

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUITS NOS. C.L. P.072/1990 & C.L. P.176/1990

BETWEEN	LINDEN PALMER	PLAINTIFF
A N D	NEVILLE WALKER	1ST DEFENDANT
A N D	MICHAEL ST. JOHN	2ND DEFENDANT

CONSOLIDATED WITH

SUIT NO. C.L. P.176/1990

BETWEEN	LINDEN PALMER	PLAINTIFF
A N D	DONALD MENDES	DEFENDANT

Crafton S. Miller & Miss Nancy Anderson instructed by Crafton S. Miller & Co. for Plaintiff.

Mrs. Angella Hudson-Phillips Q.C. instructed by Allan Rae for the 1st Defendant.

Bert Samuels instructed by Knight, Pickersgill, Dowding & Samuels for Donald Mendes.

Heard: December 11, 12, 13, 15, 18, &
19, 1995 & March 20, 1997

JAMES, W.A. J.

In these actions the plaintiff sought to recover damages for negligence against the first defendant, Neville Walker in Suit No.C.L. P.072/90 and against Donald Mendes in Suit C.L. P.176/90. The second defendant Michael St. John in Suit No. C.L. P072/90 was never served and gave evidence for the plaintiff.

The Plaintiff's Case

On the early morning of March 9, 1990 the plaintiff then a 59 year old, Deputy Commissioner of Police was driving a motor car southerly along Constant Spring Road, St. Andrew. Michael St. John was at that time driving a motor car licensed Number 2582 AP in a northerly direction which said motor car was owned by Neville Walker. As a result of the manner of St. John's driving, his motor car collided

with the plaintiff's motor car.

The plaintiff suffered the following injuries:

Hyporalaemic shock, a 8cm laceration running from the medical aspect of the left eye to cheek, a 4cm laceration over right upper eye lid, a 3cm laceration across right eye, bilateral corneo-scleral lacerations, split septum of the nose, a dislocated left hip with fracture of acetabular. Comminuted fracture of the proximal third of the left femur. There was also a fracture of the orbit.

In addition to the above, the plaintiff is permanently blind in both eyes as a result of the accident and has lost both eye balls.

The parties consented to the medical reports of Dr. Warren Blake dated April 18, 1991, Dr. D. Calder dated March 29, 1990, Carolyn Donaldson, Physiotherapist dated November, 1990 and G.M. Burgess dated June 4, 1990 to be admitted in evidence as Exhibits 1 to 4.

The plaintiff was admitted to Kingston Public Hospital on March 9, 1990 and remained there until June 20, 1990. After his discharge from hospital he visited the Orthopaedic Clinic for further treatment of his fractures and this continued up to October, 1990.

Physiotherapy commenced in June 1990 and was discontinued in November, 1990.

It goes without saying that the plaintiff has suffered greatly and especially as a result of the loss of the sight and loss of both eye balls. When he was discharged from hospital he could not walk. He was aided by a wheel chair, a walker and crutches respectively.

The plaintiff testified that he was an ardent dominoe player and a great cricket fan. He can no longer play or watch those games. Neither can he dance, swim nor drive a motor vehicle.

At the time of the accident the plaintiff was pursuing a part-time course in Management & Economics at the U.W.I.

His attempt to learn braille was unsuccessful as he testified that his powers of concentration were so affected that he discontinued that course.

The accident accelerated the plaintiff's retirement from the Jamaica Constabulary Force as he was due to retire in October of 1990. His salary was \$151,000 p.a. and with allowances increased that amount to over \$200,000 p.a. His pension and disability allowance is \$11,000 p.a.

Michael St. John, it will be remembered was named as the 2nd defendant in Suit C.L. P.072/1990 and it has already been stated that he was not served for the purpose of this action but gave evidence on behalf of the plaintiff.

He testified that he worked at the Centre Pole Club prior to the 9th March, 1990 with Fabian Mendes a brother of the defendant Donald Mendes. After the death of Fabian Mendes, St. John continued to work at the Club but this time with the defendant Donald Mendes.

St. John testified that Donald Mendes had before March 9, 1990 requested him to drive motor car licensed #2582 AP and owned by the 1st defendant. He said that Donald Mendes lent the said motor car to one Lee a friend of Mendes on the night of the 8th March, 1990. He accompanied Lee in the motor car. They went to look for one Yvette Clarke who is Lee's girlfriend. Yvette was not seen so they returned to near Centre Pole Club, stopping a short distance from its gate.

At this point Lee gave the motor car to St. John to drive on to the club premises. St. John did. He testified that inside premises of club, he saw Donald Mendes and Yvette Clarke standing and talking. St. John stopped where they were. Yvette told Donald Mendes that she would like to go home. St. John told Donald Mendes that he knew where Yvette lived. Having so assured him, Mendes told St. John to take Yvette home. It was on his way back to the club that this accident occurred. St. John admitted that the collision took place on the right hand side of the road and further that the plaintiff's car was on its correct side of road.

He admitted being charged with certain Road Traffic offences to which he pleaded guilty. He was not the holder of a licence to drive motor cars and this was told to Donald Mendes sometime before the accident.

Yvette Clarke gave evidence which if believed would corroborate St. John's that Donald Mendes authorised him to drive the motor car to take her home.

Neville Walker's evidence

He admitted being the owner of a Toyota Carina motor car registered 2582 AP. He testified that he loaned the said motor car to Donald Mendes for the purposes of attending his brother Fabian's funeral in February 1990. Donald Mendes kept the car until March, 1990. Walker asked him to return car but Mendes requested a few more days. It was during that time that the accident occurred.

Mr. Walker said in evidence that he told Mendes that he should not allow anyone else to drive the motor car.

Donald Mendes' evidence

He disagreed with Walker's evidence on the issues of the purpose for which he borrowed the car and the time at which the motor car was loaned. He agreed that Walker told him that he should not lend the motor car to anyone. Mendes denied allowing St. John to drive the motor car at any time and in particular on the morning of 9th March 1990 he had no discussion with Yvette Clarke and St. John about St. John taking Yvette home. In his examination-in-chief, Mendes testified that he did not know Yvette Clarke. However, when he was cross-examined he recalled going to Yvette's house with Lee but that was after accident.

Mendes testified that he had parked the motor car around the back of club premises with the ignition key being in the ignition. He noticed that the motor car was missing after 2:00 a.m. March 9, 1990. He left a strong message for St. John to take the motor car to Patrick City where he was staying.

Although in Mendes' evidence he testified that St. John did not work at the club, the witness Corporal Paul Robinson gave evidence that in Mendes' statement to him he said that St. John worked for him at the club.

Findings of Fact

On the evidence accepted, I find that there is none to establish either that Michael St. John was a servant or agent of the 1st defendant Neville Walker. See Morgan v. Launchbury & others [1972] 2 ALL E.R. 606 H.L. I further hold that Mendes breached a condition on which Walker loaned him the motor car, i.e. that no one else should drive the motor car. I find that Walker loaned the motor car to Donald Mendes solely for the purpose of attending the funeral.

The real issue to be determined is whether Michael St. John was driving as Donald Mendes' servant or that at the material time he was acting as his agent. The third situation is whether Michael St. John was on a frolic of his own.

In determining the several questions, I remind myself that St. John's evidence should be viewed with caution. After careful examination of the evidence I find that Donald Mendes' evidence is unreliable on the material particulars. I find that Michael worked for Donald Mendes. I further find that Donald Mendes knew of and authorised St. John to drive the motor car to take Miss Clarke home. I reject Donald Mendes' evidence that he had left the ignition key in the parked car at the back of premises. I find that a conversation took place on the premises of club between Donald Mendes, St. John and Miss Clarke. I accept the evidence of Yvette Clarke as being reliable. I find as a fact that Mendes had before St. John drove onto the premises had asked Miss Clarke for a few minutes to take care of something. It seems clear that Mendes had been asked by Miss Clarke to take her home.

It is clear that St. John drove the motor car negligently. On the evidence I find that Donald Mendes is vicariously liable for the acts of St. John. I further find that Neville Walker is not liable.

Assessment of Damages

The injuries suffered by the plaintiff are such that no case within this or similar jurisdiction has been found to assist in assessing the damages to which plaintiff is entitled. Mr. Miller cited the case of Sigh v. Sherwood & others p.54057 D2-16, Kemp & Kemp Quantum of Damages Volume 2. In that case the plaintiff was a man aged 36 at the date of the accident. He suffered injuries to both eyes resulting in permanent, total blindness. An award of £55,000 was made for general damages. This is an award made in England in December 1981.

In Winston Barr vs. Bryad Engineering Co. Ltd. & others
S.C. C.A. Nos. 45 & 48/85 (unreported)

Wright, J.A. said: -

"But I think that where justice demands, as I think it demands in this case, where the required guide cannot be found in awards in the same jurisdiction or in a neighbouring locality then recourse should be made to such source as will aid the Court in coming to a just and fair conclusion. Hence the justification for employing as a guide the figure used by the trial judge in the instant case".

In that case the trial judge relied on the assessment of damages in English cases. This case may be appropriately classified as unique.

In addition to the total loss of sight the plaintiff also lost his eyeballs. He suffered several lacerations and fractures which have left other permanent disability. Dr. Warren Blake in his medical report dated April 18, 1991 summarised the effect of the injuries of the plaintiff as follows:

"In view of the fact that he is permanently blind in both eyes and that this equates 100% permanent disability, a further rating from Orthopaedic injuries is superfluous as the maximum permanent disability that can be obtained is (100%) one hundred percent".

Having regard to the nature of the injuries by the plaintiff, the dearth of Jamaican cases I am of the opinion that following the decision in Winston Barr v. Bryad Engineering Company Limited & others supra. The formula enunciated therein may be applied to English cases.

Now applying this formula to the Singh v. Sherwood case supra. The computation reads:

1981 award £55,000	C.P.I. 41.8	J.A.
1995	C.P.I. 810.30	"
The award in 1995 would be	£1,066,148.00	
less 30%	319,855.00	
The £746,329 converted in December 1995		
at the rate of £1 = J\$57.48	\$42,898,990.00	
less 1/5 representing the immediacy of payment	\$8,579,798.00	
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	\$34,319,192.00	

Mr. Miller also cited Goherty v. Durham Country Council, Kemp & Kemp, Vol.2 at p.54056-7 D 2-015. In that case the plaintiff suffered bilateral retinal detachment. Total and permanent blindness.

In 1978 the award of £35,000 for Pain and suffering and loss of amenities was upheld by the Court of Appeal. That sum when converted to the 1995 value in Jamaican dollars comes out at \$21,262,976. He also cited Miller v. Tram Berth, Kemp & Kemp, Vol.2 at p.54055 - 54056 - D2-014 November 1982. This plaintiff suffered total irreversible blindness. Loss of smell. Impairment of taste. Multiple injuries. The award for general damages for pain and suffering and loss of amenities was assessed at £67,500. This award when converted to the Jamaican dollar value on the basis of the Winston Barr formula is \$39,563,452.

The other case cited was Goodliffe v. Snyder & Harding, Kemp & Kemp, Vol.2 at p.54054-55, D2-012 March, 1972. The plaintiff suffered bilateral bruising of both eyes. Blockage of blood supply

to right eye causing complete blindness and partial blindness to left eye causing practical blindness. In March 1972 £20,000 were awarded for general damages for pain and suffering and loss of amenity. When converted to Jamaican dollar on the formula already enunciated, the sum is \$41,732,136. It will be readily appreciated that where total blindness is experienced the awards range from \$21M to almost twice that amount viz \$41M. Jamaican dollars on the conversion from English award.

There is evidence of other injuries to the plaintiff. In Dr. Warren Blake's report admitted in evidence as Exhibit 1, he stated that both lower limbs were injured. Bilateral steinman pins were inserted and skeletal traction applied.

It is to be remembered that the accident occurred on March 9, 1990 and on that day the plaintiff was hospitalised. The lower limbs did not permit full weight bearing until approximately mid October 1990. Even with the return to full weight bearing the plaintiff was left with deformity in his left hip. He had a left-foot drop and wore special shoes and a splint on left ankle.

Mr. Miller in an attempt to fortify his submissions in respect of an award of damages for the plaintiff's other injuries cited three unreported Jamaican cases. Two from Khan's Personal Injuries cases Vol.3 and the other from Harrison's Casenote, Issue 2. In Campbell v. Allen, C.L. 1987/C81, Khan, Vol.3 p.5 - 7. The plaintiff suffered a 20% P.P.D in each leg. General damages (Pain and suffering and Loss of amenities) were assessed at \$297,250 on 29th September, 1989. At that time the C.P.I was 121.5 converting that sum to the December 1995 C.P.I of 810.30 the result is \$1,991,575. In the case of Harris v. McKenley, C.L. 1981/H.947. Khan Vol.3 p.8 - 9. The plaintiff suffered injuries which left him with a 10 - 15% P.P.D of the right lower limb and a 20 - 25% P.P.D of the left lower limb. On 15th March, 1989 General damages of

\$280,000.00 was awarded. The C.P.I. was 112 then. When converted at December 1995 to the C.P.I of 810.30 that award would now be \$2,016,000.00.

In the 3rd case of Dixon v. Jamaica Telephone Company Limited
C.L. 1987/D150, p.30 Harrison's Casenote Issue 2.

A 9 year old plaintiff was awarded \$360,000 as general damages for pain, suffering and loss of amenities. That plaintiff suffered compound fracture of the right and left femur. That award was made on March 11, 1991 when the C.P.I. was 172.9. That award when converted in December 1995 would be \$1,656,000.

Perhaps for the purpose of assessing damages which may be awarded in respect of the injuries other than those for total blindness. The case of Dixon v. Jamaica Telephone Company Limited supra, is not that helpful. For one the age of the plaintiff in this case is far greater than that in Dixon's case.

Mrs. Hudson-Phillips took no objection to the principle of using awards for similar kind of injuries in a foreign jurisdiction. She was however of the view that such awards should be calculated by using the English Consumer Price Index instead of the Jamaican Consumer Price Index to arrive at the updated awards. It would be then necessary to discount such updated award while at the same time bearing in mind the difference in the English and Jamaican economies.

The majority of the Court of Appeal in Winston Barr's case supra, scaled down the updated award arrived at after using the Jamaican C.P.I. by 30% for contingencies. The question which comes quite readily to mind is by what percentage should an English award be scaled down when awarding damages to a Jamaican plaintiff? Should a trial Judge regard the 30% by which the award was scaled down as fixed? (as Mr. Miller said).

No evidence was adduced to show the difference between the Jamaican and English economies. The object of an award for damages is to give the injured party a sum of money which will put him in the same position as he would have been in if he had not been injured.

See Livingstone v. Rawyards Coal Company (1880) A.C. 25.

The great difficulty experienced in assessing claims for general damages was fully expressed by the Court of Appeal in United Dairy Farmers v. Goulbourne (unreported) S.C.C.A 65/81

dated January 27, 1984, where Carberry, J.A. said:

"In making awards the Courts do their best to measure the incomprehensible or the immeasurable (e.g. pain and suffering or loss of amenities) but there is a stage at which this ends and sheer speculation begins."

In considering the general damages, the award will take into account his loss of amenities. There is evidence which shows that the plaintiff played dominoes, watched cricket matches at the Senior Cup and Test levels. He loved to dance and swim very often. His injuries have deprived him of nearly all these pleasant and enjoyable features of life.

Having regard to the evidence, and the cases cited together with submissions of Counsel particularly those of Counsel for the plaintiff I think that a reasonable award for general damages (i.e. pain and suffering and loss of amenities) would be \$8,000,000.

The plaintiff's claims Special Damages under the following heads were agreed:

Private nursing	\$11,050.00
Physiotherapy	3,825.00
Prosthesis	7,000.00
Doctor's visits	200.00
Medication	1,500.00
Therapy kit	2,500.00
Rental of Walker	140.00
Travelling to clinic & Doctor	500.00
Wheel chair	4,500.00
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	\$31,215.00

The particular of Special Damages were amended to include the following:-

Splint US\$500.00 @ US\$1 = \$40 JA.	\$20,000.00
Shoes US\$500.00	\$20,000.00
Gym fees for 3 years @ \$5,500 p.a.	16,500.00
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I accept the evidence given in proof of the amended items of Special Damages.

Special Damages awarded will be \$87,715.00. Any other item claimed has been disallowed either on amount of lack of or insufficient evidence.

Having regard to the evidence and the findings I have made, I give judgment for the plaintiff against the defendant Donald Mendes, with damages assessed as follows:

In respect of Suit C.L. P176/90

Special Damages - \$87,715.00
with interest at the rate of 5% p.a. with effect from the
9/3/90 to 20/3/97.

General Damages (pain & suffering & Loss of amenities -
\$8,000,000.00
with interest at the rate of 3% p.a. with effect from the
13/11/90 to 20/3/97.

The plaintiff will have his costs to be agreed or taxed in respect of Suit C.L. P176/90.

Judgment for the defendant Walker against the plaintiff.
The costs of the defendant Walker to be paid by the defendant Donald Mendes.