

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 45/87

COR: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A.

BETWEEN KENNETH KELLY DEFENDANT/APPELLANT

A N D MICHAEL BENNETT PLAINTIFF/RESPONDENT

Norman Wright for Defendant/Appellant

Miss Dorothy Gordon for Plaintiff/Respondent

On 14th & 16th December, 1987
& 2nd March, 1988

WHITE, J.A.:

This is an appeal from an award of damages assessed by
Malcolm, J., as follows:

1.	<u>"SPECIAL DAMAGES</u>	<u>\$6,220.00</u>
2.	<u>GENERAL DAMAGES</u>	
	(a) Pain and suffering	\$15,000.00
	(b) Loss of amenities	\$ 6,000.00
	(c) Loss of Earning capacity	\$10,000.00
	(d) Scarring and Disability	\$ 5,000.00
		<u>\$36,000.00"</u>
		<u>=====</u>

The stated Grounds of Appeal are as follows:

- "(i) The award of Special Damages is unreasonable, manifestly excessive and unsupported by the evidence;
- (ii) The award for pain and suffering is manifestly excessive and unreasonable and is not supported by the medical evidence;
- (iii) The awards for loss of amenities and loss of earnings capacity are manifestly excessive, unreasonable and are not supported by the evidence; and
- (iv) The award for scarring and disability is unrelated to the pleadings and is not supported by the evidence."

In the result, the remedy sought before this Court is that either the award be set aside or be reduced.

By a respondent's notice Miss Gordon contended -

"that the judgment given in favour of the Plaintiff/Respondent, Michael Bennett, in respect of general damages be raised by increasing the figure so awarded."

This respondent's notice was amended during the hearing of the appeal so that -

"the award for special damages regarding the loss of earnings be varied by increasing the judge's award by \$1800 being an additional 9 weeks @ \$200 per week."

The assessment was made with respect to personal injuries sustained by the plaintiff/respondent while he was a passenger on a motor bus, which collided with a stone and crashed into the right embankment of the Bog Walk Road, Kent Village, in the parish of St. Catherine, as a consequence of which, the bus overturned.

Those personal injuries were listed as follows:

1. Fracture to right ankle bone.
2. Compound fracture to right foot.
3. Laceration to right foot.
4. Missing skin from right thigh.

5. Missing skin from right ankle.
6. Continuing pain.
7. Impediment in walking.
8. Permanent partial disability.

The evidence emphasised these injuries. First off, the plaintiff/respondent said that when the bus overturned and he suffered injuries, he felt a lot of pain. He suffered from a broken ankle; the inside of the right thigh above the knee "dig out"; there was a fracture at that point. He was taken to the Linstead Hospital where he was given an injection and was taken to the operating theatre. He remained in that hospital for six (6) weeks. During this six weeks he had to lie down, and had to use a bed pan. His foot was raised during his hospitalisation.

He was taken to the Kingston Public Hospital where Dr. McNeil-Smith placed his right foot in a cast. He was returned to the Linstead Hospital. After this, his foot remained in a cast for four months. In fact, he used a crutch for four months. He went home with the plaster, but returned to the Linstead Hospital over a period of ten days, as an out-patient. He did not definitely state when it was that the cast was removed from his foot, nor how long it was before his mobility was restored. Nevertheless, at the most, his incapacitation was for at least five (5) months and two (2) weeks. What he did assert too was that his ankle hurts him when he runs, and he experiences pain when standing.

In his evidence, Dr. McNeil-Smith said he first saw the plaintiff/respondent on the 26th May, 1986. At that time it was too early to give any assessment of the disability. He saw him next on the 19th January, 1987; the doctor said X-rays done on the 21st January, 1987 showed that the ankle fracture about which the patient had complained had healed without trace, resulting in the normal joint space. The doctor told of a very ugly and unsightly scar

to the inner aspect of the right thigh just above the knee, and it adhered to the bone. The doctor opined that this condition was likely to be exacerbated - "it was likely to break down from time to time on irritation."

His prognosis was that, considering that the injury to the thigh was more serious than the injury to the ankle, there would be disability in the thigh, and 5-10% disability of the right lower limb; disability to knee 5-10%. Ankle disability would be 5%. He added that the injury could affect him in his work as an electrician, if he has to climb ladders or stoop. There would be trouble to the right knee. The plaintiff/respondent may complain with long walking, and long pants would cause friction on the affected thigh. Very importantly, the doctor described the scars as permanent.

At the outset of his submissions, Mr. Wright argued that there was an absence or insufficiency of (a) evidence of a work history, (b) medical evidence of when he was first seen at the Linstead Hospital; (c) loss of amenities. This state of the evidence, he said, renders the respective awards insupportable and in consequence, inordinately high, or unjustifiable, so that this Court is obliged to reconsider the award to the extent of, if not setting the award aside, yet to reduce the award considerably.

In the first place, said Mr. Wright, the plaintiff's assertion that he earned \$200 per week from doing electrical work was unsupported by any evidence of training or qualification. Therefore, the judge was not justified in finding that the plaintiff/respondent was an electrician and not a bus conductor, which last occupation was stated by the defendant/appellant.

Mr. Wright further submitted that this question of fact was compounded by the failure of the judge to give due consideration to the plaintiff's evidence suggesting that he did not make adequate attempts

to seek new employment or to be re-employed. This last comment is oblivious of the evidence by the plaintiff/respondent that since the accident he was earning an average of only \$80 per week. He said he had unsuccessfully tried to get a job as an electrician, and the firm with which he had worked refused to re-employ him.

There is this to it, that the plaintiff/respondent was never challenged as to his pre-accident earnings, except when the defendant/respondent said the former earned \$150 per week as a bus conductor.

In my view, the learned judge's award of damages for loss of earnings as an electrician is unassailable, and therefore the pre-accident earnings of \$200 per week is acceptable. However, he should have calculated this loss for over a period of 22 weeks instead of for 13 weeks. This is so because the plaintiff/respondent was completely incapacitated and unable to work for 22 weeks. I would, therefore, amend the award for this item of special damages to the sum of \$4,400, which increases the sum awarded for special damages from \$6220. to \$8020.00.

As regards general damages, Mr. Wright took issue with the award for pain and suffering as being inordinately high. But the evidence accepted by the judge supports the claim that the plaintiff suffered intense pain and supports as well the inference that he is likely to suffer similarly in the future. Indeed, the plaintiff/respondent testified that he felt a great deal of pain, and when he runs his ankle hurts him; he suffers pain when standing. He now walks with a limp. Also, bearing on this aspect is the evidence of Dr. McNeil-Smith, that the plaintiff may complain with long walking, and there would be friction from the rubbing of long pants. It is not possible to give an arithmetical calculation of this head, but this case is one in which all the foregoing factors support the Judge's award of \$15,000.00 for pain and suffering.

I think the award for loss of amenities is too low.

Even if one takes into account the separate award of \$5000 for scarring and disability. Mr. Wright's submission on this was that there was no pleading regarding scarring and disability. As was pointed out to him during the arguments, the Particulars of Injuries stated (4) Missing skin from right thigh, and (5) Missing skin from right ankle. This is amply demonstrated by the evidence of Dr. McNeill-Smith that there is a very ugly and unsightly scar to the inner aspect of the right thigh above the knee, and that it adheres to the bone, with the likelihood that it will break down from time to time on irritation. I do not agree with Mr. Wright that scarring and disability have not been pleaded. This condition inheres in the skin being dug out by virtue of which the medical evidence identifies the permanency of the scar. His submission that the award should be reduced by 50% to the extent that there was scarring is unrealistic, bearing in mind the evidence. What has to be squarely faced is that the effect of the injuries must be important in any calculation of damages. The movements of the plaintiff/respondent will be greatly restricted, in that he will be unable to climb a ladder or stoop in which activities he will be heavily circumscribed if his prospective employment entails either activity. Indeed, the medical evidence is that the more serious injury to the thigh could affect him as an electrician if he has to climb ladders or stoop. He would have trouble to the right knee. His ability to play foot ball would be affected. The plaintiff's enjoyment of life has consequently been reduced. So now, I am of the view that there the award for loss of amenities which encompasses the scarring and disability, should be \$60,000.00.

With regard to loss of prospective earnings, I take into account the fact of his age - 25 years - and the possibility that he would have been able to continue in that work of electrician, maybe

learning that work as experience dictates. On the other hand, it is also possible that he would not continue but might have gone on to another line of employment, which in a wholesome state, would have caused him to earn more than he was earning before his injuries. However, I have to take into account that it is evident that the plaintiff/respondent is not a trained electrician, maybe is no more than a helper to a trained and skilled electrician. It is not clear from the evidence whether he worked every week and whether he does so at the present time.

Taking all those contingent circumstances into account, I would award him for loss of prospective earnings an amount which is calculated at \$5,200. per year, which with a multiplier of 11 results in \$57,200.00.

In sum, the assessment of damages by Malcolm, J., is amended and is increased on this appeal to \$140,220.00

The costs, to be the plaintiff/respondent's, are to be agreed or taxed.

KERR, J.A.:

I agree. There is nothing I could usefully add.

WRIGHT, J.A.:

I agree.