IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.C 411 of 1994

BETWEEN	ANTHONY CAMPBELL	PLAINTIFF
A N D	LEVEL BOTTOM FARMS LIMITED	1ST DEFENDANT
A N D	PAUL SAMUELS	2nd DEFENDANT

Mrs. Nesta Claire-Smith and Mrs. Janet Gordon-Townsend instructed by Ernest A. Smith & Co. for Plaintiff.

Mr. Patrick Foster and Ms. Catherine Francis instructed by Clinton Hart & Co. for 1st and 2nd Defendants.

Heard: February 10th, 11th and 12th, 1998

COOKE, J

JUDGMENT

On the 12th of February I delivered an oral judgment. This is it now reduced to writing.

The plaintiff had completed his shift as a bar porter at 12 midnight. He was employed to Sandals, Dunns River. He set off for his home in Clarks Town on his Honda Ascot motor cycle. He carried a pillion rider. It was a powerful motor cycle possessed of a 500 cc engine and capable of terrific speed. On his evidence the plaintiff had been travelling about forty five minutes when he started to ascend a steep grade known as Braco Hill. This grade turns to the left as the brow of the grade is immediately approached. Thereafter there is a levelling out and a straight road lies ahead. The plaintiff asserts that as he negotiated this left hand curve, there appeared before him a tarpaulin covered trailer. It was approximately 15 to 16 yards in front when he first saw it. It was parked and unlit. There was no indication of its presence. Faced with this sudden predicament he swerved to the right. At this time he was travelling about 25 to 30 m.p.h. There is a collision to the right rear of the trailer.

He is thrown to the ground. He calls out for "help" three times. Three men come out of the cab of the trailer - the driver one Minley and another. Minley speaks and the following conversation takes place.

Minley: What's your name?

Plaintiff: My name is Everton - mother is Miss Shaw and brother Blacka.

Minley: A Blacka brother this?

Plaintiff: Yes.

Minley: My name is Minley.

Plaintiff: What sort a business this - you can park so and mek me mash up myself?

Minley: I am not the driver.

Just then a bus comes up and Minley helps the plaintiff into this vehicle and on to the Falmouth Hospital.

The second defendant Paul Samuels was the driver of trailer. He had left Rockfort in Kingston at about 7 p.m. He carried a load of 900 bags of cement. Along the way he had made three stops. Two were to 'cool down' the tyres and the engine. Those were at Linstead and St. Ann's Bay. The third stop was at Rio Bueno. This is to pay a visit to his girlfriend. Proceeding on from Rio Bueno, after about 20 minutes he begins his climb over Braco Hill. At this stage he is travelling at 5 to 6 m.p.h. Having completed the left-handed curve his speed is increased to 15 to 20 m.p.h. When he had travelled some 100 feet from the brow of hill he heard "Woof". Thinking that a tire had blown out, he stopped. The three persons in the cab - Minley, Mitchell and himself came out and went to the rear of the trailer. The plaintiff was seen behind the right rear of the trailer some 6 ft. away and across the road in a parallel position, with the rear of the trailer lay the motor cycle its engine going and the headlights on. It lay against the banking. There was no

damage to the motor bike. It would seem that it was the rubber covered part of the left handle of the motor cycle that had made contact with the extreme right rear of the trailer as there was 'only a rubber impression'. It is the evidence of Samuels that on hearing the 'woof' sound he braked and travelled 6 ft. then stopped. The trailer when in locomotion makes 'plenty noise'. He swore that the plaintiff at no time spoke.

So there it is - the contending accounts. Firstly, I consider the impression that each witness made. Paul Samuels was mumbling and hesitant. There was no spontaneity in the manner of the giving of his evidence. This was not born of the unfamiliar surroundings of a courtroom. The plaintiff was straightforward. Besides the unimpressive demeanour of Samuels his account challenges commonsense. I cannot concieve of a trailer travelling at between 15 to 20 m.p.h. coming to a stop so quickly and within such a short distance of 6 ft. In doubting this aspect of the evidence I take into consideration that the 6ft. given is an estimate. Even if this estimate is doubled belief would still be surely stretched.

Samuels gives as his reason for his braking and stopping the hearing of a 'woof' sound - a sound which to him indicated a blown out tyre. No tyre was blown out. If he heard anything it must have been a sound which exceeded that of the 'plenty noise' of the engine of the trailer. Now such a sound could hardly have come from the impact of the rubber handle of the motor cycle on the rear of the trailer. What other sound could there be? Only the sound of the motor cycle as it made its way to hitting and hitting the banking. The contact of the motor cycle with the roadway and the banking would hardly be similar to a tyre blowing out. This explanation is unacceptable.

Then there is the conversation already recounted between Minley and the plaintiff. This evidence was admitted as it was the view of the court that it was part of the res gestae.

The significant part of that conversation is the response by Minley that he was not the driver. The first question is as to whether this statement was made if indeed there was a conversation. Samuels said the plaintiff never spoke. I reject that? It is a finding that the conversation did take place and that particular statement was made. The next question is as to evidential significance of that statement. The defendant submits that it is of no significance - it is a neutral statement which does not in determining the critical issue of whether or not the trailer had stopped. I do not agree. I must view that statement within the context of the whole case. That statement was clearly made in circumstances of spontaneity . The interpretation I give is that "yes the trailer was parked but don't blame me as I was not the driver."

So then I reject the account of the defendant. On the balance of probabilities I accept the account of the plaintiff as to how the accident occurred. He presented credible evidence. The fault lays with the negligent parking of the trailer in a position much too close to the corner and without lights. There will be therefore be judgment for the plaintiff.

I now turn to special damages. Except for two items there was agreement. The items agreed which all had to do with medical attention is computed at $251,141.00 Of the items not agreed one is for loss of income for 64 weeks in which the plaintiff received half his wages before he was made 'redundant.' The sum of $80,000 represents the half-pay he did not receive. This sum is allowed. The other is a claim for recovery of monies paid to a helper for 24 weeks. The amount claimed is $8,400. In this regard the plaintiff will receive $7,200.00. The total amount awarded for special damages is $338,341.00. There will be interest on this sum at 3% from 12th of July, 1993 to today.

The plaintiff, now 34 years old has a useless left upper limb. There is a total permanent disability from total

bronchial plexus damage. He has lost 100% use of this upper limb. There is a 60% impairment, of the whole person. The quality of his life has been severely adversely affected. His self-esteem has been diminished. He cannot properly bathe himself. He dresses himself with difficulty. He can no longer "hug his little ones" as he used to do. An amputation is envisaged. In **Carlton Smith v Jasper James et al (suit no. C.L. 1984 S 341)** reported in volume 3 at p. 95 in the Khan compiliation the permanent disability was the same as here. The award for pain and suffering and loss of amenities was $180,000 which would reflect a figure today of $1,902,000. Likewise in **Victor Campbell v Samuel Johnson and the Attorney General of Jamaica (Suit C.L. 1987-C069)** reported in volume 4 at p. 89 of the Khan compilation in a comparable situation the award was $250,000 which when converted is $1,591.000.00. In this same volume at p. 116 in **Hugh Grant v. Sylvay Victor Gordon (Suit C.L. 1993 C-198)** again where there was a 100% loss of function of the right upper limb equivalent to 60% whole person disability the award was $1,000,000. The sum would be $1,460,000 today. In these three cases the plaintiff's were righthanded. This plaintiff is lefthanded. I take this into account. The award is $1,500,000. There will be interest on this amount at 3% from date of service of the writ on the third defendant until today.

The plaintiff sought damages for loss of future earnings. This is denied. His employment was terminated about October 1994. It will be recalled that he received ½ pay for 64 weeks. Since then he tried gardening. He says he had to give this up. He put his hand to selling clothes but the weight of carrying the load over his right shoulder proved too much. The court does not know when he ceased these endeavours. What is certain is that he is not now engaged in an income earning activity. At this juncture I refer to a passage from the judgment of Lord Denning M.R. in **Fairley v John Thompson (Design and Contracting Division) Ltd. [1973] Vol. 2 Lloyds Law Reports p. 40 at p. 42:**

> **"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence."**

To put it shortly, in this case there is no evidential basis on which this claim can be considered.

I now come to the difficult task of considering the question of an award for loss of earning capacity. In the usual case, I would be guided by the principles set out by Browne L.J. in Moeliker v. A. Reyrolle and Co. Ltd. [1977] 1 AER at page 9 (1976):

> **"..... The consideration of this head of damages should be made in two stages (1974) 17 K.I.R. 1. Is there a 'substantial" or 'real" risk that a plaintiff will lose his present job at some time before the estimated end of his working life? (1976) 1CR266. If there is (but not otherwise) the court must assess and quantify the present value of the risk of financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiffs chances of getting a job at all, or an equally well paid job."**

But this is not the usual case. Here the plaintiff was not employed at the date of the trial. It is not my view that he finds comfort in idleness. He wishes to work. His academic or skill training is at best most rudimentary. He relies on his hands rather than his head. Now he has only one hand. His situation does not fall within the "Moeliker" principles. Does this mean that there should be no award under this head? Or if there is an award it should only be a nominal award? I do not think that "Moeliker" principles address the problem which now confronts this court. It would be inconsistent with humanity and justice if this plaintiff should be denied an award for loss of earning capacity. Further this award should not be a nominal sum for he wishes to work.

How then should the award be calculated? Firstly, I will use a multiplier of 10 years. Next I will use the present minimum wage of $800 per week over 10 years, the sum would be $416,000. Now plaintiff has lost 60% of the whole person. So I will make an award of 60% of $416,000. This is $249,000 and that shall be the award for loss of earning capactity.

The plaintiff shall have his costs to be agreed or taxed.