

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C.L. L 116/93

BETWEEN	COURTNEY LOGAN	CLAIMANT
A N D	CHIN'S HAULAGE CONTRACTOR COMPANY LTD.	FIRST DEFENDANT
A N D	EARL POWELL	SECOND DEFENDANT

CONSOLIDATED WITH

CLAIM NO. C.L. G190/93

BETWEEN	OSWALD GORDON	CLAIMANT
A N D	CHIN'S HAULAGE CONTRACTOR COMPANY LTD	FIRST DEFENDANT
A N D	EARL POWELL	SECOND DEFENDANT

Christopher Samuda instructed by Piper & Samuda
for the Claimants

Garth McBean instructed by Dunn Cox for the Defendants

Heard: 25th, 26th, 27th March, 2nd May 2003 and 14th May, 2004

DUKHARAN, J

The cause of action in both claims is for negligence, nuisance or
breach of statutory duty.

On the 3rd September 1991 the claimant Courtney Logan alleges that he was driving a Mazda motorcar owned by Thrifty Rent-A-Car, along with the other claimant Oswald Gordon as a passenger when it collided with a motor truck owned by the first Defendant and driven by the second Defendant.

The Defendant's claim is by way of counterclaim for negligence as a result of the collision.

The issue to be determined relates to liability and to facts.

The Claimant Courtney Logan testified that on the 3rd September 1991 at about 11.30 p.m. he was driving a motor car towards Kingston. He was accompanied by the other Claimant Oswald Gordon who was seated in the left front passenger seat. While on the Bustamante Highway in Clarendon, he noticed a motor truck travelling in the opposite direction coming towards him on his side of the road without any lights on. He said when he first saw the truck he was about one and half chains away. On seeing this he applied his brakes, flashed his lights and swerved to his right in an effort to avoid a collision with the truck. The truck started to move to its left, and his right when there was a collision in the center of the road. The left side of his vehicle was badly damaged. As a result he suffered injuries to his right hand and left foot. His jawbone was dislocated and he received scratches and

bruises to his body. He was taken to the May Pen Hospital. As a result he incurred medical expenses.

The other Claimant, Oswald Gordon testified that he was a passenger in the left front seat of the car driven by Courtney Logan. He said he fell asleep during the journey and as he woke up he saw a truck heading in the opposite direction. There was a collision and as a result his leg was pinned under the dashboard. He said he was assisted to get out of the vehicle and taken to hospital. He too, suffered several injuries to his hands, legs and face and incurred medical expenses.

In cross-examination Mr. Logan maintained that the truck did not have on any lights whatsoever and that the entire truck was on his side of the road when he first saw it. He said it was a straight stretch of road where the accident happened. He said the impact was in the middle of the road. Mr. Logan denied that the accident was caused by his negligence.

Mr. Gordon in cross-examination said he was asleep when he felt a swerve and screeching of brakes. He denied that the truck was on the left soft shoulder of the road and that Courtney Logan went over on the other side of the road and collided with the truck.

The second Defendant, Earl Powell told the court that at about 10.30 p.m. he was driving a Leyland motor truck owned by the first Defendant

Fitzroy Chin. He said the car swerved violently into his path. He said at no time was he travelling without lights. He said he was never on the wrong side of the road when accident occurred. He said the left side of car collided with the left side of truck.

The Defendants called a witness in Steve Lindo. Mr. Lindo said that at the material time at about 9-10. p.m. he was travelling towards Mandeville behind a truck driven by the second Defendant Earl Powell. He said he saw a light in the opposite direction. The lights shifted to his left and he saw the truck in front of him drifting to its left. He saw lights went out, there was an impact with a loud explosion. He said when he came out of his vehicle he noticed the car was under the left front of the truck. He said at no time did he see the truck on its incorrect side of the road. He said the accident happened on the soft shoulder of the road.

Mr. Fitzroy Chin gave evidence for the first Defendant's Company. He said he was a director of the Company which owned the truck the second Defendant was driving. He said he went to the scene after the accident where he saw the truck positioned to the extreme left on the soft shoulder going towards Mandeville. He said he saw damage to the left front of truck.

The damage to the vehicles is clearly important in determining where on the road the accident occurred. As the Claimant said in evidence he had to swerve to his right in an effort to avoid a collision. The Defendant Earl Powell stated that after the accident fifty percent (50%) of the car was on the soft shoulder and fifty percent (50%) on the driving surface of the road. There are several discrepancies between the first and second Defendants and the witness Steve Lindo. Mr. Lindo maintained that no part of the car was on the driving surface of the road after the accident. Mr. Powell said that after the accident only the right headlamp of the truck was on while Mr. Lindo said that none of the headlamps were on. Mr. Powell makes no mention of seeing Mr. Lindo at the scene and they both differ as to the time of the accident.

Mr. Fitzroy Chin told the court that when he went to the scene of the accident both headlamps of the truck were off. Yet Mr. Powell said only one was on and Mr. Chin told him to disconnect the battery.

The evidence of Oswald Gordon (second Claimant) in my view is not of much assistance. He stated clearly that he was asleep in the front passenger seat and woke up almost on point of impact. He was not able to say whether the headlights of the truck were on as he was looking up at the windscreen.

The evidence of the Claimant Courtney Logan is consistent and in my view more probable than the evidence of Mr. Powell and his witness. I find on a balance of probability that the Claimant was travelling on his correct side of the road. I find as a fact that the second Defendant was on the wrong side of the road and travelling without headlights and was a danger or obstruction on the highway. Driving without headlights was a breach of a statutory duty. I therefore find that the second Defendant was negligent. Both Defendants are liable for damages to the Claimants.

In relation to the Claimant Courtney Logan he received several injuries and was seen by no fewer than five doctors. He was first examined by Dr. Ian Titus the morning after the accident. He incurred medical expenses.

He said in evidence that he got an injury to his left leg and an injury to his jawbone. He said up to now he has to sleep with a mouthpiece to help to align the jawbone and he still feels pain when he yawns.

Dr. Ian Titus examined the Claimant and although x-rays were not done on his left foot subsequent x-rays revealed a fracture on the 23rd December 1992 with the result that a below the knee ambulatory cast was applied. Dr. Titus also in his report stated that there was a blow to the right wrist which subsequently proved to have been fractured.

The Claimant also saw Dr. Richard Polino who diagnosed that he suffered cervical strain and sprain and that there were limitation of the cervical and lumbar spines as well as sciatic neuritis. He was examined by Dr. Polino three months after the accident. Dr. Polino also found frequent numbness in the left and right middle finger.

The Claimant was also seen by Dr. Jerome Feldman who in his report said that Courtney Logan was disabled and could not work and that he would require long term treatment and therapy for over six (6) months. He had not shown much improvement three and half (3 ½) months after the accident.

Dr. Earl Broker who saw the Claimant and in his report dated the 7th January 1992, said that the treatment of the facial and mandible injuries would take more than six (6) months.

Mr. Logan indicated that with the exception of Dr. Titus, the other specialist doctors mentioned he had to go overseas and was treated at Zurburgh Hospital in the U.S.A..

Mr. McBean for the Defendants submitted that Mr. Logan has failed to prove on a balance of probabilities that some of the injuries referred to in the medical reports of the overseas doctors was as a result of or caused by

the Defendant's wrongful act. This is on the basis of Dr. Titus's report that failed to mention some of the injuries the Claimant suffered.

However I am satisfied that Mr. Logan gave evidence of his injuries and that it arose as a result of the accident. Dr. Titus saw him the day after but some of the injuries were discovered afterwards by the other doctors who saw him. I am therefore satisfied that all injuries referred to in all the medical reports were caused by the Defendant's negligence.

In relation to Special Damages I find and accept that the sums regarding Medical expenses as set out in the Statement of Claim are supported by documentary evidence and have been proved. Mr. Logan is therefore entitled to his medical expenses both here and abroad.

With regards to Loss of Income from his job this has been proved by way of documentation from his employer. The Claimant is an Electrical Engineer with Smith's Engineering Ltd. He was unable to work for a period of twenty-two (22) weeks. He was not paid during the period. His net income for the period amounts to US\$ 19,867.54. He is entitled to this sum.

The Claimant is also the Managing Director of a musical band promoting reggae music both here and abroad. He said the band was rehearsing for an upcoming tour of Japan from the 14th September 1991 for six (6) months. He said that at the time of the accident the tour of Japan

was certain as he had signed a contractual agreement and arrangements were concluded before the accident. He said they were to be paid US\$6,000.00 for group performance in addition to US\$150.00 per day for any unscheduled performance per individual in the contract. A copy of the contract was exhibited (exhibit 1). Although the contract is dated the 9th September 1991 he said it was agreed in August 1991 and performance was to commence on the 14th September 1991. His commission on the contract would be 25%. The value of the contract for the six (6) months period regarding performance of the band was US\$37,200.00. His 25% would therefore be US\$9,300.00.

Mr. McBean for the Defendants submitted that no award should be made by the court for the loss of the musical contract. He said that the Claimant admitted that he signed the contract six (6) days after the accident at a time when it appeared to him, that because of his injuries he would be unable to fulfill his obligations under the contract which included travelling to Japan by the 14th September 1991. He said that because of the Claimant's admission he failed to mitigate his loss. I am inclined to agree with Mr. McBean that the Claimant signed a contract after the accident when in fact he would be unable to fulfill his obligations under the contract by travelling

to Japan with the Band. No award will therefore be made for the loss of the musical contract.

The Claimant Courtney Logan is entitled to General Damages for Pain and Suffering and Loss of Amenities. He still feels pain in his jawbone, and the opening of his mouth is limited. He says that when he plays tennis he has to wear a wrist support band and when it gets cold in the winter he experiences fatigue in the broken area of his feet. However it is to be noted that the medical reports do not show any permanent partial disability in percentage terms.

Several cases were cited to assist the court in coming to a figure for Pain and Suffering and Loss of Amenities. In relation to the injury to the hand the case of **Hines vs Edwards et al** (Khan's Vol. 4 page 100) was cited. In that case the Claimant (Plaintiff) was injured in a motor vehicle accident with an injury to the right hand. Her permanent partial disability was assessed at 10% which is equivalent to 6% whole person disability. She was awarded \$674,414.12 which when updated computes to \$1,011,783.30. In **Garwood vs Scott et al** (Khan's Vol. 4 at page 109) the Claimant suffered a crush injury to the palm and dorsal aspect of the left hand, fracture of bones of the left hand and dislocation of left hand. Permanent disability was assessed at 100% of left hand and 90% of the whole upper limb. She

was awarded \$600,000.00 for Pain and Suffering, when updated this would amount to \$1,307,208.00 today.

In relation to injury to the mouth in the case of **Campbell vs. Dyke et al** reported (at Khan's Vol. 4 page 149) the Claimant (an infant) had 3 teeth knocked out in a motor vehicle accident. This caused the gum to resorb. She had to wear a denture which would require changing from time to time. The infant's oral cavity and gums needed monitoring every six months. She was awarded \$225,000.00 for Pain and suffering which when updated would be \$490,203.00.

For the injury to the back in the case of **Earle v. Graham et al** (Khan's Volume 4 page 173) the Claimant suffered a severe whiplash and was placed in a cervical collar. She also suffered neck pains and headaches. She was assessed with a permanent disability of 10% of the cervical spine which is equivalent to 6% whole person disability. She was awarded \$800,000.00 for Pain and Suffering which when updated would be equivalent to \$1,239,050.00.

Based on the cases cited, Mr. Samuda for the Claimant, has submitted that with the combination of the injuries suffered a figure of \$1,900,000.00 for Pain and Suffering would be appropriate.

Mr. McBean for the Defendants submitted that the medical reports do not state any permanent partial disability in percentage terms and the claimant appears to have no obvious disability as was observed in court. However he said that if the court finds that all injuries disclosed by all the medical reports should be taken into account then, a sum of between \$450,000.00 - \$500,000.00 should be awarded. He provided the court with cases which provided a useful guide.

With relation to the injury to the hand the case of **Robinson vs Bonfield et al** (Khan's report Volume 4 at page 99) was cited. In this case the Claimant suffered multiple abrasions to the left hand and also a fracture of the right wrist. He was awarded \$269,438.00 for Pain and Suffering . When updated this amounts to \$422,818.00. In the case of **Finn vs Nagimesi et al** (Khan's Volume 4 at page 66) the Claimant suffered a fracture of the 5 metatarsal of the left foot. He was awarded \$64,365.00. When updated would be \$162,140.00. In **Francis v. Nugent** (Page 62 Harrison's Assessment of Damages) the Claimant was awarded \$40,000.00 for the fracture of the right mandible which when updated would be \$262,162.00.

What therefore is an appropriate figure for Pain and Suffering and Loss of Amenities? The medical reports on Mr. Logan do not reveal any

permanent partial disability. The injuries in the cases cited by Mr. Samuda are far more serious than the Claimant in this case.

Taking the combination of the injuries into account I am of the view that a figure of one million dollars (\$1,000,000.00) for Pain and Suffering and Loss of Amenities would be an appropriate figure.

In summary therefore there shall be judgment for the Claimant with the following awards for the Claimant Courtney Logan as follows;

1. **Special Damages**

a) Medical Expenses (United States) US\$ 33,409.50

Medical Expenses (Jamaica) \$ 1,376.10

Loss of (Earnings from
Permanent Job) US\$ 19,867.54

With interest @ 6% per annum from the 3rd September 1991 –
14th May 2004

2) **General Damages**

Pain and Suffering and Loss of

Amenities \$ 1,000,000.00

With interest @ 6% per annum from the 17th September 1993 –
14th May 2004.

Costs to the Claimant to be taxed if not agreed.

The second Claimant Oswald Gordon suffered multiple lacerations and abrasions on the left side of the head and face with swellings in the left periorbital area. He also received multiple abrasions and lacerations on the left forearm and left hand with superficial burn to the left forearm. He had a surgical operation in which fragments of glass were removed from under the skin to the left of his left eye and at the ulna aspect of his left wrist. The medical reports indicate that Mr. Gordon is left with facial scarring which is permanent and which involves the outer angle of his left eye and over the malar temporal area of his left cheek and the exterior aspect of his left forearm.

The evidence given by Mr. Gordon confirms the injuries as per the medical reports.

In relation to Special Damages, the medical expenses listed in the Particulars of Special Damages have been proved by documentary evidence. He is therefore entitled to the sum of \$4,431.10 for medical expenses.

In relation to Loss of Income from musical contract I am of the view, as with the other Claimant, that as the contract was signed after the accident, in fact he would have been unable to fulfill his obligations under the contract. The court will therefore not make an award under this heading.

With respect to the Claimant's Loss of Income from a restaurant which he operated at the time of the accident he said he was unable to do business for six (6) months. He said he served cooked food, fruit juices and vegetarian foods. He said he would make deliveries to business places and schools. He would sell about thirty five (35) meals daily at a rate of between Seventy-five Dollars (\$75.00) – Eighty Dollars (\$80.00) each. He said he did not earn anything from the restaurant for the period. He does not now operate the restaurant.

In cross-examination he said the figures represented his gross earnings. He admitted he had not yet started paying tax. No evidence was given as to his expenditure for expenses. He did not give the court evidence of his net earnings.

There is no evidence of a figure which the court could base an award for loss of earnings. However I believe the Court should make a nominal award of \$50,000.00 for loss of earnings from the restaurant.

In relation to General Damages for Pain and Suffering and Loss of Amenities the case of **Jamaica Telephone Co. v Barrymore Hill et al** (Khan's Volume 5 Page 239) was cited for guidance. In this case the Claimant received injuries to lower cheek, left hand, right thigh with a

Fracture of the right knee. The Claimant was left with permanent scarring of cheek, hand and thigh which was quite obvious due to the multiplicity of scars and the raised nature of most of them. She was awarded \$1,115,000.00 as General Damages for Pain and Suffering. This figure when updated amounts to \$1,542,813.10. Mr. Samuda is asking the Court to award a figure of \$1,000,000.00 for Pain and Suffering.

Mr. McBean submitted for the Defendants that a sum not exceeding \$400,000.00 would be an appropriate award. He cited **Samuels v Davis** (Khan's Vol. 4 Page 151) which in that case the Claimant who suffered multiple laceration to face, pain in chest and back was awarded \$380,000.00 in 1996. When updated this computes to \$630,085.00.

In **Griffiths v Campbell** (Khan's Vol. 4 Page 153) the Claimant suffered loss of consciousness, laceration to forehead resulting in scarring, lacerations to right cheek resulting in scarring and puncture wounds to the back of head. He was awarded \$220,000.00 for Pain and Suffering in 1997. This figure when updated amounts to \$328,238.86.

The medical report of Dr. Arscott who saw the Claimant Oswald Gordon said that corrective surgery will only provide minimal improvement to the region of the lateral angle of the left eye and only about 30 – 40% improvement of his facial scars.

Based on the cases with similar injuries an award of \$700,000.00 for Pain and Suffering and Loss of Amenities would be an appropriate sum.

In the summary therefore there will be judgment for the claimant as follows:

Special Damages

- | | |
|---------------------|--------------|
| a) Medical Expenses | \$ 4,431.10 |
| b) Loss of Income | \$ 50,000.00 |

With interest @ 6% per annum from the 3rd September 1991 – 14th May 2004.

General Damages

\$700,000.00 for Pain and Suffering and Loss of Amenities

With interest @ 6% per annum from 17/9/93 – 14th May 2004.

Costs to the Claimant to be taxed or agreed.