Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N 035 OF 1985

BETWEEN	RUDOPLH NIXON	PLAINTIFF
A N D	M.D.B. SERVICES LTD.	FIRST DEFENDANT
A N D	BRIAN MATTIS	SECOND DEFENDANT

Ainsworth Campbell for the Plaintiff.
John Vassell instructed by Dunn, Cox & Orrett for the Defendants

HEARD: October 30,1989, Nov. 2,1989, July 24 & 25,1990. Feb. 17 & 21,1989 May 11, 12 & 13,1992, Nov. 9, 10, 11, 12,1992.

PITTER J.

On the 8th August 1984, an accident occurred at the intersection of Havendale Drive and Highland Drive in the parish of St. Andrew between a motor cycle driven by one Ludlow Clarke and a motor car owned by the first defendant and driven by the second defendant. As a result, the plaintiff who claimed to have been a pillion passenger on the motor cycle suffered serious injuries and was hospitalised in the Kingston Public Hospital for three weeks which was followed-up by several out-patient visits.

The plaintiff recounted that he was a pillion passenger on the motor cycle driven by Ludlow Clarke. They travelled along Havendale Drive and on reaching the intersection with Highland Drive, a motor car driven by the second defendant, coming from the opposite direction along Havendale Drive, without any warning turned left to enter Highland Drive. The car collided with the right side of the motor cycle which was on its left hand side at the intersection, injuring the plaintiff and damaging the motor cycle.

The defendant's version is that as he came down Havendale Drive a car approached him from the opposite direction followed by the motor cycle. Both car and motor cycle were on their correct side of the road as they travelled towards him. He said he intended to turn right into Highland Drive but stopped on his correct side of the road to allow the approaching vehicles to pass. It was whilst he was in this position that the motor cycle suddenly overtook the car ahead of it and in so doing collided with the front right hand side of the car.

He said that the motor cycle overtook the car when it was some 8 - 10 feet from him. It came towards the centre of his car, then veered back to its left to avoid hitting his car, but failed to do so. He gave the width of the road at this point to be 19 feet, the width of the car ahead of the motor cycle to be 6 feet and the width of his car to be 5 feet.

The plaintiff denied there was any car ahead of the motor cycle. He also denied there was any overtaking by the motor cycle. He refuted the suggestion that at the time of the accident, the defendant's car was satationary. He maintained that the motor cycle himself and the driver ended up in Highland Drive after the accident.

The defendant under cross-examination although insisting that there was a car ahead of the motor cycle cannot remember what kind of car it was. He was not able to say what make car it was neither did he remember the colour. His evidence is that when he just saw the car it was some 140 feet away from him. He had stopped for some 15 seconds allowing it to pass. He admitted that whilst he was attending to the injured plaintiff, the plaintiff, was cursing and blaming him for the cause of the accident.

No witnesses were called in support of either party's account of how the accident occurred. The plaintiff's witness Ludlow Clarke was off the Island doing farm work in the USA. The defendant's sister who was in the car with him at the time was also off the Island in the USA.

If the defendants' account is to be believed I would have expected him to recall the make or even the colour of the car he said was ahead of the motor cycle. Further if the motor cycle travelling at 20 - 25 mp.h. approaching the centre of his stationary 5 feet wide car and began manoeuvring to its left from a distance of 8 - 10 feet away, I would have expected the motor cycle to clear the car having to swerve away only 2½ feet to its left from it. I do not accept that there was any car ahead of the motor cycle neither do I find that the plaintiff made the manoeuvre as described by the defendant. I find the plaintiff's account the more probable of the two. The defendant's admission that he intended to turn right, and in so doing would have had to cross the plaintiff's path if he had not stopped, justified the plaintiff's case that the car in fact did not stop. The plaintiff

said the driver of the car gave no signal of his intention to turn right and this I accept. On a balance of probabilities, I find the plaintiff's account to be the more credible and his version is preferred. I find therefore that the defendant is negligent and wholly liable for the accident. There is no basis to support any act of contributory negligence by the plaintiff.

Issue was taken by the defendant firstly as to the name of the plaintiff and secondly that the plaintiff was not the pillion passenger but the rider. The evidence does not support any of these contentions.

Dr. Sloly gave evidence as to the extent of the plaintiff's injuries. He said that the plaintiff was admitted to the Kingston Public Hospital on the 8th August 1984, suffering from a fracture of the mid-shaft over the right femur with a large gaping laceration over the knee exposing the patella and tendons. An open reduction of the fracture was performed and a K-nail inserted to stabilise the fracture. He said the plaintiff was totally disabled for three months after the injury and that there was a further 30% disability of the leg for a further two months followed by a further 10% for the succeeding two months. The plaintiff had to use crutches for seven months after the accident and had follow-up physiotherapy at the orthopaedic clinic. He saw the plaintiff again on the 10th April 1986 when the plaintiff complained of back pains, and pains in the his especially on bending. Examination revealed tenderness in the lumbar region between the frist and second vertebrae, and the 5th left vertebrae and the sacrum. His ability to bend was affected. He was placed on analgesic. He was again seen on the 19th April and the 6th May 1986 when he was almost pain free. However on the 2nd June 1986, his right ankle became swollen and an ulcer had developed. Dr. Sloly saw him again on the 11th July 1989 and found that power in his right leg had decreased with tenderness in the right mid-thigh and a swollen ankle; he had developed stases oedema. He considered that the nature of the plaintiff's injury limits him to a loss of 10% - 15% of his normal activity and that his ability to work would be impaired. He last saw him on the 20th November 1989 at which time the plaintiff still complained of pains to the lower back, right thigh and right knee all accociated with the injuries received in August 1984. He dismissed the

suggestion that the plaintiff would have been fully recovered after seven months. On the contrary he said, the plaintiff would not fully recover from the injuries. He would not accept that permanent disability would be 7%.

Dr. Ali saw the plaintiff on the 11th March 1992, and found that the fracture of the femur was solid but with palpable swelling at the bony site. The power in his leg was reduced and this affected his gait. There was full flexion at the joint but pains at the fracture site. His opinion is that the plaintiff would have a problem in stooping down, scraping up and cutting canes. He too found the disability to be 10 - 15%.

Dr. John Golding who gave evidence for the defence said he examined the plaintiff on the 10th July 1990 and found that the full range of motion of the right hip was slightly reduced. There was also some limitation of full flexion and extension of the right knee. It is his opinion that the plaintiff would have been unable to work for three weeks after the removal of the 'K' nail. He concluded that the plaintiff suffered a 7% disability of the right leg and by 1985 his physical ability would have been sufficiently restored to undertake the activities of a farm worker. He said it would be uncomfortable to cut canes with a 'K' nail in the hip.

Bearing in mind the plaintiff's own evidence regarding his injuries, which I accept, in considering the extent of his permanent disability having regards to the evidence from the the doctors, I come to the conclusion that it should be 10%.

The plaintiff's evidence which I accept is that he is a farm worker contracted to work on farms in the United States periodically, and at the time of the accident he was just about to go on one of his usual contracts. His contract would last for approximately 5 months, two of which would be spent in picking apples and the rest in reaping canes. He said he earned approximately $2480 for apples and $5850 for canes. After the accident he had to use crutches for seven months. He did not fully recover and even when he started walking without the use of crutches, he felt pains. In 1985 he was called back for work on the farms in USA but could only pick apples and this was limited as he could not climb a ladder, nor could he bend sufficiently. As a result he could only do eight weeks picking apples and had to return to Jamaica without going down to Florida to cut canes. In 1986 he returned to USA where he again spent eight weeks, picking

apples and only three days in Florida cutting canes. He was unable to bend or stoop sufficiently to cut canes and after being seen by a doctor there he was sent home. He has not been back to work there since and this he said is as a result of his inability to bend or stoop because of the pains associated with these movements.

It is against this background that he has claimed for loss of earnings. I am satisfied on the evidence that that the plaintiff was unable to fully participate in the farm work programme in the USA because of the injuries he received. In calculating his loss in this regard, I use as a guideline the figures supplied by the Ministry of Labour in preference to those given by him. He earned a gross income of J$13,730.33 for the crop year 1983 - 84, which when converted would be approximately US$2750 at that time. His approximate earnings for the crop years 1984 - 1987 if he had participated fully would amount to US$11000. Over that same period he earned approximately US$2600 which when deducted from the aggregate earnings would leave a net balance of US$8400 which when reconverted today would amount to J$18,500 representing his total loss of earnings. I will allow the sum of $554 for the claim of loss of pants, ganzie, crutches, taxi fares and medical bills. The award for special damages is therefore $185,554 less $8000 already paid to him for workmens compensation, leaving a net amount of $177,554.

Turning to the claim for general damages Mr. Campbell has suggested a figure of $400,000 - $450,000 for pain and suffering and loss of amenities. He has recommended a global sum of $900,000 which would take into account his loss of earning capacity which he thinks is appropriate.

Mr. Vassell on the other hand suggests an award of $100,000 to $120,000 to be the appropriate amount for pain and suffering and loss of amenities as he regards the figure quoted by Mr. Campbell to be excessive and out of proportion with the injuries suffered. Loss of future earnings he said, should be restricted to a multiplier of two or three as opposed to Mr. Campbell's 10 - 11, taking into consideration the age of the plaintiff.

A number of authorities were cited by both counsels which I have examined and considered. Taking into account the nature of the injuries suffered and the resultant disability, I am of the view that an award of $250,000 for pain

and suffering and loss of amenities is appropriate.

With regards to loss of future earnings, I take into account his age 43 years and the fact that his movements are restricted to the extent that he cannot climb a ladder nor stoop sufficiently to allow him to fully engage in the activities of cutting canes or reaping apples as a USA contract farm worker. I note however that the farm workers programme has contracted considerably, which places a degree of uncertainty in this area of continued employment. In all the circumstances, therefore I would in my award in this area use a multiplier of 7 which when applied to his net earning of approximately US$2,746 per year, amounts to the sum of US$19,222. Bearing in mind his 10% disability this sum will be adjusted downwards to accord with it, with the resultant award being of US$1,922. This converted using the current rate of exchange amounts to J$42,284.

In fine there will be judgment for the plaintiff in the sum of $177,554 for special damages with interest at 3% per annum from the 8th August,1984 to the 31st March 1993 and in the sum of $292,284 for general damages with interest at 3% per annum on $250,000 from the 5th March 1985 to the 31st March 1993.

Costs to the plaintiff to be agreed or taxed.