

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L 1994/H111

BETWEEN	RICHARD HOEHNER CELIA HOEHNER	FIRST PLAINTIFF SECOND PLAINTIFF
AND	W.A REID CONSTRUCTION CO. LTD	DEFENDANT

Miss C. Hudson for Plaintiffs

Miss D. Gentles instructed by Livingston, Alexander and Levy for Defendant

Heard - June 15, 16; November 9, 12, 19, 20, 23, 1998; February 22, March 26, 1999

Judgment

HARRISON J

Liability is not in issue in this case so, it is only for me to assess damages. These damages have arisen as a result of a motor vehicle accident which occurred on the 27<sup>th</sup> January 1994. The motor car in which the plaintiffs were travelling is registered in the name of the first plaintiff. It was badly damaged and as a consequence the second plaintiff was seriously injured.

FIRST PLAINTIFF

Let me deal firstly with the first plaintiff. It has been conceded by Counsel for the plaintiffs that the first plaintiff would only be entitled to \$30,000.00, under the head of special damages. This sum represents his excess which he had to pay. I would also allow the sum of \$8,400 which he has claimed in respect of loss of use. Two weeks would be a reasonable period of time within which he should have replaced his motor vehicle and I do believe that the daily sums claimed is reasonable. I would also allow the sum of \$2,000 for the assessor's report.

SECOND PLAINTIFF

General Damages

The second plaintiff was unconscious and later found herself in St. Joseph's Hospital in Kingston. She suffered serious injuries and although recovery was unfortunately delayed due to complications she has made a remarkable recovery. She had four operations and remained in hospital for approximately thirty-seven days. Six medical reports were agreed to and admitted in evidence. Her

injuries included:

1. Head injury(minor contusion)
2. Loss of consciousness.
3. Fracture of the nasal bone.
4. Fracture of the left ulna, radius and humerus.
5. Fracture of the right femur
6. Lacerations and cuts to the left thigh, knee, leg, buttock, groin and forearm.
7. Trauma to the abdomen and chest.
8. Deformity of the thigh and forearm.
9. Weakness in the hip which resulted in a trendelenburg gait, inability to walk long distances and up stairs.

The evidence revealed that Dr. Rose, Dr. Arscott, Dr. Cheeks, Dr. Lennox Francis and Dr. Ballie were her medical doctors.

For approximately two weeks whilst in hospital, she was unable to move any part of her body. Everything was done for her and she had to resort to the use a bed pan for approximately 3 months.

After her discharge from hospital she recuperated at her mother's home in St. Andrew. She was attended to by nurses from the Hyacinth Lightbourne Nursing Centre for about 25 days. There was great difficulty on her part moving around.

Physiotherapy was administered in hospital and at home. Therapy lasted for 2 ½ weeks at home. She had to use a quad cane to walk around with the assistance of a crutch. This cane was used for a period of about 7 months.

After the fourth operation Dr. Rose had advised a further operation as she was still having difficulty in walking. Rather than doing this further operation she opted to use a "physio-stym" machine that was recommended by a Dr. Aird and which would stimulate bone growth. This machine had to be rented from a company in Texas as it could not be obtained locally. Treatment was for about seven months.

She has ended up with scars on her thigh, legs, forearm and other parts of her body. Some of these scars are as a result of surgery. The scars have caused her humiliation but she proposes to do plastic surgery in the future. She is now 49 years of age and is unhappy wearing sleeveless clothes or a swim-wear. Dr. Arscott has expressed the view however that with corrective surgery, there should be a fifty to sixty percent improvement in the appearance and symptoms of the scars.

Before the accident she was very health-conscious. She had a flat stomach and she would wear her clothing tight around the hip area. Since the accident she has a sink and a bulge in the hip area. Her figure is no longer what it was before.

Her right leg is very small because she has lost muscle tone due to lack of use. Her left leg is much larger and muscular. The right buttock is now hung down as this was part of her body which was injured. She also sustained a broken nose which has resulted with a bulge at the top of the nose. Dr. Arscott was also of the opinion that corrective rhinoplasty to the fracture of the nose would improve the symmetry of the nasal bones and appearance of nasal profile.

She is able to stand comfortably for periods of fifteen minutes. According to her, "at times it is better and other times not good." It depended on the weather. She has pains when it gets cool and has a difficulty in air-conditioned rooms. Even though the surgical plates have been removed she still has pains. She has to keep a heated pad by her bed and she uses Tiger Balm and Radian -B to ease the pain as she has taken too many pain killers.

She is unable to drive for long distances and has to stop at intervals in order to stretch her legs due to cramps.

She is also unable to do things together with her two daughters as she did before. Some of the things include dancing. She claims that her sex life has been affected but there is no medical evidence to support this. She says however, that she was unable to have sexual intercourse with her husband for about 2 years after the accident.

She can no longer do her skiing in Switzerland when she goes there with her Swiss husband at least once per year.

She is not able to do landscaping anymore as it involves a lot of walking and physical work that she no longer can do. She has continued her gardening at home however, but has abandoned her green house.

She was a jogger before the accident but she is unable to do this now. Neither can she walk for any distance. She is also unable to do her aerobics that she did before the accident. She is unable to run and if she squats it feels as if she was pulling the stainless steel plates which have been inserted in her leg.

She was also an active dancer. She has not been to carnival in Trinidad since the accident. She can do some soca. She cannot do the waltz as she cannot be directed to the right. Her sewing has also been hampered as she can no longer use the sewing machine to make her carnival costumes.

It is without a doubt that Mrs. Hohener has suffered serious injuries and when seen by Dr. Rose on the 6<sup>th</sup> July, 1996 he stated that she had made a "very satisfactory recovery". His final report of May 17, 1997 stated that she had continued to have a trendelenburg gait however, which was due to weakness of the abductors of the right hip. He observed a full painless range of motion of the right hip, right knee and right ankle and that she had a grade 4 power in hip abduction. He concluded that there was a 25% permanent partial disability of the lower extremity which is equivalent to 10% of the whole person.

The question which now arises is, what would be a reasonable figure to compensate this plaintiff in respect of her pain and suffering and loss of amenities? Miss Hudson has urged me to make an award between \$3,800,000.00 - \$3,400,000.00. She had referred to the following cases:

1. Buchanan v Blake reported at page 45 of Khan's Vol. 4
2. Edwards v Browning reported at page 238 of Khan's Vol. 3
3. Dixon v Jamaica Telephone Co. At page 310 of Harrison and Harrison on the Assessment of Personal Injuries.
3. Whyllie v Campbell and Anor reported at page 86 of Khan's Vol. 4

Miss Gentles on the other hand, has submitted that an award of \$730,000.00 would be reasonable compensation under this head. She referred me to the undermentioned cases :

1. Martin v Industrial Commercial Development Co. And Another reported at page 145 of Harrison and Harrison (supra)
2. Sobaram v Bicknell and Anor. Reported at page 207 of Harrison and Harrison (supra)
3. Wilson v Caven reported at page 168 of Harrison v Harrison (supra)

Of the cases cited, I do believe that Martin v Industrial Commercial Dev. Co. & Anor (supra) is most helpful. A comparison of the injuries as outlined by Miss Gentles in her written submission is important and are worthwhile repeating here. The plaintiff Martin, was 41 years old at the time of trial and had the following injuries:

1. Lacerated wound on the left side of her chin and left leg.
2. Loss of upper incisor tooth
3. Fracture of the left ulna and radius, left tibia and fibula
4. Deformity of the left foot.

She was admitted in hospital and after being in hospital for four(4) to six (6) months she was discharged. She had developed a spreading infection of the left lower limb and required debridement. She was left with several scars. Among them were :

1. A 14x2 c.m scar to the upper aspect of the back of the left thigh.
2. A 58 cm scar that extended from the upper aspect of the left thigh's outer border beyond the knee to the upper third of the left leg (J shaped). This caused a marked soft tissue deformation around the knee. This was jagged and unsightly.

Her permanent partial disability was assessed at 7% of the whole person. There was evidence that corrective and re-constructive surgery would make a 70% improvement with respect to her scars. On the 26<sup>th</sup> November 1992 she was awarded \$250,000 which updated now values in the region of \$730,000.00.

When all the circumstances are taken into consideration, it would be fair to say that both Miss Martin and the present plaintiff have comparable injuries. There are differences however, as to the whole person disability and the percentage of recovery after constructive surgery is done to Mrs. Hohener. In addition, she has suffered a fractured nose which is somewhat deformed and this will have to be corrected also by corrective surgery. The loss of amenities sustained by Mrs. Hohener could be considered great. No mention is made in the Martin case as to the amenities if any, that were lost. Mrs. Hohener was definitely an active person. She was one who seemed to enjoy her dancing and this she cannot do now with the usual vigour. Her sewing, jogging, aerobics, and skiing are also lost and from all appearance she will no longer be able to pursue these amenities. Physically, she is no longer able to do the things she could have done before. I take into consideration that she is also getting on in age so, she could not be expected to be as active as before.

It is my considered view therefore, that an award of One million dollars (\$1,000,000.00) would be reasonable compensation for pain and suffering and loss of amenities. An additional sum for corrective surgery for the scars and rhinoplasty should be awarded also under general damages. I would therefore award a sum of \$140,000.00 for surgical management of her non-surgical scars and \$120,000.00 for corrective rhinoplasty. These are the figures which were set out in the medical report of Dr. Arscott.

#### Special Damages

The authorities are quite clear that special damages must be specifically proven. Documentary evidence was established in some of the items claimed but in others it was the mere "say so" of the second named plaintiff. I am therefore reminded by Miss Gentles that "plaintiffs ought not to be encouraged to throw up figures at trial judges and make no effort to substantiate them...." (Per Rowe P in Harris v Walker SCCA 40/90)

Receipts were produced in respect of some items. I find the undermentioned proved on a balance of probabilities:

	\$
1. Dr. Arscott's fees for debridement	20,000.00 (Ex. 3)
2. X-rays and Lab Tests	13,710 .00 (Ex.4, 5, & 6)
3. Quad cane	1,150.00 (Ex. 7)
4. Deluxe Ambulance Service	1,950.00 (Ex. 8)

5. Physiotherapist	7,700.00 (Ex. 9,10 & 11)
6. Dr. Arscott's medical reports	8,000.00 (Ex. 12)
7. Dr. Rose (surgery)	47,500.00 (Ex. 13) 33,000.00 (Ex. 13)
8. Dr. Rose (surgery)	42,000.00 (Ex. 14)
9. Dr. Rose (hospital visits)	4,000.00 (Ex. 15)
10. Dr. Francis	3,000.00 (Ex. 16)
11. Hyacinth Lightbourne Nursing Service	4,080.00 (Ex. 17)
12. Drugs	10,781.42 (Ex. 18)
13. Dr. Rose's medical reports	13,000.00 (Ex. 19)
14. Hospital Fees	90,345.23 6,950.48 37,983.12 (Ex. 20)
15. Orthofix machine	U.S \$5,550.00 (Ex. 22)
16. Aluminum cane	U.S \$17.00 (Ex. 24)

Sums allowed for items for which there is no documentary proof

Although there has been no documentary proof in respect of the undermentioned items, it is my view

that these expenses are reasonable and were necessary in the circumstances. I find that on a balance of probabilities the second plaintiff has satisfied me that the sums were expended and in some instances the figures represent sums for the replacement of lost articles at the time of the accident. They are:

	\$
1. Night nurses	900.00
2. Handle bars (She had given evidence of this sum so, I would allow it over the figure of \$2,802.00 pleaded)	1000.00
3. Bed pan (Evidence given as against the sum \$550 pleaded)	150.00
4. Wheel chair	2,400.00
5. Crutches (The sum of \$2,250 was pleaded but she gave evidence of \$2,000.00)	2,000.00
6. Pants	3,000.00
7. Blouse	2,000.00
8. Hand bag	8,200.00
9. Glasses	10,000.00

Expenditure for items disallowed

The second plaintiff has failed to satisfy me on a balance of probabilities that she has either expended or incurred expenses for the undermentioned items:

1. Visits to Dr. Rose ( She gave evidence that she had paid between \$14,000 to \$15,000. It was pleaded however, that these visits amounted to \$14,310.00. It is my considered view that she could have proven payment by obtaining a bill or some other document from Dr. Rose.)
2. The sum of \$47,000 which the plaintiff said she paid the helper has not been substantiated.
3. Transportation costs of \$15,000 has not been proved.
4. The evidence given as to cost of watch (\$26,000) pearl ring (\$58,000) and diamond ring (\$87,000)

is rejected as there is no documentary evidence to prove the value of these articles.

5. An invoice in the sum of \$25,603.62 for St. Joseph's Hospital was marked 21 for identification. Counsel for the plaintiff failed however, to have the item admitted as an exhibit. She has also conceded that this item has not been proved. In the circumstances, I am unable to allow this item as part of the expenses paid to the hospital.

6. The sum of \$85,000 which the plaintiff said she paid to Dr. Rose for her first operation has not been proved. Again, the plaintiff could have obtained and produced some form of documentary evidence from the Doctor.

7. The plaintiff also testified that she had paid Dr. Balli the sum of \$4,500 in respect of his bills. Her pleadings reveal however, a figure of \$3,000. No amendment was sought in respect of the pleadings. I am further of the view that she could have proved payment by producing some documentary evidence instead of asking the court to accept her mere "say so".

#### Loss of contracts and of earnings

This head of damages was not pursued by the plaintiff. No evidence was given as to the losses incurred, hence no award will be made under this head.

#### Rate of foreign exchange

I do accept Miss Gentle's submission that the proper rate of exchange to be applied in respect of the items purchased and/or rented in U.S dollars should be the rate of exchange in 1994. The Statistical Digest published by the Bank of Jamaica puts it as U.S \$1 - J \$35.54. When U.S\$5,500 and U.S\$17 are converted the equivalent in Jamaican dollars would be \$195,470.00 and \$604.18 respectively.

### CONCLUSION

There shall be judgment assessed for the Plaintiffs as set out hereunder:

#### First Plaintiff

Special damages in the sum of \$40,400.00 with interest thereon at the rate of 3% p.a from the 27<sup>th</sup> January, 1994 up to today. He shall have his costs taxed if not agreed.

#### Second Plaintiff

##### General damages

1. Pain and suffering and loss of amenities in the sum of \$1,000,000.00 with interest thereon at the rate of 3% p.a from the date of service of the writ of summons up to today.

2. Corrective surgery in the sum of \$260,000.00

##### Special damages



A total of \$570,874.43 with interest thereon at the rate of 3% p.a from the 27<sup>th</sup> January, 1994 up to today.

She shall have her costs taxed if not agreed.