

*Indexed as:*

**Giannone v. Weinberg**

**Between**

**Antonella Giannone, an infant under the age of eighteen  
years by her next friend Mario Giannone and the said**

**Mario Giannone, Plaintiffs**

**and**

**Howard W. Weinberg, Defendant**

**[1986] O.J. No. 369**

37 C.C.L.T. 52

37 A.C.W.S. (2d) 362

Action No. 4350/82

Supreme Court of Ontario - High Court of Justice  
Non-jury Sittings - Toronto, Ontario

Heard: September 20, 23-24, 26-27,

October 7-8, 10-11, 15, 1985

Judgment: May 22, 1986

**Fitzpatrick J.**

*Arm amputated at elbow -- 16-year-old girl -- \$3,272,673 total award including \$1,615,000 to offset income tax liability on investment income.*

At the age of 16 the plaintiff suffered a compound fracture of her dominant right arm. The defendant doctor applied a cast which was too tight. Two days later the plaintiff returned to the hospital where the doctor split the cast. The plaintiff returned to the hospital again the next day. The doctor removed the cast and discovered gas gangrene. The arm was amputated at the elbow. The defendant admitted liability. The plaintiff continued to have pain which would probably become worse with time. She developed psychological problems and would probably experience an emotional crisis during adolescence. It was improbable that she would go on to post-secondary education or marry.

HELD: The plaintiff was awarded a total of \$3,272,673 including \$125,000 non-pecuniary damages. The Court found that the plaintiff had lost 75 per cent of her earning capacity. She probably would have earned \$20,000 per year if she had not lost her arm. Loss of earning capacity, including Canada Pension Plan benefits was \$342,532. The best prosthetic devices, including some which would not be available for seven years would cost \$953,867. Fifteen hours of housekeeping services a week would cost \$161,274. The plaintiff was also awarded \$75,000 for management expense. The contingencies would balance out. An award of \$1,615,000 was made to offset income tax liability on the money that would be used for prosthetic devices, housekeeping help and management expense. Considering an 11 per cent yield on long-term Canada bonds and a real rate of return of two and one-half per cent provided by the Rules, the Court found that the figure that should be used for future inflation was eight and one-half per cent. Admitted special damages were \$16,514. Prejudgment interest was awarded on the awards for lost income, future care and income taxes on the basis that it had no relation to the increase for inflation. Increase for inflation is designed to preserve the real value of money. Prejudgment interest is to compensate for being kept out of the real value.

R.J. Sommers, Q.C., and Robert Roth, for the plaintiffs.

David Doherty, Q.C., for the defendant.

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**FITZPATRICK J.:**-- Antonella Giannone was born on the eighteenth day of June 1975. On August 9, 1981, she fell from the verandah of her house and suffered a compound fracture of her right arm. She was treated at the Humber Memorial Hospital by the defendant Dr. Weinberg and discharged the following day with her arm in a cast. She commenced to run a fever and her mother returned her on August 11 to the hospital where Dr. Weinberg examined her, determined that her cast was too tight, split the cast and prescribed 222's for her fever. The following day Antonella was taken back to the hospital where Dr. Weinberg removed the cast and discovered that she had developed gas gangrene. Antonella was transferred to the Hospital for Sick Children where her dominant right arm was amputated at the elbow. The defendant has admitted liability for the plaintiffs' damages.

In November 1981, Dr. Torode performed an osteotomy to remove 2.5 cm of bone from the humerus. He regretted that he had not removed more because more will have to be removed if the best appearance is to be achieved with a prosthetic arm.

Antonella continues to have pain in the stump of her arm and phantom pain. She has these pains daily. They are likely to continue and will probably become worse with time. There is a serious danger that she will develop skin problems, neck pain and psychological problems with depression.

She has had a lot of mental suffering and will probably experience an emotional crisis during adolescence. Because of that and for other reasons it is improbable that Antonella will go on to post-secondary education. She will probably not marry.

Evidence was lead on behalf of the defendant that it would be very discouraging for Antonella if a pessimistic finding were made with respect to her future. I hope that Antonella will understand that it is the function of the Court to make findings based upon probabilities only and that the Court can not take into account the inner strength and courage of a person that it has no way to measure.

I assess Antonella's non-pecuniary general damages at \$125,000.

### Special Damages

\$16,514.67 of the special damages claimed have been admitted. C.H.A.M.P.S. has paid \$9,541.69 for prosthetic devices for Antonella and Mr. Giannone has testified that he will repay this sum to that institution if he recovers it from the defendant. I hold that this sum is recoverable in this action.

### Lost Earning Capacity

Dr. Fisher testified that Antonella would have only a twenty percent chance of finding employment unless she could progress to a university level of education. I accept that, allow something for the slight chance she will go to university, and find that she has lost seventy-five percent of her earning capacity.

There is not very much evidence available as to what a young woman without a university education would probably earn. I find that Antonella would probably have earned \$20,000 per year if she had not suffered the loss that she has. The present value of \$20,000 per annum for Antonella's working life expectancy is \$448,400 and the present value of her lost Canada Pension Plan benefits is \$8,309.08. I assess her damages for the loss of her earning capacity at seventy-five percent of the sum of those figures, \$342,532.

### Future Inflation

In order to calculate the amounts of money that will be required to be invested to produce the after tax money for prosthetic devices, housekeeping help and management expenses and be all gone at the end of Antonella's expected life, it is necessary to use a figure for future inflation.

Dr. Pesando agreed that the market's forecast of future inflation is as good as any. Eleven percent was the yield from long-term Canada Bonds and from this should be deducted the long-term real rate of return on money. Dr. Pesando testified that in his opinion the real rate of interest for the next decade would be higher than the two and one-half percent mandated by Rule 53.09. I am not persuaded that the chances of this being so are sufficient to depart from the two and one-half percent provided by the Rule.

I find that the figure which should be used for future inflation is eight and one-half percent and, using that figure and the other figures found, it will require \$1,615,000 to provide for the income taxes which the plaintiff Antonella Giannone will have to pay.

#### Prosthetic Devices

A great deal of the evidence in this assessment of damages was devoted to what kinds of prosthetic devices would be best for Antonella. I was most impressed by the witnesses who testified on her behalf and accept their evidence. In view of the wrong done, I hold that Antonella should have the best prosthetic devices that are from time to time available and I find they will probably be the following:

i) Utah arm, to be replaced every five years	\$32,000.00 U.S.
ii) Back up arm, one time purchase	27,500.00 U.S.
iii) Powered wrist rotator, available in 7 1/2 years, to be replaced every 5 years	3,500.00 U.S.
iv) Lighter hand, available in 5 years	4,000.00 U.S.
v) Powered humeral rotator, available in 7 1/2 years, to be replaced every 5 years	6,500.00 U.S.
vi) Microprocessor to be available in 7 1/2 years	15,000.00 U.S.

(Availability time for items iii, v, vi is averaged)

I accept the evidence of Mr. Andrew that the average annual maintenance for all of the prosthetic devices will be twenty percent of their cost.

The sum that will be required to be invested to produce the after tax money that will be required

to purchase, fit and maintain those devices is \$690,464 U.S. I hold that the damages of the plaintiff Antonella Giannone under this head are the Canadian equivalent of that sum determined as of the date of the judgment, \$953,867 Canadian.

#### Contingencies

With respect to the estimated costs of the prosthetic devices, the housekeeping help and the management expenses, I find that the chances that the actual costs of those things will be greater than those estimated are as great as the chances are they will be less; and with respect to the value of the earning capacity lost, I find that the chances that the amount estimated is less than the real loss are as great as they are that it is more.

#### Housekeeping Services:

Antonella will always be restricted in many of the activities of daily living. Things that she will be able to do will require two or three times as much time for her as for a person with two arms and there are many things she will not be able to do at all. I find that Antonella will require fifteen hours of housekeeping help per week and that the current cost of such services is \$7.98 per hour. I find that this help will not be required until she leaves home which I find will probably be when she reaches the age of 18 years. The sum which will be required to be invested to produce the income for that help is \$161,274.

#### Tax Shelters

Mr. W.V. Crawford testified with respect to various ways in which taxes could be saved. I find that those ways would be entirely inappropriate for use with respect to the funds which will be invested for Antonella. In this regard, I accept the evidence of Mr. Allan Beach and of Mr. Peter Wallace as to the most appropriate investment vehicles for Antonella.

#### Management Expenses

Professional management will be required for the investment of the sums awarded and I find that the figure for this should be about one half of one percent of the money to be invested, \$75,000.

#### Pre-judgment Interest

With respect to whether there should be pre-judgment interest on damages which have been increased because of inflation, I rely upon the statement made in *Pickett v. British Rail Engineering Ltd.*, [1978] 3 W.L.R. 955 and accepted by the Ontario Court of Appeal in *Fenn v. Peterborough* 25 O.R. (2d) 399:

Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other.

Notice of the claim herein was delivered on the 9th day of September 1981. There shall be pre-judgment interest on the non-pecuniary general damages from that date at the average rate of interest between March 1982 and the date of the judgment herein. There shall be pre-judgment interest on the special damages at the same rate from the dates of the payment of the expenses.

In order to preserve the integrity of the awards for lost income, future care and income taxes calculated as of September 16, 1985, interest shall be paid on those sums at the average prime rate for the period between that date and the date of judgment.

I wish to thank both counsel for the help provided by their able arguments.

The plaintiff Mario Giannone shall have judgment for \$26,056.36 plus interest as set out.

The plaintiff Antonella Giannone shall have judgment for \$3,272,673, plus interest as set out. Of the monies awarded to Antonella Giannone, \$200,000 shall be paid to Mario Giannone for expenses and the balance into court until Antonella Giannone reaches the age of 18 years or further order of this Court.

The plaintiffs shall have their costs, including the costs of the expert witnesses called and of the reports.

FITZPATRICK J.

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