IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1996 B159

BETWEEN	**OSBOURNE BOWES**	**PLAINTIFF**
AND	**LILLY'S CONSTRUCTION & INDUSTRIAL SERVICES**	**1ST DEFENDANTS**
AND	**MERVYN ROY ATKINSON**	**2ND DEFENDANTS**

Mr. Kent Gammon instructed by Dunn Cox for the Plaintiff and Mr. Patrick Bailey and Mr. A. Terrelonge instructed by Patrick Bailey & Co. for the Defendants

Heard on the November 8, 2001; January 10 & 11, 2002; May 17, 2002

Anderson: J

This is an action arising out of an accident which took place on February 16, 1995 on the main road from Mandeville to Alligator Pond at about 10 o'clock in the morning in the vicinity of a village called Duff House. The plaintiff, Mr. Osbourne Bowes, was driving a 1972 Ford Cartina motorcar licence number PP9729 from Mandeville to Alligator Pond when it was involved in an accident with a green Leyland truck, licence number CC 046E owned by the first defendant and driven by the second defendant. (It should be noted that the plaintiff discontinued its suit against the 2nd Defendant by filing a Notice of discontinuance in May 1997.)

Mr. Bowes' testimony is to the effect that upon seeing the approaching Leyland truck he swerved to the left as far as he could and applied his brakes and stopped. However, his car was struck on the right front section by the truck. This caused damage to the right front section of the car including the right side of the bonnet, fender, bumper, the right hand door, broken windscreen and broken damaged doorposts. Mr. Bowes said that the accident occurred on a section of the road where there was a slight right hand bend in the road in the direction he was going, and that when he first saw the truck it was about fifty feet from him but on his side of the road which means that it was on the wrong side coming from the opposite direction. He said that as a result of the damage to his car he

was pinned in the car as his foot was stuck under the dashboard. He also felt pain in his chest and head. He was eventually removed from the car, he said, by some workers who were working in an adjoining field and he was then taken to hospital.

After the impact and before he was rescued, the driver of the truck whom he recognized came out of out of the truck and came to the car, where he, the plaintiff was still trapped. He said to the defendant driver, "A kill you a go kill me". Some moments later, he noticed a red Nissan pickup arriving on the scene and this was driven by somebody who he knew as "Lance Beckford." Beckford was a timekeeper at Lilly's Construction and the plaintiff knew him as he, the plaintiff, had worked at Lilly's in the past. The plaintiff was subsequently taken to the hospital in Mandeville.

The matter was adjourned on the first day and continued on the 10th January 2002 at which time there was an application by attorney for the Plaintiff for a Marcia Robinson to be added as a joint plaintiff. Ms. Robinson, the plaintiff's sister, was the person in whose name the Hackney Carriage licence for the plaintiff's car, was issued, and the car was registered, but Mr. Bowes was the beneficial owner. The application was granted and Miss Robinson gave evidence as well. Her evidence was to the effect that Mr. Bowes, the plaintiff, was her brother and that she knew the Ford Cartina, licence No. PP 9729 which he was driving on the date of the accident. She said although registered in her name, the car was beneficially owned by her brother but was the subject of a Hackney Carriage licence which had been first issued to her and which continued to be that issued on an annual basis in relation to the car in question. The expenses of running the car including the cost of insurance was borne entirely by her brother but her name had remained on Hackney Carriage licence since at that time the Transport Authority was not issuing new licences and the car was accordingly covered by such a licence. Miss Robinson in her evidence stated that she had previously owned the car but she had sold it to her brother who had paid for it. However, as stated before, in cross examination she also confirmed that the Hackney Carriage licence continued to be held in her name as there were no new Hackney carriage licenses being issued at the time when he purchased it. After the testimony of Miss Robinson, Mr. Bowes resumed his evidence. He indicated that he had been driving for thirty one (31) years and that on the day of the

accident he did have a valid driver's licence. In subsequent testimony, Mr. Bowes indicated that since the 16th February 1995, the date of the accident, he had not been able to operate a vehicle. He has tried but he could not do so. He has also gotten medical attention both at the University Hospital and a clinic in Mandeville Public Hospital as well as the Hargreaves Memorial Hospital. He was also seen by Doctors Dundas and Mena at Tangerine Place in Kingston. He has had X-rays as well as other consultations in relation to his injuries. He gave evidence of the expenses which he had incurred in securing treatment and much of the special damages were agreed. I shall deal with those agreed expenses later. In his evidence, the plaintiff indicated that on a daily basis he had operated a taxi from Alligator Pond to Mandeville and that on an average day he would make approximately eight (8) trips. When he was being cross-examined, he rejected the suggestion that there were other vehicles in the vicinity of the two vehicles involved in accident at the time when it occurred. In particular, he rejected the suggestion that there was a car in front of the Leyland truck, which operated to give notice to oncoming traffic of the approaching Leyland truck. He did not see any van nor any lights nor anyone waving a red flag indicating that there was danger approaching. No one else, he said, was there. Regrettably, there were no witnesses who testified for the defence. The court has to consider whether on a balance of probabilities, the evidence given by the plaintiff in this case, is true. I find that on a balance of probabilities, the accident happened in the manner set out by the injured plaintiff Mr. Osbourne Bowes and I accordingly find the first defendant liable in negligence.

With respect to the question of damages, as I have stated above, a significant amount of the claim for special damages was agreed between attorneys for the parties and these are set out below. It should be noted that the defendant had put in a counterclaim in respect of repairs to the Leyland Truck and loss of use of the said vehicle. The plaintiff's defence to the counterclaim, denied that he was in any way negligent or contributorily negligent. Again, it should be noted that no viva voce evidence was given on behalf on the defendants' counterclaim and I accordingly also find for the plaintiff on the counterclaim.

With respect to the claim for special damages, the first claim is for the total loss of the vehicle. There was evidence that the loss adjusters, Jamaica Loss Adjustors Limited had estimated the pre-accident value of the car at Fifty Thousand Dollars ($50,000.00) with a salvage value of Seven Thousand Dollars ($7,000.00). The loss in value as far as the car is concerned is Forty Three Thousand Dollars ($43,000.00) and I so hold.

There was also ample evidence to support payment to the loss adjusters. Other special damage items were however the subject of agreement between the parties and for these purposes, I list the agreed items of special damage items

Loss of value of motorcar (less salvage)	43,000.00
Assessment Fee	1,300.00
Photographs	240.00
Hospital Bills	18,723.56
Physiotherapy	9,600.00
Radiology/X-rays	600.00
Miscellaneous Medical Expenses	9,620.00

The plaintiff also gave evidence of a One Thousand Dollars ($1,000.00) payment for service of the Writ. The plaintiff also claimed special damages in respect of traveling to and from his place of residence in the country to his various medical appointments at the University Hospital of the West Indies, the Mandeville Public Hospital, the Hargreaves Medical Hospital and to Orthopedic Associates.

In relation to traveling to various appointments, the plaintiff gave evidence of payments for these various trips. Receipts to the value of Forty Three Thousand, Two Hundred Dollars ($43,200.00) were tendered in evidence. The attorney for the defence sought to object to the tendering of the receipts on the basis that they were not stamped in compliance with the Stamp Duty Act. I overruled this submission as the oral evidence given by the plaintiff was sufficiently clear and credible to be accepted even in the absence of stamped receipts. I accept this evidence. I also find support for this course of action in case of ***Walters v Mitchell (S.C.C.A. 64/91)*** a decision of the Court of Appeal. This decision was to the effect that a court, being cognizant of the environment in which

it is operating, may determine what will amount to strict proof, in the absence of documentary evidence.

The plaintiff gave evidence of his loss of income. He claimed that he made net income of Four Thousand Dollars ($4,000.00) per day. I have some difficulty in accepting this part of the evidence of the plaintiff in its totality. It was confused and he was unable to show any convincing evidence such as substantial bank accounts or tax returns to vindicate these claims. Moreover, his explanations of how he arrived at the number of trips and the income derived therefrom was far from convincing.

The medical reports are one from Dr. Adolphus Mena dated April 7, 1995 and one from Dr. G.G. Dundas dated March 1, 1999. Both of these are quite explicit and support the plaintiff's contention of major damage to his right leg and ankle. Dr. Mena's reports states. "Examination of his right ankle revealed a painful swollen area over medial and latero-posterior of both malleolar region. Range of movement were significantly restricted in all directions due to pain with neurovascular status normal." There was also damage to the bone of the first metatarsal on the left foot. Moreover, I find his evidence as to whether or not he had worked as a fisherman and his ability to work as a taxi driver unconvincing. Indeed, it should be noted that in Dr. Dundas's report, it was stated that he "had difficulty standing in a boat. He is a fisherman". It seems that the only way that Dr. Dundas could have come to this conclusion would have been on the basis of information supplied by the plaintiff. However, in his oral testimony, he plaintiff sought to back away from this, saying he lived on handouts, but agreed, under cross-examination, that he was a "part-time fisherman", and had not really worked as a taxi driver since the accident.

The report by Dr. Dundas stated that X-rays done for that report now revealed "osteoarthritic changes in the joint, especially on the tibial surface." It also indicated that the plaintiff now had "a residual angular deformity with degenerative changes in the joint", which is "not expected to improve with time". Dr. Dundas estimated the plaintiff's permanent partial disability at thirty three percent (33%) of the affected extremely or fourteen percent (14%) of the whole person.

Counsel for the plaintiff cited in support of the claim for special damages, the case of ***Peter Ankle v Florence Cox (unreported) Suit # C.L. 1987 A157*** taken from *Harrison.* In that case, the damages awarded in October 1994, of Three Hundred and Sixty Thousand Dollars ($360,000.00) to a plaintiff who suffered an eight percent (8%) PPD, would now be worth Seven Hundred and Seventy Thousand Dollars ($770,000.00). He also cited ***Morrison v The Attorney General and McKenley reprinted at p. 40 of Khan's volume 3 of Assessment of Personal Injuries. (Suit # C.L. 1983 M031*** judgment delivered November 18, 1988) There the plaintiff who suffered PPD of fifteen percent (15%) of the whole person was awarded Sixty Thousand Dollars ($60,000.00), which would be worth approximately Eight Hundred Thousand Dollars ($800,000.00) based on the C.P.I.

Mr. Terrelonge for the defendants in his closing submissions pointed to some inconsistencies in the plaintiffs' testimony. However, there was no evidence led by the defence to dislodge the credible evidence given by the plaintiff. Accordingly, I am, as stated above constrained to find liability on the part of the defendant on a balance of probabilities.

Mr. Terrelonge in his written submissions sought to suggest that the plaintiff was, if not wholly responsible for his injuries, loss and damage, then at least he was contributorily negligent. As I have noted, the defence led no evidence to support this submission.

In relation to damages, the defence also cited the ***Peter Ankle*** case but suggested that notwithstanding the difference in the PPD of the two plaintiffs, Ankle was worse off, as he remained in hospital for two (2) months and used crutches for 2-3 weeks. Counsel suggested that plaintiff in the instant case had brought no evidence of having to use crutches. This is incorrect as the report of Dr. Mena dated April 7, 1995 shows the plaintiff was advised to use crutches so as not to put weight on the injured leg.

Mr. Terrelonge also referred the court the case of ***Pauline Cunningham v. Carlton Black reported at p.374 in the "Assessment of Damages for Personal Damages completed by***

Mr. Justice Harrison. (Suit No. C.L. 1989 C279) Damages were assessed on 19th September 1991. In that case the plaintiff had a permanent partial disability of fifteen percent (15%) of the right ankle, ten percent (10%) of the left shoulder and ten percent (10%) of the left lower lip. Damages were awarded in the sum of Eighty Thousand Dollars ($80,000.00), which would now convert to approximately Four Hundred and Fifty Thousand Dollars ($450,000.00). Finally, Mr. Terrelonge referred the court to the case of ***Sharon Pearly Barnett v. Rosemarie McLeod reported at p. 33 of volume 3 of Khans' Assessment of Personal Injuiesy.*** This case was Suit No. C.L. 1983 B301 and was decided on the 26th January 1989. Here the permanent partial disability of the whole person was assessed at eight percent (8%) but I am of the view that this case does not assist us in determining the correct amount of damages to be awarded to plaintiff in the instant case.

In the outcome, I am led to award damages as follows:
Special damages $127,283.56.

For pain and suffering and loss of amenities, general damages of One Million One Hundred Thousand Dollars ($1,100,000.00) with interest at six percent (6%) from January 19, 1999 to January 11, 2002

Special Damages will attract interest at three percent (3%) from February 16, 1995 to July 14, 1999 and six percent (6%) thereafter to January 11, 2002. An award of One Hundred and Fifty Two Thousand Dollars ($152,000.00) representing the approximate estimate of the future surgery should the plaintiff decide to undergo that surgery is also made.

Finally, costs are awarded to the plaintiff, to be agreed, and if not, taxed.