JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 16/76

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Carberry, J.A.

BETWEEN	CLIFFORD SIMMS	THIRD DEFENDANT/APPELLANT
AND	KENNETH SIMMS	FOURTH DEFENDANT/APPELLANT
AND	GERALD COLLINS	PLAINTIFF/RESPONDENT
AND	GENERAL TRUCKERS LTD	FIRST DEFENDANT/APPELLANT
AND	EVERIL DAVIS	SECOND DEFENDANT/APPELLANT

Mr. O.S. Crosbie for third and fourth Defendants/Appellants

Mr. David Muirhead Q.C., and Mr. John Vassell for first and second Defendants/Appellants

Mr. Roy Taylor and Mr. George Soutar for Plaintiff/Respondent

March 26, May 16, 17, June 4,5,6,7,8, July 19, 1979

MELVILLE J.A.

On the 21st of March 1973 the plaintiff was travelling in the right passenger seat of a pick up van owned by the 3rd Defendant, Mr. Clifford Simms, and driven by the 4th defendant, Mr. Kenneth Simms. This pick up was travelling along the Foga Road in the parish of Clarendon in the direction of May Pen when it came in collision with a truck owned by the 1st defendant, General Truckers Ltd, and driven by the 2nd defendant, Mr. Everil Davis. The truck was proceeding around a right hand bend and in the opposite direction to that of the van at

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the time of the collision. The plaintiff who suffered personal injuries by reason of the collision brought an action against the 1st and 2nd defendants. Later the 3rd and 4th defendants were joined as defendants. The owners of the vehicles also claimed against each other for the damage to their respective vehicles.

As is not unusual in cases of this sort each set of defendants sought to put the blame for the collision on the other, and as is also not unusual each claimed to be as near as possible to his left when the collision occurred. Having heard these widely differing views of how the collision occurred, the learned trial judge entered judgment for the plaintiff against all the defendants for $33,589.70 and apportioned the blame as to two thirds to the 1st and 2nd defendants and 1/3 to the 3rd and 4th defendants with the necessary consequential orders on their respective claims.

All the defendants appeal to this Court both as to liability and as to the amount awarded the plaintiff. On the question of liability it was said that the findings of the trial judge were unreasonable, insufficient and contradictory. This case draws attention, once again to the necessity for a trial judge to set out his findings of fact with clarity and his reasons therefor. A Resident Magistrate is required to set out his reasons for judgment once the formalities for an appeal have been perfected and there can be no valid reason why a judge of the Supreme Court should do any less, although there is no such statutory requirements as is the case with the Resident Magistrate. One wonders if the time is not now that there should, at least be verbatim transcripts of oral judgments delivered in the Supreme Court, particularly

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where the matter is likely to go on appeal. Usually, the trial judge makes jottings of his primary findings and reasons and then elaborates when delivering his oral judgments. Counsel engaged in the case, ought to and usually, do make notes of the judge's oral judgment, and (agreed or not) these, at times form part of the record; more so, where there are deficiencies in the judges' notes. Unhappily there was no such note (agreed or otherwise) in this case. Had there been such unequivocal findings in this case, and possibly Counsel's notes, this appeal may not have taken half the time it did.

As to the facts, the plaintiff's evidence was that as the van was taking this left hand bend he saw the truck coming in the opposite direction as if out of control (zig-zagging). The van stopped and the truck hit into the right hand side of the van. He knew nothing after that as he became unconscious.

Mr. Davis the second defendant, the driver of the truck, said he was going around this right hand bend some 8 to 10 inches from his left when this van came around the bend at speed, on its incorrect side and crashed into the side of the truck somewhere behind the cab. He tried to get away from the van in so much that his left wheels ended on the bank of the road. His evidence was supported by Mr. Hubert Daley who was a passenger in the back of the van.

Mr. Kenneth Simms, the fourth defendant, said he was driving this van 25-30 m.p.h. around this bend when he saw the truck some two chains away coming around the corner at some 45-50 m.p.h. zig-zagging and on his side of the road. He pulled closer to his left bank and stopped when the right fender of the truck hit into the van.

Cpl. Pitter said he visited the scene and saw the damaged vehicles. Damage to the truck was to its right head lamp and winker light, right front fender, exhaust pipe, right stabilizer bar right spring perch and fuel tank. The whole front of the van was damaged, windscreen broken out and the battery damaged. The van was in the gully on its side of the road; the truck was parked on its left (not on the bank) and the distance between both vehicles was about 1½ chains. Broken glass was on the road but mostly on the van's side.

Facts in common appeared to be that the road was dry and asphalted, some 17 to 18 feet, the van was approximately 8 feet wide (no length given); the truck about 8 feet wide and about 24 feet long; a 10 wheeler- a single wheel in front and 2 double wheels behind the cab on each side. There were other areas of difference in the evidence for example, the 1st and 2nd defendant maintained that there was no damage to the headlamp and winker light glass of the truck and the distance between the vehicles after the collision was about 12 to 15 feet.

In this welter of confusion in the evidence the learned trial judge's findings are recorded thus:-

> "Court accepts evidence of van driver Simms, D4 that it happened on the left side facing May Pen where van was going, Daley witness for the other side said, at the collision deceased fell in the air then on the left railing of the van back then into the trench on the left hand side where culvert is. Incidentally this is where Pitter found the van. Daley goes on, "after impact van 'bounced' from right side towards the left side just come back, divert, rebound. I saw deceased go up in the air." Pitter saw broken glass at apex of the corner on right side of road to York Town which would be left facing May Pen where van was. The truck driver pointed out point of impact not on truck correct side of the road, to Pitter. Court accepts

evidence of Pitter independent witness with no interest rather than Mignott.

Pitter saw on the truck great force of damage-opened spring perch and stablizer bar opened rear wheel on right side.

On the van complete front damage, concentrate on right side of right fender } right door } damaged.

Court finds road at point of impact 17-18 inches wide, van 8 feet. Truck 8 feet approximately. Only foot or so to spare. Both vehicles moving at the material time, both on the road surface.

D4 on the correct hand, erratic bearing in mind not much room. D4 going fast in the van brushes against right front of truck, truck try to regain left hit van with its right side in the vicinity spring perch and stablizer bar, then goes some distance off to park.

Court holds truck 2/3 to blame, van 1/3 to blame"

That was the sum total of his findings on the question of liability. With the assistance of Counsel on all sides we have been carefully through the printed record, noting their criticisms of the omissions and inconsistencies in the findings of the trial judge. In the end we are not all convinced that the findings are unreasonable or cannot be supported having regard to the evidence. It is true that if the findings had been set out with greater clarity the task of this Court would not have been so difficult. What seemed to have ahappened was that the trial judge was not accepting the evidence of any one witness (with the possible exception of Cpl. Pitter) in its entirety. To quote but one example, he is clearly accepting Mr. Daley's evidence that the van rebounded throwing the child Lorna in the air then unto the left railing of the van and then into the ditch on the van's left; yet

he has not accepted Mr. Daley's evidence that the van went over unto its incorrect side and collided with the truck. Had he so found the apportionment must have been different or indeed there may have been no liability on the part of the truck. Viewing the matter in thatlight and applying the principle expounded in The McGregor (1943) A.C. 197, 201; Brown v. Thompson (1968) 1 W.L.R. 1003 we are not prepared to interfere with the learned trial judge's apportionment of liability.

Turning to the award of damages the complaint here was that the award was inordinately high. After this accident the plaintiff seemed to have been unconscious for some time - for how long has not been stated. He was transferred from the Chapleton Hospital to the Kingston Public Hospital on 27th March, 1973 where he was under the care of Mr. Burrowes the Orthopaedic surgeon, whose report was in evidence. From that report the plaintiff suffered (1) head injury-concussion (2) Comminuted fracture of the right femur (3) Fracture of the lower jaw (4) Laceration of the lower gum, and the right arm; abrasion of the right knee and chest - He was treated and discharged from hospital on 6th July, 1973 but had to be readmitted on the 11th July as he fell and refractured the leg. He was again discharged on 24th August, 1973 and continued to receive outpatient treatment until the 24th March, 1974 when he was last seen by Dr. Burrowes. On that day the plaintiff's complaints were 'stiffness of the right knee; walks with a limp and has to use a stick'. Mr. Burrowes was of the opinion that the fracture of the right knee was restricted to 90°. The period of total disability extended from the date of the accident 24.3.73 (sic) to the end of December, 1973 and thereafter a further 3 months of

50% disability and lastly the report stated "the present partial disability is 50% of the right lower limb."

Mr. John Hall, a neurological specialist and chairman of the Department of Medicine at the Kingston Public Hospital gave evidence that he examined the plaintiff in June 1974 (once only) He found "defect of abnormality in his memory, abnormality of memory for recent events, past events". Speaking of the injury to the leg he said he found:- "marked wasting, weakness, limitation of movement of right knee joint, shortening of right leg by one inch;...the wasting of the leg was actually one inch when compared to the left leg..flexion limited to 120°."

However, when shown Mr. Burrowes report Mr. Hall claimed that he was not an orthopaedic surgeon. His evidence continued" Plaintiff had healed abrasion above the right knee. From neurological point of view a serious injury. 10-15% of cases this type epilepsy may follow closed head injury. Likely to have permanent personality change. Gross memory deficit, a degree of permanent damage compatible with damage he had. He was unconscious for some time after the accident in 1973." In cross-examination he said the plaintiff was not suitable to carry out supervisory duties but if that was so he would consider him much improved to the time of his examination. To the court Mr. Hall said "personality change was a falling away of his intellectual capacity, that is to say in relation to his ability to hold good job, self sufficient in employment; and lastly that he would expect aggresiveness and instability in the plaintiff."

In so far as his physical injuries went the evidence of the plaintiff was that he could not eat without pain for about a month. His

leg is now shortened and he walks with a limp, he cannot now indulge in football and cricket or dancing as he was accustomed to do; he cannot stand for long or walk any distance as his knee hurts. To add insult to injury his girlfriend left him because she did not want any 'cripple' and any girlfriend he had after that didn't seem to stay for long with him. About all that was said of the head injury was "In the accident had suffered head injury apart from limp and shortening of leg."

As to his future loss of earning the plaintiff's evidence was that at the time of the accident he was on a 3 weeks leave from his regular job as a salesman/sideman at the May Pen Ice Company - he delivered ice and collected payments therefor - where he earned $15.00 weekly. During his leave he was working with the 3rd defendant delivering milk for which he was paid $20.00 weekly. He was born on 18th June 1941 he believed. At the time of the trial he was unemployed and it seems fair to say that the gist of his evidence was that since the accident he couldn't work, due apparently to the injury to his leg. No where can one find where the plaintiff was alleging that his inability to work was due to the injury to his head. In cross-examination however it turned out that the plaintiff worked for 9 months at Alcoa as a 'trainee electrician' from July 1974 and for a further four days at Christmas (not stated which) as a supervisor of 'crash programme'. The only other bit of evidence on this aspect, was from the 3rd defendant who said that the person who was then doing the work that the plaintiff was doing at the time of the accident was being paid about $47.00 weekly, but later he said "man I pay $47.00 a week was with me at the farm. $8.00 a day." He didn't think

he would employ the plaintiff as he "could not stand my type of work, could not understand how I set up by business now." Before the accident the plaintiff was a friendly type of person, easy to get along with but after the accident he was sometimes irritable and aggressive.

Here again, the evidence has had to be quoted at considerable length as no findings were set out apart from merely putting down the figures under the various heads. The first challenge was to the award of $2,225 as pre-trial loss of earnings. This sum apparently was for 135 weeks at $15.00 weekly from 21.3.73 - 21.11.75 = $2025; and a further 10 weeks, 21.11.75 - 8.1.76 at $20.00 weekly = $200.00. This latter increase came about because by then the Minimum Wage Act had come into force. Mr. Muirhead's submission was that this amount should be reduced by $540.00 for the 9 months at $15.00 weekly, that the plaintiff worked at Alcoa (there was no evidence of the plaintiff's wages for that period). Next it was argued that the award of $15,600 for loss of future earnings and $15.000 for pain and suffering and loss of amenities were out of all proportion having regard to all circumstances -

The record had this notation:- "Loss of earnings $15.600 1560x60." That was interpreted to mean a multiplicand of $1560.00 per annum with a multiplier of ten. There seems no doubt that the damages here were assessed on the basis of the total incapacity of the plaintiff. Mr. Taylor sought valiantly to show that the evidence supported this. He said that because of the head injury, the plaintiff's memory was affected:- as shown by his mixing up various dates - so that his stating that he worked at Alcoa after the accident must have meant before. In

the absence of any clear findings by the trial judge, this court can only go by the record. The record shows beyond any peradventure that the plaintiff remembered quite well the events leading up to, and about the accident. His only loss of memory seems to have been with regard to dates. That apart, the report of Mr. Burrowes and the plaintiff getting rid of the domestic helper at about the time when he was working at Alcoa, strongly suggest that at that time the plaintiff was quite capable of working. A fair reading of the plaintiff's evidence showed that he could not work because there was no work to be had, and putting it at its highest, he could not work because of the injury to his leg. The view that he could not work because of his head injury seems to have been but faintly adumbrated.

To assess the future loss on the basis of total incapacity in the cirsumstances was, in our view, incorrect. There was no evidence as to what the future prospects of the plaintiff were, but doing the best we can on the available material, it seems that a continuing loss of $10.00 weekly with a multiplier of 15 would meet the justice of the case. Accordingly the award here should be $7,800.00. We think that the pre-trial award should be reduced by $540.00 as the plaintiff worked for part of that period. Although the amount of $15.000.00 for pain and suffering and loss of amenities might appear on the high side, it could not reasonably be said to be so inordinately high that this court should interfere. The fact that there has been no mention of how inflation would affect awards in matters of this sort, is not to say that we have been unmindful of the able arguments addressed to us on the point, but in our view, the necessity for a ruling does not arise in this case.

At the end of the day the appeals as to liability are dismissed. The appeals on quantum are allowed and a figure of $25,249.70 substituted for that of $33,589.70. That is, the special damages have been reduced by the sum of $540.00 and future earnings by $7,800.00. It follows that the interest on the special damages as also the sum in which the defendants are liable to the plaintiff will be varied accordingly. As there was no appeal as to the other consequential orders those remain Each set of defendants is to have 1/3 costs of appeal.