

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H075/1992

BETWEEN

WENDY HOLNESS

PLAINTIFF

AND

ASTLEY MCKIE

DEFENDANT

Messrs John Graham and Hector Robinson instructed by Broderick & Graham for the Plaintiff.

Mr. C. Samuda and Mrs. K. Vouche' instructed by Vouche' & Vouche' for the Defendant.

Heard: October 14, November 8, 1993, April 8, 1994.

Assessment of Damages

HARRISON J. (Ag.)

This matter comes before me for damages to be assessed on behalf of the plaintiff.

The plaintiff, a modest young Miss, nineteen years old, is disabled and resides with her mother Delores Cooke at Guava Gap, Stony Hill, in the parish of St. Andrew. She is a deaf mute but this disability was not as a result of any injury she received in the accident.

Since she was unable to speak, Wendy Litchmore acted as her interpreter by means of the sign language.

On the 13th March 1992, the plaintiff was a passenger in the defendant's motor car when an explosion from the radiator caused boiling water to scald her on various parts of her body. She sustained burns, details of which I will deal with when I come to consider the Doctor's evidence.

I had the opportunity to view most of the burnt areas as Counsel was of the opinion that this would be of great assistance when the time came to determine quantum. Counsel for the defendant raised no objection. The scarring was severe and grotesque.

The plaintiff was admitted in the University of the West Indies Hospital on the date of the accident. Her mother visited her and had a most traumatic experience. She was seen naked, crying and in pain and there were bubbles with

water all over her body. Her fingers were swollen and the skin on her forearm, back, buttock, legs and thighs were peeled off.

She received treatment for her injuries and remained in hospital until the 8th June, 1992 when she was finally discharged.

Mr. Leighton George Logan, Consultant Plastic Surgeon attached to the Kingston Public Hospital saw and examined the plaintiff on the 14th October, 1993. He found the following injuries:

1. Left upper limb - extensive scarring on the posterior arm, the anterior and lateral aspects of the arm and the medial aspect of the forearm.
2. Left lower limb - scarring of the entire posterior and lateral thigh. There were also scarring to the posterior and lateral calf.
3. Right lower limb - scarring on the right side posteriorly. The right calf was similarly scarred.
4. Scarring of the entire back and buttock region.
5. Scarring on the left breast and left anterior chest.
6. Scarring on the left half of the abdomen.

The Doctor testified that the scars were principally of a hypertrophic nature, that is, they were raised and above the skin surface. It was his view that these scars were itchy and would be more itchy in warmer climates like that experienced in Jamaica.

Mr. Logan opined that immediately after the incident the plaintiff would have experienced severe pain because of the steam burns. It was further his view that once the burns were completely healed, actual pain would be reduced somewhat but itching would supervene.

In relation to the scarring, Mr. Logan testified that the scars could not be eliminated. He did not rule out surgery as a possible remedial measure but he would be very reluctant to proceed along those lines. He explained that the plaintiff had a tendency to form hypertrophic scars, and skin grafting would replace one hypertrophic area with another scar arising.

He suggested that two non-surgical options were open. Firstly, the plaintiff could be fitted with a pressure garment and secondly, she be given dosages of steroids and antihistamines.

The Doctor further testified that a pressure garment or what is termed a "Jobst" garment is akin to a very tight merino and if worn on a continuous basis for at least one year the hypertrophic scarring would be considerably reduced. The tightness he says, helps to reduce the scars and itching. For a patient such as the plaintiff he would recommend two sets of merinos which could be fitted to her entire body. This Merino is available only in the United States of America and cost between U.S.\$1,500.00 to \$2,000.00 per set.

Mr. Logan also testified that one must recognise that the possibility of an allergic response to the merino could arise but in the normal course of events this allergic reaction was remote. Itching could not be eliminated during the year of wearing the merino but it would be reduced. After the year there would be some residual itching but steroid injections could reduce this discomfort. Because of her size and age he would have to select areas for steroid injection and this could not be done for more than periods of three months. During breaks of 2 - 3 months antihistamines would be administered. Finally, he diagnosed that a 50% improvement although not uniform throughout, could be achieved with the use of the pressure merino, steroids and antihistamines. He also opined that a 100% restoration was not possible either with surgery or with the use of the pressure garment.

Under cross-examination Dr. Logan admitted that he had to gauge the expected improvement or response from one's own experience and the experience of others. He agreed that a patient who wore the pressure garment and being injected with steroids could have a positive result in nine months. He further admitted that at the time of his examination of the plaintiff he was not in possession of any report from a plastic surgeon but it was his opinion however, that surgery would not give the plaintiff the expected improvement. Further, he believed that if the plaintiff had the use of the merino and steroids before he saw her, her condition could have improved.

I now move on to quantify damages.

DAMAGES

Special Damages

This head of damages has been agreed at Twenty-five thousand three hundred and ten dollars (\$25,310.00).

Medical Expenses

Medical evidence revealed that the plaintiff would require two sets of pressure merinos and these range at a cost between U.S.\$1,500.00 - \$2,000.00 each. The cost of transportation and customs duty have not been included in these figures so these costs will have to be ascertained.

The Provisional Collection of Tax (Customs Tariff) (Revision) Order of 1993 published in The Jamaica Gazette Supplement dated March 19, 1993 deals with customs duty on articles of apparel and clothing accessories, knitted or crocheted. Medical equipment, accessories and apparatus are dealt with at page 500-501 under this Order but pressure clothing is not included among the medical items listed. Evidence has revealed however that the pressure garment is akin to a merino so it would be reasonable to apply the 30% rate of duty for knitted clothing as set out in Chapter 61 of the above Order.

By applying a rate of exchange at 33:1, a ~~conversion~~ of U.S. \$2,000.00 would amount to \$66,000.00. The duty then on \$66,000.00 would amount to \$19,800.00. No evidence of transportation costs has been established so I cannot estimate a sum.

Mr. Logan recommended 5 c.c. of steroids once every 2 weeks for a period of three months. The cost per treatment has been estimated at \$487.00. There would be six applications during the three month period hence the cost for administering steroids for this period would amount to Two thousand nine hundred and twenty-two dollars (\$2,922.00).

According to the evidence, antihistamines will cost \$100.00 per week. Since antihistamines will be administered during the 2-3 months break from steroids treatment, expenses would amount to 12 weeks at \$100.00 per week.

Mr. Graham has submitted that the Court should award additional sums in respect of the continuing use of steroids and antihistamines for the rest of the plaintiff's life. He further submitted that a multiplier of 10 ought to be used bearing in mind her age.

Mr. Samuda submitted on the other hand that the medical evidence did not disclose where the plaintiff would require treatment for the rest of her life. He contended that the Court should not extend the period of application beyond one year.

It is my considered view, bearing in mind the evidence of Mr. Logan that the plaintiff could have a positive result in nine months from wearing the pressure garment and the injection of steroids, that the period of time for administering drugs and wearing of the marine ought not to be extended beyond one year. I also hold that there was no evidence to support Mr. Graham's submission that this treatment should continue for the rest of the plaintiff's life.

For medical expenses, I would therefore allow the undermentioned items and expenses:

- a) Two sets of pressure garments at U.S. \$2,000.00 each = U.S. \$4,000.00.

When this sum of U.S. \$4,000.00 is converted the total cost arrived at is JA \$132,000.00.

- b) Customs Duty on two sets of garments - \$ 40,000.00
c) Application of steroids for one year - 11,788.00
d) Antihistamines for one year - 2,400.00

Total \$ 186,188.00

General Damages

Pain and Suffering

Apart from future medical expenses, Pain and suffering has been the only head under General damages to which Counsel has referred to.

The injuries which the plaintiff sustained were quite serious. She suffered pain and no doubt it must have been excruciating. She testified that the burns have itched her since the accident and when asked how often, her response to Mr. Samuda was, "all the time". She will have permanent disfigurement bearing in mind that the scars cannot be eliminated.

It was pleaded that she suffered burns covering 60% of the total body surface but unfortunately, Dr. Logan did not state the percentage in his evidence. The medical evidence disclosed however that the burns were extensive; they were

vividly described by Mr. Logan and seen by the Court. He opined that one could look for a 50% improvement at most with the method of treatment which he has prescribed. This improvement he said was related solely to the plaintiff's cosmetic appearance.

Four cases were cited by Mr. Graham in an attempt to assist the Court as to what would be an appropriate award in the circumstances of this case. I will advert to the decisions.

1. Owen Ellis v. Industrial Chemical Co. (Ja.) Ltd. reported in Recent Personal Injury Awards made in the Supreme Court and compiled by Mrs. U. Khan, at page 165 of Volume 2. The plaintiff in that case sustained extensive acid burns to 40% of the bodily surface which included the right side of back, front of trunk, chest and abdomen, groin including penis, both legs and both arms. The following disabilities resulted:
 - a) Scarring due to deep burns over his neck, trunk, external genitalia, upper and lower limbs.
 - b) ~~Hypertrophic~~ and non-hypertrophic scarring
 - c) Burn scars which were permanent.
 - d) Pleuritis
 - e) Patchy areas of depigmentation.
 - f) Stiffness in the right chest and upper groin due to tethering of the burn scars.

He was awarded \$150,000.00 for general damages in 1985.

2. Christopher Levy v. Esso West Indies reported in Recent Personal Injury Awards of the Supreme Court Volume 2 at page 173. The plaintiff in that case sustained superficial burns over 42% of the body. He had burns on the chest and back, right side of face, lateral aspect of the right lower leg, post aspect of the right upper half of the thigh and both upper limbs. General damages were agreed at \$125,000.00 in April, 1984.
3. Christopher Forbes v. Alcan Jamaica Ltd. reported in the above works at Volume 3 page 172. He was burnt by caustic soda and his injuries and consequences are particularised below as follows:

- a) Extensive burns to face, neck, eyes, trunk and four limbs.
- b) Blindness of the left eye.
- c) Itching in scarred areas.
- d) Areas of hyper-pigmentation and hypo-pigmentation within scarred areas.
- e) Superficial vascularization of the cornea at the limbus of the right eye with thickening of vascularization of the right cornea.
- f) Skin loss.
- g) Water pimples in the burnt areas which burst and heal spontaneously with periodic infection.
- h) Will need medication for life.
- i) Will have to travel far to purchase drugs.
- j) Has become sensitive, has nervous attacks and drinks alcohol excessively.
- k) Scarring on forearms, thighs, torso, penis and upper arm.
- l) 35% reduction in total vision.

He was awarded \$200,000 for pain and suffering and loss of amenities under General Damages in July, 1988. It will be seen that the injuries which the plaintiff Christopher Forbes sustained and the consequences which resulted therefrom are easily distinguished from the present case.

4. Gwen Taylor v. Kenneth Morris reported in Volume 1 of Khan's Recent Personal Injury Awards at page 144. The plaintiff sustained acid burns and was awarded \$30,000.00 in December, 1979.

Mr. Samuda referred to and relied upon the cases of Dorient Reid v. The Attorney General & Anor. and Roy Berry v. Paul Fearon and Anor. Both cases are to be found in Volume 3 pages 175 and 170 respectively of Khan's Recent Personal Injury Awards in the Supreme Court. He submitted that Dorient Reid's case was more comparable to the present case. Unfortunately, I do not share that view. He admits on the other hand that the acid burns inflicted in Berry's case were serious than the present case. I entirely agree with him and must admit that I have not found that case very helpful.

After a careful examination of the cases cited and other personal injury cases. I have been unable to find a case similar in all respects to the instant one. Of some relevance however is the case of Alfred Thomas v. Pastry Specialist T/as Allan's Pastry C.L. 1990/T078 in which damages were assessed by Reid J. on the 22nd July, 1992 in the Supreme Court. The plaintiff in that case was injured as a result of an oven exploding. He sustained superficial burns to the face and upper limbs assessed at 35% of the total body surface area. He was in Intensive Care at the University Hospital of the West Indies for three weeks and was an outpatient at the Comprehensive Health Centre Clinic for nine months. His disabilities included ~~permanent disfigurement~~ by scarring which involved the face and upper limbs. He had no functional disability. He was awarded the sum of \$275,000.00 in respect of pain and suffering and loss of amenities under the head of General Damages.

Now, what is an appropriate award in the circumstances of this case? I shall have to use my own initiative guided by the evidence and the authorities referred to me.

In considering this award I bear in mind that with future medical treatment the scarring of the plaintiff and discomfort she is experiencing are likely to be minimized. Apart from the medical evidence of Dr. Logan there is an absence of other medical prognosis. He opined that one could look for a 50% improvement at most with the use of the pressure garment, steroids and antihistamines. This he said would be related to her cosmetic appearance. He further opined that the plaintiff could not be restored 100% even with surgery.

The plaintiff is a very young person and as I have said before the scarring on her body is grotesque. She does not feel good the way her body looks now. She no longer goes to the beach and she does not like to see people. She wore shorts in public and around strangers before the accident but she no longer does this as she is afraid of people looking at her.

Mr. Graham has submitted that the defendant must take his victim as he finds her and as such the fact that the plaintiff's injuries have aggravated her previously existing condition as a disabled person must be taken into effect. He has referred me to and has sought reliance upon the cases of Smith v. Leech Brain & Co. Ltd. [1961] 3 All. E.R. 1159; Robinson v. Post Office [1974] 2 All E.R. 737; and Parris v. Stepney Borough Council [1951] 1 All E.R. 42.

Mr. Samuda's response to the above submission indicates that quite apart from the plaintiff saying she did not wish to interface with the public there was no medical evidence of psychological damage, therapy or treatment. Fear simpliciter, he says cannot be classified as psychological damage and the plaintiff is obliged in law to strictly prove this damage. He concluded that no evidence has been led to show the inimical effect her injuries have had on her being deaf and dumb.

I do agree that there is a sparsity of medical evidence and indeed it might be proper to say that there is none so far as the psychological effect these injuries are likely to have on the plaintiff bearing in mind her previous physical disability. It is my view however and I so hold that the plaintiff's personal fears, her previous disability and her lack of interaction with the society are material factors to bear in mind. I have also borne in mind that the plaintiff has re-entered the labour market and has worked since her injury albeit from August 1992 to January 1993.

I respectfully say that the awards referred to by both Counsel with the exception of Christopher Levy's case (supra) are definitely concerned with more serious burns and disabilities than the instance case. I am inclined to view that the cases of Alfred Thomas (supra) and Christopher Levy (supra) are useful guides. However, from a global perspective the plaintiff herein would be entitled to a somewhat larger award due to: 1) The hideous scarring which covers a larger body surface. 2) The diminution in the plaintiff's capacity to enjoy the quality of her life. 3) The length of time the plaintiff spent in hospital and has endured pain and suffering. 4) The effect the injuries have had on the plaintiff having regard to her previous physical disability.

I must bear in mind the advice of Campbell JA when he states that assessment of damages should be made with "moderation." It is also a fact of life that awards are now made subject to the rapid growth of inflation and the spiralling increase in devaluation of the Jamaican dollar. Rowe P, in Hepburn Harris v. Carlton Walliker S.C.C.A. 40/90 having recognized this principle stated inter alia:

"..... Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A 18/84 suggested that the depreciation of the value of the Jamaican dollar over a given period of time can be used as a measure to preserve the real value of the damages to an injured person who receives his money at a future date ..."

I am of the view therefore, that an award of \$500,000.00 in respect of pain and suffering would be fair and reasonable in the circumstances.

Damages are accordingly assessed in favour of the plaintiff as set out hereunder:

Special Damages \$25,310.00

General Damages for pain and suffering - 500,000.00 and an additional sum of \$186,188.00 for future medical expenses.

Total = \$686,188.00

Interest awarded on Special Damages at 3% from 13th March 1992 to April 8, 1994. Interest at 3% on \$500,000.00 (being the award for pain and suffering) from the date of service of the Writ of Summons to April 8, 1994.

The plaintiff is to have her Costs taxed if not agreed.

Cases referred to

- ① Owen Elliot Industrial Chemical Co (Ch) Ltd v Khan & Co Ltd [1985] 1 All ER 1000 (Khan) Vol 2 p 105
- ② Chubb v London & Lancashire Fire Insurance Co Ltd [1985] 1 All ER 1000 (Khan) Vol 2 p 172
- ③ Chubb v London & Lancashire Fire Insurance Co Ltd [1985] 1 All ER 1000 (Khan) Vol 3 p 172
- ④ Owen Taylor Ltd v Lloyds Bank Ltd [1985] 1 All ER 1000 (Khan) Vol 1 p 100
- ⑤ Dorchester Hotel v Owen & Sons Ltd [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑥ Roy Benge v Lancashire & Cheshire Fire Insurance Co Ltd [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑦ Lloyd v Lloyd [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑧ Smith v Smith [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑨ Robinson v Post Office [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑩ Pinner v Evans [1985] 1 All ER 1000 (Khan) Vol 3 p 105
- ⑪ Hebburn v Hebburn [1985] 1 All ER 1000 (Khan) Vol 3 p 105