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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-131 OF 1990

BETWEEN	ELTON MORRIS	PLAINTIFF
A N D	ISAIAH GUTZMORE	DEFENDANT

John Graham instructed by Broderick and Graham for Plaintiff.

Christopher Samuda instructed by Piper and Samuda for Defendant.

Heard 4th - 8th May and July 10, 1992

JUDGMENT

COOKE, J.

Just outside of Spanish Town, there is a roundabout. On the 18th of November 1989 at about 10:30a.m. the plaintiff negotiated this roundabout and is proceeding towards Bog Walk. Ahead of him approximately 5 chains away on his left, St. Johns Road enters into the main road on which the plaintiff is travelling on his motor cycle. On the plaintiff's account, he saw the defendant's vehicle 'pointing' poised as it were at a stop to enter the main road. There was a stop sign at the juncture where St. Johns Road meets the main road. He saw no movement and formed the impression that that vehicle had stalled. He said he was travelling quite close to the left of the road and as he approached the juncture of St. Johns Road and the main road he veered to the middle of the left lane. Then as he reached the mouth of St. Johns Road the defendant's car suddenly moved out and collided with his motor cycle. Quite graphically he described how 'me and bike pitch over and skate - ended up on right hand side of the highway on the asphalt'.

Now between the roundabout and St. Johns Road, there is what is called a 'condemned' road. This is a road that was once in general use, but is no longer so, if at all. There is agreement that there is a concrete curb wall at the end of that condemned road where it abuts the main road. To the defendant

there are spaces in this wall which will permit a motor cycle to pass through. The plaintiff says there are no such apertures - further that that condemned road is covered with bush. The defendant swore there was no bush. The thrust of the cross-examination of the plaintiff was that he (plaintiff) came out of this condemned road and then suddenly swerved into the path of the defendant's vehicle. On the defendant's account this condemned road was about 1½ chains from the juncture of St. Johns road and the main road.

This is the defendant's account of how the collision took place. "There is a stop sign where St. Johns Road meets highway. I stop at juncture. I turn my right indicator on. I look right, left and right again. When look right again nothing coming from right. I could see down to where roundabout is - about 3/4 mile away. I proceed across to Spanish Town - turn right proceed towards Spanish Town. As proceeded to Spanish Town something happened. Suddenly I saw a motor bike coming towards me. It was on my side of the road, as I was going towards Spanish Town. It was coming at about 50 m.p.h. After I made turn I travelled about 1½ chains before I first saw motor bike. When I first saw motor bike it was about 8ft from my vehicle. I brought my vehicle to a dead stop. It crashed into left side of my car. It crashed into extreme left of left hand side of car. It hit the extreme left fender."

Under cross-examination the defendant was taxed as to why he did not see the motor cycle sooner. There were these questions and answers:-

Question:- Why is it that you did not see the bike until it was 8ft away from your car?

Answer:- (after a very long time) The reason is that he was coming so fast.

Question:- Is that the only reason?

Answer:- That is the only reason.

When pressed the defendant said, 'The truth is that the only thing I can say about that bike is that it was on the highway when I first saw it'. Between the juncture of St. Johns Road and the main road is straight unimpeded passage. At no time neither in examination-in-chief nor in cross examination does the

defendant speak to the plaintiff entering the main road from the condemned road. The pleadings on behalf of the defendant makes no mention of any such manouvre. The injuries suffered by the plaintiff - which will be detailed subsequently are consistent with his account. The defendant at times seemed quite confused. His demeanour was unimpressive and there was a total want of sincerity in the way he performed in the witness box. The defendant has constructed an incredible account in an effort to avoid liability - an account which as put by his counsel he himself has destroyed. As the events were unravelling the plaintiff said that the defendant told him. 'Is alright a fi mi fault'. This came out in cross examination. I accept that the defendant did say so. In the midst of the drama he knew he was at fault. He now comes and denies every bit of responsibility.

To return to the evidence of the defendant there was this:-

Question:- The swerve that the bike made was it into or away from your car?

Answer:- It was swerving all over the place. By swerving all over the place I mean he was going from left to right to left and right again.

At no time was it put to the plaintiff that his motor cycle was swerving 'all over the place'. It is my view that the nebulous response, is born of a womb of fabrication. He is giving an answer which he thinks will cover all the possibilities. It does not. I prefer, without the slightest hesitancy, the account given by the plaintiff. I accept his account and I find that at all times he managed his motor cycle with the requisite care and attention. There will be judgment for the plaintiff on both the claim and the counterclaim.

I will now deal with the general damages to be awarded. The evidence of Sir John Golding, the eminent orthopaedic surgeon is to this effect. He first saw the plaintiff on the 27th of December 1991. This is more than two years after the date of the collision. He observed that there was a compound fracture of the left tibia which had partly united with a deformity and shortening - this shortening was some two inches. There were multiple discharging sinuses on the front and inner side of the lower leg. Pus was being discharged from the sinuses - which sinuses were the result of dead bone protruding through the skin. A most

offensive odour emanated from the sinuses. The leg was swollen and the veins of foot were distended and enlarged. The whole of the area of the left lower leg was scarred. (I looked at the scarring and the epithet "grotesque" used by counsel to describe the scarring is quite apt). There was a segmental fracture in that the middle 1/3rd of the tibia was detached from the upper and lower part. Sir John Golding performed surgery on the 9th of January 1992, when he opened up the whole of the front of the lower leg and removed all the dead bone. Thereafter the leg proceeded to heal remarkably quickly. In respect of permanent partial disability there was 28% of the lower limb i.e. leg and 10% of the whole body. The plaintiff is now at stage of maximum recovery.

The plaintiff recounted that he was hospitalized at the Spanish Town Hospital for 2 weeks and thereafter at the Kingston Public Hospital for 2 weeks and 3 days. He made repeated visits for dressings. He spoke to his broken ribs and bruises to both his elbows, his back and his side. He quite understandably endured severe pain. To him his foot 'looked embarrasing and shameful' and he always tried to hide it. He had to suffer the taunts of being labelled 'the stinking foot man'. His foot 'hinder me from everything, come in like mi life gone'. When he said this he became convulsed in tears. He complains that because of his condition his common law wife has left him. A young man of 28 years he cannot summon the courage to form any relationship with a woman. He, who hither to 'loved to exercise' can no longer do so. The quality of his life has, he said, been substantially impaired.

In arriving at the award under the head of pain and suffering and loss of amenities I do not accept that any of the plaintiff's ribs were fractured. There was no medical evidence to support this. However, I accept that he received a blow to his chest region which did cause pain. In this assessment my starting point is the dictum of Campbell J.A. in Beverly Dryden vs. Winston Layne (by next friend Stanley Lane) (S.C.C.A. 44/87) (unreported) where he said that

> "Personal injuries awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards".

As a guide I now refer to two cases which has attracted the attention of our Court of Appeal. The first is Noel Gravesandy vs. Neville Moore (S.C.C.A. No. 44/85) (unreported)dated February 14, 1986. Here there was a compound fracture of the tibia and deformity. There was a shortening of the injured leg. There was no stated percentage permanent partial disability as the doctor preferred to retain his opinion on this aspect until the conclusion of an aesteotomy which is an operation involving bone realignment. The award was $50,000.00. The second case is Lynzie Blair vs. Nicholas Jones C.L. 1987/B-428 (Khans compilation volume 3). In this case the injuries were:-

(i) Comminuted compound fracture of left tibia and fibula.

(ii) Multiple bruises

(iii) Head injury

These injuries resulted in:-

(i) Chronic osteomylitis with drainage sinuses.

(ii) Persistent swelling around left ankle.

(iii) ½' shortening of left lower limb.

(iv) Permanent limp.

(v) Stiffness of left ankle resulting in 10% - 15% limitation of movement.

The original award of $36,000 assessed on the 22nd February, 1989 was varied By our Court of Appeal on the 7th of May, 1990 to $55,000. Taking into consideration the relatively stable economic climate that existed between these two awards, although there was the passage of some years, I respectfully say that there is a similarity in the awards vis-a-vis the respective injuries. It is my opinion that in the instant case the injuries are comparable but I am inclined to the view that from a global perspective the plaintiff herein would be entitled to a somewhat larger award - due to the hideous scarring, the length of time during which he endured pain and suffering and the diminution in his capacity to enjoy the quality of his life. I am therefore going to use a base figure of $60,000.

The advice of Campbell J.A. that assessment should be made with 'moderation'

is now subject to the rapid growth of inflation and the meteoric devaluation of our dollar since the time when he spoke. This had been judically recognised. In Hepburn Harris vs. Carlton Walker (S.C.C.A. 40/90) Rowe P. had this to say:

> "Cases tried between 1984 and 1987 were cited to support the proposition that general damages awarded in those years should be massively increased to reflect the rapid growth of inflation. Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A. 18/84 suggested that the depreciation of the value of the Jamaica dollar over a given period of time can be used as a measure to preserve the real value of the damages to an injured person who receives his money at a future date. It is time that a more precise and sophisticated method be devised to find the quantum of the money of the day, taking into account inflationary trends in the economy."

In, Devon McFarlane (by his next friend Violet Carey) vs. Frederic Barrett et al (S.C.C.A. No. 57/88) (unreported) The Court of Appeal (Rowe P. Forte, Gordon JJA.) has sanctioned the use of the Consumer Price Indices ALL JAMAICAN ALL ITEMS provided by the Statistical Institute of Jamaica as providing a precise and sophisticated method of finding the quantum of the money of the day taking into account the inflationary trends in the economy. The consumer price index in April, 1992 was approximately 376. It was 112 in March, 1989. As already said, the appropriate award in March 1989 for the hypothetical plaintiff such as this one would have been $60,000. Utilizing the above data an award of $60,000 now amounts to $200,000. This will be the award under this head. I have adopted the formula in Khan's compilation volume 3 at page 245.

There is a claim for Handicap on the labour market. The plaintiff is a motor mechanic. He has earned his living in this field for the past 17 years and has been employed all this while to the same establishment of which Durant Gordon is the chief executive. The plaintiff was employed specifically in area of the reconditioning of engines and gear boxes prior to assembling. Gordon stated that this exercise required 'plenty physical strength for example to take off the cylinder head requires two people'. The plaintiff has not tried to work since the collision as he was he said always in pain. In respect of the plaintiff's capacity to perform as a motor mechanic Dr. John Golding's opinion was guarded.

He said, 'I think he probably can operate as a motor mechanic - depends on what he does'. The doctor's opinion is understandably guarded since there was not presented to him definitive circumstances which would allow him to adopt any positive approach. The plaintiff's employment was terminated in January 1990. He is still possessed of the expertise acquired over 17 years. There is no evidence from which the court can in any meaningful way determine the extent of the handicap - for handicap there will be. Accordingly I will award the sum suggested by the defendant which is $15,000 - a convertional sum.

Dr. John Golding recommended that the plaintiff should wear surgical shoes - otherwise it would be more likely than not that there would be resultant back pains. However, the plaintiff swore he would never wear any such shoes. His position was 'mi nah go wear step shoes - too embarrassing'. In the face of this adamant refusal, though inimical to his future well being, I with some regret cannot make an award for surgical shoes. No doubt the plaintiff is still agonizing over his present predicament and at this stage considers that the wearing of 'step shoes' would only result in him being ridiculed. But so be it.

I now turn to the assessment of special damages. Counsel for the defendant submitted that the relevant period for loss of earnings is 1st January, 1990 to May 1991. It was, as is recalled, that the plaintiff did receive wages up to the 1st January, 1990. In his evidence Sir John Golding was of the view that the operation he did could have been done 1 year earlier. Counsel now latches on to this opinion and proceeded to argue that the defendant ought not to bear any damages which accrued after the time when the operation ought to have been done. The plaintiff had disregarded his obligation to mitigate. The law in this area, as I understand it, is that for this submission to succeed the defendant must demonstrate that the plaintiff had unreasonably refused to undergo the operation. Whether this is so or not is a question of fact to be decided on the evidence bearing in mind that the onus of proof is on the defendant, see Steele vs. Robert George and Company (1937) Limited [1942] A.C. 497. In Marcroft vs. Scruttons Ltd [1954] 1 Lloyds Rep. 500 C.A. the plaintiff therein suffered severe anxiety,

neurosis and depression following shock consequent upon rather insignificant personal injuries. The medical advice given to him was that he should go to the Rainhill Mental Hospital for shock treatment. He refused because in his view he did not wish to attend a mental institution. The court had some sympathy for the plaintiff's subjective stance but applying the objective test decided in the circumstance that the plaintiff's refusal was unreasonable. McAuley vs. London Transport Executive [1957] 2 Lloyds Rep. 500 C.A. shows that the fact that the medical advice is from the defendant's doctor will not in any way disturb the objective test of reasonableness on the part of the plaintiff. In that case there was a 90% prospect of success. In the circumstances the court held that the plaintiff's refusal was unreasonable.

In this case there is no evidence that the plaintiff's medical advisers suggested that he (the plaintiff) should have undergone any operation. Therefore, the issue of refusal does not arise. At all material times the plaintiff was in the care of and supervision of either the Kingston Public Hospital or the Spanish Town Public Hospital - both accredited medical institutions. The plaintiff at all times was subject to their treatment to which he was faithful. It cannot be said that the onus placed on the defendant to show that the plaintiff has failed to mitigate his damages has been discharged. This submission is without merit. The plaintiff will therefore have his claim for loss of earnings for the entire period claimed. This is from 1st January, 1990 to 30th April, 1992. The sum is $59,662.34 which figure is the net sum after statutory deductions. There is a claim for transportation. The issue between the parties here is whether or not the plaintiff's use of Taxi cabs for almost all his travelling was reasonable in the circumstances. The plaintiff's contention is that it was so because of the embarrassment. It is sufficiently certain that physical incapacity did not dictate the use of Taxi cabs to the extent to which they were employed. I am of the view that physical incapacity to use ordinary public transportation is the crucial criterion. Accordingly the plaintiff's position does not find favour. The award for transportation as submitted by the defendant is $7,305.00. There has been agreement as to the cost

of repairs of the motor cycle which is $4,500 as well as the following:-

Fees in respect of operation by Dr. John Golding -	$4,000.00
X - ray	150.00
Crutches	150.00
	$4,300.00

There is no dispute that the plaintiff suffered loss of $470.00 as regards his personal effects at the time of the collision.

The plaintiff further claims $21,133.00 for expenditure for prescriptions, guaze, cotton and cleansing liquid. No bills were tendered to support this claim. The plaintiff said that every week he expended $50.00 to purchase guaze. I do not find this to be an unreasonable amount. I will allow the sum of $5,200.00. He said that every 3 weeks he had to spend $50.00 for cotton and cleansing liquid. I also allow this sum the total of which is $1,733.00. The oozing pus would have necessitated these purchases. The total sum claimed for prescriptions was $14,200. Each time he paid an out patient visit to the Hospital he was given a prescription which he had to fill. The total amount he says he spent was $14,200. In the first 3 months after leaving the hospital he says he filled 6 prescriptions each of which cost $400. Thereafter the price of each of these prescriptions was to $550. At this time he was attending only once per month and it was in the next succeeding 5 months that he filled these prescriptions. Finally there was one prescription that cost $800.00. The total sum for prescription is $5,950. I believe the plaintiff and allow this sum.

To summarise

(1) There will be judgment for the plaintiff of the claim and counterclaim.

(2) There will be an award of $215,000 as general damages with interest at 3% on $200,000 from the service of the writ to today.

(3) There will be an award of $89,120.34 as a special damages made up as follows:-

(i)	Loss of earnings	=	$59,662.34
(ii)	Transportation	=	7,305.00
(iii)	Medication etc	=	12,883.00
(iv)	Medical etc	=	4,300.00
(v)	Personal effects	=	470.00
(vi)	Repairs to motor cycle	=	4,500.00
			$89,120.34

There will be interest at 3% on this sum of $89,120.34 from the date of the service of the writ to today.

There will be costs to the plaintiff to be agreed or taxed.