# JAMAICA

IN THE COURT OF APPEAL.

SUPREME COURT CIVIL APPEAL NO. 13/65.

BEFORE: The Hon. Mr. Justice Lewis, Presiding.
The Hon. Mr. Justice Moody.
The Hon. Mr. Justice Shelley.

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JAMAICA OMNIBUS SERVICES LTD. & ARTHUR MCCAIN
Defendants-Appellants

vs.

ROCCO CALDAROLA & PATRICK LOPEZ.
Plaintiff-Respondents Defendant-Respondent

Mr. V. O. Blake, Q. C., and Mr. R. Williams for Appellants.
Mr. R. Alberga, Q. C., and Mr. N. Hill for Plaintiff-Respondent.
Mr. L. Robinson, Q. C., and Mr. J. R. Cools-Lartigue for Defendant-Respondent.

November 15, 16, 17, 18, 1966.

LEWIS, J. A.: On the 20th of July, 1957, the plaintiff, who was a seaman first class gunner's mate on the U. S. A. Navy "Tawawa", came ashore at Kingston at the Victoria Wharf some time in the afternoon. There he met the defendant Lopez, and after some conversation, during which Lopez appears to have extended hospitality to him, he went off with Lopez in his car.

Later that evening, at about half-past seven, Lopez, the plaintiff and one Angela Constantine and a couple of other persons were returning from Palisadoes Airport in Lopez' car - they had been on a sight-seeing tour - and when they arrived near to the Regent Installation, where the road made a curve, the defendant Jamaica Omnibus Services' truck, driven by the defendant McCain, came around the corner. There was a collision and the plaintiff received a very severe blow to his right elbow, which was resting on the sill of the motor car, as a result of which he had to undergo extensive medical and surgical treatment over a period of about two years. He has been left with a deformed elbow; his right arm is now shorter than his left; the movements of his elbow are limited; he has lost to some extent the usual power of his right hand and as

a result of the lack of use of his right arm there has been wasting of the muscles of the right shoulder.

In respect of these injuries, he brought this action.

At the time of the collision, the plaintiff was engaged in conversation, and apart from saying that Lopez' car was being driven at a speed of about 25 to 30 to 35 miles per hour, he was unable to give any account of how the collision occurred. He did not see the truck before the impact. Each of the drivers - the two defendants - and their witnesses gave conflicting evidence as to how the accident occurred.

It is not necessary to go too extensively into the details because this appeal concerns only the question of liability of Lopez and the quantum of damages awarded; and the defendants-appellants do not dispute the finding of the learned trial judge that they were negligent.

The two versions are set out broadly by the learned trial judge at pp. 103 and 104 of the record.

McCain's version, supported by that of his witnesses, was that the collision occurred on a straight piece of road at Rockfort at a time when the truck was travelling at a reasonable speed and on its correct side of the road; that the car driven by Lopez was overtaking other cars in a line of traffic and in doing so travelled over on some part of its incorrect side of the road and collided with the right side of the truck before it could pull back to its correct side.

Lopez' version, supported by Angela Constantine, was that he was driving his car at a reasonable speed on his correct side of the road and as the truck came around the apex of a slight curve in the road, it travelled fast and instead of holding its correct course, came on to his car. Immediately before the collision, he swung to the left bank, having braked hard, and hit the left bank just before the truck collided with him and just before he was able to bring the car to a stop.

The learned trial judge, after a very careful review of the evidence, accepted the version given by Lopez and Angela Constantine and, indeed, appears to have placed great reliance upon Constantine's evidence.

The defendant Lopez' car received some damage to the right front

headlamp, the right side and the right rear fender as well as to the right pivot window. This was the damage it received directly from the truck, but it also received damage to its left headlamp and fender as a result of having struck the left bank.

The learned judge's findings in particular were that the truck was travelling at a fast rate of speed immediately before and at the time of the collision and that its speed was unreasonable, having regard to the width of the truck and its weight, it being fully laden with a number of articles which McCain said he was taking to a dance at Bull Bay; and he found that the collision was caused by his negotiating the left hand curve at this unreasonable speed, thereby coming over to the right hand or incorrect side of the road and that, in attempting to regain his correct side, a manoeuvre necessitated by his previous negligent driving, he side-swiped Lopez' car.

On the other hand, he found that Lopez was driving at a reasonable rate of speed and that he was in no way blameworthy. He accepted the evidence of Lopez, Constantine and a police constable, Neysmith, who had visited the scene shortly after the accident, and rejected the evidence of McCain and his witness Pinnock, and, indeed, of his two other witnesses.

On the question of damages, the trial judge awarded the plaintiff special damages amounting to £335. 14. 3d. and general damages amounting to £13,920, making a total of £14,255. 14. 3d. Specifically, he rejected the plaintiff's claim to a sum of £2,808. 3. 9d. as loss of earnings which was claimed by the plaintiff as special damages, but he awarded under the head of general damages the sum of £10,320 for loss of prospective earnings, and a further sum of £3,600 for pain and suffering, etc.

Against this judgment the defendants-appellants, the Bus Company and McCain, have appealed; and a cross-appeal has been filed as to the damages by the plaintiff.

I shall deal first with the main appeal. The complaints made against the learned trial judge's judgment by the defendants-appellants are two-fold. First, it is said that he ought to have found the defendant Lopez

liable to some extent for the collision although it is conceded that the greater portion of the liability ought to be borne by the appellants; and, secondly, it is said that the learned trial judge ought to have held that the plaintiff was guilty of contributory negligence.

On the first ground, learned counsel for the appellant urged that the defendant Lopez had more than once said in his evidence that when he realized that a collision was imminent he was then about 40 yards away from the truck and that before the collision he travelled about 18 yards; and he submitted that on the basis of that evidence and having regard to the fact that Lopez had said that he had braked - and the learned trial judge must have accepted that part of his evidence - that the learned trial judge ought to have found that Lopez was travelling at a faster speed than the appellant McCain. It was contended that since the learned judge found that the truck was travelling at an unreasonable speed, then he ought not to have found that the car was travelling at a reasonable speed; and it was further submitted that in these circumstances had Lopez been travelling at a reasonable speed, the collision would probably not have occurred. So, by this process of reasoning it was sought to show that Lopez was in some way responsible for the collision.

Learned counsel for Lopez, on the other hand, submitted that the court must look, as the judge was entitled to look and did look, at all the evidence relating to the speeds of these two vehicles, and that if one did that, one found ample evidence as to the speeds to justify the learned trial judge's conclusion. In particular, he drew attention to the evidence of Constantine which, as I have said, the judge expressly accepted. She said in her evidence that the car was travelling at about 25 miles per hour; that she would dispute that it was going at about 30 to 40 miles per hour, and that she did not regard the car as going fast. She did regard the truck as going fast, and the truck was covering the distance much more quickly than the car.

Learned counsel also drew attention to the fact that McCain, who might be expected not to limit the speed of Lopez' car in Lopez' favour, had himself estimated the speed of the car as it came towards him at 30

to 40 miles per hour.

All these distances and speeds can only be approximations, for this collision quite obviously occurred, as one might say, in the twinkling of an eye; and the learned trial judge, in my view, upon the evidence, was entitled to reach the conclusion that Lopez' car was being driven at a reasonable speed.

Whatever his speed may have been, one must look to see what he did or what he omitted to do at the time of the collision in order to see whether that speed contributed in any way to the collision. On the facts which the learned trial judge found - and which have not been disputed by the appellant in this appeal - Lopez, keeping a good lookout along a straight road, saw the lights of the approaching vehicle as that vehicle approached the corner. As soon as the vehicle came to the corner, he became aware that it was on his side of the road, heading towards him and that a collision was imminent unless he acted promptly. In those circumstances he applied his brakes, he pulled as far as he could to the left - indeed into the bank - and notwithstanding that, was struck by the truck. It is quite obvious that the truck had come considerably over to his side of the road. There is no doubt that in those circumstances Lopez did all that could reasonably be expected of him and omitted nothing that might reasonably have been expected of him.

The argument that if he had not been travelling as fast as he was - whatever his speed may have been - the truck would probably not have hit him appears to me to be a bold assumption. It must be remembered that Lopez, at the speed that he was travelling, subject to the braking, was pulling away from the truck as fast as he could, and it may very well be that had he been travelling more slowly he would have received a more direct blow.

For these reasons, I consider that the learned trial judge's finding that he was in no way blameworthy ought not to be disturbed.

On the second ground, it was urged that in the circumstances, to which I shall refer, the only reasonable inference to be drawn is that the plaintiff's arm must have been protruding outside of the window and that in those circumstances he failed to take care for his own safety

by keeping a lookout for approaching traffic and ought, therefore, to be held to have contributed to some extent to his own injuries.

The motor car received what has been described as a "gouge" along the right front door about four inches below the sill, but apart from some evidence which is not quite clear, there is no evidence that the sill itself was damaged. It is contended that since the sill was not damaged, then the plaintiff's arm must have been outside of the window. He was seated on the right of the front seat, the car having a left hand drive, and between him and Lopez was seated the girl Constantine.

All the defendants had pleaded that the plaintiff was contributorily negligent on this ground, that his arm was protruding outside of the car, but none of them gave any evidence as to where his arm was. McCain offered no evidence whatsoever on that point. Lopez said he did not know where it was, and so did his witness Constantine. The learned judge was left with the positive evidence of the plaintiff that his arm was resting on the sill but the elbow was not protruding outside. Perhaps I might mention that the evidence was that the sill was about two to three inches wide.

Of course, the appellant is entitled to have the court look not merely at the plaintiff's denial but at all the evidence in the case, and if he can show, as he contends, that the inescapable conclusion, notwithstanding the plaintiff's denial, is that his elbow must have been outside, then he would be entitled to have a finding in his favour. He would have to show that the plaintiff's elbow was protruding to such an extent that it went beyond the side of the car. In my view, the plaintiff could not be held to be doing a dangerous act if it was merely resting on the sill or, although protruding somewhat, was within the limits of the side of the car. As I mentioned earlier, there was evidence that the front right pivot window was damaged. There was also evidence which would lead to the inference that in all probability the damage to the door below the sill and to the pivot window was caused by one of the side irons, made in a C-shaped form, which supported the box of the truck.

Now, as learned counsel for the plaintiff submitted, the fact that the pivot window was damaged indicates that something above the height

of the window sill came into contact with that part of the car and it is at least not improbable that it was that same part of the truck which did the damage to the plaintiff's elbow. The learned trial judge appears to have been of that opinion for at p. 110 of the record he says: "I am satisfied (a) from the type of damage done below the right window sill of Lopez' car; (b) the type of angle irons or sills used to support the body of the truck; (c) the width of the body of the truck being wider than the cab, and (d) the bending of the second angle iron or sill" - he is referring there to the sill of the truck - "that the collision" - I think a better word would have been damage - "was due rather to the protrusion of the angle iron or the width of the body of the truck beyond the cab than to the protrusion of the plaintiff's arm."

The word "or" which appears on this record is evidently a clerical error and should either be "on" or "and", having regard to what he has just said. I think it should read: "was due rather to the protrusion of the angle iron and the width of the body."

In my view, the appellants, upon whom was cast the onus of proof, failed to substantiate their pleading and this ground of appeal also fails.

I pass now to the cross-appeal by the plaintiff. It is convenient to look at the way in which the special damages were pleaded.

> "Loss of earnings: Prior to the accident the plaintiff had been accepted by the Bricklayers, Masons and Plasterers Union, Local 75, 208 Hamilton Avenue, White Plains, New York, as an apprentice bricklayer with effect from the 12th November, 1958. As a result of the said accident, the plaintiff has been unable to take up this appointment and has been employed instead as a clerk in the United States Post Office and has suffered the following loss of earnings - "

and then there is a table showing the various years, beginning at 1958, ending at 1964, what his earnings as a bricklayer would have been, the amount which he earned as a post office clerk and what the difference - in the first two years in his favour and in subsequent years against

him - was, and on this a total of £2,808. 3. 9d. was reached.

The plaintiff gave evidence in support of this claim, that prior to his going into the navy he had applied for membership in the union and apparently had been accepted; and that he had commenced his course as an apprentice bricklayer and served as such for two months. In November, 1954, on his 17th birthday, in order to avoid compulsory national service in the army, he volunteered for service in the navy and signed on for four years. He said that it was his intention after the four-year period to return to his trade and to become in due course a journeyman bricklayer. That would have taken four years.

There was evidence both from himself and from a witness named Palmer, a bricklayer and instructor in his county, that both the plaintiff's father and his brother were in the same trade - and in the same union indeed - and Palmer said it would have been comparatively easy for the plaintiff to have rejoined the union and to have picked up where he left off if he so desired. But as a result of the injuries which the plaintiff received, it was admittedly no longer possible for him to pursue the calling of a bricklayer, and he had been compelled to take such employment as he could find, which was that of a timekeeper and mail counter in the post office.

Evidence was tendered and received of a trade agreement relating to the wages of bricklayers for 1962 to 1965 and the wages pleaded and given in evidence were based upon this agreement and the learned trial judge accepted them as being a correct statement of what an apprentice or a journeyman would have been entitled to receive during that period.

However, the learned judge, upon the evidence before him, disallowed this claim for special damages; and this is the first complaint made by the plaintiff. He says that it is true that at the time of the accident he was in the navy but this was only a temporary suspension, as it were, of his employment as an apprentice and of the course upon which he had entered and which would have led ultimately to his becoming a journeyman. And he says that since this was caused by the fact that he was bound at 17 to do national service, then his position is tantamount to his having been on a sort of long leave: his job was that of an ap-

prentice, not of a sailor, and that was the job in respect of which he was entitled to claim that he has sustained loss of earnings.

The learned trial judge did not accept that view of the evidence. He referred to a passage in Kemp and Kemp on the Quantum of Damages, Vol. 1, 2nd Edition, pp. 8 & 9, reading as follows:

> "Expenses actually incurred before the date of the trial constitute special damage and should be specially pleaded."

And to another passage from the judgment of Lord Justice Asquith in Shearman against Folland, 1950, 2 King's Bench at p. 51, in which the learned Lord Justice said:

> "Expenses which up to the time of the hearing have not yet been crystallized in actual disbursements should be claimed as general damages."

And he said: "I am of the view that not because certain items are specially pleaded it means the plaintiff is entitled to such items as special damages."

After referring to the submission which I have already mentioned, the learned judge continued:

> "It is obvious, however, that at the date of the accident he was seaman first class gunner's mate of the crew of U. S. A. Navy 'Tawawa' and must have been paid some allowances during his service. As a matter of fact, he received pensions for disability through the accident. Further, the amount claimed here is neither an expense already incurred nor an expense not yet crystallized in actual disbursements but is in fact speculative."

Learned counsel for the appellant, with some degree of justification, has said that reading this passage with its reference to the two passages of Kemp and Kemp and Shearman v. Folland, it would appear that the learned judge was equating earnings with expenses; and he says that if that was what the judge said and it was on this basis that he rejected the claim for special damages, then he was in error.

I find it difficult to conceive that the learned judge would think that it was only in respect of expenses that the claim for special damages could be admitted. I think that in the passages referred to he merely intended to apply to loss of earnings the principle enunciated in respect of expenses, namely, that it is a factual expense or, as ap-

plied to earnings, a factual loss and not a possible or even a probable expense or loss which is allowed as special damage.

In the instant case, the plaintiff, at the time he received the injury, was serving as a member of the navy and in order to earn the wages which he claimed as special damages, he would have had to apply for readmission to the union and become once more an apprentice bricklayer. He had prospects of becoming a journeyman bricklayer but those prospects had not at the time crystallized even in apprenticeship, far less in employment as a journeyman. On that state of the evidence, what the learned judge had to decide was: to what amount was the plaintiff entitled as fair compensation for the loss of earning capacity resulting from his injury? and in holding that the claim ought to be dealt with as a claim for the loss of prospective earnings under the head of general damages, and not as special damages, I think he took the right approach to the matter.

The evidence establishes that the plaintiff in 1954 had taken steps to effectuate his intention to become a bricklayer by joining the union and entering upon his apprenticeship but this was interrupted, as he knew it would be, by the legal requirement that he should perform national service and his consequently joining the navy. At the end of this period, the plaintiff would have had to start again, if he so desired; and here we come, in considering the claim for loss of prospective earnings, to the first of what has been described as a series of imponderables. What would the plaintiff have decided to do in November, 1958, had he been a fit and healthy young man of 21?

The learned judge dealt with this aspect of the problem at p. 114 of the record and came to the conclusion, rightly as I think, that whatever the answer to that particular question might be, it was clear that the plaintiff was entitled to say that as a result of his injury, he had been deprived of the opportunity to engage in the kind of livelihood that he had expected and to earn the kind of wages that he would otherwise have been able to earn. Thus the learned judge had to ask himself: having regard to the plaintiff's good prospects had he decided to reenter the bricklaying trade, and having regard to his present earnings

as a post office employee, and bearing in mind all the imponderables, what is the value of the loss which the plaintiff has sustained?

No complaint has been made of the general principles on which the learned judge dealt with this aspect of the case. It is rather with the answer that he gave that the plaintiff quarrels. The learned judge appears to have answered the question by saying that on the basis of an average of what he called the plaintiff's "probable or speculative loss of earnings" of approximately £2,808 over a period of seven years, the sum of £400 per annum was a fair estimate of the value of the plaintiff's loss.

Learned counsel for the plaintiff has submitted, in effect, that that figure of £400 is far too low and has been reached by a wrong method because the learned judge failed to bear in mind the fact that four of those seven years included the low wage-rate of the apprenticeship period and it cannot be right to apply an average thus obtained over the whole of the plaintiff's fictional life as a journeyman. He submitted that the proper and fairer method would be to take the difference between the plaintiff's actual earnings at the post office in 1964 and what he could have earned as a journeyman in the same year, namely, £1,200, and to scale that down to allow for the imponderables.

The force of learned counsel's criticism of the judge's method must be admitted, but that suggested by learned counsel is also, in my view, open to objection. No doubt it would be proper if the plaintiff, having qualified as a journeyman, had gone off to the navy, but it seems to me that on the facts of this case it would be a highly speculative approach to the problem. It may be that the judge would have reached a figure more acceptable to the plaintiff had he taken the average over a longer period than seven years in view of the plaintiff's youth. The real question that this court has to ask itself, however, is, not whether the judge's method was right, but whether the sum of £10,320 awarded under this head is inordinately low.

I have looked at the figure that the judge used and I have also looked at the length of the period over which he applied it. He fixed the plaintiff's working life at 43 years and multiplied £400 by this and

after discounting ten per cent for income tax, reduced it by one-third to allow for two factors: (a) contingencies of life and (b) prompt payment. The effect of doing this is that he has used an unusually long period of purchase which has resulted in a fairly generous award. In my opinion this court cannot in those circumstances properly increase it.

The result of all this is that both the appeal and the cross-appeal, in my opinion, fail and ought to be dismissed. The defendant-respondent should have the costs of the appeal, to be borne in equal shares by the defendant-appellants on the one part and the plaintiff on the other.

MOODY, J. A.: I agree with the judgment just delivered by the learned President.

SHELLEY, J. A.: I agree and I have nothing to add.

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