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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 13/94

COR: THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE WOLFE JA

BETWEEN	POGAS DISTRIBUTOR LTD	1ST DEFENDANT
	O.K. FRANCIS	2ND DEFENDANT
	ROBINSON'S CAR RENTAL LTD	3RD DEFENDANT
	DENVE SMITH	4TH DEFENDANT
	WILLIAM BERNARD	5TH DEFENDANT/ APPELLANT
	CLINTON GRANT	6TH DEFENDANT/ APPELLANT
A N D	FREDA CLAIRE McKITTY	PLAINTIFF/RESPONDENT

SUPREME COURT CIVIL APPEAL N0 16/94

BETWEEN	O.K. FRANCIS	1ST DEFENDANT/APPELLANT
A N D	POGAS DISTRIBUTORS LTD	2ND DEFENDANT/APPELLANT
A N D	FREDA CLAIRE McKITTY	PLAINTIFF/RESPONDENT
A N D	WILLIAM BERNARD	5TH DEFENDANT
A N D	CLINTON GRANT	6TH DEFENDANT

Garth McBean instructed by F.L.D. Smith for William Bernard & Clinton Grant

Norman Davis instructed by Myers Fletcher & Gordon for O.K. Francis & Pogas Distributors Ltd.

John Graham for respondent Freda McKitty

29th, 30th, 31st May, & 24th July, 1995

FORTE JA

I have read the judgments in draft of Gordon and Wolfe JJA and agree with the reasons and conclusions therein. In the event, the appeal is allowed. The awards for loss of earning capacity, and for general damages are set aside. Judgment is entered for the plaintiff/respondent in the sum of $673,400 computed as follows:

Special Damages	$ 73,400.00
General Damages	600,000.00
	$673,400.00

With interest at 3% on the special damages from February 7, 1987, to date of judgment and 3% on the General Damages from the date of the service of the writ to the date of judgment. Costs of the appeal to the appellants to be taxed if not agreed.

GORDON J A

On 28th January 1994 the respondent was awarded $400,000.00 for loss of earning capacity and $1,000,000.00 in general damages for pain and suffering and loss of amenities resulting from injuries sustained in an accident on 7th February 1987. These damages were apportioned between the 1st and 2nd defendants/appellants on the one hand and the 5th and 6th defendants/ appellants on the other hand 20% and 80% respectively. There is no appeal against the findings on liability.

The respondent was injured on the road at Walkers Wood in St. Ann and rushed to the St. Ann's Bay hospital. She stated that she had intermittent periods of unconsciousness on this journey. Her history and subsequent medical condition are given by Dr. Dundas, Consultant Orthopaedic surgeon in his report dated June 15 1987:

> **"MEDICAL REPORT ON Claire Davidson AGE; 27 Years**
>
> This young woman was admitted to the St. Joseph's Hospital on the 10th February, 1987, under care of Dr. J.D.G. McNeil-Smith. She had been involved in a road traffic accident and was originally admitted to the St. Ann's Bay Hospital with a transient history of unconsciousness. She quickly developed cramps and weakness in both upper limbs with hypersensitivity in the lower limbs. She also sustained a fracture at the mid-shaft of the left tibia which was undisplaced. This was placed in an above-knee cast at St. Ann's Bay.
>
> The main problems at her admission were hypersensitivity in both upper limbs with

severe pains and cramps as well as pains in the neck extending to the left hand. She had been unable to pass her urine and a catheter had been inserted in St. Ann's Bay.

I first examined Ms. Davidson on the 12th February when her status had apparently not changed since admission. She had a Brown-Sequard type presentation with profound motor deficit in the left upper limb and sensory changes in the right half of the body. The left lower limb could not be accurately assessed as it was immobilized in a long leg cast because of a fractured tibia. There was radiographic evidence of subluxation of C3/C4, and for this instability in her cervical spine, she was initially treated with Halter traction. This was later changed for an immobilizing foam collar.

She went through a period of increased discomfort and pain during the first week of hospitalization, but this gradually abated and we were able to sit her out of bed by the 25th February, 1987. Further x-rays revealed a fracture of pedicle of C4 on the left side. She was gradually ambulated with great effort and discomfort. On the 18th March, 1987, her cast was finally removed and a splint applied to the leg. She was discharged from hospital on the 3rd April, 1987.

She has been seen on several occasions by Dr. McNeil-Smith, and I examined her on the 12th June in follow-up. On that visit she was still having pain in both arms, was sweating excessively, and complained that her hair was falling out. On examination I noted that the hirsutes which had accompanied her period of steroid therapy, was disappearing and the moon facies was resolved. She was, however, slightly above her previous body weight. The hyperaesthesia in both arms, especially in the C4 and 5

> distributions, had persisted. Reflexes were brisk. She had hyperaemia of the left palm and hand and forearm with spasticity in all muscle groups. The grip was weak; about grade 3+4/5. She had diminished co-ordination of finger movements and the metacarpal phalangeal joints had tight capsules. The forearm muscles were also quite tight. The spasm extended to the left pectoralis major and she effectively had a frozen shoulder. She could adduct just to 35%. Rotation was less markedly restricted in that upper extremity. There was marked temperature variation from the right to the left upper limbs. In her cervical spine she had limitation of forward flexion to a severe degree. There was mild limitation of left lateral flexion.
>
> She had still not regained normal pain and temperature sensation in the right lower limbs.
>
> She is still an out patient under care and from a work point of view is still considered totally disabled.
>
> In terms of the prognosis, I think Ms. Davidson will suffer some degree of permanent disability but the extent of this cannot at this point in time be evaluated with any degree of accuracy. Suffice it to say that she is expected to improve beyond her present status."

The respondent testified that immediately after the accident she had extreme pains in her neck and upper arm and difficulty in breathing. She lost movement in her left side and she was paralysed in her right side. For three months after the accident she could not walk and for a part of that time she was confined to a wheel chair. She required physiotherapy. Managed on

steroid for about one month, she developed a "moon face" with a rash and hair grew on her face. Cessation of this treatment saw a gradual return to her normal features.

She started working again in October 1987 as a receptionist at a hotel and in 1989 she was trained as a masseuse. In that same year she began to do skin care and she established her own business. She operated two businesses at Round Hill Hotel in Hanover and employed two persons. No longer employed, she is now an entrepreneur. She said she employed extra help whenever she had "excessive bookings". This was only in winter. "It is french deep tissue" that is the type of massages she gives, and "there is a natural excess demand in winter." The respondent testified that she still suffered ill effects from the accident. She gave them as -

> (a) I have lost pain and temperature sensation in my right side from just below my right breast to sole of my right foot.

Elaborating on this she said

> "I have been burnt on my right side and not know. I have been touched and not know. Sometimes I get weakness in lieu of pain. Condition continues even now. If I get a prick on my right side I would not feel it.
>
> (b) Disability to left hand affects me in doing massages. I must have someone else come in to assist when I have excessive number of clients during the winter months. This is because I get tired easily due to atrophy of muscles of hand."

> (c) I still have problems with motor movements of my left hand. 'I am right handed. I cannot swim - left arm movements limits me and I tire easily. I cannot take cold showers. The cold affects muscles in my left hand. In cold weather the cold give me neck pains and left hand comes up in a fist.
>
> When I read, I get neck pains by holding down my head. This applies to indoor games such as checkers, chess, cards etc. If I take long walks my knees buckle under.
>
> I enjoyed swimming and a little Badminton prior to accident. I used to go to the Gym but one side is now off - balance with the other due to left side.
>
> I don't go out as often as I used to do. I tend to be more irritable easier."

Dr. Ivor W. Crandon, consultant Neurosurgeon and Lecturer in Neurosurgery at the University of the West Indies examined the respondent and his report was admitted as exhibit 6 and reads as follows:

> "I first saw this 33 year old Masseuse on 1.4.93 when she was referred to me by Dr. Delroy Fray, Orthopaedic Surgeon of Montego Bay. I have not seen her since. Available to me for the purpose of this report were medical reports of Dr. G Dundas dated June 15, 1987 and October 9 (year unrecorded).
>
> On her visit to me on 1.4.93, she complained of numbness of the ulnar 2 fingers of the right hand, weakness of the right leg and neck pain. She traced the onset of these symptoms to a road traffic accident in which she was involved in February, 1987. At that time, she had a Brown-Sequard syndrome consequent on a neck injury and was treated with halter traction. While the paralysis of

the left side of her body recovered, the sensory loss of the right side of the body had persisted. She described her present problems to be intermittent and not severe, allowing her to lead a near normal life as a Masseuse. She denied a gait disturbance or any sphincter trouble.

On examination, her cranial nerves were normal. The significant findings were confined to her limbs. There was slight weakness (Grade IV power MRC) of the left leg. She also had wasting of the left deltoid and the left leg with a 2cm calf girth difference, the left being smaller than the right. There was sensory loss over the right leg to pinprick and light touch but vibration sense was unimpaired and coordination was normal. She had generalized hyper-reflexia with an inverted left supinator jerk, a left extensor plantar and an equivocal right plantar response. There was a full range of motion of the cervical spine.

In my opinion, there was clinical evidence of a mild myelopathy with a C5 level root lesion, all the result of the injury and consequential damage to the spinal cord and nerve root. I arranged for a Magnetic Resonance Image (MRI) scan which was carried out in Florida on 18.5.93. This study demonstrated mild foraminal narrowing on the left at C4/5 and bilaterally at C5/6. No abnormality of the spinal cord was demonstrated. There was no evidence of continuing compression of the spinal cord.

She has suffered a cervical spine injury and has residual neurological deficits as a consequence of damage to the spinal cord. The MRI findings are not inconsistent with this opinion with respect to this patient whose injury occurred 6 years ago. In my view she has suffered a permanent partial whole person disability of 20% (AMA).

> Further improvement in her neurological function is very unlikely.

He was called as a witness at the trial and he elaborated on his written report and said:

> "The significant findings on examination were weakness of left side of the body, this was mild and numbness on the right side of the body. In addition the reflexes were abnormally- brisk and the plantar response was normal. Plantar is a reflex of foot on hitting the sole of the feet.
>
> There was an abnormality of the sup-inator reflex - It affects the left arm of the patient.
>
> As masseuse - the sup-inator loss would not adversely affect one in this business of masseuse.
>
> I found wasting - reduced muscle of left deltoid muscle and the left leg.
>
> There was a 2cm reduction in calf - girt.
>
> Wasting may follow weakness - but not the other way around.
>
> I did not find any other abnormalities. The weakness on left side can affect job of masseuse.

The respondent was seen by Professor the Honourable Sir John Golding on 19th November 1993; his reports were admitted in evidence as exhibit 8. Professor Golding spoke briefly of her medical history, then of her current complaints as related by her and gave his findings in this manner:

> "Re: Mrs. Claire McKitty nee Davidson

I have today examined Mrs. McKitty for the purpose of writing this report I had available to me copies of two medical reports the first written by Mr. G.G. Dundas dated June 15th, 1987 and the second by Dr. Noel Black dated July 9th, 1987.

Mrs. McKitty stated that she had been travelling as a passenger sitting beside the driver of a car which had come into collision with a truck. Following this accident she had been taken to the St. Ann's Bay Hospital where she had remained for two days before being transferred to St. Joseph's Hospital under the care of Mr. G.G. Dundas. She had also been treated by Mr. I Crandon. She had been told that she had sustained an injury to her neck which had damaged the spinal cord and had also sustained injuries to her left lower leg involving fractures of the tibia and fibula. She had been given an above knee plaster cast to control the position of the lower leg fractures.

At the time of her admission to St. Joseph's Hospital she had not had proper control of her limbs being particularly weak in the left arm and leg and with abnormal sensation of the right arm and leg. There was hyperaesthesia of the left upper extremity but less than on the right. However this quickly resolved once her neck had been immobilized in halter traction.

Since leaving hospital she had improved greatly and was now complaining only of occasional pain in the shoulders and arms which radiated on the right side just beneath her breast. She also noticed discomfort on the medial side of her lower leg when crossing her legs.

On examination she was found to have a good range of cervical movement with some discomfort on full flexion. There was a full

range of motion of all the joints of the upper and lower extremities. There was no sign of abnormality of the central nervous system. Sensation, power and reflexes were equal on both sides.

There was a slight lump on the medial border of the tibia at the junction of the upper two thirds and lower third. New radiographs showed that this had been the site of an undisplaced fracture which was solidly healed. There was no evidence of a fracture of the fibula.

Radiographs of the cervical spine were taken in full flexion and extension. The general alignment of the cervical vertebrae was good and there was no evidence of an old healed fracture of any of the vertebrae. There was some increased mobility between the fourth and fifth cervical vertebrae which suggested that ligamentous damage at the time of injury had been the cause of her initial neurological signs and symptoms. There was now no sign of the healed fracture of the pedicle of the left ? fourth or ? fifth cervical vertebra noted by Mr. Dundas and mentioned in his report.

I concluded that Mrs. McKitty had made a good recovery from moderately severe injuries to her cervical spine. Although there is now no sign of neurological abnormality, late neurological sequelae to such an injury have been reported which would suggest a permanent impairment rated at 5% of the whole person would be reasonable. There is no impairment relative to the left lower leg.

Subsequent to my medical report of November 18, 1993, I received copies of a medical report by Mr. G.G. Dundas dated October 9. 1992, and an M.R.I. Examination and report dated 19th May, 1993.

> From Mr. Dundas' report, it is apparent that Mrs. McKitty's clinical appearance and signs have reduced considerably during the past year. This suggests that she has now reached M.M.I. and can be considered as now having a whole person impairment of about 5% to which must be added a factor for the possibility of late sequelae developing due to the definite damage to her cervical spinal cord.
>
> I would consider a total of 10% would be a fair estimate of her whole person impairment."

Two grounds of appeal were filed and argued by the appellants:

> "(a) that the award of $1,000,000.00 for pain and suffering and loss of amenities was manifestly excessive and inconsistent with awards for comparable injuries made in these courts, and
>
> (b) there was no basis, evidential or otherwise supporting the award for 'loss of earning capacity."

GENERAL DAMAGES

A doctor's estimate of the degree of disability of a patient is based on the report he receives from the patient of his/her condition at the time of examination coupled with and adjusted by his finding on examination conducted by him then. As is evident from the records in this case the doctor takes into account the entire medical history of the patient and the results of any investigations done previously or ordered by him. A trial judge's assessment of damages is influenced by the opinion he forms of the evidence adduced by and on behalf of the Plaintiff and the impact of the medical evidence presented.

The learned trial judge in his judgment described the plaintiff as "an attractive and intelligent woman" he then traced her history of employment and the injuries she sustained and her post trauma condition ending with her current complaints as given in her evidence. He next examined the medical evidence and expressed a preference for the evidence given by Dr. Crandon.

It was submitted by Mr. Davis that:

> "7. ...the award of $1 million for pain and suffering and loss of amenities was manifestly excessive. The learned trial judge place heavy and undue emphasis in making this 'substantial award' on Dr. Crandon's opinion that the Plaintiff suffered a 20% disability of the whole person. In adopting this approach, the learned trial judge ignored or failed to place sufficient emphasis on evidence which suggested that the Plaintiff was not as severely disabled as the description 20% disability, looked at in isolation, suggested. This evidence included the following:
>
> > (a) Evidence in the medical report of Dr. Crandon dated November 24, 1993 (page 70 and 71 of the bundle, Exhibit 7) that the Plaintiff 'described her present problems to be intermittent, <u>not severe allowing her to lead a near normal life as a masseuse'</u> (emphasis mine). In the said report, Dr. Crandon said that the significant findings were confined to her limbs but referred to only slight weakness of the left leg and also said that 'vibration sense and co-ordination was normal' in reference to her right leg. Of the consequential damage to the spinal cord and nerve root, Dr. Crandon said that 'there was clinical evidence of '<u>mild</u> (emphasis mine) myelopathy and

a study demonstrated 'mild (emphasis mine) foramina narrowing.' Dr. Crandon also said, 'No abnormality of the spinal cord was demonstrated. There was no evidence of continuing compression of the spinal cord.'

(b) Viva voche (sic) evidence of Dr. Crandon (at page 47 - 48 of the bundle) which supported the contention at paragraph 8 (a) (sic) above. Dr. Crandon in his testimony referred to the weakness of the Plaintiff's body on left side as mild. The Plaintiff sought to attribute her hiring of additional help in her massage business to fatigue 'due to atrophy of muscles of the hand' (page 37 of the bundle) referring to the left hand. However, the only abnormality of the left hand side referred to by Dr. Crandon was that of the superanitor reflex, loss of which Dr. Crandon said would not adversely affect one this business of masseuse (page 48 of the bundle). He testified of the MR1 scan that 'the spinal cord did not show any abnormality.' He also admitted the Plaintiff had shown 'considerable improvement' since the accident.

(c) Evidence of the Plaintiff's return to work in October, 1987, a few months after the accident, her enterprise in setting up her business after the accident and her training and giving of deep tissue massages since 1989 in her business. This evidence is not consistent with the Plaintiff's assertion of serious disability.

(d) Evidence contained in the medical reports of Professor Golding which were admitted by consent, in which he opined that the Plaintiff

suffered a 10% disability of the whole person (page 76 - 78 of the bundle, Exhibit 8).

(e) Evidence from the Plaintiff as to the effect of her injuries which suggest that she was embellishing her case in that in instances, her evidence of her disabilities was not substantial (sic) by medical evidence. The Plaintiff testified (page 35 of the bundle) that her 'short term memory and memory in general has been affected since the accident' but this was not substantial by any medical evidence. Further, the Plaintiff sought to assert that the 'disability to left hand affected one in doing massages' but, as pointed out in paragraphs 8 (a), (b), and (c) above, this was not substantial by medical evidence. Further, there were instances where the Plaintiff attempted to assert that she could not do some activities after the accident but either failed to prove that she did them before the accident or recanted from her position later in her evidence. She testified that she cannot pay (sic) tennis (page 36 of the bundle) but she did not prove that she played this before. She initially testified that she 'used to go to the gym' suggesting she no longer goes but later on, she testified that. 'I don't go as often as I used to do.' She also testified initially that she 'cannot swim' (page 36 of the bundle) but later on testified, I now swim, but not as much' (page 38 of the bundle). At one stage the Plaintiff seemed about to testify of sexual impairment when she testified, 'I had a sexual life prior to the accident" where no sexual dysfunction was pleaded nor alleged in any event. The above showed a tendency on the part of the

> Plaintif. to embellish her case as to her injuries/disabilities which the learned trial judge should have taken into account in and reduced the award of damages accordingly."

There is evidential support for the submissions of Mr. Davis. None of the doctors said there was "atrophy" of the muscles of the left arm. This word "atrophy" was introduced by the plaintiff herself. Dr. Dundas in his report dated October 9, 1992 said:

> "...the right arm girth was 0.5 greater than the left. This is within normal range. Her reflexes were normal, but the power of her muscles were mildly diminished on the left side."

Her complaints were of intermittent problems which were not severe. To Professor Golding she complained "only of occasional pain in the shoulders and arms which radiated on the right side just beneath her breast. She also noticed discomfort on the side of her lower leg when crossing her leg."

Dr. Ivor Crandon assessed the permanent partial disability of the respondent at 20%. Professor Golding assessed it at 10%. Dr. Crandon gave evidence and the learned trial judge said in his judgment that he was "particularly impressed with the manner in which he gave his evidence. He was tested under cross-examination and in the end his opinion seemed even more impressive. It follows that I accept his opinion that Freda McKitty has a permanent partial whole person disability of 20%."

The learned trial judge accepted the case of **Thompson vs. McCalla & Jamaica Omnibus Service** Vol. 3 Khan's Personal Injury Awards at page 152 as a guide for the assessment of damages in this case. Of the case he said in his judgment:

> "Here the plaintiff was in hospital for 6 months but the disability was 15%, hence the injuries were less severe. The award was in 1986 and when updated to the money of today the sum would be $1.2M for Pain & Suffering and Loss of Amenities. In that case Dr. Golding described the infant plaintiff as a 'partial paralized' yet there was much similarity to the injuries in the instant case.
>
> Taking everything into consideration my award under General Damages is as follows:
>
> > Pain & Suffering and Loss of Amenities $1 million."

Professor Golding who assessed the permanent partial disability of the plaintiff Thompson at 15% is the same person who assessed the plaintiff McKitty's permanent partial disability at 10%. It is instructive to compare the two cases as in one the learned trial judge accepted Professor Golding's assessment and in the other he rejected it.

The plaintiff Rosemarie Thompson (20 at trial on 30th July 1986) was pinned under a bus in an accident on 18th May 1991, she sustained:

"1. crush injury

2. unable to move lower limbs

3. partial paraplegia at level of 7th thoracic sacrum

4. pain in chest

5. laceration above right ankle and bruises over other leg

6. damage to spinal cord and middle of back

7. decreased sensation below costal region."

Admitted to the University Hospital she remained there until 6th August, 1981 when she was transferred to the Mona Rehabilitation Centre. She was discharged from hospital on 17th December 1981.

" In 1985 the Infant was examined by Dr. Golding who found:

(1) That she was able to walk but was still a little unsteady on her feet.

(2) That she had a large scar over front of right shin - 3" x 2", another over right ankle - 3" x 1", and a scar over thigh where skin graft was taken.

(3) That she still had abnormal sensations in her lower extremities.

(4) That her gait was somewhat unsteady.

(5) That there was a small lump on inner side of right thigh - (mass of scar tissue)

In Dr. Golding's opinion she was totally disabled until the end of 1981 with a 50% partial disability for a further 3 months and was left with Permanent Partial Disability of about 15% of her total body functions with a

> small cosmetic disability due to unsightly scars on her legs.
>
> MEDICAL EVIDENCE: Dr. John Golding in giving evidence, was of the opinion that her residual disability would affect her present and future ability to walk and remain stable. That she had made remarkably good recovery from severe injury but would not be able to take part in active sports or dance. He described here as a 'very partial paraplegic.'

Professor Golding said that her movements were "jerky but unsteady". He described her paraplegia as very slight - that there was no apparent muscle wastage in either legs, that the power in her legs was not normal but reasonable - the fine control of muscles had been blunted, that her muscles did not do exactly what she wanted them to do. That in activity requiring speedy response she was handicapped. She had intermittent tingling in her lower extremities 2 or 3 times per day.

This infant said she no longer could indulge in sporting activities, dancing or swimming and crossing the road was fraught with danger for her. In school her grades fell and she went in the HEART programme. Placed as a handicapped person in employment assembling TV sets she had been laid off.

She was awarded $210,000.00 for pain and suffering and loss of amenities and being handicapped on the labour market. [emphasis added].

Professor Golding described the injuries the infant Thompson sustained as severe. On the evidence she was hospitalized from May to December 1981 a period of seven months. Professor Golding said she was totally disabled for this

period. The respondent was hospitalised for two months. On her evidence she was able to discard her wheel chair in the third month and move about unassisted. She was therefore unable to work from February to mid July. She said she did not seek any employment between mid July and October 87.

Professor Golding saw and examined her seven months after Dr. Crandon. Having seen the report on her M.R.I. examination he opined: "She ... can be considered as now having a whole person impairment of about 5% to which must be added a factor for the possibility of late sequelae developing due to the definite damage to her cervical spinal cord.

I would consider a total of 10% would be a fair estimate of her whole person impairment." He described her injuries as "moderately severe." Thompson's injuries he regarded as "severe" and when the two cases are compared it is obvious that the infant Thompson has suffered more and lost much more than the respondent. The learned trial judge misdirected himself by looking at percentages and did not properly assess the injuries and period of total incapacity and the permanent partial incapacity when he said in his assessment -"The plaintiff (Thompson) was in hospital for 6 months but the disability was 15%, 'hence the injuries were less severe' ".

He was guided in his award by the damages in Thompson's case but a significant factor in that award appeared to have been overlooked. The sum given to Thompson included in the global figure of $210,000.00 an award for

being handicapped on the labour market. Thompson's handicap on the labour market, it cannot be denied, was great.

In my view, the learned trial judge's award of $1,000,000.00 was arrived at by the application of a method of assessment which was based on a wrong premise. The award is grossly excessive and cannot stand. Of the cases examined, Thompson's case offers the best guide to what an appropriate assessment should be. Thompson was hospitalized for seven months, the respondent for two months. Each had had a catheter inserted in hospital, Thompson is a partial paraplegic, her legs do not do exactly what she wants them to do. She cannot dance, swim, indulge in sport. The respondent does not suffer from any of these handicaps. Each has intermittent numbness or tingling.

I would set aside the award of the learned trial judge and substitute a sum which in my opinion is fair and just. I award for pain and suffering and loss of amenities the sum of $600,000.00 with interest at 3%.

Loss of Earning Capacity

The case is starved of evidence of the respondent's post trauma earnings. There is evidence she operates two businesses in Beauty Salon and Skin Care and Massage, she employs two persons. It is to be inferred she does the administration, in this she has special expertise. We know that before the accident she earned $2,000 per month as an administrative assistant and trainee sales person. How much she earned in her business was not given.

The only evidence we have of any earnings is given in relation to her work as a Masseuse in the Tourist winter season:

> "Based on last year's experience I require about 6 to 7 sessions per week. I charge US$55.00 per session when I get an assistant."

There is a natural influx of patrons in the winter period which lasts approximately 20 weeks. Her normal working hours are 10:00 a.m. to 6:00 p.m. and "fatigue at end of day is a normal condition if I work hard" she said.

Loss of earning capacity as a sub-head of general damages is recognized in these courts. The principles which guide our Courts in the assessment of this head of damages are clearly stated in **Moeliker v A Reyrolle and Co Ltd** [1977] 1 All ER page 9 at page 176 by Browne LJ thus:

> " ... The consideration of this head of damages should be made in two stages. (1974) 17 NIR 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? (1970) ICR 266. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

These principles were adopted and applied in SCCA No. 38/90 **George Edwards and Moses Morris v Donovan Pommells and Fitzroy Gordon**

delivered 22nd March 1991 and SCCA 109/91 **Owen Francis v Corporal Baker et al** delivered 16th November 1992.

The question to be asked therefore is " is there a 'substantial' or 'real' risk that the plaintiff will lose her present job at some time before the estimated end of her working life?"

The approach of the learned judge to this aspect of damages is to be found in this segment of his judgment:

> " In dealing with the evidence adduced in support of earnings, the evidence came from oral testimony unsupported by even a scrap of documentary evidence. As was stated in the judgment of Rowe P. **Hepburn Harris v Walker** C.A. 40/90 'Plaintiffs ought not to be encouraged to throw figures at Trial Judges, make no effort to substantiate them by even their books of account and to rely on logical argument to say that specific sums must have been earned. Courts have experience in measuring the unmeasurable ... but when they have so acted, their determination ought not to be unreasonably attacked.
>
> With respect to Handicap on the Labour Market and with reference to Dr. Crandon's evidence that the weakness on the left side can affect her job as a masseuse and taking her own evidence into consideration pertaining to her earnings I make an award of $400,000.00 for Loss of Earning Capacity. It must be borne in mind that although the evidence of the loss of earnings was not challenged, the reliability of the evidence is a matter which I carefully considered. The reason for such a substantial award under this head relates to the foreign exchange earnings in that field of activity."

There is in this assessment no attempt to apply the **Moeliker** principles or to answer the question posed above. There is no evidence that the accident affected the respondent's ability to function efficiently as an administrative assistant or even as an administrator and the fact that she acquired expertise as a Masseuse is evidence itself that she was not so adversely affected by the trauma that she was unable to extend her resources to other fields of income bearing endeavour. She said of herself "I describe myself as an ambitious business woman." On her evidence she was tired at the end of a normal working day but that was to be expected. It was only when she had excessive bookings that she required extra help. This was seasonal and she retained 55% of the amount earned from the excess bookings. Extra work meant increased earnings. There was no loss shown on the evidence. On the contrary increased earnings from expanded business ventures were shown.

In **Smith v Manchester Corporation** [1974] 17 K.I.R. I Volume I Kemp and Kemp on Damages 1990 Edition the dicta suggests that it must be shown that the plaintiff's position in the competitive labour market would be considerably weakened as a result of her disability; where there was no clearly forseeable loss there must be evidence of an existing and permanent reduction in her earning capacity for which she must be genuinely compensated.

Mr. Graham in support of this award prayed in aid the decision of the Court of Appeal (Purchas, Mustill & Woolf LJ) in **Page vs. Enfield & Haringay**

Area Health Authority(5th November 1986) Kemp & Kemp on damages 1990 Edition page 5051.

The plaintiff a student nurse suffered an injury to her back in an accident and endured considerable pain. She underwent an operation for the removal of a prolapsed disc. After convalescing she completed her general course and midwifery. she suffered much pain after a long day and had to avoid stooping and lifting. She intended to relinquish nursing and become a nursing teacher. To this end she had been accepted for a course to train as a nursing teacher. In his judgment Cantley J said at page 5053:

> " I have also to consider in this case whether there is a real risk that, if she (that is the plaintiff) "falls out of employment, she will suffer a loss of earnings in the open labour market. These calculations are always difficult. The situation, for example, is that, if she fails to qualify as a teacher, she will inevitably have to give up midwifery at some time and seek what she can earn in some other activity in the open labour market. I have no reason to expect she will fail to qualify. She is competent to succeed and her record in her training shows that she is a diligent person and a conscientious one. If there is no mishap resulting in exacerbation of her present condition, she will, as a nursing teacher, have a profitable career to look forward to with no diminution but, on the contrary, an increase in remuneration. However, a person who has suffered as she has a prolapsed intervertebral disc, with residual and permanent symptoms, is particularly vulnerable; and I consider there is a real risk, although the extent of it is really impossible to calculate with any sort of exactness, that she might have to find a job in the open labour market.' It was taking into

> account that risk which led the learned judge to reach the figure of L8,000 for that contingency."

The risk the learned judge referred to was that she would have further trouble from the prolapsed intervertebral disc which she had sustained in the accident. It was acknowledged that there was a possibility of this risk in the event of another accident. Her back was particularly vulnerable. On appeal Purchas LJ in his judgment at p. 5055 said:

> " With respect to the learned judge, in my view he has approached this particular part of his assessment of the risk and the result, for the two must go hand in hand, incorrectly. The court must weigh the risk of the accident occurring, in this case an exacerbation of her condition either from a further accident or from the normal wear and tear of life, and then assess the result of the materialisation of the risk upon the plaintiff. It is at this point that I venture, with respect, to differ from the learned judge. I do not feel that he has made a sufficient discount to take into the calculation the vagueness and uncertainty of the feature, to which he referred. That should be reflected, as we said in this court in ***Mitchell v. Liverpool Area Health Authority*** to which Lord Justice Woolf has referred, and must import a very substantial discount upon the damages. Here in this case, as the plaintiff achieves seniority and experience in her teaching career, I would draw the secondary inference from the primary facts found by the learned judge that he failing to find a job of some appropriate nature in the open market in the nursing field in one way or another is very remote indeed. With her experience, her personality and her record it would be a very rare and unfortunate event that would prevent her

> finding appropriate employment in this specialised and important field."

The Court of Appeal thereon halved the award.

In order for a plaintiff to obtain an award under this head (referred to as the ***Smith vs. Manchester*** head) it must be shown that there was a risk that at a future date there could be an exacerbation of the injury occasioned in the accident that would, or would be likely to, result in the plaintiff suffering a reduction in income. There is in this case no evidence of the likelihood of this occurrence.

Page vs. Enfield does not provide the support Mr. Graham sought. The award for loss of earning capacity cannot be allowed to stand and must be set aside.

In the result the appeal is allowed the award for loss of earning capacity is set aside, the award of $1,000,000.00 for General Damages is set aside and an award of $600,000.00 substituted. The appellants will have their costs to be taxed if not agreed.

WOLFE, J.A.:

Two grounds of appeal were argued before us by the appellants. These grounds may be summarised as follows:

> (i) That the award of $1,000,000 for pain and suffering and loss of amenities was manifestly excessive;
>
> (ii) That the award of $400,000 for loss of earning capacity was unwarranted as it was not supported by the evidence, alternatively the award was manifestly excessive.

I propose to address the second ground of appeal first. The evidence adduced at the trial revealed that the respondent at the time of the accident was employed as an Administrative Assistant and Sales Representative to Pogas Distributors Limited, the second defendant/appellant, at an annual salary of $24,000. Prior to the accident in 1987 the respondent had undertaken a course of study in Management at I.M.P. in 1984. Subsequent to the accident in 1989 she received training as a Masseuse. As a masseuse she earns US$55 per person. When she is assisted by someone she receives 55% of the fee. Over a period of twenty weeks her income was assessed at US$2,228 net which converts to J$73,524. This demonstrates that her post accident earnings have outstripped her pre accident earnings.

Against this background of evidence, Langrin, J. awarded the respondent a sum of $400,000 for loss of earning capacity. He justifies this award as follows:

> "With respect to Handicap on the Labour Market and with reference to Dr. Crandon's evidence that the weakness on the left side can affect her job as a masseuse and taking her own evidence into consideration

> "pertaining to her earnings I make an award of $400,000.00 for Loss of Earning Capacity. It must be borne in mind that although the evidence of the loss of earnings was not challenged, the reliability of the evidence is a matter which I carefully considered. The reason for such a substantial award under this head relates to the foreign exchange earnings in that field of activity."

If I may be permitted to, I extract from what the learned trial judge has said above that the bases for the award were (a) the possibility that the weakness on the left side could affect her job as a masseuse and (b) the quantum of the award was influenced by the fact that the respondent's earnings as a masseuse was primarily foreign exchange. Unhappily, neither of these two bases is a proper basis on which to make such an award.

Before examining the cases from which the principles as to an award of damages for loss of earning capacity may be culled, it must be noted that the injuries sustained by the respondent have not resulted in a diminution of her income. On the contrary, as pointed out earlier, her income has increased six fold. Secondly, there was no evidence before the court to show that if required to enter the labour market to seek a job the respondent would be less competitive as a result of the injuries sustained.

In ***Moeliker v. A. Reyrolle and Co. Ltd.*** [1977] 1 All E.R. 9 at page 16, Browne, L.J., in dealing with the question of an award for loss of earning capacity, said:

> "But what has to be quantified in assessing damages under this head is

> "the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market."

Continuing, the learned Lord Justice said:

> "Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, loose that job and be thrown on the labour market. I think the question is whether this is a substantial risk, or is it a 'speculative' or 'fanciful' risk (see ***Davies v. Taylor*** per Lord Reid and Lord Simon of Glaisdale). Scarman, L.J. in ***Smith v. Manchester Corpn.*** referred to a 'real' risk which I think is the same test."

This approach was approved by this court in S.C.C.A. 109/91 ***Owen Francis v. Corporal Baker et al*** (unreported), delivered 16/11/92 and in S.C.C.A. 38/90 ***George Edwards and Moses Morris v. Donovan Pommells et al*** (unreported), delivered 22/3/91. Not one shred of evidence was adduced in this case to meet the test laid down.

In any event, I am of the view that the learned judge erred in basing the award on the present income of the respondent. He ought to have examined her competitiveness in relation to the capacity in which she had been employed at the time of the accident.

It is abundantly clear to my mind, relying upon the principles adverted to heretofore, that the award for loss of earning capacity cannot be allowed to stand. I would, therefore, order that it be set aside.

I turn now to ground 1 in which the complaint is that the amount of $1,000,000 awarded for pain and suffering and loss of amenities is manifestly excessive.

A court of appeal will only reverse the trial judge on the quantum of damages if it is convinced that the trial judge acted upon some wrong principle of law or if it can be shown that the award was so extremely high or so very low as to make it in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See ***Davis v. Powell Duffryn Associated Galleries*** [1942] A.C. 601.

An award is considered an erroneous estimate when it falls above or below the bracket within which awards of the appropriate standard are contained. See Quantum of Damages, Personal Injury Claims Vol. 1, 3rd edition, page 136.

Two questions therefore arise: (1) did Langrin, J. act upon some wrong principle of law in making the award or (2) is the award so extremely high as to be considered an entirely erroneous estimate of the damage to which the plaintiff is entitled. With respect to the first question, none of the appellants have contended that the learned trial judge erred by acting upon some wrong principle of law in making the award. The burden of the submissions on behalf of the appellants has been that the award was manifestly excessive in that it fell above the bracket in respect of awards made by the court for injuries similar to those sustained by the respondent.

There can be no doubt that the respondent was seriously injured. To aid the better understanding of my approach to the

award, I set out in full the evidence relative to the injuries the respondent received as also the likely effect those injuries will have upon her. The following is taken from the judge's review of the evidence of the respondent's injury:

> "In her evidence, she said she lost consciousness at time of impact but regained it before she left the scene to the hospital. She experienced numbness in her neck, pains in her upper limbs and difficulty in breathing. She had a dizziness and she was fitted with a collar and cast on her left leg. She was given steroids and for the first month was immobile. Her bed was articulated and a catheta was inserted in her urethra. She never had a bowel movement for about two weeks. Apart from a short term memory her memory in general was being affected. She had to be fed and it was not until three months after the accident she was able to move about unassisted. There was a negative reaction to the steroids resulting in her getting a moon face, rash and hair growing in her face, abdomen distended and cessation of menstrual periods. After the collar was removed she experienced an electrical sensation in her spine. Her right side was paralized and she lacked movement on left side immediately after the accident for a period of 2 months. There were problems with motor movements on the left hand. She cannot play musical instruments or do any high impact exercises e.g. aerobics or tennis. She is a masseuse having received training in 1989. Her left hand becomes tired since the muscles atrophy. She is unable to swim because the left arm movements limits her and makes her tire easily. She is unable to take cold showers and during cold weather she has neck pains and the left hand comes up in a fist. Whenever she reads she experiences neck pains from holding down her head. Similarly, when she plays indoor games

"like checkers, cards and chess. Whenever she takes long walks her knees buckle under. Prior to the accident she enjoyed swimming and badminton. She used to go to the gym but unable to do so now with one side of her being off balance with the other. She does not go as often and tends to be more irritable. She started working in October 1987.

Let us now look at the medical evidence. Dr. Ivor Crandon, Consultant Neurosurgeon and Lecturer in the Department of Surgery at University Hospital of the West Indies, first saw the plaintiff on 1st April, 1993 but the medical reports of Dr. Dundas in 1987 were available to him. On examination, her cranial nerves were normal. The significant findings were confined to her limbs. There was slight weakness (Grade IV power MRC) of the left leg. She also had wasting of the left deltoid and the left leg with a 2cm calf girth difference, the left being smaller than the right. There was sensory loss over the right leg to pinprick and light touch but vibration sense was unimproved and coordination was normal. She had generalized hiper-reflexed with an inverted left supinator jerk, a left extensor plantar and an equivocal right plantar response. There was a full range of motion of the cervical spine. The Doctor opined that there was clinical evidence of a mild myelopathy with a C5 level root lesion, all the result of the injury and consequential damage to the spinal cord and nerve root. A magnetic Resonance Image (MR1) scan was carried out in Florida on 18th May, 1993. The study demonstrated mild foraminal narrowing on the left at C 4/5 and bilaterally at C 5/6. She has suffered a cervical spine injury and has residual neurological deficits as a consequence of damage to the spinal cord. The MR1 findings are not inconsistent this opinion with respect to this patient whose injury occurred 6 years ago. In his view she

"has a permanent partial whole person disability of 20% (AMA). Further improvement in her neurological function is very unlikely. Finally, he opined that the weakness on left side can affect job of masseuse.

Professor John Golding, Consultant Orthopaedic Specialist at the University Hospital examined Freda McKitty on 19th November, 1993, and in his final report had this to say:

> 'From Mr. Dundas' report, it is apparent that Mrs. McKitty's clinical appearance and signs have reduced considerably during the past year. This suggests that she has now reached M.M.I. and can be considered as now having a whole person impairment of about 5% to which must be added a factor for the possibility of late sequelae development due to the definite damage to her cervical spinal cord. I would consider a total of 10% would be a fair estimate of her whole person impairment.'

In October 1992, Dr. G.G. Dundas, Consultant Orthopaedic Surgeon had assessed her as suffering a 25% permanent partial disability relating to the whole person. Dr. Crandon gave evidence and I was particularly impressed with the manner in which he gave his evidence. He was tested under cross-examination and in the end his opinion seemed even more impressive. It follows that I accept his opinion that Freda McKitty has a permanent partial whole person disability of 20%."

Having catalogued the respondent's injuries, their effects and likely effects, as well as the evidence of three eminent

medical gentlemen, each of whom is regarded as the best in Jamaica in their particular field of medicine, Langrin, J. concluded:

> "On the issue of general damages there can be no doubt that the plaintiff should be awarded substantial damages. As indicated supra I accept the opinion of Dr. Crandon that the plaintiff suffered a disability of 20% of the whole person!!"
>
> [Emphasis supplied]

The learned judge seemed to have relied on the case of ***Thompson v. McCalla & Jamaica Omnibus Service***, reported at Vol. 3 of Khan's Personal Injury Awards at page 152. In respect of this case, the judge commented:

> Here the plaintiff was in hospital for 6 months but the disability was 15%, hence the injuries were less severe. The award was in 1986 and when updated to the money of today the sum would be $1.2M for Pain & Suffering and Loss of Amenities. In that case Dr. Golding described the infant plaintiff as a 'partial paralized' yet there was much similarity to the injuries in the instant case.
>
> Taking everything into consideration my award under General Damages is as follows..."
>
> [Emphasis supplied]

There are two observations I would make. Firstly, the learned judge has concluded that the respondent should be awarded substantial damages but he failed to state the basis for his conclusion. However, it is fair to assume that the conclusion is based on the nature of the injuries sustained by the respondent and the resultant 20% disability of the whole person. It must be noted, however, that notwithstanding the 20%

disability of the whole person, Dr. Crandon, whose testimony the judge accepted, said that the respondent had informed him that her present problems were intermittent and not severe allowing her to lead a near to normal life as a masseuse. It is in this light that the 20% disability of the whole person must be seen.

Secondly, the judge, in reference to ***Thompson v. McCalla & Jamaica Omnibus Service*** (supra), concluded that because the disability to the whole person was 15% the injuries sustained by the plaintiff were less severe than the injuries sustained in the instant case. This, with due respect to the learned judge, is a non sequitur. Primarily, what we are looking at in an award such as this is pain and suffering and loss of amenities, not necessarily resultant disability. No doubt resultant disability is a factor to be considered in an award for pain and suffering and loss of amenities, but it does not necessarily speak to the extent of the pain and suffering an injured person endures. What must also be taken into account is that Professor the Hon. Sir John Golding, who assessed the plaintiff's disability as 15% in ***Thompson's*** case (supra), was of the view that the respondent in the instant case "had made a good recovery from moderately severe injuries to her cervical spine. Although there is now no sign of neurological abnormality, late neurological sequelae to such an injury have been reported which would suggest a permanent impairment rated at 5% of the whole person would be reasonable." This was on November 19, 1993. Having seen the M.R.I. Examination and a report dated May 19,

1993, as also Mr. G. G. Dundas' medical report dated October 9, 1992, he opined as follows:

> "From Mr. Dundas' report, it is apparent that Mrs. McKitty's clinical "appearance and signs have reduced considerably during the past year. This suggests that she has now reached M.M.I. and can be considered as now having a whole person impairment of about 5% to which must be added a factor for the possibility of late sequelae development due to the definite damage to her cervical spinal cord. I would consider a total of 10% would be a fair estimate of her whole person impairment."

Be it noted, however, that the learned judge preferred Dr. Crandon's estimate of 20% to that of Professor The Hon. Sir John Golding's estimate of 10%. He has not, however, rejected Professor Golding's assessment of the injury as being moderately severe because this agrees with Dr. Crandon's examination of the respondent in which he uses words such as slight and mild.

Without setting out the injuries of the plaintiff in ***Thompson's*** case (supra), there is absolutely no doubt in my mind that they were far more severe than those sustained by the respondent. The learned judge definitely erred in concluding that the injuries were less severe than those sustained by the respondent in the instant case. Further, the award of $210,000 in the ***Thompson*** case, which the trial judge said would be $1.2M in today's money, included a figure for handicap on the labour market.

Although not argued by the appellants, I am satisfied that Langrin, J. employed the wrong principle in assessing the

damages which he awarded the respondent. Further, when compared with the award in the ***Thompson's*** case (supra), the award is erroneous in that it is excessive. The appropriate award for pain and suffering would be in the bracket of $450,000 to $600,000.

Having established the bracket in which the award should fall, I would make an award of $600,000 for pain and suffering and loss of amenities.

Accordingly, I would allow the appeal, set aside the award of $400,000 made for loss of earning capacity and reduce the award of $1M made for pain and suffering and loss of amenities to $600,000.