

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/B237

BETWEEN	SALOME BAILEY	PLAINTIFF
A N D	VIRGINA DARE (Jamaica Ltd.)	1st DEFENDANT
A N D	CLEVELAND DAVIS	2nd DEFENDANT

Mr. Rudolph Francis and Mr. Winston Rhoden

And Company for Plaintiff.

Patrick Foster and Miss Catherine Francis instructed by

Clinton Hart & Co. for Defendant

Heard: October 4,5,6,7,8 and
10th November, 1999.

HARRIS J.

On the 22nd April, 1993 the plaintiff was driving her Opel Corsa motor car along the Spanish Town to Old Harbour main road in the parish of St.

Catherine when a motor truck owned by the first defendant collided with her motor vehicle. Liability had been admitted by the defendants. The

assessment of the damages to be awarded to the plaintiff now falls for consideration.

Leave to amend the particulars of injuries and particulars of special damages of her statement of claim was sought and obtained by the plaintiff. The particulars of injuries as outlined in the amended statement of claim are as follows:-

- “
- (i) Two centimetre (2 cm) swelling to forehead.
 - (ii) Tenderness over right shoulder.
 - (iii) Tenderness over left hip.
 - (iv) Fracture of the left ileum.
 - (v) Cracked fracture of the left ilium bone.
 - (vi) Posterior disc herniations at C4-5, C5-6 and C6-7, creating cord impingement without obvious myelopathy.
 - (vii) Degenerative spondylosis and loss of lordosis in the spine.
 - (viii) Unhealed fractures of C5 and C6 vertebrae.
 - (ix) Grade 1 anteolisthesis of C6 and C7.
 - (x) Intra-articular swelling in the right C5 and C6 facet joint.
 - (xi) Interspirous ligament injury to C5-C6 and C6-C7.
 - (xii) Injury to the posterior ligaments at C5-C6 and C6-C7.”

The claim as expressed in the amended particulars of special damages is stated hereunder:-

“Medical Treatment

(i)	Payment to Dr. Notice	\$ 1,200.00	
(ii)	Payment to Dr. Miller (Ophthalmologist)	1,100.00	
(iii)	Payment to Dr. Dundas	3,850.00	
(iv)	Payment to Dr. Cheekes	600.00	
(v)	Payment to Dr. Fowler	<u>450.00</u>	<u>\$ 7,200.00</u>
			\$ 7,200.00
(vi)	Payment for two (2) MRI Scan examinations @ \$19,200.00 each.	\$38,400.00	
(vii)	For one C.T. Myleogram	3,643.00	
(viii)	For Lumber Puncture Investigation	1,312.00	
(ix)	For one (1) x-ray Examination	<u>350.00</u>	<u>\$43,705.00</u> <u>\$50,905.00</u>

Payment for Physiotherapy Treatment

(x)	To Mrs. Swyre Forbes	3,285.00
(xi)	To Mrs. Bernadette Frankson	5,385.00

(xii)	To Spanish Town Hospital	<u>40.00</u>	<u>\$ 8,710.00</u>
			\$59,615.00

Payment for Medical Reports

(xiii)	To Dr. Dundas (for several Reports)	\$ 7,500.00	
(xiv)	To Dr. Notice	600.00	
(xv)	To Dr. Miller	<u>1,100.00</u>	<u>\$ 9,200.00</u>
			\$68,815.00

TRAVELLING EXPENSES

(i)	1993 – Cost of Airline Ticket to Miami for MRI Scan examination	\$ 3,737.00	
(ii)	1994 – Cost of Airline Ticket to Miami for second MRI Scan examination	<u>5,707.00</u>	<u>\$ 9,444.00</u>
			\$78,259.00
(iii)	Amount paid for ambulance	\$ 800.00	
(iv)	1993 – Travelling by taxi on all occasions for medical treatment	7,000.00	
(v)	1994 – Travelling by taxi on all occasions for medical appointment and treatment	8,600.00	
(vi)	1995 – Travelling by taxi on all occasions to keep medical appointments.	<u>2,600.00</u>	<u>\$ 24,700.00</u>
			\$102,959.00

PURCHASE OF SPECIAL ARTICLES

(i)	One (1) pair of tested glasses	\$ 278.40	
(ii)	One (1) pair of cervical collar	350.00	
(iii)	One (1) pair of cervical collar	1,100.00	
(iv)	One (1) cervical pillow	2,640.00	
(v)	One (1) electrical heating pad	<u>415.04</u>	<u>\$ 4,783.44</u>
			\$107,742.44

NURSING AND DOMESTIC SERVICES

(i)	Employment of practical nurse From 27/4/93 to 10/5/93	2,000.00	
(ii)	Employment of domestic helper From 11/5/93 to 31/11/12/93	7,426.00	
(iii)	Employment of domestic helper	19,650.00	
(iv)	Employment of domestic helper	21,760.00	
(v)	Employment of domestic helper from 2/1/96 to 28/6/99 and continuing.	<u>11,790.00</u>	<u>\$ 62,626.00</u>
			\$170,368.44

LOSS OF INCOME

Loss of earnings from 25/5/93 To 28/6/96 for thirty-seven Months @ \$5,282.86 per month	<u>\$195,465.82</u>	<u>\$195,465.82</u>
		\$365,834.26

MISCELLANEOUS EXPENSES

(i)	Overnight accommodation at St. Joseph's Hospital	\$ 250.00	
(ii)	To Spanish Town Hospital	<u>200.00</u>	<u>450.00</u>
			\$366,284.26

PURCHASE OF MEDICATION

Purchase of medication as Prescribed during the period	\$2,834.00	<u>2,834.00</u>
		\$369,118.26

ADDITIONAL MEDICAL EXPENSES

(i) On 13.12.96. Follow-up visit To Dr. Dundas	\$ 400.00	
(ii) On 16/1/97 to 18/5/98 Six (6) visits to Dr. Dundas @ \$500.00 each	3,000.00	
(iii) On 14/7/97 and 5/8/98 Payment to Dr. Dundas for two (2) medical reports @ \$5,000.00 each	10,000.00	
(iv) Taxi fares from home to Dr. Dundas between 13/12/96 and 5/8/98 – Sever. (7) times @ \$800.00 return -	5,600.00	
(v) On 13/12/96 to 17/2/98 Follow-up visits to the Physiotherapist -- Three (3) Visits	260.00	
(vi) Taxi fares from home to Spanish Town Hospital (Physiotherapist) and return. Three (3) times @ \$100.00 each -	300.00	
(vii) On 20/1/99 Payment to Dr. Dundas for surgical fees on Right hand	9,350.00	

(viii) On 14.1.99 to (10/2/99 Four (4) visits to Dr. Dundas @ \$500.00 each	\$2,000.00	
(ix) On 20/1/99 to 10/2/99 Taxi fares from home to Dr. Dundas and return - Five (5) times @ \$800.00 each	4,000.00	
(x) On 17/12/98 Payment to Dr. Daniel S. Graham for Neura Diagnostic examination and report -	<u>8,000.00</u>	<u>42,910.00</u>
		\$412,028.26

FURTHER LOSS OF INCOME

Further loss of income from 29 th June, 1996 to 30 th September 1999; thirty-eight (38) months at \$5,282.86 per month =		<u>200,748.60</u>
TOTAL		<u>\$612,776.94</u>

The plaintiff claims the sum of Six hundred and twelve, seven seventy six and ninety four cents.”

I will first give consideration to the matter of general damages and only the question of pain and suffering will be considered under this head as evidence had been adduced relating to this head only. It was the complaint of the plaintiff that after the receipt of her injuries she experienced dizziness, a severe headache, pain in her neck, shoulders, left hip and left leg and weakness. She stated that she was bleeding from above her left eye. She also asserted that there was numbness in her ankles and she had "pins and

needles" sensation in fingers of her right arm. She was taken to the Spanish Town hospital where she was seen by a doctor, sent to be x-rayed, given medication and sent home on bed rest. She remained in bed for a month as she discovered that she was unable to walk due to pain in her hip and swollen feet.

Her pain and discomfort persisted, rendering it necessary for her to be seen once again by a doctor at Spanish Town Hospital and twice by Dr. Notice who referred her to Dr. Dundas. She was seen by Dr. Dundas on 35 occasions. She was also seen by Dr. Randolph Cheeks and Dr. Daniel Graham.

Dr. Dundas gave evidence on her behalf. He confirmed that he had seen her on the occasions stated by her, beginning on 26th June, 1993 and ending on the 8th August, 1999.

His first examination of her revealed that her respiratory and cardiovascular systems were normal. The main abnormal findings related to her neck,, in which there was significant restriction of motion and marked tenderness on palpation. He also found that in her right upper extremity, she had diminution in sensation, weakness in her grip and finger movement, reduction in her deep tendon reflexes and spasms in her right trapezius. She

retained good range of movement and displayed no neurovascular deficits in her legs.

His review of x-rays done at Spanish Town hospital revealed a fracture of the left side of her pelvis, involving the anterior superior iliac spine. New x-rays of the neck were done, as those done at the Spanish Town Hospital were inadequate. The new x-rays showed a narrowing of the space between 5th and 6th vertebrae and also a misalignment of the 6th and 7th vertebrae

Dr. Dundas said when he saw her on the 26th June 1993 there was nothing to indicate a fracture of the 5th and 6th vertebrae.

A MRI report in respect of a scan done on her on the 21st September 1993 showed apparent presence of unhealed fractures of the C5 and C6 vertebrae.

The report of a second MRI scan done on the 12th October, 1994 demonstrated that unhealed fractures of 5th and 6th vertebrae were present. Dr. Dundas pointed out that depending on the type of fracture, some might be easily overlooked while others may be undetectable on a x-ray.

He stated that a CT scan which was done subsequent to the first M.R.I. scan failed to confirm the fracture which was suspected. He pointed out however that the CT scan would demonstrate more graphically gross

changes in the bone structure while the MRI scan detects changes at biochemical level. He concluded that the fracture of 5th and 6th vertebrae is questionable.

The MRI scan showed 3 disc herniations between the 4th & 5th, 5th & 6th and 6th & 7th vertebrae which were impinging on spinal cord. An old disc degeneration of the 5th and 6th cervical vertebrae existed. Up to June 1992 Dr. Dundas saw nothing to show a fracture of the 5th and 6th vertebrae. The first MRI scan revealed that a fracture was apparent. The second scan showed a fracture. The CT scan revealed no fracture. Dr. Dundas regarded the existence of the fractures a questionable diagnosis. In light of this, the plaintiff has not proved on the balance of probabilities that fractures to the 5th and 6th vertebrae resulted from the accident. The claim with respect to the unhealed fractures of the C5th and C6th vertebrae cannot be taken into account in assessing her pain and suffering.

Dr. Dundas next saw her in July 1993 and on examination she had persistent spasms and increased tenderness in her right shoulder. Her ability to discriminate sensation in her right hand was impaired. Her blood pressure was elevated. Dr. Dundas opined that pain could be a possible cause of elevation in one's pressure. It is my view that her elevated blood pressure is directly related to the pain she experienced as a result of the accident.

Dr. Dundas next saw her on the 10th September 1993. Her symptoms

continued with minimal improvement. By then she had also developed pain in the left sacro-iliac joint. This was a late sequel of her fractured pelvis.

He again saw her in April 1994 but her condition generally had not improved save and except her blood pressure was controlled. By then she

had begun to develop signs of intractable nerve compression at the right

wrist.

In May 1994 and January 1996 there was no significant changes in her condition. When he saw her on 20th May, 1996 she was having spasms in

her lumbar spine as a sequel of her whiplash.

He examined her on the 6th June 1996. The discomfort in her right upper extremity had worsened and the grip in her right hand was

diminishing. Her complaint, among other things was in-ability to comb her hair, which he stated was linked to a progression of carpal tunnel syndrome

in her wrist.

She next visited Dr. Dundas in March 1997 as a consequence of significant exacerbation of pain in her neck, back and lower extremities.

Her next examination on the 14th July revealed tenderness in the right

radial plexus with restriction of motion of her cervical spine, tenderness in

her scalene muscles and reduction in her grip. The reflexes in her knees were reduced.

When again seen by the doctor on the 6th November 1997 she had developed pain in left upper extremity and weakness which had not previously manifested itself. There was tenderness on the left side of her neck.

She was further seen in December 1997 at which time the pain in her arm had improved but the neck pain persisted. An examination of her in March 1998 revealed that cramps in her right hand had worsened, both grips were reduced and her reflexes on the right side was slower than the left.

On the 16th November 1998 she was again examined. The features of her complaint included discomfort in her groin area, tingling in her toes, pain in the neck, 'pin & needles' sensation in her right index finger and stiffness in her right index finger which confirmed the existence carpal tunnel syndrome.

Her next medical review was on the 2nd December, 1998 when numbness in her right upper extremity intensified. There was also an unusual sensation in her right lower extremity. Examination revealed depression in her reflexes in right upper extremity with all signs of carpal tunnel syndrome. A nerve conduction test done by Dr. Daniel Graham on

the 17th December 1998 proved positive for the compression of the nerves.

This led to surgery being performed on her arm on the 20th January 1999 by Dr. Dundas to correct the carpal tunnel malady.

He asserted that carpal tunnel syndrome may or may not be related to the plaintiff's injury but stated that the possibility of this being connected to her injury is more likely than not. It is my view, on the balance of probabilities, the condition of carpal tunnel syndrome was induced by the injury the plaintiff received to her neck and right shoulder at the time of the accident.

There is no doubt that the plaintiff suffered much pain and discomfort consequent on her receipt of injuries to her pelvis, and her neck and shoulder. She gave evidence with respect to injury to her eye but her pleadings do not disclose any claim for an eye injury. Cognisance cannot be taken of the eye injury. It is clear that, however, her agony had been persistent and she has suffered excruciating pains since date of accident up to the present time. When Dr. Dundas last saw her on 8th August, 1999 she was quite tender in the right radial plexus and the restriction of motion of her neck was in the worse condition than it had ever been. While giving evidence in court it was observed that she at times winced with pain of the neck. Her disability was assessed at 20% of the whole person.

Mr. Francis placed reliance on three cases in support of this head of damages. These cases are: *Jenkins v Richard Thomas & Baldwins Ltd.* 1966 2 All E.R. 15, *Cunningham v New Town Bakery* 2 Harrison's Casenotes pg. 94 and *Grant V. Wyndham Hotel* 4 Khans Report 194.

The case of *Jenkins v. Richard Thomas & Baldwin Ltd.* does not offer assistance in the making of an award, as this case would only be relevant with respect to a claim for loss of future earnings and such a claim had not been made in the present case.

Cunningham v. New Town and Bakery and *Grant v. Wyndham Hotel* do not proffer assistance in the calculation of an award, as the injuries sustained by the plaintiffs not in those cases and the nature of disabilities are closely related to those of the plaintiff in the case under consideration.

Mr. Foster made reference to the following cases: -

Bell v. Taylor & Anor - 3 Khan's Report page 103.

Peru v. Frome Monymusk Land Co. Ltd. - 1 Khan's Report page 127.

Hall v. Morgan & Anor - 3 Khan's Report 201.

Gardener v Cehu & Anor - 4 Khan's Report 156.

Richards v. Foster - Harrison's Revised Edition of Casenotes No. 2 page 85.

These cases cited by Mr. Foster do not, in my opinion, offer appropriate guidance in the computation of an award for the reason that the injuries suffered by the respective plaintiffs are not closely comparable to those suffered by the plaintiff in the present case.

An exhaustive search of cases of personal injuries awards has not revealed any comparative cases to which the court could resort as a reasonable comparative guide in the assessment of an award for the plaintiff's pain and suffering. In my view the sum of \$1,200,000.00 would be reasonable compensation for her pain and suffering.

I will now make reference to the claim for special damages. It is the duty of the plaintiff to tender strict proof of all items for which she seeks compensation, or for reimbursement of her loss. It is the plaintiff's evidence that she expended the sums outlined in her particulars of special damages. She also stated that she had lost income from the 22nd April 1993 until 30th September, 1999 due to her inability to work.

She exhibited receipts and other documentary evidence in proof of the following expenditure: -

Medical Treatment

Payment to Dr. Notice	\$1,200.00
Payment to Dr. Miller	\$1,100.00

○ Payment to Dr. Dundas (inclusive of all visits to 1999 & report) except for 5/8/98)	22,900.00	
Payment to Dr. Dundas (re surgery on right hand)	9,350.00	
Payment to Dr. Cheeks	600.00	
○ Payment to Dr. Fowler	450.00	
Payment to Dr. Graham (re neurodiagnostic given)	8,000.00	
	431600.00	\$43,600.00
Payment to MRI scans @ \$19,000	38,400.00	
One C.T. Myelogram.	3,643.00	
One Lumbar Puncture Exam	1,312.00	
○ One X-ray Exam	<u>350.00</u>	
	43,705.00	\$43,570.50
<u>Physiotherapy</u>		
Mrs. Swyre Forbes	\$2,550.00	
Mrs. B. Frankson	\$1,600.00	
Spanish Town Hospital	<u>\$180.00</u>	
	\$4,330.00	
Follow-up visit to ○ physiotherapist	<u>260.00</u>	
	\$4,590.00	\$4,590.00

Purchase of Articles

One pair of glasses	\$278.40	
One cervical collar	\$350.00	
One Philadelphia collar	\$1,100.00	
One cervical pillow	\$2,640.00	
One electrical heating	<u>\$415.00</u>	
	\$4783.00	\$4783.44

Nursing & Domestic Services

Employment of practical nurse	\$2,000.00	
Employment of domestic helper (11/5/93 - 31/12/93)	\$7426.00	
Employment of domestic helper (2/1/94 - 31/12/94)	\$19,200.00	
Employment of domestic helper (1995)	\$21,760.00	
Employment of domestic helper (2/1/96 - 8/96)	<u>\$17,950.00</u>	
	\$68,336.00	\$68,336.00

Hospital Fee

Overnight accommodation at St. Joseph's	\$250.00	\$250.00
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Cost of Medication

Medication agreed at	\$2,834.00	\$2834.00
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Overseas Travelling Expenses

Travelling to Miami in order to have scars done 1993 - Cost of airline ticket & travel tax	\$337.00	
1994- Cost of airline ticket & travel tax	<u>\$5707.00</u>	
	\$9044.00	\$9044.00

Amount paid for ambulance service	<u>\$800.00</u>	<u>\$800.00</u>
	\$800.00	

Grand Total **\$1168.098.40**

So far as the medical reports are concerned, no award will be made for the cost of Medical reports, of Notice Dr. Miller and that of Dr. Dundas dated 5th August, 1998 as these expenditure had not been proven in that neither reports nor relevant receipts were tendered in evidence. The plaintiff proved payment of only \$600.00 to Dr. Cheeks the additional payment of \$2000 has not been prove and is therefore disallowed.

All costs of the plaintiff's local travel to her appointments with the doctor's have not been specifically proved. It was her evidence that taxis were the mode of her transportation on her visits to the various doctors. She stated that the round trip fare by taxi from her home in Spanish Town to Kingston was \$180.00 on each occasion and the round trip fare from her home to Spanish Town hospital was \$40.00. However, it was revealed in cross-examination that the use of taxis was not the only method by which she travelled. She travelled by bus, or taxis and was also transported by her husband to Dr. Dundas office on several occasions. However, when she was taken by her husband she would return home by taxi. The following trips will be allowed.

1993

- 5 trips to Dr. Dundas @ \$90
(one way: Kgn. to home) \$450.00
- 2 trips to Dr. Notice @ \$40 round trip
to Sp. Town 80.00
- 4 trips to Dr. Miller @
\$180 (round trip) 720.00
- 1 trip to Dr. Fowler 180.00
- 2 trips to Dr. Cheeks @ \$180 360.00 \$1790.00

1994

- 5 trips to Dr. Dundas
Morning appt. 2 @ \$900 \$180.00
Late appt. 3 @ \$180 \$540.00
\$720.00

1995

- 4 trips to Dr. Dundas
Morning appt. 1 @ \$90.00 \$90.00
Late appt. 4 @ \$180 \$720.00
\$810.00

1996

- 4 trips to Dr. Dundas
Morning appt. 3 @ \$90 \$270.00
Late appt. 1 @ \$180 \$180.00 \$450.00

1997

4 trips to Dr. Dundas

Morning appt. 3 @ \$90 \$270.00

Late appt. 2 @ \$180 \$360.00

\$630.00

1998

5 trips to Dr. Dundas

Morning appt. 2 @ \$90 \$180.00

Late appt. 3 @ \$180. \$540.00

\$720.00

1999

6 trips to Dr. Dundas

Morning appt. 1 @ \$90 \$90.00

Late appt. 5 @ \$180.9 \$900.00

\$990.00

\$6110.00

Taxi fare to physiotherapist in
Spanish Town

\$360.00

\$6470.00

\$6,470.00

Her claim for \$200.00 paid to the Spanish Town hospital is not allowed as she gave no evidence with respect to this item.

As to the plaintiff's claim for loss of income, she is under an obligation to provide strict proof of her loss of income for the period she had stated that she had not been in receipt of a salary. She is a Public Health Nurse and was so employed at the time of the accident, earning a net salary of \$5,282.86 monthly. She is still employed to the Government of Jamaica.

She was subjected to an examination by the Medical Review Board in February 1997.

Mr. Foster urged that it is reasonable to infer that she continued to receive full salary up to February 1997. He stated that she adamantly asserted that she was in receipt of salary up to the end of April 1993 but only she was confronted by him with a document did she admit that she received salary up to the end of May 1993, thus making her credibility questionable.

He further submitted that when she was asked in cross-examination if she agreed that when a matter such as hers is referred to the Medical Review Board she receives her salary, she replied in the affirmative. She however stated afterwards that she honestly did not know whether a public servant receives salary up to the period a Medical Board hears an application.

In my view the issue as to whether she was paid up to the date the medical board reviewed her matter must be considered in light of all the circumstances surrounding her employment.

She stated that at the time of the accident her post with the Ministry of Health was a temporary one. She had commenced an assignment at the St. Jago Health Department in January 1993. In view of the fact that her post was a temporary one and she had only begun her assignment 3 months prior to the

accident, it is unlikely that she would have had the benefit of any paid leave on the ground of illness, inclusive of any period beyond that for which she stated that she had been paid. On the balance of probabilities, she would not have been afforded paid sick leave for 45 months, that is from June 1993 to February 1997.

She said she made a mistake when she stated she had not received salary for May. This I accept. She further said she did not receive salary for June or any other period. I find that she was not in receipt of salary for the period, June 1993 to February 1997. She would therefore be entitled to recover the amount she would have received as salary for 45 months at rate of \$5282.86 monthly.

The Medical Board, on review of her case, made a finding that she could do sedentary work. She however, made no effort to return to work and attempt to seek reduction in her assignments to incorporate sedentary duties only. She did not endeavour to secure a transfer to an area of employment within the public service with which she could cope. Dr. Dundas stated, that with appropriate adjustments she could work as a nurse.

She could do a job which is less physically taxing than that of her present post. However, when the doctor examined her on the 9th August, 1999 he had suggested that she do no work.

Although she ought to have mitigated her loss by seeking adjustments in her mode of work, the circumstances of this case I will not completely disallow an award for the period February 1997 to September 1999 but will grant her compensation of one half of her monthly salary. Her monthly salary being \$5,282.86, one half would therefore be \$2,641.43.

The award for loss of income is as follows:-

Salary from June 1993 - February 1997
(45 months) @ \$5,282.86 monthly -

\$2375728.70

Salary from March 1997 to September 1999
(31 months) @ \$2,641.43 monthly -

\$813884.33

SUMMARY

General Damages

Pain and Suffering

\$15200,000.00

Special Damages

Medical expenses, cost of
Physiotherapy, hospital fee,
Medication cost

94,979.00

Travelling expenses

Overseas and ambulance service

98,44.00

Local travelling expenses

6,470.00

Loss of income

319,613.03

Purchase of articles

4,783.44