IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J 140 of 1984

BETWEEN	LAUGHTON JONES	PLAINTIFF
A N D	GASFORD GOLAUB	1ST DEFENDANT
A N D	HUBERT WILLIAMS	2ND DEFENDANT

Claim and Counter Claim in Negligence

W. B. Frankson Q.C. instructed by Gaynair and Fraser for the Plaintiff.

G. Robinson and P. Brooks instructed by Judah, Desnoes, DeLeon Scholefield and Company for the Defendants.

Hearing on January 14, May 30, 31, and June 1, 1988

Bingham J.

On 1st June, 1988 I delivered an oral judgment from a prepared draft and promised to reduce it into writing and this is now a fulfilment of that promise.

In this matter the Claim and Counter Claim is for negligence arising out of a collision between two trucks, along the main road leading from Savanna La Mar to Frome in the parish of Westmoreland on 7th August, 1983.

The Plaintiff's truck was owned and being driven by him, and the other truck which was owned by the first named defendant was being driven by the second named defendant at the time of the collision.

It is common ground and not in dispute that the collision took place at Georges Plain which is situated not far from the Frome Sugar Factory. As a result of the collision both vehicles were extensively damaged and the Plaintiff also received a fracture to one of the bones of his right foot which incapacitated him for some twelve weeks.

The Evidence

This case has been remarkable for the paucity of evidence as to how the collision took place and also as to the marked absence of material witnesses on both sides.

The Court it is true to say, has been left to determine the question of liability and damages to a large extent based on the bare ipse dixit of the two drivers of the respective vehicles. In the prevailing circumstances, the demeanour of these two persons was of the utmost importance in the determination as to where the truth of the matter lay.

On what, as the facts emerged from the evidence, was a wet road surface it being common ground that it had been raining earlier that night, and was drizzling at the time of the collision, the plaintiff testified that he had just completed the delivery of a large tent, at the Frome Sugar Factory and at about 9:45 p.m. was now proceeding back to Savanna la Mar driving his motor truck at a speed of about 20 to 25 miles per hour. He was driving about six inches from the left of the road where there is a grass verge, as one faces Savanna la Mar. His headlights were on and when reaching in the vicinity of the Georges Plain School he saw the defendant's truck approaching from about 300 - 400 yards away. This truck was about 30 feet from the entrance to the Georges Plain School at which point there is a break away which was situated on the road to the plaintiff's right of the road (the defendant driver's side of the road) when the defendant driver suddenly swerved his truck to the right of the road and collided with the plaintiff's truck.

It was the right front of both vehicles that collided. The force of the impact caused the plaintiff's truck to swing to the right immediately upon the impact taking place. The result of the impact caused the following damage to the plaintiff's truck:-

1. From the mountings to the right front suspension

was completely torn off.

2. The front windshield was broken.
3. The right front door.
4. The right front fender.
5. The right rear view mirror.
6. The support for the right front springs were broken off.
7. The power steering jack.

The plaintiff's truck came to rest at a distance of 28 feet from the point of impact, and while still facing Savanna la Mar, it was now positioned with the left rear wheel four feet from the left bank and the front wheel being six feet from the left bank.

The defendant's truck was now positioned to the back of the plaintiff's truck and on the right side of the road facing Frome, and was some 80 feet from the point of impact.

The defendant driver in his account as to how the collision occurred testified that he was driving a 10 ton Leyland motor truck which was used for the transportation of canes and that he was proceeding along the main road on his way to Georges Plain. There were two workers driving along with him in the cab of the truck. Also in the body of the truck was a grabloader which weighed about four tons.

The defendant's truck was some 30 feet in length as against the plaintiff's truck which was 24 feet in length. The driver was on his way to Grange Hill to pick up two tractor operators.

While driving the motor truck along the main road and on reaching Georges Plain, travelling to the left of the road at a speed of about 35 miles per hour he observed a truck approaching at about the same speed from the Frome direction. The truck had only one headlight functioning, the right headlight and was proceeding on its correct side of the road. He was able to observe that it eas a truck from two street lights which were on.

As both vehicles almost passed each other the other truck made a sudden swing to its right and hit into the right front wheel by the hub of the defendant's truck also hitting the right front fender and then collided into the stake body behind the cab, As a result of the impact the defendant's truck received the following damages:-

1. The power steering.
2. The spring perch was cut loose.

This damage caused the defendant's truck to get out of control and it ended upon the right side of the road facing Frome to the rear of the plaintiff's truck.

In a situation with which on a wet road with not more than three feet of asphalt surface available given the width of the road - 19 feet and the relative width of both vehicles - 8 feet each a collision occurred in which the right front of one of the truck's (the plaintiff's) and the right side of both vehicles received extensive damage and in which both drivers are contending that it was the other who turned suddenly into the path of the next vehicle it is clear that both accounts cannot be true. Someone must obviously be lying.

The plaintiff in an attempt to support his account gave evidence of a breakaway in the road in the vicinity where the collision occurred. This breakaway which at various times was also referred to as a 'rut' and a 'pothole' was situated to the defendant's half of the road and according to a photographer called by the plaintiff Edward Lindsay, it took up about a quarter of the defendant's half of the road. The plaintiff relied upon this fact as establishing likely or probable reason for the defendant driver swerving in the manner that he contended and so causing the collision between the two vehicles.

The demeanour of the defendant driver when confronted with this evidence, although Learned Counsel for the defence submitted that his testimony was unshaken in cross examination, was in my view far from convincing. For example, although he at first emphatically denied the presence of any rut on the road in the

vicinity where the collision occurred, and kept on referring to it as the "state dirt road, as his evidence went on when faced with the photographs taken at the scene of the collision and having admitted to recognising the area as portrayed by them, he admitted in cross examination that there was some damage to the road in the vicinity of the collision but now stated that this affected the entire width of the road.

The evidence of the photographer is amply supported by the prints Exhibit 2, 2A and 2B which graphically reveal a situation which given the speed at which the defendant driver on his account was travelling would have caused him to take the sort of manouvre which on the plaintiff's account he did take with the consequences which flowed from that act. Exhibit 2 in particular which is a close up Photograph of the breakaway in the road clearly reveals a condition on that main road which would have been an obvious hazard to any motorist, moreover, so to the driver of a large 10 ton cane truck which was carrying a load weighing four tons at the time of the collision.

As it is common ground that both vehicles were 8 feet in width and that the road at the point of impact was 19 feet wide, it is clear that on a wet road surface, faced with this situation, this called for extreme caution by both drivers in manouvering their vehicles on the night in question given the prevailing conditions at the time of the collision.

The Submissions

In his final submissions Learned Counsel for the defence in urging the Court to accept the defendant's version as to how the collision occurred as the more probable of the two accounts contended in particular that:-

1. The plaintiff's truck was being driven on the night in question with only one headlight functioning. This fact is supported by the evidence

of the plaintiff that this question was raised by the defendant's driver to the Police following the collision.

2. The fact that the plaintiff wore bifocal glasses is supportive of the manner in which they sought to contend that the collision took place.

3. The damage to the front of the plaintiff's truck in particular to the cab of the truck as being supportive of the fact that it was the plaintiff's truck that swerved to the right side of the defendant's truck. This would be further borne out by the absence of any damage to the front of the defendant's truck.

It is of some significance that the first time there was any mention being made of the presence of only one functioning headlight was when the plaintiff was being cross examined. It was not alluded to in the original particulars of negligence being relied upon by the defence as set out in the pleadings. Although the Defence and the Counter Claim was settled on 25th July, 1984 and served on 27th July, 1984, no attempt was made to amend this to include that particular until very late in the trial on 30th May, 1988. Because questions were put to the plaintiff in cross examination concerning this area of the evidence and no objection was raised by the Learned Counsel for the plaintiff, the amendment was allowed. As the evidence emerged, however, the plaintiff himself frankly admitted that there was mention made of this fact on the scene by the defendant driver to the Police after the collision and that a test was made of the plaintiff's vehicle to ensure that the lights were in proper working order and they both functioned satisfactorily. This evidence, when his turn came to testify was not controverted by the second named defendant.

In this regard that would seem therefore, to be effectively dispose of that contention on the defendant's part.

As regards the question of the plaintiff wearing bifocal glasses this was also admitted by him under cross examination. The plaintiff himself gave evidence of the visibility on the night in question despite the weather conditions as being fairly good and this evidence was not controverted by the defendant driver.

The further submissions made by Learned Counsel for the defence therefore, of the visibility being poor or of such a nature as would have been likely to affect the plaintiff because he wore glasses and thereby to have had some effect on his judgment is in the light of the evidence speculative, having no real factual basis to support it.

On the other hand, Learned Counsel for the plaintiff adverted to some five areas of the evidence from which he contended that if these were accepted then the Court ought based upon these findings to conclude that the plaintiff ought on a balance of probability to succeed on both the Claim and Counter Claim. These were:-

1. That the road was wet or damp and called for careful driving.
2. That the defendant was driving at a speed which was excessive in all the circumstances.
3. That the defendant driver changed course and drove over to the wrong side of the road in all probability to escape a rut which was on the road.
4. That Court ought to find that there was such a rut present in the vicinity where the collision took place.
5. That the defendant driver was guilty of a lack of consideration for other users of the road.

Conclusions and Findings of Fact

As it is common ground that the road was wet and coupled with this the fact that the defendant driver was carrying a load weighing some four tons in the back of the truck; given all these factors this situation called for extreme caution on his part, bearing in mind that it would have required twice the normal stopping distance for him to come to a stop and control his vehicle in an emergency there being as I find as a fact the presence of a breakaway (rut) on the left of the road facing Frome. On the basis of this evidence I would further hold that the defendant driver given the circumstances with which he was confronted, did swerve to his right in an attempt to avoid the rut. That this swerve to his right was occassioned by his negligent manner of driving his truck at a speed which on his own admission was excessive in a situation which on a wet asphalt road with a heavy load called for extreme caution on his part, which caution he failed to display in his manner of driving given the condition of the road.

On the other hand there is nothing on the evidence which would lead me to the conclusion that the plaintiff's manner of driving on the night in question was other than careful. He was driving on his unchallenged evidence at a speed which the ocassion called for and although his vehicle was damaged in a manner which made braking impossible, it was brought to a halt at a distance which when measured by the Police was found to be 28 feet from the right front wheel of his vehicle to the point of impact. Having regard to the length of his truck this meant that his truck had travelled a very short distance after the collision. Given the length of the truck this would indicate that the reason for the plaintiff's truck coming to rest within such a short distance

would have been due to the fact that the heavier vehicle (the defendant's truck) by the force of the impact would have caused the plaintiff's vehicle not merely to slow down almost to a halt, but to change its direction as well.

The fact that irrespective of the damage to the right side of both vehicles, the defendant's truck was able to continue for another 80 feet before coming to rest is further evidence supportive of the excessive rate of speed of that vehicle prior to the collision taking place.

Learned Counsel for the defendant had submitted that the defendant's account is further supported by the damage to the front of the plaintiff's truck and is contending that had the collision taken place in the manner as the plaintiff has testified one would have expected some damage to the cab of the defendant's vehicle.

The fact of the damage to the windshield and front of the plaintiff's truck can be explained on the basis of the plaintiff's testimony which based upon the demeanour of the plaintiff which impressed me as to his frankness, I accepted as the truth. His account in this regard, is that following the collision the force of the impact caused the front of his vehicle to swing to the right immediately upon the impact taking place. This manouvre would have brought the front of his truck including the cab and the windshield into contact with the right side of the defendant's truck.

On the question of liability therefore, I find that the plaintiff's account of the manner in which the collision took place was the more probable of the two accounts and that this is supported by:-

1. The presence of the breakaway (rut) on the defendant driver's half of the road.
2. The wet road surface when coupled with the speed at which the defendant driver was travelling given the conditions existing at the time of the collision.

I would accordingly find that the defendant driver was soley to be blamed for the collision.

Damages

This falls to be considered under two heads namely:-

1. Special Damages.
2. General Damages, based on an award for personal injury and the resulting pain and suffering caused therefrom.

Special Damages

In so far as this head of damages is concerned the claim contained some six subheads. The first subhead concerned a claim for $9,943.58¢ being an amount claimed as being the cost of repairs to the plaintiff's motor truck. In this regard Learned Counsel for the defendants submitted that the entire claim for special damages ought to be rejected upon the ground that the plaintiff had failed to prove the special damages alleged. He relied upon Robinson and Company Limited vs. Jackson and Lawrence Volume 11 JLR 450 per dictum of Hercules J.A. as being in support of his contention.

Having regard to the facts of that case where the plaintiff who was injured although a seaman had not worked as such for a long period of time, but had gained employment as a Bartender at a much lower wage than when he was engaged as a seaman In reducing the amount awarded for loss of earnings, the Learned Judge quite rightly in my view held that as the plaintiff had not worked as a seaman for a long time, although there was some evidence of a hope that he might be so engaged in the near future there was no basis for an award calculated on his earnings as a seaman.

In this instant case the plaintiff has given evidence as to the damage which was done to his truck, and the cost to him for having it repaired. True it is that he did not call the

mechanic who repaired it or produce any supporting documents as to the cost of the parts or as to the payment of labour. This, however, would be evidence going as to weight. In the final analysis the question for my determination was based upon the unchallenged testimony of the plaintiff in this area as to whether I accepted his evidence that this was the sum that he paid for the repairs done to his truck. Having accepted his account, it satisfied the test laid down by the authorities and I allowed the claim in that regard.

The amounts of $39.00 for travelling expenses, $41.00 for assessors fees and $240.00 for wrecker fees were all proven were not challenged and were allowed.

There was a further claim of $65.00 for medical expenses paid to Dr. Molyneaux the payment of which sum was supported by the evidence of the Doctor. This sum was not challenged and is also allowed.

The amount of $9,000.00 for loss of use of the truck while it was laid up pending repairs as well as the plaintiff's incapacity calculated on a basis of $300.00 per day for 30 days was challenged mainly on the basis that on the plaintiff's evidence, it was admitted that it was not every day that the truck was engaged in haulage work. There was the further contention by the defence that from the sum awarded there had to be discounted an amount of $200.00 per week which would be required to pay two sidemen, who, on the plaintiff's evidence, both worked on the truck.

In so far as the matter of the length of time claimed, 30 days I do not regard this as exorbitant but reasonable as:-

1. The plaintiff was fully incapacitated for six weeks and partially incapacitated for six weeks, a total of 12 weeks.
2. He was the driver of the truck.
3. The period that he has claimed for six weeks represents the period that it was estimated that it

took for the repairs to the truck to be effected.

Had the truck been functional and had work been available for it to undertake then it would have been so engaged in carrying out that work.

In so far as the sum of $200.00 to be deducted for expenses for payment of the sidemen I regard the adjustment as reasonable and this would reduce the claim by $1200.00.

It should be mentioned in passing that the period of 30 days is based upon six weeks, (the period of full incapacity) calculated at a five day working week, the evidence being that the truck worked from Mondays to Fridays. On this calculation the remainder for loss of use would be $7,800.00. The matter does not end there as there would be the question of income tax to be deducted based upon a proportion of 2/5 of the amount of $7,800.00 as the truck was the main source of income earned by the plaintiff which would yield an amount of $3,120 which after deduction would leave the sum recoverable as being loss of use of $4680.00.

General Damages

This leaves only the question of General Damages to be determined. The medical evidence is that the plaintiff suffered a fracture to the fourth right metatarsal bone of the foot. This injury would have been painful. The plaintiff would have been completely incapacitated for six weeks during which period he would be unable to drive a motor vehicle. He would be partially incapacitated for another six weeks. He made a very good recovery. There would have been no residual injury - nothing significant, apart from the occasional pain.

In so far as the damages falls to be calculated under this head therefore one has to take into consideration the nature and the extent of the injury, the degree of pain experienced by the plaintiff and the period of his incapacity.

Learned Counsel for the defendants, as is by now to be

expected in claims for personal injuries, has suggested an award of $5000.00 under this head as reasonable. Not to be outdone Learned Counsel for the plaintiff suggested an award of $15,000. as being more in keeping with a realistic figure. I elected to choose the middle path which would have suggested an award of $10,000. I was lead to reduce this sum further having regard to the fact that the award of $4,680 represented what was in effect a sum for compensation due to the loss of income suffered by the plaintiff, while he was laid up at home and his truck was out of commission. On this basis I considered that taking everything into consideration an award of $7,500.00 for general damages would meet the justice of the case and that is the sum which is allowed.

Accordingly, the respective awards are therefore as follows:-

1. Special Damages - $15,008.58
2. General Damages - $ 7,500.00
   $22,508.58

Judgment entered for the plaintiff on the Claim and Counter Claim for $22,508.58¢ with costs to be agreed or taxed.

Interest awarded at 3% on Special Damages from the date of the accident 7th August, 1983 to date of judgment 1st June, 1988 and on General Damages from date of service of the Writ 18th May, 1984 to date of judgment 1st June, 1988.