57.

Judgment Book

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L. 1985/L029

BETWEEN	ASTON LOWE	PLAINTIFF
AND	TERRY GILLETTE BAKERY LTD.	1ST DEFENDANT
AND	PATRICK GRAHAM	2ND DEFENDANT

Mr. R.S. Pershadsingh Q.C. and Mr. Alvin Mundell
for Plaintiff

Mr. A. Rattray and Miss Carol Sewell instructed
by Rattray, Patterson, Rattray for the Defendants

Heard: November 15, 16, 17, 18, 1993; May 27, 1994

HARRISON J. (Ag.)

The plaintiff in this case, claims damages for personal injuries, consequential expenditure and loss sustained by negligence of the second defendant, the servant or agent of the first defendant.

The Facts:

On the 13th December, 1982, the plaintiff was riding his motor cycle on the left side of the road going towards the district of Clonmel in the parish of St. Mary when he saw a van travelling in the opposite direction, wobbling and coming two sides of the road. He bolted immediately into a gateway on the left and stopped but the van left the road and hit him off his motor cycle.

He knew nothing further until he found himself in hospital. He sustained a number of injuries and was discharged a week later.

He has strongly denied a suggestion that he was travelling on the incorrect side of the road. Rather, he has stated that he was riding on the straight, about a yard from the edge of the roadway on his correct side of the road.

Dennis Jones, Sgt. of Police, gave evidence on behalf of the plaintiff. He recalled going to Clonmel on the 13th December, 1982, and on arrival at the scene of an accident he saw a motor cycle on the left side of the road facing Highgate.

He also saw a Toyota motor truck on the right side facing Annotto Bay with its front section resting on the motor cycle which was in a gateway off the driving surface of the road. He made other observations, details of which will be referred to at a later stage of this judgment.

Sgt. Jones further testified that whilst he was on the scene he saw the second defendant. He asked him why the truck was in that position and he stated that the steering got out of control and the brakes had failed him.

Lauriston Lowe, a son of the plaintiff, was also called as a witness. He recalled sometime during the morning of the 13th December, 1982, seeing his father's motor-cycle in a gateway about some 2 ft. off the road. He also saw Mr. Terry Gillette's bread van in the gateway with the front wheels of the van resting on the motor-cycle. The second-named defendant and another man were trying to pull the motor-cycle from underneath the wheels but he told them not to interfere with it until the police arrived.

Patrick Graham, the second defendant, testified that on the date of the accident he was driving a bread delivery truck owned by Terry Gillette Bakery. His brother and one Paul Campbell were in this van and they were on their way to Annotto Bay. The morning was bright and sunny and the road surface was dry.

Whilst travelling at about 30 m.p.h. in Clonmell district and as he was proceeding down a slight grade, he saw a motor cyclist approaching him on his left side of the road. He blew his horn, applied brakes, swerved to the right and stopped in order to avoid a collision. As he went to the right and stopped, the motor cyclist swerved back to his left and collided into the front grill of the van. The rider then fell on the bonnett of the van, hit his head on the windscreen and rolled off into the road. He has maintained that only the front part of his vehicle went over to the right side of the road.

As a result of his vehicle blocking traffic going towards Annotto Bay he removed it and parked it on the right hand side of the road before the police arrived on the scene.

Graham has denied admitting to anyone that his brakes had failed him and that the vehicle's steering was defective. He also denied that he was driving from side to side across the road and that he collided with the plaintiff in a gateway off the road.

The Law:

Fox, J.A. stated inter alia, in **James v. Selvwright** 12 J.L.R. 617, at page 621:

> "For all practical as well as legal purposes, section 44(1)(a) of the Road Traffic Act divides the roadway into two halves, and identifies the particular half in which a motor vehicle shall have the right of way, depending whether it is meeting, or is being overtaken by, or is overtaking other traffic. As a result, in the event of an accident between two vehicles on the roadway, the point of collision becomes an important fact in determining fault. Proof that this point is located within a particular half of the road is capable of giving rise to an inference that the driver who should have kept his vehicle within the other half is to be blamed for the accident. The further away from the centre line this point is, the stronger may be the inferences of negligence. The legal consequence of the inference is to put an evidential burden upon the driver of the vehicle which has encroached to show that the accident was not caused through his fault. In any action for damages resulting from the collision, the extent of his liability would be largely dependent upon the degree of his success in discharging this burden .... He may be able to establish that notwithstanding his encroachment, the accident was caused either wholly, or partly through the fault of the other driver. He may also be able to prove that the accident was **unavoidable.** But if he should fail to discharge the evidential burden which is initially upon him, and there was proof only of the fact that the point of collision was on a particular half of the road, a court would be entitled to conclude the issue of liability on the basis of the inference described above."

It is also prima facie evidence of negligence if a motor vehicle leaves the road, mounts a pavement and strikes bystanders - see **Ellor v. Selfridge** (1930) 46 T.L.R. 236.

The case of **Brandon v. Osborne, Garrett & Co.** [1924] 1 K.B. 548 is authority for the proposition that where a person or third party is placed in danger by the wrongful act of the defendant that person is not negligent if he exercises such care as may reasonably be expected of him in the difficult position in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances.

The Issues:

The point at which both vehicles collided must first be determined. Was it in the road as the defence contends or was it in a gateway off the road as the plaintiff maintains. These conflicting contentions can only be resolved by examining the evidence and assessing the witnesses' credibility.

The plaintiff's evidence is that before he was hit from his motor-cycle he had left the road. He went into a gateway, and saw the van some three chains ahead "wobbling" two sides of the road as it approached him.

The second defendant on the other hand has asserted that he saw the plaintiff approaching him on the right. He blew his horn, applied brakes, swerved to the other side and stopped but the plaintiff nevertheless collided into his grill.

Sgt. Jones' evidence reveals that on arrival at the scene of the accident he saw the motor-cycle in a gateway off the road and that the front section of the van was resting on the motor-cycle. He further observed the following:

1) Drag mark 1½ chains long starting from the left side of the road and going towards the right side as one proceeded towards Annotto Bay.
2) Drag mark ending one foot from the right wheel of the truck.
3) Right front and rear wheels of the truck off the road surface and resting on a slight bank.
4) A straight road in the vicinity of the accident.
5) Damaged headlamp, park lights, indicators and front fork of the motor-cycle.
6) Damaged truck's grill.
7) Broken glass on the left side of the road facing Highgate where the truck was resting on the motor-cycle.
8) Duco droppings from both vehicles on the "ground".

I have formed the distinct impression from the evidence of the defendant that he was stationary when the collision occurred. After he saw the plaintiff approaching him on his side of the road he swerved to the right and stopped. The plaintiff then swerved back to his left and collided into the grill of his truck. From this account, the plaintiff would be moving away from the truck. How could he then collide into his grill thereby causing damages to the grill and bonnet? I am of the firm view that if the plaintiff is moving away it is most unlikely for him to have collided in the truck's grill. On the contrary, the resultant damages to the motor-cycle, that is, the front fork, headlamp, park lights and

indicators and damage to the grill of the truck are more consistent with the plaintiff's account of the truck driving into the motor-cycle.

I regard Sgt. Jones as a disinterested witness, and one who in the course of his duties went to the scene of an accident to carry out investigations. He gave his evidence dispassionately. I am convinced that his honesty is beyond reproach and his credibility is untarnished. His observations at the scene have made it abundantly clear as to the point of impact and corroborates the plaintiff's account on this issue.

I accept the plaintiff's version that he saw the second defendant's vehicle "wobbling" two sides of the road as it approached him and in an effort to escape injury he bolted into a gateway on his left side of the road. I also find that in spite of this evasive action the second defendant nevertheless collided with him. I accept the plaintiff and his witnesses as witnesses of truth and I totally reject the second defendnat's account of this accident.

I find that on a balance of probalities the second defendant was negligent in his driving and is fully to be blamed for this accident.

DAMAGES

Special

The plaintiff gave evidence of special damages in relation to medical expenses, drugs, cost of transportation, loss and damage of personal effects, extra help and loss of earnings.

Mr. Rattray cited and relied on the cases of **Murphy v. Mills** [1976] 14 J.L.R. 119; **Harris v. Walker** S.C.C.A. 48/90 (un-reported) delivered 10th December, 1990, which insist on the necessity for strict proof of special damages. He submitted that the failure of the plaintiff to provide documentary evidence to substantiate payments was fatal.

I am of the view however that the plaintiff has given credible evidence in relation to certain items under this head and I find the following proved:

a)	Medical expenses	$	2,730.00
b)	Cost of transportation	-	1,170.00
c)	Drugs and linaments		2,000.00

d)	Eye glasses broken	$ 300.00
e)	Pants and shirt destroyed	90.00
f)	Repairs to damaged denture	50.00
g)	Extra Household help (pleaded) as $60.00 per week. Oral evidence given by plaintiff as paying $120.00 per week. No amendment sought). Amount allowed - 78 weeks @ $60.00 per week	$ 4,680.00

In so far as loss of earnings is concerned, I am in total agreement with the submission of Mr. Rattray. "McGregor on Damages" 14th Edition at para. 1161 states:

> "The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for pecuniary loss he has suffered. This is today a clear principle of law."

The principle therefore, is that the injured party should be placed in the same position as nearly as possible as if he had never been injured.

The plaintiff in the instant case has failed in my view to put before this Court sufficient evidence to entitle him to this award. In his evidence in chief and under cross-examination he has stated that he did "a little electrical work among other things" prior to the accident. He has pleaded loss of earnings of $270.00 per week but he has not shown by evidence what occupation this weekly earning related to or how this figure was arrived at. There is no evidence that at the time of the accident he was employed as an electrician so as a result of the accident he lost earnings whether current or pending.

The extra help for attending to the plaintiff's animals has not been proved. The evidence has revealed that this help was required due to the absence of the plaintiff's sons from home. This help did not arise as a result of the accident. The sons were no longer at home to assist him hence the need arose for extra help.

The plaintiff is therefore awarded the amount of $11,020.00 as Special damages with interest at 3% as of the 13th December, 1982.

General

Mr. Pershadsingh invited the Court to award damages under the following heads:

i) Brain injury.

ii) Pain and suffering and loss of amenities.

iii) Loss of future earnings.

He cited and suggested several cases by which this Court should be guided in awarding damages.

Mr. Rattray on his part argued that no satisfactory evidence has been adduced to justify an award for loss of amenities and loss of future earnings. As to brain injury, he has submitted that Dr. Doorbar's evidence should be disregarded and be treated as wholly unreliable. He has forcefully argued that the Court should accept Dr. Cheeks finding that there was no evidence of brain injury.

In Mr. Rattray's view, the Court should only consider the head of pain and suffering when awarding damages. He cited several cases and suggested that a sum not exceeding $70,000.00 should be awarded under this head.

Brain Damage

I will deal firstly with the evidence relating to head injury. What is the nature and extent of this head injury? Has the plaintiff proven that he has suffered brain damage? Since any brain injury is a serious injury the resolution of this issue will effect the eventual quantum of damages to be awarded.

I have had the benefit of referring to the agreed medical report of Dr. Cheeks, Consultant Neurosurgeon, as well as assessing the evidence given by Dr. Doorbar, Clinical Psychologist.

Having observed the demeanour of the plaintiff in the witness box, it is my considered opinion and I so find that he has impressed me as an intelligent witness. He showed by his answers to questions asked of him that he comprehended them. He showed the ability to recall salient facts advantageous to his case.

Dr. Doorbar, like Dr. Cheeks, did not previously examine the plaintiff. Data was collected by both from the plaintiff himself.

Dr. Doorbar had administered psychological tests which revealed that the plaintiff was suffering from 23% intellectual impairment and 22% deficit memory function. She testified that both findings were indicative of organic brain damage.

Dr. Cheeks carried out a Computerised Axial Tomography (CAT) brain scan in order to seek confirmation of his clinical impression that there was no evidence of any brain damage. This CAT Scan was done and it confirmed that no evidence of brain damage was present.

In answer to a question put to Dr. Deotbar under cross-examination she stated " .... if subsequent to my testing it was found out that he was working as an electrician I would call him back. It can't be. It is highly unlikely. I would call him back to re-test him. Brain damage is a permanent damage so it could not be that his condition has improved." Of course, evidence has revealed to the contrary that the plaintiff has been working as an electrician subsequent to the date of the accident.

In light of the evidence I am therefore constrained to accept the objective finding of Dr. Randolph Cheeks as to the absence of brain damage. I find therefore, that the plaintiff suffered no brain damage.

Pain and Suffering

The plaintiff was admitted to the Port Maria Hospital and was discharged one week later.

Exhibits 2 and 2A, medical reports of Dr. Morais V. Guy, Physician and Surgeon of Highgate, St. Mary, show where he saw and examined the plaintiff on September 19, 1984. Clinical examination revealed:

1. Multiple healed scars to the frontal region of the scalp extending across both eyebrows.
2. Loss of sensation to the right 5th finger with no power in the finger.
3. The right 3rd and 4th fingers had diminished sensation as well as loss of power in the fingers.
4. Lavity of the right knee joint with weakness in the joint and inability to bear weight on that limb.

Dr. Guy further examined the plaintiff on the 26th September 1989 and has stated that his condition had remained unchanged. Further, it was his view that there was nerve injury in the right hand.

Dr. Roy Thomas' medical reports, Exhibits 1, 1A and 1B, have revealed inter alia that the injuries sustained by the plaintiff were not serious and should have caused no lasting disability. He finally saw and examined the plaintiff on the 1st February, 1993. He assessed loss of function in the right hand to be 7.5% and for the right knee 10%.

Dr. G.G. Dundas, Consultant Orthopaedic Surgeon saw and examined the plaintiff on the 6th September, 1991. Medical report, Exhibit 4 has revealed inter alia that:

> "From an Orthopaedic point of view he had wasting of the right forearm to the extent of 1 centimetre and 15 degree flexion deformity at the distal interphalangeal joint of the right ring and little fingers. The range of flexion was un-impaired. There was mild right thenar wasting and pallor in the hand. No true clawing was noted and his reflexes were bilaterally depressed. A bony spur was noted in the midshaft of the right humerus anterolaterally.
>
> Examination of the right lower limb revealed that he had 1 centimetre of quadriceps deficit. There was demonstrable neurological deficit. Examination of the knee showed that his collaterals were stable, but he had a positive Lachman's Test indicative of compromise of his anterior cruciate ligament. He was able to walk without a walking aid and the range of movement was very close to normal. There was no indication of impairment of his neck movements. X-rays failed to reveal any bony abnormality of his knees.
>
> Based on the demonstrable physical findings the disability related to his right upper extremity would amount to about 5% of that extremity, and to his right lower extremity about 10% of the extremity."

In summary, the medical reports indicate that the plaintiff has a 10% disability of the right lower extremity. In relation to the upper extremity the disability ranges from 5% by Dr. Dundas, 7½% by Dr. Thomas and 30% by

Dr. Cheeks. There is no evidence as to Dr. Thomas' qualifications. Dr. Cheeks is a Neurosurgeon whereas Dr. Dundas is an Orthopaedic Surgeon. I am inclined to accept Dr. Dundas' diagnostic impressions. I therefore accept and find that the plaintiff sustained a 10% disability of the right lower extremity and a 5% disability of the right upper extremity.

Loss of Amenities

The plaintiff has failed in my view to prove this loss.

Future Loss of Earning

It is subsequent to the injury but evidence must show what was the plaintiff's loss at the time of the injury which would accrue in the future. See dicta of Scrutton L.J. in the **Arpad** 1934 P. 189. The loss must be "real assessable loss sufficiently proved by evidence". See Lord Denning's dictum in **Farley v. John Thompson Limited** [1973] 2 Lloyd's Report 40.

I find that there is no credible evidence on which an award can be made under this head.

Conclusion

There is no doubt that the injuries sustained by the plaintiff must have resulted in pain and suffering. I am guided however by the statement of Campbell J.A. in the case of **Beverley Dryden v. Winston Layne** S.C.C.A. 44/87 (un-reported) that:

> "... personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."

I must also bear in mind the rapid growth of inflation and the steady depreciation of the value of the Jamaican dollar over the years when it comes to assess damages.

In the circumstances and considering the cases cited I make the following award:

For pain and suffering	$ 90,000.00

There shall be judgment for the plaintiff and he is hereby awarded $90,000.00 as General damages to bear interest at 3% as of the date of service of the Writ of Summons and Special damages in the sum of $11,020.00 with interest thereon as of 13/12/82.

The plaintiff shall have his costs taxed if not agreed.