

Judgment 102

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L.G. 103 of 1992

BETWEEN	GRACE GRANT	PLAINTIFF
A N D	NOEL FOSTER	1st DEFENDANT
A N D	WOOD IDEAS LIMITED	2nd DEFENDANT

Mr. N. O. Samuels for Plaintiff

Mr. D. Henry instructed by Messrs.
Nunes, Schofield, DeLeon & Co. for defendants.

Heard: 14th, 15th, 16th October, 1996
24th November, 25th November, 1997,
and June 26th, 1998.

MARSH, J

ASSESSMENT OF DAMAGES

The delay in handing down this judgment is greatly regretted.

The plaintiff, a life underwriter was on her way to visit her parents and to do business. She was driving her motor car on March 30, 1991, at Glasgow, Hanover when there was an accident between her car and one driven by the 1st defendant and owned by 2nd defendant.

She received several cuts to legs and arms, blow to forehead resulting in a large haematoma and she lost consciousness for a period of about 5 - 10 minutes. She was assisted, bleeding, from the car and taken first to Noel Holmes Hospital in Lucea, Hanover, from which she was sent to Cornwall Regional Hospital in Montego Bay to do x-rays to her head and foot. Splinters of broken glass, were in the cuts on each arm. Walking became difficult as she was experiencing pains in the left foot.

A visit to her personal physician Dr. Michael Banbury was made and he treated plaintiffs injuries and put her left leg in a cast of plaster of paris. He ordered crutches for plaintiff and these plaintiff wore for sometime - a continuous period of 12 weeks. Mobility was difficult - plaintiff resided in a town house and to get up or down the stairs, plaintiff had

to sit on her bottom while she negotiated the stairs.

While plaintiff was on crutches, she returned to Dr. Banbury and he in turn referred her to a Dr. Ali. At this time plaintiff was suffering from severe pains and sleep was difficult. Dr. Ali treated her and removed and replaced cast that was on plaintiff's foot. Several visits were made to Dr. Ali to fulfil appointments.

An apparent improvement in the left foot's condition prompted plaintiff to return to work in July 1991. She could not work as well as there was still swellings on the left foot and she was feeling some discomfort.

In early March 1992, the pains in the left foot became more severe and another visit was made to Dr. Banbury who referred plaintiff to Dr. Dundas. Dr. Dundas' management of the injured left foot and bouts of physiotherapy achieved some improvement in the condition of the said leg, albeit for the brief period of a month. Several other visits were made by plaintiff to Dr. Dundas as pains in left leg increased. Visits were also made to Dr. Logan and Dr. Cheeks Consultant Plastic Surgeon and Consultant Neuro-surgeon respectively.

Plaintiff had stopped working because of the severe pains and swellings to left leg, in June 1992. She resigned from Mutual Life in October 1992 as life underwriter.

Some of the doctors who attended to plaintiff were called and gave evidence. Dr. Geddes Dundas, orthopedic surgeon, was the first doctor to testify. He first saw plaintiff at his offices on 28th November, 1991. On examination of plaintiff, he found (a) left foot swollen, tender, shiny with blunting of sensation to light touch from area extending from the ankle to the ball of the foot, namely the 2nd, 3rd metatarsals and the intervening space. Examination of X-ray reports relevant to plaintiff revealed that there was a fracture through the base of the 2nd metatarsal next to big toe of left foot. This fracture

later healed. Plaintiff continued to be seen by Dr. Dundas, next on 23rd March 1992 and thereafter several times in 1992 and 1993, for recurrent pain, swelling, weakness and sensory loss in the left foot. She had a walking tolerance of about 400 metres.

A regimen of exercise was suggested to plaintiff but this did not alter her status. A later examination of plaintiff revealed that her sensory deficit had not improved, nor had tenderness to the left foot. Rotation range of the foot was reduced by 25%. Further examination of plaintiff revealed that the sensory loss was becoming more pronounced. Between November 1992 and May of 1993, temporary relief was provided for plaintiff's discomfort by Dr. Dundas injecting the ankle several times. Strong analgesics did not help. The most successful injection was received by plaintiff in May 1993 when relief lasted for three (3) months. However this was accompanied by a number of reversible complications.

Between May 1993 and June 1995, Dr. Dundas did not see plaintiff. He next saw plaintiff in June 1995, she had been experiencing pains and physiotherapy had not helped. There was demonstrable spasm in nerves of her calf and significant pain in the inversion of her ankle and forefoot. Lateral ligament was demonstrably unstable. Dr. Dundas' last examination of plaintiff was on the 5th day of July 1996. The instability persisted and there was tenderness and inflammation as had been seen on other previous examinations. Conservative medical approaches having been exhausted, Dr. Dundas recommended that plaintiff have surgical reconstruction.

Initially, condition was of a fracture of the 2nd metatarsal, but between the first time Dr. Dundas examined plaintiff and May 1993, she had developed a condition called "Reflex Sympathetic Dystrophy." Torn lateral collateral ligament remained unhealed. The Reflex Sympathetic Dystrophy is a condition which develops when there has been injury to the sympathetic nervous system-

this part of the system is excessively stimulated. The patient with this condition will manifest evidential signs of overactivity of the nervous system - manifested as painful, swollen, sensitive and stiff and cool extremity. Area is cooler to touch than other unaffected parts. This condition is self perpetuating difficult to treat and most patients have ongoing problems for 2 - 3 years.

Plaintiff also had a lateral ligament tear of left ankle with arthritis - accompanying degenerative change manifested in a testified ability of plaintiff to bend toes towards head or downwards. Lateral ligament rupture is evidenced by a positive drawer sign; one of the physical signs are elicits in a patient. She also had persistent neuralgia from injury to the perineal nerve which gives sensation to the foot. Plaintiff now limps. Plaintiff's disability was assessed at 31% of the affected extremity or 11% of the whole person.

Dr. Leighton Logan, Consultant Plastic Surgeon examined plaintiff on the 21st February 1993 and found that she had

- a. multiple scars to dorsum of right hand,
- b. two scars to right knee
- c. deep abrasion to the left knee.

Scar revision surgery was advised.

Dr. Franklin Ottey also saw plaintiff on 16th June, 1995 in his capacity of Consultant Psychiatrist and as a result of plaintiff's complaints and history, found that plaintiff was having trouble sleeping, was prone to bouts of crying, had recurrent headaches, poor concentration and was subjects to feeling of depression.

Dr. Randolph Cheeks is a consultant neuro-surgeon and his evidence is that he saw plaintiff on the 17th of June, 1995 for the purpose of evaluating plaintiff's status consequent as an injury to left lower extremity, sustained in an accident in 1991. She complained of pain over dorsum of left foot and front of left ankle, pain aggravated by walking.

Examination of plaintiff revealed tenderness to outside of left ankle and reduced sensation over dorsum of the foot, stretching lateral ligament of ankle was painful. Dr. Cheeks opined that since four years had elapsed since the accident, plaintiffs condition had reached maximum medical improvement. Original injury was an extension/inversion injury to left ankle associated with acute stretching of the cutaneous branch of the peroneal nerve resulting in intra neural injury i.e. injury outside the structure of the nerve, in the cutaneous nerve. This had not recovered up to 17th June, 1995 and plaintiff had been left with permanent dysaesthesia - (abnormal painful sensation) over left foot and ankle.

This disability, using the American Medical Association guidelines, is rated at 3% of whole person, is not expected to worsen with time and is unlikely to require surgical treatment.

Pains plaintiff feels are abnormal - pains are normal, when, what is felt when normal healthy nerves causes the painful stimulus to the brain. An unhealthy or injured nerve will distort abnormal painful stimulus producing an abnormal or sometimes bizarre subjective sensation. This produces a variety of sensations which have one thing in common, unpleasantness. Collectively these sensations are referred to as "dysaesthesial." Quite likely patient would experience two pains from affected area - one from the injury to lateral ligament of the ankle which was reproduced by doctor when he stretched the ligament; the second pain is due to injury to the nerve. An objective finding was that there was reduced sensation in the territory of this nerve.

GENERAL DAMAGES

Plaintiff has testified that consequent on the accident, because of the pain and discomfort and the fact that she no longer was able to meet her quota, a requirement as a life underwriter, she was compelled to give up her job in June 1992. This is an uncontroverted fact and I accept this as true. The pain and discomfort about which plaintiff gave evidence are

bolstered by the evidence of Drs. Dundas and Cheeks, Consultant Orthopedic Surgeon and Consultant Neurosurgeon respectively as to plaintiff's painful condition and the reasons for it. Plaintiff will have pain for the rest of her life.

Dr. Leighton Logan, Consultant Plastic Surgeon gave evidence that plaintiff had scars to dorsum of right hand, to right knee and deep abrasion to left knee. He recommended a surgical procedure to correct the scars that he saw. This was evidence which remained uncontested and which I find to be a fact.

Dr. Cheeks was of the expressed view that the abnormal painful condition, permanent dysaesthesia was not expected to worsen with time and would not require surgical treatment.

Dr. Dundas however recommended surgical reconstruction. He assessed her disability before surgery to be 31% of the affected extremity and 11% of the whole person using the American Medical Association Guide for evaluation of permanent impairment. Effect of surgery, to hazard a guess, coupled with physiotherapy, would be to reduce the 15% disability relative to instability of ligament rupture, may well improve her range and reduce her disability to about 4 - 5% of whole person.

I therefore conclude that Dr. Dundas was of the opinion that surgery was likely, with physiotherapy to improve the problem plaintiff had with ligament, but not with regards to the damaged nerve.

Since accident, plaintiff went back to work and stopped working as life underwriter in June 1992. However Dr. Dundas testified that for about eight months before 28th November 1991 plaintiff could not have worked, also from 24th September 1992 through to 13th May, 1993. Dr. Dundas opined that for approximately sixteen months plaintiff could not work. Quite ironically it is plaintiff's evidence that she had returned to work in July 1991, some three months after the accident since there was an improvement in the leg. She resigned from Jamaica Mutual in October 1992.

After resigning from her job in October 1992, plaintiff has worked as:

- (i) Manager of an Overseas Company - Automotive (Overseas) Distributors - started August 1993 and ceased in January 1994 at \$3,000 per week. She received no payment for period November 1993 to January 1994. In all she was paid for three months - her total earnings for this period was \$36,000.00.
- (ii) baby sitter in New York from January 1996 to March 15, 1996. Salary was \$175 U.S. per week.

Efforts to get other forms of employment since March of 1996 have been unsuccessful. Plaintiff went overseas in 1994 to Bermuda and returned to Jamaica in June 1995.

It is her evidence that while there she made no application for jobs despite the fact that her decision to go overseas was indirectly prompted by her inability to find jobs locally.

Plaintiff has, besides a high school education, qualifications as Inspector of Public Health, certificate from the Jamaica Institute of Management and several certificates re Life insurance industry courses.

Mr. Samuels for Plaintiff, submitted that damages in the instant case ought to be substantial because of the peculiar nature of this case. He was unable to find any cases substantially on par with the instant case. He however referred to the case **Campbell v. Allen** at page 5 of **Mrs. Khan's third volume of Recent Personal Injury Awards**, a decision of Justice P. Harrison (as he then was). Nothing in this case remotely resembled the facts of the instant case. Similarly, the next case cited was also unhelpful. This was

the case of **Thompson v. McCalla et al** page 52 of **Mrs. Khan's Third Volume**. **Taylor vs. Jamaica American Motoring Company Ltd. and Murdock** at page 64 of **Mrs. Khan's Second Volume** was also referred to and, like the instant case involved the ankle. Permanent partial disability was 5% of left lower limb, Dr. Dundas assessed plaintiff Grace Grant's disability as 31% of the affected extremity or 11% of the whole person. General damages he contends should be computed bearing in mind that a disability of 31% is six times more than one of 5%. Mr. Samuels suggested a global figure of Seven Million dollars (\$7,000,000).

Mr. Henry for defendants agreed that plaintiff was entitled to be compensated for loss of earnings, pain and suffering and handicap on the labour market. Major chunk of the award should be to loss of amenities. He referred to several cases which could assist the Court:-

- (i) **Farrell v. Townsend et al** at page 46 of **Mrs. Khan's Third volume**.
- (ii) **Morrison v. The Attorney General et al** at page 40 of **Mrs. Khan's Third volume**.
- (iii) **Swaby vs. The Attorney General** at page 56 of **Mrs. Khan's Third Volume**.
- (iv.) **Barnett v. McLeod** at page 372 **Harrison's Assessment of damages for personal injuries**.

Award in instant case should be in the range \$350,000 to \$400,000.

Plaintiff had not availed herself of the surgery recommended by Doctors Dundas and Logan, when such recommendations were made in 1992 and in 1995 respectively. Surgery would cost less at time recommendations were made. Plaintiff therefore had failed to mitigate her losses.

The effect of the injury was to restrict range of opportunities re jobs that plaintiff can have. An award should be made under head of "Handicap on the labour market" - a substantial sum. He continued that there was no proper basis

for claim for loss of future earnings. Court has been provided with evidence of plaintiff's qualifications. Her main asset is her brain. Evidence suggested that plaintiff has refused to work.

Of the cases cited in instant case to assist Court, the one that most resembled this case was the case **Sharon Barnett v. Rosemarie McLeod (supra)**. Damages were assessed before Marsh J. on 26th January 1989. Plaintiff had suffered fracture of right talus (highest bone of the foot and which articulates with tibia and fibula), loss of consciousness, superficial abrasions with tenderness and swellings to various parts of the body. She was admitted to University Hospital and her leg was immobilized in a plaster of paris cast (back slab). A full cast was later placed on leg and she was discharged. She attended an outpatient clinic subsequently. Swelling and pain was a problem and physiotherapy was administered to the ankle. There was continuous pain and dorsoflexion of the joint was limited to zero degrees and plantar to 20 degrees. Early arthritis set in and permanent partial disability of right lower limb was assessed at 21% or 8% of the whole person. Reduction of pain could be eliminated if an operation was done. This would however result in plaintiff having a permanent limp. If operation was not done plaintiff would always suffer persistent pain. She was unable to stand for long period, unable to go to the beach because of scars. There was discomfort when dancing. General damages - Pain, Suffering and loss of Amenities were assessed at \$45,000.00. When upgraded to money of the day, this sum would account to approximately \$439,000.00.

The plaintiff Sharon Barnett was a 19 years old higgler. The plaintiff in instant case, at time of accident was thirty-four years old life insurance underwriter, who had, in her first year of employment achieved the prestigious Million dollar Round table. Her injuries were, fracture of the 2nd metatarsal near left big toe, unconsciousness and blow to head resulting in haematoma, lacerations to dorsum of right hand, lacerations

to both knees, swellings and painful left foot stiff and shiny, pain and instability of left foot due to a demonstrably torn unstable ligament; plaintiff developed a condition called Reflex Sympathetic Dystrophy, resulting from an injury to a part of the sympathetic nervous system. She will have pain for the rest of her life. No surgical procedurals will be able to alter the injury to the nerves while there is the possibility that an operation coupled with physiotherapy may ameliorate the plaintiff's ligament problem. Dr. Dundas assessment of plaintiff's permanent partial disability was put at 31% of the affected extremity and 11% of the whole person. She can no longer jog, no longer dance (and she loved to dance) and walking is limited to a range of 400 metres. She has had to alter her mode of dress as the wearing of high heel shoes is no longer possible.

Dr. Ottey, the Consultant Psychiatrist opined that plaintiff was suffering from chronic reactive depression precipitated by injuries received as a result of the accident and the resultant effects on her personal and occupational life. It must therefore be concluded, bearing in mind the age of the plaintiff, the effects of the accident and the nature of her occupation at time of accident, that the compensation in this case should be much more than in the Sharon Barnett case above. What then should be the measure of compensation for the plaintiff Grace Grant?

Lord Reid delivered himself as follows in **H. West and Son Limited v Shepherd (1964) A.C. 326:**

"....There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunity to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am prevented by authority, I would think the ordinary man is, at least after the four months, far less concerned about his physical injury as than about the

dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the injured man's consequential difficulties in his daily life."

Compensation awarded therefore for General Damages is as follows:

- (i) Pain and Suffering and Loss of Amenities-
\$800,000.00.

I accept the evidence of the plaintiff that pain and discomfort in the affected extremity compelled her to give up life underwriting as she could not meet her quota. This pain and discomfort are to be suffered by her for the rest of her life. Dr. Cheeks describes the sensations which plaintiff will feel, in the affected area, as characterized by unpleasantness. Her range of job opportunities will be substantially restricted. I therefore make an award for "handicap on the labour market of \$100,000.00.

- (ii) Mr. Henry had submitted that since plaintiff had not acted on the recommendations of Dr. Dundas and Dr. Logan to have had reconstructive surgery done when these were communicated to her she had not sought to mitigate her loss. However it was Dr. Dundas, in cross examination, who said that it was not true to say that plaintiff should have had surgery immediately - he would not have done surgery while "Reflex Sympathetic Dystrophy' was active in the plaintiff. The cost of Dr. Logan's scar correction surgery is \$47,000.00 in all. The cost of Dr. Dundas reconstructive surgery is \$77,450.00.

- (iii) Cost of future surgery - \$124,450.00.

General Damages - \$1,124,450 with interest of 3% p.a. on the sum of \$800,000.00 from the date writ was served to date.

Special Damages -

An amount of \$15,765.00 was agreed for all items except.

(i)	cost of replacing lost radio, tape deck -	\$9,240.00
(ii)	Cost of lost licence plate	\$250.00
(iii)	Salvage Value of motor vehicle	\$63,000.00
(iv)	Loss of Use	\$14,000.00
(v)	Loss of Earnings	\$87,865.00

The amounts sought for loss of car radio, tape deck and licence cannot be recovered as there is no evidence that the loss of these items was caused by the accident. Plaintiff also claimed as Special Damages:

Extra Domestic Help	\$2,880
Loss of Motor car	\$75,390.00 in all.

No evidence was led to the value of motor car and so the amount claimed of \$75,390 cannot be awarded. Although claim for extra domestic help is \$2,880, plaintiff's evidence was that she paid \$150.00 per week for 16 weeks to her domestic helper - that is a total sum of \$2,400.00. Cost of moving plaintiff's car to Green Island, than to Kingston was \$3,700.00. Car and driver hired during the period plaintiff returned to work is \$14,000.00. computed at \$3,000 per week for car rental and \$500 per week for chauffeur for four weeks.

Dr. Dundas had said that plaintiff could not have worked for about eight months before 28th November 1991, and for a similar period between 24th September 1992 to 13th June, 1993. This would be a total of approximately sixteen months. However, plaintiff admits to having worked after accident, between July 1991 and June 1992, a period of approximately 10 months.

Plaintiff earned October 1990 - October 1991, \$77,167.80; November 1991 - October 1992, her earning was \$134,126.29, a figure which involved a casework bonus of \$68,017.19. Salary therefore was

\$66,109.10 Loss of earnings claimed is \$87,865.00 and this is is the amount I will award for loss of earnings. There is a claim also for changing type of shoes being worn - cost is \$3,500. This is a reasonable sum and an award is made in this amount.

The total award for Special Damages is therefore \$123,730.00 Interest thereon shall be at the rate of 3% per annum from the 30th day of march 1991 to today. Plaintiffs costs are to be taxed if not agreed.

Stay of execution for four (4 weeks.

By consent:

Sum of Seven Hundred and fifty thousand dollars (\$750,000.00) paid into Court on 9th June, 1995 with interest thereon be paid out to the plaintiff's Attorney.