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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. B-313 OF 1988

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| BETWEEN | FELIX BEECHER | PLAINTIFF |
| A N D | ST. MARY BANANA ESTATES LIMITED | FIRST DEFENDANT |
| A N D | WINSTON BURDAH | SECOND DEFENDANT |
| A N D | MICHAEL GORDON | THIRD DEFENDANT |

Mr. Orrin Tonsingh for plaintiff.

Mr. David Batts and Mr. Ransford Braham for first and second defendants.

Ms. Dorothy Lightbourne for third defendant.

JULY 8, 9, 10, 11 AND 12, 1991
DECEMBER 19, 1991

COOKE, J.

On the 17th of November, 1987, Felix Beecher, the plaintiff in this action is a passenger in a minibus which is being driven by Michael Gordon, the third defendant. The minibus is travelling along the Castleton road in St. Mary proceeding towards Kingston. At the same time a truck, driven by the second defendant Winston Bundah, and owned by the first defendant St. Mary Banana Estates Limited is travelling in the opposite direction. Both vehicles collide. This collision is in a corner. Beecher is injured and he now brings this action seeking damages. My first task is to address the question of liability.

Beecher admits that he never saw what happened at the moment of impact. He swore that immediately after the collision, the minibus was wholely on the left hand side of road, and part of the truck was over on to the minibus' side of the road. He claimed that part of truck was over the white line for some eighteen inches to two feet. This witness is the only one who speaks positively that there was a white line in the road. If he is to be believed, the inference is that in negotiating the corner, the truck came over into the path of the minibus. Beecher said that although he would not describe Gordon the third defendant as a friend, they had been acquainted for a long time.

This is Gordon's account. He was travelling at about 25 miles per hour, keeping his vehicle about two feet from the left embankment. He saw the truck

coming about one chain away. It was in the middle of the road with the greater part over on his side of the road. It was wet. He applied brakes. He tooted his horn and stopped at which stage the oncoming truck was about 3/4 chain away. He was still hugging the embankment. Then "the truck came right down and shub in the front of bus". This was at the beginning of the corner as he approached that corner. On his evidence, he would be entirely faultless.

Bundah's evidence is to this effect. He is coming from Kingston with a load of fertilizer. It is about 3:30 p.m. As he is about to negotiate what for him was a right hand corner, he saw the minibus approaching in the middle of the road. He blew his horn and pulled futher over to his left and stopped. Thereafter the minibus went into a skid and collided into the front of his truck. He said that he had gone so far over to his left embankment that the left wing mirror of the truck was broken. On his account no blame could be attached to him.

The final witness who speaks to the question of liability is Delroy Brown. He is the managing director of D.T. Brown Construction Limited. He was called on behalf of the first and second defendants. He was on his way to Port Maria in connection with a building with which his firm was then engaged. He had been travelling behind the truck for some time. This is quite understandable for that road known as the junction road is a road of seemingly unending corners. It was his estimate that the truck was travelling at about 15 m.p.h. He witnessed the accident. He said it was a "see around corner" and the impact took place in the "apex" of that corner. It was drizzling and the road was wet. He said "I saw the minibus bow as if brake applied and it skidded into the right hand front side of truck". Further, he swore that "Just before the impact the truck was travelling about two feet from (its) left hand embankment and just before the impact it swung further to its left". It is common ground that after the collision the roadway was blocked. Brown was quite anxious to reach Port Maria but he could progress no further. The vehicles were kissing. The driver of the minibus was pinned inside. Brown produced a rope from his vehicle. This rope was attached to the truck and the front section of minibus and by the truck reversing thereafter the pinned driver was released. Subsequently, states Brown, the rear of the minibus was moved out of the road thus enabling him to proceed to Port Maria.

I regard Brown as a disinterested witness. He had no axe to grind. He gave his evidence dispassionately and I am convinced that his honesty is beyond reproach and his credibility is unfarnished. He supports Bundah in every relevant material

particular. It is my finding that at the time of the impact the truck was on its left side. I reject the contention of the third defendant that at the time of the collision the truck came over and hit the minibus which had stopped. The third defendant is wholly responsible for the collision. It is my view that the third defendant failed to safely negotiate the corner and finding himself in a predicament in applying his brakes on a wet surface, there was a skid which propelled the minibus into the truck which at all times was being controlled with due care and attention. There will therefore be judgment for the plaintiff against the third defendant.

The plaintiff is now 46 years old. Medical evidence pertaining to the injuries of the plaintiff was given by Dr. Aston Young, a registered general medical practitioner who is now pursuing post graduate studies for qualification as an orthopaedic surgeon. He describes himself as a resident in orthopaedic surgery at the Kingston Public Hospital and of the five years duration for this field of study he had completed 2½ years. He described the following injuries:

(i) 4 cm. lasceration over right eyebrow.

(ii) 2 cm. open wound over anterior aspect of right leg between knee and ankle.

(iii) comminuted and compound fracture of the tibia and fibula bones of right leg.

There was swelling and tenderness to this leg. The plaintiff was admitted to the Kingston Public Hospital on 17th November, 1987 and discharged therefrom on the 26th November, 198 . The injury over the right eyebrow was cleaned, dressed and sutured. The right leg was placed in cast which cast was from the mid-thigh to the ankle. After the date of discharge, Dr. Young subsequently saw the plaintiff on six occasions, the last being on 3rd March, 1988. At that time the cast was off but there was still reliance on crutches. There was an angulation at the point of fracture. Dr. Young who did an examination on the plaintiff within the precincts of the court is of the opinion that this angulation is permanent. He futher opined that there was a resultant partial disability of some 30% of the right lower limb and 15% of the whole body. The pleadings on behalf of the plaintiff claimed that the permanent partial disability of the left lower limb was between 10% to 15% and perhaps, now without reason, counsel now claims no more. It is the doctor's estimate that the period for the maximum recovery

would be between 12 to 18 months. Finally, there was an increased risk of osteo-arthritis in the ankle joint.

In considering the damages under the head of pain and suffering and loss of amenities, I will review some past awards. From Mrs. Khan's valuable compilation, Volume 3, there is Clifton Edwards v. Calfin Browning - C.L. 1986/E-053 - assessed on the 5th December, 1990, the injuries were:

(i) Unconsciousness for a short period.

(ii) 4 cm. lasceration over the distal third of right leg.

(iii) Compound comminuted fracture of right tibia and fibula.

(iv) Disfigurement and deformity of the right lower limb.

(v) Blow to back.

(vi) Permanent partial disability of 30% of the right lower limb which could be reduced to 15% - 20% if an operation was successfully undertaken. This disability was due to an angulation.

The award under the head of pain and suffering and loss of amenities was One Hundred and Fifty Thousand Dollars ($150.000.00). This plaintiff was aged 37 years at the time he received his injuries.

In Henry Carter v. Jamaica Inn, Carl Elleston and Lloyd Parkinson - C.L. 1984/C-437 - (Khan's compilatory Vol. 3, assessed on 15th February, 1990, the injuries were:-

(i) Severe concussion

(ii) Compound fracture of right tibia and fibula.

(iii) Post traumatic headaches.

(iv) Loss of teeth.

(v) Nausea.

The award under the head of pain and suffering and loss of amenities was One Hundred and Eighty Thousand Dollars ($180,000.00). There is no mention of any permanent partial disability. The age of this plaintiff was 41 years at the time of the receipt of his injuries.

In Lynzie Blair v. Nicholas Jones - C.L. 1987/B-428 (Khan's compilation Vol. 3) the injuries were

(i) Comminuted compound fracture of left tibia and fibula.

(ii) Multiple bruises.

(iii) Head injury.

The resultant disability consisted of:

(i) Chronic osteomylitis with drainage sinus.

(ii) Persistent swelling around left ankle.

(iii) ½" shortening of left lower limb.

(iv) Permanent limp.

(v) Stiffness of left ankle resulting in 10% - 15% limitation of movement.

In this case the original assessment done on the 22nd of February, 1989 was Thirty-six Thousand Dollars ($36,000.00) for pain and suffering and loss of amenities. This figure was varied by our Court of Appeal on the 7th May, 1990 to Fifty-five Thousand Dollars ($55,000.00).

In Noel Gravesandy v. Neville Moore [S.C.C.A. No. 44/85] dated February 14, 1986, there was a compound fracture of the tibia and deformity consisting of a shortening of the injured leg. In this case, there was no stated percentage permanent disability as the doctor preferred to retain his opinion on this aspect until the conclusion of an oesteotomy which was an operation involving bone realignment. The award here was Fifty Thousand Dollars ($50,000.00).

In Beverly Dryden v. Winston Layne (by next friend Stanley Layne) (S.C.C.A. 44/87) it was accepted:-

> "as established principles that personal injury awards should be reasonable and assessed with moderation and that so far as is possible comparable injuries should be compensated by comparable awards". (per Campbell J.A.)

I am guided by this statement. However, "moderation" is now subject to the rapid growth of inflation and the meteoric depreciation of value of the Jamaican dollar. This has been judicially recognised. In Hepburn Harris v. Carlton Walker (S.C.C.A. 40/90, Rowe P. had this to say:-

> "Cases tried between 1984 and 1987 were cited to support the proposition that general damages awarded in those years should be massively increased to reflect the rapid growth of inflation. Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A. 18/84 suggested that the depreciation of the value of the Jamaican dollar over a given period of time can be used as a measure to preserve the real value of the damages to an injured person who receives his money at a future date. It is time that a more precise and sophisticated method be devised to find

> "the quantum of the money of the day, taking into account inflationary trends in the economy. This should now be a matter of evidence and moreso when substantial sums are being claimed."

In this case there is no evidence of the type suggested in the passage just quoted. Further in this same judgment Rowe P. opined that:-

> "Absent any evidence of the effect of inflation upon the value of money since 1986, the yardstick of 150% increase upon the 1986 award for a similar injury which was used in this case represents the upper limit for such an award today."

Now, this opinion was expressed on the 10th of December, 1990. It is notorious that since that date the inflationary trend has not abated. It has increased.

The Gravesandy and Blair awards were from our Court of Appeal. Taking into consideration the relatively stable economic climate that existed between these awards, although there was the passage of some years, I respectfully say that there is a similarity in the awards vis-a-vis the respective injuries.

In the instant case the injury suffered bears significant similarity. Perhaps today an increase of 150% would no longer be regarded as the upper limit. Accordingly, I have little difficulty in using that percentage increase as being consistent with moderation. As such, the award here is One Hundred and Fifty Thousand Dollars ($150,000.00).

I now turn to special damages. Apart from loss of earnings there is agreement on the sum of Nine Hundred and Thirty-nine Dollars and Fifty Cents ($939.50). The date of the accident was the 17th November, 1987. The plaintiff migrated to the United States of America on 15th April, 1988 to join his family and started to work there in the first week of May, 1988. He worked as a carpenter with Craftwork Building Co. Inc. in Chicago but after two weeks he had to stop working because of his injury. He resumed employment in July of that year although he was not yet fully functional and this employment was continuing at the time of the trial. The normal remuneration was US$20.00 per hour but as he was not fully functional in 1988, he was only able to earn US$15.00 per hour. In 1989, his remuneration was US$20.00 per hour but according to him, his injuries precluded him from working full time. His contention was that 66% of his working time was at the full hourly rate and the remainder at piece work.because he could

not fully cope. In 1990, his injuries again affected what would be his full earnings. He now claims the sum of US$16,450.00 as regards loss of earnings in the United States. The defendants submitted that loss of earnings ought not to be calculated with reference to earnings in the United States of America. Firstly, it was argued that the plaintiff earned more than in the United States despite his injury and therefore there was no loss. In the alternative, any such loss was not forseeable. This loss was too remote.

At paragraph 1161 of McGregor on Damages (14th Edition) it is written

> "The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss that he has suffered. This is today a clear principle of law".

This statement I accept as correct. In construing "full compensation" I understand these words to mean that the compensation should be such that the injured party should be placed in the same position as nearly as possible by judicial determination, as if he had never been injured.

Although loss of earnings is subsequent to the injury, it is the being of the plaintiff at the time of the injury which is a most crucial factor. What was his loss at that time which would accrue in the future? This loss may be based on his present state of remuneration. It may be based on prospective loss for example if there was real prospect of promotion; the plaintiff may produce a lucrative contract of anticipated employment. There are, of course, other conceivable situations. However, there must be an evidential base. Accordingly, if a plaintiff is to be successful in a claim for loss of earnings arising from a source other than his then means of livelihood, he must demonstrate by evidence that at the time of the injury there was a real likelihood that the claimed loss would be endured. It is the loss of the plaintiff at the time of the injury which is the subject of compensation. In The Arpad [1934 P. 189 (CA)] Scrutton L.J. said:

> "You negligently run down a shabby looking man in the street, and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on: or you negligently and ignorantly injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man

"or his goods at the time of the tort".

I find support in the dicta quoted supra.

In applying these principles, it is my view that the plaintiff is not entitled to loss based on his loss of remuneration in the United States of America. He left to go to the United States of America some five months after the date of his injuries. He went to join his family. There is no evidence that at the time of his injuries there was any real likelihood that he would be working in any capacity other than as a sub-contractor and supervisor in the Beecher's Construction Company Limited of which his brother is the managing director. It is my view that loss of earnings in this case, if any - must be calculated in reference to that employment. To this I now turn.

In a document (Exhibit 1) the managing director of Beechers Construction Company Limited stated:

> "Mr. Beecher ceased working with the company after he sustained a broken leg as a result of a motor vehicle acccident, as well as his subsequent migration to the United States of America".

The plaintiff in his evidence said he migrated to the United States of America on the 15th April, 1988. It follows therefore that any nexus of employment between Beechers Construction Company Limited and the plaintiff was severed at the latest on 15th April, 1988. By the first week in May, he had started to work elsewhere. Thus, the plaintiff had decided that he would no longer work with his erstwhile employer and the latter had apparently accepted this decision. But for his injuries the plaintiff would have continued earning until the date of his migration. I award the sum of Eleven Thousand, Nine Hundred and Forty-eight Dollars ($11,948.00) as suggested by counsel for the plaintiff which sum reflects net earnings. Since the plaintiff severed the nexus of employment the question of loss of earnings with that company cannot and does not arise.

In the light of the views already expressed pertaining to the plaintiff's working in the United States of America, there will be no award for loss of future earnings. However, I must still address the question of loss of earning capacity as an item of general damages. The plaintiff complains that because of his injuries he cannot earn as much as he would normally do. There is permanent partial disability of between 10% to 15%. The plaintiff is a carpener and mason by trade. As regards any adverse effect of his permanent partial disability on h

his working performance, this is what Dr. King said: "I can't say how adversely he would be affected as a carpenter and mason, but I know there would be repeated swellings and pain which could prevent him from work for a day or two. I know it would affect him adversely on the job". There is no evidence as to the regularity, or otherwise of how often the swelling and pain would occur. Nor is there any evidence as to the circumstances in which the swelling and pain would arise. Despite these inadequacies, I am of the view that there will be some loss in earning capacity. The award here is to award what I regard as a conventional sum: $8,000.00.

Mr. Tonsingh, counsel for the plaintiff, in an interesting submission asked the court to make an award of 10% interest on special damages. His starting point was Section 3 of the Law Reform (Miscellaneous Provisions) Act which states:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment."

Counsel recognised that he had to contend with the guideline laid down in Central Soya Ltd. v. Junior Freeman S.C.C.A. No. 18/84. Therein Rowe, P. stated:

> "As the law now stands I would suggest as a guideline for the award of interest in personal injury cases that:
>
> (a) interest be awarded on special damages at the rate of 3% from the date of the accident to the date of judgment.
>
> (b) interest be awarded on general damages at the rate of 3% from the date of the service of writ to the date of judgment."

He submitted that this guideline was not cast in stone. He relied on a passage from the speech of Lord Diplock in Wright v. British Railways Board [1983] 2 A.E.R. 698 at page 705:

> "A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience

> "shows that it does not assist in the achievement of even-handed justice or that it makes trials more lengthy or expensive or settlements more difficult to reach. But, though guidelines should be altered if circumstances relevant to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial."

Counsel next proceeded to argue that there were "faulty aspects" of the judgment in the Central Soya case.

The first "faulty aspect" was to use 6% as a starting point. In Central Soya, Rowe, P. said:

> "With this in mind, I turn to consider what guideline this Court should suggest in the matter of the rate of interest to be awarded on general damages. Section 51 of the Judicature (Supreme Court) Act provides that:-
>
> > "Every judgment debt shall in the Supreme Court carry interest at the rate of six per centum or <u>such other rate per annum as the Minister may by Order from time to time prescribe in lieu thereof</u>, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."
>
> "The words underlined became part of the section by Section 2 of act 25/71. This amendment was made on the recommendation of the Law Reform Committee and its objective was to introduce a method into the law where the exercise for effecting a change in the interest rate would be rendered much easier by obviating the necessity of having to resort to amending legislation on every occasion for this purpose. So far, no order has ever been made by the Minister under the section.
>
> Unlike the position which existed in England in 1970 where the rate of interest on judgment debts had been fixed over 130 years before and could be considered irrelevant, Parliament in Jamaica as late as 1971 legislated a method for fixing interest rates for judgment debts and it must be assumed that no recommendation or no sufficiently persuasive recommendation has been made to the Minister since 1971 to increase the 6% rate. I think that that rate of 6% should be our starting point."

Mr. Tonsingh says that to use this figure is unrealistic and the court should so recognise as was done in <u>Jefford and Another v. Gee</u> [1970] 1 A.E.R.

1292. At that time the interest on a judgment debt in England was 4%. This is what Lord Denning at page 1210 (b) said as regards the adequacy of that percentage.

> "It was suggested to us that, in principle, the rate of interest on a debt or damages before judgment should be the same as the rate after judgment. It would be anomalous if a defendant paid less interest after judgment than before it.
>
> "This argument would be acceptable if the rate of interest on a judgment debt were a realistic rate. But it is not so. It is only 4%. It was so enacted in 1838 and has never been changed since. It should be changed. We are told that steps are being taken to increase it. But we do not think we should wait for this to be done. We ought to award a realistic rate, even if it does mean an anomaly. To go to the other extreme, it was suggested that bank rate should be awarded. That stands at 8 per cent. We cannot agree with this suggestion. Bank rate fluctuates too much."

Mr. Tonsingh points out that the rate of 6% was fixed by Act 31 of 1919, some 71 years ago. Since Act 25/71, the Minister is empowered to change the rate of interest. There has been no change. It is argued that the court should not be impressed by this. The court should adopt a realistic approach. What if the minister does not exercise his discretion to change the existing 6% rate for another 30 years? The court it is said should not be fettered by executive inaction especially in circumstances where this inaction is to be decried.

In Jefford and Another v. Gee, the court in rejecting the then 4% on judgment debt, chose as an alternative 6%. This percentage was the average percentage of the rates prevalent between 1966 to mid-1969 in respect of which interest was being awarded. The rates over this period were prescribed by the Lord Chancellor under The Administration of Justice Act 1965, section 8(g) which gave him the authority of

> "prescribing the time of which money falls to be placed to a deposit account or short term investment account is to be so placed and the times at which interest on money so placed is to begin and cease to accrue and the mode of computing any such interest".

There is no such parallel provision in Jamaica.

Counsel then submitted that assistance could be obtained by examining the average rates of interest between 1987 to 1990 (years covering the date of accident and date of trial) and striking an average of those averages. The rates were taken

from the Statistical Digest, April, 1991 prepared by the Bank of Jamica which was in evidence.

For domestic interest rates, the average was 75.29%. Domestic interest rate is the rate on ordinary savings. For short term fixed deposits, that is, less than six months, the average was 16.41%. As regards treasury bills, the average was 22.1%. The average rate as regards certificates of deposits with the Bank of Jamaica was 23.52%. The average rate offered by finance houses was 21.22%. The average rate of during this period was 19.728%. It is one-half of this overall average rate which counsel now seeks.

Evidence as to interest rates was not before the court in Central Soya. There has been no argument before me as to the validity of the approach suggested by counsel. The defendants contented themselves by merely saying they relied on guideline in Central Soya. In Wright v. British Railways Board, [1983 2 A.E.R. 698 at p 704 Lord Diplock suggested two routes which a court might choose to follow in deciding on the appropriate rate of interest. The first was that the appropriate rate of interest should be that which is accepted by investors in index-linked government securities. This is not applicable in Jamaica. The alternative as stated by Lord Diplock is:

> "The other route by which the choice of an appropriate rate of interest may be approached is, first, to see what were the actual rates of interest that were obtainable over the relevant period on various kinds of government or other securities in which the risk element apart from inflation is minimal, next to deduct from the actual rates of interest that were obtainable over the relevant period on various kinds of government or other securities in which the risk element apart from inflation is minimal, next to deduct from the actual rates of interest the rate of inflation over the same period, and then to treat the difference as representing the element in the interest that represents the reward for foregoing temporarily the use of the invested money".

It is the second route that counsel invites the court to follow. This route presupposes the presence of expert evidence as to

(a) securities in which the risk element apart from inflation is minimal.

(b) rate of inflation over the relevant period.

This is lacking in the instant case. For the last five years, the Central

Soya guideline has been followed - even if with reluctant diffidence. There has been a reasonable degree of predictability about the sum of money that would likely to be recovered at a trial. It may well be that the present rate of interest of 3% is too low taking into consideration our present economic circumstances. However, I am not satisfied that the argument presented to me is sufficiently comprehensive to permit me not to heed the Central Soya guideline.

The damages awarded are as follows:

General damages:

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| (i) | Pain and suffering and loss of amenities | $150,000.00 |
| (ii) | Loss of earning capacity | $ 8,000.00 |
| | | $158,000.00 |
| Special damages: | | $ 12,887.50 |

There will be interest of 3% on One Hundred and Fifty Thousand Dollars ($150,000.00) from the service of the writ until the 19th December, 1991. There will be no interest of Eight Thousand Dollars ($8,000.00) which is loss in respect of earning capacity. There will be interest of 3% on Twelve Thousand Eight Hundred and Eighty-seven Dollars and Fifty Cents ($12,887.50) from 17th November, 1987 until 19th December, 1991. The plaintiff will have his costs. The costs of the first and second defendants will be bourne by the third defendants.