



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010 HCV 04205**

**BETWEEN                      PAULETTE ROBINSON - KEIZE                      CLAIMANT**  
**AND                              CARLOS MORANT    DEFENDANT**

**Mr. Dale Staple instructed by Kinghorn & Kinghorn for Claimant**

**Defendant not present nor represented.**

**September 12<sup>th</sup> & October 5<sup>th</sup>, 2012**

**Assessment of Damages – S.31 E Evidence Act - Admissibility where no counter notice served and Defendant unrepresented – whiplash injury to neck.**

**CORAM:                      JUSTICE DAVID BATTS**

1. This Assessment of Damages came on for hearing on the 24<sup>th</sup> September, 2012. On that date the Claimant satisfied the court by affidavit sworn to on the 7<sup>th</sup> September, 2012 that the Defendant had on the 1<sup>st</sup> September, 2012 been served with Notice of Assessment of damages.
2. The defendant did not appear nor was he represented and therefore the hearing of the Assessment of Damages commenced.
3. The Claimant Paulette Robinson-Keize was sworn. She identified her witness statement dated 1<sup>st</sup> September, 2012. I ordered that her Witness Statement stand as the evidence in Chief.
4. The Claimants Counsel Mr. Dale Staple then sought to put in evidence certain documents which he stated had been the subject of a Notice of Intention to Tender in

Evidence Hearsay Statement made in a document. That Notice dated the 20<sup>th</sup> day of June 2012 had been served upon the Defendant on the 1<sup>st</sup> day of September 2012. See Affidavit of Service dated 7<sup>th</sup> September, 2012. The court enquired of Counsel whether he intended to lead evidence pursuant to Section 31E (4) of the Evidence Act. Counsel submitted that such evidence was unnecessary and that Notice having been served and no counter notice served by the Defendant the documents should go in as of right.

5. The Court asked Counsel to produce authority to that effect and the matter was adjourned to the 28<sup>th</sup> September, 2012 for that purpose.
6. On the 28<sup>th</sup> September 2012 counsel made submissions and the court adjourned the matter to the 1<sup>st</sup> October 2012 for continuation. On that date the Claimant was represented by Miss Oraina Lawrence instructed by Kinghorn & Kinghorn. The court made the following ruling:

#### **Ruling**

**In this matter counsel for the Claimant sought to put in a document (medical reports and some receipts) without calling the maker of said documents.**

**Counsel relied upon a Notice of Intention to Tender in Evidence hearsay statement made in document which is dated the 20<sup>th</sup> day of June 2012. Counsel submitted that pursuant to Section 31 E of the Evidence Act it was sufficient to prove service of the notice and that it was not necessary for him to establish the circumstances in Subsection (4) of Section 31E of that Act as the Defendant had served no counter notice.**

**This Court asked Counsel to provide authority to support that proposition and counsel referred to *Fenella Kennedy-Holland et al v. Joan Williams et al* HCV 01916/2008 (unreported) Judgment of Sykes J. I have carefully perused the judgment which concerns the admissibility of certain parts of a witness statement. Although Section 31 is discussed in detail, the issue before this court, vis the**

**circumstances of admissibility where no counter-notice is served, was not decided in that case. It is because counsel was unable to produce a decided case on the point, that I took time to consider my ruling.**

**Having done so I rule that counsel's submissions are substantially correct. That is Section 31 E(4) only applies if a Counter notice is served by the Defendant.**

**In this case the Defendant not having appeared to object and not having served a counter-notice, then the documents are admissible provided they satisfy the test in Section 31E (1) and Section 31 (F) as adumbrated by Sykes J in the decision under reference.**

**I have come to this decision on a true construction of Section 31E and will set out my reasons in detail when giving judgment on the Assessment of Damages.**

7. I have incorporated this ruling into this judgment as it is an important matter of practice which does not appear to have received a judicial gloss. Section 31E was intended to allow for the admission of secondary evidence in civil proceedings where there was either no objection, or where proof by primary evidence was imbued with certain specified difficulties. Subsection (4) of Section 31(E) is clear. There would be no benefit to be gained from a Section 31 (2) notice if one had to prove the circumstances set out in Section 31E (4) whether or not a counter notice was served.
8. The Claimant on the 1<sup>st</sup> September 2012 was resworn. She was shown the documentation which had been the subject of the Notice of Intention to tender and the following were in consequence admitted:

Exhibit 1	Medical Report of Dr. O. Francis dated 22 <sup>nd</sup> May, 2010
Exhibit 2	Medical Report of Dr. Phillip Mighty dated 9 <sup>th</sup> November, 2010.
Exhibit 3	Medical Report of Dr. Wendel Abel dated 23 <sup>rd</sup> March, 2012
Exhibit 4	Receipt dated 25 <sup>th</sup> May, 2010
Exhibit 5	Receipt dated 11 <sup>th</sup> May, 2012

Exhibit 6 Invoice dated 15<sup>th</sup> November, 2010

9. One of the documents sought to be adduced was not admitted. This was a Police Report dated 16<sup>th</sup> April 2010. The Court ruled that the document did not satisfy the criteria outlined in Section 31(E) (1) and elaborated upon in the judgment of Sykes, J. in the Fenella Kennedy-Holland case referred to above. That is because, had the police officer making the report been called, the information in that report particularly the details as to how the accident occurred, could not have been given by the police officer as it breached the rule against hearsay evidence.
10. All the evidence having been adduced counsel submitted in respect of damages as follows:

<b>For Special:</b>	\$
Dental Treatment	119,000
Dr. Abel	60,000
Dr. Francis	25,000
Transportation	3,100
<b>For General Damages</b>	
Pain, Suffering and Loss of Amenities	\$2,000,000.00

Counsel relied on "Final Judgments" in the matters of **Claim No. 2010 HCV 04670 Cornella Tomlinson v. Dennis Gordon and Consolidated Claim No. 2010 HCV 0029 Wayne Hutchinson v. Cyril Robinson et al.** In respect of each matter counsel attached copies of medical reports which she assured me were the reports upon which the court relied to assess the damages.

11. The injuries suffered by the Claimant in this case were as follows:
- 4 cm laceration to right leg, 1 cm laceration to forehead
  - Laceration and pain to the mouth
  - chip to front incisor tooth
  - soft tissue damage to right knee, right elbow and right side chest
  - muscular ligament damage to lumbar spine
  - muscular ligament damage to cervical spine

- g. body aches and pains
  - h. stiffness and inability to flex or rotate back muscles or turn her head
  - i. inability to bend from the waist torso or sit for extended periods without pain
- 12. There was however no underlying damage to the spinal column. She was given pain and anti-inflammatory medication and advised to rest. Doctor Francis estimated that she would make a full recovery in 8 – 10 weeks.
- 13. As regards the damage to her teeth Dr. Phillip Mighty reported on aspects of her dental condition unrelated to the accident. He for example identified 10 cavities for filling and recommended generalized cleaning and deep scaling. He did however identify the fracture to the #10 crown and grade two (2) mobility of her upper and lower incisors. These he interpreted as a sequelae of trauma.
- 14. The Claimant also visited Dr. Wendel Abel complaining of “physiological arousal” when reminded of the accident and nightmares. Dr. Abel’s tests, as counsel candidly conceded, negated the existence of post traumatic stress disorder or depression. The doctor does however state that her,
  - “overall quality of life has been impacted by this accident.
  - She experiences repeated cues that trigger memories and anxieties associated with the accident.”
- 15. This Court is reluctant to rely solely upon the Final Judgments cited without reference to the Judge’s Reasons for Judgment. This is because unless one knows the factors considered relevant and the evidence, which was accepted or rejected, one cannot reasonably apply an authority on damages. Further there is the risk of error as was demonstrated by the fact that when handing up the judgment in the **Wayne Hutchinson** matter counsel also passed up a medical report unrelated to the damages awarded to **Mr. Hutchinson**. The error was caught and quickly corrected.
- 16. I will not however entirely remove from my consideration the two awards. The one was an award of \$1 million on 1<sup>st</sup> July 2011 and the other \$1 million on 19<sup>th</sup> June, 2012.

17. I have reviewed cases reported in Mrs. Khan's publication "**Recent Personal Injury Awards**" Volume 6. This publication is widely used by Practitioners and the Courts alike and has gained an enviable reputation for the accuracy of its case notations and reports. In particular I had regard to the following authorities:
- a. **Richard Asphalt v. David Daley Claim No. 2005 HCV 1528** reported in Khan's Vol. 6 page 120. The 24 year old Claimant suffered a mild tenderness of the spine, pain in front of neck at level of larynx and muscle spasm. X-rays revealed no bony injury but he had severe spasms which were painful .  
Dr. Randolph Cheeks Consultant Neurosurgeon found that the injury to the supra spinous ligament and adjacent paraspinal musculature had healed with scarring and caused restricted range of forward flexion of lumbar spine and would cause intermittent pains in the back. His permanent partial disability was assessed at 3% of the whole person.  
The award for General Damages on the 24<sup>th</sup> July 2006 was \$700,000 when updated using the Consumer Price Index of 184.1 helpfully provided by Counsel this award today would approximate to \$1,302,000.
  - b. **Earlette Palmer v. Brown Claim no. 2005 HCV 5337** Khan Vol. 6 page 122. The Claimant suffered trauma to right side of neck, trauma to right breast and trauma to right leg.  
Right neck muscle strain (whiplash) was diagnosed. Three (3) months later the Claimant was diagnosed as having 2 sets of masses/collection in right breast suggestive of haematoma. Consecutive management by ice compress and anti-inflammatory drugs was continued. In August 2005 the breast was found to be normal and there was no pain in the neck.  
The award in October 2007 for Pain Suffering and Loss of Amenities was \$800,000. When adjusted for inflation this amounts to \$1,328,000.00.
18. These cases I find to be of assistance. In the instant matter the Doctors have not assessed any permanent disability. The cases are also consistent with the 2 Final

Judgments cited by Counsel for the Claimant. The Claimant however, also required dental treatment consequent on the accident and had some anxieties in consequence of the accident. Her case is therefore on par and possibly slightly more serious than the above cited authorities. In her witness statement she describes residual effects for which compensation is to be granted as follows,

“These days it is my knee that gives me most of the problem. I cannot stand for any long period of time on the knee. If I sit for any long period of time, the knee would become stiff and it would take a little time for it to revive. The pains in my neck and back are still there. They are not as bad as before, but if I look up, I would still feel like a pain in the back of my neck.” [paras. 26 & 27]

19. When regard is had to the authorities referred to above I make the following award of damages:

**General**

Pain, Suffering and Loss of Amenities            \$1.6 million

**Special**

	\$
Dental Treatment	119,000.00
Medical Report of Dr. Abel	60,000.00
Medical Report of Dr. Francis	25,000.00
Transportation	<u>3,100.00</u>
<b>Total</b>	<b>207,100.00</b>

20. Interest will run at 3% on the General damages from the 19<sup>th</sup> December 2010, being the date of service of the Claim Form and Particulars of Claim as per affidavit of Service dated 24<sup>th</sup> May, 2011, to the 5<sup>th</sup> October, 2012.
21. Interest will run on the Special Damages at 3% from the 25<sup>th</sup> day of February, 2010 being the date of the accident, to the 5<sup>th</sup> October, 2012.

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21. Interest will run on the Special Damages at 3% from the 25<sup>th</sup> day of February, 2010 being the date of the accident, to the 5<sup>th</sup> October, 2012.



22. Costs are ordered in favour of the Claimant in the amount of \$40,000.00 as requested.