J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 5/74

B E F O R E: The Hon. Mr. Justice Luckhoo - President
The Hon. Mr. Justice Hercules- J.A.
The Hon. Mr. Justice Watkins - J.A.

BETWEEN LAWFORD MURPHY - DEFENDANT/APPELLANT

AND LUTHER MILLS - PLAINTIFF/RESPONDENT

Mr. Norman Hill, Q.C. for Defendant/Appellant

25th February, 1976

HERCULES, J.A.

The Respondent in this matter was on the sidewalk at the intersection of Rosemary Lane and Tower Street on 10th February, 1971, when a truck was so negligently driven that it hit Respondent and pinned him against a wall bordering the sidewalk. The Respondent suffered a fracture of the right pelvic bone. He claimed inter alia loss of earnings for eight months at $120.00 per month. Under this head Robotham, J. awarded him six months at $120.00 per month and general damages in $4,000.00.

It was not in dispute that Respondent was the victim of the negligence described above. The critical issues raised on appeal before us were:

(1) That the evidence identifying Appellant and his truck was so unreliable that it could not be said to have constituted the necessary preponderance.

(2) On the evidence the learned judge erred in awarding $720.00 for loss of earnings and

(3) The award of $4,000.00 general damages was manifestly excessive.

The first issue was a straight question of fact. The appellant by himself contended that his truck was nowhere in the

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area of the accident on the material date. The Respondent called one Cynthia Richards who testified that she knew Appellant and saw him driving the truck F5364 at the material time. She made a note of the number by writing it at once in the palm of her hand and she otherwise committed it to her memory. She also gave the Police the number of the truck shortly after when the Police arrived on the scene of the accident. Having regard to the length of the examination-in-chief and the cross-examination, she must have spent a considerable time in the witness box, so the learned trial judge had ample opportunity to observe her and to assess her evidence vis-a-vis the evidence of Appellant that he was not involved at all.

In his findings the learned judge resolved the matter in this way:-

> "Court is not unmindful of the discrepancies in the evidence of Plaintiff and Cynthia Richards. Although Plaintiff was somewhat unimpressive and at times shifty in his evidence, the witness, Richards, gave her evidence in an honest, straightforward and intelligent manner. When asked by Counsel for the defence to sign her name she did so without any show of hesitancy."

The learned trial judge found that the evidence of Cynthia Richards tilted the scale in favour of Respondent. As to liability, this finding attracted the gravamen of Mr. Norman Hill's complaint.

It now becomes necessary, therefore, to examine the circumstances in which a judge can be distrubed by an appellate court on questions of fact.

In Yuill v. Yuill [1945] 1 All E.R. 183, at page 188, Lord Greene, M.R. stated:-

> "It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion."

I would hasten to interject that I do not consider this one of those very rare occasions.

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But there have since been several cases approving that dictum as the proper attitude of an appellate court towards the findings of fact of a trial judge. For instance, the matter was thoroughly reviewed in the well known case of Watt (or Thomas) v. Thomas reported at [1947] 1 All E.R. 582. At page 587 Lord Thankerton expounded the principle in three parts as follows:-

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
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> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

On the evidence Robotham, J. had before him, I am not prepared to hold that he fell short of any of the tests indicated in Lord Thankerton's propositions. A court of appeal should attach the greatest weight to the opinion of the judge who saw and heard witnesses. Therefore I would not wish to disturb the judgment as to liability.

But I am not happy about the awards under the heads of loss of earnings and general damages. In his statement of claim, Respondent pleaded "Loss of earnings for eight months at $120.00 per month, $960.00." In examination-in-chief he said: "I could not work for about six months. I usually earn as a mason $120.00 to $130.00

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per month." Then in cross-examination he said: "I have no salary slips for my earnings. I work for Sharp Construction in Montego Bay. Was not working at the time." On this evidence I fail to understand the award of six months at $120.00 per month. In the case of Bonham-Carter v. Hyde Park Hotel Limited,[1948] 64 T.L.R. 177 at page 178, Lord Goddard, C.J. declared:-

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

In this case I feel very much the way Lord Goddard felt and I would disallow any award under the head of loss of earnings.

Then there is the question of general damages. There was no evidence whatever that the Respondent would suffer from any residual disability, so the only factor the learned judge had to consider under this head was pain and suffering and general discomfort from a fractured pelvic bone resulting in two weeks in hospital. The learned judge awarded him $4,000.00. I agree with the submission by Mr. Hill that that award was manifestly excessive. In my view an award of $2,500.00 would be more appropriate.

In the result I would dismiss the appeal as to liability and allow same as to quantum - making it $303.70 instead of $1,023.70 special damages and $2,500.00 general damages - total of $2,803.70 instead of a total of $5,023.70 as awarded by the learned trial judge. I would allow one-half costs of the appeal to Appellant to be taxed or agreed.

LUCKHOO, P.(Ag.):

I agree.

WATKINS, J.A.:

I also agree.

LUCKHOO, P.(Ag.):

The appeal as to liability is dismissed. The appeal as to quantum is allowed and judgment is entered for the Plaintiff in $2,803.70 with half of the costs of the appeal to be taxed or agreed.