Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C251 of 1976

BETWEEN	ROY CAMERON	PLAINTIFF
A N D	EDWIN CLARKE OSCAR HAMILTON	DEFENDANTS

D. V. Daley and R. Fairclough for Plaintiff

D. Scharschmidt instructed by Robinson Phillips & Whitehorne for Defendants

Heard on January 8, 10; June 18, 19, 21 and 22;
October 4, 5; December 20, 1979.

JUDGMENT

CAMPBELL J.

The plaintiff's claim is for damages for personal injuries suffered by him consequent on the negligent driving of the first defendant's bus "The Port Maria Special" by the second defendant on June 14, 1975. The plaintiff was a passenger on the said bus travelling from Kingston to Port Maria.

The plaintiff's evidence is that on June 14, 1975, he boarded the first defendant's bus at West Street, Kingston about 3:13 p.m. The journey commenced about 3:30 p.m. There were some 40 passengers, some sitting others standing. The journey to Castleton Gardens was without mishap. On the next leg of the journey from Castleton Gardens there were now about 20 passengers who were all seated. The plaintiff was seated on the back seat in the bus. The driver who had stopped at Castleton Gardens for about one hour apparently to regale himself in one Mrs. Cockburns's bar, on resuming

the journey moved off in an unusual manner, he appeared to be in a nasty mood, he caused the bus to jump in starting it, he drove off leaving a passenger despite appeal to him to stop for this passenger. He had the horn of the bus continuously depressed and blaring. He was cursing bad words complaining that he was not getting the pay he had asked for. He drove at an excessive speed even when negotiating corners. The complaint of the passengers about his driving either fell on deaf ears or was rebuffed with indelicate and infelicitous language. The driver, notwithstanding this furious driving, reached the Whitehall-Llanrumley stretch on the main road to Port Maria. This stretch of road is chequered by bumps, saucer depressions, ridges, ruts, pot holes and sharp corners. The bus on this stretch of road was being driven exceedingly fast with consequent excessive jerking of the back area thereof. The bus was travelling at an estimated 70 plus miles per hour. While the bus was so being driven on this stretch of road the conductress one Mavis Martin spoke to the plaintiff, the blaring horn disabled him from hearing so she beckoned to him. He went to hear what she was saying, he was holding onto an upright hand rail to steady himself while she spoke to him. The bus lurched or dipped heavily causing his head to collide with an overhead standing passenger hand-rail. He lost consciousness but recovered in the Port Maria hospital the same evening.

Under cross-examination he admitted that he was having a conversation with Mavis Martin just before the accident. That she said something to him which he did not hear so he got up to go and hear what she was saying. He does not here say that he got up to go

to her consequent on her beckoning to him. He admitted further that when he got up the bus was travelling at perhaps 80 miles per hour and was jerking up and down. He further admitted that just before the accident there were about 18 passengers as two or three had dropped off, there were quite a few unoccupied seats and that he was the only one standing.

The plaintiff called one Clinton Beaumont to testify in support of his case. This witness in his endeavour to dramatise the incident (if he was indeed on the bus) has so exaggerated the incident that it is difficult to ascertain what of his evidence constitutes facts and what is fantasy. He says the driver was driving like a madman, passengers were pitching when corners were being taken, passengers were thrown out their seats, the plaintiff himself was thrown out his seat. He said he actually got up from his seat, (the third from the back) proceeded up front and actually saw the needle on the speedometer flicking 70 - 75 miles per hour. The plaintiff said nothing of passengers being thrown from their seats including him. I cannot safely rely on the evidence of Clinton Beaumont because it is not only exaggerated to the point of being uncredit-worthy but it has the attributes more of a rehearsal of a story told to him than a description by a person who actually witnessed the incident. I accordingly reject his evidence in its entirety.

The conductress Mavis Martin giving evidence on behalf of the defendant admits that the plaintiff's head collided with an overhead hand-rail consequent on the bus jolting. She further admitted that at the time when the bus jolted the plaintiff was holding on to the

hand-rail having got up from his seat to speak to her. She says as the plaintiff got up to hear what she was saying to him the bus went down into a pot-hole and he bruised his head on the rail. She said that approaching the site of the accident the bus was being driven at around 25 mile per hour. She said the bus cannot be driven at more than 50 M.P.H. since there is a governor on the gas pedal to control the speed. She admits however that she does not know to what speed the governor will limit the bus. She says that having regard to the nature of the surface of the road, driving at even 40 or 50 miles per hour would cause the passengers to be flung around. The pot-hole into which the bus went was a little one not so wide and not so deep. She is unable to say why the bus dipped suddenly into the pot-hole as in passing over other pot-holes it dipped slightly. The overhead rail on which the plaintiff's head collided was like a chrome pipe.

In similar vein is the evidence of Victor Duhaney a former employee of the first defendant. He said the bus at no time was being driven more than 25 - 30 M.P.H. He admits that the Llanrumley road on which the accident occurred was in 1975 bad in most parts, bumpy with pot-holes. A driver he says, would be expected to drive on it with extreme care. He said the bus got into a rut and jerked up hard, it was not jerking up hard before that. Later in his evidence he said the bus went into a pot-hole, it was not a bad pot-hole but being that the bus was a heavy bus it jerked hard. When the bus jerked the plaintiff was holding on to the hand-rail. He would describe the blow which the plaintiff suffered as a hard blow, the side of his head was bruised, it was cut though id did not bleed much.

In considering and determining which version of the accident appears more probable, I at the out-set must say that the plaintiff in his estimate of the speed at which the bus was travelling has exaggerated the same in like manner as he has exaggerated his evidence as to his injuries and his income bearing activity prior to the accident. However on the defendant's version it appears to me

absolutely inexplicable as to why a bus, even accepting that it was a heavy one, should lurch so violently so as to cause a standing passenger holding on to a hand-rail for balance, to be jerked forward with such momemtum that not merely does his head collide with a hand-rail parallel to but forward of the one on which he was holding but in the ensuing collision the side of his head becomes bruised to the extent of causing it to bleed even though the impact is only with a chrome-piped hand-rail. Dr. McHardy who saw the plaintiff more than a month after the incident testified that he saw a healing bruise, this shows that the bruise must have been a substantial one to have kept so long to heal. I reject the evidence of both Mavis Martin and Victor Duhaney as to the speed at which the defendant's bus was being driven at the material time. They are both untruthful as regards this aspect of the matter. I accept the plaintiff's evidence that the bus was being driven at an excessive speed albeit not at the estimated 70 - 75 M.P.H. given by him. The very fact that the defendant on the evidence of the conductress saw fit to put a governor to limit the speed of the bus to not more than 50 M.P.H. is testimony enough that he knew that it was usually being driven above 25 - 30 M.P.H. On the evidence of the conductress, driving at even 40 or 50 M.P.H. would, having regard to the surface of the road, be driving at an excessive speed likely to cause passengers to be thrown about. I find as a fact that this is exactly what the first defendant's driver was doing on the Llanrumley stretch of road namely driving at a speed well above 25 - 30 M.P.H. which in the circumstances including the nature of the road surface was excessive. Whether or not the plaintiff got up on the beckoning of the conductress or on his own volition is irrelevant since in standing he exhibited reasonable care for his own safety in holding on to the hand-rail which was provided for the very purpose for which it was being used by him.

The first defendant's driver was negligent in failing by driving at an excessive speed on a rutted and bumpy road to have

regard for the safety of passengers who could reasonably be expected to be standing even though seats were available. The presence of hand-rails is an invitation to a passenger to stand if he so elects provided he exercises reasonable care for his own safety by securely holding on to the hand-rails so provided.

On the issue of liability I find that the defendants are liable to the plaintiff for the foreseeable consequences of the negligent driving of the bus on the day in question.

The plaintiff claims special and general damages for personal injuries suffered. In addition, he claims damages for loss of income during his incapacitation consequent on his injuries which incapacitation he asserts still subsist in substantial form.

As to his personal injuries he says when his head collided with the hand-rail he lost consciousness. He regained consciousness in the Port Maria hospital.

The defendant hotly disputes this, saying that though the plaintiff's head was bruised he never fell to the ground, he was never unconscious, he went unaided by anyone to resume his seat in the bus. The conduct of the defendant in not allowing the plaintiff to alight at the latter's destination which was "Sandside" and which was reached before one reaches the defendant's gas station, the concern of the defendant in securing a taxi to take the plaintiff to hospital and providing him with an attendant even though the bus would in due course pass the hospital, the further concern of the defendant in securing a taxi for the plaintiff from the Port Maria hospital to his home all at the expense of the defendant is in my view indicative of two things, firstly that the injury suffered by the plaintiff was due to the fault of the defendant and secondly the injury appeared sufficiently serious to warrant the expeditious dispatch of the plaintiff to hospital. I find as a fact that the plaintiff as a result of his head injury was unconscious and in that state was taken to the Port Maria hospital where he recovered consciousness.

The plaintiff adduced evidence from Dr. McHardy a Consultant Neurosurgeon at Kingston Public Hospital who examined him on 21st July, 1975, on a reference from the neurological clinic where the plaintiff had attended on 25th June, 1975. His examination revealed a healing abrasion on the left side of the head. He had no apparent neurological signs on examination indicative of damage to the brain. A skull X-Ray and brain scan showed nothing abnormal. He complained of deafness from both ears and on testing appeared to hear only a loud whisper in both ears. He was slow mentally, apparently having difficulty in understanding and carrying out simple commands or requests. He complained of episodes of mental absences. An EEG test was ordered the result was "abnormal but non specific". He was again seen on 1st September 1975 when he reported that he had fallen in a fire at home once. This history together with the finding on the EEG suggested that the plaintiff was having epileptic attacks. He was referred to Dr. Shaw in respect of his ear. The plaintiff continued to attend the neurological clinic and a further EEG on 21st July, 1978, still revealed an abnormal non specific condition. Plaintiff continued to report bouts of fits with loss of consciousness which however in the view of Dr. McHardy were surprisingly poorly controlled by the large doses of anti-epileptic drugs prescribed. As there was no history from the plaintiff of fits prior to the accident Dr. McHardy stated that it could be presumed that the plaintiff developed post traumatic epilepsy consequent on head injury resulting in brain damage. Dr. McHardy said that the plaintiff was not totally unfit for work even though his ability to earn a living was seriously impaired. He would have been able to work after 18 months. He would have expected his therapy to result in a reduction in the number of fits.

Dr. H. Shaw an ear, nose and throat consultant at the Kingston Public Hospital said the plaintiff was referred to him on 24th July, 1975, from the Neurosurgical Clinic. He examined him and found what appeared to be a small polyp in the left ear-drum.

An electronic hearing test was conducted known as an "audiogram". This revealed that the plaintiff had marked bilateral sensori-neural deafness which was not amenable to medication and or surgery. Hearing aid was recommended. The plaintiff is not expected to recover. The sensori-neural deafness could definitely be caused by head injury, concussion injury, even though there was no skull fracture. Dr. Aubrey Russell who saw the plaintiff about a year after the accident namely on May 10, 1976, diagnosed him as suffering from trigeminal neuralgia that is to say severe pain in the distribution of the 5th cranial nerve in one or more of its branches. From the report from the doctors which he received, he formed the opinion that the trigeminal neuralgia was consistent with impact of the head on a hand-rail. The pain was intermittent lasting for a few minutes though it could sometimes last longer. He was given the strongest analgesis to relieve the pain. The prognosis is that the treatment will give relief. The plaintiff was also found to be suffering from traumatic neurosis which occasioned severe depressions but this has been minimised and would disappear once the case is finally determined. The plaintiff he said has improved tremendously, there was the possibility of a complete recovery. The totality of the evidence of the doctors is that:

(a) The plaintiff likely suffered a concussion, this resulted in a moderate brain contusion which led to post traumatic epilepsy. This post traumatic epilepsy in its frequency as told by the plaintiff has shown surprising resistance to anti-epileptic drugs.

(b) The plaintiff has also suffered from marked bilateral sensori-neural deafness due to damage to the inner ear or the 8th nerve i.e. the cranial nerve going to the brain, or both. The use of the word "marked" indicates that the percentage loss of hearing is over 50%

(c) The plaintiff suffered from trigeminal neuralgia and traumatic neurosis which in each case is not likely to be permanent.

I find as a fact on the medical evidence taken together with the plaintiff's evidence as to his injuries and suffering, that he did suffer a concussion resulting in moderate brain injury

which has left him the victim of epileptic fits of a frequency which is however grossly exaggerated by him and which contrary to the impression given by him is capable of being controlled by anti-epileptic drugs. He now suffers from marked bilateral sensori-neural deafness necessitating the use of hearing aid. This disability is permanent.

He also suffered from trigeminal neuralgia and traumatic neurosis which have responded to treatment and are not likely to be permanent disabilities.

The plaintiff in seeking medical attention has incurred expenses. His evidence is that he spent $287.70 in acquiring the hearing aid recommended, he had X-Ray costing $4.20; he incurred expenses on medical certificate and medication totalling $81.35. He claims in total $358.25. He paid $105.00 to one Dr. Foster who attended on him also $200.00 to Dr. Aubrey Russell making a total of $305.00 in medical fees. I accept these expenditures as proved and accordingly award the sum of $663.25 in respect of these matters.

The plaintiff claims expenses on travelling to see his doctors. He says he saw Dr. Amos Foster about 4 or 5 times. He took taxi to see him and the taxi cost $5.00 for a round trip. He said he attended the Kingston Public Hospital about 70 to 80 times each trip costing $4.00. He claimed in total $270.00 for transport. I consider this claim is exaggerated both as to the number of trips and as to the cost per trip. I will award $150.00 under this head. There is no explanation why the J.O.S bus service could not be utilised or more fully utilised.

The plaintiff aged 50 years claims damages for loss of earnings both actual and prospective. He says that he was, prior to January, 1975, a truck owner. He operated between Kingston, St. Mary and Portland seven days a week.

Equally at some time in the past he used to work at Remco on King Street. He sold the last truck which he had, and entered

the jerk pork business on January 8, 1975.

He operated this business at 52D Oliver Road, Kingston, purchasing his pork from one Aston Thomas and selling the finished product to customers such as Clinton Davis, Mrs. Dorothy Dixon and Mrs. Maria Rose all from Kingston. He said he purchased 800 lbs of pork weekly at 90 cents per lb. He transported this pork on Wednesday each week in a hired delivery van to the backyard of premises at 52D Oliver Road. He alone jerked the pork which engaged him continuously for approximately 20 hours. One Vida Campbell helped him but only to decorate the pork for which she was not paid. He said he spent $20.00 weekly for the hire of the delivery van. All told he spent $128.70 on seasoning, charcoal and transportation and $720.00 weekly for the pork making a total expenditure of $848.70. The pork when jerked was sold by him at $3.00 per lb. When jerked the 800 lbs. pork was reduced to 440 lbs. He therefore grossed $1,320.00 from his sale and realised a net weekly profit of $471.30. He said he always paid the proceeds of his business into the bank, he kept delivery books and account books, none of these were however produced in evidence. He said he paid no income tax.

In support of his case the plaintiff called Aston Thomas who testified that he the plaintiff commenced purchasing 800 lbs of pork from him from 8th January, 1975. He sold to him at 90 cents per lb. The plaintiff paid $720.00 weekly for the pork and he gave plaintiff a receipt. He said that the plaintiff was his biggest customer. Other customers would buy 100 lbs, 70 lbs, 50 lbs or 40 lbs. He does not remember the dates when these other customers or any of them started buying pork from him. He remembers the 8th January, 1975 and 11th July, 1975, being the commencing and closing dates of his business with the plaintiff. He remembered these dates solely because the plaintiff was a big customer. He concedes that 800 lbs of pork is a lot to be jerked in a week and that his other customers in the jerk pork business operated in a small way.

Clinton Dixon came and testified that he first met the plaintiff on January 2, 1975, and that the plaintiff first supplied him with jerk pork on 9th January 1975, he bought 70 lbs from plaintiff at $3.00 per lb. He was thereafter supplied every Thursday up to June 12, 1975. When asked how he remembered the dates so clearly, his answer was that the business with the plaintiff enabled him to make profit. He said that after June 12, 1975 he did not purchase jerk pork from anyone else.

Sylvia Tennant came to say her piece in support of the plaintiff to the effect that she made available to him her backyard for the jerk pork business from around January 8, 1975. Plaintiff would season the pork which came in around midday each Wednesday. He would then commence jerking, she would go to bed leaving him jerking, she got up on Thursday mornings seeing the plaintiff still at work jerking. He would finish about midday on Thursday. It was a large amount which he jerked, she estimates the weight to be 800 lbs and saw 800 lbs written on paper indicating the weight.

The plaintiff has grossly exaggerated his activities in the jerk pork business. I do not accept his witnesses namely Aston Thomas, Clinton Davis and Sylvia Tennant as witnesses of truth in so far as they seek to support his grossly exaggerated version of his business activities. The precision with which they recollect the date of commencement of the plaintiff's business activity with them as also the terminal date and the specious reasons given for so remembering the dates, create the gravest doubt as to whether they were speaking truthfully. The show of considerable acuity in their memory as to the transactions with the plaintiff in contrast with the totally faded memory of transactions with other persons during the same period makes their evidence suspect. They struck me as "oath-helpers" rather than truthful and fair minded persons endeavouring to assist the court. I will place no reliance on their evidence. In regard to the plaintiff's own evidence, it seems to me highly inprobable

that he would have embarked on this jerk pork business in such a big way without first testing through reasonably satisfactory market surveys the likelihood of his maintaining his outlet for so much jerk pork in an essentially competitive business. Again it is highly improbable that the backyard of Mrs. Tennant would be adequate for such a large scale jerk pork operation. There looms also the high improbability that had he been operating on such a grand scale, he would not have got some ready and willing hand even to cover the roasting operation. It is improbable that he could have been working single-handedly continuously for some 20 hours. On his own admission this is the only way he could get through with jerking so much pork.

Weighing the evidence of the plaintiff in the context of what appears to be reasonably probable I have concluded that he would be jerking no more than about 160 lbs of pork each week. On this basis the cost to him of the pork would be $144.00; transport would be $20.00 other expenses for seasoning and charcoal proportionately reduced would be $22.00 making a total expenditure of $186.00. The resultant jerk pork proportionately reduced would be 88 lbs. This when sold at $3.00 per lb would fetch $264.00. The net profit per week would be $78.00.

The plaintiff in his statement of claim, under the particulars of special damage claims loss of income on a total incapacity basis for 70 weeks from 14th June 1975 to 15th October 1976. Dr. McHardy in his evidence says the plaintiff would have been able to work after 18 months even though his ability to earn a living would be seriously impaired. On this evidence the claim of the plaintiff for 70 weeks loss of earning is reasonable. I will accordingly award special damage for loss of earing for 70 weeks at $78.00 per week in the sum of $5,460.00. The other special damages I have awarded in the sum of $813.25 making a total of $6,273.25.

As regards general damages for future loss of earning, no evidence has been adduced as to any alternative economic activity on which the plaintiff has embarked. He says he cannot now continue the jerk pork business as he has been advised to keep away from fire. He says he can get no one to help him so to enable him to continue this business. This I do not believe or accept. Even if it is accepted that the plaintiff is still susceptible to bouts of epileptic fits notwithstanding his taking anti-epileptic drugs, there is no reason why he could not continue his jerk pork business by employing some one to attend to the fire. Bearing in mind the minimum wage level for unskilled workers, a wage of $15.00 for a day worker would in my view secure to the plaintiff the services of a helper on the Wednesdays when he ordinarily jerks. His prospective loss of income is therefore this sum of $15.00 per week which he now may have to pay. This would amount to $780.00 per annum. The plaintiff is now aged 50 years. He would reasonably be expected to continue working until he is aged 65 years. A reasonable multiplier therefore in his case would be 10 years. Combining these data the prospective future loss of income is assessed at $7,800.00.

Turning again to the personal injuries suffered by the plaintiff, there has not been any hospitalization, he has however suffered a permanent disability in the marked bilateral sensori-neural deafness. He suffered from post traumatic epilepsy and still suffers therefrom. Equally he suffered from trigeminal neuralgia and traumatic neurosis. The prognosis for complete recovery from these latter two is good, but not certain. I think for pain and suffering, permanent disability and the loss of amenities flowing therefrom general damages in the sum of $15,000 would be reasonable. I accordingly award $15,000.00 as general damages under this head.

There will accordingly be judgment for the plaintiff against the defendants and each of them for damages for negligence

in the sum of $29,073.25 made up as hereunder namely:-

Special Damages	$6,273.25
General Damages including $7,800 for loss of future earning	$22,800.00

Interest at the rate of 3% per annum is awarded on the Special damages from the date of the accident namely 14th June 1975 to date of judgment.

Costs awarded to the plaintiff against the defendants the same to be agreed or taxed.