

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B 25 OF 1985

BETWEEN	DEVON BROWN	PLAINTIFF
AND	JAMAICA OMNIBUS SERVICES LIMITED	1ST DEFENDANT
AND	DOUGLAS BRYAN	2ND DEFENDANT
	LANCELOT CLARKE	
	(Representative of Estate Roy Fenton Blake)	3RD PARTY

B.E. Frankson and A. Kitchin instructed by Gaynair and Fraser for the Plaintiff

D. Goffe and D. Jackson instructed by Myers, Fletcher and Gordon Manton and Hart for the Defendants

Daley, Walker and Lee-Hing on record as appearing for 3rd Party - Not represented.

Hearing on October 3,4,5 and November 29 1990

BINGHAM J.

JUDGMENT

The Plaintiff in this matter was, while a passenger in a Peugeot motor car travelling along Spanish Town Road between 6 Miles and Kingston, seriously injured when the car which was being driven by the Third Party one Roy Fenton Blake collided with a J.O.S. bus driven by the Second-named defendant Douglas Bryan. The driver of the car and six other passengers in it perished as a result of the collision. The plaintiff was the only occupant in the car who survived that ordeal.

The facts and circumstances leading up to that incident which occurred around 9 P.M. on Labour Day May 23, 1983 have already been ventilated and determined in C.L. H 143/86 Olive Hall vs. J.O.S. Limited etal. in which the question of liability as between the defendants and the deceased third party was determined.

The present action, therefore, is concerned with an assessment of the damages resulting from the injuries suffered by the plaintiff arising out of the collision.

At the time of the incident the plaintiff was, and still is, a Corporal attached to the Jamaica Defence Force. Following the collision he was removed from the scene at the intersection of Weymouth Drive and Spanish Town Road in an ambulance to the Kingston Public Hospital where he was admitted.

THE PLAINTIFF'S ACCOUNT

In giving evidence the plaintiff related his experiences following the collision. He described the various injuries he received namely:-

1. A fracture of the femur, the left hand elbow joint.
2. Severe burns to the buttocks
3. Burns from the left foot going down to the ankle. This area had to be skin grafted.
4. A fracture of the left leg.
5. A large cut (wound) under the chin.

As a result of his condition he had to lie on his stomach for a period of six months.

There is now a disability to his left hand. The elbow is frozen - it cannot bend. He cannot make a fist properly. As a result there is always a sensation of a cramping nature in the hand. The left hand is now shorter than the right. His left ankle cannot bend like the right. The section where the skin grafting was done tends to break down once every six months causing cuts to appear on the surface of the skin resulting in fluid gathering under the surface.

As a result of his condition, he can no longer stoop properly. He cannot swim or play football. His left foot is shorter than the right. he now has to almost constantly resort to wearing slippers. Most of the strength in his left foot is gone and he has difficulty standing on it for long periods. He can no longer ride a bicycle due to the tenderness of his buttocks. he can no longer bathe himself and has to be assisted to put on a tie and button his shirt and put on his belt. He used to represent his company at football and owned a bicycle. These activities he can no longer pursue.

Dr. Trevor McCartney, a Surgeon Specialist was one of the Surgeons attached to the hospital and who had the day to day supervision of the plaintiff while he remained at that Institution. On admission, he examined the plaintiff and made certain observations and on July 3, 1984 he prepared a medical report which was tendered in evidence at the hearing as Exhibit 1. This report read in part:-

Medical Report

"Re: Devon Brown"

"Mr Brown was admitted to the Kingston Public Hospital on the 23rd May 1983 when he was allegedly involved in a motor vehicle accident, the motor vehicle later burning producing deep burns to Mr Brown. The injuries sustained were:-

- (1) Fracture left femur.
- (2) Fracture neck of left humerus.
- (3) Compound fracture dislocation of the left elbow.
- (4) Multiple lacerations to his cheeks.
- (5) 35% burns of both lower limbs and perineum. These were mainly full thickness burns.

In view of the complex nature of his injuries, surgical management was very difficult and prolonged. His fractures and dislocation were managed by the orthopaedic surgeons and a separate report has been prepared.

His burns were treated by a combination of the open and closed methods and this was completed by split skin grafting to the areas of full thickness skin loss.

During his hospitalization, he received several units of blood. He was also referred to the psychiatrist for acute depression. He has completely recovered from his burns.

/Sgd./ Trevor McCartney
D.M. (Surg.) F.R.C.S.
Consultant Surgeon
K.P.H."

On this plaintiff's admission Dr. McCartney testified that he was responsible for all his injuries during the acute stage of the first twelve hours. The burns which the plaintiff suffered were of full thickness and in his opinion serious, and as such likely to leave permanent scarring.

Dr. McCartney has not seen the plaintiff since his discharge from the hospital in 1984 at which time, he then observed that there was some keloid forming and as his notes revealed there was hyperaesthesia or increased sensitivity in those areas. The plaintiff remained in hospital from May 1983 to January 1984 for a period of approximately 8½ months."

Dr. McCartney also gave evidence of the nature of the treatment administered to the plaintiff.

Having regard to the injuries suffered by the plaintiff the doctor was of the opinion that he would have experienced excruciating pain due to the several fractured bones. For this pain the plaintiff was treated with pain killers when he complained of feeling pain.

During his stay at the hospital, the plaintiff as a result of severe fractures he suffered was referred to the Orthopaedic Department where he was examined and treated by the Orthopaedic Surgeons among whom was one Dr. O. Clunis, a medical practitioner attached to that department. Dr. Clunis subsequently, on June 19, 1984 prepared a report which was tendered in evidence as Exhibit 2. This report read in part:-

"Re: Devon Brown"

"This letter serves to inform you that the abovenamed gentleman was admitted to this institution on the 23rd May 1983 after suffering the misfortune of being trapped in a motor car which caught fire immediately subsequent to a road traffic accident. His injuries were as follows:-

- (1) Multiple burns over posterior aspect of both thighs, buttocks and perinium.
- (2) Burns to the left leg and left ankle and foot.

X-ray confirmed multiple fractures as follows:

- (1) Fracture of left femur.
- (2) Fracture neck of left humerus.
- (3) Fracture dislocation of left elbow which was compound.

While in hospital, he was jointly managed by the orthopaedic team and the general surgery service. He also had occasion to be referred to the Psychiatric service because of his severity of physical injury as well as the loss of his family members during the accident.

His fractured femur was treated on skeletal traction and his left elbow was splinted after clean and dress. He had numerous blood transfusions and made slow progress in hospital particularly due to the extensive amount of burns.

His wounds are now healed. He now walks with

a limp. His left upper limb is severely disabled permanently and although he has been considered for operative fixation of his left elbow, he is considered partially disabled at this time. The extent of his partial disability amounts to approximately 60% and is composite of the injuries to his left upper limb and his left lower limb.

Although he is being considered for an arthrodesis of his left elbow in a more functionable position, his improvement may be only minimal as he lost much of the strength to left upper limb.

/Sgd./ D.C. Clunis M.B.,B.S.,
Department of Orthopaedics
K.P.H."

Professor Sir John Golding, an eminent Orthopaedic Surgeon who is attached to the Mona Rehabilitation Centre and the Orthopaedic Clinic at the University Hospital of the West Indies also saw and examined the plaintiff on April 23, 1990 for the purpose of and up-to-date assessment of his present condition.

Having related the history given to him by the plaintiff of the injuries he had sustained and the subsequent treatment received at the Kingston Public Hospital and at the Clinic at Up Park Camp, he testified that the plaintiff's main areas of complaint were:-

1. abnormal sensation over the inner border of his left hand
2. a stiffness in his left elbow
3. an inability to raise his left hand
4. a stiffness in his left ankle
5. an inability to squat.

On examination Professor Golding found that:-

1. the left elbow was solid in extension (straight) and this due to severe scarring on the inner side
2. The nerve in this area had been damaged causing the lack of sensation in his hand. There was only 40% of movement in his shoulder.
3. He had a 4 by 4 inch depigmented scar over the left ankle. The ankle showed only 50% of the normal range of motion. The

joint under the ankle was stiff but otherwise it was mobile.

4. The fracture of the femur had united with a one inch shortening. There was a 10 by 10 inch depigmented scar over the left thigh from where the skin graft had been taken.

Professor Golding was of the opinion that the plaintiff had reached the maximum stage of his medical improvement.

The extent of his disability was assessed as follows:-

1. He had a 12% of loss of function of the lower extremity due to the scarring and stiffness around the left ankle.
2. He had a 10% shortening of the leg.
3. He has a 65% loss of the upper extremity due to the stiffness and scarring around the elbow. 10% of this was due to the injury to the shoulder and 20% was due to the stiffness of his fingers and the loss of the sensation in the hand.

When quantified this amounted to a 21% loss of the lower extremity and a 75% loss of the Upper extremity or a total loss of 37% of the whole person.

In his opinion, the extent of the plaintiff's disability would render him incapable of being able to perform as a fighting soldier again. He could be able to fit into some sedentary job of sorts, which is in effect the type of work that the plaintiff now performs in the office at Up-Park Camp. From the medical evidence it can, therefore, be safely stated that the plaintiff's future as a career Soldier is for all intents and purposes virtually at an end although he is fortunately still able to fit into some sort of sedentary occupation doing office work. As the normal retiring age for an active Soldier is 40 years, the plaintiff who is now 32 years of age and who stated that when he enlisted into the army he had intended to make it his life's career, he still has another eight years certain left to serve. If at the end of that period, he is kept on by the authorities he can continue to serve carrying out the sort of duties which he now performs up to the age of 60 years which is the compulsory retiring age for all ranks.

In advancing the plaintiff's claim for damages learned counsel, Mr Frankson submitted that, apart from the head of the claim for Special Damages which was agreed to by the consent of both Counsel at the sum as claimed of \$340, the

General Damages ought to be considered under four heads namely:-

1. Loss of future earnings
2. Handicap on the Labour Market.
3. Pain and Suffering
4. Future Expenses

Mr Goffe for the defendants advanced his submissions in reply along similar lines but contended that in relation to the fourth head of "future expenses," this claim was totally lacking in any independent evidence to support it. The only evidence advanced in this regard was the plaintiff's testimony by which he sought to contend that because of his condition he is now unable to help himself and that his wife had to cease working to do so, the weight of the evidence is decidedly to the contrary. These parties were living together as man and wife after the plaintiff was discharged from the Medical Hospital at Camp during which period his present wife became pregnant and was obliged to stop working and as a result of the subsequent birth of their daughter has chosen to remain at home caring for her daughter and doing housework rather than employing an helper. The evidence further reveals that the plaintiff, far from being unable to attend to himself, leaves for work at 6-7 a.m. every morning and remains away from home up to 7-9 p.m. a period of more than 12 hours during which he has to "fend for himself." There is no evidence that he has any difficulty getting to and from work or functioning on the job. On the evidence therefore I would be minded to hold that the claim to be compensated under this head fails. Added to the above it is indeed strange that from the plaintiff was discharged from hospital and resumed working, there is no evidence that apart from when he attended on Professor Golding, in April 1990 that he has to consult any doctor or was put to any expense towards obtaining medical attention because of his condition. Indeed Professor Golding's evidence would tend to confirm that, apart from some intermittent pain from standing for long periods, the plaintiff has now reached the maximum of his recovery.

On the sheer weight of the evidence it clearly militates against any such award being allowed under this head and I would so hold.

In relation to the other three heads, such issues as were raised mainly centered around the quantum of the award that ought to be made and not whether such an award was justifiable. It may, therefore, now be necessary to examine each particular head.

1. Loss of future earnings.

In this regard one has to consider that prior to the collision the plaintiff was then a 25 year old career soldier who had been married for about 6 months. He had during the seven years that he had was in the army risen to the rank of a Corporal, attaining that rank in five years and with this sort of performance had clearly displayed an attitude to advance to the rank of a Colour Sergeant a position which but for his injuries he seemed well on his way to achieving that status.

Indeed it is the evidence of Lieutenant Donavan Lewis, the officer now commanding the Support Platoon Headquarters Company 1 J.R. to which the plaintiff is now attached, that:-

"given his record in achieving the rank of Corporal in the ordinary course of events, he would now be at least a Colour Sergeant."

This view of Lieutenant Lewis, with whose testimony and demeanour I was most impressed was reinforced in cross examination. He then said:-

"Colour Sergeant and Staff Sergeant is the same rank but if he (the plaintiff) was to be a tradesman then he would now be a Staff Sergeant. Corporal Brown being a non tradesman in the ordinary course of events would be now at least a Colour Sergeant."

It was this evidence which Mr Frankson used as the basis for his submission under this head of general damages and his calculations were made on the premise that his contentions in this regard would have been accepted.

Mr. Goffe on the other hand contended that the highest rank that the plaintiff could have expected to attain on the evidence would be a Sergeant. If by this he meant with any certainty I would be minded to agree, but then it is settled law that that is not the test even in matters of a more serious nature. The weight of the evidence here clearly establishes that in all probability the plaintiff given the fact of his performance up to the time of the accident to borrow Lieutenant Lewis' words that of a proven "high flier" and a high achiever

he would in all probability have continued to advance in rank and would have attained that of a Colour Sergeant, and I hold.

Mr. Goffe's contention as to the method of calculation is not, however, without merit. I am in complete agreement with him that such sums as ought to be deducted as tax after taking into consideration the allowance for income tax as well as that for the immediacy of payment, and using the figure of 14 as being the correct multiplier to be applicable, when the salary differential of \$16.36 per day is calculated, this would result in a gross annual sum of \$5755.04¢ to which when the multiplier of 14 is applied amounts to a sum of \$80,570.56. Applying the necessary adjustments of 1/3 deduction for income tax and 1/5 for immediacy of payment, the sum recoverable under this head is \$45,637.63¢

2. Handicap on the Labour Market

It is common ground that the plaintiff from the nature of his injuries and present condition would be a person who qualifies for an award under this head. The only issue here being the size of the award. Mr Frankson argues that a reasonable sum ought to be in the region of \$25,000.

He Cited in support:-

6008/86 Donald Grey vs. The Attorney General an reported judgment of Mr Justice Courtenay Orr, delivered in March 1989.

The sum being suggested is, as Mr Goffe observed, clearly out of line with comparable awards made under this head of damages. It is noteworthy that Mr Frankson, himself also drew the Courts attention to the case of United Dairy Farmers Ltd. vs. Lloyd Goulbourne Supreme Court Civil Appeal 5/1981 a Judgment of Carberry J.A. where an award of \$10,000 by the trial Judge was allowed to stand. The sum of \$15,000 suggested by Mr Goffe as being a reasonable award seems to me to be more acceptable and in keeping with what would be regarded as not out of line with what would qualify as being a just award under present day standards, and that is the sum which will be allowed.

3. Pain and Suffering

It is this part of the claim which must clearly attract the lion's share of the award under this head of general damages. There is no gainsaying the fact that given the plaintiff account of the sheer agony he underwent

following the collision which is fully supported by the medical evidence of both Dr. McCartney and Professor Sir John Golding and which had already been alluded to, the plaintiff experienced considerable and excruciating pain over a long interval and during which periods he was for the most part helpless and although he has now reached the maximum state of recovery, his condition has been assessed by Professor Golding as being of a range of disability amounting to 37% of the whole person.

In contending for an award of \$500,000 Mr Frankson sought to highlight the various areas on the plaintiff's person that received the most severe injuries while at the same time not being aware of the fact that Professor Golding was most careful to highlight these factors in his evidence in arriving at his final assessment. Although one will of necessity being human feel a great measure of sympathy for the plaintiff not only for the extreme suffering that he had undergone, both from what has happened to him as well, having lost his wife and other members of his family in the accident, this, however, cannot be the yardstick by which the measure of damages falls to be determined. While no pecuniary award can adequately compensate him for what has now befallen him, the sum to be awarded ought to be such as to afford reasonable compensation to him for the past, present and future suffering which he will have experienced.

The fact that he has since the incident remarried will mean that he will at least, not have to face the future alone. Learned Counsel relied in support on the following cases:-

1. Ellis vs. I.C.I. - 40% burns an award in 1963 of \$150,000.
2. Morgan vs. J.C.S. Ltd. pp. 2 of Volume 2 of Mrs Khan's work on Personal Injuries Awards - an award of \$245,000 of which \$110,000 was for Pain and Suffering in 1966.
3. Michael Campbell vs. Ernest Allen Supreme Court Suit C.L. 681/1987 unreported Judgment of Harrison J. delivered on September 29, 1989. 20% permanent partially disability of each leg caused from accident in November 1987. Plaintiff a Hawker and Peddler can now no longer play football and cricket award of General Damages of \$307,520 of which \$297,000 was for pain and suffering and \$10,000 for loss on the Labour Market.
4. Desmond McLean vs. Yorkwin Walters and Another Supreme Court C.L. 1007/1988 Judgment of Patterson J. delivered on July 9, 1989 operation necessary to

correct disability without which surgery the plaintiff would suffer a 20% disability of the whole person. Award for General Damages of \$190,000. The plaintiff in this case was a Sergeant of Police.

I must observe from the outset that the sum of \$500,000 for pain and suffering canvassed by Mr Frankson is totally out of kline with comparable awards for injuries falling within the category as that in the instant case. By the same token I cannot say that the sum of \$250,000 as canvassed by Mr Goffe is so inordinately low as to be regarded as an unreasonable award. I am buttressed in this regard by the award in 1986 of \$110,000 by Patterson J. in Morgan vs. J.O.S. Ltd. (referred to Supra) which when increased having regard to the spiralling effect of inflation on the value of the Jamaican dollar can be equated with the sum being suggested by Mr Goffe.

I would also rely upon C.L. G 104/89 Laurel Garrick and Ronald King an unreported Judgment of this Court delivered on 12/7/90. The facts briefly summarised were that the plaintiff a Graduate Teacher was on June 20, 1986 seriously injured when a Mini bus in which she was travelling overturned on the Spanish Town by Pass. She received very serious injuries to the neck region, the 5th and 6th Cervical Vertebra; her left shoulder and left hand which is now rendered almost useless. In addition she has now to wear a cervical Collar for the remainder of her life. her total disability was assessed by Dr. Christopher Rose, an Orthopaedic Surgeon at 25% of the whole person. Despite this severe handicap she continues to function as a Lecturer at a Tertiary Institution and is at present pursuing a Post Graduate Degree in her chosen field, an award for pain and suffering of \$140,000 in July 1990 was considered as reasonable in the circumstances of the case.

When one compares these two cases with the instant case allowing for the necessary upward adjustment to allow for the more serious nature of the injuries suffered by the Plaintiff and the increased assessment of his disability, then the sum of \$250,000 can be regarded as more in keeping with what can rank as being in the nature of a reasonable award. This can be justified when one considers the fact that although the plaintiff is now engaged in a more sedentary type of occupation, he is nevertheless engaged in useful work and can continue to make some contribution to the Army to which he has expressed himself as being

loyal and most devoted.

Having regard to the foregoing the sum awarded for general damages amounts to \$310,637.63¢ and the total damages will be assessed at \$310,977.63¢ with costs to be agreed or taxed being:-

1. Special Damages	\$340
2. General Damages for Pain and Suffering and Loss of Amenities and including a sum of	\$45,637.63¢
for Loss of future earnings and \$15,000	
for handicap on the labour market	<u>\$310,977.63¢</u>
	\$310,977.63¢

Interest on Special Damages at 3% from 23/5/83 to 29/11/90 and on General Damages at 3% from the date of entry of appearance, 9/7/85 to November 29, 1990.

Judgment entered for defendants against 3rd party for 40% of such sum as is payable to the plaintiff by defendants.

Costs of third party proceedings to be paid by 3rd party to the defendants.