AMCJ.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 92/98

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN J.A. (Ag.)

BETWEEN	MELVIN SMITH	1ST DEFENDANT/APPELLANT
AND	CARSON JAMES	2ND DEFENDANT/APPELLANT
AND	CALBERT GORDON	THIRD DEFENDANT
AND	DENIECE BROOKS (An infant by Karen Hyatt, her next friend)	PLAINTIFF/RESPONDENT

CONSOLIDATED WITH S.C.C.A. NO. 91/98

BETWEEN	MELVIN SMITH	1ST DEFENDANT/APPELLANT
AND	CARSON JAMES	2ND DEFENDANT/APPELLANT
AND	CALBERT GORDON	THIRD DEFENDANT
AND	KAREN HYATT	PLAINTIFF/RESPONDENT

Christopher Samuda, instructed by Piper and Samuda,
for the 1st and 2nd defendants/appellants

Colin Henry, instructed by Henry and Malcolm,
for the plaintiffs/respondents

January 29, February 12 and May 10, 1999

FORTE, J.A.:

Having read in draft the judgment of Bingham, J.A., I agree with his reasoning and conclusion and have nothing further to add.

BINGHAM, J.A.:

This appeal is from a judgment of Donald McIntosh, J., delivered on 10th July, 1998, whereby it was adjudged that there be:

C.L.B. 485/94

1. Judgment for the plaintiff against all three defendants. The third defendant is liable as to two-thirds and the first and second defendant is liable as to one-third in respect of the accident.

2. General damages of $200,000 with interest at 6% from 21st December, 1994, to 10th July, 1998.

3. Costs to the plaintiff to be taxed if not agreed.

C.L.H. 282/94

1. Judgment for the plaintiff against all three defendants. The third defendant liable as to two-thirds and the first and second defendants liable as to one-third in respect of the accident.

2. Special damages of $127,311 with interest at 6% from 29th January, 1994, to 10th July, 1994.

3. General damages of $2,000,000 being:

   (a) for pain and suffering and loss of amenities with interest at 6% from 21st December, 1994, to 10th July, 1998, and

(b) for handicap on the labour market.

4. Costs to the plaintiff to be taxed if not agreed.

The appellants sought to have this judgment against them reversed.

It is necessary to state from the outset that the court was once more placed at some disadvantage by the absence of a note of the judgment delivered by the learned trial judge. We were informed by counsel who argued the matter before us and who both appeared in the court below that there was on oral judgment delivered by the learned judge. Although rule 27(1) of the Court of Appeal Rules makes ample provision for this to be recorded by counsel and presented to the judge for his approval, regrettably once again this task, which is a part of counsel's duty, has gone unheeded. The result is that the thought process of the learned judge as to what may have led him to his conclusion in the several areas of the evidence remains for the most part undocumented.

Liability

In coming to his conclusion on the issue of liability the learned trial judge found that both motorists were at fault. As the third defendant driver was crossing from a minor road into a major thoroughfare he apportioned the blame to this defendant at two-thirds. The one-third apportionment of blame to the first and second defendants (driver and registered owner) was arrived at on the basis that the driver of this vehicle was guilty of travelling at an excessive speed on approaching what was a road junction when the accident occurred.

The primary findings in determining liability for the collision was in the sole province of the learned trial judge who saw and heard the witnesses. On a careful examination of the printed record there is nothing suggesting to us that he failed to take advantage of his function in this regard in coming to his conclusion on this question of liability. This being the situation this court cannot interfere in relation to this question (vide ***Watt (or Thomas) v. Thomas*** [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 63 T.L.R. 314; [1947] 1 All E.R. 582 and ***Benmax v. Austin Motor Co. Ltd.*** [1995] A.C. 370; [1955] 1 W.L.R. 418; [1955] 1 All E.R. 526.

The Issue of Damages

Given the nature of the apportionment of blame in respect of the defendants, the learned trial judge assessed damages in favour of the plaintiff as follows:

1. **The plaintiff Deniece Brooks**

   (a) Special damages in the sum of $6,007.15 with interest at six percent (6%) per annum from January 29, 1994, to July 10, 1998;

   (b) General damages of $200,000 with interest at the rate of six percent (6%) per annum from December 21, 1994, to July 10, 1998.

2. **The plaintiff Karen Hyatt**

   (a) Special damages in the sum of one hundred and twenty-seven thousand, three hundred and eleven dollars $127,311) with interest thereon at the

rate of six percent (6%) per annum from January 29, 1994, to July 10, 1998;

(b) General damages in the sum of two million dollars ($2,000,000); of that amount one million, five hundred thousand dollars $1,500,000) is for pain, suffering and loss of amenities with interest thereon at the rate of six percent (6%) per annum from December 21, 1994, to July 10, 1998, and five hundred thousand dollars ($500,000) is for handicap on the labour market.

Learned counsel for the appellants sought to challenge the awards made to the plaintiffs below as manifestly excessive.

1. Deniece Brooks

In so far as the infant plaintiff was concerned, counsel highlighted the absence of any medical evidence being adduced in support of the injuries as pleaded in the statement of claim. This can be explained on the basis that efforts made by counsel for the plaintiff to have the doctor who attended on the plaintiff testify at the trial were unsuccessful. When this failed, attempts by counsel to tender a medical report in support of the claim did not meet with the consent of defence counsel.

What was clear from the evidence before the learned judge was that following the accident the plaintiff was admitted into the Spanish Town Hospital along with the other plaintiff who is her mother. They both spent three days in this institution before being transferred to the Medical Associates Hospital at Tangerine Place in St. Andrew. Miss Hyatt, the mother, described the

condition of the infant plaintiff as "having her face very swollen and suffering from minor cuts and bruises." The infant plaintiff spent another two days as a patient at that institution before being discharged.

While a patient at the Medical Associates Hospital the infant plaintiff was attended to by Dr. Robin Sahoy, a consultant surgeon specialist at that institution. He was responsible for preparing the medical report on this plaintiff to which consent as to its admissibility in evidence was withheld by defence counsel.

Learned counsel for the appellants submitted that given the nature of the evidence before the learned judge, a reasonable award for pain and suffering ought to have been about $30,000. He cited in support the following personal injury awards:

> **1.** C.L. 1990/H170 ***Ronald Holmes v. Jeremiah Anderson***, reported in Harrison (Karl) J's case notes at page 87 -- a whiplash injury causing pain in the neck, hip and back, an award by Reid, J. of $12,000 for pain and suffering and loss of amenities on 12th June, 1992 which now converts to $37,000.
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> **2.** C.L. 1991/B247 ***Shirley Maynier Burke v. Ervine Wilson***, reported in Harrison (Karl) J's case notes at page 88 -- an acute sacral strain, whiplash injury and tenderness in the lumbar spine; an award by Reckord, J. on 2nd July, 1992, of $10,000 for pain and suffering which now converts to $30,000.

Learned counsel for the infant respondent submitted that despite the absence of the medical evidence supporting the viva voce testimony of the

plaintiff and her mother, there was sufficient evidence upon which the learned judge could find that the injuries suffered by the plaintiff would warrant an award of $200,000 for general damages. He cited in support C.L. 1987/R239 ***Sydney Rowe v. Johnson Lue***, where for injuries of cerebral concussion permanent pain in back and neck, damages assessed by G. G. James, J. an award on July 1, 1991 of $133,287 for general damages which now converted to $500,000.

When examined the case relied on by learned counsel for the infant plaintiff discloses that the injuries were far more serious than that suffered by the plaintiff in this case. Given the fact, however, that the infant plaintiff suffered a loss of consciousness in addition to the injuries mentioned by her mother such injuries that necessitated her admission to a public hospital for three days and a further admission at a private hospital for an additional period of two days, a situation not indicated in either of the two cases relied on by learned counsel for the appellant, the award of $200,000 for general damages assessed by the learned judge is fully supported by the evidence and ought not to be disturbed.

2. Karen Hyatt

This plaintiff suffered serious injuries and was in an unconscious state following the accident on 29th January, 1994, in which she was hit down by the defendant's motor vehicle travelling at great speed which overturned following the impact.

She was taken to the Spanish Town Hospital where she was admitted and treated for the following injuries:

i. loss of consciousness;

ii. laceration to the front parietal scalp;

iii. fracture of the pelvis and lower and middle thirds of the left leg;

iv. fat embolism;

v. lower back pain radiating to right hip;

vi. hyperesthesia in the right middle finger in the volar aspect from its base to the tip;

vii. A 26% impairment to the middle finger or 5% of the hand or 3% of the whole person.

The plaintiff in testifying described her condition on regaining consciousness in the hospital as one in which she experienced pain "all of me from head to toe. I had lacerations all over my body from forehead. My foot was broken between my knee - nearer to the ankle was broken off - only held by skin - skin broken. I had two teeth broken - canines broken in half. Hip bone was broken." She was subsequently treated but her left foot was put into a cast from toes to top of leg, just below hip. The cast remained until March, 1994. It was then shortened from the left knee to the foot. This shortened cast remained on the left foot until July, 1994. After this cast was removed the plaintiff needed the aid of two crutches for the first week, and the one crutch for about two months. During the time that the short cast was on the plaintiff was

able to walk around with the aid of the crutches. She was not able to get around while the longer cast was on.

Following her transfer to Medical Associates Hospital, the cuts were cleaned and stitched on the forehead and all over the body and injections, dressings and cleaning done. An x-ray was also carried out. She was seen by Dr. Dundas.

The plaintiff remained at Medical Associates Hospital for one and a half weeks following which she was transferred to the University Hospital of the West Indies. It was there that the long cast was removed and the short one put on. The plaintiff attended at the Orthopaedic Clinic there from time to time until she was admitted to the hospital for four days. The purpose of this admission was for Dr. Minott who was attending to her broken hip to attempt to put it back together. This was not done. The result is that the plaintiff now experiences discomfort in moving around. She was not able to recommence working until June 1994.

Her prospects for the future have been seriously affected as a result of the injuries which she suffered. Prior to the accident, she had the ambitions of qualifying for appointment as a health insurance executive. She was undertaking courses to sit LOMA examinations in her field of work and had successfully completed two of ten parts in order to qualify for such an appointment in that field of endeavour. With each successful completion of a part of the course the status of the individual would improve. With the injury to

the plaintiff's hand she is no longer able to function efficiently as she had difficulty in holding a pen and in writing as she did before the accident. She is now just able to sign her name. Although the plaintiff has been able to continue working which she has done since June 1994 to the present the injuries which she has suffered has resulted in her not being able to improve her work status as she has had to abandon her ambition to qualify as an health insurance executive as a result of the injuries which she suffered.

Faced with this evidence, the learned trial judge awarded the plaintiff general damages of $2,000,000, apportioned as follows:

> **(i)** pain and suffering and loss of amenities -- $1,500,000
>
> **(ii)** handicap on the labour market -- $500,000.

Learned counsel for the appellants has submitted that the medical evidence indicated that although the injuries suffered by the plaintiff were serious that she has made an almost complete recovery. The award made for pain and suffering, etc. were, therefore, out of line with comparable awards in this jurisdiction. He cited in support:

> **1.** 1988/W028 ***Donald Williams v. Evette Cope***, page 100 of Harrison's case notes No. 2. The plaintiff suffered a fracture of the pelvis to the roof of the right acetabulum, separation of the pubic symphysis, displacement of the right sacro-iliac joint, compound comminuted fracture of the left tibia and fibula, the lower back was swollen and tender over the lumbar region, scrotum swollen and painful. He was hospitalized for 35 days. Disabilities: the left leg healed with a "bow" leg deformity and a one inch shortening. He now walks with a limp

and is likely to develop osteoarthritis within five to seven years. The fracture will affect his walking and will be painful for life. He now suffered a 15% permanent partial disability of the whole man. Patterson, J. (as he then was) on September 24, 1990, assessed the general damages for pain and suffering and loss of amenities at $110,000, loss of earning capacity $10,000. The award of $110,000 was increased on appeal as being too low to $130,000.

2. 39/94, ***The Attorney General et al v. Calbert Smith***, where the injuries suffered by the plaintiff were as follows:

   i. 2cm laceration to left forehead;

   ii. 4cm laceration to right elbow;

   iii. 15cm deep laceration to anterior aspect of mid shaft of right leg with obvious deformity;

   iv. compound comminuted fracture of right leg with bones shattered in several places.

The plaintiff was admitted to the Spanish Town Hospital and transferred the next day to the Kingston Public Hospital where he remained for 4½ months and then discharged home on crutches. He attended the Out-patient Clinic for about two years.

When last examined by Dr. A. Mena the right lower limb showed marked muscle waste of thigh and leg. He walked with a significant limp and his right lower limb was 2½ inches shorter than the left.

His permanent functional impairment was assessed at 35% of the lower limb equivalent to 15% to 17% of the whole man. An award of $300,000 for general damages for pain and suffering and loss of amenities was affirmed on appeal.

Counsel for the appellants submitted that as the injuries in the cases cited were far more serious than in the instant case the awards for pain and suffering, etc. and handicap on the labour market ought to reflect this fact. He contended that given the plaintiff's injuries a reasonable award for pain and suffering and loss of amenities ought to be of a range which when converted was much lower than the award in this case. He submitted that no award for handicap on the labour market ought to have been made as the plaintiff was now gainfully employed.

Learned counsel for the plaintiff urged the court to uphold the awards made below. He cited in support the judgment of the Court of Appeal of Trinidad and Tobago in ***Trinidad Transport Enterprises Ltd. and another v. De Souza*** 25 W.I.R. 511 at 515 (per dictum of Hyatali, C.J.), where the learned Chief Justice cited with approval from the judgment of the House of Lords in ***Davies and another v. Powell Duffryn Associated Collieries Ltd.*** [1942] 1 All E.R. 657; [1942] A.C. 601, the principle to be applied as "a good general guide" with regard to the jurisdiction of an appellate court to interfere with an award of damages. There the noble law Lords relied on the dictum of Greer, L.J. in ***Flint v. Lovell*** [1934] All E.R. (Rep.) 200 at 202 (I) to the following effect:

> "To justify reversing the assessment of damages by a judge who has tried the case without a jury, the Court of Appeal must be convinced either that the judge has acted on a wrong principle of law or that the amount awarded was so extremely high or so very small as to make the assessment an entirely erroneous estimate of the damages to which the plaintiff is entitled."
> [Emphasis supplied]

Counsel submitted that it was for the appellants to show that the awards were out of line with current awards made in this jurisdiction. He also cited in support C.L. 1987/M087 ***Desmond McLean v. Yorkwin Walters and another.*** Damages were assessed November 9, 1989, by Patterson, J. (as he then was). The plaintiff, a sergeant of police 39 years of age, was injured in a motor vehicle accident on 27th May, 1979, in which he suffered the following injuries: unconsciousness, severe fracture, dislocation of the left hip, fracture of the shaft of the left humerus, small cuts in face and head. His hip fracture was reduced and plaster cast applied to the left arm. He was placed in traction and confined to bed with the left arm suspended. He could only move if assisted. He could not wear clothing up to two months before his discharge. His arm cast was removed after two months. Traction lasted 3½ to 4 months. He had a second operation to reduce hip and was discharged in a wheelchair. Later he used crutches. He resumed duties in early 1980. Disabilities: shortening of the left lower hip - walked with a limp - restricted movement of left hip. Considerable new bone formation around hip. A total hip replacement would

be required at some stage. The total hip replacement when done would result in whole person disability being put at 6%.

The award by Patterson, J. (as he then was) on November, 1989, for general damages for pain and suffering and loss of amenities was $190,000. When converted to the money of the day this sum is $1,500,000.

The award for handicap on the labour market

Learned counsel for the respondent plaintiff contended that the plaintiff's prospects for advancement has been cut short because of the accident. The unchallenged evidence being that she had been engaged in a course of study to qualify as an health insurance executive.

She was now only able to complete two parts of a ten part course. Much to her credit, she, far from malingering, has on her own initiative gone back to work some five months after the accident. This she has done without the advice of her own doctor.

When the rival contentions of counsel are considered, I am minded to accept the arguments advanced by learned counsel for the respondents. What one has here is a plaintiff who was still a relatively young lady at the time of the hearing, single and who has suffered what can be regarded as serious injuries which has left her with a limp in her gait and a permanent impairment in her control arm. Her prospects for attaining her life's ambition now appear for the most part to be left unrealised. Although the award for pain and suffering and loss of amenities, when compared with the awards cited by the appellants, may

appear to be on the high side when the injuries are compared like for like given the age and status of the plaintiff, I would not disturb it. One cannot say that the learned trial judge who saw and heard the plaintiff and her witnesses and observed her demeanour and applied his mind to her situation came to a conclusion which, given the particular circumstances of this case, was an entirely erroneous estimate of the damages to which the plaintiff is entitled

As to the award for handicap on the labour market, no serious challenge has been mounted by the appellants to this award. Given the unchallenged evidence as to the plaintiff's prospects prior to the accident as against her present position one cannot say that this award ought to be disturbed.

For the above reasons, therefore, I would dismiss the appeals and affirm the judgment of the learned judge below with costs to the respondents to be taxed or agreed.

LANGRIN, J.A.:

I agree.