

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1990/J206

BETWEEN SELVIN JAMES PLAINTIFF
A N D WESTERN WHEELS LIMITED DEFENDANT

John Graham and Camille Meikle for Plaintiff instructed by Broderick and Graham.

Crafton Miller and Nancy Anderson for Defendant instructed by Crafton Miller and Company.

Heard: May 26, 27, 28, 29 and July 30, 1992.

RECKORD, J.

The plaintiff's claim against the defendant is to recover damages for negligence and or breach of contract arising out of a motor vehicle accident along the Fairfield Road, in St. James on the 18th of April, 1986.

It was the plaintiff's case that between 11 to 11:30 o'clock that night he was a side man on a truck operated by defendant sitting on a seat specially constructed for that purpose just behind the back of the cab on the right hand side. The truck was being driven by Mr. Noel Smith from Montego Bay to the dump at Retirement when on negotiating a corner he felt the truck bounce on the bank on the right hand side of the road, swerved back to the left and then to the right and overturned on the right hand side of the road. The plaintiff was thrown off the truck and found himself lying on the asphalt under the cab of the truck. He was taken to the Cornwall Regional Hospital where he was admitted suffering from a broken left leg and spent about 7 weeks there as a patient. He had several other injuries as set out in the medical reports tendered in evidence. His left foot was placed in traction after several attendances in the operating theatre. He received lots of treatment, tablets, injection and medicine. His foot was very, very painful. Up to when he left hospital his foot was still in traction and he could not walk. When traction removed he had to purchase a pair of crutches on which he moved about.

For the first six months after leaving hospital he returned for treatment four days per week at cost of between \$20 - \$30 per round trip. For the next six months he went once every two weeks to orthopaedic clinic at cost of \$6.00 per round trip by bus. He was treated by Dr. Herard during his illness. He had to purchase ointment "to keep the foot mild - it cristalize sometimes." He spent not less than \$3.00 for ointment and \$80.00 for the pair of crutches. He now walks with a limp as the left foot is shorter than the right. Whenever he walks the foot gets swollen and he has pains in his ankle.

Since the accident he has not gone back to his job. He tried to get job at Public Work Department but failed as he can't do any bending down due to pains across his back. His instep cannot bear any pressure. He used to be a good swimmer but can't swim any longer. He was 58 years old at time of the accident and was earning \$530.00 per fortnight.

Under cross-examination the plaintiff said he did not know if anyone else except the driver was in the front of the truck at the time of the accident. When they drove off at the No. 2 Post office in Montego Bay only the driver was in the front and the truck never stopped until it over-turned. Just as the truck was about going into the bend he saw the spread of lights of a motor car about 1½ chains away approaching the truck from the direction of Granville. The width of the road there could be about 18 feet. The truck swerved to the right because of two big manholes and hit into the bank. It could be that his salary was \$329.00 per fortnight. He was paid his full salary until 18th of November, 1986. He got a couple days work with Public Works Department in 1989 but could not manage the work because of his injuries. He can't maintain the small farm that he has. He does gardening work at the house of the Public Work Department superintendent on Saturdays. He knew Farrel McPherson who operates a tractor at the dump but he never saw him on the truck on the night of the accident.

Two medical reports from Dr. Herard and one from Professor Golding were admitted in evidence by consent. This was the end of the plaintiff's case.

Case for the Defence

Farrel McPherson testified that in 1986 he operated a tractor at the Retirement Dump and was the holder of a General Driver's Licence and worked then and now for Mr. Henry Rhoden, the Managing Director of the defendant company. On the 1st of April, 1986, he saw the defendant's truck in Montego Bay. The driver stopped and spoke to him and he went in the front of the truck with the driver. The plaintiff and one other man were sitting on a seat behind the cab. The truck was driven towards Retirement, but on reaching Fairfield it was going around a corner when he saw the lights of two vehicles coming towards the truck from the direction of Granville. They were side by side overtaking one another and were very close to the truck and coming fast. His driver swung to the left to avoid a head on collision and the left front wheel of the truck "ride the bank" and the truck overturned on its right side on the left hand side of the road. Neither of the two vehicles collided with the truck and neither of them stopped. After the accident vehicles from Granville to Montego Bay were passing freely. The accident occurred about 8:00 p.m.

This witness had known the driver of the dump truck for about eight years. He was known as Ranjeet. He used to drive a Leyland truck with a big crane on it. He had often times seen him drive the dump truck to the dump. Since the accident he had seen the plaintiff doing roadwork all the while.

He was cross-examined. He was not a truck driver in 1986. He was picked up by Ranjeet about 7:30 p.m. Ranjeet left the island on farm work and he has not seen him since. He denied that the accident occurred near mid-night. The truck was travelling between 24 and 25 m.p.h. as it approached the corner and about 1½ feet from the left side of the road. Driver reduced his speed. Just as truck hit the bank the two cars passed. He swerved hard enough to escape the head on hit. After the truck overturned the right front wheel was about one foot from the left bank. The cars passed before plaintiff fell out. He denied that the truck collided with the right back, then swung left and overturned on the right hand side of the road. When he saw the lights coming and made out it was a car, it about ½ chain from the truck.

Mr. Henry Rhoden, the manager of the defendant company next gave evidence. He had an arrangement with the St. James Parish Council to use their vehicles for garbage collecting. On the night of the 18th of April, 1986, one of the garbage trucks driven by Noel Smith otherwise called Rangeet was involved in an accident at Fairfield. He had known Smith for 8 to 10 years before the accident and Smith had been driving for him for 5 to 6 years. Before this Smith had been driving a heavy 10 wheel truck with a crane attached. He would describe Smith as an extremely competent driver. Except for this accident, his accident record was Nil.

He arrived on the scene between 10:30-11:00 p.m. and saw the vehicle lying on its right side on the left hand side of the road. The following morning he saw a huge imprint on the left bank which could have been made by the wheel of the truck - where he saw the truck the road is about 18-20 feet wide. The truck had a hydraulic braking system with a compactor behind the cab and was loaded with garbage. It was driven from the scene the following morning.

The plaintiff had been working with him since February 1986, and his salary was \$329.00 per fortnight - he paid the plaintiff salary up to 26th November, 1986. Since the accident he had seen the plaintiff doing roadwork several places in the area.

Under cross-examination Mr. Rhoden said his company was responsible for the maintenance of the vehicle but he never insured it. There was another case arising out of this accident involving Weston Wheels, Noel Smith and St. James Parish Council but he had passed on the correspondence concerning that case to one Mr. Fowles of their Association.

A long bench is provided attached to front part of the compactor behind the cab for the garbage men to sit. They get up on the truck by steps and handrails. There are no seat belts nor doors to keep the sidemen from falling out if the truck overturns.

The driver Mr. Smith continued working with him after the accident and left on farm work abroad in the winter season of that same year. At the time of the accident he never had any insurance on the vehicle for the workers.

Submissions

Mr. Miller submitted that the only evidence given by plaintiff to support negligence was a swerving from left to right. The defendant admitted swerving to the left to avoid two vehicles coming towards him on a collision course. This has not been denied by the plaintiff. The overturning was consistent with this manoeuvre. There was no evidence of speeding by the defendant. There has been no challenge that vehicles coming from the opposite direction passed freely after the accident. The driver was competent and knew the road well. It was unlikely that the truck overturned on the right hand side of the road as claimed by the plaintiff as no damage was seen on that side and there was no collision with the oncoming cars. It was more probable that truck overturned on the left hand side of the road as stated by Mr. McPherson who the court should accept was present and who was a witness of truth. He referred to the case of Tocci v. Hankard and Another - reported in the Supplement to The Solicitor's Journal dated January 27, 1967 - where Lord Denning said that "when a dangerous situation was created such as this one, one ought not to be critical of what was done on the spur of the moment to avoid an accident."

On the question of special damages Mr. Miller contended that the evidence did not support the claim for transportation, medical expenses and loss of earnings. In respect of general damages he referred the court to two cases in Khans work on Personal Injury awards - Volume 3 page 40 C/LM031/83 - Morrison v. Attorney General and Another and at page 85 - Harris v. Walker - S.C.C.A No. 40/90 - and suggested an award of between \$180,000 and \$200,000.00.

On the claim for breach of contract Mr. Miller submitted that the terms were not pleaded hence this part of the claim must fail.

On behalf of the plaintiff Mr. Graham submitted that only one vehicle was involved in this accident which in the circumstances raised a presumption of negligence on the part of the driver. He was driving a ~~high~~ truck which was laden, and coming out of a blind corner collided with the embankment. From the evidence the driver knew the road and knew that on a Friday night it was very busy - and knew he had workers on the back who were unprotected. His duty was to reduce his speed so that if emergency arose

he would be able to either bring the vehicle to a stop or manoeuvre the vehicle so as to make it unnecessary to make a violent swerve as the pleadings alleges. The result of this violent swerve was that it hit the bank and overturned. The defendant was under a duty to present evidence that the driving was reasonable but from the evidence it was not. He submitted that the driver lost control of the vehicle and this caused it to hit bank and overturned. The driver did not slow down sufficiently - he did not try to stop the vehicle before it hit the bank. The plaintiff did not see Mr. McPherson on the truck. The plaintiff lay bawling on the ground yet Mr. McPherson never went to where he was. This behaviour is most improbable and is reason for court to doubt whether Mr. McPherson was present. The evidence of Mr. McPherson does not go far enough to rebut the presumption of negligence. If court finds that the alleged motor cars are partly to be blamed at least 40% of the blame for this accident should rest squarely on the shoulders of the driver of the truck.

Re Special Damages

Whatever work plaintiff got on weekends this would be in addition to what he would earn in his normal work week - loss of earnings from 27 November, 1986 to present was 286 weeks @ \$309.00 per fortnight = \$47,047.00.

The odd jobs he picked up should be discounted as they were few and far between.

Transportation for first six months - 4 days per week for 24 weeks	
@ \$30.00 per day	= \$ 2880.00
2nd Six Months - 12 visits @ \$6.00	= \$ 72.00
Prescription -	= \$ 540.00
Ointment -	= \$ 800.00
Crutches -	= \$ 80.00
Clothing -	= \$ 300.00

Re General Damages

Mr. Graham referred to Harris v. Walker (Supra). An award of \$100,000.00 was made over 2 years ago. Today's value this would be in the region of \$300,000.00.

In Felix Beecher v. St. Mary Banana Company an award of \$150,000.00 made on 9th December, 1991 where disability was of 10% to 15% of the limb.

Handicap on the Labour Market

Mr. Graham submitted that although the plaintiff was now 65 years old he was not adverse to earning a living and was asking for award of \$30,000.00 under this head of damages. Mr. Miller in reply was of the view ~~that~~ a conventional sum of \$10,000.00 was appropriate award under this head unless the evidence shows that greater amount is deserved.

Conclusion

The claim for a breach of contract was not pursued and that therefore fails.

The plaintiff here is perfectly innocent and ought to recover damages. His evidence of negligence of the defendant's driver was that he "felt the truck bounced on the bank on the right hand side of the road, then I felt it ~~take~~ a sudden lock to the left and rode back to the right and then the truck turn over." However, under cross examination he said the truck was being driven on the left hand side and all of a sudden it swung to the right because there were two big manholes and it hit the bank on the right hand side. It is most improbable that seated on the right side behind the cab of the truck that he could have seen at that time of the night these big manholes on the left from which the truck swung. The plaintiff's evidence in this regard is unreliable. He admits that just before the accident a spread of lights were approaching from the opposite direction. The evidence of the defendant witness that these lights caused the driver to swing to the left is more probable. The credibility of ~~the~~ witness was severely tested and from his demeanour in the witness box I accept that not only was he present but also that he gave credible evidence.

This incident took place at night. The driver of the defendant's truck ought to have been aware of the approaching vehicles even before he reached the corner. He should then have reduced his speed pull further left and got ready to stop the vehicle if that became necessary to avoid an accident. Instead of stopping he swung the vehicle violently left which caused the left front wheel to ride the bank and overturned. This cannot be said to have been a dangerous situation which caused him to act on the spur of the moment. Notwithstanding his previous good record as a driver

I find that the defendant's driver was negligent when he so swung the vehicle so that it hit the bank. It was the hitting of the bank that caused the vehicle to overturn and injured the plaintiff. A driver exercising caution and care could easily have manoeuvred the vehicle to avoid an accident without hitting the bank.

The details of special damage as indicated in Mr. Graham's submissions accord with the evidence and are not unreasonable.

Loss of earnings from 27th November, 1986 to end of May 1992 = 286 weeks @ \$329.00 per fortnight =	\$47,047.00
Travelling =	\$ 2,952.00
Prescription, ointment, crutches and clothing	<u>\$ 1,720.00</u>
	\$51,719.00

On the question of general damages, the medical evidence indicates a serious injury to the left leg - Dr. Gerard viewed it as a 25-30% disability.

Professor Golding estimated a permanent impairment of 37% which was equivalent to 18% of the whole person.

In Felix Beecher v. St. Mary Banana Estate Limited (Supra) an award of \$150,000.00 was made in December 1991, for a similar lower limb injury which was estimated to be a 15% disability of the whole person. This would be equivalent today to an award of \$200,000.00.

For handicap on the labour market a conventional award of \$10,000.00 is made.

The awards are as follows:

Special damages: \$51,719.00 with interest @ 3% from 18th April, 1986 to date of judgment.

General damages: Pain and Suffering and loss of Amenities \$200,000.00.

Handicap on labour market \$10,000.00 with interest @ 3% on \$200,000.00 from date of service of writ to date of judgment

Costs to the plaintiff to be agreed or taxed.