31. 3. 94

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 261/90

BETWEEN:	AINSWORTH ANTHONY MYERS (As Personal Representative of the Estate of Cheryl Lynn Myers)	PLAINTIFF
AND:	DR. FRANK KOHLSCHEIN, MBCHB MRCVG	DEFENDANT

For the plaintiff: Ramon Alberga Q.C. and Mr. Graham Ritchie
For the defendants: Mr. Timothy Shea

HARRE C. J. **JUDGMENT**

This trial concerned a plaintiff who was suffering from terminal cancer. In evidence at the trial was medical opinion that she was unlikely to live more than a year and could die at any time. Unfortunately this prognosis proved accurate. Twenty-two days after the end of the trial and before judgment had been delivered, the plaintiff died. Her husband, as administrator of her estate, was made a party to the action and applied for judgment to be entered nunc pro tunc as being on the last day on which the action was heard. Our local rules are silent on the matter, but Order 35 rule 9 of the English Supreme Court Practice reads as follows:

> "Where a party to any action dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the death, but the foregoing provision shall not be taken as affecting the power of the judge to make an order under Order 15, rule 7 (2) before giving judgment.".

Order 15 rule 7(2) is the provision which empowers the Court to order a person to whom the interest or liability of any party is assigned, transmitted or devolves to be made a party to the cause or matter.

I had reached a conclusion as to liability and causation, and the major items of damages before the plaintiff's death and had begun to

write my reserved judgment. In those circumstances I considered that I had a discretion in accordance with the practice under Order 35 rule 9 to make an order nunc pro tunc.

I had been concerned, however, as to whether it would be proper to exercise this discretion in a case where the deceased plaintiff's expectation of life was an issue. The precedents in this matter are all old and indeed date from the days when an action would have died with the plaintiff. Turner v. London and South Western Railway Company (1874) L.R. 17 Esq. 561 is the case in which the matter is most extensively canvassed. It had to do with the regulation and designation of trains and the death of the plaintiff did not go to those issues at all. Nevertheless, as the death of the plaintiff in the present case had been known to be imminent on the basis of eminent medical evidence which I had accepted, I concluded that the better course was to accede to the application rather than reopen the whole matter as a claim on behalf of the estate. Unfortunately the objective of the expeditious disposal of the matter following the order which I made was, for other reasons, not achieved.

Having dealt with the preliminary procedural point, I now go on to judgment on the issues before me at trial.

In May 1989 the plaintiff was aged 32. She had an impressive academic record and was employed by the Cayman Islands Government as a teacher. She had reason to believe that she was pregnant and on the 30th May 1989 she consulted Dr. Kohlschein, the defendant, who confirmed that that was indeed the case. Her husband is a Jamaican who at that time was also working in the Cayman Islands as a member of the police force.

By the date of trial the situation had tragically changed. The plaintiff had advanced cancer and after undergoing the gruelling surgical and other procedures associated with that disease she had been told that she had not long to live. The issue in this case is the extent of the defendant's liability for that situation. The

defendant's negligence has been admitted but there was argument during the case as to the extent and nature of the admissions. In the light of the findings which I shall make this will be a secondary matter but I shall make some observation on it now nevertheless, as I was invited to do.

I need not linger over the arguments, which were about whether the defendants admission of negligence also constitutes an admission of liability, since I was amply satisfied that, on the balance of probabilities it was the defendant's negligence and breach of duty which either caused or materially contributed to the condition in which the plaintiff was at the time of the trial and the pain and suffering which she had endured and would continue to endure. Liability is established. In the correspondence the defendant admitted negligence. But it was not clearly established whether he was admitting negligence in not having taken the steps which the plaintiff's witnesses regarded as appropriate in August 1989, or because of having lapsed at some later stage.

If I accept, as I do accept, that the negligence dated from August, and that on the balance of probabilities the plaintiff's cancer was at that time curable then the disaster which followed must be laid wholly at the defendant's door. That the principle established unanimously by the House of Lords in Hotson v Berkshire Area Health Authority, 1987 2 AER 909 which was the converse on the facts of the present case. It was expressed most succinctly by Lord Ackner as follows -

> "Once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100% certainty.".

If, on the other hand the defendant was not negligent in not dealing with the cancer until later, then the question of causation would have been quite different in nature. However, in her letter of 11th June 1992, the defendant's attorney did say that negligence as pleaded in the statement of claim is admitted. That includes, as a particular of

the defendant's negligence, the following -

> "Despite being told by the Plaintiff on 23rd August 1989 of the presence of a lump in her right breast he failed and/or neglected and/or refused to perform a thorough or any examination of the plaintiff's right breast."

It is clear from that that negligence dated from 23rd August 1989 was being alleged. However, what was described as "counsel's final position on the causation issue" was set out in a letter dated 24th June 1992 from the defendant's attorney. It was this -

> "Notwithstanding the negligence of the defendant which has been admitted, the Plaintiff would still have undergone the same treatment procedures, a mastectomy, and would have a reduced life expectancy.".

I was referred, on behalf of the defendant, to the following passage of paragraph 14.32 of the textbook "Medical Negligence" by Powers and Harris, 1990 Edition -

> "An admission of 'liability' by a defendant is generally understood to include an admission that the harmful consequences pleaded (though not their pecuniary evaluation) were caused by fault on the part of the defendant, but for the avoidance of doubt a written and open admission that such consequences were in fact so caused must always be expressly obtained before a plaintiff may safely proceed to trial on the issue of quantum alone.".

The time spent in this case on this issue amply illustrates the good sense of the warning at the end of that passage. What the defendant's attorney said fell short of the "written and open admission" which was appropriate and I would not have been content to shut the defendant out on the basis of an admission as to liability had the matter not been rendered academic by the findings of fact to which I now turn.

The evidence in this case was given by the plaintiff herself and by two expert medical witnesses. The defence called no witnesses. Because of her state of health the plaintiff was unable to come to the Cayman Islands to give oral evidence but it was by leave of the court taken in Canada by affidavit and subject to cross-examination by conference telephone.

It is important to refer to the sequence of events as set out in the statement of claim and confirmed by the plaintiff in evidence.

After Dr. Kohlschein had seen the plaintiff on the 3oth May 1989 and confirmed that she was pregnant she engaged him as her gynaecologist and obstetrician. He set up a programme for her to attend him on a regular basis for examination and observation during her pregnancy. In July 1989 the plaintiff noticed that a small lump, in her estimation smaller than a pea, had developed in her right breast. On her next visit on 23rd August 1989 the plaintiff brought this to the attention of Dr. Kohlschein. He was not concerned about it, did not examine the plaintiff's breast at this time and assured her that many changes occur in the breast during the course of pregnancy including the development of lumps resulting from hormonal changes caused by it. Between the 23rd August and the plaintiff's next scheduled visit to Dr. Kohlschein on 22nd September the lump continued to grow but was painless. On 22nd September the plaintiff advised Dr. Kohlschein that in her opinion the lump had approximately doubled in size since July. Dr. Kohlschein did not examine the plaintiff's breast, again repeated what he had said on the 23rd August and assured the plaintiff she had absolutely nothing to worry about. The plaintiff accepted this and because of the assurance given to her did not raise the question of the lump when she next visited him on 12th October. By her next appointment on 9th November the lump had grown bigger and in the estimation of the plaintiff was approximately the size of a small plum. It was also very firm. On that occasion the plaintiff told Dr. Kohlschein that she was very concerned about the presence and the growth of the lump and insisted that he examined her right breast. After doing so for the first time he again assured her that there was nothing to worry about and told her that nothing could be done about the lump whilst she was pregnant and that it was not possible to have a mammogram during pregnancy. He also told her that if the lump persisted after her pregnancy and if, following the birth, it interfered with breast feeding then at that stage he would do something about it.

On 4th January 1990 the plaintiff gave birth to a son. From the 9th November 1989 onwards she had had regular two weekly consultations with Dr. Kohlschein. Although during the course of these she had informed him that the lump was getting bigger and firmer he did not carry out any further examinations and never departed from the assurances and advice which he had given both before and after his examination on 9th November.

Following the birth of her son the plaintiff's breast was very tender, painful and warm to the touch and she developed a fever. Dr. Kohlschein again told her that there was nothing to worry about but he did recommend that she discontinue breast feeding and that she wait for a further six weeks to see what effect the fact that the plaintiff was no longer pregnant or breast-feeding would have on the lump. The plaintiff was discharged from hospital on 6th January and next saw Dr. Kohlschein on 8th. On this occasion, for the first time, he said that the lump would probably have to be removed but he indicated that he still wished to wait out the six weeks to see if it would shrink of its own accord. He repeated this advice on 11th January.

By about the 18th or 19th January the plaintiff noticed that smaller lumps had developed around the primary lump. She had an appointment with a Government Gynaecologist on 1st February who advised her that the lump would have to be removed and recommended a mammogram. The plaintiff decided to return home to Canada as soon as possible to consult with her Canadian Physician. She saw Dr. Kohlschein for the last time on 13th February and he then told her for the first time that she should have a mammogram. She had this in Canada and it indicated that the lump was a solid mass which was possibly a carcinoma. She underwent surgery on 6th March and the lump was diagnosed as being malignant. Some of her lymph nodes under her right arm were removed for examination which revealed that the cancer had spread to four of the nodes. She was diagnosed as being at Stage 3 breast cancer, a term to which I shall refer later. A complete mastectomy was performed on 28th March. Between April and September 1990 she received eight cycles of systemic chemotherapy with

subsequent courses of an oral synthetic anti-estrogen and radiation therapy with follow up treatment. Her ovaries have been removed and it is now known that the cancer has spread to her skull, her thoracic spine, the right iliac crest and right ischium.

As I have said, the plaintiff was diagnosed as having Stage 3 breast cancer in February 1990. This classification of the stages of cancer took on great significance in the case and were described by Dr. Charles J. Wright the first of the plaintiff's two medical expert witnesses. It is appropriate to say at this point that I regarded both Dr. Wright and Dr. Popkin the other medical expert as giving evidence of great weight both on the basis of their qualifications and experience and by the manner in which they gave it.

The various stages of breast cancer were described in the following terms by Dr. Wright. Stage 1 is a small lump, two centimetres or less in diameter restricted to the breast with no lymph node involvement or other spreads - metastases - to other parts of the body. Stage 2 is a situation where there is either involvement of the lymph nodes in the arm pit or the tumour in the breast is itself larger -between 2-5 centimeters in diameter - with or without involvement of the lymph nodes. The prognosis is less favourable at Stage 2, and the method of treatment more painful and distressing. That is why the determination of whether the plaintiff was at Stage 1 or Stage 2 at the time when Dr. Kohlschein should, in exercising a proper standard of care, have discovered and treated the cancer was such an important issue in the case.

I accept that the description "smaller than a pea" is descriptive of an object of, at the most, one centimeter in diameter. On that basis Dr. Wright was of the opinion that in July to August 1989 Mrs. Myers was at Stage 1. He said that the likelihood of that being the case was 75%. There was a relationship between the size of the lump and the likelihood of lymph node involvement. The smaller the lump, the less likely was the involvement of the lymph nodes. He also referred to the pathology report which followed the diagnosis of the lump as

being malignant. It showed it that it was histologically Grade 1 which he described as being the least aggressive type of tumour.

Now this evidence was inconsistent with certain statistics which were put both to Dr. Wright and Dr. Popkin in support of the proposition that Mrs. Myers was already in Stage 2 by August 1989 on the balance of probabilities.

That proposition was supported by statistical findings appearing in a specialised text book entitled "Breast Diseases" which brings together the views of 51 contributors, and other evidence indicating that there is a higher likelihood of lymph node involvement in pregnant women. An occasional review entitled "Mammary cancers and pregnancy" by John M. Anderson, a consultant surgeon which appeared in the British Medical Journal in 1979 shows at page 1125 on the basis of six studies an overall percentage of 76 in the incidence of histological axillary lymph - nodal metastases in mammary cancers detected during pregnancy or lactation. Nevertheless that same review also includes a graph showing survival curves for 221 pregnant or lactating patients and the same number of non-pregnant patients with mammary cancers who were matched for age and tumour stage. Overall the survival was the same in both groups, although the five year survival of patients treated in the second half of pregnancy was only 11% compared with 48% for those treated in the first half.

Notwithstanding these findings, Dr. Wright confirmed his opinion that Mrs. Myers was more likely than not to have been in stage 1 in August 1989. In support of this he pointed out that neither the size nor the histological grade of the tumour in women included in the statistical surveys is known. Both are known in the case of Mrs. Myers and it is self evident that these matters, and indeed all known clinical factors, are to be weighed in ascertaining the probabilities in relation to an individual patient as opposed to a statistical group.

Dr. Popkin confirmed Dr. Wright's opinion that there was a direct relationship between the size of the lesion and the lymph node

involvement. He said that when Mrs. Myers first raised the question of the lump with Dr. Kohlschein it was a very small lesion and it was most probable that the lymph nodes were not involved.

I now turn to the evidence of the two medical experts as to what in their view would have been the outcome for the plaintiff had the defendant acted with a proper degree of professional competence, and the related question as to what that degree of professional competence was.

The first two particulars of negligence pleaded against the defendant in the amended statement of claim are these -

> "1. Despite being told by the plaintiff on 23rd August 1989 of the presence of a lump in the right breast he failed and or neglected and or refused to perform a thorough or any examination of the plaintiff's right breast.
>
> 2. Failed again to examine thoroughly or at all the plaintiff's breast on 22nd September 1989 when the plaintiff expressed concern that the lump appeared to be growing".

In Dr. Wright's opinion, the cancer should have been diagnosed in August 1989. Accurate diagnosis is not, he said, difficult nowadays and a needle biopsy would have been the diagnostic method he would have regarded as appropriate.

Both doctors were of the view, not only that Mrs. Myers was more likely than not to have been at Stage I in August 1989, but also that had the disease been, as it should have been, diagnosed and treated at that time it was more likely than not that she would been cured and there would have been no recurrence. Dr. Popkin put her chance of a cure at 80%. I accept that evidence.

As for therapy following a diagnosis of cancer, Dr. Wright described a stark contrast between the relatively benign procedure of segmented mastectomy, possibly associated with other treatment, depending on whether the lymph nodes were involved, and the treatment which the plaintiff actually had to undergo. I shall refer again to the mental and physical anguish involved in that when dealing more fully with the

evidence of Dr. Popkin.

It fell to Dr. Popkin, who is the gynaecologist to whom she had been referred, to explain to the plaintiff the factors involved in the decision whether or not to undergo an operation for the removal of her ovaries - on the one hand the reduction of the risk of recurrence of the cancer, and on the other the loss of the prospect of having any more children and the immediate onset of the menopause. When Dr. Popkin saw her she had already had counselling and completed chemotherapy and radiation and she decided upon the operation. Dr. Popkin described the consequences of that operation, physical and mental. There would be an immediate reduction of the level of two hormones. The immediate physical price of the reduction of cancer risk would be hot flushes and sexual discomfort, but the loss of both breast and ovaries, with the knowledge that the cause of this is cancer, produces grief and depression in a woman with a component of anger and fear that she may no longer be functional and attractive as a sexual partner.

I accept that these effects on the mind of a young woman would be most severe.

The doctors were unshaken in cross-examination. I accept their evidence and find that the negligence of the defendant, in and from August 1989 caused the damage suffered by the plaintiff, on the balance of probabilities, and that the principles which were enunciated by the House of Lords in Wilsher v Essex Area Health Authority (1988) AC, where McGhee v National Coal Board (1972) 3 All ER 1008 was searchingly analysed, apply. The onus of proof upon the plaintiff is satisfied by proof that the defendant's breach of duty made a material contribution to the injury.

Numerous heads of special damage were claimed. They appeared in a schedule to the statement of claim, and much explanatory detail is to be found in the plaintiff's affidavit dated 24th July 1992 and the transcript of her cross-examination upon it in its draft form on 23rd

July. The defendant produced a schedule in rebuttal. I shall deal with each item in the sequence used in both schedules. Some of the matters which are not agreed arise from the defendant's contention, which is correct, that the plaintiff was already suffering from cancer when she first consulted Dr. Kohlschein and would have had to undergo some form of treatment in any event.

Medical expenses

Prescription costs are agreed at $160.00

I allow $333.02 as costs claimed by the plaintiff for a prosthesis, wig and bra. The treatment of stage I would not have required any of these items.

Blue Cross Medical Insurance costs are agreed at $257.04.

The plaintiff was hospitalised in Saskatoon, Sascatchewan for 27 days between February 1990 and May 1992 as an in-patient and had 22 out-patient "series", at a total cost of $10,553.26. Some hospital costs would have been incurred in any event to reflect the probable surgery described by Dr. Wright. His evidence was that on a diagnosis of cancer following a needle biopsy in August 1989 he would have recommended segmented mastectomy which would have taken out the small lump and some surrounding tissue. The breast would have been retained and axillary node sampling done. If the lymph node samples were negative, radiotherapy would have been given to the residual breast and armpit after the baby's birth. Dr. Wright described this as a benign procedure and the plaintiff would have been discharged after two days at the latest if pregnant. A deduction of 10% of the total hospital and out-patient costs seems to me to be the maximum reasonable amount. I therefore award $9497.90.

Home/Child care costs

The plaintiff returned to Canada in February 1990 and her mother gave up full-time work to look after her and her newly born son, Nigel. The plaintiff claims, on her mother's behalf, the difference between her mother's earnings in 1989 and 1990. On Dr. Wright's evidence, the plaintiff's treatment would have been over and done with before Nigel's birth. On the other hand, even if she had been perfectly healthy, the probability is that she would have had to

arrange and pay for some kind of day care for him if she were to continue working. But I have no evidence about that. I do not know, for example whether any member of her husband's family was in Cayman and available to do this free of charge or what time her husband, as a policeman, would have had free during the day. The plaintiff estimated that during her temporary employment in Canada from August 1991 to March 1992 Nigel went to a day care centre for about 8 days a month. My view is that I have to ignore speculative possibilities as to what would have happened in Cayman and award the sum of $2,927.85 sought.

Cost of relocating the plaintiff and her family to Canada

These comprise an airfare to Miami, shipping of personal effects, sponsorship of plaintiff's husband to become a landed immigrant and clothing for Nigel. It is not clear to me why a round trip airfare to Miami in February 1990 is claimed as part of this. I cannot relate it to the plaintiffs' account in her affidavit of what happened in that month. I therefore disallow the item of $349.24,00 while allowing the other relocation costs totalling $1060.67.

I shall not speculate on how, if at all, the Myers family might have relocated from Cayman in happier circumstances. As for the cost of clothing for Nigel, it is obvious that a baby born in Cayman in January is going to need extra clothing to face February in Canada and indeed the defendant does not press his objection to this item.

Cost of air travel

I allow this item in full, at $1,802.50.

Telephone calls

I deduct 10% of the total as likely to have been incurred in any event, leaving $379.95.

Transport in Canada

In my view, transportation costs in Canada or Cayman for the benign treatment at Stage I would have been minimal. I ignore them and award the $734.40 claimed.

Board and lodging for the plaintiff and son whilst in Canada

The plaintiff and Nigel lived with her parents in

Saskatoon from February 1990 until April 1991. She claims CDN$200 per month representing a reasonable sum of board and lodging during that period on behalf of herself and her parents. The defendant addresses this by saying that lodging costs would have been incurred by the parents in any event by way of rent payments and "boarding" would have been incurred by the plaintiff in any event.

The plaintiff's parents made their home available to her. That was a consequence of the defendant's negligence. Extra costs for utilities and household articles must have been incurred. Of course the plaintiff and Nigel would have eaten wherever they were, and the family's cost of living in Cayman would inevitably have decreased to some extent while the was in Canada. I will make a deduction of 25% for that and award $1,428 under that head.

Loss of earnings (past)

The plaintiff was employed by the Cayman Islands Government as a teacher. She had been offered a contract for a further academic year from September 1989. It was a temporary post, subject to the condition that, in keeping with Government policy on localisation, it would be terminated when a Caymanian became available for that post. Her husband was a narcotics officer with the Royal Cayman Islands Police and, as she put it, her contract really rested on him. He had lived in Cayman for several years before the couple came here together in 1988. In 1989 her salary was $21,024.00 per annum. It would have increased by 23% from January 1990.

The plaintiff was able to obtain temporary employment as a teacher in Canada from the 26th August 1991 until the 2nd march 1992 earning a salary (net after tax) of CDN$2,255.65 per month. Credit is given for this income when calculating her claim for loss of earnings, which she sets out as follows -

DATE	ITEM	DOCUMENT	AMOUNT (CI$)
1 January to 31 March 1990	Loss of increase in salary at the rate of CI$371.00 per month		1,113.00

31 October 1990	Loss of wages	14,861.00
1 January 1991 to 30 June 1992		40,337.00
		56,311.00
LESS: Earnings as temporary teacher in Canada from 26 August 1991 to 2 march 1992 at a net salary of CDN$2,255.65 per month equals CDN$15,789.55		10.736.89
		45,574,11
LESS: Income Continuance at the rate of CDN1,039.25 per month for the month of June, 1992		706.69
		44,867.42

The defendant seeks to reduce that sum to $25,736.89 on the following grounds -

(i) There is no documentary evidence that the Plaintiff has or would have been offered a new contract commencing in September 1990.

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There could not be any such evidence. But I infer both from the evidence of her own high academic record and husband's position in the Royal Cayman Islands Police that on the balance of probabilities she would have been.

(ii) Alternatively there is no documentary evidence that she did not receive a 23% salary increase between the 1st January 1990 and the 1st April 1990.

That is true, but I believe the plaintiff's affidavit evidence that she did not get it.

(iii) In any event, given earlier diagnosis and treatment, the Plaintiff would probably not have been able to commence her teaching duties in September 1989 until at least April 1990 (assuming that there would still have been a position available for her) and probably not until September 1990 at the commencement of the

new academic year.)

This is speculation and contrary to the expert evidence of Dr. Wright, who said that, assuming the cancer was at Stage I in August 1989 and then nipped in the bud, the plaintiff could have resumed normal life, and her teaching profession in two to three weeks. In any event the plaintiff was on maternity leave until 31st March.

(iv) The probability is further that, given the temporary nature of the contracts and the non-Caymanian status of the Plaintiff, she would not have been offered a further contract commencing September 1991 and that any alternative employment would have been in Canada at a lower rate of salary, with tax.

I take the opposite view of the balance of probabilities as I have said.

Accordingly, I award the sum of $44,867.42 claimed by the plaintiff.

Costs of renovating home

These were agreed at $2,547.00

FUTURE LOSS

Loss of earnings

As will be seen from what I have already said, I have come to the view that had it not been for the matters complained of in this suit the plaintiff would have returned to her employment as a teacher with the Cayman Islands Government after the conclusion of her maternity leave. The evidence of Dr. Wright was that the plaintiff was highly unlikely to survive a year and could die at any time. Of course, both doctors expressed their caution but Dr. Popkin's evidence was also that the plaintiff's death was probable sometime within the next year.

In the light of this evidence I concluded tht a multiplier of one was the proper one for future loss of earnings. One year's salary at

$26,232.00 less income continuance under Canadian Social Security provisions to 31st March 1993 gives an award under this head of $20,578.48.

Claim for "lost years."

The defence accepted in principle that a claim under this head had been recognised and approved by the House of Lords in Pickett v British Rail Engineering Ltd. (1980) AC 136 but there was no admission as to the multiplicand and dispute as to the multiplier. It was, however, agreed that the available surplus for the purpose of arriving at the multiplicand should be 2/3rds of the plaintiff's earnings. The plaintiff proposed a multiplier of 16. The defendant argued that assuming a normal life expectancy of a woman of 36 a multiplier of 12 would be appropriate, but even assuming earlier diagnosis and treatment in August 1989, and no nodal involvement at that time, a maximum multiplier would be 8. There is a high degree of speculation inherent in assessment of damages under this head. I have already dealt with the plaintiff's loss of earnings up to date of trial and for one year thereafter. She had no prospect whatever of ever resuming work again. At the time of trial she was 35 years old. She had developed cancer at the age of 32. The medical evidence was that it was more likely than not that with proper diagnosis she would have been cured. While a decision on the balance of probabilities determines the issue of causation and liability, it does not at all follow, in my view, that in assessing lost years I should disregard the possibility that there would have been a recurrence of the disease even if the treatment had been promptly and properly carried out. Dr. Wright thought that the chances of a complete cure were 80%. I shall reduce the "lost years" element of damages by reducing the multiplier by 20% of the figure which I would otherwise have arrived at for tht reason. The plaintiff expressed her confidence that she would have continued working until retirement at 60 and said that the financial circumstances of the family were such that they could not have afforded to live off one income alone. Whether her husband's progress in the police force would have altered that situation cannot be assessed. Nor can fluctuations in the plaintiff's level of salary

caused by inflation or other causes. I take the multiplicand, therefore, as being $26,232.00 the salary she would have been earning in the Cayman Islands had all been well. It is true that her appointment was temporary in nature, but it was not, in my view, precarious and the plaintiff ws well placed in view of her outstanding academic record to obtain a teaching position elsewhere if that necessity arose.

Taking all these factors into account, I assess the 'normal' multiplier in this case as 15, which I reduce by 3 years to reflect the possibility that the plaintiff would not, in any event, have been cured. This is based on the plaintiff's age of 35 at the date of trial and 36 at the time of her expected death. A deduction of 1/3rd to represent her probable personal living expenses during the "lost years" has been agreed. The calculation therefore is as follows -

$17,488.00 x 12 = $209,856.00.

Cost of future medical treatment and cost of wheelchair

These were agreed at $500.00 and $1,020.00 respectively.

Cost of future nursing care

Despite the element of artificiality, it follows from the basis on which I am delivering this judgment that I should make an award under this head on the basis of the plaintiff's survival for one year. There was evidence of a palliative care programme under the Saskatchewan Health plan, but the plaintiff preferred the services of a private organisation called the Nightingale Nursing Group. A plaintiff is only required to act reasonably in mitigation of damages, and whether that has happened is a question of fact in the circumstances of each particular case. It was reasonable, in my view, for the plaintiff to seek to alleviate the sufferings of her last days by using the private nursing facilities which she preferred. I award the sum of $6,365.00 claimed by the plaintiff for the one year of her survival which was in prospect at trial.

Costs of future child care

I will address this matter at the end of this

judgment.

Future costs of transportation and medical costs

These were agreed at $500.00 and $86.00 respectively.

Damages for pain and suffering and loss of amenity

I was referred to a number of authorities by each party on this issue. I have already found that but for the negligence alleged the plaintiff would, on the balance of probabilities, have been completely cured. That distinguishes the present case from Barnett v Kensington & Chelsea Hospital Management Committee (1969) 1QB 428 and Sutton v Population Services Family Planning Programme Ltd. (1981) Lexis Transcript. Before turning to another English case I will repeat the observation which has been made before by this Court that such cases can be taken only as guidelines or pointers to the kind of awards that can be made here. However, as there has, to my knowledge, been no previous case of this nature in the Cayman Islands, it is appropriate to consider the English principles expressly, where the facts are comparable. In Jefferson v Cape Insulation Ltd. (1981), Kemp F2-100, the plaintiff was 47 years old. She went through some three years of pain and suffering from cancer, with physical pain becoming acute and intractable for some six or seven months before the trial. She then knew that she had not long to live and could die at any time. The following passage from the judgment of Farquharson J is particularly relevant -

> "I have also to bear in mind, it seems to me, amongst the facts I have already found, that the major misery this woman is going to sustain is not the pain, serious and terrible as that is, but the prospect which must be continually in her mind of being parted from her family, and particularly her youngest child. In any circumstances, it must be a dreadful possibility to contemplate for anybody about to die that they are going to die in such great pain and, so far as she can understand it, under the continual influence of drugs.".

£18,000 was awarded as damages for pain, suffering and loss of amenity. That would have to be approximately doubled to take account of inflation today.

However, grievous though the sufferings of the plaintiff in that case

were, the sufferings of Mrs. Myers have been in my judgment substantially greater. The defendant made some but not in my view sufficient, acknowledgment of this, in proposing a figure of a little under $70,000.00. Mrs. Myers has had to undergo hormone and chemotherapy and its distressing consequences, and the removal of one breast and her ovaries. She was deprived of any chance of having any more children and indeed of being able to nurture her infant son for very long. She knew that her death would leave her husband far from the land of his birth to bring up the child. And the mental suffering of knowing that the days of life are numbered can only be increased in the case of a woman in her early thirties, the very prime of life.

Among the local cases which I was invited to consider was Adamek v Jurgens, Cause 232 of 1990. The plaintiff suffered a severe leg injury in a road accident in which his fiancee was killed. He had a gruelling course of treatment, characterised by setbacks and disappointments and considerable pain and compounded by the emotional distress of the bereavement which he suffered in the accident and which brought on identifiable clinical depression. The prognosis was that he would continue to have recurring problems for the rest of his life. The worst case prognosis was that he might lose the leg

I assess the pain, suffering and loss of amenity of the present plaintiff as being some three and a half years of very severe physical and emotional distress. It calls for a substantial award but Mrs. Myers' short expectation of life, while exacerbating these sufferings while they last also brings release from them. Moderation is called for, bearing in mind that in a case of this nature damages under this head form part of a considerably larger award. Taking all these factors into account I assess damages for pain, suffering and loss of amenity at $100,000.00

Thus the totality of the award under the heads with which I have dealt so far is as follows -

PAST LOSS

Medical expenses	$
Prescription (agreed)	160.00

Prosthesis, wig, bra	333.02
Blue Cross Medical Insurance	257.04
Hospital Costs	9,497.90
Home/Child Care Costs	2,927.85
Cost of Relocation to Canada	
Shipping of personal effects	771.67
Sponsorship for husband	85.00
Clothing for Nigel	204.00
Air Travel costs	1,802.50
Telephone calls	379.95
Transportation in Canada	734.40
Plaintiff's and Nigel's Board and lodging in Canada	1,428.00
Loss of earnings (past)	44,867.42
Cost of renovating home	2,547.00
FUTURE LOSS	
Future loss of earnings	20,578.48
"Lost years"	209,856.00
Future treatment and wheelchair	1,520.00
Future nursing care	6,365.00
Future transportation and medical costs	586.00
Pain, suffering, loss of amenity	100,000.00
	$404,901.23

Cost of future child care

This claim was presented on the basis that a multiplier of 12 should be applied to the estimate at CDN$12,000.00 of the minimum annual costs of employing a nanny or home help to provide the services which the plaintiff, if she were able, would have provided. Further, or in the alternative, the plaintiff claimed on behalf of her husband and child damages for loss of wife's services and a mother's care. The defendant argued that on either basis the claim was essentially a dependency claim under part II of the Law of Torts Reform Law (Revised) and should not be dealt with during the lifetime of the plaintiff. On behalf of the plaintiff I was invited to break new ground and deal with the matter at trial during the plaintiff's life. In my view it would be quite anomalous for me to make an award under this head in a judgment based on evidence given while the plaintiff was still alive and delivered nunc

pro tunc as of the date of trial. In the first place, the fact and precise date of the plaintiff's death need to be known. Moreover, the distribution of an award under the Law of Torts Reform Law, which is for the benefit of dependents rather than the estate, may be different from that under an action brought during the lifetime of a plaintiff and which survives after the plaintiff's death in accordance with the Estates Proceedings Law for the benefit of the estate. While both kinds of claim are carried on in the name of the personal representative, they are different in nature.

Both sides acknowledged that it might be appropriate to adjourn the claim for cost of future child care until after the plaintiff's death. Now that that event has occurred, I believe that the wisest course is to hear further argument related to the issue of future child care on the basis of such an adjournment having taken place. Such researches as I have been able to make show that the overlap between claims under the equivalent statutes in England has given rise to considerable debate, and indeed specific statutory provisions there. That there is an overlap between the award for 'lost years' which I have made and the claim for future child care which has yet to be fully addressed seems to me to be self-evident. Without wishing to preempt any argument of the parties, I refer to observations made in the House of Lords in Pickett v British Rail Engineering Ltd, and in particular the following from the speech of Lord Wilberforce at page 778 of 1979 1 All ER -

> "It is assumed in the present case, and the assumption is supported by authority, that if an action for damages is brought by the victim during his lifetime, and either proceeds to judgment or is settled, further proceedings cannot be brought after his death under the Fatal Accidents Acts. If this assumption is correct, it provides a basis, in logic and justice, for allowing the victim to recover for earnings lost during his lost years.".

Such conditions as may flow from further argument on this issue will not affect the award which I have announced and judgment for $404,901.23 may be entered as of the last day of trial.

G. E. Harre
Chief Justice

Delivered as of 31st July 1992
on 31st March 1994.