JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 103/2000

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE PANTON, J.A.

BETWEEN:	**VANDYARD DACRES** **CARLA DACRES**	**DEFENDANTS/APPELLANTS**
AND	**TANIA REID**	**PLAINTIFF/RESPONDENT**

Christopher Samuda instructed by Piper & Samuda for appellants

Mrs. U. Khan & Charles Campbell instructed By Khan & Khan for respondents

October 1, 2, 3, 4, 2001 & April 11, 2003

DOWNER, J.A:

Having read in draft the judgment of Harrison, J.A. I entirely agree.

HARRISON, J.A:

This is an appeal from the judgment of Reckord, J. on August 17, 2000, awarding:

> "1. Special damages
>
> $175,029.09 with interest at 6% per annum from 27th August, 1997 to today.

2. General Damages

   Pain and Suffering and Loss of Amenities $1,375,000.00 with interest at 6% per annum (six percent) from date of service of Writ to today.

3. Costs of future medical expenses $50,000.00.

4. Costs to the plaintiff to be agreed or taxed."

The relevant facts are that the respondent, on August 27, 1997 was a passenger sitting in the left front passenger seat of a motor car driven by the second appellant and owned by the first appellant along Constant Spring Road in the parish of St Andrew. Turning across the road towards Manor Centre, the said car was hit by a bus. The respondent became unconscious and regained consciousness lying on a stretcher in the University Hospital. She was suffering from pain to her chest, shoulder, face, head and knees. Cuts to the left side of her face were sutured, she received intravenous fluids and felt dizziness. Her left cheek bones and both clavicles were fractured. She was seen by Dr Branday who observed these injuries, as also bleeding under the membrane of the left eye and tenderness and swelling of her upper chest. She was also seen by orthopaedic and ear, nose, and throat specialists. She was discharged from the hospital two days after, on August 29 1997, with both shoulders bandaged. During the period September 2 to November 11, 1997, she attended the hospital as an

out-patient for treatment, at the surgical, neurosurgery, orthopaedic and ear, nose and throat clinics.

Dr Anthony Lewis, consultant oral and maxillo-facial surgeon first examined the respondent on September 26, 1997 and observed then, a left periorbital haematoma, left conjunctival haematoma, fracture of the left malo-auxillary complex with fractures of the inferior and lateral orbital rims and of the zygomatic arch. There were also fractures of the incisors edges of the central maxillary incisors (the cutting edge of the teeth were broken off). The fractures were reduced under general anaesthetic and immobilized. Dr Lewis saw her again on October 23, 1997 and September 27, 1999. On the latter date, Dr Lewis observed that the fractures were healed, but the left was flatter than the right.

Dr Dundas, consultant orthopaedic surgeon examined the respondent on September 29, 1997. He observed that the fractures of both clavicles were overlapping and untreated. He applied clavicular brace and after four weeks, the left clavicle was healed, but not the right. Six weeks later the left clavicle had healed but the right clavicle still overlapped. There was evidence of nerve deficit involving the bronchial plexus, the major nerve in the ovum near to the latter fracture, and tenderness at the said site. Dr Dundas saw her again on January 1, 1998 and on July 28, 1998. On the latter date, the

tenderness at the fracture site of the right clavicle remained. X-rays revealed that the right clavicle was still un-united. Physical therapy was introduced and on October 29, 1998 it was confirmed by radiography that the right clavicle was united. The unit comprising the nerves of the bronchial plexus was damaged. Due to the overlap on the fracture of the right clavicle there was movement disability due to the right shoulder injury, of 5% of the right arm and 2% of the whole person. That overlap could also cause degeneration of the bone.

Dr Junior Taylor, consultant plastic surgeon, examined the respondent on ~~April~~ 22, ~~1998 and observed the scars in~~ the area of the left eye and on the left cheek, and a nodule, probably a fragment of glass, under the skin of the said cheek. He estimated that the cost of surgical, anaesthesia and hospital fees would be $50,000.00. He maintained that although the scars could be reduced she would be permanently scarred.

The respondent was, at the time of the accident, a bank teller for three years. After the accident she eventually resumed her job but with her face scarred. The injury to her right shoulder caused cramps when she carried her handbag on that shoulder. Counting money or using the computer, a daily use, causes cramps to her fingers. She also needed assistance to carry her till with money, due to the injury

to her shoulder. She is unable, as she did before the accident, to swim or play tennis because of the pain it causes her.

The respondent was absent from work for 8½ weeks as a result of the accident. She was then earning $4,400.00 net per week.

Reckord, J. assessed the damages and made the awards aforementioned, resulting in this appeal.

Before hearing this appeal counsel for the respondent raised a preliminary point by notice of motion to strike out the notice and grounds of appeal. The grounds stated in the motion were:

> "(a) That the appeal was filed on the instructions of the insurer of the defendants/appellants in an attempted exercise of a subrogated right which it did not have and is an abuse of the process of the Court.
>
> (b) That even if the said insurer had a subrogated right, the use of same was inequitable in the circumstances.
>
> (c) That the appeal herein was filed without the authority and consent of the defendant/appellants or an order of the Court.
>
> (c) That the said notice and grounds of appeal disclose no proper ground of appeal, an/or alternatively, they are too vague and unspecific, and are insufficient and inconsistent with what is required at law by Regulation 12(2) of the Court of Appeal Rules 1962 as amended.
>
> The costs of this application and of the appeal to be paid by the

defendants/appellants and/or their insurer."

The gist of Mrs. Khan's arguments in support of the motion was that the appeal was filed by the insurers of the appellants who had no right to do so except by subrogation. There was no right in the instant case to subrogation, nor any contractual or statutory right in the insurers to appeal. For subrogation to arise the insurers must first pay under the contract of indemnity and then seek to recover in the name of the insured. By letter dated October 30, 2000 to counsel for the respondent, the insurers stated that the appellants Dacres could not be found, therefore they could not be said to have directed an appeal. The notice and grounds of appeal were filed on September 5, 2000 and the insurers paid after that date, therefore no right existed to be subrogated when the appeal was in fact filed. The policy of insurance which is governed by the Motor Vehicles Insurance (Third Party Risks) Act gives to the insurance company the statutory right to intervene, which right is restricted to the right of "... defence or settlement of any claim or to prosecute ..." There is no right in the said company to appeal. Counsel relied on the cases of ***Costellain v Preston et al*** [1883] 11Q.B.D 380, ***Edwards v Motor Union Insurance Company*** [1922] 2 K.B. 249, ***Morris v Ford Motor Company Limited*** [1973] 2 All E.R. 1084, ***McDonald v Williams et al*** (1985) 22 JLR 36, ***Williams v Wilson et al*** (1989) 26 J.L.R. 172.

Mr. Samuda, conceding that no right of subrogation arose, submitted that the terms of the contract gave the right to the insurers to institute and conduct proceedings. He concluded that the right under the policy of insurance, as well as under the provision of the Act includes an appellate right.

The right of subrogation did not exist for the benefit of the insurance company until it had honoured its contract of indemnity with the insured by paying all claims that arose: (***Page v Scottish* Insurance Corp.** [1929] 98 K.B. Div. 308).

In ***Costellain v Preston*** (supra), Brett, L.J., explained that the fundamental principle of insurance law is that the assured by the terms of the policy is indemnified in full by the insurer, but must not receive more than the loss sustained. Continuing, he said that the doctrine of subrogation can arise, to fulfill that fundamental rule, but, he said, at page 389, the insurer,

> "... cannot be subrogated into the right of action until he has paid the sum insured and made good the loss."

Apart from the insurers' right to intervene, where subrogation arises, the policy of insurance itself may allow for this intervention. In ***British Insurance Company v Mountain*** (1919) 35 T.L.R. 375, the Court of Appeal, held that the assured had an obligation to advise

insurers of any claim or intended defence of an action. Lawrence J. at page 377, said:

> "The relation of assured and assurer is one of ***uberrima fides.*** The purpose and object of clauses giving the insurer a right to notice is to afford him the opportunity of investigating the facts as to a claim at once, in order that he may be able to defeat an unfounded claim or to reduce an exaggerated one."

This right of early intervention of the insurance company, grounded in the terms of the policy of insurance, exists prior to the right of subrogation arising.

The ~~author~~ in ***Colinvaux's Law of Insurance,*** 7th edition, (1997), at page 405, said:

> "Since the insurers cannot make use of their ordinary rights of subrogation to contest the assured's liability as against a third party unless they first pay the assured the full amount of his estimated loss, the policy usually specifically reserves their right to conduct litigation in connection with the assured's liability on his behalf."

In the instant case,the policy of insurance between the appellants and the insurers, N.E.M. Insurance Company (Jamaica) Limited provided in the policy contract, in paragraph 2 of the conditions:

> "2. No admission offer promise payment or indemnity shall be made or given by or on behalf of the insured or any person claiming to be indemnified without the written consent of the Company which shall be entitled if it so

> desires to take over and conduct in the name of the Insured or such person the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the Insured and such person shall give all such information and assistance as the Company may require."
>
> (Emphasis added)

That clause, taken as a whole, provided sufficient authority to the insurers to conduct proceedings in defence of the claim, including the appellate proceedings to its ultimate conclusion. The insurers were entitled to do so, in the light of their contract of indemnity without resort to the principle of subrogation. We agreed with Mr. Samuda for the appellants in this respect.

This Court, consequently, on 2nd October 2001, dismissed the above motion of the respondent with costs to the appellants and ordered that the appeal proceed.

The grounds of appeal were:

> "(1) The Honourable Judge failed to assess or properly assess the plaintiff's evidence regarding her claim for Special Damages and General Damages and erred in law in making the awards therefor which are not substantiated by the evidence in that:
>
> > (a) the claim for loss of earnings/income was not strictly proved in accordance with the law and the evidence in relation thereto was conflicting and ought therefore to have

been rejected; and the award for pain and suffering and loss of amenities is inordinate/excessive having regard to the nature of the injuries suffered evidence in respect thereof and comparable awards.

(b) the award in relation to costs of future medical expenses is not supported by the evidence.

2. The learned trial judge in admitting certain medical evidence which was hearsay erred in law and in relying upon the same particularly the evidence relating to the reports of Dr Branday, made an award for pain and suffering which was excessive.

3. ~~The honourable trial judge erred in~~ law in awarding interest at 6% on both Special Damages and General Damages."

Mr. Samuda for the appellants argued that there was no strict documentary proof of the earnings of the respondent, and that the award for pain and suffering was excessive. The evidence of the respondent was unreliable in that the medical evidence did not disclose that the injuries and disabilities were as serious as the respondent claimed. The learned trial judge did not assess properly the variance between the medical evidence and that of the respondent and consequently relied on cases in which the claimant suffered injuries far more serious than the respondent did. He argued that the learned trial judge relied on hearsay evidence from Dr Branday and concluded that the learned trial judge erred in awarding interest at the rate of

6% on personal injuries instead of 3% as laid down in the ***Central Soya*** case.

Mrs. Khan for the respondent submitted that the learned trial judge accepted the evidence of Dr Branday who saw and examined the respondent. His viva voce evidence was relied on by the learned trial judge and is therefore not hearsay. The medical evidence supports the final global figure awarded by the learned trial judge and cannot be regarded as inordinately high and therefore excessive.

The award of ~~interest~~ of 6% on personal injuries is in keeping with the ~~increase~~ in the interest ~~payable on judgment~~ debts since 1999. The credibility of the respondent is a question of fact for the learned trial judge. The appeal ought to be dismissed.

The assessment of damages for personal injuries is governed by the principle of restitutio in integrum, that is, to restore the injured party to the position he would have been, had the tort not been committed against him: (see ***British Transport v Gourley*** [1956] A.C. 185 at p. 197 per Earl Jowitt). This object is achieved by the award of a sum of money calculated on the basis of established principles and comparable cases; provided that, a person claiming damages will not be awarded compensation for injuries not caused by the defendant's wrong or any loss which is too remote or uncertain.

The extent of the loss suffered by an injured party includes the physical injury which is clearly discernable, the objective element and the pain and suffering, the subjective element, the latter being more attributable to the awareness of the injury: (***West v Shepherd*** [1963] 2 All E.R. 625). Both elements are usually present and are factors which a court must consider in assessing an award for general damages.

Relying on comparable cases involving injuries similar to that under consideration, the practice of the court has been to add up the award on each item of injury in arriving at a total sum. Although as a matter of practical necessity this approach is adopted, the true test is whether this total sum equates to the global sum that should be awarded taking into consideration the extent of the injuries involved.

The learned trial judge in making the award in respect of the injuries, other than the facial injuries, relied on the case of ***Mahtani v Wright and Vault Realty Co. Ltd.*** Suit No M 151/89 in making the award of $375,000. He said:

> "From the cases referred to by both sides, save for the facial injuries, the ***Mahtani*** case is the closest to the instant case."

Mrs. Khan for the respondent submitted that the injuries in the instant case were more serious than that in the ***Mahtani*** case, because the former case involved a nerve disorder in addition to the fractured

clavicles of the respondent. Mr. Samuda pointed to the absence of detail of the medical evidence and the fact that there was no hospitalization in the ***Mahtani*** case.

An examination of the injuries sustained by the plaintiff in the ***Mahtani*** case, reveals that there were fractures of both clavicles with abrasions to the back shoulders, elbows and knees. Within a month, his pain had ceased and the fractures were almost healed. He sustained no disability thereafter. Compared with respondent in the instant case, I agree with Mrs. Khan that her injuries were more serious. However, the award of $375,000.00 to the respondent cannot be viewed as inordinately low and in addition, no consequential complaint was filed in that respect. The award of $375,000.00 cannot be faulted.

The respondent suffered another area of significant injuries, namely, fractures to her facial bones. She was also unconscious immediately following the accident. Dr Anthony Lewis, consultant oral and maxillo-facial surgeon, on his examination of the respondent on September 26, 1997 observed:

(i) left per orbital haemotoma
(ii) left subjunctival haemotoma
(iii) fractures of the left malo-maxillary complex and of the inferior and lateral orbital rims and the zygomatic arch.

The fractures were immobilized and repaired. As stated earlier, Dr Lewis saw the respondent finally on September 27, 1999 and observed that the fractures were healed. However, on healing, the left side of her face was flatter than the right side. Dr Lewis found no residual disability nor any need for further treatment.

Reckord, J. referred to the case of ***Richard Hoehner et al v W.A. Reid Construction Co. Ltd.*** Suit No. C.L.H. 111/94 in which the damages were assessed in 1999 and, on page 24 of the supplemental record, said:

> "That plaintiff 49 years old also suffered fractures to the upper limb, and femur and was awarded $1 Million for pain and suffering and loss of amenities and $260,000.00 for corrective surgery. That obviously is a more serious case 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, probably another fifty years, an awesome expectation for this unmarried young woman".

The injuries in fact sustained by the plaintiff in the ***Hoehner*** case were head injuries causing mild concussion, unconsciousness, fracture of the facial bones, fractures of the left ulna and radius and the left femur, multiple lacerations and trauma to the chest and abdomen. Several surgical operations resulted in residual scars. There were residual deformity of the thigh and forearm, and left hip. She had been hospitalized for 37 days.

Relying on the ***Hoehner*** case, in which the award of $1,000,000.00 was awarded for pain and suffering and loss of amenities, involving both the fracture of the facial bones and the fracture of the left forearm and thigh, as the comparable case based on which the learned trial judge, in the instant case concluded, that:

> "...an award of $1Million would be a reasonable sum for injuries to her face and mouth"

the learned trial judge may have been generous: ($1,000,000.00 was valued at slightly under $1,100,000.00 in the year 2000).

In the ~~instant case, the respondent~~, unlike the plaintiff in the ***Hoehner*** case, suffered no deformity nor dislocation, was not referred by Dr Dundas to a neurosurgeon, did not complain to him of numbness and "responded positively to physiotherapy ..."

Consequently, to rely on the ***Hoehner*** case, and then award the respondent in the instant case $1,000,000.00 damages for "injuries to her face and mouth" in addition to $375,000.00 damages for "fracture of both clavicles", could attract an argument that the learned trial judge was awarding her twice for the fractures other than the facial fractures. However, considering an overall award for pain and suffering and loss of amenities the damages in the instant case cannot be seen as inordinately high.

The respondent 23 years of age at the date of the accident has suffered and will continue to have a residual asymmetry of her face.

After further surgery, the scars to her face will be reduced appreciably but will always be present. She has resumed her employment as a teller at a bank, and apart from the queries and some degree of reluctance to participate in her former social activities, no specific evidence of any psychological disadvantage was led. The global award of $1,375,000.00 for pain and suffering and loss of amenities is an appropriate sum, in all the circumstances.

In respect of interest on the damages, the learned trial judge awarded 6% per annum on both special and general damages.

As long ago as 1985, the Court of Appeal in the case of ***Central Soya of Jamaica Ltd. v Junior Freeman*** S.C.C.A. No 18/84 delivered on March 8, 1985 Rowe, P. suggested, in guidelines in respect of the rate of interest on awards for personal injuries, that the rate should be 3% per annum on both special and general damages. His reasoning was based on the view that the award of interest on general damages should not exceed one-half the rate applicable to judgment debts. In 1985, the rate of interest on judgment debts in the Supreme Court under the provisions of section 51 of the Judicature (Supreme Court) Act was 6% per annum.

The power of the court to grant interest on damages is conferred by section 3 of the Law Reform (Miscellaneous Provisions) Act. Section 3 reads:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment."

The manner in which that discretion ought to be exercised was laid down by the English Court of Appeal in ***Jefford et al v Gee*** [1970] 1 All E.R. 1202, a case that is consistently followed by the courts in Jamaica and was relied on in the ***Central Soya*** case.

Damages ~~for personal injuries are awarded in the~~ money of the day in order to take into account inflationary factors. Both rates of interest on such damages are awarded on the rationale that the injured party has been kept out of his money by the dilatory action of the defendant.

The rate of interest on judgment debts was increased to 12% per annum in 1999, in the exercise of the power of the Minister under the provisions of section 51 of the Judicature (Supreme Court) Act, by the Judicature (Supreme Court) (Rate of interest on Judgment Debts) Order 1999. This Order was published in the Jamaica Gazette Supplement dated July 14 1999.

The Court of Appeal in the ***Central Soya*** case, stated the formula for the award of interest in personal injury cases. Rowe, P. said at page 28:

> "Once the assessment has been made on the money of the day principle I do not think that the interest on the general damages for pain, suffering and loss of amenities should exceed one-half the rate applicable to judgment debts."

The Court went on to fix the rate at 3% per annum on both special and general damages.

In recent times courts in Jamaica have been granting interest on general damages varying between 3% and 6%. It is now necessary to formally standardize the said rate in awards for personal injuries.

We adopt the principle applied in the ***Central Soya*** case,that the rate of interest should relate to the rate of interest granted on judgment debts in the Supreme Court. The rate of interest in personal injuries cases should be 6% per annum on both special and general damages from the date of the accident and from the date of the service of the writ, respectively. Accordingly, I agree with Reckord, J. in awarding damages at the rate of 6% per annum.

For the above reasons, I am of the opinion that the appeal should be dismissed.

PANTON, J.A:

I agree with the reasoning and conclusion of Harrison, J.A. that the appeal be dismissed.

ORDER

DOWNER, J.A:

Appeal dismissed. Order of the Court below affirmed. Costs of the motion to the appellants, and costs of the appeal to the respondent to be agreed or taxed.