NMS.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: SCCA 89/98

BEFORE: THE HON. MR JUSTICE DOWNER, J.A.
THE HON. MR JUSTICE BINGHAM, J.A.
THE HON. MR JUSTICE HARRISON, J.A.

BETWEEN	**ORAL MORGAN**	**PLAINTIFF/ APPELLANT**
AND	**GOODYEAR JAMAICA LIMITED**	**DEFENDANT/ RESPONDENT**

Carol Vassall instructed by **Norman Samuels** for the Plaintiff/Appellant

David Henry instructed by **Nunes Scholefield DeLeon and Company** for the Defendant/Respondent

July 6, 7, 2000 and April 23, 2001

DOWNER, J.A.

I have read in draft the judgment of Bingham, J.A., and agree with his reasoning and conclusion, and the Order proposed.

BINGHAM, J.A,

In this appeal the appellant sought to challenge an award of assessment of damages by the Supreme Court before Marsh, J., on June 26, 1998. Following a hearing over three days the learned judge reserved his decision. In a written judgment delivered on the date previously adverted to he gave judgment for the appellant in the following terms:

1. Special Damages

$20,300.00 with interest at the rate of 6% per annum from the 14th November, 1995, until the 26th day of June, 1998.

2. General Damages

(a) Pain and Suffering and Loss of Amenities $750,000 with interest at the rate of 3% per annum from the date of service of the Writ of Summons until the 26th June, 1998.

(b) Handicap on the Labour market $70,000.00.

(c) Cost of Future Surgery $395,000.00."

The appellant now seeks an order setting aside the assessment and requesting that this Court assess the damages as it deems just and expedient. Alternatively, that the matter be returned to the Court below for a new assessment to be done, on the basis that the damages awarded both as special damages and general damages were inordinately low, and not reflective of the pain and suffering and pecuniary loss suffered by the plaintiff (appellant).

That the damages both special and general were assessed on the wrong principle of law, the appellant sought to rely on the following grounds of appeal:

"**(1)** That the learned trial judge erred in Law in awarding damages for handicap on the Labour Market when the evidence clearly indicated Future Loss of Earnings.

(2) The learned trial judge erred in Law in not addressing his mind to the Loss of Earnings suffered by the plaintiff from the date of the injury to the date of trial.

(3) The learned trial judge failed to appreciate the weight of the evidence in respect of the extent of the physical injuries suffered by the plaintiff and the effect of the permanent nature of the injuries and in particular:

(a) that the quality of life of the plaintiff was seriously impaired by a 10% loss of hearing in one ear and total loss of 40% of hearing coupled with disabling condition of Tinnitus

(b) the possibility of the disorder in the spine progressing to paralysis of the spine."

Although the grounds of appeal in this matter sought to challenge the learned judge's order in respect of both Special and General Damages, at the outset of the hearing of the arguments learned counsel for the appellant announced to the Court that the order in so far as it related to the award for Special Damages was no longer being challenged. This left for our consideration the matter of the award for General Damages. In this regard and following the reasoning of this Court in **Central Soya of Jamaica Ltd. v Junior Freeman** [1985] 22 J.L.R. 152 the proper award for interest on the special damages ought to have been 3%.

The Facts

The factual background to this matter are fully summarised and set out in the judgment of the learned judge in the Court below. They were as follows: The plaintiff (appellant) 30 years of age at the time of the hearing was then currently unemployed but up to May 17, 1996, he obtained his living as a U2 machine operator at the defendant's company a tyre factory at Morant Bay, St, Thomas. He also supplemented his income from the factory

by operating a poultry farm on a fairly limited scale. He was married with a family at the time of the incident.

On November 14, 1995, while operating the said machine at the defendant's plant, the machine malfunctioned and this resulted in his receiving serious injuries. He was struck to the ground and lost consciousness. He later awoke to find himself being attended to by a doctor at the Princess Margaret Hospital in St Thomas. He could not move. There was pain from his neck down to his hands. Later that same day he was transferred to the Medical Associates Hospital in Saint Andrew. He was examined, given medication and referred to Dr. Winston Chutkan an Orthopaedic Surgeon, but in his absence he was seen by a Dr. Vaughan from Dr. Chutkan's office. Medication and a course of physiotherapy were administered. Mr Morgan was then sent home and the next day he was taken to the company's medical clinic at Morant Bay. It was from there that the referral was made to Dr. Chutkan and Mr Morgan seen by Dr. Vaughan. He also saw Dr. Lyle Harper, Dr Graham, , Dr. Hal Shaw and Dr. Randolph Cheeks.

Summary of the Medical Evidence

Dr. Chutkan

He first saw the appellant following the injury at Orthopaedic Associates, Tangerine Place, on December 7, 1995. The appellant then complained of pain to the neck radiating down to the right shoulder as also stiffness in the neck.

The appellant related a history of having his neck trapped within a bit of machinery. He suffered abrasions to the left shoulder and to the left side of the abdomen. He was treated with analgesics, fitted with a cervical collar and given physical therapy. He also complained then of suffering from cramps to the right side of the neck radiating into the right arm.

An examination revealed some decrease in the range of movement in the cervical spine. No abnormal neurological signs were observed, and X-rays of the neck revealed no bony injuries.

On a visit to Dr. Chutkan on January 10, 1996, the appellant continued to complain of pain in his neck. An examination by the doctor revealed that the patient (appellant) would allow very little movement to his neck. He continued to be treated with medication and physical therapy.

On January 24, 1996, at the patient's next follow-up visit, there was no further complaint of stiffness to his neck but he still complained of pain on turning his head. An examination again revealed that the patient would allow for very little movement of his neck.

On February 7, 1996, another follow-up visit, the patient continued to complain of pain on turning his neck. He had also been seen by Dr Graham a Neurologist who had ordered an M.R.I. Examination of his neck to be done.

On March 13, 1996, the appellant in another follow-up visit to Dr Chutkan brought along the M.R.I. report which revealed that he had suffered a slight cervical scoliosis and a bulging disc at the C6-C7 which did not impinge on the thecal sac.

At the time of this visit the appellant was advised by the doctor to return to work and was discharged from his care.

The appellant was last seen by Dr. Chutkan on 3rd October, 1996. He stated at this time to be feeling much better but continued to complain of pain to his left upper limb and numbness to his left hand. There was no further injury to his neck. In his written opinion, the doctor made the following observations:

> "Examination revealed a healthy male who had a normal gait and sat comfortably. Examination of his cervical spine showed no deformity. There was slight tenderness over the left trapezius. There was a full range of movement of his cervical spine with slight pain at the extremes of movement. In his left shoulder there was a full range of movement and again there was slight pain in full abduction.
>
> In summary, this patient suffered an injury to his neck which I think was muscular and ligamentus. Following physical therapy and cervical collar, he seemed to have made satisfactory recovery but continues to complain of some pain in his neck. He had pain initially in his right shoulder and right arm but at his last visit he had pain in his left shoulder and left hand.
>
> I think that the patient suffered an injury to his neck from which he should make a full recovery."

Dr Randolph Cheeks, a Consultant Neurosurgeon, saw the appellant on 20th June, 1996. This visit followed his dismissal from his job at the respondent's factory.

The history and the examination was consistent with that related to and as diagnosed by Dr. Chutkan. Dr. Cheeks also had the benefit of observing the M.R.I. Scan of the cervical spine done on 14th February, 1996. He stated as his opinion that:

> "This man suffered an impact to his head is undoubted by virtue of the wound on the left side of his head, but to the extent that he has no retrograde amnesia and can recall being in the ambulance on the way to hospital, I do not think that this was a serious head injury. I note the description of him (*made at the time*) as being 'badly shaken' but not unconscious, suggesting that he did not quite sustain a concussion."

Dr. Cheeks as was the case with Dr. Chutkan saw the injury to the appellant's neck as being an injury to the ligaments involving the annular ligament of the C6/7 intervertebral disc. This he saw as representing a mechanical derangement of this disc as a consequence of the injury and is liable to trouble him periodically, especially at the time of physical exertion. The disability of this injury he rated at five percent (5%) of the whole person for the deranged cervical disc, plus one percent (1%) for the loss of thirty degrees of lateral rotation to the neck. He also said that:

> "The dizziness/ 'blackouts' is a consequence of the diffuse head injury which he sustained. It is not permanent and will usually be resolved in about nine to twelve months."

It was following the follow-up visit to Dr. Chutkan on March 13, 1996, that Dr. Chutkan took the decision to advise the appellant to return to work and discharged him from his care. Although the appellant had made some recovery from his injuries, he had not reached the stage of full recovery. Dr Cheeks' opinion was that the appellant up to the time of his examination, had a history of dizziness and "blackouts" as a consequence of the diffused head injury which he sustained. He still needed nine to twelve months to ensure complete recovery.

The appellant had been injured on the job. The response of the respondents following the appellant's discharge from the care of Dr Chutkan was to terminate his employment. The letter from the Manager of Human Resources read:

> "May 8, 1996
>
> Mr Oral Morgan
> Botany Bay
> White Horses P.O.
> St Thomas
>
> Dear Oral:
>
> Re: Termination on the Grounds of Medical Redundancy
>
> It is with deep regret that Goodyear Jamaica Limited has decided to terminate your services by reason of redundancy on medical grounds.
>
> This decision is due to the injury on-the-job which resulted in your inability to perform your normal duties since November, 1995 and for a future unspecified period. Your current ill-health as confirmed by the doctor renders it impossible for us to continue your employment with Goodyear.
>
> You will be compensated as per The Employment (Termination and Redundancy Payments) Act and Collective Labour Agreement with the Union. Your last work day will be May 10, 1996, and payment will be made on May 17, 1996.
>
> You qualify for four (4) weeks notice pay and you will be paid in lieu of notice also on May 17, 1996.
>
> We thank you for your past service to Goodyear and wish for you every success in the future.
>
> Yours sincerely
> GOODYEAR JAMAICA LIMITED
>
> Nathan Thompson
> Manager Human Resources."

Dr. Hal Shaw, Ear Nose and Throat Specialist, and someone with a wide experience in the field of Otolargngology saw and examined the appellant on June 7, 1996. The appellant related the circumstances of the accident on November 14, 1995, and of the injuries suffered including that to his left ear. He complained of experiencing "a ringing" in his ears, a condition which the doctor saw as "one of the most disabling complaints a patient may be suffering from, is something treatable. In this case, audiograms revealed that there was severe mixed hearing loss. This was assessed at 60% -70% of the left ear and permanent. An hearing aid would be unhelpful in this case."

The appellant also gave a history of bleeding from the left ear and experiencing hearing loss coupled with dizzy spells and blackouts from January 1996. These symptoms suggested a skull fracture at the time of the left middle cervical fossa. At the time of the examination it had now healed. The dizziness and the fainting (blackouts) will go away over a period of time. (Emphasis supplied)

The Judgment of the Learned Trial Judge

In his judgment, the learned trial judge having reviewed the evidence including a brief summary of the appellant's account of the accident and the events following thereon, he then considered the medical evidence. This consisted of the sworn testimonies of Dr. Randolph Cheeks and Dr. Hal Shaw and their reports which were also admitted into evidence.

He also examined the medical report of Dr. Winston Chutkan and Dr. Graham, the Radiologist. This being a matter of an assessment of damages,

one would naturally expect that the learned trial judge would have taken into account all the medical evidence which was not challenged or countered by other evidence to the contrary. It is clear from the comments of the learned trial judge that he accepted the medical evidence in so far as it related to the account given by Dr. Cheeks as to his oral and documentary evidence. The same observation can also be made in respect to the evidence contained in the Medical Report of Drs. Chutkan and Graham. I have formed this view as apart from reviewing their evidence, the learned trial judge did not raise any adverse concerns in relation thereto.

When it came to the account given by Dr. Hal Shaw he held the view that there was the possibility of the plaintiff (appellant) suffering a fracture of the left middle cervical fossa based on a history of bleeding from the left ear accompanied by dizzy spells and fainting (blackouts). This evidence which no doubt was based on the doctor's experience in this field, and not countered by evidence from a countervailing source was rejected by the judge, as in forming this opinion the doctor did not avail himself of any other of the plaintiff's record. This opinion was in relation to a post accident complaint which first surfaced in January, 1996. The medical report of Dr. Chutkan and his examination of the plaintiff (appellant) pre-dated the visits to Drs. Cheeks and Shaw. He was assisted in this regard by an X-ray of the plaintiff's neck and a M.R.I. report (exhibit 1) in relation to an examination done on the plaintiff's cervical spine, neither of which would have been of any assistance to Dr. Shaw in forming the opinion to which he came. Dr. Shaw, however, had been careful to state that this possible fracture had healed at

the time he saw the plaintiff on June 7, 1996. The learned trial judge observed in relation to this opinion canvassed by the doctor that

> "he admitted to the question if he had any other of the plaintiff's record available he said 'no'. He has not therefore satisfied this Court as to why he concluded that the plaintiff had fracture of the cervical fossa."

While the learned trial judge was entirely at liberty to comment adversely on any aspect of the evidence, in my opinion, these remarks were unfortunate. They may well have affected his overall assessment when he came to make the award to the plaintiff for General Damages under the heading of Pain and Suffering and Loss of Amenities.

The learned trial judge made the following awards:

(1)	Pain and Suffering and Loss of Amenities	$750,000.00
(2)	Cost of Future Surgery and Neurological Monitoring	$395,000.00
(3)	Handicap on the Labour Market	$ 70,000.00

Awards 1 and 3 have been challenged in this appeal by learned counsel for the appellant, Miss Vassall. Learned counsel for the respondent on the other hand has valiantly sought to support it.

The Submissions

In advancing her submissions on behalf of the appellant learned counsel having referred to the medical evidence submitted that it was clear from his comments that the learned trial judge formed the view that the

appellant's testimony was exaggerated. He came to this conclusion based on the evidence contained in the medical report of Dr Winston Chutkan. It is to the nature of the appellant's injuries that this Court will have to look in determining whether the awards made by the learned trial judge were reasonable.

The following cases were relied on by counsel:

(1) **Glenville Bell** v **The Attorney General and Neville Walfall Khan and Khan** Volume 4, page 175;

(2) **Robinson** v **Butish Gas P.L.C - Kemp and Kemp** Volume 2, pages 54317 and 54423;

(3) **Economic and Social Survey Jamaica 1998,** by **Planning Institute of Jamaica**;

(4) **Srult** v **Manchester City Council** Volume 118. **The Solicitor's Journal 597**;

(5) **H. West and Sons Ltd.** v **Sheperd** [1964] A.C. 326;

(6) **Thompson** v **Smith's (North Shields) Ltd.** [1984] 2 W.L.R. 522;

(7) **Bailey** v **I.C.I. Ltd. Kemp and Kemp** Volume 2, pages 5461 - 5464.

Learned counsel submitted that the English cases cited in the Court below were referred to as a guide, in order to assist the Court in the correct approach. The manner of the reasoning, provided proper guidelines as to how an assessment Court ought to approach cases where there is a total or partial hearing loss.

In making his award it became apparent that the learned trial judge did not take these cases into consideration and in this regard he fell into

error. The case of **Bell v The Attorney General** (supra) was the only case which counsel in her research was able to unearth in this jurisdiction. In that case the award based as it was on medical assessment of a 20% permanent disability of the whole man clearly involved injuries far more serious than in the instant case. Counsel argued that an adjustment ought to have been made and a reasonable award for Pain and Suffering and Loss of Amenities ought to have been in the region of $1.3 million dollars.

Counsel also submitted that given the serious injury to the appellant's left ear, a condition which has now thrown him unto the labour market with little or any hope of obtaining gainful employment; given the appellant's age; a multiplier ought to have been arrived at by the learned trial judge and a calculation made based on a half of the appellant's earnings at the time of the accident with a view to arriving at an award for Loss of Earning Capacity.

Mr Henry in responding referred us to **Flint v Lovell** [1934] All E.R. (Reprints) 200 as to the principles which would justify an Appellate Court to interfere with an award of an inferior court. He submitted that this case has been consistently followed in this jurisdiction. Counsel submitted that the learned trial judge did take into consideration the injury to the ear. He failed however, to take into account the skull fracture mentioned by Dr. Hal Shaw. In this regard, Dr Cheeks' evidence was more definite as he not only examined the appellant but looked at the medical records including the M.R.I. report and the X-ray of the neck area – no bony injuries were seen. This would rule out any question of skull fracture. He also submitted that the question of credibility was important in this case. As to the evidence about

unconsciousness related by the appellant, this was ruled out based on the testimony of Dr. Cheeks. Given the narrative of the events, the learned trial judge took into account all the relevant injuries and ruled out those that he considered not relevant. What the English cases on injury resulting in hearing loss show is that the matter is a subjective one. Counsel also referred to **Bell v The Attorney General et al** (supra.) He submitted that the award made might be conservative but it is on no account erroneous. It is highly improbable that the appellant will require surgery (as recommended by Dr. Cheeks) and in this regard he would have obtained an unjustifiable windfall. The Court ought not to interfere with the award under this head of damages.

As to the question of loss of future earnings as canvassed by learned counsel for the appellant, here the evidence for such an award to be made was absent. The appellant would only qualify for an award under this head of General Damages in circumstances where he could no longer be gainfully employed . The learned trial judge in awarding a sum for Handicap on the Labour Market was correct in so doing. This is borne out by the fact that it was the hearing loss, the result of the injury to the left ear, that resulted in the termination of his employment. The only question therefore was whether this sum was a reasonable one.

In so far as the rival contentions advanced by counsel are concerned, I am guided by the dictum of Greer L.J. in **Flint v Lovell** (supra) as to the principles which ought to guide this Court in reviewing an assessment of an

inferior court in respect to an award of general damages. The following passage at page 202 (H – I); 203 (A), I would regard as apposite:

> "It is not possible to say that the tests which have been laid down in cases like **Phillips** v **London and South Western Railway Company** (5 Q.B.D. 78) apply to an appeal from a judge trying a case without a jury, because an appeal is a re-hearing by the court with regard to all the questions involved in the action, including the question what damages ought be awarded. But though the established rules with regard to appeals in cases tried with juries do not apply to appeals from the decisions of judges trying cases without the assistance of a jury, I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled." (Emphasis supplied)

Considering the submissions of counsel and while I am mindful of the observations of Greer, L.J. in **Flint v Lovell** (supra) and would regard the arguments as canvassed by learned counsel for the respondent as attractive, I do not agree that the approach and conclusions of the learned trial judge in all respects were correct. On a careful examination of his judgment while it is apparent that he considered the medical evidence in arriving at his assessment under the head of the claim in General Damages, the award

seemed to have been based on the evidence of Doctors Chutkan, Graham and Cheeks in arriving at the sum of $750,000.00 for Pain and Suffering and Loss of Amenities and $395,000.00 for Corrective Surgery and Monitoring of the Cervical Spine. These sums I would regard as reasonable based on Dr Cheeks' assessment of 6% disability of the whole man in rating the extent of the appellant's condition as to the injuries to the neck and cervical spine. On the other hand, when it came to considering the evidence of Dr. Hal Shaw as it related to the injury to the appellant's left ear, there is nothing in the learned trial judge's findings to show that he gave any consideration to the unchallenged evidence of a serious hearing loss as found by the doctor. Indeed the only award which would appear to take this permanent injury into account is the sum of $70,000.00 made under the head of Handicap on the Labour Market. It was this hearing loss which was mainly responsible for and rendered the appellant because of this disability as a possible risk to himself and his fellow workers at the respondent's factory and resulted in his employment being terminated.

Based on his conclusions as to the possible fracture to the left cervical fossa, in the opinion of Dr. Shaw, this injury had healed at the time of his examination of the appellant. The learned trial judge rejected this as having no evidential basis supporting such an opinion. There was, nevertheless, a marked absence of any reference to the doctor's opinion as to the extent of the injury to the left ear resulting in a 60% to 70% permanent loss of hearing to the left ear. As Dr Shaw did audiogram tests he had a basis for his diagnosis as to the tinnitus in the left ear. This would have amounted to

a failure by the judge to take into consideration material evidence, which, had he done so, would certainly have affected the final award for Pain and Suffering. When this evidence is looked at in the round, such a failure in my view would have amounted to an erroneous estimate of the total loss suffered by the appellant thus justifying this Court in interfering to correct such a situation. In this regard when all the injuries are considered, I am of the opinion that a reasonable award under this head ought to be in the range of $1,000,000.00.

For the same reasons I would also find that there is clear justification to increase the award for Handicap on the Labour Market to $100,000.00.

I would for the reasons advanced by learned counsel for the respondent find that the arguments by counsel for the appellant as to a possible award for Loss of Future Earnings for the reasons indicated untenable, being unsupported on the evidence. On a similar score, and given the evidence of Dr. Cheeks as to the need for corrective surgery on the appellant to avoid the possible risk of paralysis, the award of $395,000.00 cannot be seen in the light of the submission by counsel for the respondent to be a possible windfall. In all other respects I would uphold the assessment of the learned trial judge.

In the result, for the reasons which I have set out, I would allow the appeal and set aside the assessment below in so far as the awards for Pain and Suffering and Loss of Amenities, and Handicap on the Labour Market are concerned. The following awards are substituted:

(1)	For Pain and Suffering and Loss of Amenities	$1,000,000.00

(2) Handicap on the Labour Market $100,000.00

(3) Corrective Surgery $395,000.00

(4) For reasons previously indicated, the interest on the Special Damages is reduced from 6% to 3% from the date of the accident, 14th November 1995, until the date of Judgment 26th June, 1998 and 3% on General Damages from the date of service of the Writ, until the date of Judgment 26th June, 1998.

The appellant is to have his costs of this appeal such costs to be taxed if not agreed.

Harrison, J.A.

I too have read in draft the Judgment of Bingham J.A. and I agree with the Order proposed.

ORDER

Downer J.A.

Appeal allowed. The assessment varied in the following terms:

(1) For Pain and Suffering and Loss of Amenities sum awarded $1,000,000.00

(2) Handicap on the Labour Market $ 100,000.00

(3) Corrective Surgery $ 395,000.00

Interest on the Special Damages is reduced from 6% to 3% from the date of the accident, 14th November 1995, until the date of Judgment 26th June, 1998 and 3% on General Damages of $1,000,000.00 from the date of service of the Writ, until the date of Judgment 26th June, 1998.

Costs of the appeal to the appellant to be taxed if not agreed.