IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1993/M-140

BETWEEN	MATTHEW McGOWAN	PLAINTIFF
AND	ERIC BLAKE	DEFENDANT

Dennis Forsythe instructed by Forsythe and Forsythe for the Plaintiff.

Debbie Ann Robinson instructed by McGlashan, Robinson and Company for the Defendant.

Heard: January 31, 2002 and August 2, 2002.

JUDGMENT

RATTRAY, J.

This action arises out of an accident which occurred on the 24th November, 1991 in which the Plaintiff, aged sixty (60) years at that time, suffered personal injuries and incurred loss and expense.

Both parties to this action were and had been good friends for a number of years. On the day in question, the Plaintiff had chartered the Defendant's truck registered No. CC 725 Q to travel from Somerset in the

parish of Saint Andrew to Whitehall in the parish of Saint Thomas to attend a funeral.

The Plaintiff's case is that on the way back from the funeral, he was seated on a cross board in the rear of the open back truck when between 10:30 and 11 p.m. the said truck, in attempting to cross over the Ramble bridge in the parish of Saint Thomas, in the words of Plaintiff,

> "...hit on the bridge and a piece of lumber fell off the truck and hit me on my right leg."

It is the Plaintiff's evidence that the Defendant, as owner and driver of the truck was responsible for his injury because of the manner in which he drove the truck, that is to say, "violently and with speed" as he approached the bridge. Further, the evidence of the Plaintiff is that the Defendant was aware of the bad road conditions on the bridge, which was under repairs. He stated that the Defendant knew that the road was closed, as there was a notice there when they were going to the funeral, but the Defendant decided to take his chance and drive on the said road. On their way to the funeral, they did not drive on the road where the accident occurred.

The Plaintiff maintained in his evidence that at the time of the accident, he was seated in the back of the truck towards the right side and the bit of lumber that hit him was a cross piece from the body of the truck,

which he described as a piece of lumber across the top of the body of the truck from one upright to the next.

Under cross examination by the Defendant's Counsel, the Plaintiff denied that he had been seated on the right wing of the truck, with one leg hanging over the side and the other on the inside of the truck at the time when the accident happened. He further denied that the Defendant spoke to him at any time about the manner in which he was seated prior to the accident.

He testified that he was seated on the cross board about six (6) inches wide which was fastened with screws and bolts inside the truck. He stated that there were eighteen (18) persons in the back of the truck with him, but at the time of the accident, he was the only one seated on that cross board, and the only one injured.

In answer to the Court, the Plaintiff stated that some of the persons in the back of truck were standing in front of him in the direction the driver was sitting. Further that the time of the funeral was 4 p.m. and that they left Whitehall, St. Thomas after the funeral at about 7:30 p.m., at which time it was dark. The distance between Whitehall and the Ramble bridge where the accident took place was about thirty (30) miles and there were no street lights in the area.

The Defendant in giving his evidence agreed;

(1) that he was the owner and driver of the truck at the material time and had been friends with the Plaintiff for many years,

(2) that the accident took place at the Ramble bridge,

(3) that the distance between Whitehall and where the accident occurred was approximately thirty (30) miles,

(4) that there were no street lights in the vicinity, and

(5) that the width of his truck was about eight (8) feet.

His case was that the Plaintiff, on the return journey from the funeral, instead of seating himself in the back of the truck, placed himself on the wing of the truck, which the Defendant described as the side of the truck about six (6) inches wide and about five (5) feet off the floor of the truck.

He testified that he first became aware of where the Plaintiff was seated when he stopped at the hill at Whitehall, St. Thomas to check if everything was allright. He told the Plaintiff to come down off the wing and he complied. However, on two other occasions on that return journey he had to stop to let off a passenger and when he came out of the truck, he observed that the Plaintiff was again seated on the wing of the truck with one leg hanging on the outside of the truck and the other on the inside. On both occasions he instructed the Plaintiff to come down off the wing and each time the Plaintiff followed his instructions.

He further testified that on the third occasion that he spoke to the Plaintiff, he reminded him that they were going down to the bad bridge. He regarded this bridge as a bad bridge because it had a lot of potholes and not because there was anything wrong with the bridge itself, the width of which was fourteen (14) feet. He stated that there was a right hand corner to go on the bridge and a pothole at the mouth of the bridge. He further stated that when easing down into the pothole, the truck rocked on the right hand side and the upright on that side of the truck hit the bridge, broke and went down between the Plaintiff's legs. At that time, the Plaintiff was seated between two uprights on the wing of the truck.

Despite the detailed description given by the Defendant as to how this accident took place, he went to admit that he did not see the upright fall on the Plaintiff and in fact, he was not aware that the Plaintiff had been injured or that his truck had hit the bridge, until after he had driven across the bridge and was turning to go to Somerset when he heard a sound and stopped. When he came out of his truck, he stated that he saw the Plaintiff sitting on the wing and there was blood running down the side of the truck.

According to the Defendant, he left Whitehall at about 3:30 p.m. and the accident took place at the Ramble Bridge at about 8:30 to 9 p.m. He admitted under examination in chief that he was familiar with the road and

the conditions of the road. However under cross examination, the Defendant stated that he did not know about the potholes on the bridge until he reached there and hit the pothole.

The pith and substance of the Defendant's case then was that the injuries to the Plaintiff were caused or contributed to by the Plaintiff's own negligence and by his conduct in disregard of his own safety, despite the several warnings of the Defendant.

Both the Plaintiff and the Defendant are men in the twilight of their years, presently aged seventy-one (71) and seventy-two (72) years respectively. This cause of action arose over ten and a half (10 ½) years ago. Having heard the evidence of the parties to this action, and after observing their demeanour in the witness box, I find the evidence of the Plaintiff more credible on the balance of probabilities.

The Defendant made assertions in his testimony which not only contradicted the evidence of the Plaintiff, which is to be expected, but also went contrary to his own evidence. He stated that he was familiar with the road conditions in the area where the accident happened and was well aware of the potholes on bridge, thereby causing him to warn the Plaintiff that they were approaching the bad bridge. However further in his evidence, he went on to state that he did not know about the potholes on the bridge until

he reached there and hit the pothole. That was his position despite his saying that he eased into the pothole.

The Defendant gave evidence that they left the Whitehall district at 3:30 p.m. and travelled over the agreed thirty (30) mile distance to the Ramble bridge and arrived there between 8:30 and 9 p.m. some five to five and a half hours later, after making three (3) stops. The Plaintiff on the other hand testified that they left Whitehall at about 7:30 p.m. and the incident happened between 10:30 and 11 p.m. The evidence of the Plaintiff is unchallenged that the funeral he was attending took place at ~~4 p.m., half~~ (1/2) an hour after the time the Defendant said they left the Whitehall area. I find it highly improbable and unlikely that a sixty (60) year ~~old man~~ would prefer to sit on the wing of a truck six (6) inches wide, as alleged by the Defendant, travelling at night on a road under repairs, rather than on the relative safety of a secured bench in the back of the truck.

I do not accept as truthful the Defendant's evidence that he could see those persons in the back of the truck by using using his side mirrors, but he was unable to see anyone who was on the wing in the position in which the Plaintiff was alleged to have been in. It is difficult to understand how the use of side mirrors would enable a driver to see anyone in the back of a truck, such as the one in this case.

It would seem logical that the use of side mirrors would assist the driver in observing any movement or activity to the side of the vehicle, whether automotive or otherwise. A person sitting with his leg dangling on the outside of the truck ought to have been detected by an observant driver.

I find that evidence of the Defendant in this regard is not only unhelpful but also unbelievable.

I further find that the Plaintiff is a witness of truth and where his evidence conflicts with that of the Defendant, I accept that of the Plaintiff.

On the ~~balance of~~ probabilities, the Court finds that the Plaintiff was seated in the truck, when the right side collided with the bridge and the upright broke ~~causing~~ him to sustain injuries to his right leg.

The Court finds further that the injuries were sustained due to the negligent driving of the Defendant at the material time, as he was driving without due care and attention. On his own evidence, he knew the road and in particular, that the bridge had numerous potholes. He therefore ought to have approached it either more carefully or taken an alternative route. Having decided to travel across a bridge fourteen (14) feet wide, and driving a truck of a width of eight (8) feet, he ought to have driven in such a manner and/or at such a speed as to avoid colliding with the bridge, which he failed to do. Having regard to all the circumstances of this case, I find the

Defendant solely responsible for this accident and liable for damages incurred as a result of the Plaintiff's injuries.

The injuries sustained by the Plaintiff as a consequence of this accident were pleaded in the Statement of Claim as follows:

(a) Six weeks hospitalisation.

(b) A 20 cm wound on right thigh.

(c) Displaced fracture of mid shaft of right femur.

(d) Significant shortening of right foot and acute limping.

The medical report of Dr. Ian Neil dated March 8, 1993 tendered and admitted as Exhibit I, confirmed the injuries pleaded and outlined details of the treatment provided to the Plaintiff while he was a patient at the Kingston Public Hospital. His injuries were considered serious, but had healed with marked shortening of his right lower limb measured at 7 cm, which caused an obvious limp. Dr. Neil was of the opinion that the Plaintiff would have been able to go back to work by August 24, 1992, nine (9) months after the accident.

The Plaintiff's claim for Special Damages was broken down as follows:

(1) Four trips to Doctor and back at $600.00 each trip - $2,400.00

Evidence given by the Plaintiff to support this expense and four (4) receipts were tendered and marked as Exhibits 2 (a), (b), (c) and (d) in proof of transportation expenses from Somerset, St. Andrew to the Kingston Public Hospital.

The Defendant's Counsel in her written submissions suggested the sum of $1,000.00 for this aspect of the Plaintiff's claim without putting forward any basis for the suggested reduction. I find that the amount claimed has been proved and award **$2,400.00** in that regard.

(2) Loss of Income ~~from~~ November 25, 1991 to August 24, 1992 at $1,500.00 per week as a farmer (9 months) - $54,000.00

The Plaintiff gave evi~~dence~~ that he worked for himself as a farmer and he had property of over thirty (30) acres of land. At the time of the accident he was reaping guango peas, limes, ackee and sour sop, but he was not utilising the whole of that land.

He stated that as a result of his injuries, he was treated at the Kingston Public Hospital where he was admitted for six (6) weeks. After being discharged, he suffered further injury to his leg when a child playing with a ball hit his injured leg and he was readmitted to hospital for a further week. The medical report indicated that x-rays done showed that he had refractured the old injury site.

The Plaintiff further gave evidence that he was affected by his injuries as his leg was not flexible and he was not able to walk properly or work on the hillside. However he went back to work after nine (9) months and lost income of $1,500.00 per week for that period, making a total of $54,000.00.

Plaintiffs are constantly reminded that when it comes to a claim for Special Damages, they are obliged to strictly prove their alleged losses. I can do no better than to refer to the often cited dicta of Lord Goddard in the case of **Bonham - Carter vs. Hyde Park Hotel Limited** (1948) 64 TLR at page 178 where he opined -

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

This guiding principle however, which has been adopted in numerous cases in this jurisdiction is not cast in stone. The Court in assessing whether or not the Plaintiff has cleared this evidential hurdle, ought to consider on the one hand the circumstances of the particular case, which would include the lifestyle of the Plaintiff and the type of business he operated, while on the other hand being cognizant of the obligation of the Plaintiff to provide proof sufficient to satisfy the Court of his entitlement to Special Damages.

The learned author of **McGregor on Damages**, 13th edition at paragraph 1392 stated:

> "However, in relation both to the particularity of special damage in the initial statement of claim and to the particulars demanded of an allegedly insufficient statement of claim, the courts are realistic and accept that the detail must be tailored to the facts. This was laid down by Bowen L.J. in **Ratcliffe v Evans** (1892) 2 QB 524 the leading case on pleading and proof of damage. In relation to special damage he said:
>
> > 'The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated.... As much certainty and particularity must be insisted on... in pleading...of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'"

I find myself in agreement with the dicta of Wolfe J.A. (Ag.) (as he then was) in **Desmond Walters v. Carlene Mitchell** (1992) 29 JLR 173 at page 176 where he stated,

> "Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organised corporation may well be what Bowen L.J. referred to as 'the vainest pedantry."

The Plaintiff in this case was a sixty (60) year old farmer at the date of the accident. While he has not provided documentary proof in support of his claim for loss of earnings, I am satisfied that he is a witness of truth and that he was unable to reap crops from his property for a nine (9) month period.

No breakdown was given to the Court as to how the figure of $1,500.00 per week was arrived at or whether that sum was a gross or net amount. In light of certain expenses that the Plaintiff outlined, such as transportation costs for his crops and fertiliser, I am satisfied that he has proven loss of earnings for a nine (9) month period at $1,000.00 per week. The award then for loss of earnings is **$36,000.00**.

(3) Consultation fee for Attorney $400.00

(4) Medical Report $300.00

The evidence given by the Plaintiff of incurring those expenses was unchallenged and I find the claims credible and reasonable in the circumstances. The sum of **$700.00** is therefore awarded for those items.

(5) X-ray fee $60.00

This item was never addressed in evidence by the Plaintiff and modest though the claim may be, the paucity of the claim does not rid the Plaintiff of his obligation to prove his case. No award is therefore made for this item.

I find that the Plaintiff has proven his claim for Special Damages in the sum of **$39,100.00.**

The Plaintiff complained that as a result of his injuries he could not walk properly as his leg was not flexible. Dr. Neil's medical report referred to the injuries as serious but has stated that they have healed "with marked shortening of his right lower limb which is causing an obvious limp."

Counsel for the Plaintiff submitted that an award for Pain and Suffering and Loss of Amenities in the sum of **$293,329.00** would be appropriate compensation for his client under this heading of General Damages. He relied on the case of **Andrew Sinclair (b.n.f. Ellen Williams) vs. Eglon Mullings,** Suit No C L 1985/S-180 – Personal Injury Cases, Case Note 1 at page 29 by Justice Karl Harrison, in which the Plaintiff sustained a fracture of the left femur and was hospitalised for two (2) months. He was awarded the sum of $32,000.00 for Pain and Suffering and Loss of Amenities on February 22, 1991. That sum converted to today's rate utilising the Consumer Price Index would amount to approximately **$275,000.00.**

He also cited the case of **Delroy McGowan (b.n.f. Rudolph McGown) vs Winston Chang,** Suit No. C.L. 1987/M023 – also at page 29 of Mr. Justice Harrison's said Case Note decided on February 25, 1991, in

which the Plaintiff suffered a fracture of the shaft of the right femur. He spent approximately one (1) month in hospital, was treated with skeletal traction and then mobilised on crutches. There was half (½) inch shortening of his right lower limb. Damages for Pain and Suffering and Loss of Amenities were awarded in the sum of $30,000.00. That figure today would amount to **$260,000.00.**

The final case cited on behalf of the Plaintiff was **Horace McLean vs Thelma Evelyn**, Suit No. C L 1983/M-041 reported in Volume 2 of Mrs. Khan's Recent Personal Injury Awards at page 82. The Plaintiff in that case suffered a closed displaced fracture of right femur, abrasion of left elbow, laceration of chin, and superficial bruises to right upper arm. He was hospitalised for thirty-eight (38) days and the permanent partial disability of his lower limb was assessed at five percent (5%). Damages were assessed at $16,000.00 on October 31, 1984, which sum today would amount to **$355,000.00.**

Counsel for the Defendant on the other hand submitted that an award **$200,000.00** was reasonable as General Damages in this matter, after taking into consideration the intervening injury. Interestingly, the awards in three (3) of the four (4) cases cited by the Defendant's Attorney at law were higher than the figure submitted on behalf of the Plaintiff.

She relied on the case of **Wade McKoy vs Hilda Beckford,** Suit No. C L 1984/M-396 found in Assessment of Damages for Personal Injuries by Harrison and Harrison at page 327. There the Plaintiff sustained a fracture of mid-shaft of left femur and a cut on the forehead and was hospitalised for twenty-five (25) days. His left lower limb was placed in traction and the fracture internally fixed. He was discharged on crutches and attended as an outpatient for five (5) months. There was residual pain in his left lower limb after prolonged driving of a motor vehicle and he was unable to flex the knee fully. His left lower limb was shrunken in size by 1 cm and shortened by 1 cm. Permanent partial disability was assessed at fourteen (14%) of the whole of the whole man. The sum awarded for Pain and Suffering and Loss of Amenities of $60,000.00 in October 1990 is now equivalent to **$570,000.00.**

Miss Robinson also referred to **Devon McFarlane vs Frederick Barnett et al,** Supreme Court Civil Appeal No. 57 of 1988, a Judgment of the Court of Appeal delivered on October 28, 1991. The Plaintiff there had a comminuted fracture of the proximal third of the left femur and right tibia and multiple lacerations on the left upper face and right leg. He was hospitalised for four and a half (4 ½) months and his residual disability consisted of multiple scars, slight bowing at the fracture site of the

femur, left lower limb was quarter (¼) inch shorter than the right and he walked with a slight limp. The Court of Appeal increased the General Damages award from $35,000.00 to $60,000.00, which today is equivalent to **$345,000.00.**

She relied also on the cases of **Nathan Clarke vs Gernel Hancel,** Supreme Court Civil Appeal No. 96 of 1989 at page 300 of Harrison and Harrisons's Assessment of Damages for Personal Injuries and the unreported case of **Louise Brown vs Thomas Chen and Michael Mendez,** Suit No. C L 1995/B-120.

In the **Nathan Clarke case**, the Plaintiff's injuries included comminuted fracture of the ~~mid~~-shaft of the right femur, lacerations to right forearm and right elbow, head injury with loss of consciousness, ten percent (10%) permanent partial disability of left lower limb. The Court of Appeal in December 1992 reduced the General Damages award from $100,000.00 to $60,000.00 which equates to **$210,000.00** at today's rate.

The Plaintiff in the **Louise Brown case** had a transverse fracture of mid-thigh of right femur, displaced transverse fracture of mid-shaft of the left leg, 1 cm shortening of left leg, osteoarthritis in knee joint, ten percent (10%) permanent partial disability of whole person (and not of the said limb as stated in the written submissions). She was hospitalised for three (3)

months and three (3) weeks and thereafter spent two (2) months in bed after release from the hospital. A sum equivalent to **$1,010,000.00** at today's rate was awarded for Pain and Suffering and Loss of Amenities.

Bearing in mind the submissions advanced by both Counsel on the issue of quantum and after examining the cases cited, I am of the view that a reasonable award for Pain and Suffering and Loss of Amenities would be **$290,000.00.** I accept Counsel for the Plaintiff's submission that the Defendant must take his victim as he finds him. Further, I am of the view that where the Plaintiff is injured as a result of the Defendant's negligence, the Defendant cannot escape responsibility in the circumstances of the present case, for the subsequent incident which exacerbated that injury. There will therefore be no reduction in this award because of the subsequent injury to the Plaintiff's leg.

Counsel for the Plaintiff also submitted that a sum ought to be awarded to correct the Plaintiff's shortened right limb. He cited the 1991 case of **Delmar Dixon v Jamaica Telephone Company Limited** referred to at page 30 of Mr. Justice Harrison's, Personal Injury Awards, Case Note 1, which contained an award of $20,000.00 to correct a deformity in the lower limb. Adopting that figure, Counsel suggested the sum of $160,421.00 for Future Corrective Surgery.

While the medical report clearly revealed that the Plaintiff's right leg was shortened by 7 cm as a result of the accident and that he walks with an obvious limp, which may be corrected by surgical intervention, no evidence whatsoever was led as to the likely cost of this surgical procedure. Nor was any evidence given of the nature of surgical involvment required, its chances of success, or whether such surgery could be performed in a public or private medical facility.

The Plaintiff cannot fill this obvious gap in his evidence by referring to a case decided eleven (11) years ago in which an award was made, based on the evidence then presented to correct a deformity, where the type of surgical procedure could be entirely different from that which may be required in the present case. No award is therefore made on this aspect of the Plaintiff's claim.

Judgment is awarded in favour of the Plaintiff against the Defendant in the sum of **$329,100.00** as follows:

Special Damages	**$39,100.00**
General Damages	
Pain and Suffering and Loss of Amenities	**$290,000.00**
	$329,100.00

Interest on Special Damages at six percent (6%) per annum from November 24, 1991 to August 2, 2002. Interest on General Damages at six percent (6%) per annum from May 6, 1993 to August 2, 2002. Costs are awarded to the Plaintiff pursuant to Schedule A of the Rules of the Supreme Court (Attorneys-at-Law's Costs) Rules 2000.