

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74/01

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.**

BETWEEN	WILLIS REYNOLDS	APPELLANT
AND	DERON LEWIS	RESPONDENT

**David Johnson instructed by McGlashan, Robinson & Co.,
for the appellant**

**Ms. Christine May Hudson instructed by K. Churchill Neita & Co.,
for the Respondent**

6th June & 7th November 2002

FORTE, P:

This is an appeal from an Order made by Anderson, J in an Assessment of Damages arising out of a claim in negligence brought by the respondent against the appellant. The Order reads as follows:

- "1. Special Damages in the sum of Two Hundred and Eleven thousand One Hundred and Fifty Dollars (\$211,150.00)
2. Interest awarded on the Two Hundred and Eleven Thousand One Hundred and Fifty Dollars at 6% per annum from 1st day of October 1999 to the 11th day of May 2001.

3. General Damages-Pain & Suffering in the sum of Nine Hundred and Fifty Thousand Dollars (\$950,000.00)
4. Interest awarded on the Nine Hundred and Fifty Thousand Dollars (\$950,000.00) at the rate of 6% per annum from the date of service of the Writ namely 30th day of May 2000 to the 11th day of May 2001.
5. Future Medical Care expenses in the sum of One Hundred and Forty Thousand Dollars (\$140,000.00)"

This appeal challenges only the award made for pain and suffering and loss of amenities. In summary the grounds of appeal filed contend⁶ that the award given for pain and suffering and loss of amenities is inordinately high and at "variance" with the decided authorities relied upon by the appellant.

Before examining the arguments presented before us, it is appropriate to reiterate the general principle which this Court applies, before disturbing an award made by a trial judge. It was originally stated in the case of **Flint v. Lovell** [1934] All E.R. (Reprint) and applied by this Court in several cases thereafter. The Court will not reverse an award of damages in respect of its quantum unless the Court is convinced either that the trial judge acted on some wrong principle of law or that the amount awarded is so inordinately high or so very small as to "make the judgment of the Court, an entirely erroneous estimate of the damages to which the Plaintiff is entitled" (**Flint v. Lovell** (supra))

At trial, three medical reports were tendered by consent, two from Dr. Vaughn Whittaker, Resident Department of Orthopedics at the Kingston Public

Hospital, and one from Dr. Guyan Arscott a Cosmetic and Reconstructive Surgeon.

Dr Whittaker reported that the respondent was admitted to the Kingston Public Hospital having been hit from his bicycle by a motor car "traveling at 'high' speed". He was unconscious and remained so for twelve hours. X-ray revealed comminuted fracture of the mid-shaft of the right femur. He was admitted to the Neurological Unit and seen by the Orthopaedic Service. He was treated conservatively with skeletal traction to the right tibia with fifteen pounds of traction. He was managed conservatively on Neurosurgery with no active intervention. Although scheduled to have open reduction and internal fixation of his fracture, this was not done as he developed pin site infection, which was treated with antibiotics. He however continued his traction and on November 15, 1999 six weeks after the accident, he was assessed as clinically stable. He was discharged on November 21, 1999 with crutches. At "follow-up" on 14th December 1999, he had full range of extension and flexion in the right lower limb. He had callus palpable at the fracture site.

Dr. Guyan Arscott saw the respondent on September 9, 2000. He had had multiple injuries to his right femur, right upper limb, left foot and head.

When Dr. Arscott saw him, he complained of residual scars that were itchy, tender and unsightly.

On examination, the Doctor found:

- "1. Over their deltoid and extensor aspect of the arm there were raised hyper-pigmented and hyper-trophic scars. These were multiple: the

largest over the deltoid measuring approximately 6x4cm.

2. Over his right forearm, the antero-lateral aspect, there were multiple raised hyper-pigmented and hyper-trophic scars.
3. To his right face there were smaller hyper-trophic scars over the outer eyebrow and cheek.
4. On the right upper leg there were two hyper-trophic scars representing areas of skeletal traction used to manage his fractured femur. These measured about 2x2cm each.
5. On the left foot there was a smaller 2x1 cm hyper-pigmented, hyper-trophic scar involving the dorsum of the foot."

The doctor opined that the respondent will be left with permanent scars that are quite extensive in his right upper limbs. These scars are for the most part active and will produce symptoms of itchiness and sometimes tenderness over an indefinite period. Corrective surgery will provide partial improvement to the appearance and symptoms of the scars. This surgery will involve extensive scar excision over the right deltoid and the right forearm antero-lateral aspect. Repair will be done with full and partial thickness skin grafting. Following the healing of the skin graft, he will need a course of superficial X-ray therapy to limit recurrence of scars in these areas. The doctor, however, stated that the scars over the left foot and right upper leg may not benefit from corrective surgery.

In his later report, Dr. Whittaker also makes reference to the scarring which he noted on the respondent as follows:

- (i) Over the right deltoid and extensor aspect of right arm
- (ii) Multiple scars on the right forearm anterior lateral aspect
- (iii) Small scars to the right face, just lateral to the right eyebrow and right intra-orbital region.

The reports of the Doctors disclosed that the respondent suffered injuries of two different types – in summary a fracture of the mid-shaft of the right femur and severe scarring which were hypo-trophic and which covered several areas of the body. As a result counsel had great difficulty in finding any precedent which could fit closely the injuries suffered by the respondent. The learned judge in coming to his conclusion on general damages for pain and suffering stated summarily:

"Court felt that injuries and pain and suffering in this case more serious than **Lawrence v. Young & Young or Pennycooke v. Wellington**. More akin to injuries in Wendy Holness because of considerable hypertrophic scarring, which even after surgery, will not improve by more than 35-40%."

As the arguments both in the court below and before us were directed totally to the nature of the injuries, I set out hereunder the injuries of the plaintiff in the case of **Wendy Holness v. Astley McKie** on which the learned judge relied and which is reported in Assessment of Damages for Personal Injuries – Harrison and Harrison page 224:

" - Left upper limb – extensive scarring on the posterior arm, the anterior and lateral aspects of the arm and the medial aspect of the forearm.

- Left lower limb – scarring of the entire posterior and lateral thigh. There were also scarring to the posterior and lateral calf.
- Right lower limb – scarring on the right side posteriorly. The right calf was similarly scarred.
- Scarring of the entire back and buttock region.
- Scarring on the left breast and left anterior chest.
- Scarring on the left half of the abdomen.”

The scars were grotesque and extensive. An award of \$500,000.00 was given for pain and suffering. That sum using the relevant tables would be equivalent to \$1,139,295.00 at the time of trial.

Counsel for the appellant contended that the learned judge placed too much reliance on the *Holness* case (supra) in coming to his conclusion on the question of damages.

It appears, however the learned judge was concerned with the gravity of the scarring to the respondent, and concentrated his award in that area as there is no reference by him to the fractured femur suffered by the respondent. Had the injuries suffered by the respondent been restricted to the scarring, there might have been some merit in counsel’s contention that the award was inordinately high. Counsel for the respondent however invited us to examine several other cases in which damages were awarded for fractured limb and invited us to apply those in conjunction with cases dealing with scarring in order to get a total picture of the global award of damages that would be appropriate. She relied on the case of *Nathan Clarke v. Gernes Hancel* SCCA No. 96/89

delivered on 18th December 1999 (unreported) in which the equivalent of \$652, 276.71 at today's money value was awarded for a fracture of the femur with loss of consciousness. Other cases examined were **Jason Edwards v. Phoebe Buchanan** Khan's Volume 3 page 69, **Floyd Miller and Fitzroy Hamilton v. Levy** CL 1987 M-349 Khan Volume 3 page 63, **John Shirley v. Jamaica Premix Ltd** Assessment of Damages for Personal Injuries - Harrison and Harrison page 215 and **Pogas Distributors Ltd v. Freda Clarke McKitty** SCCA 13/94 and **Francis v. Pogas Distributors Ltd** SCCA 16/94 delivered 24th July 1995 (unreported).

On the basis of these authorities she contended that a sum in the region of \$485,000 to \$652,000 would be a reasonable award in respect of the respondent's fracture of the femur resulting in his pain and suffering.

We were of the opinion at the end of the argument that the respondent having suffered a fractured femur and loss of consciousness, and in addition severe scarring all over his body the sum awarded could not be said to be inordinately high, and as a result, there was no reason to interfere with the learned judge's assessment of the damages. It was for these reasons that the appeal was dismissed.

BINGHAM, J.A.

I agree.

SMITH, J.A.

I agree.