Judgment Book

IN THE SUPREME COURT OF JUDCIATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.R.021/98

BETWEEN	TANYA REID	PLAINTIFF
A N D	VANYARD DACRES	1ST. DEFENDANT
A N D	CORLA DACRES	2ND. DEFENDANT

Mrs. Ursula Khan for plaintiff instructed by Khan and Khan, Attorneys-at-law

Mr. Christopher Samuda for defendant instructed by Mrs. Faye Chang-Rhule, Attorney -at-law.

JUDGMENT

HEARD: September 20 & 27, 1999
October 10, 1999
January 24, 25, 26, 2000
August 17, 2000

Reckord, J.

This action came before me for assessment of damages. It took much longer than it ought to. The plaintiff is a 25 years old bank teller.

On Wednesday the 27th of August, 1997, she was passenger in a motor car driven by the 2nd named defendant. The 1st defendant is the owner. She was sitting in

the left front passenger seat. While being driven down Constant Spring Road the driver wanted to turn right into Manor Centre. She stopped, waited for oncoming vehicle to pass and the proceeded to turn. "Then I heard tyre dragging on my side. I looked up and saw a bus which hit the front door. She received a blow to her head and 'I think, I became unconscious.' She regained consciousness in the University Hospital suffering from pain all over especially her chest, shoulder, face, head and knees. She remained laying on a stretcher until the afternoon. Doctors sutured the left side of her face, she was feeling drowsy and dizzy. She remained in hospital overnight and was placed on drip. Her cheek bones were fractured as a result she could not open her mouth. It was swollen, she could not move her shoulders. She was given medicine by a spoon. She could not get out of bed; she did everything in bed with the use of a bed pan and could not stand without the help of nurses, but not for long as she was unbalanced.

She was discharged from hospital on the Friday night, her parents took her home. Both shoulders were in bandages. Between September and 20th November, 1997 she visited out-patient clinic for treatment.

Pains to chest lasted upto 18 months. When ever she moved her shoulders her chest would tighten up. She has been going to neurosurgeon clinic because of dizziness she was having. This lasted to January, 1998. Her private Doctor Clive Morrison prescribed tablets for her.

She received E.N.T. treatment for her mouth as it could not open enough. She had second opinion from her Dr. Anthony Lewis. He did surgery inside her mouth. After this it could open more than before. Up to now she can't open her mouth to the fullest. She can't eat dumpling or oxtail. When she chews she feels pain on the inside.

The plaintiff said she suffered cuts and bruises to the left side of her face. The cuts were sutured leaving scars. The left side of her face is now lower than the right .

Her left eye is now smaller since the accident. The eye was blood shot from the morning of the accident. Her face was not like this before.

As a bank teller she is a front line staff. She is upset and embarrassed about her face, customers ask over and over about it. She had lots of friends with whom she went to the movies and partying. She no longer go out with friends. When she look in the mirror she feels self-conscious and upset. As a result of the condition of her face she contacted Dr. Junior Taylor a plastic surgeon in April 1998. He gave her a report suggesting he could help her.

One month after the accident the plaintiff saw Dr. Dundas. She was in pain and discomfort because of injury to her shoulder. She could not do things for herself, her mother had to help her. Dr. Dundas treated her, but the pain did not ceased. The bandages were removed and replaced by a clavicle brace. She did xrays on both shoulders, the right gave more problems than the left. She is right handed. She received treatment from Dr. Dundas until October, 1998. She can't take cold showers any more as they become cramped Can't carry her hand bag on her right shoulder because of cramps. She has to sleep on her back most of the times. At work she has to ask for help to carry her cash till because of the weight. When counting money her fingers tend to cramp, also when using the computer.

The plaintiff no longer goes to future fitness, swimming or play lawn tennis at the sports club. She now stays at home and watch television and read novels. She view all these injuries as serious. She is scared of the future.

Doctor Joseph Brandy of the University Hospital saw the plaintiff on the day of the accident. She had no recollection of the accident. There was history of loss of consciousness. There were bruises and lacerations primarily to the left side of her face below her eye. There was bleeding under the membrane of left eye. There was

tenderness and swelling of her upper chest. Xray done on admission revealed fractures of both clavicles also several fractures of her left facial bones.

She was admitted to hospital. She was seen by orthopedic and E.N.T. specialists. She was given pain medications; restraining bandages were applied. In respect of her facial bones fractures she was advised to seek surgical correction when some of the swelling had been reduced.

She was discharged from hospital on the 29th August, 1998 with arrangement for out patient follow-up. Between 2nd September and 20th November, 1997 she attended out patients clinic-surgical, neurosurgery, orthopedic and E.N.T.. During this time her facial fractures were surgically treated. On her last visit there was gradual improvement and healing of her fractures but there remained a residual depression of the left side of her face. He regarded her injuries as serious and consistent with being involved in a motor vehicle accident. The bones in the face were the maxilla zygonia, they give the check prominence.

The doctor admitted under cross-examination that some of the evidence came from notes of other doctors. The plaintiff could walk when she was discharged from the hospital.

Dr. Geddes Dundas, consultant orthopedic surgeon, examined the plaintiff on the 29th September, 1997. He noted that facial injuries she sustained had been treated before he saw her. Fractures to both clavicles over lapped and were untreated. He applied clavicle brace for 4 weeks. Further examination on the 29th of October, 1997 showed the left clavicle to be quite stable. The right side however was still springy. About 6 weeks later he reviewed her and xrayed the bones. The left one had become acceptably reduced, but the right one was still over-lapped. She demonstrated at that time evidence of nerve deficit involving the brachial plexus which is the major nerve in

close proximity to the fracture. She still had tenderness at the right clavicle fracture but the stability appeared to be improving.

The plaintiff was seen again by Dr. Dundas on the 30th January, 1998 and the 23rd July, 1998. In July she was still complaining of pain to the right shoulder. It was quite tender at the fracture site of the right clavicle. A stress examination revealed that the stress was still mobile. X-rays indicated that the left had healed well but the right was not united. She still complained of nerve pain involving the brachial plexus. The doctor referred her to a programme of physical therapy aimed at promoting union of the right clavicular fracture . When she was finally examined on the 25th October, 1998 there was clavical and radiographic confirmation that healing to the right clavicle had been completed. The residual disability amounts to about five percent of the right upper extremity or two percent of the whole person.

The cramps she has is consistent with nerve injury.

Under cross-examination Dr. Dundas said that the plaintiff never indicated to him that she had difficulty taking cold shower. Never indicated to him about cramps, she never said she suffered from numbness when using the computer. Never complained of carrying her cash till.

There was no deformity or dislocation of the shoulder. There was no evidence of wasting.

Dr. Junior Taylor (F.R.C.S) saw the plaintiff on the 22nd of April, 1998. His main findings concern the left side of her face. There was a curved scar approximately 4 cm long extending from just lateral of the left eye onto the left molar region. There was also a curved transverse scar 3 cm long extending to the left cheek. There was also an area on the left cheek with multiple small scares together. A foreign body was left beneath the skin , quite likely introduced at the time of the accident.

It is possible to do a reversion to improve the appearance of the scars and also to explore the area where the module was left, if it can be removed. If reversion is done she could still have scar. Costs of such a reversion would be $50,000.00. Patient could be discharged same day. The effects of scaring can be source of distress, possible serve as a constant reminder of a traumatic experience. This invites unwelcomed attention for others.

Dr. Dwright Lewis, consultant oral and maxilla-facial surgeon, examined the plaintiff first on the 26th of September, 1997. She had a left periorbital haematoma, left subconjunctival haematoma, fracture of the left malo-maxillary complex with fractures of the inferior and lateral rims and the zygomatic arch. There were fractures of the incisor edges of the central maxillary incisors (the cutting edge of the teeth were broken off).

She was under general anaesthetic and the fractures were reduced and immobilised. Dr. Lewis last saw her on the 27th September, 1999. The occlusion was good but the left was flatter than the right.

Under cross-examination Dr. Lewis saw her 26th September, 1997, and 23rd October, 1997 and 27th September, 1999. The fractures had healed. Whatever small problem he saw would be resolved in about one year.

In answer to the court the Dr. Doctor said her face seemed alright in October, 1997. When he next saw her, the tissues had contracted during the passage of time and the injury was obvious.

When the hearing continued on the 24th of January, 2000 the plaintiff was recalled to complete her evidence. She went to the gym three times weekly, played tennis fortnightly. She can't swim anymore. She incurred expenses as a result of this accident. For medical reports she paid:

Dr. Lewis	$5,000.00
Dr. Brady	1,500.00

Dr. Morrison	3,400.00
Dr. Lewis	7,000.00
Prescriptions	1,801.09
Hospital fees	1,200.00
Clavicle brace	2,730.00
Dr. Dundas	2,000.00
Laboratory	290.00
Police Report	1,000.00
Dr. Taylor	2,500.00
Physiotherapy	41,600.00
Dr. Dundas	5,000.00

Up to the time of the hearing the plaintiff had not received the hospital bill.

As a result of the accident she got no pay for 8 ½ weeks at $4,400 net per week = $37,000.00. She had received physiotherapy for three months from July to October, 1998 . She received pay for 2 months during this period. For one month she receive no pay; ($4,400.00 per week) = $17,600.00. She also paid $500 for photograph of her face. She was in court when Dr. Lewis gave evidence and heard him say it would cost about $50,000.00 for corrective surgery to her face for which she is making a claim

Under cross-examination the plaintiff said she did not indicate to Dr. Brandy that she was not feeling well when he was discharging her. She did not agree with Dr. Brandy that she had full range of movements at all joints. Dr. Dundas never referred her to a neurologist or neurosurgeon.

When she returned to work she asked to be relieved of some of her duties, but returned to her regular duties as time went by. She has not been promoted or transferred. She tried to play tennis since, but her right shoulder pained. Dr. Dundas advised her to be very careful. She said "Dr. Dundas told me not to go to gym or play

tennis". Then she contradicted herself by saying, "he never told me never to play tennis or never to go gym". She never told him she could not play tennis nor swim. I can swim but it hurts. She never told Dr. Dandas of this condition. She received pain medication and restraining bandages. The last time she went to the bank's club was in 1999.

When re-examined she recalled going to see Dr. Bruce, a neurosurgeon at the University Clinic.

In answer to the court, the plaintiff said that the surgery needed was to remove the scar on her face arising out of the accident. She was single , 25 years old and wished to get married. She believed that the scars on her face may affect her chances of getting married. She did not then have a boyfriend. She now go out with friends but not as before. She goes to functions at the club but not to entertainment stage shows.

This was the case for the plaintiff. The hearing resumed on the following day the 25th of January, 2000. Mr. Samuda informed the court he would not be calling any witness on behalf of the defence.

Mrs. Khan for the plaintiff submitted that it was the defence who required the attendance of the doctors called by the plaintiff. Not too much turned on the cross-examination of these witness and she was therefore asking the court to recommend that the taxing master order the defendants to pay the full cost paid by the plaintiff to secure the attendance of these witnesses. Mrs. Khan tendered written submissions in favour of the plaintiff's case.

Mrs. Khan summarised the effect of the plaintiff's injuries as :

1. Her face is a source of great embarrassment, discomforture and upset.

2. She does not have full use of her mouth.

3. The injury to her shoulder and its consequences have adversely affected her daily and working life.

4. She did not know what to expect in the future and is very scared.

With reference to the medical evidence, Dr. Brandy said that in his opinion the combination of personal injuries was potentially serious.

Dr. Dundas had admitted that a medical error was made in diagnosis. That despite the best endeavor of a very reputable and skilled doctor of great experience, she had been left with physical and functional disability complicated by nerve deficit. She now was over sensitive to touch. She was left with residual disability in both shoulders. He assessed the permanent disability of the right shoulder 5% of the extremity or 2% of the whole person.

Dr. Taylor said that revision could improve her appearance of the scars making them less prominent but that they were permanent. That surgery cost was estimated at $50.000.00.

In Dr. Lewis' opinion the soft tissues contracted more than be expected and that the left side of her face is flatter and obvious to all. Counsel noted that the plaintiff was still very young and that the disability and impairment described were permanent and life long which affected her daily and working life. She submitted that the plaintiff would be entitled to substantial compensation.

CASE LAW

Counsel referred the court to a number of cases. CLM 151/89 Mahtani vs. Wright and others heard 20.5.99. Motor cyclist 32 years old sustained fractures of both clavicles and multiple abrasions in collision with a motor car-no permanent disability. Awarded $350.000.00 which is equivalent to $375.000. today. The plaintiff in the instant case should get substantially more.

C/L R. 159/90 Kenneth Richmond and Caribbean Steal Co. Ltd. heard January 1998. Plaintiff struck in face by quantity of steel being loaded in truck and left with twisted face and right eye impairment and experience giddy spells. Present condition

source of embarrassment, speech affected, causes him to be irritable and depressed, has been virtual recluse; 10% loss in recent memory squint and facial asymmetry. Awarded $1.5 million equivalent just under $1.8 million today.

S.C.C.A 126/ 96. Jamaica Telephone Co. Ltd. vs. Hill and Daley. Infant plaintiff left with scarring over cheek and jaw. Multiple hypertrophies scarring near ear and lower cheek etc. had no impairment awarded, $850,00 for pain suffering and loss of amenities – equivalent now at $1.1.m C.L. H. 1119/4 Richard Hoehner and Celio Hoehner vs. W. A. Reid Construction Co. Ltd. heard 24.3.99. 2nd plaintiff sustained minor concussion, loss of consciousness, fracture of nose, 3 bones of left upper limb and femur, multiple lacerations, trauma to abdomen and chest. She had 4 operations which left scars which caused humiliation. Unhappy wearing sleeveless clothes and swim wear, now has a flabby figure. Awarded $1 million for pain and suffering and loss of amenities-equivalent to $1.1. million. Other cases of general application were mentioned.

Housecraft vs. Burnett (1986) 1 AER. 332/ S.C.C.A. 13/94 and 16/94 Pogas Distributor Ltd. McKitty and Francis etal vs McKitty/ C/L C204/88 Thomas Crandell vs. Jamaica Folly Resorts

On the question of damages generally counsel referred to the House of Lords case of H. West and Son Ltd. and Anor vs. Shepherd (1963) 2.AE.R. 625 which dealt comprehensively with the proper way to view damages and the basis on which damages is awarded Finally, counsel posed the question; to what extent has the plaintiff's life been dislocated? And answered it thus:-

1. She is suffering mentally because of her face.
2. Her active life style is a thing of the past.
3. Her social activities are curtailed
4. Her daily life is affected

5. Her working life is affected

6. She continues to suffer pain and her shoulder may deteriorate causing further pain

7. She has some probable 53 years to endure this dislocation and deprivation.

Counsel submitted that for these substantial injuries and the effect on her life, the plaintiff should be compensated as follows:-

General Damages:- Pain & Suffering	
For face and mouth	**$1,300,000.00**
Shoulders	**800,000.00**
Minor injuries	**75,000.00**
Handicap on the labour Market	**150,000.00**
Future medial expenses	**50,000.00**
	$2,375.000.0
Special Damages:- as pleaded	**$175,029.09**

On the question of costs counsel referred to Phipsons on Evidence 14th Edition page 596, chapter 22 and submitted that the court has power to penalize a party who serves unnecessary counter notice in its order for costs.

In response to these submissions on the question of costs Mr. Samuda, on behalf of the defendants, said that the court would have to find as a fact that the counter notice was unnecessary. He submitted that the notice was essential for the following reasons:-

1. Given the conflict in Dr. Dundas' report respecting the plaintiffs' injury

2. Given the fact the Dr. Brandys evidence has turned out to be hearsay in material respects,

3. It is the inalienable right of the defendants pursuant to the Act to require the attendance of a witness by filing and serving a counter notice therefor and in the event it is deemed essential or a consideration for the determination by this court for the issue of damages.

4. Whereas in this instance we are concerned with damages and if the plaintiff is to be believed, which is not admitted, serious damages, then the vice voce evidence of medical witnesses is imperative, not only to a clear understanding of the court of the plaintiffs damages but also to its understanding of the truth.

Counsel submitted that one or all the above clearly illustrates that the counter notice was necessary. Furthermore, in view of the fact that none of the reports has been admitted, though it was clearly within the right of the plaintiff so to do, the viva voce evidence of the witnesses is indispensable.

Counsel further submitted that the court cannot make an order for full costs in the absence of evidence respecting those costs.

The very terms of the order being sought is an attempt to circumvent the duty of the taxing master who will be obliged at the hearing of the taxation to investigation what in fact are the full costs and to determine whether such costs are reasonable and allowable in light of decided and known authorities.

To make such an order will entirely remove the discretion of the taxing master which is entrenched in legal case authority.

On the foregoing basis the order being fought should be refused. The authority cited from Phipson's will have first decided that the notice was unnecessary, but wish the court to be sensitive to the fact that the actual terms being sought. I.e. first costs be awarded, cannot be made by the very nature of

its terms-Medical costs can be recovered on taxation subject to the discretion of the taxing master, which is a discretion in law.

Re: Admissibility of evidence of Dr. Brandy

Counsel submitted that the evidence of Dr. Brandy is in material respects, if not entirely, hearsay for the following reasons

1. Dr. Brandy evidence in cross-examination is this:- The notes which I have are a compilation of the notes of doctors.
2. It is clear evidence that there are findings in the report which are not his
3. His clear evidence that such section of the report which are extracted from notes of other doctors was based on their examination. Furthermore, his clear evidence that he was not at all present when the doctors examined the plaintiff

If the court examines the evidence given in-chief, it is littered with the statement. It was noted whenever reference was made to the report or the medical files regarding the plaintiff. It matters not when an explanation is made to expunge hearsay evidence from the record, if only for the reason that this court is empowered by law to and of its own votition can reject the evidence as in-admissable. Further, the courts duty so to do is even more imperative when the fact that the evidence is hearsay is not apparent in-chief, but is extracted in cross-examination.

There is no evidence before the court that Dr. Brandy was in a position to speak from the records or was in possession, custody and control of the records; was he keeper of the records?

The Integrity of the Plaintiff and her Evidence

1. Mr. Samuda pointed out that in-chief, the plaintiff said she cannot now swim or play lawn tennis. In cross-examination it is clearly bourne out that she can swim and play tennis, albiet on her evidence she suffers some discomfort.

2. She indicated in cross-examination that Dr. Dundas did not make any reference to physiotherapy as a means by which the alleged injuries could be inferred. In Dr. Dundas' evidence in chief he indicates quite clearly that he referred her to physiotherapy aimed at promoting the union of the right clavicle.

3. She indicates in cross-examination that Dr. Dundas was not of the view that that treatment could aid her. However, in his evidence-in-chief he indicates quite clearly that the programme was successfully persued and when re-examined there was clinical and radiographic confirmation that healing had occurred.

Dr. Dundas said in cross-examination that the plaintiff never told him she had difficulty taking cold showers – no mention of cramping fingers and therefore on that basis he never quirried her regarding the cramps. She did not say she suffered numbness when using the computer. She did not say that she had any difficulty lifting the cash tin. Having described her occupation to the doctor and having not at that time of examination indicated that she had difficulty lifting her tin or suffered cramps when typing, is in itself and in the context of her evidence of non-disclosure to the doctor, is clear basis for this court to find that she has not been candid. In chief she says she does not go to parties; in cross-examination, she goes, but not as before.

With respect to her injuries, Dr. Dundas found no dislocation of the shoulder, no deformity of the shoulder; no evidence of degeneration or wasting of the muscles, he never referred her to a neurosurgeon or neurologist as he did not think there was any basis for referring her. The doctor said there was no

evidence during the course of his examination of the plaintiff which would cause him to alter his opinion. His evidence clearly indicates that he did not see the plaintiff by any stretch of imagination on a regular or continual basis. Dr. Dundas saw her on the 29th October , 1998, discharged her and did not request that she return. Plaintiff said she is not being seen by Dr. Dundas now dispite the plethora of complaints that she had.

Mr. Samuda, contended that it was the contention of the plaintiff that she was very concerned with her appearance, she has suffered adversely therefrom consistent with the following facts:-

1. Her being placed in customer service to work after the accident.
2. Her failure to request referral or herself seek counseling or treatment with respect to any psychological effect that her injuries may have caused.
3. The lack of any medical evidence of the alleged complaint that she ought to receive psychological or emotional therapy.
4. The fact that she was seen by the plastic surgeon some eight months after the accident quite co-incidentally, virtually on the eve of the commencement of litigation.
5. The fact is that she was only seen once by Dr. Taylor who gave evidence and his clear evidence is that he saw her on the 22nd of April, 1998 and that he did not consider it necessary to see her after that date.
6. The fact that Dr. Dundas mentioned that she did not disclose to him the alleged consequences of the injuries (e.g. Numbness etc.) even though she was seeing Dr. Dundas while litigation was in court.

Re: Evidence of Dr. Taylor

Mr. Samuda submitted that Dr. Taylor's evidence that the scars on the plaintiffs' face can be a source of distress and possibly serve as a constant reminder of a traumatic experience is in itself conjecture and that the court find it to be so given the very terms he uses as well as for the following reasons:-

1. the absence in his evidence that the plaintiff detailed to him any adverse consequences from which she suffers in light of her facial appearance.
2. His clear evidence that the plaintiff never requested him to refer her to a psychologist or psychiatrist and his own evidence that he did not see fit to refer her.
3. The fact that he did not see it fit to see her after his examination on the 22nd of April, 1998.
4. Dr. Taylor did not request any report from a faceo or maxillary surgeon and did not himself have any reports in his possession before or while examining the plaintiff.
5. If Dr. Taylor by dint of his experience was of the opinion that the plaintiff suffered adversely from the scars and general condition of her face he would have stated so, which he has not and moreover given his evidence that he never referred her to a psychologist and psychiatrist or even suggested emotional or psychologist therapy, it is clear that he did not consider her case as an appropriate one. Counsel submitted that the court should err on the side of caution by making no award for this condition.

Re: Dr. Lewis

Counsel submitted that Dr. Lewis evidence is that:-

(1) occlusion is satisfactory which clearly did not need him to investigate further or for further treatment.

(2) The fractures are healed.

(3) That there was no significant disability at all, and the fact that this doctor saw the plaintiff during the year of the accident and her own evidence that she underwent doctors' care for the year 1999 and only saw doctors very intermitently in 1998. Following the accident there is no evidence of continuous medical attention.

Mr. Samuda next commented on Mr. Khans' written submissions.

There was no evidence that Dr. Dundas treated the plaintiff for chest pains.

Evidence of dizziness is very scarce. On her own evidence she never received any medication at the U.W.I. Hospital.

Her evidence of injury to her mouth should be rejected as she failed to seek further medical attention.

Mrs. Khan's statement that the plaintiff remained under Dr. Dundas' care until the end of October 1998, for the fracture of her right clavicle, is misleading. Further it was Mr. Khans' opinion that the plaintiffs' case was complicated by nerve damage involving the brachial plexus. Dr. Dundas said the nerves involvement was very mild. The doctors opinion never changed when he subsequently saw her. Dr. Dundas saw no evidence of degeneration; there was no medical basis for referring her to a nerve specialist. His opinion never changed during the course of his treatment. There is no evidence that there is

infact any nerve damage. She only made 2 visits to Dr. Dundas over 16 months. Mrs. Khans' submission that the plaintiff's swimming is curtailed is clear recognition that she can still swim.

The Cases

With reference to the 1st case mentional by the plaintiff Mahtani vs. Wight (supra) Mr. Samuda pointed out that there was no period of hospitalization; there is absence of detail of medical finding. Dr. Dundas found minimal nerve deficit.

Re: Kenneth Richmond and Caribbean State Co. (supra)

Counsel submitted this is far more serious that in the instant case. In that case there was 10% loss of recent memory loss of vision in one eye; twisted face; paralyses of 6th and 7th cranial nerves. - eye deviated toward the nose. Lenear fracture of left temporal bone and evidence of basal skull fracture; period of hospitalization much longer than instant case.

Jamaica Telephone Co. Ltd. vs. Hill Darby (supra)

Injuries far more serious than instant case.

Hoehner etal vs. W.A. Reid Construction

Injuries far more serious than instant case. There was fracture of ulna, radius, femur, deformity of thigh and forearm, head injuries with mild contusion. This patient was hospitalized for 37 days.

Counsel submitted that there was no evidence that this plaintiff's life has been dislocated. She has not said that she is suffering mentally about scars on her face. There is no evidence that she disclosed this alleged mental suffering to any doctor; there is no evidence of any mental, psychological, emotional treatment or therapy.

Counsel further submitted that as a result of her interfacing with the public there was no evidence of any adverse consequent to the extent that she wished to be

transferred. There is no medical evidence that her shoulder will deteriorate. Her fractures are healed hence Dr. Dundas discharged her.

Counsel for the defendants referred to the following cases:-

Winston Layne vs. Beverly Dryden –

Khans' volume 3; page 73 – suggested ? not recommended by Court of Appeal.

George Mykoo vs. Andre Blake Harrison's - page 249. July 1992.

Fracture of left clavicle ;

Bruises and abrasion all over body

Arm in sling for 2 months

Disability 10%

Award: $55,000.00 for pain and suffering

Equivalent to $173,366.00, today.

Thomas Williams vs Carl Brown Khans-volume 4 page 98

Far more serious than instant case deformed right shoulder with loss of normal contour; dislocation of right humeral head; recurrent anterior dislocation of right shoulder; gross muscle around the shoulder joint- Disability of 23% of the whole person - Awarded $355,000.00 now equivalent to $436,000.00.

Pauline Cunningham vs. Carlton Black-Harrison's page 374

Fracture of right ankle; Torn muscle of left thigh; Fracture of left clavicle; inability to run. Limitation of movement of right limb and shoulders constant swelling of the right ankle - 15% p.p.d, of the right ankle 10% p.p.d. of left shoulder - 10% p.p.d. , of left lower limb. September 1991 damages assessed by consent $80,000; equivalent to $455,000.00

Evadne Kerr vs Edward Lyn Heard 19/6/96

Muscle injuries, blood shot eyes, fracture of tibia and fibula, fracture of the skull base, giddiness, mild drooping of the eye lid, deviation of nasal bone, medical displacement of the lateral wall of the right antrum, shortening of the right lower limb,

deformation of the left leg; permanent partial disability of 5% in both legs. Awarded for pain and suffering $850,000.00 equivalent now to $1 million.

These injuries are far more serious than the instant case.

Hepburn Harris vs Carlton Walker S.C.C.A No. 40/90 – Khans Vol. 3.

Counsel submitted that general damages should not exceed $300,000.00.

Handicap on the labour market

1. Counsel submitted that there is no evidence that there is a risk that the plaintiff will lose her job as a consequence of the injuries she has suffered.
2. There is an abundance of medical evidence to demonstrate clearly that her injuries do not affect her adversely and to the extent that she will lose her job.
3. There is clear evidence from the plaintiff herself that she is no longer under the care of any doctor and has not been under the care of doctor since December, 1998.
4. There is clear evidence that she has returned to be a teller and this was on the instruction of her employer.

(See Harrison's at page 143).

See Monica Williams v Kingsley BhooraSingh Vol. 3 Khan's page 116. Injuries far greater than instant case. P.P.D. 65 – 75%. Awarded $60,000 for pain and suffering in April 1990. Equivalent to $600,000. No award made for handicap on the labour market. Counsel submitted that the evidence in this case does not demonstrate that an award for hardship an the labour market should be made.

Re: Special Damages

Counsel submitted that there is no documentary evidence to support her claim of $4,400.00 per week for salary. This has not been strictly proved as required by law. The defendant is not obliged to challenge the plaintiffs' evidence where same is insufficient to support the claim.

Counsel further submitted that the plaintiff is under a legal duty to specifically prove her special damages and where, as in this case, there is no evidence whatever of the salary scale of a bank settler working with N.C.B. OR or any bank at all, the duty of the plaintiff is all the more critical. Given the absence of that evidence, counsel submitted that the court cannot speculate or hazard a figure or to say that the amount given by her was in fact her net pay.

FINDINGS

Admittedly , this plaintiff secured some facial injuries and injuries to her shoulders and chest arising from a motor vehicle accident in which she was a passenger in the defendants' car.

The Plaintiffs' attorney-at-law, Mrs. Khan views the injuries and the effect they have had on the plaintiff so serious as to attach an award of no less than $2.3 million for pain and suffering and loss of amenities.

On the other hand, Mr. Samuda. Attorney-at-law for the defendant, regards the injuries as far less serious and suggest a sum of not more than $300,000.00 under that head of damages. Counsel for the defendant also challenged the plaintiff's claim for handicap on the labour market on the ground that there was no evidence to suggest that the plaintiff was in any danger of losing her job as a result of her injuries. The plaintiff's claim under special damages for loss of income was also challenged for the reason that no documentary or other evidence was tendered in support.

Because of the wide difference in the opinion of the attorneys as to the extent of the plaintiffs' injuries it will be necessary to carefully consider each claim.

Firstly, I will deal with the claim for special damages:-

Save and except the claims for loss of income totaling $55,000 for

12 ½ Weeks salary @ $4,400.00 per week, the details set out in the amended particulars of claim have been satisfactorily proved and supported and have been unchallenged. They are all granted. With regard to the challenged claim for loss of income I am grateful to Mr. Samuda for supplying me the judgment of the Court of Appeal in SCCA No. 40/90 Hepturn Harris vs. Carlton Williams where President Rowe said on page 3 that

> "Plaintiff's ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned."

I note that in the Hepturn Harris case that despite this pronouncement that the court of appeal did not strike out the award made for loss of earnings, which was substantially less than the amount claimed by the plaintiff. Bearing in mind the warning, I think that I can safely say that the sum of $4,400.00 is not an unreasonable claim as salary of a bank clerk in the largest commercial bank in the island. The sum was not, challenged by the defendants'. Accordingly, despite the comments by the defence attorney on this head of damage the is sum of $55,000.00 is a allowed as prayed.

I now turn to the claims under the heading of General Damages for pain and suffering and loss of amenities; handicap on the labour market and future medical help.

The claim for future medical help again has not been challenged, it does not appear to be unreasonable and no reason has be shown why it should not be granted. This claim for $50,000.00 is allowed.

I agree with the point raised by counsel for the defendants concerning the claim for handicap on the labour market. From the evidence I find nothing to support this claim and accordingly this claim is refused.

Re: Pain and Suffering and Loss of Amenities.

The House of Lords in a case known as H. West & Sons Ltd. vs Shepherd (1963) 2AER.G 625 dealt comprehensively with the proper way to view damages and the basis on which damages is awarded. General damages for personal injuries are" to compensate for results that actually been caused which may consist both of physical loss e.g. loss of use of a limb, which is an objective element of damages and of pain and suffering, of frustration and the affliction of awareness of the loss.....which form a subjective element, and in relation to both these elements, the period of probable duration is relevant to be taken into consideration."

Mrs. Khan, in her written submissions at pages 1, 2 and 3 sets out quite succinctly, the plaintiff's injuries and the after effects. The defendants attorney Mr. Samuda, has pointed out that the complaints of consequences listed on page 3 were not reported to the doctors. Of the number of cases referred to by the attorneys it appears that none of them is on all fours to the instant case. On page 12 of her written submissions, Mrs. khan suggested sums for each area of injury, perhaps awards taken from other cases, and then totaling these for a final award. However, Mr. Samuda pointed out that this method of assessing damages did not find favour with the Court of Appeal in a case called United Diary Farmers Ltd. vs. Lloyd Goulbourne SC.CC.A. No. 65/81. With reference to the plaintiff's integrity, defence counsel regarded her evidence as less than candid. He seems to be inferring that she is padding her claim, hence being unable to explain why several of her complaints were not reported to her doctors.

With reference to the complaints concerning the evidence of Dr. Brandy, it is clear on the admission of the doctor himsef that significant areas of his evidence is hearsay. This became known only on cross-examination. The court must do it's best in sifting through his evidence and acting only on the direct evidence and ignoring the rest. The court should not reject his evidence in its entirety.

In the Mahtani case, this 37 years old male plaintiff was awarded $350,000.00, for fracture of both clavicles, multiple abrasions to back, shoulders, elbows and knees; no disability. This now equivalent to $375.000.00.

From the cases referred to by both sides, save for the facial injuries, the Mahtani case is the closest to the instant case. The facial injuries are those for which the plaintiff seeks a substantial compensation.

The plaintiff in the Hoehner case, like the instant plaintiff, suffered loss of consciousness, fractures of facial bones, trauma to chest, scars from facial wounds, causing embarrassment. That plaintiff 49 years old also suffered fractures to the upper limb, and femur and was awarded $1 million for pain suffering and loss of amenities and $260,000.00 for corrective surgery. That obviously, is a more serious than the instant case. However, this plaintiff was only 23 years old when she suffered these injuries. She will have to live with these scars and the asymmetry of her face for the rest of her life, probable another fifty years, an awesome expectation for this unmarried young woman.

It is my considered opinion that an award of $1 million would be a reasonable sum for injuries to her face and mouth. This would be in addition to the sum of $375,000.00 for her shoulder injuries.

Accordingly, damages are assessed as follows:-

Special Damages:- **$175,029.00,**

with interest at the rate of 6% per annum from the 27th of August, 1997 to today.

General Damages

Pain and suffering and loss of amenities assessed, at **$1,375,000.00** with interest at 6% per annum from the date of the service of the writ to today.

For future medical expenses - $50,000.00

There will be costs to the plaintiff to be agreed or taxed.

It is unusual for a judge to make any comment to the taxing master when the question of taxing a bill of costs comes to be considered. However, in the instant case I am of the view that the defendants decision to refuse to agree to the admission of the four medical reports was ill-advised.

Nothing of significance came out of their cross-examination. No expert witness was called by the defence to challenge the plaintiff's doctors.

The plaintiff was forced to call four medical doctors to give viva voce evidence at considerable expense, notwithstanding the fact that her attorneys had served the appropriate notices on the defendants indicating their intention to rely on the written reports of these doctors.

I am therefore recommending that the taxing master seriously consider awarding to the plaintiff the full expense incurred by the plaintiff in securing the doctors attendance at court