IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

BETWEEN	HUBERT GEORGE CARPENTER Also known as George Hubert Carpenter)	PLAINTIFF
AND	CANCER HOLDINGS LTD.	1ST DEFENDANT
AND	SYDNEY TULLOCH	2ND DEFENDANT

HEARD: February 18, 19 and April 15, 2009

Mr. Philmore Scott instructed by Williams and Young for the claimant; and Ms. Carol Davis for the defendants.

Motor vehicle collision; Personal Injury; negligence; no objective witnesses; establishing liability on a balance of probabilities; demeanour as factor in credibility; counterclaim by first defendant but no evidence in support offered whether as to liability or damages; proving special damages.

ANDERSON J.

Although the accident giving rise to this action took place almost seventeen years ago, the matter is, unfortunately, only now coming on for trial. The claimant who was fifty-nine (59) years old at the time is now seventy-six (76) years old. With the best will in the world and notwithstanding how good some persons' memories may be, time does erode the sharpness of the memory of events. And so it is not surprising that the claimant did say, in response to certain questions, that he "could not remember". In this relatively simple case, the fundamental issue is what evidence is more credible and therefore worthy of belief in order to establish liability.

In his witness statement signed in September 2006 and his supplemental witness statement signed 17th February 2009, together admitted as his evidence in chief, Hubert George Carpenter ("the Claimant") avers that at about noon on October 10, 1992 he was driving his Sunbeam Hunter motor car, a taxi, licensed no: PP 1029. He was travelling at about fifteen (15) miles per hour down Spur Tree Hill from Mandeville towards Santa Cruz. As he approached a corner in the road, he slowed down and started to negotiate the

corner when a Suzuki Vitara motor car being driven Mr. Sydney Tulloch, (the "2nd Defendant") in the opposite direction collided with his vehicle. The first defendant, Cancer Holdings Ltd., is sued as being the owner of the vehicle driven by the 2nd Defendant.

In his witness statement, the claimant states that as a result of the accident he was first taken to the Mandeville Hospital where he was treated for five (5) weeks. He was transferred to the Kingston Public Hospital ("KPH") and remained in that institution from October 15 to December 1992. He was again admitted to K.P.H. on April 15, 1993. He says he was also admitted to hospital on two (2) other occasions when he had surgery. The medical report of consultant orthopedic surgeon, Dr. Warren Blake FRCS which was by consent tendered into evidence is helpful in explaining the period visits to the hospital.

According to Dr. Blake's report, when he first came to KPH in October 1992, the cast which had been placed on his injured arm at Mandeville Hospital was changed to one that gave greater support but which was more comfortable while he awarded surgery at the KPH. In December 1992, when his arm was again x-rayed, it revealed a "malunion of the fractures". As a result, he had an osteotomy, (a surgical procedure in which a bone is divided or sectioned) in April 1993 so as to internally fix the fractures and this required the implantation of metal supports for the surgically repaired bones of the Claimant's arm. When seen by Dr. Blake in January 1994, the fractures had healed satisfactorily. The metal implants were removed at the KPH in May 1994, and thereafter, according to Dr. Blake, the claimant complained of numbness in the fingers of his left hand. Dr. Blake opined that there appeared to be some evidence of carpal tunnel syndrome which may have been as a result of the accident and he recommended to the Claimant that he seek treatment for this condition. No therapies were pursued by the Claimant in respect of the carpal tunnel syndrome.

The injuries of which the claimant complained were fractures of the radius and ulna bones of the left forearm; an incomplete fracture of the first metatarsal of the right foot as well as fractures of the third and fourth ribs posteriorly. On subsequent x-rays, it was

noted that the injured ribs had healed satisfactorily. Although the claimant says he continues to have stiffness and numbness in his fingers, Dr. Blake said in his report that he was unable to ascribe a value for permanent partial disability. However, the Claimant does aver that as a result of the injuries he has suffered a lot of pain and loss of his livelihood.

In his answers to counsel for the defendant in cross examination, he said that as he descended the hill he was pressing his brakes lightly so that he would not go faster. It is common ground that the accident took place in the vicinity of the Montpelier property, and that it was in a corner which was a right hand bend for the claimant going in the direction of Santa Cruz, while it was a left hand bend for the defendant. The claimant says that as he was making the corner, he saw the defendant's car approaching him on his side of the road (that would be the wrong side of the road for the defendant) and that it crashed into his right side damaging both doors on that side. He said the impact was to his right side at a point behind the right front wheel of his car and that the collision took place on his side of the road. He also said that while he could not remember exactly, there was little or no damage to the front of his car.

The defendant on the other hand says that as he was going up the hill and as he completed a sharp left hand bend in the road as he proceeded towards Mandeville, he saw the claimant's car, part of which was on his side of the road. They collided on his side of the road but near the centre. That, as a result of the impact, both vehicles ended up in the middle of the road. His vehicle was facing the direction from which it was coming but "with the rear section of the vehicle on my side of the road and the front on the other driver's side of the road." He gave no evidence of the damage to the vehicle which he was driving

Neither claimant nor defendant, in their witness statements, mentioned whether there was either an unbroken or broken dividing line in the road separating the lanes. Both counsel sought to elicit from the witnesses some comment on this. The claimant, after some

hesitation, eventually conceded that he could not remember whether there was, while the defendant, in re-examination, said there was an unbroken line.

Given the length of time that has elapsed since the accident giving rise to this action, it is understandable that memories may have faded. In that regard, a close attention to demeanour may be rewarding. Having observed the demeanour of the witnesses, I must say that I was impressed by the claimant's evidence and his apparent candour in admitting that he may have forgotten some things. Counsel for the defendant submitted that there was an inconsistency between the testimony of the claimant and the assessor's report, which report referred to damage to the "right front" of the claimant's vehicle. I am not of the view that the apparent inconsistency is significant. Similarly, claimant's counsel sought to suggest that the defendant's present assertion that the vehicles collided "front to front" was a recent fabrication which ought not to be believed. Again, I do not believe that this makes or breaks the case for either party.

In my view, on a balance of probabilities and based on my observations of the demeanour of the witnesses, I accept the claimant's version of the incident as more probable. One of the factors which influences me to this decision is the position in which according to the evidence, the cars ended up. It was the claimant's evidence that, not only his car which was immobilized by the accident, but the car driven by Mr. Tulloch as well, ended up on the left hand lane of the road as it goes down towards Santa Cruz. It was suggested to the defendant that, as a result of the blockage of that lane all vehicles passing the disabled cars, did so in the left lane going towards Mandeville. The defendant said he could not recall any traffic passing but that both cars were in the middle of the road.

The defendant's witness statement lends some credence to the claimant's evidence in that he says the rear of his car was across the middle of the road on the left lane going towards Mandeville and the front in the lane going towards Santa Cruz and actually pointing in that direction. In the absence of any objective non-party evidence, the court has to make a decision on liability based upon the evidence of the witnesses provided. Based upon my assessment of the witnesses and bearing in mind the demeanour of the Claimant, who I

find to be a witness of truth and whose evidence I found more credible, I find that it is more probable that the 2nd defendant was negligent in this action and so find for the Claimant on the claim.

It should be noted that the first defendant had filed a counterclaim against the Claimant, claiming damages to the motor vehicle being driven by the 2nd Defendant. Although no defence to counterclaim was filed in response, the first defendant led no evidence in support of the counterclaim, either in terms of liability or damages. I hold that in the absence of any evidence, I must find in favour of the Claimant and against the first defendant on the counterclaim.

I turn now to the question of damages. I shall deal first with special damages.

Special Damages

It is trite law that he who alleges must prove. This applies to damages and so damages must be proven. The principle is particularly relevant to special damages which the authorities indicate must be specifically proven. As Lord Goddard C.J. said in **Bonham Carter v Hyde Park Hotel [1948] 64 TLR 177 at page 178**:

> Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of the Court saying: "This is what I have lost; I ask you to give me these damages" They have to prove it.

This is a principle which has been reiterated in several cases including some heard by the Jamaican Court of Appeal. (See for example its acceptance in the judgment of the Court of Appeal in **Lawford Murphy v Luther Mills [1976] 14 J.L.R** referred to in **The Attorney General of Jamaica v Tanya Clarke SCCA No: 109 of 2002** per Cooke J.A., cited below) I am indebted to his lordship Cooke J.A. for his exposition in the case last cited, and to which further reference is made below, as to the appropriate treatment of certain losses claimed by way of special damages..

The Claimant in his particulars of claim sets out a number of different heads of special damages. These included medical expenses, including the cost of medical report and medication, physiotherapy costs; costs of a police report; costs of chartering a vehicle to transport him to Kingston for his medical appointments; loss of earnings, cost of extra help at his farm and at his home; wrecker and assessor fees and the value of his motor vehicle which was a total loss. The Claimant was unable to provide receipts or other documentary evidence for most items claimed. Counsel for the 2nd Defendant was prepared to agree special damages supported by receipts in the amount of $18,190.00 mostly in relation to the costs of medical expenses including a medical report, medication and physiotherapy. Counsel however was not prepared to accept that any sum should be awarded in relation to sums purportedly spent on help for workers at the Claimant's farm nor for sums paid for domestic help. Indeed counsel for the 2nd defendant submitted that the Claimant himself had said that his wife took care of him and that help was needed while the children had to be prepared for school.

The Claimant has set out as his main item of special damages, a claim for loss of earnings in the sum of $3,295,850 covering a period of four and a half years from the date of the accident, that is, up to about March or April 1997, this on the basis that the Claimant could not work during that period. This specific sum is unsupported by any documentary evidence such as receipts or tax returns. There were not even rudimentary or "back-of-the-envelope" accounts which the Claimant produced which would substantiate this level of earnings. The oral evidence of the Claimant was to the effect that he had gross earnings of between $1,200 and $1,500 per day. Critically, he said he could not remember the details of the expenses of operating the taxi, which expenses would have to be set off against earnings. Bearing in mind the strictures enunciated in **Bonham Carter** above, the question is whether the court can make any award to the Claimant under this head and if so, the jurisprudential basis upon which it could be based.

In **The Attorney General of Jamaica v Tanya Clarke SCCA No: 109 of 2002**, in the Jamaican Court of Appeal, Cooke J.A. in an extremely useful exposition, reviewed and analyzed the approach of local courts here and in the wider Caribbean where the

evidential basis for special damages appeared tenuous. I adopt and rely upon His Lordship's reasoning as I approach the determination of special damages.

Starting with the **Bonham Carter** case, and the principle enunciated by the then Lord Chief Justice, Lord Goddard, his lordship then referred to the case of **Ratcliffe v Evans (1892) 2 Q.B. 524** and the judgment of Bowen L.J. who said:

> As much certainty and particularity must be insisted upon both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest of pedantry.

The learned Judge of Appeal then referred to the judgment of Wolfe J.A. (as he then was, later Wolfe, C.J.) in the Court of Appeal in the case of **Desmond Walters v Carlene Mitchell 29 J.L.R. 173**. There Wolfe J.A., in considering the concept that is "strict proof" did not consider it necessary "to lay down general principles as to what is strict proof", but noted that:

> "...to expect a side walk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. , referred to as ' the vainest pedantry."

While I would not properly characterize the foregoing as a derogation from the general principle that damages must be strictly proven, it does seem to beckon the court to a somewhat more common sense approach to the determination of loss, which takes account of the socio-cultural realities of the society and the specific nature of the damages claimed. This was an approach which was apparently endorsed by Rowe P. in the Jamaican Court of Appeal in the case of **Central Sova of Jamaica limited v Junior Freemen [1985] 22 J.L.R 152.** In that case the learned President stated:

> "In casual work cases it is always difficult for legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence".

Cooke J.A. then referred to **Ashcroft v Curtin [1971] 3 All ER 1208**, and in particular the judgment of Edmund-Davis L.J. There the issue was one of seeking to quantify the

loss of earnings arising from injuries occasioned by a motor vehicle accident. The accounts of the business of the claimant there were "rudimentary and unreliable" (per Cooke J.A.). In Ashcroft, counsel for the defendant/appellant argued that the judge at first had erred in law when he made an award of £10,500.00 in the absence of strict evidence as to the amount that the plaintiff/respondent had lost. The learned judge Edmund-Davis L.J. was urged to make a nil award for loss of earnings because of the lack of hard evidence to support the claim. He declined to do so since, as he opined, to do so "does not seem to me to meet the justice of the case". He concluded that:

> "So approaching the matter the unsatisfactory conclusion to which I have felt myself driven is that while the probability is that some loss of profitability resulted from the plaintiff's accident, it is quite impossible to quantify it".

Nevertheless, given his conclusion that there had in fact been a real loss, the learned judge was prepared to make an award of £2,500.00. Almost apologetically he stated:

> "Doing the best I can, and fully realizing that I am rendering myself liable to be attacked for simply plucking a figure out of the air, I think the proper compensation under this head is £2,500.00".

The dicta of Edmund-Davies L.J. was cited with approval in the recent case in the Scottish Court of Session, in **Ronald M. Smith etc v Honda Motor Europe Limited t/a Honda (UK) [2007] CSOH 74**, the court said:

> "As Edmund Davies LJ said (1213 H): "'arithmetic has failed to provide the answer which common sense demands'". The facts of the case are wholly different from the present but it does show that, before assuming losses, the Court must have reliable information on which to base an award".

Cooke J.A. in the Clarke case said he deduced the following principles from the authorities he had considered:

1. Special damages must be strictly proven (**Murphy v Mills; Bonham Carter v Hyde Park Hotel Ltd**);
2. The court should be wary to relax the principle (**Ratcliffe v Evans**).
3. What amounts to strict proof is to be determined by the court in the particular circumstances of the case **Walters v Mitchell; Grant v Mootilal Moonan Ltd. and Another.**

4. In consideration of 3 above, there is to be the concept of reasonableness
   a. What is reasonable to ask of the plaintiff in strict proof in the particular circumstances, (**Walters v Mitchell; Grant v Mootilal Moonan Ltd. and Another**) and
   b. What is reasonable as an award as determined by the experience of the court (**Central Soya of Jamaica Ltd. v Junior Freeman**);
5. Although not specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation.(**Ashcroft v Curtin; Bonham Carter v Hyde Park Hotel Ltd.**)

Based on the evidence, it is clear that the Claimant would have been unable to work for some period after the accident but there is no compelling evidence except his say so, that he would not have been able to work for a period of four and a half years. The evidence of Dr. Blake, the orthopaedic surgeon who treated him is that after the removal of the backslab from his forearm in May 1993, he continued to be a patient of Dr. Blake at monthly and then six-weekly intervals. By January 1994, the fracture had "united satisfactorily" It was then decided that the metal implants should be removed from his forearm and this was done on May 13, 1994 and the sutures removed on May 19, 1994. He returned to see Dr. Blake on June 13, 1994 and at that time he complained of numbness. The doctor theorized but has not been able to establish that this may have been a development of carpal tunnel syndrome, and it was never confirmed that this was a sequela of the injury to the forearm.

Nevertheless, I believe that it is in these circumstances that it is open to the court to say that some measure of damages has been established and to make an award accordingly. In that regard, I start with the evidence of the Claimant that his intake varied from $1,200.00 to $1,500.00 per day. The evidence of the Claimant is that he worked most weeks six to seven days per week. I believe that the court could proceed on the basis that expenses would amount to one-third of his gross intake. The court can also take note of the evidence which indicates that certainly up until June 1994, the Claimant was under the doctor's continuing care and may have had some difficulty in carrying out his trade as a taxi operator. There is no direct objective evidence that subsequent to that time the

Claimant would have been unable to carry on his trade as a taxi driver or that he made any attempt to mitigate his damages from loss of earnings by seeking alternate employment. Using that analysis, I believe that it is possible to compute his loss of earnings to be the sum of $432,000.00. This I do by using a net earnings figure of $800.00 per day x 6 days per week x 90 weeks (12 weeks from October 10 to December 31 1992) and 52 weeks from January 1, to December 31, 1993 and 26 weeks from January 1, to June 30, 1994). I regret that in the absence of any evidence that the claimant had attempted to mitigate his damages, I am loth to grant any loss of earnings beyond this time.

Insofar as the other items of special damages are concerned, I hold that there is no specific evidence of transport costs associated with the injury. There is clear evidence in the assessor's report that the Claimant's motor vehicle was a write-off. The value at the time was $35,000.00 and the value of the salvage was $5,000.00, giving rise to a $30,000.00 loss. There was no evidence that the Claimant carried on the business of farming and so no special damages can be awarded in the absence of specific proof of such expenditure. It is also understandable that the Claimant would have required some additional domestic help, and the Claimant gives evidence that he did so hire such help for which he claims to have paid $900.00 per week. Again, the hard evidence is not provided. It is the view of this court that a nominal figure for this head of damages should be a figure of $36,000.00 being 40 weeks at $900.00 per week. I am emboldened to take this approach with the recognition that it is trite that the victim of a tort who has a relative look after him at no cost is still entitled to compensation for the services of the family member. The victim is not obliged to subsidize the tortfeasor. Together, these sums total $516,190.00.

General Damages

The Claimant relied upon three authorities. Claimant's attorney cited **Hernal Bennett & Clive Richards & Ors v Daniel Edwards** the plaintiff had a limp as a result of the shortening of one leg and weakness and stiffness of the left hand. He also had occasional ache in his right thigh. As a result of the accident in that case, the plaintiff had been unconscious for a considerable time and suffered fractures of both the left and right

femur. He had sustained injuries to his left arm and needed a tendon transfer in the left wrist because of damage to the radial nerve which had left him with a wrist drop. There was also deformity of the wrist and reduction in the range of movement. He had a total permanent partial disability of 22% of the whole person. In that case decided in March 1994, the court awarded a figure of $1,380,000.00 in Maech 1994. According to the Claimant's counsel, this would have converted to a figure of $7,666,666.67 with the CPI at 136.00 in February I do believe that the injuries in that case are far more serious the injuries suffered by the Claimant in this case.

Secondly, Mr. Scott cited **Frazer v Morgan and Corroll, C.L F -031 of 1999**, decision of Beswick J (Ag) as she then was, given June 2, 2000. There the plaintiff had a severe crush injury of the left lower extremity from middle third of leg to the dorsum of the foot. He suffered a below knee amputation of the leg. The plaintiff was assessed as having an eighty per cent PPD of the extremity and a 32% PPD of the whole person. There, the Claimant was awarded $2,000,000.00. That figure would now be worth $5,008,255.33. Again, I am of the view that this case is far more serious than the instant case.

Finally, Claimant's attorney-at-law cited **Osbourne Bowes v Lilly's Construction and Industrial Services & Mervyn Atkinson C.L 159 of 1996.** There, the plaintiff had a severely damaged ankle with resultant deformity and osteo-arthritic changes. Dr. Dundas, the consultant orthopaedic surgeon in that case estimated that the plaintiff had a PPD of 33% of the affected extremity and 14% of the whole person. Again I am not convinced that this case is really helpful in deciding the extent of the damages to be awarded for pain and suffering and loss of amenities in this case. A figure of $1,100,000.00 was awarded by me in May 2002. That figure would now be worth $2,443,052.59.

Counsel for the 2nd Defendant also cited three cases which she submitted were more appropriate to guide the court. These were as follows:

Davis (b.n.f. Marlene Karen Stewart v Todd & Bandoo C.L. D – 001 of 1999, a decision of Pitter J. There the plaintiff, a three year old child, had among his injuries a complete displaced fracture of the lower end of the radius and ulna bones. The plaintiff

also had a laceration to the side of the head as well as a tender painful swelling of the right forearm. There was a 5%-10% loss of normal function in the right upper arm. The damages awarded in that case, $400,000.00, would now convert to $1,034,117 using the CPI of 136.4 for November 2008.

Secondly, counsel cited **James v Pre Cast Concrete Limited C.L. J -040 of 1996**. There the plaintiff had a displaced mid-shaft fracture of the left humerus with deformity; compound fracture of the distal left radius with deformity; degloving injury to the palm of the left hand; lacerations to armpit, neck and back. The plaintiff was hospitalized for two (2) months. He was unable to lift any heavy weights or to continue to work as a labourer which he had been before. He was assessed with a total PPD of 17% of the whole person. In April 1997, McCalla J (as she then was) awarded the plaintiff, $500,000.00 a figure which now converts to $1,588,262.

Finally, counsel cited **Samuels v National Housing Trust, Rainford & The Attorney General, C.L. S – 368 of 1993**, a decision of Karl Harrison J (as he then was) given March 1997. The plaintiff suffered a fracture of the shaft of the right humerus. There was a deformity at the fracture site and there was need for further surgery and a bone graft. Harrison J took the view that because of the plaintiff's failure to have problems discovered corrected much earlier, the damages should be reduced. He awarded as damages for pain and suffering and loss of amenities $250,000.00 which converts at the November CPI of 136.4 to a sum of $801,598. Defendant's counsel felt that an award of between $1,200,000.00 would be an appropriate award for the Claimant in this case.

I do believe that the first two (2) cases cited by the 2nd Defendant's counsel are in my view more in line with the Claimant's injuries in this case. But before I make a final determination on a figure for the damages, I should observe what counsel in any personal injury case should appreciate, that the damages is not to be determined by the number of injuries claimed in the particulars of injury but in the seriousness of the injuries. This affects pain and suffering and loss of amenities. It may or may not necessarily be reflected by the extent of the permanent partial disability. Secondly, I need to remind

counsel that whether a document has been included in a list of documents and a Notice of Intention to tender into evidence what would otherwise be hearsay, do not of themselves make the documents automatically admissible into evidence. That is dependent upon the rules dealing with admissibility and the following of the Evidence (Amendment) Act.

In the instant case and as noted above, Dr. Blake was unable to quantify the extent of the PPD as he said that would have to await the completion of his treatment and he did not see him at that time. The Claimant does say he continues to have pain and stiffness in his fingers, but the most one can say is, like Dr. Blake did, that it *may be* a sequela of the accident. I believe that in the instant case, the Claimant should receive an award for general damages of $1,800,000.00 and I award this sum.

Finally, I should note that the Claimant's counsel asked for a figure of $3,000,000.00 for handicap on the labour market. It may just have escaped counsel that the Claimant is now seventy-six (76) years old and already past the retirement age and that damages under that head are given on the basis that the claimant may be at a disadvantage if he has to look for a job in the future. Moreover, awards under this head are usually more nominal than is suggested by counsel. I make no award under this head.

I award interest on the special damages at 3% from October 10, 1992 to July 14, 1999, and at 6% from July 15, 1999 to June 13, 2006 and thereafter at 3% until March 13, 2009. I also award interest on the general damages at 3% from October 16, 1998 and 6% from July 15, 1999 and then at 3% from June 13, 2006 to March 13, 2009.

The Claimant is to have his costs agreed at One Hundred and Twenty Four Thousand Dollars ($124,000.00). Stay of execution of Judgment granted for 21 days.

ROY K. ANDERSON
PUISNE JUDGE