COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law Side

1996

No. FP/126/96

BETWEEN

BYRAN ROLLO

1st Plaintiff

and

CLARENCE HIELD

2nd Plaintiff

and

DONETTE DAVIS

3rd Plaintiff

VS.

GEORGE WILLIAMS

1st Defendant

and

LEVI BIZZARD

2nd Defendant

Appearances: **Robert K. Adams for 3rd Plaintiff**
Cheryl Bazard for Defendants

ASSESSMENT OF DAMAGES

This action arose out of a traffic accident which occurred on July 12, 1993, at about 3:00 p.m. at the intersection of Sierra Leon Drive and Dominica Avenue in Freeport, Grand Bahama, involving inter alia a vehicle owned and driven by the third plaintiff (hereinafter called "the plaintiff") and a vehicle owned by the second defendant and driven by the first defendant (hereinafter together called "the defendant").

The plaintiff commenced her action by a generally endorsed Writ of Summons filed on January 6, 1994. The plaintiff's statement of claim was filed April 28, 1994. The defendant filed his defence on October 10, 1994. In May 1995 the plaintiff applied via summons for an order for interlocutory judgment against the defendant on the issue of liability for negligence with damages and interest to be assessed. The order in the terms of the Summons was granted on March 2, 1995. By the same order the Deputy Registrar, Stephen Isaacs, also ordered that the assessment of damages be heard by the Deputy Registrar in Freeport.

This matter came on for hearing before me on September 24 and 25, 1996. On the first day of the hearing, counsel for the plaintiff sought and was granted leave to amend the plaintiff's statement of claim as follows:

PARTICULARS OF INJURIES

1. Fracture of the ~~left lateral malleolus~~ right ankle
2. Sinus Tarsi Syndrome
3. Calf muscle weakness

PARTICULARS OF SPECIAL DAMAGES

(1) Medical Expenses	~~157.00~~	$ 562.00
(2) Loss of wage as Speech Therapist from ~~July 12~~ September 10, 1993, to ~~October 12,~~ September 23, 1993. ~~@ $125.00 per week.~~	~~$1,140.00~~ ~~$1,500.00~~	$ 829.17
(3) Loss of wages as Aerobics Instructor from July 12, 1993 to ~~April 2, 1994~~ September 25, 1996 @ $100.00 per ~~week~~ month	~~$ 900.00~~	$3,600.00
TOTAL	~~$4,897.00~~ ~~$2,557.00~~	$4,991.17

The hearing on the assessment proceeded.

The plaintiff testified that the accident occurred at about 3:00 p.m. on July 12, 1993, near her home, as she was returning to work, and that her daughter, who was six (6) years old at the time, was in the car with her.

The plaintiff said that she was driving her vehicle in a northerly direction and stopped at a **"STOP"** sign on the corner of Sierra Leon Drive and Dominica Avenue when, seemingly "out of no where," appeared a vehicle being driven by the first defendant at a very fast speed. She said that the defendant's vehicle collided with another vehicle which collided with the plaintiff's vehicle. She said that shortly after the impact she began feeling pain in her right ankle. She said she had difficulty moving her right leg. She said that there were cuts and bruises between the knee and ankle of her right leg, which had begun to swell around the lower part toward the ankle.

The plaintiff said she was eventually taken in an ambulance to the Emergency Room at the Rand Memorial Hospital, Freeport, where she was attended to by Dr. Burton whose diagnosis was that she had suffered a fractured ankle. She said her right leg was then placed in a partial cast and she was asked to return to the hospital the following day for the leg to be placed in a full cast.

According to the plaintiff's evidence the day after the accident, she returned to the Rand Memorial Hospital where a full cast was placed on her right leg and she was also given a pair of crutches to use.

The plaintiff's evidence is that her right leg was in a full cast for 4 or 5 weeks, after which it was put in a bandage which she wore past November 1993. She said that even though the cast had been taken off, and she attended physiotherapy until February or March 1994, there was still some degree of swelling in her right ankle.

She said that because the ankle area of her right leg was still swollen more than a year after the accident she went to see Dr. Granville Bain, an orthopedic surgeon, who advised her that scar tissue had developed in the ankle as a result of the injury. She said she was given an injection to get rid of the scar tissue and reduce the swelling. She said after the injection the swelling decreased, but the ankle continued to swell from time to time, though not as often or as badly as before she had seen Dr. Bain.

Dr. Granville Bain, a Board Certified orthopedic surgeon in private practice and a consultant at the Princess Margaret Hospital, gave evidence that he had first seen the plaintiff in September 1994, in connection with injuries she sustained in an accident in July 1993. Subsequent to his first visit with the plaintiff Dr. Bain said he prepared a report in which he indicated inter alia that the plaintiff could **"walk with good strength in the ankles and is able to lift her feet off the ground. Sensation is normal in both feet."** He indicated that his review of x-rays showed a fracture of the distal fibula; that the sinus tarsi was tender but there was no gross instability of the ankle.

Dr. Bain's diagnosis of the plaintiff at that time (i.e. September 1994) was that she had suffered:

(1) a fracture of the right ankle (transverse);

(2) sinus tarsi syndrome and

(3) anterior calf muscle weakness.

Dr. Bain explained that in the area between the lateral malleolus and the lower border of the ankle is the sub-talus joint and the ligament that extend from the talus to the heel bone is called the sinus tarsi area; that a collection of problems or symptoms connected with that area is called a syndrome. He said that at the time of the accident there was not a complete separation of the sub-talus joint; that the joint was probably pulled open wide resulting in residual problems manifested by swelling, tenderness and weakness.

According to Dr. Bain, the anterior calf muscle weakness was manifested in the plaintiff's inability to bring the injured ankle up as far as the other. He said that the test to see if there was weakness in the anterior calf muscle was performed by asking the patient to walk on his/her heels. The patient's inability to do so would suggest that there was some weakness.

However, he said he did not perform this test on the plaintiff because the plaintiff's problem was obviously manifest . He also said that a weakness of the calf may result from immobilization in a cast and that it was possible for the weakness to persist for two (2) years after the cast had been removed without good treatment such as physical therapy or muscle strengthening exercises. Dr. Bain said that he had examined the plaintiff earlier on the day of the hearing and had taken an x-ray of her right ankle and noted that the ankle fracture was barely noticeable, indicating that it was fully healed. In his opinion the sub-talus joint was not as wide as it should normally be - otherwise there appeared to be no other abnormality.

Under cross-examination Dr. Bain testified that a fracture usually takes 6 to 8 weeks (12 weeks at the most) to heal. By "healed" he said he meant that the ankle could be taken out of a cast. In his opinion there should have been no need for medical aids such as crutches once the cast had been taken off. Despite the note in Dr. Bain's report of December 1994 that the plaintiff's progress would be reviewed in six (6) months' time, Dr. Bain admitted that he had not seen the plaintiff since September 1994 until the day of the hearing.

During his testimony Dr. Bain gave detailed explanations of his diagnosis of the plaintiff's injuries, but his diagnosis as stated in his report of December 1994 remained unchanged. He was still of the view that the plaintiff had suffered a fracture of the right ankle, sinus tarsi syndrome and anterior calf muscle weakness.

I accept the evidence of Dr. Bain with regard to the plaintiff's injuries and find that the plaintiff suffered the injuries set out in the amended statement of claim.

I turn now to the issue of damages which are awarded under three (3) heads:

(1) Special Damages

(2) General Damages for non-pecuniary loss and

(3) General Damages for pecuniary loss.

In her statement of claim (as amended) the plaintiff claimed the following special damages:

(1) Medical Expenses	$ 562.00
(2) Loss of wage as Speech Therapist from 10th September 1993, to 23rd September, 1993	$ 829.17
(3) Loss of wages as Aerobics Instructor from July 12th, 1993 to September 25th, 1996 $100.00 per month	$3,600.00
TOTAL	$4,991.17

There is no dispute between the parties as to Items 1 and 2 of the plaintiff's statement of claim. However, as regards the plaintiff's claim for loss of earnings as an aerobics instructor from July 12, 1993, to the date of the assessment in the sum of $3,600.00, Counsel for the defendant

has asked the court to disallow that item as being "highly speculative" and because there is no evidence as to how long the plaintiff would have been required to stay with that or any other job.

The evidence re the plaintiff's employment as aerobics instructor came from the plaintiff and Mrs. Norma Headley.

The plaintiff's evidence is that she taught aerobics at Cove House Condominium for some of the residents two (2) evenings per week and she earned a minimum of $100.00 per month, though payment sometimes exceeded $100.00, depending on the number of persons attending the class. The plaintiff under cross-examination said she could not recall when she started teaching aerobics at Cove House Condominium, nor did she have a written contract or a time period for the duration of the classes. She said it was her understanding that the classes would continue as long as she was able to conduct them. On re-examination, the plaintiff stated that she had been teaching aerobics at Cove House for between 1 and 2 years.

Mrs. Headley's evidence is that she is the owner of an apartment at Cove House Condominium and one of the persons who attended the aerobics classes taught by the plaintiff. Mrs. Headley testified that the plaintiff was an aerobics instructor at Cove House for a maximum of about 2 years prior to June 1993; and that the reason the plaintiff had to discontinue the classes was an accident in which the plaintiff was involved in 1993. Mrs. Headley confirmed that payment for the plaintiff's services depended on the size of the classes. Mrs. Headley stated that she was responsible for receiving payment from the persons attending the classes and that she gave the funds to the plaintiff. Mrs. Headley also testified that each person attending class paid about $10.00 or $12.00 per class and approximately 25 persons attended each class. Mrs. Headley confirmed that all the moneys collected were given to the plaintiff without deduction. Despite that testimony, Mrs. Headley estimated the plaintiff's income as an aerobics instructor at between $150.00 and $200.00 per month, though a simple mathematical calculation of the plaintiff's income from the aerobics classes, based on Mrs. Headley's testimony, would net the plaintiff at least $250.00 per class or $2,000.00 per month.

The plaintiff testified that the owners at Cove House Condominium have asked her to resume the aerobics classes, but that she has to date refused because her ankle is not yet strong enough. She says she has been doing exercises to help strengthen the muscles in her ankle. Mrs. Headley confirmed that the owners want the plaintiff to resume the classes, and she was of the opinion that had it not been for the accident and the plaintiff's injuries sustained therein, the plaintiff would still be teaching aerobics at Cove House.

There is no documentary evidence to support the plaintiff's claim for loss of earnings in the sidelines she pursued as an aerobics instructor, and in the absence of a contract or other form of agreement for continued employment as such, one can only speculate as to whether the plaintiff would have been required to continue teaching aerobics if she had not had the accident.

However there is evidence that the plaintiff did in fact teach aerobics at Cove House Condominium and would still be required to teach such classes if she were able. From the evidence, it also appears that the plaintiff may have under-stated the amount which she could have earned for the period stated.

On the authority of **George Lubin v. Miriam Major No. 6 of 1990 C.A. Civil Side** and the guidance given by the learned Registrar and the Court of Appeal therein, I can award a sum on a claim in the absence of the same having been vouched. I will therefore allow the sum of $3,600.00 as special damages for loss of wages as an aerobics instructor.

Special damages are assessed and allowed as follows:

(1) Medical Expenses	$ 562.00
(2) Loss of wage as Speech Therapist from 10th September 1993, to 23rd September, 1993	$ 829.17
(3) Loss of wages as Aerobics Instructor from July 12th, 1993 to September 25th, 1996 $100.00 per month	$3,600.00
TOTAL	$4,991.17

The plaintiff recalled that after the accident, **after** thanking God she was alive and ensuring that her daughter, who was in the car with her was all right, she realized that her right ankle was hurting. She said that there were cuts and bruises on her right leg and it was difficult for her to move the leg; that she felt nauseated, as though she would "black out." She said that she vomited while waiting for the ambulance and soon realized that her right leg had started to swell and had also started to throb. She said that they waited some time for the ambulance and the police, and after neither came, a woman at the scene of the accident and the plaintiff's daughter helped the plaintiff into the woman's car and they went to the plaintiff's home nearby and called the police and the ambulance. She said that while at her house the leg kept swelling and hurting so she applied an ice pack to it, but the ice pack did not help.

She said they returned to the scene of the accident shortly after which the police and ambulance arrived and she was taken to the Rand Memorial Hospital. The plaintiff said she did not know what was wrong with her but felt that if she "blacked out " she would die. At the Rand Memorial Hospital she was examined by Dr. Burton who diagnosed her as having a fractured ankle. The right leg was placed in a partial cast, the plaintiff given an injection for pain and told to return the following day to have a complete cast put on the leg. She said she was also given Motrin (pain killers) to take for the pain. The plaintiff said she could not walk so she was pushed in a wheelchair to her friend's car and went home. She testified that it was "quite an ordeal" getting into the car because she was still experiencing pain and had to ensure that she was comfortable without hurting the leg.

The plaintiff testified further that the first night after the accident was also frustrating for her. She said as a single parent and primary caretaker of her daughter, with no other family, she found it difficult coping as she was in so much pain that night she could not move about and do the simple chores she normally would do when she got home from work in the evening.

According to the plaintiff, on the day of the accident she got home about 7:00 p.m. and tried to go to the kitchen, but after hopping and falling a few times she gave up and resorted to sitting while her 6 year old daughter "took care of her." The plaintiff said that the pain in her right leg was throbbing so much that she thought that something other than the fractured ankle must have been wrong with her; she said the pain was so severe that she took more than the recommended dosage of the Motrin because she hoped it would relieve the pain. She said that the leg had also started to get numb so she elevated it with pillows as Dr. Burton had told her it would help the circulation. The plaintiff said she was not able to take a shower that evening because she could not "figure out" how to get into the tub with the cast on her leg. She said she had never before felt such pain, as a result of which she got very little sleep that night. She said she felt devastated - like she was going through torture. She said she felt incapacitated, because she could not move or do anything for her child. She recalled that during that night, her daughter had a nightmare and started to scream. The plaintiff said she tried to go to her daughter to comfort her, but could not move so she had to comfort the child verbally.

The plaintiff said that she kept thinking of the accident and having flash backs so she awoke the next morning exhausted due to lack of sleep and still in pain.

The following day, the plaintiff was taken to the hospital by a friend and had a full cast placed on her leg, from her knees to her foot. The plaintiff's evidence is that her right ankle was in a full cast for about four (4) or five (5) weeks after the accident. She was also given crutches to help her move around. She said that trying to use the crutches was scary because she was not used to using them; that at times she felt as though she would fall, especially over certain terrain, like grass or rocky yards. She said the cast was heavy and uncomfortable and her leg continued to throb with pain; that it was extremely frustrating getting in and out of cars and maneuvering stairs. She said that during the time she had on the cast she could not drive so she had to depend on others to take her where she wanted to go. That, in itself, she said was very trying for her as she was used to "jumping in" her car and going where she wanted to go. In addition to arranging rides for herself, the plaintiff said she also had to arrange rides for her daughter to and from school during the time she could not drive. Mrs. Headley and Mrs. Julie Glover confirmed that they assisted the plaintiff with shopping and driving after the accident.

The plaintiff testified that after the cast was taken off her leg, a bandage was placed on the ankle and she was given instructions for removing and replacing the bandage. She said she wore the bandage consistently past November 1993, though she took it off daily to soak the ankle

in hot water and Epsom Salt as advised by the Rand Memorial Hospital staff. However, she said that even after she stopped wearing the bandage consistently there was still some degree of swelling. She recalled that the day after the cast was taken off she tried to apply a bit of pressure to the ankle, pursuant to the instructions of the hospital staff, but there was so much pain when she tried, she thought the bone had not healed. She said she did not recall exactly when she stopped using the bandage consistently, though she believes it was well into 1994, and she still uses the bandage when she exercises as it provides support for the ankle.

The plaintiff said she still experiences pain in the ankle and there are times when the ankle swells, usually if she stands for long periods. She said that prior to the accident she wore very high-heeled shoes, to compensate for her height, but that for some time after the accident she could not wear high-heeled shoes at all and had to wear a slipper and a flat shoe. She said that she can now wear heels (in fact she was wearing shoes with heels which were about 2½ inches high) and that once in a while she wears very high heels, but because of the discomfort she experiences, she wears them very little and usually carries a pair of flat shoes in her car to change into when her ankle swells.

The plaintiff said that she started driving again sometime in September 1993 after school had started as she had to take her daughter to school and she was afraid she was "wearing out her welcome" by depending on friends to do the driving. The plaintiff said after the accident she was afraid to drive, but forced herself to do so. She said she kept thinking about the accident and found it difficult being on the road. She said she developed a phobia about driving and often "tensed up" at corners.

Counsel for the defendant has asked the court to find that the plaintiff has not mitigated her damages in that she failed to undergo the intensive therapy recommended by Dr. Bain in September of 1994, so that the court cannot not know whether or not surgery would have been needed. Counsel for the plaintiff replied that the evidence was that where there is cartilage damage physiotherapy will not heal the cartilage or ligaments. Dr. Bain in his evidence, indicated that there are times when physiotherapy reduces the severity of treatment that a patient needs, but that there are some specific injuries which cannot be cured by physiotherapy. He said that physiotherapy helps one live with what one has by taking away the inflammation. He said that he had recommended physiotherapy in the hope that if the plaintiff did have it there would be no need for the surgery though he conceded that the physiotherapy was no guarantee against the surgery.

General Damages are awarded for pain and suffering and loss of amenities. In assessing general damages, one ought to have regard to comparable awards for comparable injuries. In **H. West & Son Ltd. V. Shepherd (1963) 2 W.L.R. 1359** Lord Tucker at p. 1368 stated:

> **"Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must**

be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common assent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that as far as possible comparable injuries should be compensated by comparable awards "

However, as noted by the learned Deputy Registrar in the case of **Janice Coakley v. Philip Outten No. 639 of 1992:**

"one of the difficulties which judges and registrars face in assessing damages in a small country such as the Bahamas is a lack of locally decided cases which establish comparable awards for comparable injuries."

Some guidelines have of course been provided by Chief Justice Georges in the case of **Peter Frank Matusowicz v. Scott Parker C.L. No. 827 of 1985** and approved by the Court of Appeal in the case of George Lubin v. Miriam Major, Civil Appeal No. 6 of 1990. Chief Justice Georges said, inter alia:

"......I do not think it would be helpful to consider awards made in the Commonwealth Caribbean. The great difference existing between the value of their currency units and the Bahamian dollar would make comparisons difficult.

The most useful precedents could in my view be drawn from Bermuda and the Caymans which have similar legal systems and in which economic and social conditions are most like ours. They are, like ourselves, comparatively small jurisdictions; cases are not likely to be many and in the absence of law reports, access to decided cases will not be easy.

.....Until a pattern of local decisions emerges, it appears to me sensible to look to the English decisions. They should not be treated as inflexible guides. There is no income tax in the Bahamas. The cost of living is somewhat higher than in Great Britain. It would also be true to say that expectations in relation to awards are higher because of awareness of the very high awards common in the United States of America - awards which incidentally have built into them the costs of counsel paid on a contingency basis. English awards could therefore be treated as a guide but increased as seems appropriate, having regard to local conditions. "

Counsel for the plaintiff submitted that there is a dearth of local comparable cases and referred the court to several English and Canadian cases, suggesting that the awards ought to be adjusted upwards. He urged the court to follow the approach adopted by their Lordships of the Bermudan Court of Appeal in **Deshield v. James Civil Appeal No. 18 of 1988 at p. 3.**

"...in translating English awards into an amount which is suitable to Bermuda we think it correct to take into account the fact that a degree of inflation has taken place in England. As a rough guide, awards there should be adjusted by at least 5% a year to allow for inflation. We also take into account that in Bermuda the cost of living is higher than that in England and that therefore equivalent awards may be expected to be that much higher."

Awards in the English cases cited by Counsel for both sides ranged from £5,500.00 in 1988 to £7,000.00 in 1991; and in the Canadian cases from Can. $30,000.00 to Can. $44,000.00. Counsel for the plaintiff suggested that the aforesaid awards be adjusted upwards by 5% per

annum to allow for inflation and by a further 30% to allow for "our higher cost of living and conditions." Unfortunately, counsel did not provide the court with any evidence as to how he arrived at 30% and I am not certain that the cost of living in The Bahamas is higher than that in Canada. Nevertheless, using the plaintiff's formula, the aforesaid English awards would now translate to between $18,000.00 and $23,000.00, while the Canadian awards would range from $30,000.00 to $44,000.00

Local cases cited were **Janice Coakley v. Philip Outten No. 639 of 1992** **(Coakley)** and **Trevor Rolle v. Resorts International (Bahamas) Limited No. 499 of 1991 C.L.** **(Rolle)** Judgment in both cases was delivered in 1994 and the sum of $25,000.00 in general damages awarded. Coakley suffered a whiplash injury while Rolle suffered the amputation of his little finger. As has been said by other justices and registrars in personal injury cases, the amount of the award turns on the facts unique to those cases.

In the instant case, the plaintiff suffered an injury to her right ankle and in this regard, the 1986 Canadian case of **Russell v. Keene,** **provided by Counsel for the plaintiff and** cited in **Goldsmith's Damages for Personal Injury and Death in Canada 1986-1987,** is instructive. In that case, the plaintiff's most serious injury was to her right ankle. She was in her mid-thirties. A walking cast was applied and she was prescribed pain killers. She was immobilized for 2 months. Eventually an operation was performed. She made a satisfactory recovery but still experienced swelling and discomfort. The Plaintiff had been a very active person prior to the accident. She could do virtually nothing around her home for 9 months and only began to return to limited sporting events 1 month after that. Her inactivity contributed to the onset of bouts of depression. At the date of the trial, over 2 years after the accident, the plaintiff was able to walk 2 miles without problems. The ankle was aggravated if she put too much stress on it. Bearing in mind some future loss of enjoyment of life, MacKinnon J. awarded $15,000.00 as non-pecuniary damages for the ankle injury.

The evidence is that, prior to the accident the plaintiff, a single mother of a six (6) year old little girl, led an active, athletic life. She played tennis at least three (3) times a week - and taught aerobics two hours per week. She said that prior to the accident she had been playing tennis regularly and consistently for about ten (10) years and that in addition to her "regular" job as a Speech Therapist with the Ministry of Education, she had been teaching aerobics between one (1) and two (2) years as a means of providing additional income for her family. The plaintiff was also the Secretary to the Grand Bahama Tennis Association and Program Director for the Hugh O'Brien Youth Foundation, an organization involved in developing leadership skills with teenagers in junior high school. The plaintiff said that prior to the accident she did between one (1) and two (2) hours of exercise daily and that she also did light weight training on a weekly basis.

There is no doubt that the plaintiff has experienced pain and suffering and loss of amenities as a result of the accident.. Since the accident, the plaintiff has had to greatly curtail her activities. She has not been able to play tennis with her daughter or teach aerobics (both of which she says she loves to do) because of the injury to her right ankle. She was inconvenienced by having to ask friends for assistance, and though it appeared from the testimony of two (2) of her friends that they did not mind helping, it was evident that the plaintiff, being independent as she was, had a difficulty asking for and accepting their help. Both witnesses testified that the plaintiff was not as active or as cheerful as she was before the accident.

The plaintiff is in her early 40'S; she led an active pre-accident life; she has made some recovery but at the trial date, some three (3) years after the accident, the plaintiff's ankle still swells and she still experiences discomfort when on her feet for long periods; she has returned to limited exercise in an effort to strengthen the ankle; surgery has been recommended to correct the problem. When all the relevant factors, including the plaintiff's age, pre- and post-accident activities, are fairly weighed, and bearing in mind that an assessment is weighed more for pain and suffering and loss of amenities than for physical injuries with each case depending on its own facts, an award of $27,000.00 is, in my view, reasonable.

The plaintiff is also seeking damages for future pecuniary loss. Counsel for the plaintiff submitted that the plaintiff's loss include $36,380.00 for future medical care and $18,000.00 for future loss of earnings as an aerobics instructor.

Dr. Bain testified that when he examined the plaintiff at 9:00 a.m. on the day of the hearing he noted that her right ankle was swollen and he assumed that she had awaken with the swelling. He said that meant that she had a problem that was static, not brought on by any positioning, and that most likely it was a physical injury. He said that upon further examination he noted that she had **"exquisite direct tenderness to digital pressure over the sinus area."** He said that when he turned the ankle outward she had tenderness, though internal rotation did not hurt. He further stated that the plaintiff was able to walk on tiptoe easily indicating that her calf muscle was strong. However, walking on her heel was difficult, particularly with the right ankle and she was unable to stand up as strongly as she could on the left ankle and maintain her balance, which indicated a weakness of the muscles which lift the foot.

Dr. Bain said that when he examined the plaintiff on the morning of the hearing, he had her right ankle x-rayed and noted that the ankle fracture was barely noticeable, indicating that it was fully healed. His diagnosis of the plaintiff's condition on the day of the hearing was that she had a fracture of the right malleolus that had healed and ligamentous injuries to the lateral talus calcaneal joint which is part of the sinus tarsi syndrome which still existed; he said she also had a sub-talus joint arthritis and a sinusitis of the sub-talus joint - all of which he said are located in the

sinus tarsi tunnel. Dr. Bain's recommendation is that the plaintiff should have an MRI and undergo arthroscopic synovectomy. He said that an MRI would show cartilage (ligament) damage and give an indication of what was wrong in the sinus tarsi area, thereby enabling the surgeon to make a more erudite decision. The arthroscopic surgery he said was necessary for the purpose of shaving trimmings and removing any debris and damaged tissue that may still be there; after which he anticipated the plaintiff would need physiotherapy for as long as 6 months. Dr. Bain was of the opinion that the problems which the plaintiff was experiencing was because of the sub-talus joint which, he said, if not treated promptly by the arthroscopic surgery (a minimally invasive procedure) would require arthodesis surgery for fusing the bones in the ankle. Dr. Bain's assessment, based on the Academy of Orthropedic Surgery, was that the plaintiff had a permanent physical impairment and loss of physical function to the right ankle of 25%, which he said represented 8-10% permanent physical impairment and loss of physical function to the body as a whole .

Dr. Bain estimated the cost of the recommended treatment as following:

	ARTHROSCOPIC	**ARTHRODESIS**
Surgeon fees	3,500.00	$4,000.00
Hospital fees	1,600.00	6,000.00
Anesthesia	800.00	1,000.00
Physiotherapy	13,000.00	2,880.00
Office follow-up	1,500.00	2,000.00
Ankle strapping braces	000.00	100.00
MRI	1,500.00	1,500.00
	$21,900.00	$17,480.00

I accept Dr. Bain's prognosis for future medical care and his estimate of the costs to be incurred in connection with the arthroscopic synvectomy and allow the sum of $22,000.00 for future medical care.

No allowance is made for the arthrodesis surgery which, according to Dr. Bain, may or may not be necessary, depending on the outcome of the arthroscopic surgery.

The plaintiff's claim for loss of earnings is in respect of her inability to conduct aerobics classes as she did before the accident. The plaintiff's claim is for $18,000.00 calculated by an annual sum of $1,200.00 over 15 years.

There is no evidence that the plaintiff will not recover from her injuries. In fact the evidence is that the fracture has completely healed and according to Dr. Bain once the plaintiff has the athroscopic surgery it is very likely that she will be able to resume her pre-accident activities. If the surgery is successful, it is possible that the plaintiff will be unable to resume her

aerobics classes for some time, allowing for the surgery, physiotherapy and strengthening of the muscles in her foot. However the nature of the plaintiff's employment as an aerobics instructor was uncertain; it was part-time employment and there was no certainty or high degree of probability that she would continue to retirement as say, in the case of her job as a speech therapist. Nonetheless, there is some loss and I therefore allow $3,000.00 for loss of earning capacity.

Damages are therefore awarded as follows:

Special damages	$4,991.17
General Damages for pain and suffering and loss of amenities	27,000.00
General damages for future medical care	22,000.00
General damages for loss of earning capacity	3,000.00
TOTAL AWARD	**$56,991.17**

The plaintiff also claimed interest pursuant to Section 3 of the civil Procedure (Award of Interest) Act 1992.

By the said Section 3, the court is given the power to award interest on damages, or on such part of the damages as the court considers appropriate unless the court is satisfied that there are special reasons why no interest should be given in respect of these damages.

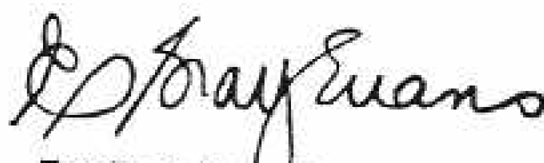
Having regard to all the circumstances, including Counsels' submissions, I would award interest as follows:

1. On special damages (i.e. $4,991.17) at the rate of 5% from the date of the accident until the date hereof
2. On damages for pain and suffering and loss of amenities (i.e. $27,000.00) at the rate of 10% per annum from the date of service of the Writ to the date hereof.
3. No interest is awarded on damages for future medical care (i.e. $25,000.00)

Judgment is awarded to the plaintiff in the sum of $56,991.17 and **Interest shall** run on the judgment debt of $56, 991.17 (plus interest as aforesaid) at the rate of 10% per annum pursuant to the provisions of the Civil Procedure (Rate of Interest) Rules S.I. No. 70 of 1992 from the date hereof unto payment.

Costs are awarded to the plaintiff, to be taxed if not agreed.

DATED this 19th day of December A.D. 1996



Estelle G. Gray Evans
Deputy Registrar