

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1993/L042

BETWEEN HOPIE LAWRENCE PLAINTIFF
AND LORENZO GILL DEFENDANT

Arthur Williams instructed by Kelly, Williams & McLean for plaintiff

Miss Andrea Walters instructed by Brown, Llewellyn & Walters for defendant

HEARD : January 21, 22, 23 and March 23, 1998.

WALKER J.

On November 14, 1991 the plaintiff who is now 65 years of age was seriously injured when he was hit down by a motor vehicle of which the defendant was the registered owner along Brunswick Avenue in the parish of St. Catherine. As to the circumstances in which this accident occurred the plaintiff's evidence was diametrically opposed to the evidence adduced on behalf of the defendant.

THE CASE FOR THE PLAINTIFF
ON THE ISSUE OF LIABILITY

The plaintiff's case rested entirely on his own evidence. He testified that between 10.30 p.m. and 11.00 p.m. on the day in question he travelled as a passenger on a minibus from Kent Village in St. Catherine where he had been working, his intended destination being Kingston. The minibus was a right hand drive Dodge Ram vehicle. It broke down along Brunswick Avenue after which it was parked on a soft shoulder on the left hand side of that road going in the direction of Kingston. At this time the minibus was parked with

its right front and rear wheels positioned about 2 ft. on to the main road and with its park lights turned on. The driver exited the vehicle and lifted the bonnet and then from a position on the left side of the vehicle commenced to examine the engine. The plaintiff also alighted from the minibus and proceeded to lean against the right front fender of the vehicle while observing the driver's examination of the engine. As the plaintiff stood in this position he was struck on his right leg by some external force which he neither saw nor heard at any time before the impact. Be that as it may, the plaintiff was of the impression, which he expressed, that he was struck down by a motor vehicle which was at the time travelling in a direction towards Spanish Town i.e. in the same direction in which he (the plaintiff) had been travelling. The plaintiff expressly denied that the vehicle which hit him was travelling towards Linstead, and he also denied that at the time of this collision the minibus on which he had been travelling was parked on the left side of Brunswick Avenue going towards Linstead.

THE CASE FOR THE DEFENDANT
ON THE ISSUE OF LIABILITY

Lascelles Marston testified that he was the driver of the defendant's vehicle which was an Encava bus. He drove the bus from a terminus in Spanish Town towards the town of Linstead via Brunswick Avenue where he stopped to take petrol at a gas station. After completing this exercise he drove the bus in which he was carrying passengers along Brunswick Avenue at a speed of 20 m.p.h. - 30 m.p.h. On reaching a certain section of that road he observed a vehicle parked on the left hand side of the road about 1 ft. away from the kerb. This vehicle was an "open back pick-up van". He was certain that this vehicle was a van and not a Dodge Ram minibus. The van was a left hand drive vehicle

and was parked with no park lights on about 40 yards away from the gas station out of which he had just driven. There were bright street lights which illuminated that section of the road. He first noticed this parked van when he was about one chain away from it. There were concrete sidewalks on both sides of the road in the vicinity where the van was parked. There was no soft shoulder on either side of Brunswick Avenue in that vicinity. As he was in the process of passing the van the plaintiff suddenly emerged from the van through a right hand door. Having alighted from the van, the plaintiff slammed the door shut and then proceeded to run across the road and to collide into the left front fender of the bus. After the collision the plaintiff fell in the middle of the road from where he was picked up, put in a passing van and taken off to hospital. In re-examination Mr. Marston said that upon seeing the door of the parked van open suddenly he swerved his bus to the right and stopped. It was after he had taken this evasive action that the plaintiff collided into the bus. After the collision he moved the bus further to the right and parked properly.

Previously in cross-examination, Mr. Marston had given evidence which I recorded in the following terms :

“Swerved across road for a distance of about 40 feet.....
Plaintiff collided into bus after bus had stopped. Bus stopped over white line on right side of road.
I stopped bus in middle road at time I saw door fling open. Left front wheel now in middle of road. After this I moved off again swerving further to my right. Plaintiff hit into me after I made the first stop. Moved off again as I didn't know where plaintiff was after the collision.
Plaintiff collided into bus at point between front wheel and front of bus. From left entrance to front of bus is about 3 feet.”

The witness testified that at no time did he see the bonnet of the van from which the plaintiff ran raised up, nor did he observe any person standing around the van at any time. Immediately after the collision the van "drove off slowly." Mr. Marston's account of this accident was corroborated in large measure by his witness, Mr. Dennis Bacchas, whose testimony was that at the material time he was one of the passengers on the bus and saw what happened.

FINDINGS ON THE ISSUE OF LIABILITY

The plaintiff impressed me as an honest witness. He was forthright and convincing in the witness box. I accept his evidence with a single reservation only. Contrary to the plaintiff's evidence that he was struck down by a vehicle which was being driven towards Kingston, I find that that vehicle, of which Mr. Marston was the driver, was being driven in the opposite direction towards Linstead. I make this finding accepting, as I do, the evidence of the plaintiff as to the relative positions of himself and the parked minibus in which he had been travelling and relating those positions to the medical evidence that the plaintiff's injuries were substantially, if not wholly, right-sided. Then, too, there is the positive evidence of the plaintiff that he was struck on the right leg. Of course, my finding on this aspect of the matter is strengthened by the evidence of the defendant's witnesses which is to the same effect. The plaintiff's misapprehension in this regard is, I think, explicable on the ground that at the precise moment of impact he stood looking into the engine of the disabled minibus and, as he admitted, did not at any time actually see the vehicle which hit him down. Otherwise, where the circumstances of this accident are concerned I reject the evidence of the defendant's witnesses wherever that evidence

conflicts with the evidence of the plaintiff. In particular I reject the evidence of those witnesses that the plaintiff alighted suddenly from a parked vehicle and ran, and kept on running, across the road until he collided into the side of the vehicle being driven by Mr. Marston, even as that vehicle swerved to its right farther and farther away from the plaintiff. In my opinion that was a most improbable story. It painted a scenario that was not likely to result in a collision. As for the witness, Bacchas, he presented a truly pathetic figure in the witness box. His demeanour betrayed a resolve to corroborate Mr. Marston's evidence in every particular, material or otherwise, without any regard for the truth. In fact his evidence co-incided exactly with Mr. Marston's evidence. Of Mr. Bacchas I would only say the less said the better. In my judgment this accident occurred solely through the negligence of the defendant's driver in passing the parked minibus, beside which the plaintiff stood, too closely and without exercising due care and attention at the time.

Now comes the question of damages. As to the plaintiff's claim for special damages, certain items in a total sum of \$6,972.71 were agreed by the parties. That left for determination by the court compensation for loss of earnings and extra help at home for which the plaintiff also claimed under this head of damages. As to the claim for loss of earnings the plaintiff gave evidence that he was formerly employed to the Caribbean Cement Company as a casual worker. In that job he used to earn \$180.00 per hour working 8 hours, sometimes 16 hours, per week for 7 days weekly over a period of 4 months in a year. This represented an annual income of \$152,000.00. Otherwise, he did odd painting jobs payment for which he was not able to quantify. Since the accident he

had not worked, and had not been able to work, due to his continuing disability to move around without the aid of crutches which he still uses. Since his misfortune he had sought to obtain a job from his old employers and from other places without success. "No one will employ me with crutches" moaned the despondent plaintiff. On this aspect of the matter Miss Walters for the defendant submitted that the plaintiff is able to work even if not in his accustomed fields of endeavour. Moreover, she said, the plaintiff is under a legal duty to mitigate his loss. I agree. As the court was able to observe, the plaintiff is not by any means a cripple, although he does, in fact, continue to move around on crutches. And, undoubtedly, he is under a legal duty to mitigate his loss of earnings. It is clear that in the opinion of Professor Sir John Golding as expressed in his medical report dated May 28, 1993, to which I shall refer in greater detail in this judgment, the plaintiff was up to that date "quite unable to work." In that report Professor Golding recommended for the plaintiff corrective procedures that would, literally, put the plaintiff back on his feet again. Using the date of this report as a starting point, therefore, and allowing for a time span of say 18 months for the implementation of the procedures recommended in that report and for a reasonable time for recuperation thereafter, it seems to me that the plaintiff would have been able to resume doing some kind of work by the end of November, 1994. So reasoned, I would award the plaintiff a sum of \$456,000.00 for loss of earnings over a period of 3 years. Such an award is computed on the basis of proven earnings of \$152,000.00 per annum prior to the accident. With respect to the plaintiff's claim for compensation for extra help at home, counsel for the defendant concedes that the plaintiff is entitled to an award under this heading. The plaintiff gave

evidence that he expended \$1,000.00 every 6 weeks for a period of 3 years for such assistance. I accept that evidence and award him a sum of \$25,980.00 on that account. Accordingly, I award the plaintiff a total sum of \$488,952.71 by way of special damages.

The plaintiff is also entitled to an award for general damages for pain and suffering and loss of amenities. He sustained serious injuries in proof of which four medical reports were by consent of the parties admitted in evidence. Following the accident, the plaintiff was admitted to the Spanish town Hospital. In Dr. Buchignani's report the plaintiff's injuries were described as follows:-

- (1) Head injury with loss of consciousness
- (2) Fracture right femur
- (3) Fracture right ischiol tuberosity and right superior ramus of pelvis."

On November 18, 1991 the plaintiff was seen and examined at the Kingston Public Hospital. The report of Dr. Ian Neil dated March 22, 1993 disclosed the following :-

"On physical examination the following findings were noted :-

Respiratory System: tenderness right upper chest with surrounding surgical emphysema. There was adequate air entry to all zones of the lungs and breath sounds were normal.

Cardiovascular system: Normal findings.

Abdomen: Supra-pubic and right groin tenderness.

Central Nervous System: Normal findings.

Musculoskeletal System: Right lower limb shortened and externally rotated. The thigh was swollen deformed and tender. No nerve or vascular deficit was apparent in the limb.

X-rays done showed:

- i) Fracture right third rib, no haemopneumothorax
- ii) Fracture right ischial tuberosity and superior pubic ramus.
- iii) Fracture midshaft right femur.

The patient was admitted to the male Orthopaedic Ward, and given analgesics and the fractured femur immobilized with skeletal traction.

While in hospital the patient had a bout of acute gastroenteritis which resolved promptly with treatment. He also had infection of the steimman pin tract in the right leg which was treated with dressings and antibiotics.

After nearly three months in hospital the femoral fracture failed to heal hence on February 14, 1992 open reduction and internal fixation using a K-nail was done under a general anaesthetic.

His post operative course was uneventful and he was discharged from hospital on February 25, 1992 with an appointment for review in the Orthopaedic Out-Patient Clinic.

He was seen in the Clinic on March 19, 1992 at which time he complained of pain in his right knee. On examination he was found to have full range of pain-free passive movement of the affected knee but there was marked laxity of the lateral collateral knee ligament. He was referred for a course of physiotherapy and analgesics were prescribed.

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He was reviewed again on May 28, 1992. At this time he complained of pain in the hip and right thigh. He was sent for new x-rays of the affected part. These showed that the fixation device was loose. He was advised to rest the part and more analgesics were prescribed. He however continued to complain of pain. October 15, 1992 when he was last seen he was noted to be tender over the old fracture site. He was sent for new x-rays and he is to return to the clinic for re-assessment.

Mr. Lawrence was involved in an accident in which he sustained multiple injuries which were considered serious. His recovery has been very slow and associated with several complications.

He remains unable to carry out his normal activities.”

The Plaintiff was also examined privately by Dr. Emran Ali, a consultant Orthopaedic Surgeon. Dr. Ali's findings which were incorporated in his report dated February 1, 1993 were as follows:-

"He has developed non-union of the fracture with distal migration of the nail. As a result, he now has a pseudoarthrosis at the fracture site which causes severe pains on walking and has resulted in shortening of the right lower limb."

In Dr. Ali's opinion the plaintiff would require a bone grafting operation in an effort to achieve bone continuity at the fracture site. Finally, the plaintiff's condition was assessed by professor Sir John Golding whose report dated May 28, 1993 read inter alia as follows:-

"Medical Report Re Hopie Lawrence

I examined Mr. Lawrence for the purpose (sic) of writing this report on the 28th May, 1993. I had available to me copies of a Medical report written by Dr. E. Ali dated February 1, 1993 and Dr. Ian Neil dated March 22, 1993.

On examination he was seen to be a small rather frail man. There was 3" of measured shortening of the right lower extremity. There was an obvious non-union at the fracture site where the femur could be moved freely in all directions. There was 110 degrees of flexion possible at the right knee. The range of motion at the right ankle was normal, but there was a 50% reduction in the range of motion at the right subtalar joint. Radiographs showed there was a K-Nail in place, but that the fracture site was the site of pseudarthrosis (sic).

I would consider that Mr. Lawrence requires and (sic) Open Reduction and bone graft to try and secure union of the femur. Even after this is being done the right lower extremity is going to be considerably short and he will need a raise to his right heel.

At present he is quite unable to work. He has an impairment equivalent to 80% of the function of his right lower extremity, which will continue until surgery is performed. This is equivalent to a whole person impairment of 32%."

In advancing their arguments on this aspect of the matter counsel on both sides have referred the court to several authorities reported in Mrs. Khan's Reports of Recent Personal Injury Awards made in the Supreme Court and in the Harrisons' Assessment of Damages for Personal Injuries published in 1997. Nearest in point is *Hepburn Harris v Carlton Walker Suit No. SCCA 40/90*, a judgment of the Court of Appeal delivered December 10, 1990 and reported at p. 333 of the latter work, cited by counsel for the defendant. In Harris the plaintiff sustained serious injuries to his left leg and left hip. More specifically, Mr. Harris suffered a fracture of the upper end of the tibia and fibula with an unusual fracture of the acetabulum socket. Consequentially he suffered wasting of the quadruped muscles, swelling around the upper third of the left lower leg, scarring and 3/4" shortening of the left leg. He also experienced pain in the left hip. Professor Golding, Orthopaedic Surgeon, who treated the plaintiff estimated that the plaintiff had suffered impairment of 50% of his left leg and 20% of the whole person. In delivering the judgment of the Court of Appeal Rowe P. referred to the case of *Thomas v Arscott and Patterson SCCA 74/84* decided May 1986 and said:

"Thomas v Arscott and Patterson SCCA 74/84 was decided in the Court of Appeal in May 1986. Thomas suffered a wound 6" long and 4" deep to the right thigh extending 3" above the knee going proximally to the hip joint. The femur protruded through the wound. There was a comminuted circular fracture which extended to the knee joint and was, on admission to hospital, found to be contaminated and dirty. There was severe blood loss necessitating a blood transfusion. A skeletal traction was applied to the injured limb and remained

in place for over two months, completely immobilizing the patient. Complications including a chest infection developed while the patient was hospitalized. After the removal of the plaster of paris cast, X-rays revealed that the large segment of bone which projected from the wound was dead but had not separated sufficiently for safe removal. A further operation was projected. For over two years the fracture site oozed malodoursly (sic).

There was marked similarity between the injury to the plaintiff in Thomas v Arscott (supra) with that of the instant appellant. Both men suffered 3/4" shortening of the leg and both would be likely to suffer a 10% permanent disability after a second operation. Thomas was awarded \$40,000 for pain and suffering. Absent any evidence of the effect of inflation upon the value of money since 1986, the yardstick of 150% increase upon the 1986 award for a similar injury, which was used in this case represents the upper limit for such an award today."

Like Harris the instant case is one in which the plaintiff sustained serious injury to a lower limb occasioning impairment of the function of that limb. In Harris the extent of such impairment was estimated by Professor Golding at 50% of the left leg and 20% of the whole person. Furthermore, the prognosis was that Harris would suffer a permanent disability of 10% after a second operation on the leg. In the instant case the extent of the plaintiff's impairment was, at the date of his report, estimated by the same eminent orthopaedic surgeon to be 80% of the right lower leg and 32 % of the whole person. Professor Golding's opinion as expressed in that report is that Mr. Lawrence will require a further medical procedure in the nature of "open reduction and bone graft" in order to try and secure union of the femur, and that even after that is done "the right lower extremity is going to be considerably short and he will need a raise to his right heel." It is clear, therefore, that even were Mr. Lawrence to have done the procedure recommended by Professor Golding he will still be left with some permanent partial disability of not

insignificant extent. In Harris the trial judge awarded a sum of \$100,000.00 for pain and suffering and loss of amenities. That award was affirmed on appeal. It seems to me that the facts of the instant case bear sufficient similarity to the cases of Thomas and Harris to justify my using the awards for pain and suffering and loss of amenities made in those cases as a guide for determining the award I should now make to Mr. Lawrence. In today's money the award of \$100,000.00 in the Harris case, using the most recent Consumer Price Index available of 1099.2 at December, 1997, would equate to a sum of \$661,770.00. Therefore, taking into account the observation of Rowe P. as to the appropriateness of the award of \$100,000.00 in Harris' case and, also, allowing for the fact that this plaintiff will, in any event, suffer permanent partial disability of as yet indeterminate extent, I am prepared to award a sum of \$700,000.00 for pain and suffering and loss of amenities.

Accordingly, there will be judgment for the plaintiff in the sum of \$1,188,952.71 with costs to be agreed or taxed.

Interest on the sum \$6,972.71 at a rate of 6% per annum from November 14, 1991 to the date of judgment.

Interest on the sum of \$481,980.00 at a rate of 6% per annum from January 1, 1995 to the date of judgment.

Interest on the sum of \$700,000.00 at a rate of 6% per annum from the date of service of the writ of summons to the date of judgment.