Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L.D.171/1984

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| BETWEEN | PAUL DOWNER | PLAINTIFF |
| AND | TYRONE CHEN AND | |
| | SEAN CHEN | DEFENDANTS |

Arthur Williams Jnr. for plaintiff.

Patrick Foster for the instructed by Dunn, Cox & Orrett.

Hearing on November 12,1992
February 22, 23 and
September 23, 1993.

JUDGMENT

Bingham J.

On Saturday 8th April 1984 in the early afternoon around 2.00 P.M., there was a collision between a Volkswagen Van owned and driven by the plaintiff and a B.M.W. motor car jointly owned by the defendants and driven by the second named defendant Sean Chen. The collision occurred on the main road leading from Denbeigh to Vernamfield, in Clarendon at a 'blind' curve while both motorists were in the process of negotiating the corner.

The respective accounts given by both drivers sought to attribute the blame for the collision on the other by describing the approach and position of the other vehicle as travelling at a fast rate of speed and on the incorrect side of the roadway. Given the real evidence which is contained in exhibit 1-5 these being photographs taken. of both vehicles at the scene following the collision, however, it is clear that the collision occurred at the blind curve, at or about in the apex of the curve and that in all probability neither motorist was keeping a proper look-out prior to the collision taking place nor saw the other vehicle approaching until the collision was imminent. It is further on the evidence common ground that neither motorist on appraoching this blind corner which was described on the

evidence as being a right angular corner, sounded his horn to signal the presence of his vehicle. Needless to say that the accounts of both drivers, as is customary in cases of this nature, sought merely to place both vehicles on its correct half of the road properly observing 'the rules of the road' and proceeding at a speed within the permitted speed limit. With such ideal conditions prevailing as the evidence given indicated and on what was said to be a clear day both drivers ought to have had not the least difficulty in negotiating his vehicle pass the other without incident. The fact that a collision occurred while they were negotiating what was a right angular section of the curve and not at the begining or near the end of the corner as one travelled in the direction of Denbeigh, depending on which of the two accounts of the collision one chooses to accept, rules out either account being frank and truthful so as to render it reliable.

The plaintiff's account was further discredited as he sought to relate a story of a collision involving not only his vehicle and the B.M.W. car driven by Sean Chen, but related an account in which after this collision a red Vauxhall car following behind the B.M.W. car collided into the rear of that vehicle. Not only does an examination of the photographs taken at the scene of the accident (Exhibits 1-5) rule out this as being factual in so far as it does not indicate any visible damage to the rear of the B.M.W. car, a situation which given the relative speed of 40-45 miles per hour, which the plaintiff attributed to the driver of that vehicle as well as the Vauxhall motor car, had this account been true one would have expected considerable damage to be done to the front and rear of the B.M.W. and the front of the Vauxhall motor car. Although the plaintiff testified that following the accident he observed damage to the right tail lamp of the B.M.W. on being shown Exhibit 2 and in answer to a question asked by the Court he admitted that on looking at the Exhibit he saw no damage to the rear of the B.M.W.

It was common ground and not in dispute on the evidence, however, that at the point of impact the road was wide enough to accommodate both vehicles without the least difficulty. The evidence here being that the estimated width of the road was about twenty feet and the combined estimated width of the Volkswagen Van and the B.M.W. car was about ten (10) feet.

Regardless of this the right front section of both vehicles collided head-on and came to rest in about the centre of the road. Moreover, it is common ground that neither motorist sounded his horn on approaching or while in the act of negotiating this blind corner.

Conclusion and Findings.

When the respective accounts are examined, assessed and tested against the real evidence of the photographs and of the relative position of both vehicles taken at the scene following the collision, the manner in which the collision is said to have occurred lead me to infer that in all probability neither motorist was exercising that degree of skill and care which one would have expected of a reasonable and prudent driver, given the circumstances which confronted each of these two motorists on the afternoon in question. Having regard to the width of the roadway, in all probability both drivers were cutting the corner. I was lead, therefore, to reject both accounts as not credible and reliable and I apportioned the blame for the collision equally as between both drivers.

Damages.

(1) The Plaintiff's Claim

(a Special Damages

This head of the claim was not in issue being agreed to by counsel at the commencement of the hearing and fixed at $27,445.50¢.

(b) General Damages

The plaintiff suffered serious injuries to his face and his right foot. He was assisted from his van and taken by the driver of the Vauxhall car to the May Pen hospital where he was admitted and treated. He spent three days thereafter which he was transferred to the hospital of the University of the West Indies. At this hospital a pin was inserted into his leg and it was placed in traction. It remained in this condition for six (6) weeks. The plaintiff experienced severe pain for a month of this period. He remained in hospital for three months before being discharged using crutches. He continued using crutches for another six weeks. Before the accident the plaintiff led an active outdoor life. He played football and cricket for

his church. As a result of his injury he can no longer pursue these activities. Any attempt on his part to run or put pressure on his leg causes it to become swollen.

Dr. Paul Wright, an Orthopaedic Surgeon was the specialist who was responsible for treating the plaintiff. His report reveals the following:-

> "August 29, 1984 this patient was seen in the orthopaedic clinic of the University Hospital of the West Indies on the 12th April, 1984. He had injuries to his right leg and face. He did not loose consciousness. He was taken to the May Pen Hospital where he was admitted, but his relatives requested transfer to this hospital, hence his being seen in this Clinic. Examination revealed a young man in some distress.
> He had:-
> (i) missing incisor teeth.
> (ii) loose, soft tissue-gums right mandible.
> (iii) sutured laceration to chin.
> (iv) swollen tender, deformed right thigh.
> X Rays revealed a comminuted fracture of the right femur on an alveolar segmental fracture of his mandible. He was admitted to the orthopaedic ward where his factured femur was treated with skeletal traction via a **tibial** steinman pin. His alveolar fracture was treated with an arch bar, which was put in place by the oral surgeons. On 22nd May, his fractured femur was immobilished in a plaster of paris hip spica and he was discharged home on 24th May, 1984.
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> On the 5th July, 1984 the plaster was removed and the fracture was healed. Partial weight bearing on crutches was allowed and knee bending exercises advised. On the 19th July, he was walking with the assistance of one crutch. He was able to flex his right knee up to 70°. Mr. Downer was totally disabled from the 8th April, 1984 until the 5th July, 1984. He then had a 30% disability which should improve with time."

In 1990, Dr. Wright revised his assessment of the plaintiff to 15% permanent partial disability of the right foot or 6% of the whole person.

In fixing a reasonable sum to be awarded for general damages for pain and suffering and loss of amenities the following awards were referred to by Counsel. These were all part of Mrs. Khans valuable compilation "Personal Injury Awards Made in the Supreme Court of Jamaica."

Mr. Foster for the defendant relied on C.L.182/G174 Clive Gordon v Desnoes and Geddes Ltd et al Volume 3, p.59. before Edwards J an assessment on the

30th January 1990. The facts were that the plaintiff aged 30 was injured in a motor vehicle accident on the 22nd September, 1986. He suffered the following injuries:-

(1) Fracture of the Mandible.

(2) Severe fracture dislocation of left wrist.

(3) Comminuted displaced fracture of the right femur.

The disability of the plaintiff was assessed by Dr. Grantel Dundas at a 11% permanent partial disability of the upper and lower limbs.

An award of $100,000 was made for general damages for pain and suffering and loss of amenities. When updated to February 1993 this sum would result in an award of $223,000.

Mr. Williams for the plaintiff relied on the following:-

1. C.L.1987/M072 Arlington Myers v Sandra Bent Buxton et al Volume 2. p.84. before Vanderpump J. on 24th February 1984. The facts were that the plaintiff aged 31 an hardware and grocery store owner and farmer was injured on 8th November, 1980 in a motor vehicle accident. He suffered the following injuries:-

(1) Fracture to the middle of the right femur.

(2) Comminuted fracture of the proximal third of right tibia.

(3) Abrasions to right leg.

He was totally disabled for seven (7) months. Unable to squat fully. Experiences discomfort when driving for long periods. Injuries were assessed at 15% permanent partial disability of the right lower limb.

An award of $45,000 was made for general damages which when updated to February 1993 would attract an award of $338,000.

2. C.L.1988/L051 Winston Layne (b.n.f. Stanley Layne v Beverley Dryden, Volume 3, p.71. assessment before Malcolm J. on 25th March, 1987. The facts were that the plaintiff an infant aged eight (8) years was injured in a motor vehicle accident in 1979. He suffered a badly crushed right lower limb with compound fracture of the right tibia and fibula, accompanied by shock and substantial loss of blood.

The injuries were assessed at a 15% permanent partial disability of the right lower limb. An award of $70,000 was made for general damages which sum when updated to February, 1993 would attract an award of $304,000.

Given the fact that the injuries to the plaintiff in Gordon v Desnoes and Geddes Ltd et al (referred to supra) were on a some what higher plane than those to the plaintiff in the instant case Mr. Foster submitted that a reasonable award ought to be in the range of $170,000 to $180,000.

Mr. Williams not to be out done submitted that the injuries in the Gordon case was not as serious as those suffered by the plaintiff in this case. With this I must respectfully take issue as it would be difficult to find two cases where the facts bore a more marked similarity to each other. The only difference being the presence of a third fracture to the left wrist in the Gordon case. This, however, is counter-balanced by the loss of teeth in the instant case. For the purposes of assessment therefore, I find that the Gordon case to be that which most closely approaches the facts in the instant case. The two main injuries being of a marked degree of similarity. As for the suggested awards made by counsel the fact that, learned counsel for the plaintiff opted for a higher figure and learned counsel for the defendant sought to lean in favour of suggesting a lower award is by now a state of affairs not out of line with the current practice at the Bar. What is left for the Court is to arrive at an award which can best meet the justice of the case. This generally is a sum, an approximate mean average figure, somewhere between the two extremes suggested by counsel. Taking this guide into consideration and keeping uppermost in my mind the fact that the inflationary spiral has continued unabated I would consider that a reasonable award to the plaintiff for general damages for pain and suffering and loss of amentities ought to be $300,000.

(2) The Defendants Claim.

(a) Special damages.

This head of the second defendant's claim was agreed on by Counsel and fixed at the sum set out in the particulars of special damages, in the defence and counter-claim, being $15,504.00.

(b) General damages.

The nature and extent of the defendants injuries are best described in the medical report of Dr. G.W. Smith who attended on the defendant Sean Chen at the Saint Josephs Hospital. This report reads as follows:-

"Medical Report 30/11/84
Re Sean Chen.
He was allegedly involved in a motor vehicle accident 8/4/84 and was admitted to May Pen Hospital that day. He was discharged on 9/4/84 and was seen by me for the first time on that day. On examination then the following was found:-

(1) Abrasions to the upper mid chest.
(2) Sutured laceration to right knee.
(3) Large pneumothorax (i.e. air in the left chest cavity).
(4) Small haemothorax (i.e. blood in left chest cavity. He was admitted to hospital again that day.

"Treatment then included:-

(1) Analgecics
(2) Antibiotics
(3) Sedatives
(4) Physiotherapy
(5) Insertion of an intercostal chest tube to the left chest and connection to the underwater seal drainage. This was done in the operating theatre. The chest tube was removed 11/4/84 and a repeated X Ray of the chest revealed that the left lung had re-expanded fully. On the 12/4/84 the right knee was noted to be infected hence the sutures were removed and daily dressings done to the area. He was discharged from hospital 14/4/84 and seen again 16/4/84, and 26/4/84. His chest was clinically clear and the right knee was healing satisfactorily. His injuries were serious but are unlikely to produce any permanent disability apart from scarring Sgd. G.W. Smith. M.B. F.R.C.S."

Mr. Foster relied on the following awards from Mrs. Khans "Personal Injury Awards."

(1) C.L.1984/P116 Clifton Powell v Egerton Brown et al Volume 2.p.226. an assessment before Patterson J. on 24/4/85. The facts were that the plaintiff a Millwright aged 55 was injured on 9/3/84 in a motor vehicle accident. He suffered the following injuries:-

(1) Contusion of the upper back and right shoulder.

(2) Blow to the chest.

(3) Laceration and swelling of the left instep.

(4) Cut on right chin.

(5) Pain in right shoulder-persisting to November 1984.

Loss of Amenities.

Could not exercise for sometime. An award of $5,000 was made for general

damages. When updated to February 1993 would attract an award of $28,000.

(2) C.L.1981/W072 Desmond White v Attorney General for Jamaica Volume 2, p.229. a trial before Orr J. on 1/5/84.

The plaintiff an impact worker aged 26 injuried on 19/7/80 was assaulted by the police. He suffered the following injuries:-

(1) 3" x 2" bruise to back of neck.

(2) 2 small scratch marks to posterior lateral aspect of middle third of left forearm.

(3) 1" superfical abrasion just above left nipple.

(4) 8" superficial abrasion to anterior aspect of his right leg.

(5) Swollen tender right ankle. X Ray revealed no fracture.

(6) Bilateral subconjunctival haemorrhages.

An award of $7,000. was made for general damages. When updated to February 1993 this would attract an award of $35,000.

Mr. Williams in suggesting a sum as a reasonable award to be made to the defendant Sean Chen for general damages cited no comparable awards. He was of the view that having regard to the nature and extent of the injuries suffered an award of $50,000. would be sufficient to meet the justice of his claim.

Mr. Foster submitted that having regard to the more serious nature of the defendants' injuries an award in the region of $60,000. ought to be reasonable in the circumstances. This submission has much to commend it.

Having regard to the medical report there is very little that one could add that falls for consideration in arriving at a reasonable award to the defendant. There is no gainsaying that he did suffer serious injuries but given the treatment he received and with nature's intervention this has resulted in a rapid improvement in his condition and what may now be termed as a total recovery on his part to the injuries he received.

I would regard the sum of $60,000. suggested by Mr. Foster to be an appropriate sum to be awarded for general damages.

In conclusion, therefore, the plaintiff succeeds on the claim as follows:-

Judgment for the plaintiff for $327,445.50¢ with costs to be agreed or taxed, being:-

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| (a) | general damages | - | $300,000.00 |
| (b) | special damages | - | 27,445.50 |
| | | | $327,445.50 |

less 50% the extent to which he is blameworthy.

The defendant succeeds on the counter-claim as follows:-

Judgment for the defendant on the counter-claim for $75,504.00 with costs to be agreed or taxed being:-

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| (a) | general damages | - | $60,000.00 |
| (b) | special damages | - | $15,504.00 |
| | | | $75,504.00 |

less 50% of the extent to which he is blameworthy.

Interest awarded on sums for special damages at 3% as from 8/4/84 to 22nd September 1993 and on general damages at 3% as from 11/10/84 (the plaintiff's Claim) the date of entry of appearance of 2nd defendant Sean Chen and at 3% as from 3/1/85 (the date of the filing of the reply and defence to the counter-claim) respectively and 23rd September 1993.