IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1982/B018

BETWEEN	SOLOMON BARRETT	PLAINTIFF
AND	DENNIS DARLINGTON	DEFENDANT

W.B. Frankson Q.C. and Ainsworth Campbell for the plaintiff.

Orrin Tonsingh for the defendant.

Heard: December 6, 7, 1984, February 4, 5, 6, 1985
January 13, 14, 15, 1986 and May 8, 1986

WALKER J.

On December 17, 1977 an accident occurred along the main road leading from Bog Walk to Riversdale in the parish of Saint Catherine. It involved the plaintiff and the defendant's motor vehicle which was at the time being driven by the defendant himself. The plaintiff who alleges that he suffered personal injuries and loss as a result of this accident, in due course, engaged the services of Mr. Ainsworth Campbell, attorney-at-Law, and on January 21, 1982 suit was filed against the defendant in the Supreme Court claiming damages for negligence on the plaintiff's behalf. The suit was taken through the interlocutory stages by Mr. Campbell and the court records show that pleadings therein were closed upon perfection of the Order on Summons for Directions on February 1, 1983. Thereafter, the matter was placed on the cause list for fixture for trial. The suit eventually came on for trial before me on December 6, 1984, having come on for trial twice previously on November 7, 1983 and March 22, 1984.

At the very outset of these proceedings, and with the agreement of counsel for the plaintiff, counsel for the defendant was allowed to address certain submissions to me in limine. These submissions concerned the validity and effect of a document which was admittedly executed by the

plaintiff and under and by virtue of which the plaintiff had accepted payment of a sum of $15,000.00 in exchange for the release of the defendant and his insurers, Central Fire and General Insurance Company Limited (hereinafter called "the company") from all claims and demands whatever arising directly or indirectly out of the accident. This document which was tendered and admitted in evidence before me as exhibit 2 and which is headed "Third Party Release" reads in full as follows:

"CLAIM No. LD-50/12/77

Received from Central Fire and General Insurance Company Limited and Dennis Darlington the sum of Fifteen Thousand Dollars and.....Cents in full satisfaction of all claims costs and expenses in respect of all personal injury and loss or damage to property suffered by me whether now or hereinafter to become manifest arising directly or indirectly from the accident between Motor Vehicle No. NE-1801 the property of the said Dennis Darlington and myself Solomon Barrett which occurred at Knollis Main Road in the parish of St. Catherine on the 16 day of December 1977.

This Payment is received by way of compromise of the claim I have made and without any admission of liability on the part of the said Central Fire and General Insurance Company Limited and Dennis Darlington and in consideration thereof I do hereby release and discharge the said Central Fire and General Insurance Company Limited and Dennis Darlington and each of them of and from all claims and demands whatever arising directly or indirectly out of the said accident.

Dated the 14 day of September 1983
Signature Solomon Barrett
Address Knollis Dist. Bog Walk
Witness Eli Barrett
Occupation Machine Operator
Address Knollis Bog Walk P.O.
Witness Dudley A. Brown
Occupation Company Director
Address 1A Central Road, Kingston 10."

The defendant called two witnesses as to the preliminary point, the first of whom was Dalon Wong. This witness, who was a director of the company, testified that at the material time the defendant was the company's insured

and that a cheque in the sum of $15,000.00 was paid to, and accepted by, the plaintiff in full and final settlement of his claim. This cheque which was tendered by the witness and admitted in evidence as exhibit 1 showed that it was endorsed and negotiated by the plaintiff, a fact which was not disputed. The second, more important witness was Dudley Brown, a private investigator. Mr. Brown gave evidence that acting on the instructions of the company he visited the plaintiff on two occasions at his home at Knollis, Bog Walk, St. Catherine for the purpose of negotiating a settlement of his accident claim. He first visited the plaintiff on September13,1983 when the witness said that he proposed to the plaintiff an amount of $12,000.00 to settle and was met with a counter - proposal of $30,000.00. Thereafter, having deliberated for some time, the plaintiff eventually agreed to accept an amount of $15,000.00 in settlement of the matter. On the following day Mr. Brown returned to the plaintiff's home and, on this occasion, in exchange for the cheque (exhibit 1) which was paid to him and which he accepted, the plaintiff signed the document, exhibit 2. At this time the plaintiff's signature was witnessed by Mr. Brown and, more importantly, by the plaintiff's son, Mr. Eli Barrett, who described himself as a machine operator. Mr. Brown testified that on both occasions on which he visited the plaintiff, the latter appeared to him to have been a person of sound mind. Mr. Brown also asserted that before exhibit 2 was executed he read the contents of the document to the plaintiff and his son. The witness denied in cross-examination that in negotiating this settlement he fraudulently induced the plaintiff to accept an inadequate sum of money by way of compensation for his injuries, in the event circumventing the plaintiff's attorney-at-law of whose existence, it was suggested,

he knew or ought to have known.

The plaintiff on his part called two witnesses, namely Dr. Ruth Doorbar, a consultant psychologist and Dr. John McHardy, a consultant neuro-surgeon and now Chief Medical Officer in the Ministry of Health.

Dr. Doorbar saw the plaintiff for the first time on November 2, 1983, and again on November 5, 1983. She subjected the plaintiff to psychological tests, on the first occasion employing the "House - Tree - Person" and "Bender - Gestalt" tests, and on the second occasion the "Wechsler Adult Intelligence" test. Having administered the first mentioned test in which the plaintiff was required to produce drawings, Dr. Doorbar concluded that the plaintiff was in very poor control of his motor facilities. She also found the plaintiff to be suffering from a condition of perseberation which she described as a compulsive, repetitious form of human behaviour which was, itself, symptomatic of organic brain damage. The "Bender - Gestalt" test consisted of a series of cards with designs which the plaintiff was required to reproduce on a plain sheet of paper. From the result of this test Dr. Doorbar was able to detect in the plaintiff further evidence of this condition of perseberation. She concluded that the plaintiff had, indeed, suffered organic brain damage and was also suffering from severe depression. The third and final test was the "Wechsler Adult Intelligence" test which, primarily, comprised a block design test, a vocabulary test, a comprehension test, a memory test and an abstract reasoning test. On the basis of the results of these tests the plaintiff's I.Q. was assessed at a figure of 62 which placed the plaintiff within the range of persons

regarded as being mentally defective. From her examination of the plaintiff Dr. Doorbar concluded that it would have been impossible for the plaintiff to have comprehended the transaction of a settlement of his accident claim within a period of two months immediately prior to her examination. The witness opined that there would have been no great difference between the plaintiff's condition on September 14, 1983 (the date when the claim was purportedly settled) and November 2, 1983 (the date when the plaintiff was first seen and examined). Significantly, however, Dr. Doorbar said that in administering these various tests she gave the plaintiff verbal instructions, and it was Dr. Doorbar's belief that on each occasion the plaintiff understood what he was being required to do.

Dr. McHardy first saw the plaintiff on December 16, 1977 on which date the plaintiff was admitted to the Kingston Public Hospital. The plaintiff remained in that institution until his discharge therefrom on January 6, 1978. Subsequently the plaintiff was seen by Dr. McHardy on two occasions, namely January 25, 1978 and June 26, 1982. From his examination of the plaintiff Dr. McHardy concluded that he had sustained, inter alia, a moderately severe cerebral contusion with signs of a diffuse injury to the right side of the brain, and that as a consequence of this injury the plaintiff had been left with some residual brain damage. The witness said that his expectation was that some intellectual impairment would have resulted from the plaintiff's injury, although he was unable to demonstrate this expectation convincingly by the simple clinical tests which he conducted. On June 26, 1982, when the plaintiff visited him, Dr. McHardy said that the plaintiff and himself communicated well. At this time the plaintiff was not out-going but answered questions relevantly and to the point. No deterioration in the plaintiff's condition was then detected. It was Dr. McHardy's opinion that all useful recovery from the plaintiff's injury would have occurred

within two years after the injury was sustained.

Against the background of this evidence counsel for the plaintiff submitted that the document, exhibit 2, was obtained by fraud. Such fraud, he argued, consisted of:

(a) a deliberate and studied avoidance of the plaintiff's attorney at law by the defendant's agents who well knew that the plaintiff was legally represented;

(b) inducing the plaintiff to enter into the alleged agreement without regard to the question whether or not the compensation being offered was sufficient;

(c) failure to make any reference to the nature and extent of the plaintiff's injuries and the consequential disabilities arising therefrom;

(d) fraudulently taking advantage of the plaintiff's incapacity of which the defendant's agents knew or ought to have known;

(e) fraudulently representing to the plaintiff that the sum of $15,000.00 was all that was available by way of funds for settlement of the plaintiff's claim.

In support of his submission Mr. Frankson cited the cases of Collins v. Blantern (1784) 2 Wilson's Reports 347 and Stewart v The Great Western Rly. Company and Saunders(1866) 2 Degex, Jones and Smith Reports 319. Alternatively, counsel for the plaintiff submitted that the document, exhibit 2, was void and of no effect, it having been shown by the evidence that by reason of intellectual impairment occasioned by his injuries the plaintiff was incapable of understanding, and in fact did not understand, the true nature and effect of the document

which he signed. To put the matter another way, the plaintiff's mind did not go with the terms of the document when he signed it. In this regard counsel for the plaintiff pointed, firstly, to the evidence of Dr. McHardy which he maintained established the following facts:-

(1) that the plaintiff suffered diffuse brain damage of moderate to severe extent secondary to trauma to the right side of the head;

(2) that as a direct consequence of this injury the plaintiff became spastic and was reduced to walking with a shuffling gait;

(3) that the plaintiff suffered marked weakness to the left side of the body;

(4) that the possibility arose of the plaintiff developing post-traumatic epilepsy;

(5) that the intellectual function of the plaintiff had been impaired as a consequence of his injury, the extent of which impairment Dr. McHardy had been unable to assess.

Secondly, said Mr. Frankson, there was the evidence of Dr. Doorbar which, itself, established:

(1) that the plaintiff suffered severe brain damage which reduced him to moronic dimensions;

(2) that his intellectual capacity had been severely impaired to the extent that he could no longer operate as a reasonable human being;

(3) that the extent of the intellectual damage was such as to render the plaintiff incapable of bringing measured judgment to bear upon the implications of the offer of settlement made to him;

(4) that, inferentially, the plaintiff's mind did not go with the terms of the alleged

agreement at the time he executed it.

It was the submission of counsel for the plaintiff that both Dr. McHardy and Dr. Doorbar, who were eminently qualified in their respective dispiplines, had given entirely credible evidence which was unchallenged and should be accepted by the court. In any event counsel for the plaintiff argued that the document, exhibit 2, was not demonstrative of the principle of accord and satisfaction and could not be so regarded by the court. As illustrative of his submission in this regard Mr. Frankson cited several authorities, among them the cases of Roberts v Eastern Counties Rly Co. 175 English Reports 808; Lee v Lancashire and Yorkshire Rly Co. 1870 - 1871 6 Law Reports Ch. Appeals 527; Ellen v Great North Western Rly Co. 1900 - 1901 T.L.R. 453.

Contra, the submissions of counsel for the defendant were , in substance, that the document, exhibit 2, was a valid document, the legal effect of which was to estop the plaintiff from pursuing his claim against the defendant any further. In other words, exhibit 2 constituted accord and satisfaction in law which enured to the benefit of the defendant in these proceedings. Mr. Tonsingh's submissions were advanced on three bases, namely:

(1) that fraud had not been proven by the plaintiff;

(2) that it had not been proven that at the time of execution of exhibit 2 the plaintiff was incapable of understanding the nature of the transaction of a settlement of his claim;

(3) that, even if such incapacity of the plaintiff had been proven, there was no evidence to show that the defendant had knowledge of such incapacity.

Mr. Tonsingh was painstaking in his examination of the medical evidence adduced on behalf of the plaintiff and he submitted that that evidence fell far short of supporting the plaintiff's pleas of fraud and/or incapacity through intellectual impairment. In articulating his submissions Mr. Tonsingh questioned the sincerity of the plaintiff's plea of incapacity in light of the fact that, initially, this plea was not alleged in the plaintiff's Statement of Claim. He observed, quite rightly, that the plea first appeared in the plaintiff's Reply filed in July, 1984. Why, asked Mr. Tonsingh, was the plaintiff's incapacity not pleaded at the very outset if, in fact, such a condition existed at the time of execution of exhibit 2? A pertinent question indeed. As regards proof of a plea of incapacity, counsel for the defendant submitted that the relevant law is stated in the case of Imperial Loan Co. v. Stone (1892) 1.Q.B. 599.

Having considered the totality of the evidence adduced before me as well as the submissions addressed to me by counsel on both sides I find the following facts:-

1. That on December 17, 1977 the plaintiff was, indeed, injured in a collision which involved a motor vehicle owned and driven at the time by the defendant.
2. That, inter alia, the plaintiff suffered a diffuse injury to the right side of the brain which resulted in brain damage and some impairment of his intellect.
3. That on September 14, 1983 the plaintiff executed the document, exhibit 2.
4. That the plaintiff's signature to the said document was duly witnessed by the plaintiff's son, Mr. Eli Barrett and the defendant's agent, Mr. Dudley Brown.

5. That prior to execution of the said document the contents thereof were read to the plaintiff by the witness, Dudley Brown.

6. That such brain damage and resultant impairment of the intellect as was suffered by the plaintiff was not of such severity as rendered the plaintiff incapable of understanding the true nature and effect of the document, exhibit 2, at the time that he signed it.

7. That at the time he executed the said document the plaintiff understood the true nature and effect of the document and intended to, and did accept the sum of $15,000.00 in full and final settlement of his claim against the defendant. Here I make the observation that the plaintiff's son, Mr. Eli Barrett, was not called as a witness for the plaintiff as one might have expected; nor was any reason given for not calling him. Counsel for the plaintiff was, of course, under no duty to offer any explanation to the court in this regard. I would only say that had Mr. Eli Barrett been called as a witness he might have been able to give to the court the most valuable assistance touching the critical issue of the mental capacity of his father at the material time.

8. That, even if at the time of execution of the said document the plaintiff was incapable, through intellectual impairment, of understanding the true nature and effect of the document, the

plaintiff failed to prove that such incapacity was at the time known to the defendant (vide Imperial Loan Co. v. Stone referred to supra).

9. That the said document was in the nature of an agreement and not merely a receipt. It is on this basis, I think, that the instant case is distinguishable from Ellen's case (referred to supra). Distinguishable, too, are the cases of Lee v. Lancashire and Yorkshire Rly. Co. and Stewart v. The Great Western Rly. Co. and Saunders (referred to supra), the former on the ground that in that case the statement in the receipt could be rebutted by evidence that the plaintiff had not received the money in full satisfaction of all demands /which is not so in the instant case/, and the latter on the ground that there, as is not the situation here, a directly fraudulent and false statement was made to the plaintiff in order to induce him to enter into the arrangement upon which the company later sought to rely. Again, the case of Roberts v The Eastern Counties Rly. Co. (referred to supra) is easily distinguishad, the ratio decidendi of that case being that acceptance by the plaintiff of 2L as compensation for damages to his hat (property damage) could not be set up as an accord and satisfaction for a patent and severe injury to the brain or spine (personal injury).

10. That Dr. Doorbar's conclusion that the plaintiff could not have understood the transaction of a settlement of his claim is not supported by the results of her examination of the plaintiff and runs contrary to other evidence given by her,

and which I accept, namely that in administering the various tests to the plaintiff, she gave the plaintiff verbal instructions which he understood and afterwards carried out.

11. That the evidence of each of the witnesses, Dr. McHardy, Dalon Wong and Dudley Brown is reliable in its entirety.

12. That the plaintiff has failed to discharge the burden of proving fraud as alleged or at all. It is convenient to observe here that the cases of Wright v Burroughes, Berkeley and Leader (1848) 3 C.B. Reports 344 and Jones v Bonner and Nash 154 English Reports 476 were both concerned with the Court's attitude towards settlement of an action effected by a pauper plaintiff behind the back of his attorney. The instant proceedings do not involve similar considerations. Certainly no evidence was led before me to show that representation of the plaintiff was undertaken on a contingency basis.

13. That whether or not the plaintiff was competent to determine the sufficiency of the offer of settlement made to him is an irrelevant consideration, the instant case being one concerned with a disputed claim.

14. That the document, exhibit 2, is a valid agreement entered into between the plaintiff and the defendant, the legal effect of which estops the plaintiff from pursuing his claim in this action.

In the result I find that the burden of proving the pleas of fraud and/or incapacity alleged herein has not been discharged by the plaintiff. The preliminary point taken by counsel for the defendant, therefore, succeeds.

Accordingly, it having been conceded that such a decision as I have reached would, without further enquiry, warrant the pronouncement of a judgment in favour of the defendant, I now pronounce such a judgment with costs to the defendant to be agreed or taxed.

That, I think disposes of the issues. However, before parting finally with this matter I desire to make one observation which I consider necessary. It has to do with the manner in which the plaintiff's claim was settled. I find that this settlement was effected behind the back of the plaintiff's attorney-at-law as the evidence leaves no doubt in my mind but that at the material time the company well knew that the plaintiff was legally represented. The company, therefore, had a moral duty to present its offer of a settlement through the plaintiff's attorney-at-law and not otherwise. As it was, the conduct of the company was unethical and utterly reprehensible. It was conduct which bordered on chicanery but, as I find, did not, per se, constitute fraudulent behaviour. It is to be hoped that such conduct never recurs.