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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. B 138/1991

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| BETWEEN | ALTON BENNETT | PLAINTIFF |
| A N D | HECTOR PRYCE | DEFENDANT |

Norman Davis instructed by Myers, Fletcher & Gordon for the plaintiff

Mrs. Ursula Khan instructed by Khan & Khan for the defendant

Claim in Negligence

Hearing on December 12, 15, 1994 and May 3/ 1995

BINGHAM, J.

The plaintiff's claim in this matter arose out of a collision between a pedal cycle which he was riding and a motor truck along the Long Hill main road, Mount Industry in the parish of Saint Catherine. The collision occurred on 30th November, 1990 in the morning hours.

As a consequence of the collision the plaintiff suffered the following injuries:

1. abraisons to the right forearm
2. a swollen deformed right thigh

The plaintiff was laid up for eight weeks convalescing from his injuries. The total period of his disability was, however, six months. His injuries gave rise to a claim in negligence against the defendant who was the owner and driver of the truck in question.

In the particulars of negligence the plaintiff alleged that the defendant

"(a) Failed to keep any/or any proper look out.

(b) (sic) Drive on the incorrect side of the road way.

(c) Drove at a speed that was excessive in the circumstances.

(d) Negotiated the corner on the incorrect side of the road.

(e) Failed to heed or observe the presence of the plaintiff riding his (sic) motor cycle lawfully along the road

(f) Failed to stop, slow down, swerve or in any way manouvre the said motor vehicle so as to avoid the said collision.

The defendant for his part in the defence pleaded that "the collision was caused solely by the negligence of the plaintiff or in the alternative that he materially contributed to it".

In the particulars of negligence pleaded in the defence it was alleged that the plaintiff was:-

"(a) Riding at too fast a rate of speed having regard to the fact that he was going down a steep hill on a roadway with sharp curves.

(b) Failing to exercise proper care on negotiating a dangerous corner.

(c) Riding at too fast a rate of speed so as to preclude proper control of his bicycle.

(d) Failing to keep a proper and/or sufficient look out having regard to the blind or near blind nature of the corner because of the high bank on his own side.

(e) Having passed the front of defendant's truck which was stationary, failing to manouvre his bicycle on his own side of the roadway so as to avoid colliding into the right rear wheel of the stationary truck when there was adequate room for him to safely pass."

**The Evidence**

**The Plaintiff's case**

The plaintiff in his account related an incident in which on the morning in question he was riding his pedal cycle going down the Long Hill Road on his way to one Miss Pearl's shop which is situated to the right of the road as one proceeds down the road.

It is common ground and not in dispute that the road in question as one travels in the opposite direction uphill is steep, winding and full of curves. The length of the hill from top to bottom is about two and a half miles . Also not disputed is the fact that the section of the road where the collision took place was a blind corner for vehicles coming from either direction.

The plaintiff said that he was in the act of negotiating the curve over on his left hand side of the road riding about two feet from a concrete wall to his left. He had positioned himself to go right over to Miss Pearl's shop situated to the right of the road when the truck came upon him same time. According to the the plaintiff the whole of the truck was then on his left and as soon as he saw it, it hit him on his right foot. It was about two feet from the wall when it hit him. The corner was a right hand corner for the truck. It was a long truck. Both vehicles were not moving at the time of the collision. He was seated on his bicycle at the time of the collision.

As it is common ground that the width of the road at the point of impact was estimated at sixteen to twenty feet, in so far as the defence sought to contend that the collision took place over the defendant's half of the road this cannot be supported by either reason or common sense. For this long truck to negotiate what was a deep right hand corner it would have of necessity to encroach some distance over to the right half of a roadway as the truck proceeded around the corner up this steep hill.

Under cross examination the plaintiff denied that he was negotiating his cycle down hill on the incorrect side of the road and that on seeing the truck as it emerged from around the corner he lost control of the cycle and although managing to negotiate the cycle pass the front of the stationary truck he collided into the rear of the truck which was more out in the road. The plaintiff admitted that the rear of the truck was more out in the road than the front. He denied that he was coming down hill at a fast rate of speed.

The defendant's witness who is also a truck driver by occupation had been given a lift by the defendant. He joined the defendant along the Spanish Town Road and was in the vehicle at the time of the collision.

**The Defendant's Case**

The defendant in his account described travelling up what was acknowledged to be a steep winding hill. He was proceeding at about ten to twelve miles per hour and continuously sounding his horn. Given the length of the truck, as well

as the nature of the terrain which he was traversing, a prudent driver in encroaching over to right half of the road as he negotiated these numerous corners, such a manouvre would call for caution on the defendant's part including the sounding of his horn as a warning to other road users of the presence and approach of the truck. The steep hill would also call for use of a lower gear by the defendant, a situation which would result in the revving of the engine giving off a sound sufficient to alert road users of the approaching vehicle.

As he approached what was a right hand corner to him and a deep curve he saw the plaintiff approaching down hill on his bicycle. Plaintiff was coming very fast. He (the defendant) sounded his horn, applied his brakes and stopped. On sounding his horn the bicycle started to wobble but it kept on coming towards the truck. The plaintiff managed to pass the front of the truck, but he collided into the right rear wheel. At impact there was about five feet of clear road-way to the right rear of the truck for the plaintiff to pass. The plaintiff on impact fell under the truck by the right rear wheels. He was taken up by the defendant and his passenger along with passers-by who came on the scene and assisted in placing the plaintiff who was injured into the truck. The plaintiff was taken to the Linstead Hospital where he was treated and later transferred to Spanish Town Hospital, where he was admitted.

The witness Winston Lynch gave an account which materially supported the defendant's evidence.

**The evaluation and Assessment of the Evidence**

As it is common ground that the corner where the collision took place was a deep curve and what was admitted by both sides to be a blind corner, it is clear from the account of both parties that they did not see each other until the collision was almost imminent. The defendant for his part was in the act of negotiating his truck around this deep curve, a manouvre which necessitated his having to encroach more to the right of the road to be able to negotiate the corner. Although the law required him to keep as near to the left of the road as possible this has to be viewed in the light of the circumstances as the state of the road-way made possible. Given the estimate of the width of the road - sixteen to twenty feet and given the length of the truck being twenty-eight feet

and its width about eight feet, to negotiate the curve, it would have had to encroach over to at least a half of the right section of the road to negotiate the corner . This manouvre, however, called for extreme care on the defendant's part and in so far as he said that he sounded his horn he would have discharged the common duty of care owed to other road users including the plaintiff. The fact that the plaintiff was not moved to take no avoiding action would lead me to believe that no horn was sounded. It is difficult to imagine that the plaintiff would not have taken advantage of the opportunity available to manouvre his cycle to the left and safely passed by the right of the truck.

I find that no horn was blown by the defendant to alert the plaintiff as to the presence and approach of the truck and in failing to do so the defendant was negligent.

For his part although the plaintiff would have me believe that he was travelling at an ordinary speed going down this steep hill and about two feet from his extreme left as he negotiated this deep curve, his own account gives the lie to this being so as under cross examination he admitted that "at all times I intended to go right at Miss Pearl's shop. I positioned myself to go right." That being so he would not have been far over to his left about two feet from the wall to the left but more to the centre of the road as the defendant said positioning himself intending as he did to go to the right of the road over to the shop.

The rules of the road requiring a motorist in using the road to keep as near to the left of the road as possible apply with equal force to cyclists as well especially in circumstances where one is faced with operating a vehicle on a steep, winding road full of curves which is known to be also narrow for at least one mile of the distance of two and a half miles.

I find that the plaintiff was riding his cycle at a fast rate of speed and more to the centre of the road and that it was his manner of operating the cycle that resulted in him not seeing the approaching truck coming at a much slower speed up hill earlier than he did. Had he been riding more to his left he would have seen the truck earlier and been able to take evasive action by negotiating

the cycle to the right of the truck. He seemed from his admission under cross examination to be more concerned with getting to Miss Pearl's shop which was to the right of the road as one travel down the Long Hill Road. In this, regard he was in breach of particulars (a - d) as pleaded in the defence and also negligent moreso in that he failed to take reasonable care for his own safety.

On the issue of liability and having regard to the duty of care placed on the plaintiff and defendant I apportion the blame for the collision at 40% to the plaintiff and 60% to the defendant.

**Damages**

1. Special Damages

The following were the particulars of special damage pleaded:

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| (i) | Cost of repairing bicycle | $ 380.00 |
| (ii) | Cost of medication | 200.00 |
| (iii) | Cost of travelling | 1,500.00 |
| (iv) | Cost of pants lost | 120.00 |
| (v) | Extra cost of food - $30.00 per day for 60 days | 1,800.00 |
| (vi) | Loss of earnings - $500.00 per forth night for 5 months | 5,500.00 |
| | | $ 9,500.00 |

It is by now trite and a settled principle of law relating to proof of special damages that it must be specially pleaded and strictly proven. Of the six items pleaded under this head of damages attempt was made to prove only one, number 6 relating to loss fo earnings. The other five items lacking as to proof must therefore be regarded as abandoned. As to loss of earnings although the plaintiff's evidence was that he was earning $500.00 per day from his previous employment when this evidence was put to the test it emerged that this income related to only such occasions as the plaintiff was able to secure a buyer for the lumber he secured and this was not as frequent as he made it out to be, but was in fact more of a forthnightly occurrence. The sum recoverable therefore is calculated on the basis of $500.00 per forthnight over a period of five months that being the period pleaded in the particulars of special

damage. The sum recoverable is therefore $6,500.00.

2. General Damages

Following the collision on November 30, 1990 the plaintiff was admitted into the Spanish Town hospital as a result of the injuries he suffered. A medical report dated March 19, 1991 from Dr. Colin Abel a surgeon at that institution and who treated the plaintiff reveals the following:-

"Re Alton Bennett

This patient was admitted to this hospital on November 30, 1990 as a result of injuries sustained. There was a history of loss of consciousness:-

When examined the following was noted:-

(1) Abrasions to right forearm

(2) Abrasions to right foot

(3) Swollen deformed right thigh

X-rays of skull were normal. X-rays of right thigh showed fracture femur. His wounds were dressed and analgesia prescribed on the advise of orthopaedic surgeons Kingston Public Hospital, sketal traction was started and sustained for eight weeks. He was discharged on February 1, 1991 after x-rays showed good bone healing.

He will be mobolized on crutches for a further three months. His period of total disability is six months.

Yours sincerely,

Sgd. Dr. Colin Abel
(Surgery) "

As a follow-up to this report and obtained no doubt in preparation for the hearing of this action an up to date report was obtained from Dr. Emran Ali, a Consultant Orthopaedic Surgeon at Eureka Medical Centre. This report which is dated October 1994 reads as follows:-

" Re Alton Bennett, age 26

This patient was seen by me on December 11, 1990, with a history of being involved in a motor vehicle accident on Novmeber 30, 1993, at which time, he suffered a fracture of the right femur for which he was treated at the Spanish Town Hospital.

On examination, he has a well healed superficial 1" scar on the lateral aspect of the left upper forearm and over the lateral aspect of the right ankle. He had full range of movement at the ankle joint.

He also had a healed Pin Track scar joint below the tibial tuberacle of the right tibia. There is a slight bony swelling at the junction of the middle and distal 1/3 of the right thigh over the fracture site. Check x-rays confirm a well healed fracture junction of the middle and distal 1/3 of the femur with slight overlap. The fracture is solid. There is some wasting of the quadiceps and flexion of knee is limited 0-100°.

This patient was seen again on September 6, 1994 for final certification. He still complains of pains at the pin tract site and fracture site. The leg is ½" short and he walks with a slight limp. In my opinion, he suffered a P.P.D. of 10% of the function of the right lower limb.

Sgd. Dr. Eman Ali
Consultant Orthopaedic Surgeon "

In support of a reasonable award for pain and suffering and loss of amenities no reference was made by Counsel to any recent comparable awards. Learned Counsel for the plaintiff suggested that a reasonable award for general damages ought to be in the region of $200,000.00. Learned Counsel for the defendant did not seek to argue to the contrary and offered no demurrer to this suggestion. Given the fact that following the collision the plaintiff's injuries laid him up for six months this has to be regarded as the total length of his disability. Added to this is the fact that he is now left with a half inch shortening of his right ankle which has left him with a ten percent partial disability of the right limb.

An examination of comparable awards although not unearthing material of a nature in keeping with the instant case would suggest that an award within the range of $180,000.00 to $200,000.00 would meet the justice of the claim. Taking everything into consideration I would consider an award of $210,000.00 as reasonable in the circumstances.

In fine the plaintiff succeeds as follows:-

Judgment for the plaintiff for $216,500.00 with costs to be agreed or taxed being:-

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| 1. | Special Damages | $ 6,500.00 |
| 2. | General Damages | 210,000.00 |
| | | $ 216,500.00 |

less 40% the extent to which he is blameworthy. Final judgment entered for plaintiff for $129,900.00 with costs to be agreed or taxed.

Interest awarded at 3% on 60% of $6,500.00 on special damages as from 30/11/90 to 31/5/91 on general damages and at 3% on 60% of $210,000.00 as from 11/6/91 to 31/5/95