

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 2001/P 036

BETWEEN RICARDO PELLINGTON
 (BY NEXT FRIEND KAREN PELLINGTON) PLAINTIFF

AND CECIL BOWEN DEFENDANT

Miss Sherry-Ann McGregor instructed by Nunes, Scholfield
Deleon and Co. for plaintiff

No appearance by or for defendant

HEARD JULY 11, 2002 AND JULY 18, 2002

ASSESSMENT OF DAMAGES

Sykes J (Ag)

1. On Friday January 28, 2000 young Ricardo and his family including his mother were walking along Windward Road in the parish of Kingston. They were beckoned across the road by the driver of a coaster bus that had stopped at the pedestrian crossing. While crossing the road the bus was struck from behind by a truck owned and driven by the defendant. The bus was catapulted into Ricardo's left side.

2. He fell to the ground and seemed to have been either disoriented or unconscious. He was taken initially to the Kingston Public Hospital and then transferred to the Bustmante Hospital for Children.
3. He stayed at the hospital for one week. He felt pain in his left side. After his release from hospital he was at home for three months. While at home he was unable to carry out his household chores because of the pain in his side. He was not able to participate in either cricket or football games with his friends.
4. He says that he is now fully recovered from his ordeal and does not have any side effects from the injuries he received.
5. His mother who also testified, corroborated his evidence concerning the accident and post discharge recovery.
6. She says that during the week that he was hospitalised she travelled twice per day to the hospital from her home to see her son. She even stayed over night. Her presence quite likely contributed to Ricardo's well being and aided his recovery. She did not go to work during his hospitalisation. Each trip cost \$600.00. This amounts to \$1,200.00 per day. She made six trips to the hospital.
7. After his release from hospital she took him back thrice and each time she had to pay a registration fee of \$150.00.

MEDICAL EVIDENCE

8. A medical report dated September 20, 2000 was prepared by Dr. Colin Abel of the Department of Surgery at the

Bustamante Hospital for Children. The report has the following:

- i) tenderness over left side of chest and abdomen;
- ii) fracture of 6th, 7th and 9th rib on left side with a haemothorax on the same side;
- iii) contusion of the left lung;
- iv) approximate 10% disability.

9. It is not clear what this "approximate 10% disability" means. The plaintiff says he is fully recovered. His mother says he is fully recovered. The term is not explained in the report. Counsel was not able to assist me with the meaning of the phrase. The plaintiff and his mother do not mention any kind of disability. I therefore do not take it into account. This highlights the danger of the current practice of tendering medical reports under the provisions of the Evidence Act. If very technical terms are used or some diagnosis or prognosis is made that is not properly explained then the court may not be able to give it the consideration that is required.

10. The doctor said that when Ricardo was seen on May 11, 2000 he was showing signs of good recovery.

11. The prognosis was good and so it has turned out to be.

SPECIAL DAMAGES

12. The plaintiff claims the following as special damages:

- a. transportation cost for medical treatment \$7,200.00

b. medical expenses	\$3,240.00
c. medical report	\$1,750.00
d. loss of earnings for 2 weeks at \$4,00.00 per week	\$8,000.00

13. The details of Mrs. Pellington's daily travel during the hospitalisation of her son have already been given.
14. It is clear law that third party expenses are recoverable by the plaintiff (see *Frank Coleman v Donald McDonald & Carol Smyth* (1979) 28 W.I.R. 137 per Carberry J.A.)
15. The issue is whether this expenditure and her loss of earnings for the week of hospitalisation are recoverable. The touch stone of recoverability was stated by Carberry J.A. in *Frank Coleman v Donald McDonald & Carol Smyth* (supra). This was an appeal from the Cayman Islands to the Court of Appeal of Jamaica. Carberry J.A. undertook an extensive and exhaustive review of the case law upto that time. He noted that in the earlier cases three requirements were needed before recovery for third party expenditures was permitted. The plaintiff had to show that (i) they were reasonably necessary as a consequence of the tortfeasors conduct; (ii) the expenses would have been incurred whether or not the third party had expended the money and that the sums were reasonable and (iii) the plaintiff undertook to repay the third party. This third condition was bound up with the idea that the plaintiff had to be under a legal obligation to repay the third party.

16. The very learned Justice of Appeal noted that the third requirement led to the absurd practice (my words not his) of children and parents, husbands and wives signing contracts prepared by legal advisers so that when the trial came on the "obligation" to repay would be an established fact.
17. His Lordship noted that subsequent developments in the law virtually eliminated the necessity to establish that there was an undertaking to repay the third party. The notion of an obligation to repay the third party also disappeared with the desirable consequence that the absurd practice was interred in the legal grave yard.
18. The two other requirements were still left intact. Thus in *Coleman's case* (supra) the defendant was not able to escape the plaintiff's claim to recover expenses covered by insurance.
19. In *Thomas v Arscott* (1986) 23 J.L.R. 144 the plaintiff recovered the cost of his mother's travels to take him vegetarian dishes. Giving high priority to gastronomical delights Rowe P said that a vegetarian who is hospitalised ought not to be compelled to have meat dishes and if costs are incurred in procuring vegetarian dishes then they are recoverable. The learned President endorsed the analysis and conclusion of Carberry J.A. in *Coleman* (supra).
20. Even as recently as 1994 the House of Lords said that "a plaintiff who establishes a claim for damages for personal injury is entitled in English law to recover as part of those damages the **reasonable value** of services rendered to him gratuitously by a relative or friend in the provision of nursing care or domestic

assistance of the kind **rendered necessary** by the injuries the plaintiff has suffered" (see **Hunt v Severs** [1994] 2 A.C. 350 per Lord Bridge of Harwich at 355).

21. When the decisions cited are examined they show that there ought to be clear evidence that the expense incurred by third parties was necessary and reasonable. One simply cannot just say the expense was incurred and expect the court to give the evidence the breath of life. In some cases the necessity of the expenditure will be obvious but in others more than the mere fact of incurring the expense is necessary. The case of **Johnson v Browne** (1972) 19 W.I.R. 382 makes this very clear. The husband was not able to recover either the cost of his wife's flight to Canada or her loss of earnings for the time was not at work. It also makes clear that familial relations without more is not a sufficient nor even a necessary basis for recoverability. The expense must be shown to be both necessary and reasonable.
22. I must say that this is a border line case. She says that she stayed with her son during the nights; dressed him in the mornings and saw to his ablutions.
23. I take into account that the plaintiff here is a young child. The evidence given on this aspect of the claim is very slender but I will err on the side of recoverability.
24. Her evidence is that she earned \$1,800.00 per week and not \$4,000.00 as pleaded. She can recover the \$7,200.00 for travelling expense and two weeks loss of earnings at \$1,800.00 per week.

25. In respect of medical expenses she said that she paid \$150.00 on the three visits to the hospital after her son was discharged. That amounts to \$450.00. No other medical expenses were proven.
26. The medical report was paid for by her attorneys. That was the evidence. This shows that it was a litigation expense and not an expense incurred for medical care and treatment. The sum of \$1750.00 is not recoverable.

GENERAL DAMAGES

27. On this aspect of the case counsel cited *Corine Peart v Chin's Transport Ltd. & Hayden Smallwood*, (suit number was not stated) Harrison and Harrison, *Assessment of Damages for Personal Injury*, at page 95. There the plaintiff suffered five fractured ribs, tenderness and swelling over right lower chest with severe pain in the right chest. The assessment was done on July 26, 1991. The sum awarded was \$65,000.00. The cpi at the time was 219.2. The cpi in April 2002 was 1475.9. This gives a current value of \$473,652.83.
28. She also referred to *Eroy Willary v Happy J's Transport Ltd* [Suit No. C.L. 1986/W430] in Harrison & Harrison at page 95. The plaintiff suffered multiple rib fractures and right haemo-pneumothorax. There was no permanent disability. The plaintiff experienced chest pains for 6-9 months. The assessment was done on July 23, 1991. He was awarded \$50,000.00. The report of the case does not say how many ribs were fracture. The current value of the award using the April 2002 cpi is \$336,656.02.

29. In the present case the plaintiff had three fractured ribs and pain for at least three months after the accident. There is no reliable evidence of any permanent disability despite the doctor stating in his report that there was "approximately 10% disability".
30. I therefore award the sum of \$390,000.00 for pain and suffering and loss of amenities.

TOTAL AWARD

31. The awarded comprises:

SPECIAL DAMAGES

Transportation	\$ 7,200.00
Medical expense	\$ 450.00
Loss of earnings	\$ 3,600.00
TOTAL	\$11,250.00

This sum attracts an interest rate of 6% from January 28, 2000 to July 18, 2002.

GENERAL DAMAGES

Pain and suffering & loss of amenities	\$390,000.00
---	--------------

This sum attracts an interest rate of 6% from August 16, 2001 to July 18, 2002.

Costs are awarded to the plaintiff in accordance with schedule A of The Rules of the Supreme Court (Attorneys At Law's Costs) Rules 2000.