

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 96/91

COR: THE HON MR JUSTICE CAREY, P (AG.)  
THE HON MR JUSTICE GORDON J A  
THE HON MR JUSTICE WOLFE J A

BETWEEN	LASCELLES NEUNIE	PLAINTIFF-APPELLANT/ CROSS RESPONDENT
AND	IRVING BUS SERVICES LTD RAPHAEL McNAMEE	DEFENDANT-RESPONDENTS CROSS APPELLANTS

Ainsworth Campbell for Appellant

Miss Nancy Anderson for Respondents

September 26, 27 & October 24, 1994

GORDON J A

At the conclusion of the hearing of the appeal and cross-appeals herein we dismissed the appeal of the appellant, allowed the appeal of the cross-appellants and set aside the judgment entered; and entered judgment for the defendants with costs both here and below to be taxed if not agreed.

On 4th October 1991 the plaintiff was awarded \$375,000 damages for injuries he sustained from the alleged negligent manner in which the second defendant drove the bus owned by the first defendant on 4th September 1985. He challenged the award claiming:

- "(i) the sum was not in accordance with the injuries suffered;
- (ii) that the learned trial judge erred in failing to make an award for corrective surgery;
- (iii) that the learned trial judge erred in failing to make an award for future loss of earnings and/or handicap on the labour market."

Dr. Pierre Herrard was the first witness called at the trial and he spoke of the history of the case and the injuries and treatment:

"On the 4th September 1985 Lascelles Neunie was admitted at the Orthopaedic Department - Casualty of Kingston Public Hospital with a story of being in a road traffic accident one hour before. He was conscious, restless in painful distress with his two legs oozing blood through the bandage. Both legs were badly crushed. He said a bus wheel ran over his two feet while he was going into the bus. We prepared him for emergency surgery and took him to the operating theatre while under general anesthesia we assessed the two feet surgically.

The left heel was partially amputated and there was a long laceration extending from the distal part of the leg going through to the platform aspect of the foot and going to the other aspect of the ankle. The laceration split the foot in two. The injury was from the distal part of the leg to the foot. All the foot structure (ligament and bones) could be seen bleeding profusely. There were multiple fractures of the left foot - all the tarsal bones were crushed and part of the heel was almost partially lift up.

The right foot had a partial amputation of the ankle - it was hanging down. You could see all the structures - the bones were crushed, the skin lifted and bleeding. The diagnosis was (1) injury to both legs and feet. (2) Fracture of the ankle bones of both legs. (3) Multiple fractures of the tarsal bones of the right foot.

The tibia and fibula of the right foot and the lateral malleolus of the left foot were broken in effect the ankle bones were broken. We contemplate amputation, but due to his age we did debridement and tried to give the foot a shape. We put a pin in the right foot to push it back in an acceptable position and took off the bad skin. From the left foot we took off the heel that was hanging down, above the bone and cut off the non-healthy skin. We made an intensive care unit specially for him to observe him for the next 48 hours. He stayed there and was dressed every day and given antibiotics and we had a team to assess him. We kept him for two weeks and took him back to the theatre to fix what was out of shape.

"The first surgery was to conserve and the second to shape. We applied external fixtures to the two ankles. It was done under general anesthesia so he did not know what was happening. (Looks at X-rays) all the tarsal bones of the right foot were crushed - no more ankles. We put in fixative in a neutral position so he could step although the outcome would not be fully satisfactory. The left ankle was not as good as the right. We decided to keep it still and put it in neutral position pending further surgery. The following day after further surgery he was sent back to the ward. He stayed there from October, November, December, January. On January 10 he had skin graft of both feet. The skin graft is taken from the thigh to the open wound. He has extensive graft. He remained at Kingston Public Hospital until 31st March, 1986 when he was discharged and requested him to return as an out-patient. I was transferred to Montego Bay. He came to Montego Bay last month. I examined his two feet and was very pleased to see him walking. The left foot was smaller than the right. There was no heel. The ankle bones was not in good alignment. The foot was flat in an equinus position. There was an ulcer about 4 c.m. x 4 c.m. where the heel was amputated and this has not healed from that time. The foot had lost its arch and there was no heel. It will remain unhealed until some other surgery is done. Too much pressure on the skin near the bone. The right foot in my assessment was totally deformed with obvious shifting of the medial and lateral aspect of the ankle. The scar of the graft was healed satisfactory. The right foot tended to be twisted - varus. The tendons of the right foot were restricted. He could step on it but he can not step on the left foot as it has no heel. He can't walk on it without shoes. He has to wear special shoes due to the lack of heel. He can walk slowly - not run, he can stand for a limited time. He can move from one side to another. He no longer uses crutches. He just takes his time."

As to the circumstances of the accident, the plaintiff said he was a passenger standing in the bus and he fell when the bus swung from side to side in the course of its journey. He felt pain and

found he had the injuries to his feet. He was supported by two witnesses. One said he saw him enter and later saw him on the floor of the bus injured; the other saw him injured. Both said this was subsequent to the bus swerving in the course of its journey. The plaintiff said that at all times his entire body was within the bus and no part ever protruded therefrom. He denied that he ever said his feet were run over by the wheels of the bus. He maintained he was injured in the bus and his feet were never run over by the wheels of the bus.

The cross appellant's main ground of appeal was:

"That the finding of the learned trial judge that the 2nd defendant was liable for the accident was against the weight of the evidence."

Edwards J gave an oral judgment and Mr. Campbell presented us with a bundle containing notes of the judgment, one recorded by him the other by Miss Anderson. Miss Anderson's record was more detailed than that provided by Mr. Campbell. Both sets of notes show that the judge did consider future surgery and loss of future earnings. On the former he said:

"\$80,000.00 plaintiff said he would like to have his heel back, plastic surgery. Plaintiff did not express any to court. General damages adequate to cover this."

On the latter:

"Loss of future earnings - evidence is he is making more money after accident than before. The evidence supports this finding."

We were not persuaded that the award for general damages was inordinately low as to cause us to interfere.

On the issue of liability, the judge said:

"Dr. said crushed by bus, can't see how this could happen. Seems, on evidence, the bus did swing, his feet protruded through door and hit something, we do not know. Plaintiff story more likely."

The plaintiff said he fell in the bus and no part of his body ever protruded from the bus. The doctor said the injuries he saw were crush injuries:

"Basically the only injuries I saw were his two feet and legs the wheels passed over them. The injury could not be caused by the foot hitting a tree."

So far as the medical evidence went, it would seem that the plaintiff would necessarily have had to be outside of the bus at the material time to suffer the injuries he did.

The learned judge found himself torn between the evidence of the plaintiff and that of the doctor which were irreconcilable. He opted to find that which was pleaded in paragraph 4 of the particulars of claim thus:

"On or about the 4th day of September, 1985 the Second defendant so negligently drove and or controlled the vehicle licenced NF 3369 along the Parks Road in the parish of Saint Andrew that the said bus fell into a depression at such speed and with such force that the plaintiff was flung to the floor of the bus with his feet protruding from the said bus thereby causing the Plaintiff to sustain bodily injuries and to suffer, pain, damages and loss."

The conclusion of the judge is thus unsupported by the evidence. The plaintiff has failed to establish a case and the judgment could not stand. It was for these reasons that we made the order set out at the beginning of this judgment.