JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	ERIC BUCHANAN	PLAINTIFF/APPELLANT
A N D	ELIAS BLAKE	DEFENDANT/RESPONDENT

Ainsworth Campbell for plaintiff/appellant

Earl Delisser instructed by Mrs. Angela Greaves-Hill for defendant/respondent

July 11, 12 and October 27, 1994

RATTRAY P.:

On the 29th October 1992, Theobalds J. gave judgment in an action in negligence brought by the plaintiff/appellant Eric Buchanan against the defendant/respondent Elias Blake, in which he found the defendant/respondent seventy-five percent to blame and the plaintiff/appellant twenty-five percent. The action arose out of a motor vehicle accident which took place on the main road between Old Harbour and Spanish Town, on the 12th of December 1986 between the plaintiff/appellant's taxi-cab and a truck owned and driven by the defendant/respondent.

The plaintiff/appellant appealed on the ground inter alia:

> " That the Trial Judge was in error in finding him blameworthy in any respect,"

and asked this Court for an order that the defendant/respondent be found 100% liable.

He further maintains that the Learned Trial Judge erred in disregarding the doctor's evidence, "and consequently failed to include in general damages an award for future surgery."

We will deal first with the Judge's findings in respect of liabiity. The plaintiff/appellant's case was that he was driving his Lada motor car from Old Harbour to Spanish Town, conveying some passengers. In the vicinity of McCooks Pen he saw a bus going in the opposite direction. It was a clear day, the time being about 4:45 p.m. The road surface was dry. There was a broken white line in the centre of the road. There was a line of traffic travelling behind the bus. On being requested by a passenger to stop, he pulled off the road surface onto the soft shoulder on his left hand side and came to a stop. He was aware of traffic coming behind him in front of which was a minibus going towards Spanish Town. Whilst so parked, he noticed a truck break out of the line of traffic behind the bus. This truck swerved across the road onto its incorrect side and hit the plaintiff's taxi-cab parked where it was on the soft shoulder. The taxi-cab was badly damaged and the plaintiff/appellant suffered serious injuries.

The defendant/respondent's case was that he was proceeding along in the line of traffic travelling towards Old Harbour at about 30 m.p.h. A red pick-up was travelling immediately behind him. The red pick-up suddenly overtook him and then cut directly in front of him. The pick-up appeared to "start to ease up its speed". To avoid running into the back of the pick-up he swerved to his right and found himself near to a car travelling in the opposite direction in the middle of the road, but on its correct side of the white line. That car turned out to be the plaintiff/appellant's taxi-cab. He tried to avoid the car but "somehow I collided with it". He could

not swing to his left he said, because he then saw that there was a parked bus in front of him.

The Learned Trial Judge rejected the defendant's evidence concerning the pick-up. He said:

> "For the pick-up to have overtaken the defendant's truck in the manner described by the defendant and cut in without crashing into the back of the parked bus is incapable of belief. I reject this."

The driver of the pick-up was not a party to the action.

Theobalds J. further said:

> "... the defendant on his own evidence never even saw the bus until he was three to four yards away from it. Clearly he was not keeping a proper look out."

Most graphically he further stated:

> "Not to have seen the parked bus before he did could only mean that his eyes were closed. His was not an example of the proverbial dozing at the wheel. He had retired to bed and was by now fast asleep. His age and the time of day may have contributed to this condition."

How did the Learned Trial Judge treat the plaintiff's evidence? He referred to Section 51 of the Road Traffic Act which states:

> "... it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

The Learned Trial Judge then said:

> "This obligation is not necessarily discharged by a faithful compliance with the main rule of the road by driving on the left half of the driving surface."

In respect of the plaintiff/appellant he found on the evidence:

> "... that when hit his vehicle was certainly not on the soft shoulder, certainly was not stationary but was in motion near to the centre line of the road albeit on his correct half of the driving surface."

He further continued:

> "A plaintiff may be found contributorily negligent although keeping to the left of the centre line if he fails to employ avoiding tactics in the face of an accident which he can reasonably foresee and prevent."

Theobalds J. continued:

> "... the plaintiff in this case (Buchanan) should have been put on his enquiry when -
>
> 'he suddenly saw the approaching line of vehicles stop with the bus.'
>
> This was an unusually wide road on his own estimate nearly a chain in width including the soft shoulders on both sides. He ought not to have been travelling so close to the dividing centre lines in the first place and having been put on his enquiry he was obliged to move further to his near side; which is the normal position anyhow. On my findings of fact I would hold the plaintiff by his negligence contributed to the extent of twenty-five percent to this collision, by 'failing to swerve or manage his vehicle or to take any steps to avoid the said collision'."

We can find no evidence which would establish that the driver of the taxi-cab should have been put on his enquiry and be alerted to the possibility that the truck would swing out of the line and swerve onto his side of the road.

The Learned Trial Judge cites the evidence of the plaintiff/appellant but disconnects it from the fact that the plaintiff/appellant is saying that at the time when he noticed the line of vehicles stop behind the bus he was not on the road surface. He was on the soft

shoulder of the road. There is no evidence that when the plaintiff/appellant noticed the line of vehicles on the road, he was in motion on the road at that time. Such evidence would have to be given by the plaintiff/appellant himself. In any event, it is unreasonable to expect that the driver of the taxi-cab, even if he is on the road surface, on seeing a bus stop with a line of traffic behind it and with traffic coming from the opposite direction would expect that the truck would swerve out of the line of traffic to endanger vehicles travelling on their correct side of the road in the opposite direction. Holdack v. Bullock Brothers (Electrical) Ltd. [1964] 108 Sol. Jo. 861, affirmed [1965] 109 Sol. Jo. 238, CA on which the Learned Trial Judge relies supports no such proposition. In that case the movement of the van with which the scooter rider collided whilst the scooter rider was overtaking that very van was such as to put the scooter rider on enquiry as to what the van was going to do. In this case is it being suggested that the stopping of the bus, not the manner in which the truck was being driven, was such as to put the driver of the taxi-cab on enquiry as to what the truck driver behind the bus was likely to do. This cannot be tenable. Furthermore, how is it established that the accident would have been avoided if the taxi-driver had been travelling closer to his left? Such a finding would have been in the realm of speculation. The finding therefore that the plaintiff/appellant contributed to the accident cannot be supported. The appeal on liability must therefore be allowed. The driver of the truck was clearly one hundred percent to blame for the accident.

We now move on to the question of damages. The plaintiff/appellant was assessed $400,000.00 for pain and suffering and loss of amenities. Counsel for the plaintiff/appellant Mr. Campbell has submitted that the Learned Trial Judge erred in failing to include in general damages an award for future surgery. The award under general damages is a global figure and does not indicate the components which comprise the sum awarded.

We are grateful to Mrs. Angela Greaves-Hill, instructing Counsel, representing the defendant/respondent who with the consent of Mr. Campbell for the plaintiff/appellant supplied her Notes of Evidence given by Dr. Dundas, Orthopedic Surgeon at the trial, as it was clear that the file record did not reflect the full medical evidence relied upon by the plaintiff/appellant. Mrs. Greaves-Hill's notes have assisted in supplementing the evidence in the record filed.

Dr. Dundas saw the plaintiff/appellant on the 19th of January 1987. He had sustained a fracture of the right hip with a dislocation. The cup, the acetabulum was fractured and this allowed for dislocation of the joint. There was rupture of the ligaments. It was not practicable to repair the torn ligament in the joint. Other structures kept the joint in position however. Although weakened it was not totally compromised. There was a certain amount of weakening and flexion deformity 5% degree. Internal rotation 15% degree. Total of 20% degree. There was a loss of 1cm of muscle bulk. When examined on the 15th of March 1991 the total measure of his disability was 12% of the right lower extremity. There was a high probability of development of osteoarthritis in the joint and lower back pain. Treatment recommended was physiotheraphy to mobilize the joints. The doctor thought it was remarkable that he had recovered so well. The plaintiff/appellant was 34 years of age at the time of the accident and at the time of the trial was 39 years of age. The doctor expected osteoarthritis to show up at around age 45.

There was however an alternative method of treatment. This would be either total hip replacement or fusion of the joint. Dr. Dundas' preference in respect of the alternative was total hip replacement rather than fusion of the joint. This treatment would remove the hip pain completely. However, the artificial hip would place limitations not now existing in the patient, for example, he could not jump, run stoop or squat or take part in any active sports other than golf or swimming. The hip replacement would cost a total

of approximately $100,000.00. It is this sum which Mr. Campbell submits should have been added to general damages.

It was the Judge's view that the plaintiff/appellant lacked frankness and candour in respect not only to liability but also the quantum of damages. In his judgment Theobalds J. states:

> "With regard to the latter (that is quantum of damages) there are factors which in my view could tend to justify this conclusion in relation to the extent of personal injury allegedly suffered by the plaintiff. It was his evidence that between '1987 to March 91 I never go to any doctor three years I not been to a doctor ... I never had any need in those years'. In fact Doctor Dundas did say that the plaintiff was down to resume work on 1st March 1987, which was in fact less than three months after the collision. He never saw him again until March 1991 fully four years after when he wrote a report on the plaintiff for either a Court Action (presumably this one) or a settlement".

Furthermore still in relation to Dr. Dundas' evidence the Learned Trial Judge said:

> "Again based on a complaint of pain in the hip joint made to him on the 15th March, 1991 examination the goodly doctor opined that 'the relief of pain can only be accomplished by a hip replacement or fusion of the joint both by surgery. An artificial hip is never as strong as the original. Cannot, run, jump, stoop or squat or take part in active sports other than golf or swimming. 15th March, 1991 he showed none of the above limitations'. (Emphasis mine). Yet he goes on to catalogue the costs and expenses running into six figures involved in a hip replacement. This figure did not include, incidentally, a minimum convalescent period of six months before the plaintiff could resume driving his taxi."

It seems clear to me that the Learned Trial Judge was accepting that the hip replacement procedure should not be pursued and that the physiotheraphy treatment which at the time the doctor saw the patient in March 1991 had not left him with the limitations which would exist following a hip replacement procedure would be the better course for the patient to pursue. This in fact was the treatment which the doctor recommended. The doctor's recommendation as to hip replacement was a recommendation as between hip replacement and fusion of the joint. The Learned Trial Judge therefore in my view assessed damages in relation to pain and suffering and loss of amenities based upon the treatment recommended by the doctor which had been pursued and which had resulted in the words of the doctor in reference to his examination on the 15th of March 1991:

> "Extent of injury thought [illegible] remarkably recovered so well."

And in respect of the fracture of the right sacral iliac joint:

> "... sacral iliac is problematic as area of transfer of body weight when you walk. ... On 15th March, 1991 was last examination. Not creating a problem for him."

But in addition to the deficit in the evidential basis for the award of this sum for future surgery there was an objection raised by Mr. DeLisser which I think is a valid one. It affects the question of the pleading in the case. It is trite learning that one of the functions of pleading is to present the opponent with the claims to be met and so eliminate the element of surprise. The contention was that the defence could not have come to Court prepared to meet this claim for future surgery which was not pleaded and was literally thrown at the Court in mid-course.

There can be no doubt that the defence is entitled to consult their own specialists on any aspect of the plaintiff's claim and it would work an injustice if this opportunity were denied especially where, as in this case, the claim is of a technical nature attracting an award which cannot be labelled as inconsequential.

The appeal against quantum, therefore, fails.

The appeal is allowed, the order of the Court below set aside and judgment entered in favour of the plaintiff/appellant for the full sum assessed, that is:

General damages with interest at 3% from 28/1/87 to 29/10/92, and	-	$400,000.00
Special damages with interest at 3% from 20/12/86 to 29/10/92	-	$ 36,425.00

The plaintiff /appellant will have the costs of appeal as well as costs in the Court below to be taxed if not agreed.

WRIGHT J.A.:

I agree.

DOWNER, J.A.:

I agree.