

11/10/03 ✓

IN THE SUPREME COURT JUDICATURE OF JAMAICA

SUIT NO. CL 2001/H14V

BETWEEN GREGORY HAMILTON CLAIMANT
AND COURTNEY BURNETT DEFENDANT

Ms. Patricia Roberts Brown and Ms. S. Wolfe instructed by Crafton S. Miller & Company for the Claimant.

Ms. Daniella Gentles and Mr. Matthew Hogart instructed by Livingston, Alexander, Levy for the Defendant.

Heard: 22nd and 23rd October, 2003 and 1st December, 2003.

Straw, J. (Ag)

The claimant, Mr. Gregory Hamilton, a welder, has brought an action against the defendant, Mr. Courtney Burnett, a Minister of Religion, for damages suffered in a motor vehicle collision between both parties on the 16.04.01 at about 10:30 p.m.

The defendant has filed a counterclaim arising out of the same incident. The issue of liability as well as the question of damages has to be determined by the Court.

Issue of Liability

It was late at night. The defendant was driving his Mitsubishi Lancer motorcar along Hope Road. He was coming from Papine heading towards

Half Way Tree. He alleges that on reaching the stop lights at the intersection of Hope Road and Trafalgar Road, he positioned himself in the far right hand lane. This lane was for motor vehicles turning right onto Waterloo Road. There was another vehicle in front of him. The lights were on red. About two to three minutes later, the filter green light came on which would allow the vehicles in the far right lane to turn right onto Waterloo Road.

He states that the car in front of him proceeded to turn right and he followed 5 feet behind. As he was proceeding, he heard screaming and pressed his brakes. He stopped his car and that was when he saw the plaintiff for the first time. He was on a bike about 5 feet away. Seconds later, the plaintiff's bike collided into his car. He alleges that the cause of the collision was due to the fact that the plaintiff was speeding and had actually gone through the red lights. He suffered damages to his motor vehicle.

On the other hand, the plaintiff is contending that he was riding his motor cycle along Hope Road and proceeding from Half Way Tree to Liguanea.

When he reached the vicinity of Winchester Avenue, he noticed that the traffic lights at the intersection of Hope Road, Waterloo Road and Trafalgar Road were on green. This would allow him to proceed through the intersection and to continue on Hope Road. He estimated his speed at about

70-80 km. He reached the lights in less than 10 seconds. The lights were still on green. He indicated the distance between Winchester Avenue and the traffic lights to the Court and this was estimated to be between 180 to 210 feet.

While he was crossing the intersection, he was hit by the defendant's vehicle which had turned across the intersection to proceed onto Waterloo Road. As a result of the collision, he was thrown from the motor cycle onto the road surface at the corner of the fence by Devon House.

The plaintiff suffered traumatic injury to his right leg. He lost consciousness and was eventually taken to the University hospital of the West Indies where he was admitted.

Did the Plaintiff or the Defendant break the stop lights?

The first issue for the Court to decide is which party went through the red lights. When the filter lights are on green, traffic proceeding right onto Waterloo Road have the go-ahead. At that time, traffic proceeding down towards Half Way Tree from Hope Road and traffic proceeding up Hope Road towards Liguanea are in a stationary position as these lights are then showing red.

Neither of the parties in the present case have called witnesses. The Court had to determine this issue based on an assessment of the credibility of each witness.

The Court accepts, and it is uncontested, that the collision took place while the plaintiff's bike was in the intersection and the defendant's car was slanted to the right across Hope Road.

The damage to the Lancer was to the right front and bonnet. It is clear that the right front of the defendant's car came into contact with the right side of the plaintiff's bike.

I observed both witnesses as they gave evidence. Whilst the plaintiff, for the most part, gave his evidence in an honest and straightforward manner, I was not so impressed with the defendant. He spoke without any degree of conviction except when he mentioned the speed of the plaintiff. During that time he seemed to 'come alive'.

I also found certain aspects of the defendant's evidence to be totally unconvincing. He testified that he did not see the plaintiff while he was waiting at the stop lights, yet he could see vehicles waiting at the stop lights on the opposite side as far as there were lights. He agreed that the headlights of the bike had been on, yet he failed to observe it coming through the intersection till it was 5 feet away.

It is interesting to note also, that under cross examination, the defendant said he heard screams and stopped his vehicle before the collision took place.

However, in his witness statement he said as follows:

“I had just about finished turning from the lane on Hope Road facing Waterloo Road when I felt an impact to my car. I immediately stopped the car. I then realized a motor cycle had hit my car....’

I find that this is a previous inconsistent statement and the defendant gave no explanation for the inconsistency.

The court also found it difficult to believe the defendant when he stated that another vehicle had crossed the intersection just before him. Both parties agreed that the plaintiff did not step on his brakes or swerve at all. If another vehicle had preceded the defendant's, one would have expected it to have some type of effect on the plaintiff's behaviour. In fact, the defendant said that the plaintiff did nothing to avoid the collision but rode straight into him. There was nothing, either on the plaintiff's or defendant's evidence to support the defendant as to the activity of another vehicle preceding the collision.

On a balance of probabilities, the Court finds that the defendant turned right onto Waterloo Road while the filter lights were off and it was not safe for him to do so. As a result, he collided with the plaintiff's motor bike while the plaintiff was lawfully crossing the intersection and proceeding up Hope

Road. The defendant is therefore liable for the damages suffered by the plaintiff as a result of the collision.

Quantum of Damages

The injuries suffered by the plaintiff as a result of the collision were outlined in a report from Dr. Rory Dixon as follows:

1. abrasions and tenderness over the right clavicle,
2. traumatic amputation of the right leg,
3. disruption of the acromia clavicular ligament in the right shoulder.

He was treated with tetanus prophylaxis, antibiotic, analgesics and was taken to the operating theatre where a formal amputation was performed.

Dr. Dixon stated that he did well post operatively and the stump eventually healed.

While the report indicated that Mr. Hamilton was hospitalized for three (3) weeks, the plaintiff said it was for eight (8) days but he visited the hospital for the remainder of that period.

Mr. Hamilton is permanently incapacitated. Dr. Dixon stated that the level of permanent disability is 70% of the lower limb which is equivalent to 28% of the whole person.

He was fitted with a prosthesis in November 2001, but complains that the particular prosthesis does not fit well. In relation to the injury to his

shoulder, he stated that sometimes he cannot lift anything too heavy. There is no evidence before the court to indicate whether the injury to shoulder will have permanent effects.

General Damages

In relation to the assessment of general damages and its subhead, pain and suffering and loss of amenities, the following cases were cited to the Court by counsel in their written submissions:

- ❖ **Joseph Frazer v Tyrell Morgan et al**, 5 Khan, page 19,
- ❖ **Jaipaul v Manning et al**, Unreported Supreme Court judgment delivered on 28th day of August, 2002,
- ❖ **Delroy Barrett v The Attorney General**, Harrison's Assessment of Damages page 328-329.
- ❖ **Oswald Espeut v K Sons Transport Limited et al** at 5 Khan, page 39.

The Court is of the view that the most useful cases for comparison with the present are **Oswald Espeut v K Sons, Jaipaul v Manning and Frazer v Morgan**

The injuries in the Frazer case are very similar to the injuries sustained in the present case. Frazer had a high below knee amputation and his

disability was assessed at 80% of the affected extremity or 32% of the whole person.

On 2nd June 2000, he was awarded \$2,000,000.00 for pain and suffering, loss of amenities. The present value of this award using the CPI for August 2003 would be \$2,595,699.25.

In **Jaipaul v Manning et al**, the injuries of the plaintiff are particularized as follows:

He was suffering hemorrhagic shock, his blood pressure was elevated and vital organ functions were not performing. The tissues were not being oxygenated and were deprived of nutrient.

The right leg had been completely crushed below the knee. There was a comminuted fracture of all the bones. Several pieces of bones were missing. He had an above knee amputation and was assessed at 90% impairment of the lower extremity or 36% of the whole man.

In August 2002, he was awarded \$2,500,000.00 for pain and suffering and loss of amenities. Using the C P I for August 2003, the present value of that award would be \$2,797,133.84.

The plaintiff in **Oswald Espeut v K Sons et al** also suffered an amputation of the right leg above the knee. His permanent disability was assessed at 80% of the lower extremity. The present value of the award given

to him for pain and suffering and loss of amenities using the C P I for August 2003 would be \$2,449,027.02.

The Court bears in mind the awards in the above-mentioned cases. The Court also considers that in the present case, the plaintiff's permanent disability is assessed at 70% of the affected extremity and 28% of the whole person and that there is injury sustained to the shoulder.

In all the circumstances, the Court is of the view that a reasonable award for pain and suffering and loss of amenities would be \$2,500,000.00.

Handicap on the Labour Market

Mr. Hamilton is 27 years old and a welder by profession. After leaving High School he worked at Tankweld Limited where he was trained as a welder since 1993. He has no other skills. Before the accident, he was working at Value Engineering earning a net weekly sum of \$5,162.50. He also spoke of doing private work in evenings or weekends.

At present, he is again working at Tankweld Limited doing time work. He has, however, indicated to the court that he will be leaving Tankweld in a week's time to work with Port Authority on a 6 month to 12 month contract.

In his witness statement he had indicated that he was presently earning \$5,500.00 weekly at Tankweld which is basically the same as which he earned at Value Engineering.

Under cross examination, he did not agree with what was in his witness statement and claimed that he does not remember giving it. He, however, was not re-examined on the point and the court accepts it as evidence of his present earnings.

Mr. Hamilton has suffered a permanent disability. He is seeking to recover for the consequent handicap he will suffer in seeking employment in the future even though at the time of the trial he is working at his full pre-accident wage.

In order to decide whether to award Mr. Hamilton any damages under this head, the Court relies on the principles as set out in Moelicker v A Reyrolle and Company Limited, 1977 1 AER, page 10.

a). **Does a real risk exist?**

The first issue is whether there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life.

Mr. Burnett's attorneys have argued that no such risk exists because Mr. Hamilton has given evidence that he has been able to secure employment from various employers since the date of the accident, that he was able to do excellent work and that he has a prosthesis that allows him to stand, although there is some difficulty if he stands for a long period of time.

The plaintiff gave evidence as to the effect his disability has had on his working life. He stated that in November 2001, he began working at Tankweld but indicated that this was because the ‘boss knew him as he grew amongst them,’ that if it was not for that he might not be working. He explained to the Court that although the quality of his work has not been reduced, the handicap has put a certain limit on his life and he cannot go some places to work, that certain positions were awkward.

He told the court that he does several types of welding but he specializes in tig welding which is the highest paying field in the welding industry. He was mostly doing tig welding now. He explained that he could sit and do it most of the time. He has a difficulty in standing too long. For example, if the job involved a tank he would have to go around all the tank and he would have to stand.

In relation to doing private work, he explained that it had decreased as he cannot move around on his bike as he did before, that it was too hectic for him now as he can hardly walk on his legs after work. He expressed himself as follows:

‘Most of the time, it is sore. My knees hurt. In my position, it is difficult in the field to work.’

The Court was impressed with Mr. Hamilton. He appeared to be

honest and straightforward as he described his present situation. He is someone who, in spite of his handicap, is doing his best to continue to live a productive life and has succeeded so far.

It is clear, however, that even with the prosthesis, he will experience some difficulties doing certain jobs. This will render him less competitive on the labour market as he may not be considered for certain jobs . The Court therefore finds that there is a substantial or real risk that the plaintiff will lose his present employment or be thrown on the labour market at sometime before the estimated end of his working life.

b). Assessment of Award

Since a substantial risk does exist, the Court has to now make an assessment of an appropriate award. In doing this, the court is guided by the factors recommended by Lord Brown in the Moelicker case (supra) (page 17, paragraph b) which are stated basically as follows:

The quantification of the present value of the financial damage that will be suffered if the risk materializes, having regard to the degree of the risk, the time when it may materialize and the factors both favourable and unfavourable which may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialize.

The Court assesses the degree of the risk to Mr. Hamilton as one that will be periodical, that is there is a real risk he may be thrown on the labour market periodically because of his disability and that he will not be able to obtain job security.

However, the fact that Mr. Hamilton specializes in tig welding will operate in his favour as it is a speciality which is the highest paying in the field and there will be some demand for his expertise.

In the circumstances, the Court is of the opinion that an award of a global figure without any reference to the multiplier/multiplicand will be the most just in the circumstances. The usual discount, including 25% taxation taken into consideration, the sum of \$300,000.00 is awarded under this head.

3. Cost of Future Prosthesis

The claimant has stated that the prosthesis with which he is presently fitted has to be replaced as it is uncomfortable and ill fitting. He has submitted for the court's consideration an estimate from Orthro Pro Associates In., for US\$2,000.00 for a new prosthesis. This will have to be replaced every 2 to 5 years. The life expectancy table produced by the Statistical Institute of Jamaica for the period 1999-2001 estimates that a male at age 25 years has on average a life expectancy of another 48.88 years. The claimant can be reasonably estimated to have a life expectation of another 46

years. In all the circumstances, the Court will award him US\$2,000.00 for a new prosthesis and a further US\$20,000.00 for 10 replacements to cover his life time.

The total award would therefore be US\$22,000.00. This should be converted at the Bank of Jamaica rate as of December 1, 2003.

Special Damages - Medical and Transportation Expenses

The claimant has proved his case in relation to both medical and transportation expenses.

He is therefore awarded as follows:

Medical expenses	-	\$73,704.47
Transportation	-	1,800.00

Lost Items

The claimant has stated that he lost the following articles at the scene of the accident:

Lost bracelet	-	\$10,000.00
Lost watch	-	5,000.00
Lost rings	-	12,300.00
Lost shoes	-	3,600.00
Lost card	-	4,000.00
Phone card	-	<u>500.00</u>
Total	-	\$35,400.00

The attorneys for the defendant have submitted that this claim has not been proven.

In his witness statement, Mr. Burnett asserts that when he went to speak to the driver of the motor cycle, he was not wearing any bracelet, watch or rings and he did not see them around the area.

Under cross examination, he admitted that a lot people were around the claimant as he was lying unconscious on the road; that the people lifted him and put him on the sidewalk but he did not assist. He also stated that it was not possible that they could have been taken because he was close to them while the claimant was being lifted.

It has also been pointed out that there are no receipts, nor any other substantiation of the allegation of lost items. **(as per Hepburn Harris v Carlton Walker S C C A no 40/90)**

The Court is of the view that it is extremely unlikely that Mr. Burnett would have been paying attention to Mr. Hamilton's wrist, fingers or the contents of his pockets in these traumatic post accident moments. Also having regard to the time of the incident, they would have been less visible.

The defendant also supported the claimant's evidence that he was taken away in a vehicle to the hospital. The Court finds that a window of opportunity existed for articles to be lost or stolen

However, having regard to the principle as enunciated in the Hepburn Harris case (supra), the Court will only make an award in relation to some of the articles. These are as follows:

Watch	-	\$5,000.00
Shoes	-	3,600.00
Cash	-	4,000.00
Phone card	-	<u>500.00</u>
Total	-	13,100.00

Loss of Earnings

The claimant has pleaded loss of earnings for 23 weeks between April 16 to October 5, 2001 at \$5,500.00 per week..

This was his gross earnings at Value Engineering before the accident. The net figure is \$5,162.15. The Court will award loss of income at 23 weeks on the net figure of \$5,162.15. The total is therefore \$118,729.45.

Part time Employment

The claimant has pleaded for 6 months of loss of part time income at \$30,000.00 per month.

There has been no substantiation of any of these payments. He has stated that he had on average, three (3) part time jobs to do per month where he could make \$30,000.00 and over. He conceded, however, that he would

sometimes get a job to do for \$6,000.00. Based on my acceptance of the evidence of the plaintiff as being truthful, the court finds that damages in this area has been proved.

The Court, therefore accepts the figure of \$6,000.00 per job at three (3) times per month which is \$18,000.00 at 6 months. This is discounted by income tax at 25%. The total awarded for part time employment is therefore \$81,000.00.

In summary therefore damages are awarded as follows:

Special Damages:

Medical expenses	-	\$73,704.47
Transportation	-	1,800.00
Lost items	-	13,100.00
Lost of earnings	-	<u>199,729.45</u>
Total Special Damages	-	\$288,333.92

General Damages

Pain, suffering, loss of amenities	-	J\$2,500,000.00
Handicap on the labour market	-	300,000.00
Cost of future prosthesis	-	US\$ 22,000.00

(to be converted into Jamaican currency
at Bank of Jamaica rate as of 01.12.03)

Interest is awarded on the sum of \$2,500,000.00 at 6% per annum from December 27, 2001 to December 1, 2003.

Special Damages of \$288,333.92 with interest thereon at 6% from April 16, 2001 to December 1, 2003.

Cost to the claimant to be agreed or taxed.