illegible] Dryden (1987) Khan Vol III p 7[illegible]