

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 2004 HCV 2899

BETWEEN	STEVEN SPENCE	CLAIMANT
AND	JOSLYN PRYCE	1 ST DEFENDANT
AND	DAVIOT PRYCE	2 ND DEFENDANT

Miss Christine Hudson instructed by K.C. Neita & Company
for the Claimant

Mr. Manley Nicholson instructed by Nicholson, Phillips for the Defendants

Negligence – Liability – Quantum of damages

Heard: 3rd November, 2008

CORAM: MORRISON, J (Ag.)

Day had given way to night, night was calamitous for the Claimant. This farmer and coalsmith of Northhampton, St. Elizabeth was driving his motorcar registered 2010 DJ along the Longwood main road, St. Elizabeth when he was thumped as a result of an accident involving another motor car registered at 1560BV then being driven by the second Defendant, the servant and/or agent of the 1st Defendant.

As the central issue is one of fact it is apposite that I have recourse to the pleadings on both sides.

The particulars of negligence relied on by the Claimant are that the second Defendant –

- (a) drove at a speed which was excessive in the circumstances;
- (b) drove onto the wrong side of the road and there colliding with the Claimant;
- (c) failed to keep to his correct driving side of the said road thereby colliding with the Claimant's motor car;
- (d) failed to negotiate a corner without encroaching on the Claimant's correct driving side of the roadway;
- (e) failed to have any or any proper look-out or to have any or have sufficient regard for other traffic and in or particular to oncoming traffic;
- (f) placed the Claimant in a dilemma by failing to keep to his correct driving side of the said road
- (g) failed to stop, slow down, swerve or turn aside in sufficient time to avoid being or becoming a danger to vehicular traffic and in particular the Claimant's motor vehicle so as to avoid the said collision;

- (h) drove outside of his correct side of the road and out of his correct and lawful lane;
- (i) drove too fast around the corner without due care and diligence and without regard to other users of the road and without regard to the nature and condition of the said road;
- (j) failed to properly and effectively negotiate a corner so as to avoid colliding with the Claimant's motor vehicle;
- (k) failed to manage and/or control his motor car so as to avoid it colliding with the Claimant's motor vehicle.

The Defendants rebuttal was a sweeping omnibus denial of liability on their part. Save for a general agreement that the accident occurred in point of fact they attributed the same to the Claimant solely. The Defendants did not countenance contributory negligence. The Defendants descended to particulars of negligence in which they claimed that the Claimant:

- 1) failed to keep any or any proper look-out;
- 2) sped excessively in all the circumstances;
- 3) drove onto the second Defendant's side of the road and there colliding with the Defendant's vehicle
- 4) failed to brake, stop, slow-down, swerve or otherwise manouvre to avoid the collision failed to heed the presence of the Defendant's

motor vehicle which was on the correct driving side of the road at all material times.

The Submissions

On behalf of the Claimant Miss Hudson has sought to eviscerate the Defendant's contention by alluding to the undermentioned.

Firstly, that the Defendant alleged in his pleadings that the Claimant was speeding yet the Claimant was not challenged in this respect by the Defendant.

Secondly, the Defendant's suggested to the Claimant that the accident happened in the middle of the road, yet, no evidence was produced to substantiate that suggestion. Further, and in any event, this vagrant suggestion differs from the Defendant's pleadings and witness statement.

Thirdly, and unhelpfully, the Defendant has not in his evidence or pleadings evouched as to what he did in order to avoid the accident.

Again, so the Claimant argues, the lone independent witness called by them was not challenged by the Defendant as to his actual

visit to the *locus in quo*; the time that he went to the *locus in quo* and the position of the vehicles as they were seen at rest.

Finally, the Claimant submitted that the Defendant at no time on the pleading or otherwise, except in final submission, raised the issue of contributory negligence.

The Claimant relied on the cases of **John Shirley v. Jamaica Premix Ltd & Hopeton Smith, Suit No. CL 1991/S 105** and **Arthur Lee & Another v. Richard Belnavis, SCCA No. 28/90** as authorities for the proposition that general damages ought to be awarded to the Claimant in the sum of \$2,800,00.00. Both cases are reported in Assessment of Damages for Personal Injuries, Vol. 2 Harrison & Harrison pages 354 and 214, respectively.

The submissions above were resisted by the defence. The defence posited that there are inconsistencies of the account given by the Claimant in contrast with the diagram produced by Constable Clive Archer, police officer attached to the Traffic Department of the St. Elizabeth police station. The Defendant dilated by saying that the said diagram does not support the damage which the Claimant asserted was done to his vehicle; that the still position of the

Claimant's vehicle does not reveal any attempt by the claimant to take evasive action.

Stunningly, the broadside was launched against Constable Archer who was depicted as not being a witness of truth. Not unsurprisingly, the Defendant proponed that the Claimant and his witness ought not to be believed.

Essentially, purged to its distillation, this case, I am asked to say resolves itself on the matter of the credibility of the witnesses on both sides.

The Defendant relied on the authority of Linton Taylor v. Linford Smith and Llewellyn Clarke Suit No. C.L.1990T in proposing a sum of \$1,100,000.00 for general damages.

Finally, I have been invited by the Defendant to denounce the Claimant's case by saying that it has spawned such doubts which should be resolved by saying that the Claimant is contributorily negligent and thereby is responsible for one half of the general damages.

At once it is abundantly clear that each side is blaming the other for causing the accident. The Claimant himself gave evidence and called one independent witness, who while he was not present

when the accident occurred, managed to produce for the benefit of the court a pictorial sketch of the relative position of both vehicles after impact. The second Defendant was the sole witness called by the Defendants.

It has to be said of the Claimant that he delivered himself with disarming and unassailable forthcomingness. He was forthright. The evidence of Constable Clive Archer of the Santa Cruz Police Station though challenged by the second Defendant, is after all has been said and done, virtually impregnable. This witness for the Claimant was not beholden to either party at bar. He simply did his bounden duty with unattached objectivity.

The evidence of the second Defendant is rejected as factually untrustworthy. His evidence was characterized by non-committal answers and uneasy pauses in response to questions. I find the second Defendant to be a dissembler.

In the end the Claimant's case was accepted. Constable Archer's evidence was pivotal as it was irrefragable. His sketch of the stationery position of the vehicles after collision evinces the Claimant's contention as to the overwhelming material points raised in the Claimant's particulars of negligence.

The Injuries

The report of Dorton Jonathon Taffe, Medical Practitioner, M.B.B.S., of the Mandeville Regional Hospital was received in evidence in respect of the injuries sustained by the Claimant. It is dated 10th April, 2004 in respect of the accident of December 20, 2003. The Claimant suffered cerebral concussion, laceration to the scalp and left knee, closed fractured right femur, closed comminuted fracture of the right patella, fracture to the fifth left metacarpal and radial nerve palsy to right hand that had resolved.

The Claimant was hospitalized at the Mandeville Regional Hospital for twenty-four (24) days where he underwent surgery, open reduction and interfixation to the left knee. Plaster of paris and skeletal traction were applied and followed up with physiotherapy.

Subsequently, the Claimant, from the report of Dr. Grantel Dundas dated March 17, 2005, was seen by the latter whose diagnosis revealed a healed fracture of the right femur with interal fixation and healed fracture of the right paella with internal fixation.

The Claimant's impairment according to Dr. Dundas was 12% as to muscle weakness in the left thigh, patellar mis-alignment of 10% of the extremity or 4% of the whole person with a present overall disability of 8% of the whole person.

From the Magnetic Resonance Imaging to the right ankle engendered by a report of October 2, 2006, the injuries appeared to have normalized to the extent that it was negative for osteochondral fracture and an incidental tiny lesion in posterior aspect of calcaneus, possibly a miniscule chondroblastoma. He concluded by saying it was an otherwise normal study.

As to special damages the Claimant canvassed unresisted claims in the sum of \$339,357.70. The only remaining issue was as to the amount of general damages.

The Law

It is the law that a driver of a motor vehicle on a public road has a duty to other road users to so manage and/or control his motor vehicle in order to prevent hurt, harm or damage to each other. In short, the law fixes him with a duty of care. This duty of care can be breached by a positive act of commission or by an omission. If by his commission or omission an accident occurs as a result of his breach he is responsible in law to that other who has been wronged.

Finally, such a duty of care and its consequent breach must result in damage to that other.

From the facts, in the instant case, on a balance of probability I find that the Defendant is beholden to the Claimant for the ensuing damage of which he is the author. Special damages being agreed beforehand I now review the cases on general damages.

In **Arthur Lee and Another v Richard Belnavis**, supra, the Claimant suffered from a displaced fracture of the midshaft of the left tibia; displaced fracture of the midshaft of the right tibia, displaced fracture of the midshaft of the right fibula and a jagged wound on the right leg with the residual deformity in both legs in the form of excessive callosus formation at the fracture sites.

On appeal the Court of Appeal affirmed the judgment from the lower court in making an award which when translated into the money of today yields \$2,200,000.00.

In **John Shirley v. Jamaica Premix Ltd. & Hopeton Smith**, supra, the Claimant suffered fracture of the right femur, blow to the right thigh multiple abrasions and lacerations over the right arm and elbow. He was awarded the princely sum of \$200,000.00 then which is valued today at \$1,599,000.00. Of the above cited cases the former is more analogous to the injuries received by the Claimant in the instant case. However, it is to be discounted as the injuries in the instant case are less severe.

Notwithstanding, this has to be contrasted with the case as supplied by the Defendant of Linton Taylor already adverted to.

In that case the Claimant suffered from a fracture of the shaft of the left femur, fracture of the upper end of the tibia, several wounds to the right hand, left foot and right wrist, laceration to the left occipital region of the scalp and right eyebrow. His whole person disability was 9%. In today's money the award of general damages appears to be the paltry sum of \$1,000,000.00.

In the case at bar the Claimant suffered residual injuries, that is, pain in his right ankle and a lack of extension to his left knee. Primarily, as I have said elsewhere, in the final analysis, there was "as evidence of osteochondral fracture with respect to the tibia, fibula and also of the right ankle. There was evidence of callus build-up at the fracture sites.

I am inclined to the figure arrived at by Defendant's counsel but will augment it to \$1,500,000.00 owing to the Claimant's residual injuries impact coupled with the Claimant's potential for developing arthritis.

In the end judgment is hereby entered in favour of the Claimant as follows:

Special damages in the sum of \$339,357.70 with interest thereon at 6% from the 28th November 2003 to the 21st June 2006 and thereafter at 3% from the 22nd June 2006 to the 24th April, 2009.

General damages in the sum of \$1,500,000.00 from 10th January 2005 with interest thereon at 6% to the 21st day of June 2006 and thereafter at 3% from the 22nd day of June 2006 to the 24th April 2009.

The Defendants are obliged to the Claimant to pay this costs generated by this trial. If these costs cannot be agreed then they are to be taxed.