Nunes.

JAMAICA

IN THE COURTOF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/98

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:

OTIS GORDON	APPELLANT
CARLTON BROWN	RESPONDENT

Maurice Manning instructed by Nunes Scholefield DeLeon and Co., for the appellant

Christopher Samuda, instructed by Brown, Llewellyn and Walters, for the respondent

October 5 and 6 and December 20, 1999

FORTE, P.

Having read in draft the judgment of Panton, J.A. I agree with his reasoning and conclusion and have nothing further to add.

HARRISON, J.A:

I agree with the conclusions expressed. I have nothing further to add.

PANTON, J.A.

This appeal is from a judgment of Karl Harrison, J. delivered on March 31, 1998, in which he dismissed the plaintiff/appellant's claim and awarded judgment to the defendant/respondent with costs to be taxed, if not agreed.

In his amended Statement of Claim the plaintiff/appellant alleged that on April 25, 1992, he was a passenger in a public passenger vehicle (a bus) owned by the defendant/respondent and driven by his servant or agent. The bus stopped along the Constitution Hill main road in St. Andrew to permit passengers to disembark. While the appellant was in the act of disembarking, "the defendant's servant and/or agent so negligently drove managed and/or controlled the said bus that he caused the plaintiff to fall therefrom."

The appellant suffered injuries and loss which will be referred to later.

The defence that was filed contains an admission as to the stopping of the bus. However, it alleges that "the plaintiff along with other persons unknown forcefully entered the defendant's motor bus and that by virtue of this forced entry the plaintiff was at all material times a trespasser." Further, the defence indicated that the respondent would be relying on the doctrine of volenti non fit injuria in that the appellant attempted to end his trespass by jumping from the bus as a result of which he injured himself.

In that setting, the questions for determination were:

(a) was the appellant a legitimate passenger or a trespasser?

(b) did the appellant disembark in the normal manner, or did he jump from the bus?

(c) did the respondent's servant or agent negligently drive the bus while the appellant was disembarking, causing the latter to fall and sustain injury?

The plaintiff/appellant gave evidence that he went on this bus that was plying the Papine to Constitution Hill route. He paid a fare of ten dollars. While he was disembarking at Constitution Hill, the bus was driven off. He then had one foot on the bus step and the other on the sidewalk. The door of the bus hit him on his right shoulder causing him to fall to the ground. The bumper also hit his side. He apparently

became unconscious and next found himself in the University Hospital. He insisted that although he had seen the word "charter" on the bus, he had paid ten dollars as fare having taken the bus at a bus stop. He denied entering the bus with others with a knife, threatening the conductor and driver. He denied also that the injuries he sustained were due to his own fault.

The defence called one witness, the individual who claimed to have been the conductor on the bus on the evening of the incident. He is now a bus driver. On the night in question, according to him, the bus was on a "funeral trip." When they were leaving Constitution Hill, "three guys ... jump up on the bus" he said. They were advised that the bus was not working. There was a violent reaction by the men who threatened the driver and the conductor. Two of them jumped off while the bus was in motion. None of them was identified by the witness as he did not remember their faces although he was sitting on the front seat beside the driver. So, although the pleadings suggest that the appellant's presence on the bus was admitted, the sole witness for the defence testified that he didn't know if the appellant was on the bus.

In arriving at his "findings and decision", the learned trial judge said the following:

> "It was my considered opinion after reviewing the evidence carefully, that the plaintiff was not frank with the court. I found him most evasive and untruthful and his credibility was seriously impeached. His versions of how the accident occurred was a matter of grave concern... .
>
> It was also my considered opinion that the plaintiff was one of those three men who had hopped the bus. I further accepted Davies' evidence that all three men were armed with weapons and that they jumped from the moving bus after their use of indecent language."

The learned judge also found that the appellant had not taken the bus in Papine, nor had he paid a fare. He accepted the defence's position that the appellant had been the author of his own mishap.

The appellant has challenged the judgment on the following grounds:

> "1. The judgment is unreasonable and against the weight of the evidence.
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> 2. The learned trial judge erred in concluding that the plaintiff/appellant did not prove his case on a balance of probabilities.
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> 3. The learned trial judge erred in not giving greater weight to the plaintiff/ appellant's viva voce evidence over the documents as tendered by the plaintiff/appellant in his Notice of Statements to be tendered in evidence under the Evidence Act.
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> 4. The learned trial judge unreasonably concluded that the plaintiff/appellant was not a witness of truth because of inconsistencies between his evidence and the medical report of Professor Golding dated January 25, 1994, tendered into evidence by virtue of the Evidence Act.
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> 5. The learned trial judge erred in finding that the statement attributed to the plaintiff/appellant by Dr. Golding in his medical report dated January 25, 1994, was a material discrepancy affecting the issue of liability of the defendant/respondent."

An examination of the findings of the learned judge leads to the making of the following observations. Firstly, he took into consideration inadmissible evidence in the form of reports of statements allegedly made by the appellant to persons who were not called as witnesses. In Professor Golding's report, he mentioned a version of the accident as recorded at the University Hospital by someone whose identity had not even been ascertained. It seems that it was this version that caused the judge to have had "grave concern." He was therefore clearly influenced by inadmissible material and thereby fell into error in condemning the appellant on that basis. Secondly, his findings

that the appellant was among persons armed with weapons is not supported by any evidence whatsoever. The sole witness for the defence gave no evidence of seeing the appellant or anyone else armed. To be aggressively armed on a public passenger vehicle is a serious matter which has criminal sanctions. This finding, based on non-existent evidence, presents the appellant in a very negative light, and would have contributed to the overall damning picture found of him by the judge.

Mr. Manning submitted that the appellant ought not to have been found to be untruthful as there was insufficient evidence to justify such a finding. He urged us to reverse this finding. In support he referred to the case of **Barrow v. Barrow** (1968) 12 W.I.R. 440 at 442 where Williams, J. said:

> "It is of course, established that an appellate court in reviewing decisions of fact by a court exercising original jurisdiction attaches great importance to the advantage which the trial judge had of seeing and hearing the witnesses give their testimony: **Watts or Thomas v. Thomas** [1947] 1 All E.R. 582. But it is likewise established that the mere fact that a trial judge saw and heard the witnesses does not in every case preclude an appellate court from altering his decision, and may do so if in the circumstances this is justified. Guidance on this question was provided by the opinions given in the House of Lords in that case. Viscount Simon said((1947) A.C. at p. 486) that if there is no evidence to support a particular conclusion (which is really a question of law) the appellate court will not hesitate so to decide."

In **Algie Moore v Mervis L. Davis Rahman** (1993) 30 J.L.R.410, this Court held that where there is an appeal from a trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

In the instant case, the circumstances clearly justify the reversal of the decision by the learned trial judge. He has made an adverse determination in respect of the

credibility of the appellant (the sole witness in his cause) on not only inadmissible evidence but also on non-existent evidence.

The pleadings confirm that the appellant was in the vehicle. His statement to Dr. Dundas as to the manner of the accident is consistent with what he said at the trial, and with the pleadings. The report of what he said to Dr. Cheeks bears only a slight variation. To have ignored the aforesaid consistency and to have relied on the variation in the report of what he had said to Dr. Cheeks was in our view an unwarranted approach to take. The report to Dr. Cheeks was, after all, the furthest in time from the date of the accident.

In respect of the finding that the appellant was armed and in the act of committing a criminal offence, this placed the appellant in an undeserved adverse light, from which he did not recover in the eyes of the judge.

The learned trial judge ought to have been very reluctant to accept the evidence of the respondent's witness, instead of the appellant's when consideration is given to the fact that the witness made no mention whatsoever of the accident. As conductor on the bus, he could hardly have excused himself from seeing what had happened to the appellant. Yet, nary a word from him on it.

We are convinced that the learned judge was in error when he entered judgment for the respondent. Accordingly, the appeal is allowed and judgment entered for the appellant instead.

DAMAGES

(A) The injuries and disability

The appellant was twenty (20) years old at the time of the accident. He spent more than three (3) months in the University Hospital. The records of that institution

indicate that on admission thereto he was suffering from a deep laceration about 5 cm in diameter of the left side of the lower back over the iliac crest. He was experiencing pain on movement due to a fracture dislocation of the left side of the pelvis. On May 1, 1992, surgery was done on this fracture. There was further surgery on May 5 for the wound over the iliac crest. On May 10, the appellant showed signs of mental instability by removing the dressings, a traction pin as well as a catheter. A skin graft was done in respect of the iliac wound and on July 30 the appellant was discharged from the hospital. At that time, he had a limp due to weakness of the extensor muscles of the left lower leg.

Professor Golding who examined the appellant on January 21,1994, found the following:

1. a definite slight limp which prevented fast walking or running;
2. a large scar, 4 inches x 1½ inches over the left iliac crest;
3. partial foot drop causing the limp: and
4. wasting of the extensor compartment of the left lower extremity

Maximum medical improvement had been reached by the appellant at the time of this examination. He had been totally disabled for approximately six (6) months from the date of the injuries, and then had a 30% impairment for a further three (3) months. At the point of maximum medical improvement, he was found to have a 20% impairment of the left lower extremity. This is equivalent to 8% impairment of the whole person.

Dr. Grantel Dundas examined the appellant on August 28, 1997. He noted a palpable lump in the area of the pubic - symphysis. The pelvis was irregular and asymmetrical. There was a shortening of 1 cm on the left side and the appellant walked with a slight limp. He noted also "exuberant bone formation around the fracture zones

(of the pelvis) and a loop wire in situ, the residue of surgical intervention." He estimated the residual disability in relation to the pelvic injury at 14% of the whole person.

He suggested that the appellant's complaint of sexual mal-function would best be investigated and commented on by an urologist.

Instead of a reference to an urologist, the appellant received a reference to Dr. Cheeks a neurologist. He found the appellant fully alert and well-orientated, and estimated that the appellant had suffered a 22% impairment of the whole person. This estimate took into consideration the appellant's inability to have an erection.

(B) The assessment

Mr. Manning submitted that an award of $1.8 to $2 million would be within the proper range for pain and suffering and loss of amenities. We note that Mr. Samuda for the respondent though not conceding liability, thought that a sum of $1.1million would be fair compensation. He challenged Mr. Manning's reliance on the case **Desmond McLean v Yorkin Walters and another** (unreported) (C.L.1987/M087-assessed November 9, 1989, by Patterson, J. (as he then was).

We note that in **McLean** there was a disability of 20% which compares favourably with Dr. Cheeks' estimate of the disability in the instant case. There was in **McLean** also evidence of interference with sexual function. Taking these factors into consideration, an award of $1.8 million is, in our view, appropriate.

That leaves for consideration the question of handicap on the labour market. It is well settled that for such a claim to succeed, it has to be shown that there is a substantial or real risk of loss of employment in the future as a result of the injury and an inability to compete equally for alternative employment with those persons who have suffered no similar injury. If there is such a risk the court has to quantify the present

value of the risk of the financial damage likely to be suffered. See **Moeliker v. A. Reyrolle and Co. Ltd. Ltd.** (1977) 1 All E.R. 9. In the instant case, the appellant who used to do "body work" earning three hundred dollars ($300) per week has had to turn to farming as he said he cannot move as fast as before. He is obviously earning money in this new endeavour but he never gave any evidence as to the level of his earnings. That being so, there is no basis for any award for being handicapped on the labour market.

The order of the court is therefore that the appeal is allowed. The judgment of the court below is set aside, and judgment entered in favour of the appellant as follows:

General damages:	$1.8 million plus interest at 3% from the date of the service of the writ.
Special damages:	$44,900 (agreed) plus interest at 3% from April 25, 1992.

Costs to the appellant are to be agreed or taxed.