IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/G047

BETWEEN	VIVIAN GAYLE	PLAINTIFF
A N D	THE JAMAICA PUBLIC SERVICE CO. LTD.	1st DEFENDANT
A N D	ANTHONY CURTIS	2nd DEFENDANT

Crafton Miller and Mrs. M. Brown instructed by Crafton Miller and Co. for Plaintiff.

Christopher Samuda instructed by Piper & Samuda for defendants.

Heard: June 22nd and 23rd, 1998 and 31st July, 1998.

HARRIS, J

The plaintiff, on the 3rd November, 1995 was the owner and driver of a minibus. On that date, he was standing at the rear of his bus on the Goshen main road in St. Elizabeth when a vehicle owned by the Jamaica Public Service Company and driven by one Anthony Curtis collided with him and his bus. He sustained injuries to his left kneee, particulars of which were described as a "fracture of the proximal portion of the left tibia." The bus was also damaged. The first defendant admitted liability. The matter now falls for assessment of damages.

Special damages were particularized as follows:-

Repairs to vehicle PP251H	$84,564.00
Transportation & Continuing	15,700.00
Loss of Income & Continuing $42,000 per week x 24 weeks	1,008,000.00
Medical Expenses and Continuing	72,495.35

The plaintiff sought and obtained leave to amend his statement of claim to include 2 additional items of special damages, namely:-

Helper's wages	$8,000.00
Depreciation of motor vehicle	$250,000.00

The undermentioned items of special damages were agreed:-

Cost of repairs including assessor's report	77,963.00
Medical expenses	63,807.00
Transportation Costs	7,000.00
Helper's Wages	8,000.00
	$156,770.00

Medical reports of Dr. Konrad Lawson dated 7th March, 1996, the 26th October, 1996 and 18th March 1998 as well as adjusters report dated 18th December, 1995 were also agreed.

I will first make reference to the special damages, certain items of which have been agreed by the parties. There are however, two other items to which consideration must be given. These relate to the claims for loss of income and loss in respect of depreciation to the plaintiff's motor vehicle.

The matter of the plaintiff's loss of income will first be addressed. He testified that at the time of the incident he realised a gross income $54,000.00 weekly by plying his bus on a route between Savanna-la-mar and Kingston twice daily and once daily from Santa Cruz to Savanna-la-mar and from Savanna-la-mar to Santa Cruz. This he did 6 days per week. His bus carried a complement of 18 passengers each of whom he charged $100.00 on the trips between Savanna-la-mar and Kingston and $50.00 per person on the leg of the journey between Santa Cruz and Savanna-la-Mar. He carried a full load of passengers each day, as he stated that he did not embark on any part of his journey until the bus was full.

His expenditure included the costs of maintenance and upkeep of his bus. This amounted to $9,422.00 weekly. In addition, to these expenses, he had an obligation to the bank for the repayment of a loan of $500,000 which he obtained in 1993. This loan was secured for 3 years at a rate of interest of 45% per annum. It was not disclosed in evidence whether the loan attracted interest at simple or compound rate. This not having been stated, the inference to be drawn is that the rate was one of simple interest. The plaintiff would have thereby been required to repay a monthly sum of $32,638.88 and not $25,500.00 as stated by him.

The medical report of the 7th March, 1996 shows that up to that date he was still incapacitated and was unable to return to work as a driver, or to work in any other capacity, though he had the ability to walk short distances unaided.

However, the report of 26th October 1996 indicates that he was seen in February 1996 by the doctor and by then he had full range of movement, was complaining of mild discomfort and as he was able to bear full weight restrictions on his activities were removed. The latter prognosis conflicts with the doctor's findings in March. This notwithstanding, given the uncertainties encountered in life, it is possible that his condition could have changed between his visit to the doctor in February and that in March 1996.

The report of October, 1996 also stated that the plaintiff was seen on 12th August 1996 when he complained of mild discomfort when walking. By then he had painless range of movement of his left knee and was comfortable driving a taxi. Continuing, the report outlined that he required a 10 month rehabilitation period. This statement by the doctor is again in direct conflict with his findings when he examined the plaintiff in August.

The question which now arises in what was the period during which the plaintiff was in fact disabled? In my opinion the period of his incapacity would commence on 3rd November, 1995 and terminate before 10th August1996, which would be sometime after 3rd March, 1996.

Although he suffered disability for some time, the matter of the length of time during which his bus ought to have been out of service must be taken into consideration in computing the time which ought to be allowed for compensating him for loss of income as a plaintiff should take steps to mitigate his loss.

From the assessor's report it is shown that the repairs on the vehicle could have been completed in five (5) working days. The plaintiff stated that the repairs were done shortly after the assessor carried out his inspection of the vehicle. The adjuster inspected the vehicle on the 8th December 1995. It was incumbent on the plaintiff to have had the bus repaired soon after. This was however not done. It is obvious from his evidence that the bus was not delivered to the garage to be repaired until sometime in 1997. The repairs were effected in October 1997, nearly 2 years after the accident.

No evidence had been adduced to explain the excessive delay in effecting the repairs. But assuming an explanation had been given the period of more than a year which he took to deliver the bus for repairs could never be regarded a reasonable time. It is my view that a period of 8 weeks would have been a reasonable time after the accident for the vehicle to have been out of service.

The plaintiff was engaged in the operation of a taxi before August 10, 1996, from which he stated he earned an income of $15,000 weekly. He thereafter ceased operating the taxi and begun giving lessons as a driving instructor from which he declared he earned $5,000 weekly.

He stated that he discontinued his taxi service because of his injury. This I reject. It is clear that when he began to drive the taxi he was physically fit enough to drive. The medical report of October 1996 attests to that. He had no disabilities which could have precluded him from continuing

operation of his bus. Further, it is my opinion that he had started the taxi service as he had failed to repair the bus. Moreover, if he had experienced a reduction of income by driving a taxi and then as driving tutor, this was as a result of his own negligence in repairing the bus and not as a consequence of the injury.

I accept his weekly income to be $54,000.00 and his weekly expenditure in respect of maintenance and upkeep of the vehicle to be $9,422.00. I find that his weekly payment on the loan amounted to $8,159.72. He would also have been under an obligation to pay income tax of $13,229.25 and such tax must be deducted from his gross earnings. His net income would be $23,189.63 weekly. He was obliged to have mitigated his loss by repairing his vehicles soon after the inspection by the assessor and thereafter employing a driver to operate it until he was capable of driving again. In my view he will be eligible for compensation for loss of income for a period of 8 weeks only and is therefore entitled to an award of $23,189.03 per week for 8 weeks.

I will now turn to the claim relating to the cost of depreciation of the plaintiff's motor vehicle. The owner of a chattel which has been damaged by negligence may recover the costs of repair as well as the difference if any between the value of the chattel before it was damaged and the value after repair. However, where such chattel has been fully or substantially repaired the plaintiff can only recover the

costs of repair without any additional costs for depreciation unless he can prove such additional costs.

The plaintiff stated that the bus was repaired. The value of the bus before the accident was $400,000.00. The estimated value after the accident was $300,000.00. The sum of $300,000 was an estimated cost by the adjuster of the unrepaired vehicle.

It is the duty of the plaintiff to tender strict proof, not only of the cost of the vehicle before the accident but also the cost of it after repairs were done. No such evidence was forthcoming. He sold the vehicle for $150,000.00 after it was repaired but this does not establish that $150,000.00 was the true value of the reparied vehicle. The plaintiff disclosed that an offer of $150,000.00 for it was made to him, which he accepted. At the time of the sale he was desirous of completing the repayment of his loan to the bank. It is clear he sold it for $150,000.00 because he wanted to liquidate his indebtedness to the bank but this does not demonstrate that $150,000 was the proper value of the repaired vehicle. No evidence has been adduced to show that the plaintiff is entitled to any additional costs for depreciation.

Additionally, he was obliged to have repaired the vehicle as soon as practicable after the accident. His evidence clearly disclosed that he failed to do so within a reasonable time. Repairs were done in October, 1997, a period of nearly 2 years

after the accident. It cannot be recognised that he would be entitled to depreciation costs, when any depreciation which may have existed would have been caused by his own neglect.

I will now address the matter of general damages. The issue of pain and suffering and loss of amenities will first be considered. It was the plaintiff's complaint that after the receipt of the injury he could not walk and he experienced terrible pains in his knee. He also asserted that he still feels pain and discomfort in his knee. There is no doubt that he would have suffered pain consequent on the injury. Such agony and discomfort would have been from the time of the accident and for some time after. I must add, however, that in light of the medical report of the 18th March, 1998 I do not accept that he still feels pain. The report shows that he has full and painless range of movement of his left knee.

He stated that before the accident he could run and swim but is now unable to do so. He continued by declaring that he can no longer walk across a street swiftly and the fact that he has to traverse any public thoroughfare at a slow pace, causes him embarrassment. In view of the medical reports that he has had and continue to have full painless range of motion of his knee, his evidence that he still feels pain and discomfort in the knee, is unpersuasive. His statement that he is embarrassed by his inability to cross the road briskly in unconvincing.

Mr. Miller placed reliance on three cases in support of this head of damages. These cases are **Scott v Jamaica Pre Pak Ltd. - Harrison's Report v. page 284; Gayle v Grey & Anor. Khan's Report Volume 3 page 36 and Donaldson v Attorney General- Harrison's Report page 396.**

Mr. Samuda made reference to the following cases:- **Harrison v Durrant- Harrison's Case Notes page 359. Johnson v Thomas - Harrison's Case Notes page 362 and Satahoo v Johnson Harrison's Case Notes page 415.**

The cases of **Scott v Jamaica Pre Pak Ltd.** and **Donaldson v. Attorney General** do not offer appropriate guidance in computing an award, as the injuries suffered by the respective plaintiffs exceeded those suffered by the plaintiff in the present case. The plaintiffs also suffered permanent partial disability of a limb or of the whole person. This is not so with the plaintiff in the present case. The case of **Harrison v Durrant** would likewise not be helpful .in estimating an award as the plaintiff in that case also experienced some permanent disability.

In my opinion, some assistance in the calculation of an award can be obtained from the cases of **Gayle v Grey and Another, Johnson v Thomas and Satahoo v Johnson.** In **Gayle v Grey & Anor** the plaintiff suffered minor fracture of the tip of right fibula and lacerations over her right arm and left eyes. General damages of $27,750 was made in May 1990. Such an award would amount to $19,073.63 today.

The plaintiff in **Johnson v Thomas** sustained fractures

of the medial and lateral malleoli of the left lower limb. She received general damages of $15,000, for pain and suffering on the 10th January 1991. This sum would currently amount to an award of $99,795.00.

In the cases of **Satahoo v Johnson and Ors.** damages for pain and suffering and loss of amenities were assessed at $17,500 in January 1992. A similar award today would amount to $62,146.36. In that case the plaintiff suffered a fracture of the condyle of the left tibia.

The plaintiff in the case under review sustained a broken or fractured left tibia. He suffered no permanent or partial disability. The medical report of the 18th March, 1998 shows that he has had a remarkable recovery. It is stated in that report that "he has no objectively measurable permanent partial disability." He currently has full and painless range of motion of his left knee with no ligamentous instability. The report also indicates that "radiographs of his left knee done in Febraury 18, 1998 showed no early changes suggestive of developing osteoarthritis, but the lateral tibial plateau remains depressed by 0.5 cm. Therefore the potential for early development of arthritis still exists and is quite likely." Although there is no evidence of the presence of osteoarthritis in his knee, the likelihood of its development is uncertain. However, the plaintiff is 47 years old and the fact that the lateral tibial plateau has remained depressed

which condition may give to early onset of osteoarthritis, is a factor which in my view I also ought to take into account in assessing the award.

It is my view that an award ranging between $130,000.00 and $198,000.000 ought to be appropriate. I accordingly award the sum of $180,000.00 which I regard an adequate compensating sum for his pain and suffering.

There remains to be considered the plaintiff's claim for prospective loss of earnings. He is a driver by occupation and had been so engaged for the past 17 years. He began his career by driving a taxi and then a mimibus. He drove a taxi after the accident.

The medical report of the 10th October, 1996 illustrates that after the accident he resumed working as a driver, by driving a taxi before the 10th August 1996. It has been clearly established by the medical report of the 18th March, 1998 that he has sustained no permanent disability and that he is able to function with only minor modifications to his life style. The medical evidence in my opinion demonstrates that the plaintiff can function normally.

He could have resumed his occupation before August, 1996. His injury, had not caused him any permanent or partial incapacity. The injury has not resulted in his being unemployed or rendered him unemployable as a driver.

In determining whether he is entitled to future loss of income I must also take into account the matter of the availability of bus from which he derived his income at the time of accident. The accident occurred on 3rd November, 1995. It was the assessor's opinion that 5 days would have been adequate time within which repairs could have been done. Repairs were not done in 5 days. Although the repairs not carried out within the time specified by the assessor, it was duty of the plaintiff to have ensured that repairs were effected within a reasonable time.

There is no evidence that he endeavoured to have bus repaired in a reasonable period. His evidence reveals that he delivered bus to the garage sometime in 1997 and repairs were done in October of that year. By his own negligence he failed to do what was necessary to have made the bus available for use within a reasonable time, which time I would assess to be 4 weeks after the damage was estimated by the Adjuster.

There is no evidence, to demonstrate that plaintiff suffered incapacity or diminished capacity to earn in the future, an income commensurate with that which he earned immediately before the accident. Consequently, he is not entitled to an award for loss of future earnings.

Damages are assessed as follows:

General Damages	
Pain and Suffering	$180,000.00
Special Damages	
Cost of Repairs, transportation, medical expenses, helpers wages agreed at	$156,770.00
Loss of Income	$185,512.20

Mr. Miller urged that interest on special damages be considered at commercial rate. The case of S.C.C.A 18/94 **Freeman v Central Soya Jamaica Ltd** authorises the award of interest at 3% per annum on both general and special damages in cases relating to personal injuries caused by negligence. The present case is one of personal injuries arising from negligence. I am therefore guided by and I am constrained to adhere to the principles laid down by judicial authority.

Judgment for the plaintiff in the sum of $522,282.20 being general damages in the sum of $180,000.00 with interest thereon at rate of 3% per annum from the date of Serivce of Writ and Special damages of $342,282.20 with interest thereon at rate of 3% per annum from the 3rd November, 1995.

Costs to the plaintiff to be agreed or taxed.