Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-341 of 1992

BETWEEN	GODFREY McLEAN	PLAINTIFF
A N D	ATTORNEY GENERAL	DEFENDANT

Ms. Carol Davis instructed by Mrs. Crislyn Bravo of Playfair, Junor, Pearson and Company.

Mr. Cordell Green and Mr. Curtis Cochrane instructed by Director of State Proceedings.

Heard: 18th, 19th, 20th and 27th March, 7th and 14th April, 1998.

COOKE, J.

JUDGMENT

On the 25th December 1991 the fire alarm bell sounded at the York Park Fire Station. The plaintiff was one of the fire-fighters on duty. He was assigned to a unit known as "the 75". This vehicle was the rescue unit. It had a single cab capable of seating the driver and two others. Behind this cab there was a bed on which there was a ladder grounded on a revolving base. In close proximity to this ladder was an operator's chair. On the way to the fire "the 75" hit a curb wall in the vicinity of the roundabout at Marcus Garvey Drive. This collision, at fairly high speed, caused the unit to tilt. The plaintiff who was travelling on the bed fell off and sustained injuries. The contest as to liability was soon abandoned. "The 75" was not designed to carry fire-fighters on the bed. Therefore to transport fire-fighters thereon in such a manner was unsafe. So the court is now faced with the assessment of damages. The first issue in this regard is the contention that the plaintiff was contributorily negligent. I now examine this.

Six fire-fighters were on the bed of "the 75". It is only the plaintiff who received other than quite minor injuries- if any at all. Now there was the factual issue - very hotly debated - as to whether or not at the time of the collision with the curb wall the plaintiff was seated in the operator's chair. The defendant is asking the court to say he was so seated. If the court were to so find, the argument is that the plaintiff well knew that to sit in that operator's chair was overly dangerous, and unsafe. Therefore he was contributorily negligent. This chair, I accept was some two feet above the level of the bed.

The defendant submits that since the only person who received other than minor injuries was he who sat in the operator's chair, then the sitting in that chair was a contributory factor in respect of the injuries he received. Under cross-examination the plaintiff admitted that he would regard it as dangerous for a fire-fighter to sit in the operator's chair on the way to a fire. But it was dangerous to travel on the bed whether in the operator's chair or not. The question posed by the court to counsel for the defendant was this:

> What is the nexus between the behaviour of the plaintiff (assuming he was sitting in the operator's chair) and his resultant injuries?

As yet there has been no satisfactory answer. There is no evidence to substantiate the contention that there was a relationship between sitting in the operator's chair and the injuries sustained. This so called circumstantial evidence as to the cause of the plaintiff alone being seriously injured is unconvincing. All the time, perhaps everyday all over the world in accidents some get hurt, others escape injury - quite inexplicably. In our country with its Christian tradition those who escape injury do so because of divine intervention. The defendant placed great reliance on **Jones v Livox Quarries Ltd. [1952] 2 QB. 608.**

In this case the headnote is as follows:-

> "In a quarry at the lunch hour the workmen and a few slow moving vehicles were proceeding down the base of the quarry to the canteen. The way was round a stationary excavator vehicle, turning almost at a right angle. A traxcavator, a tracked vehicle with a speed of 2½ miles an hour turned this corner and stopped or nearly stopped to change gear. The plaintiff had jumped on to this vehicle and then stood on the towbar at the back of it holding on to two uprights very much in the position in which a footman stood at the back of an eighteenth century carriage, so that some part of his body was behind the traxcavator. The workmen at the quarry, including the plaintiff, had been instructed not to ride on the quarry vehicles and, in doing so, the plaintiff acted in defiance of his orders. A dumper, a vehicle with a speed of 4½ to 5 miles an hour driven by a servant of the defendants, the quarry owners, with a load of stone, followed the traxcavator a few seconds later round the stationary excavator and crashed into the back of the traxcavator and the plaintiff was severely injured.
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> On the issue whether the plaintiff, by taking up this position on the traxcavator contrary to his orders in part caused his injury in that he suffered "damage as the result partly of his own fault" within the meaning of ss. 1(1) and 4 of the Law Reform (Contributory Negligence) Act, 1945, it was contended that the fact that he was exposing himself to a risk in travelling in a dangerous place, in defiance of his employers' order was nihil ad rem; it had as little to do with the cause of the injury as if the plaintiff had been shot by the negligence of a man shooting game in the neighbourhood. And it was observed that the trial judge had said: "This was a vehicle with tracks, not a vehicle with wheels, and it seems to me that in doing that, any man was running the risk, in travelling somewhere which was not a proper place to travel, of being thrown off --that is I think the risk which he ran and no other."
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> Held, that the plaintiff had suffered "damage as the result partly of his own fault," i.e., that it was caused partly by his own fault within the meaning of ss.1(1) and 4 of the Law Reform (Contributory Negligence) Act, 1945. Davies v. Swan Motor (Swansea) Ltd. [1945]2 K.B. 291, considered and applied."

It seems to me that as regards contributory negligence two questions fall to be determined. An affirmative answer to either of them will have adverse consequences to the plaintiff. The first is whether or not there is any causal connection between travelling in the operator's chair and the accident. In the Livox Quarries case, Singleton l.J. had this to say at p. 613:

> **"It was submitted to us that the prohibition against riding upon one of these vehicles was because of the danger of a man falling off, or the danger of his becoming trapped in some part of the machine. I think there is more than that to be considered. The plaintiff, in riding on the trax-cavator, was disobeying the orders of his employers. In so doing he was exposing himself to danger. It may well be that the chief danger was that he might fall off, or be thrown off, or that he might become entangled in some part of the machine on which he was riding; but those were not the only risks to which he submitted himself. He had put himself in a dangerous position which, in fact, exposed him to the particular danger which came upon him. He ought not to have been there. The fact that he was in that particular position meant that he exposed himself, or some part of his body, to another risk, the risk that some driver following might not be able to pull up in time - it may be because that driver was certainly at fault. That is the view which the trial judge took of this case, and I do not see that that is a wrong view. It is not so much a question of Was the plaintiff's conduct the cause of the accident? as Did it contribute to the accident?"**

It cannot be said that travelling in the operator's cahir contributed in any way at all to the accident. This has not been suggested. The other question has to do with whether or not travelling as the defendant claimed he was, the plaintiff contributed to the extent of his injuries. In this same Livox Quarries case Denning L.J. at p. 617 put it this way:

> **"It all comes to this: If a man carelessly rides on a vehicle in a dangerous position, and subsequently there is a collision in which his injuries are made worse by reason of his position than they otherwise would have been, then his damage is partly the result of his own fault, and the damages recoverable by him fall to be reduced accordingly."**

As I have already indicated there is no evidence to indicate that the injuries of the plaintiff "were made worse by reason of his position than they otherwise would have been." The preceding discussion has been based on the assumption that the plaintiff was travelling as the defendant asserts. It really does not matter. If he was he would not be contributorily negligent. I must say that I am inclined to the view that he was seated in the operator's chair at the relevant time. I should add that there was no prohibition against him being thus seated.

I now turn to the award for pain and suffering and loss of amenities. I set out hereunder the medical report of Dr. Emran Ali dated August 4, 1992.

August 4, 1992

TO WHOM IT MAY CONCERN

RE: GODFREY McLEAN, 40 YEARS

This patient was referred to me on March 3, 1992 with a history of being involved in a fire truck accident on December 25, 1991, at which time he suffered injuries to his right ankle for which he was treated at Kingston Public Hospital.

On examination, he had a deformity of the distal third of the right ankle with stiffness of the ankle. X-rays showed an oblique fracture of the distal medial end of the tibia with dislocation of the ankle. There was also non-union of the fracture. He was admitted to Andrews Memorial Hospital on March 9, 1992 and open reduction, screw fixation and bone grafting was done under general anaesthetic. A P.O.P. cast was applied. After a few days in hospital, he was discharged walking with the aid of crutches to be followed-up in my clinic.

The P.O.P. cast was removed on April 14, 1992 at which time the fracture was found to be solid and he was advised exercises and partial weight bearing. He was also sent for a course of physiotherapy.

He was last seen on June 9, 1992, for the purpose of medical certification. On examination, he has a well healed 6" incision scar on the medial aspect of the distal third of the right leg. The fracture is solid with a mild varus deformity as a result of which he tends to walk on the outer border of the foot. His ankle is sitff and the leg is 3/4" short. As a result he walks with a limp. This patient still complains of pains at the fracture site. He will be unable to continue as a fireman and in my opinion suffers a P.P.D. of 15-20% of the function of his right lower limb.

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ERMRAN ALI, CCH., MBBS., FRCS., FACS., FICS.,
CONSULTANT ORTHOPEDIC SURGEON

On the day he gave evidence Dr. Ali said he had examined the plaintiff within the precinct of the court and his findings were the same as that given in his medical report. It is to be noted that Dr. Ali saw the plaintiff some two months after the accident. The plaintiff gave evidence of other injuries which presumably were then of no account when he was examined by Dr. Ali as these were not mentioned in the report. I accept that there was injury to his right wrist to the elbow which necessitated the employment of a cast in that area. I also accept that there was a laceration extending from right wrist to the elbow. This laceration required stitches.

Miss Davis suggested that an appropriate award would be $960,000. She based this assessment on Brazella Edwards v Sylvia Sterling and Ingrid Sterling reported in the 4th Volume of the Khan compilation at p. 63. That case is unhelpful for there the injuries were much more severe and extensive and the resultant disability far greater than in the instant case. Let us advert to some relevant awards. In July 1983, there was an award of $5,500 in **Lucille Richards v The Attorney General and Kingston and St. Andrew Corporation.** This is reported at p. 63 in Volume 2 of the Khans compilation. There the personal injuries and resulting disabilites were:

1. Fracture dislocation of right ankle
2. Right ankle thickened.
3. Limitation of inversion and eversion

4. Not able to fully support her weight.

5. Permanent partial disability of right lower limb assessed at 15%.

This award would be converted to $110.000. In January 1985 the Court made an award of $22,000 to a factory guard aged 53 years, in **Sydney Taylor v Jamaica American Motoring Co. Ltd. and Murdock reported at p. 64 of the Volume 2 of the** Khan compilation. Here there were:

1. Fracture dislocation of left ankle.
2. Obvious limb.
3. Permanent partial disability 5% of left lower limb.
4. The medical opinion was "That at best the Plaintiff can only engage himself in a sedentary post for the rest of his life." Further the development of osteoarthritis was not remote.

This award when converted would be $300,000. There is in Volume 3 at p. 33. **Sharon Pearl Barnett v Rosemarie McLeod.** Here the award was $45,000 in January 1987. In this case there were:

1. Dorsiflexion of joint limited to zero degree and planter limited to 20 degrees.
2. Osteophyte formation of lateral and medial malleolus consistent with early arthritis.
3. Permanent partial disability assessed at 21% which converts to 8% of whole person.

This award when converted amounts to $450,000. In this same volume at p.44 our Court of Appeal made an award of $55,000 in May 1990. Here there were:

1. Comminuted compound fracture of left tibia and fibula.
2. Chronic osteomylitis with drainage sinus.
3. Persistent swelling around left ankle.
4. ½" shortening of left lower limb.
5. Stiffness of left ankle resulting in 10% - 15% limitation of movement.

When this award is converted the sum is $370,000.00.

The last case I wish to mention is in Khan Volume 4 at p. 61. It is **Roy Douglas v Reids Diversified Ltd. Rolling Stock Ltd. and H. G. Reid.** Here there were:-

1. Compound fracture of medial malleolus of right ankle.
2. Fracture of posterior malleolus of right ankle.
3. Special fracture of distal 5cm of right fibula.
4. Permanent partial disability of function of right leg assessed at 10% - 15%.

The award of $240,000 in October 1995 is now $300,000. Having reviewed these awards I make an award of $400,000. There shall be interest of 4% from the date of the service of the writ.

The plaintiff returned to work in May 1994. He had been off the job for two years and four months. He says that during that time he would have earned additional income from overtime and double-time. All the evidence indicates that for the relevant period the fire stations were woefully under-manned. It is therefore more probable than not that the plaintiff would have earned additional income as he claimed. The Court was provided with data of the additional hours which the

plaintiff worked for the year 1991. A monthly average was then struck. Applying this average to the relevant period the plaintiff would have earned $304,639. This figure must be reduced by 1/3 to accommodate statutory deductions and other contingencies. Accordingly, the award in this area is $203,083. There will be interest of 4% on this sum as of the 1st May 1994. Special damages were agreed at $2,850.00. There will be interest of 4% on this amount as of the 25th December 1991.

The plaintiff seeks an award for handicap on the labour market/loss of earning capacity. He says he has a fear that he will be 'sent home' because of his physical handicap. He also said he expected to continue in his present job if required. This plaintiff at the time of the accident had been a fire-fighter for some 17 years. At that time he had attained the rank of Corporal. In his report (supra) Dr. Ali was of the view that "He will be unable to continue as a fireman." Under cross-examination by Mr. Green Dr. Ali expressed great surprise that the plaintiff had not only returned to work as a fire-fighter but had been promoted two grades. Consequently, in his examination on that day he gave evidence, he had not inquired of the plaintiff as to the nature of the duties he now performed. Then there is the letter from Dr. H. D. Fisher which speaks for itself. It is now reproduced.

March 29, 1994

Mr. R. Kerr
Deputy Commissioner
Jamaica Fire Brigade
Orange Street
Kingston.

Dear Mr. Kerr,

RE: GODFREY McLEAN

Mr. McLean has requested that he return to work and be given light duties, while awaiting the results of his Medical Board.

He is medically fit to carry out light duties which does not involve standing for long periods, climbing ladders or any other duties which may put stress on his foot.

Yours faithfully,

H. D. Fisher, M.B., B.S.

So the medical opinion indicates that the plaintiff is unfit to work as a fire-fighter. But this is not the end of the matter. Commissioner George Benson informed the court that in 1995 the Fire Brigade embarked on a restructuring exercise. Some fire-fighters were not retained. An essential criterion of those retained was the capacity to perform as a fire-fighter. Cpl. McLean the plaintiff was not only retained but was promoted to the rank of District Officer. He had leap frogged the rank of Sergeant. In the restructuring exercise there were two panels which were involved. The first panel would conduct interviews with each fire-fighter and then there was another panel which took the final decision. The Commissioner was not on the interviewing panel but he was on the decision making panel. It was his evidence that the physical capacity of the plaintiff was never a factor in the deliberations. It was his evidence that in the restructuring exercise the medical history of each fire-fighter was taken into account. He knew that the plaintiff was in an accident but he was not aware of the extent of his injuries. Appartently the panels assumed that the plaintiff was physically competent - that his recovery was such as to place him in the class of persons who were suitable to be retained. The Medical Board of which Dr. Fisher speaks was by the time of the restructuring exercise a mere incident in the passage of time. Clearly the plaintiff did not indicate that he was unfit to be a fire-fighter. He accepted his retention as a fire-fighter and must have been very gratified when in October 1995 he was promoted to the status of a District Officer. He must have held himself out as being physically competent. I find it more than strange that this plaintiff, whose condition certainly has not deteriorated in any way since October 1995 now asks the Court for an award of $2,600,000 for handicap on the labour market. Is it that he wishes to eat his cake and have that same cake multiplied before his eyes? Is there a want of sincerity in this request of the

court? Let us look at the evidence. The plaintiff is a District Officer in operations. The Commissioner's evidence is that he is the "first line response officer." At the ringing of the bell it is all action stations. He is in command. At the scene he is expected to make a quick assessment 'run around' and deploy his crew. Further as the situation unfolds he the District Officer would make the decisions "according to the demands of containment." So the question arises as to whether this plaintiff has been performing efficiently - despite his physical impairment. It is the plaintiff's evidence that he considered himself an efficient officer. There have been no complaints as to his efficiency. It is the Commissioner's evidence that there is no concern that as to whether or not the plaintiff would be able to continue his service to the time of retirement at age 60. The Court put the following question to the plaintiff.

> "What are the circumstances which now prevail which may adversely affect your continued employment?"

His answer was a bald "physical fitness." This answer is not in harmony with the evidence unless this plaintiff has succeeded in a calculated enterprise of deception. For years he would have deceived the people of our country that although he knew he was incompetent he was enjoying a status of responsibility which involved the protection of life and property. I shudder. The plaintiff considers himself "an efficient officer." The Commissioner has received no adverse reports pertaining to the performance of his duties. However the medical reports cannot be ignored. The Commissioner was shown the report of Dr. Ali dated 4th August 1992 which he was seeing for the first time. His view was that that report concerned a position in August 1992. The review of the plaintiff in the restructuring exercise was done in October 1995. He was aware of Dr. Fisher's letter (supra). However by observation the plaintiff had

improved to such a degree that it was determined he could go back to the rigours of operational duty.

Dr. Ali's evidence was that the plaintiff would be unable to run around and scramble up ladders. The Commissioner said that if this was so then such an inadequacy would have an adverse effect on the plaintiff's duties as an operational officer. The court gave to the Commissioner a synopsis of the evidence of Dr. Ali and posed this question to him.

Question: Bearing in mind the recent medical evidence and taking into consideration the reports on McLean's performance would you care to give a view as to the Fire probability of McLean remaining in the Fire Brigade until retirement - McLean now 46 years old.

Answer: If evidence just brought to my attention is reduced to a medical report, and brought to my attention I would seek to have him Medical Boarded.

Let us now turn to the law. This court is guided by **Moeliker v A Reyrolle and Co. Ltd. [1977] 1 AER p.9.** The headnote accurately and succinctly sets out the guidelines to be followed:-

> **"In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable,**

> **which in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job, or or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate (see p. 16 c t0 17 c, p 18 a to c and p. 19 a to e, post)."**

The critical question is whether there is a substantial or real risk that this plaintiff will lose his employment before the age of retirement. There is no medical prognosis that there will be any deterioration in his condition. The plaintiff has not said that there is any deterioration. He has never brought it to the attention of the authorities that because of disability he cannot perform as a District Officer. He, on all accounts has been performing efficiently. The Commissioner is quite satisfied with his competence and had no concern as to his continued employment. However, Dr. Ali still maintains that he is unable to work as a fire-fighter. It is to be recalled his surprise when in court he heard that he was thus employed. He believed he had long since retired. He therefore had not on his last examination enquired of the plaintiff the circumstances of his present employment. The evidence suggests that Dr. Ali has been proven wrong. This plaintiff has demonstrated his capacity to perform as a District Officer. Perhaps, this is yet another example of the triumph of the human spirit over physical adversity.

The Commissioner in the question posed to him on the evidence of Dr. Ali responded that if such evidence was reduced to writing he would then put such a report before the Medical Board. He did not indicate if he would make a request for any such report. That is a matter for him. I cannot say if he asks for such a report and such is referred to the Medical Board what will be the decision of that Board. However,

it is my view that if the Board decides that he is unable to continue in his employment then the plaintiff would be in an unenviable position. That would be confirmation that he has not been honest. If that is the case - so be it. There will be no award under this head of damage.

Finally I wish to comment on the sum of $2,600,000 which was suggested as an appropriate award. This figure was based on the present salary which the plaintiff now receives. This base figure must be wrong for two reasons. Firstly, it does not take into account the pension benefits, whatever they are, which the plaintiff would get as a result of early retirement. Secondly, there is the most questionable assumption that if the plaintiff had to go on early retirement he could not find any other means of earning. The plaintiff said that this was so because all his training had been semi-military. In the Moeliker case Browne L.J. said at p. 176 b and c p. 17:

> **"I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.**
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> **It is impossible to suggest any formula for solving the extremely difficult problems involved in the second stage of the assessment. A judge must look at all the factors which are relevant in a particular case and do the best he can."**

This court has already decided that in respect of stage 1 - there is no 'substantial. or 'real' risk. If this decision was otherwise this court would have been unable to make an assessment. This is so because of the paucity of relevant factors which have been placed before the court.

It is only now left for me to say that there will be judgment for the plaintiff. He shall have his costs - to be agreed or taxed.