

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M. 153 OF 1986

BETWEEN	LYDIA MARTIN	PLAINTIFF
A N D	INDUSTRIAL COMMERCIAL DEVELOPMENT CO. LTD	FIRST DEFENDANT
A N D	HORACE KNIGHT	SECOND DEFENDANT

Assessment of Damages

for Personal Injuries

Ainsworth Campbell for the Plaintiff

Miss Janet Morgan instructed by Milholland Ashenheim and Stone for the Defendants

Hearing on April 22, 23, 24; July 20, and November 26 1992

Judgment

Bingham J

The plaintiff Lydia Martin, a Beer Joint Operator now aged 41 years, as a pillion rider on a motor cycle being ridden by one Lindel Dixon, was on 18th September 1985 injured in a Motor Vehicle accident along the Waltham Park Road in the parish of Saint Andrew. This accident occurred when a pick-up owned by the first named defendant company and driven by the second named defendant collided with the motor cycle along the said road.

Following the collision the plaintiff was taken to the Kingston Public Hospital where she was admitted and treated. On admission the medical report of doctor Francis Lindo dated 4th April 1986 (Exhibit 1) described her as suffering from the following injuries:-

- "1. 1 centimetre lacerated wound on the left side of her chin.
2. 18 centimetres lacerated wound on the anterior aspect of her left leg with a fractured bone exposed. It was grossly contaminated.
3. Absent left upper incisor.
4. A deformity of the left foot.

X Rays at that time revealed fractures of left ulna and radius and a fracture of her left tibia and fibula with subluxation of the head of the left fibula.

The wounds were appropriately treated.

Her upper limb fracture was treated with plaster of paris immobilization while the lower limb fracture was cleaned up and treated with immobilization also in a pop cast.

In hospital she developed a spreading infection of her left lower limb and required a debridement on 27th September, 1985.

She required further smaller debridements under local anaesthesia on two occasions.

On 10th January 1986 she had a skin graft of the wound on the left lower limb with the donor site from the right thigh. She was discharged home on the 27th January 1986 with an appointment for follow-up care.

The upper limb cast was removed on the 3rd October 1985, while the lower limb cast was removed on the 24th December, 1985.

She will require follow-up care to complete her rehabilitation and to correct possible deformities which can follow treatment for her injuries. Further reports will be required to give a complete picture".

The plaintiff described her experience while in hospital, the extreme pain she suffered and the surgical procedures which she underwent. She testified to being eventually discharged from hospital after a stay of six months. She was, however, unable to say when this was. The medical report of doctor Lindo did not support the length of her stay in hospital and indicates the date of her eventual discharge as being on 27th January 1986.

Following her discharge from hospital the plaintiff continued to visit the out patient clinic for follow-up treatment. Apart from doctor Lindo she was treated at the Kingston Public Hospital by doctors Dundas, and Herard.

The plaintiff following her discharge from hospital testified to being unable to work. Because of her condition she had to employ a household helper to assist her with the washing and cooking. She could not stand up or use her left hand. She was also unable to stand for any length of time without experiencing pain in her left foot. Her left hand was also painful. While testifying she told the Court of still experiencing pain in her foot and hand after a period of some six years. No doubt this pain will diminish with the award of damages which she now anticipates. She now has to employ someone to cook, wash and clean for her at a cost of \$60.00 per week and \$80.00 per week when she can afford it. At the time of this hearing she was still unable to work. She attributes all this to the injuries she suffered and this despite the fact that the medical evidence of doctors Dundas, Jackson and Arscott identifies and recommends corrective and reconstructive surgery for her left hand and foot. Doctor Dundas, an Orthopaedic Surgeon is of the opinion that

the maximum period of her disability would have been eighteen months. The plaintiff, however, would in the light of her experience see herself as being unable to work and would, from the particulars of damage in her claim and her evidence in Court, appear to place herself on the same footing as someone who as a result of the accident is now reduced to being a paraplegic.

Liability having been admitted by the defendants, the claim is now left for assessment of damages. This falls to be considered under two broad heads namely:-

1. Special Damages.
2. General Damages being:-
 - (a) Pain and Suffering and Loss of Amenities
 - (b) An award for Corrective and Re-Constructive Surgery
 - (c) Loss of Earning capacity.

In far as the plaintiff has sought to claim for future earnings based on a total loss of income situation I regard her claim in this area as being speculative. She being self employed, given the the medical evidence of her not being permanently disabled, as well as the fact that she is being compensated for loss of earnings for the entire period of her disability, in my opinion therefore no question arises as to her being awarded any total loss of future earnings.

Special damages

(a) Loss of Earnings

Under this head the plaintiff's claim resulted in a most remarkable state of affairs. An examination of the particulars of special damage indicates that whereas in the original Statement of Claim filed with the Writ the plaintiff's claim for loss of earnings was "from 18th September 1985 to 28th February 1987, 75 weeks at \$700.00 per week". This sum was then varied to \$1,831 by virtue of an order of the Master on 17th July 1990. By a document captioned "Second Amended Statement of Claim", of which a copy was served on the Attorneys for the defendants on 3rd October 1990, the sum claimed as the plaintiff's weekly income was again altered to \$700.00 per week. In the face of all this the plaintiff sought to testify to earning a net income of \$1,800.00 per week. Having regards to the fact that on her evidence she kept no records there existed no reliable basis for her estimated income. As the original particulars would have been given as part of her instructions to her Attorney-at-Law prior to the filing of the original Statement of Claim which was lodged on April 1986, a period nearer to the accident, I accept the sum of \$700.00

per week as a reasonable starting point in determining her income. As to the length of time this far from the period of 257 weeks claimed has now to be adjusted to be in conformity with the period of her disability deposed to by doctor Dundas of 18 months, or 78 weeks, the plaintiff being limited in her entitlement to recover her actual loss. The gross sum recoverable for loss of earnings is accordingly \$54,600. This sum has now to be reduced by one-third for income tax purposes, after having deducted the sum of \$10,400.00 as the non-taxable allowance. When the remainder of \$44,200.00 is reduced by one-third the sum recoverable as loss of earnings is therefore \$39,866.67.

The following additional items which were claimed and were not disputed are allowed:-

1	Cost of Crutches	\$ 28.00
11	Employment of Extra Help for 46 weeks at \$60.00 per week.	\$ 2,760.00
111	Transportation	\$ 400.00

The total sum recoverable as special damages is therefore \$43,054.00

2 General Damages

The plaintiff from the injuries which she suffered to her left foot and hand will have to undergo corrective and reconstructive surgery. As to the injury to her left wrist doctor Dundas from his examination of the plaintiff remarked that:-

"An examination of the left upper extremity revealed that the lower end of the ulna was dislocated. This is the smaller bone hading down to the wrist. The wrist was 15° of radial deviation (angulated). She had lost 10° of flexion. The deviation and angulation restricts the plaintiff's ability to move the wrist in the opposite direction with full force. Any attempt to use the wrist is likely to cause pain".

Doctor Dundas recommended an operation costing \$4,000.00 to correct this condition. In so far as such an operation apart from improving the flexion of the plaintiff's left wrist would also result in alleviating the pain now being experienced. I would be minded to accept the opinion of the doctor.

Far more serious, however, were the injuries which the plaintiff suffered to the left lower extremity. Doctor Dundas in his evidence referred to these as several scars some of which were merged. He further deposed that:-

- 1 "There was a 14x2c.m. scar to the upper aspect of the back of the left thigh.
- 2 A 58c.m. scar that extended from the upper aspect of the left thigh outer border beyond

the knee to the upper third of the left leg (J shaped) this caused a marked soft tissue deformation around the knee. This was jagged. It was unsightly."

It is this condition that doctors Horace Jackson and Gian Arscott two eminent plastic surgeons, recommend as requiring reconstructive surgery. Doctor Dundas recommends a total knee replacement every 8 - 10 years costing about \$100,000.00. If this were done it would require about 3 - 5 similar operations for the remainder of the normal life expectancy of the plaintiff.

In view of the reconstructive surgery recommended by doctors Jackson and Arscott such a procedure as suggested by doctor Dundas would be totally unnecessary. Such a course would only be resorted to if plastic surgery was not being done.

This fact seemed to have escaped the attention of learned counsel for the plaintiff who sought to advance submissions in which he sought compensation based both on doctor Dundas' recommendation as well as that of doctors Jackson and Arscott. In the light of the fact that the recommendation for plastic surgery to be resorted to as the means of correcting the plaintiff's condition to her left thigh and knee, that aspect of doctor Dundas' recommendation as it relates to the knee replacement procedure is not accepted.

An issue however, arises in relation to the opinions canvassed by doctors Jackson and Arscott. This revolves around the surgical procedure to be adopted the remedying the grotesque scar to the left knee and thigh. As a result of the opinions canvassed by the goodly doctors there is a secondary issue as to the estimated cost involved in carrying out the reconstructive surgery. Doctor Jackson recommend a procedure at his State of the Art private clinic with air-conditioned rooms and television sets which seek to utilise treatment by means of tissue expansion.

The effect of this surgical procedure would leave the plaintiff with about a 70 percent recovery resulting in her being made acceptable from a love-making distance. The estimated cost using this method would be about a \$400,000.00 and an additional cost of U.S.\$6,000.00 for importing five tissue expanders and drains. This estimate is arrived at as follows:-

1	Hospitalisation	JA\$150,000.00
2	Anaesthetic and nursing care	JA\$100,000.00
3	Surgical fee for surgeon and assistant surgeon	JA\$150,000.00
4	Cost of importing tissues expanders and drains from U.S.A.	US\$6,000.00
		JA\$400,000.00
	and US\$6,000.00	

which when converted to Jamaican Dollars

\$133,200.00
JA\$533,200.00

Doctor Arscott for his part would recommend the following measures in effecting reconstructive surgery:-

- 1 Transferring tissue to cover the defect over the left leg.
- 2 The use of tissue expansion to revise the scars on the left thigh.
- 3 The use of fat suction to correct the contour over the left thigh.

Doctor Arscott's estimate for the surgical management inclusive of the surgeons, assistant surgeon and anaesthetist fees is placed at JA\$212,000.00. The break down of his costs is as follows:-

1	Cost of three tissue expanders	US\$1,500
2	The Surgeons fee	JA\$80,000.00
3	Assistant Surgeon	JA\$20,000.00
4	Anaesthetist fee	JA\$25,000.00
5	Hospitalisation	JA\$70,000.00
6	Nursing assistance & follow-up care for one year	<u>JA\$17,000.00</u>
		JA\$212,000.00

When the sum of U.S. \$1,500.00 is converted the total cost arrived at is JA\$245,300.00.

The evidence revealed that doctor Jackson operates from his own private clinic which is equipped with the latest State of the Art equipment and luxurious rooms with television and all the ultra modern amenities. Doctor Arscott on the other hand operates out of the St. Josephs Hospital which although not offering the exclusiveness of doctor Jackson's private clinic, does offer the latest State of the Art equipment required for the Surgical procedures to be undertaken. The question for the Court

therefore is, given the fact that both doctors are of proven competence, which facility ought to be made available to the plaintiff? It appears to me that what this plaintiff is entitled to is proper treatment for her condition and based on the evidence of both doctors that treatment is available at both these institutions and more particularly at half the cost as against that of doctor Jackson's private clinic. That apart I am inclined to prefer the procedure recommended by doctor Arscott. While not taking anything away from doctor Jackson's expertise, doctor Arscott as a plastic surgeon who from his experience apart from his private practice, he is now engaged in treating patients at St. Josephs Hospital, the private wing of the University of the West Indies, Kingston Public Hospital the latter two of which he is the Consultant Plastic Surgeon apart from assisting at the Bustamante Hospital for Children. He in my view therefore more favourably placed to canvass an opinion as to the type of surgery for which this plaintiff is the better suited.

In the light of the above reasons I would accordingly make an award of \$245,300.00 for reconstructive surgery under this head of General Damages.

Pain and Suffering and

Loss of Amenity

Doctor Dundas in testifying assessed the extent of the plaintiff's condition at 7 percent permanent partial disability of the whole person. Against this background learned Counsel for the plaintiff has suggested that reasonable award under this head ought to fall within the range of \$750,000.00 to \$950,000.00. Learned Counsel for the defendant on the other hand has canvassed a sum of \$150,000.00. Given the fact that the plaintiff is being fully compensated for her loss of earnings for the entire period of her disability based on the medical evidence and the fact that she also will benefit from awards for corrective and reconstructive surgery her case has now to be considered on the basis that following such surgery she can expect at least a 70 percent recovery in her condition. There is also no plausible reason as to why, based on doctor Dundas' opinion that if the plaintiff who is grossly overweight sought to lose weight that her condition for weight-bearing would not improve considerably. Her estimated disability of 7 percent would in 1985 the year of the accident have attracted an award of the range of \$50,000.00 to \$60,000.00. Given the current inflationary trends, however, that award would at present

be of a range of between \$200,000.00 - \$250,000.00. I would opt for the higher sum \$250,000.00 and that is the amount which I would amend for pain and suffering and Loss of Amenities.

This leaves the question as to what sum if any ought to be awarded for loss of earnings. Mr. Campbell from a starting point of \$3,600,000.00 suggested an award of \$600,000.00. The plaintiff's present age is 41 years. A reasonable multiplier would accordingly be 10 years purchase and using a multiplicand of \$15,600.00 being the minimum wage given the medical evidence and the plaintiff having chosen of her volition to take no steps to mitigate her loss and to seek some meaningful employment, the gross figure would amount to \$156,000.00. Of this sum, however, the plaintiff would be only entitled to 30 percent of the gross, that being her reduced earning capacity based on the medical evidence. Her entitlement under this heads, therefore, is \$46,800.00.

The result is that damage are assessed at \$589,154.67c being:-

- 1 Special Damages \$43,054.67
- 2 General Damages for pain and suffering and loss of amenities
\$250,000.00 and additional sum for corrective and reconstructive
surgery \$249,300.00 and for reduced earning capacity \$46,000.00
 Total = \$589,154.67

Interest awarded on special damages at 3 percent as from 18/9/85 to 26/11/92 and on general damages of \$250,000.00 (award for pain and suffering and loss of amenities) at 3 percent as from date of service being 4/4/86 to 26/11/92.