IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/R-008

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| BETWEEN | RIXON RICHARDS | PLAINTIFF |
| A N D | BANK OF JAMAICA | FIRST DEFENDANT |
| A N D | FITZROY SCOTT | SECOND DEFENDANT |

Dr. R.B. Manderson-Jones for Plaintiff.

Mr. Alton Morgan for Defendant.

HEARD: JANUARY 28, 29, 30, 1991
MAY 12 AND 13, JULY 5, 1991

REID, J. (AG.)

Plaintiff is a commissioned Land Surveyor employed to the Ministry of Construction. On 10th July, 1984 he was driving his Ford Escort station waggon from Kingston to Yallahs in St. Thomas, with him his wife and two children. At 8:00 p.m. he had just negotiated a left hand curve ascending a gradient when his car collided with a Suzuki jeep driven by second defendant but owned by first defendant, the Bank of Jamaica. Maintaining his 1100 c.c. engine at 30 m.p.h. in third gear along a winding roadway plaintiff had completed a series of hair-pin curves, the last being, according to him, "more a U-bend than an S-bend ... 150 feet in line length". To his left on the corner was an embankment two to three feet high and he had seen the lights of the vehicle approaching before impact. His modified answer under cross-examination was that he had not seen the direct beam of light but only the "impression of the lights on the landscape at a tangent to the curve".

After the collision his car came to rest facing the direction from which it had been proceeding and the other vehicle overturned, resting roof down.

Plaintiff denied taking the corner wide and thereby causing the accident. He admitted that he had neither applied his brakes nor had he swung for there was no time to react evasively. He was trapped in his car which was considerably damaged, his injuries - a shattered pelvis, fractured right ankle, cuts and bruises. Since hospitalization he walks with a walking-stick and occa-

sionally uses crutches. Although able to bend, he can no longer squat, stoop or rotate; he now limps, his right leg shortened an inch.

His wife Olga Richards who herself sustained a fractured hand, testified that from the front passenger seat at left, she had seen the oncoming lights. When shown a statement recorded on 16th October, 1984 (Exhibit 3) she admitted having therein stated:

> "The oncoming vehicle which was travelling toward Kingston was travelling on its left hand".

Re-examined, she said that the vehicle "must have been" travelling on plaintiff's path of the roadway. Surprisingly, she was not asked to explain the inconsistency which the signed statement introduced.

Simroy Ellis was a passenger in the Suzuki jeep and he testified before second defendant did. Ellis says he had seen approaching lights and vouched that his driver had braked before impact after which both vehicles came to rest on defendant's path of the roadway, a car's length apart. The occupants of both vehicles were sent off for treatment, only he remaining until the police arrived. The roadway was unchanged even up to 12th May, 1991 when he visited to measure same and find it twenty feet wide.

Fitzroy Scott testified that driving the jeep on the business of the Bank, he was on no haste while returning from Prospect in St. Thomas and he was proceeding at 30-35 m.p.h.; he had seen oncoming lights as he approached a right-hand bend (described in his statement to the police, as he admits, a left hand bend). In an effort to avoid a collision, with his left road wheels he traversed the corresponding road shoulder which he said was one foot wide, although in the witness-box he demonstrated a metre or so. Following the collision he knew nothing else until being aware that he was in hospital.

Mr. Morgan submitted that it was significant that the evidence from both sides disclosed that the collision occured just as plaintiff had made his exit from the corner and that both vehicles had come to rest on defendant's path of the roadway. Plaintiff's car had rotated through 180° without any impact on the embankment to his left. The assessor's report, in evidence by consent and describing the damaged sections would suggest that the impact was

not head-on. The conclusion, he submitted, was that plaintiff's own negligence was substantially if not wholly the cause of the accident.

Dr. Manderson-Jones would persuade the Court to find that the impact was so instantaneous that there was no time for evasive action by plaintiff: that the proper interpretation of plaintiff's evidence was that the approaching lights had cast "a silhouette across the landscape". To accept that defendant driver had veered on to the road shoulder would be preposterous for an impact in such circumstances should surely have precipitated the jeep over the gully-edge (such was the terrain to defendant's left); in fact the jeep had overturned wheels up. If, as witness Ellis testified, the gradient was no greater than that along Church Street nearby, why should the driver have been applying brakes continuously for twenty chains back? In fine, he submitted, the cause of the accident poluted to the Bank's driver:

1. Driving on the wrong side of the roadway
2. Failing to slow down while descending a gradient and approaching a curve
3. Failing to give adequate and timely warning
4. Failing to make or keep a proper lookout.

I must here comment on the dearth of evidence to indicate the location of the point of impact. No attempt was made to identify with either vehicle the casual mention of a tire impression on the roadway. The demeanour of each witness respectively calls for no particular mention apart from where, as the record shows, testimony had manifested inconsistencies. Having epitomized the narrative given by each, I would only add that the undisputed evidence of mutually approaching lights, whether beaming directly or obliquely on the landscape, should have been a warning to each driver. In conclusion I do hold that each driver must share the blame for the collision and so I apportion liability equally.

Plaintiff's injuries

Professor John Golding the orthopaedic surgeon, well known, and whose report appears, by consent, as Exhibit 2 explained as he testified, that plaintiff's severe limp was partly due to the one-inch shortening of the limb

and complicated by the stiffness of the hip. A nerve in the limb was damaged and he is unable to raise his foot. The consequent permanent disability of the lower limb due to shortening was measured, says Professor Golding, at 10%; the foot-drop at 35% and stiffness at 45%. The overlapping itemisation resolves itself as 70% of the lower limb or 28% of the whole man. Impairment could be reduced by surgically transferring a spare tendon from the back of the leg to the front and thereby eliminate the foot-drop; the cost of such surgery being approximately Ten Thousand Dollars ($10,000.00). Likewise, a hip replacement procedure costing some Fifteen Thousand Dollars ($15,000.00) would improve the function of the hip by 75% to 80% - clearly to the advantage of plaintiff who at age forty-two would not run the risk of osteo-arthritis. Plaintiff would then be able to sit or walk more easily and without pain, although hardly able to play cricket as a fast bowler, says Professor Golding. Despite the prospect of alleviation of his persisting discomfort, plaintiff is unwilling to presently undertake the hip surgery. While recuperating in hospital in 1984, says he, a Doctor then attending him had recommended that the hip surgery would not be advisable for someone under fifty years of age. Under normal activity, the replacement had a projected life span of twenty years. Were plaintiff to undergo the surgery and then resume his normal occupation that period could be less. A second similar operation would entail far greater risk and be likely not to last as long. This advice prompted him to postpone the hip replacement procedure. Not until his visit to Professor Golding in 1990 was he aware that relief could be had by the tendon transfer operation. The preceding portion of plaintiff's narrative, clearly hearsay, explains plaintiff's not availing himself hitherto of the surgical procedure. The higher estimate of Twenty Thousand Dollars ($20,000.00) for the hip replacement procedure told to plaintiff, I cannot use in the award of damages as expenses to accrue in the future. Since damages both already accrued and prospective must be assessed at one and the same time, the combined figures of Ten Thousand Dollars ($10,000.00) and Fifteen Thousand Dollars ($15,000.00) given by Professor Golding will be computed in the assessment.

Plaintiff says he is no longer able to enjoy recreational pursuits of cricket, football, table-tennis and dancing. No longer is he able to undertake

survey jobs on rugged sites and his disability has lost him the opportunity for advancement in the Ministry of Construction. He is no longer involved in field surveying for the Ministry. More recently, says he, there was the prospect of secondment for period of three years to a project sponsored by the Canadian International Development Agency. This would have earned him additional emoluments of between Fifteen Thousand Dollars ($15,000.00) and Twenty Thousand Dollars ($20,000.00) per annum higher than of that which he was receiving in 1984 as a senior executive surveyor - the latter position being next to that of Chief Surveyor. His emoluments over the years in the Ministry were as follows:

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| 1985 | - | $40,000.00 |
| 1986 | - | $40,000.00, thereafter he advanced and in |
| 1987 | - | $50,000.00 |
| 1988 | - | $60,000.00 |
| 1989 | - | $60,000.00 |
| 1990 | - | $84,000.00 |

Additionally, he earned income from private surveys conducted in the afternoons and on week-ends. These comprised identification report for mortgage applications as well as rural small settlers' surveys. His lost income from this source over the period of his incapacitation is not disputed and will be reflected below in the award for special damages. Since his partial recovery, he has continued this ancillary practice, now limited, he says, by reason of his disability. No attempt was made to elicit the extent of this deminution.

Special Damages

During the first day's hearing, the defence consented to an amendment of the plaintiff's particulars of special damages with adjustments as to quantum. As will appear later, yet another amendment was to come. Loss of income representing the private surveys lost during plaintiff's twenty-eight weeks incapacitation was not disputed so the agreed special damages at that stage were:

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| Hospital fees | $ 2,900.00 |
| Drugs | $ 225.00 |
| Physiotherapy | $ 2,000.00 |
| One crutch | $ 100.00 |
| 28 weeks loss of income | $19,000.00 |
| Motor vehicle (less salvage) | $ 7,000.00 |
| Wrecker fee | $ 350.00 |
| | $31,575.00 |

An application for the second amendment was unopposed by Mr. Morgan save on terms of one day's costs as well as an adjournment to be granted to the defence. Item 5(b) of special damages introduced in the re-draft reads as follows:

"5(B) Loss of earnings from inability to embark on full-time private practice from 10/4/84 to 31/1/91, that is, 6½ years @ $250,000.00 per annum ..... $1,625,000.00

Expenditure

Cost of setting up ..... $ 80,000.00

Expense at 30% ..... $487,500.00

$ 567,500.00

Gross earnings less expenditure ..... $1,057,500.00

Less tax at one-third ..... $ 352,500.00

Net loss of earnings ..... $ 705,000.00"

The above computation fails to discount the emoluments in fact earned from the Ministry over the period in question as well as that from the resumed part-time practice. Notice how the period runs precisely back to the very date of the accident! After eight years with the Ministry, says Plaintiff, he was getting ready to go into private practice as the volume thereof engaging him part-time indicated that there could be a conflict to the detriment of the time allotted to his avocation with the Ministry. From full-time private practice he would have anticipated an income of between One Hundred Thousand Dollars ($100,000.00) and One Hundred and Fifty Thousand Dollars ($150,000.00) per annum, as he went on to say, One Hundred Thousand Dollars ($100,000.00) over his official level of Forty Thousand Dollars ($40,000.00) in 1984. He also said that the average

yearly difference between the 1984 official level and the income anticipated over these so-called lost years of private practice would have been Two Hundred and Fifty Thousand Dollars ($250,000.00) per annum. The cost of equipping himself in 1984 he would have expected to be "pretty close to Eighty Thousand Dollars ($80,000.00)", a sum representing capital expenditure and requiring financing, repayable over a three-year period. Up to the time of the accident he was enjoying a facility at Gentles Road where a friend had afforded him the concession of office-sharing. The cost of renting an office would not therefore have arisen in 1984. Does the enjoyment of this facility point unequivocally to a contemplated change of career-status considering that the office was used for his part-time practice? The foregoing projection with reference to the commencement date as pleaded would depict one who, but for the accident, must have effectively terminated his employment with the Ministry and on the date of the accident or the very next day after, would have embarked on a full-time career as a private surveyor. But, it was plaintiff himself who in testimony said that he was "getting ready to go into private practice" as well as that he had made:

> "No exploration in depth of costing for office in private practice for this was then a little way off, then projected for about the commencement of 1985".

If, as earlier stated, his disability prevented him from undertaking surveys on rugged terrain and in fact lost him the opportunity for advancement in the Ministry, can it be said that he had, in fact, been seriously contemplating a career change or had actually been at the point of departure as pleaded?

His witness Mr. Barrington Dawkins, also a Commissioned Land Surveyor, with the experience of one year's private practice following employment with the Ministry, detailed as he was able, no doubt, to do, the expenses incidental to setting up practice. In view of the conclusions I will indicate on item 5(B), I will dilate no further on Mr. Dawkins' opinion as to income which should accrue to a successful career surveyor.

Dr. Manderson-Jones pleads his own blame worthiness for not having

included item 5(B) from the very start, labouring, as he was under the impression that the issue of that item would be assessable as general damages. Whatever the merits of such contrition, it does not derogate from the principle that before a claim for loss of future earnings can succeed, there must be a reasonable expectation that the plaintiff would have earned the sums alleged to have been lost rather than a speculative possibility that he would have earned them.

See Kemp v. Kemp on Damages - 3rd Ed. p. 24 (Eleventh Supplement).

Clearly therefore plaintiff claim for lost years' income cannot be sustained and his special damages must be limited to a computation based on the quantum hitherto set out.

General Damages

Although not obliged so to do, Plaintiff by an amendment inserted, pleaded loss of earning capacity, which as Carey J.A. said in Gravesandy v. Moore (Unreported) Supreme Court Civil Appeal 44/85 dated 14th February, 1986

> "... is an item of general damages coterminous with pain and suffering".

The judgment of Browne L.J. in Moeliker v. Reyrolle & Company Limited [1977] 1 All E.R. 9 supplies the test in determining whether or not this item arises:

> "In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of trial, the Court should only make an award for loss of earning capacity if there is a substantial or real, risk that the plaintiff will lose his present employment of some time before the estimated end of his working life".

The exercise, therefore, of assessing and quantifying the present value of the risk of the financial damage the plaintiff will suffer should that risk materialize, should only be conducted after the first part of the test is applied. As Carey J.A. said in Gravesandy v. Moore (Supra):

> "The claim for loss of earning capacity is more likely than not to arise where the plaintiff is in employment at the time of trial or assessment, for as Browne L.J. points out, if the plaintiff is earning as much or more than he was earning before he suffered injury, he can have no claim for loss of earning capacity if he should ever lose his present job".

As the judgment further pointed out, the principles stated in the judgment of Browne L.J. in the Moeliker case apply equally to a person who is self-employed.

However, what we are concerned with is whether or not it applies to the circumstances of plaintiff who has been de facto partly self-employed. Apart from his evidence that he has been conducting less private surveys since his resumption, it is clear that he has lost no status at the Ministry where his emoluments have increased in the ordinary course although his is no longer engaged in field surveys for the ministry. It cannot therefore be said that he is at risk in losing his employment there. No doubt his art-time private practice has been partly cut back, to what extent we are n told, but the surgical procedures yet to be undertaken ought to restore hi a state to be able to conduct substantially the same volume as before his ident. The additional emoluments which secondment to the Canadian proje ould have earned is immaterial to this head of assessment.

Manderson-Jones cited a number of comparable awards form Mrs. Khan's Digest o reme Court awards Volume II. He then suggested a sum of Two Hundred an ty Thousand Dollars ($240,000.00) for pain and suffering as well as Sixty Th Dollars ($60,000.00) for loss of amenities. This submission overlooks the that an award must cover these heads collectively and although an awa reflect worth in money of the day, the figures suggested are wholly unrea Two recent awards only will I abstract.

First, C.1 -026 Walters v. West Indies Alliance Trust Co. Ltd.

Awarded on 15th Jan Comminuted fra ll.

right tibia, right pe er left libia, fibula, proximal right femur limb shortened. Permanermity lower left forearm and left leg; right early osteo-arthritis. A disability 15% to 20%. Likely to develop

Douglas v. Mullings suffering, loss of amenities $150,000.00

Fracture of tibia and 25th January, 1991.

great toe. Unable to wear ord ht). Fracture proximal phalanx right right limb. Clawing - Great toe with comfort limp. Dragging of Unable to run - Award - $130,000. third toes. Female, 11 year old.

The indication is that plaintiff is unlikely to develop osteo-arthritis. In all the circumstances the level of the award should be One Hundred and Fifty Thousand Dollars ($150,000.00).

Defendant's counter-claim

By exhibit 5 in evidence, by consent, the assessed amount of damages accruing to the defendant bank is Twenty-one Thousand and Seventy Dollars ($21,070.00). Since each side is liable for one-half the damages, fendant Bank will have a judgment of Ten Thousand, Five Hundred and Ty-five Dollars ($10,535.00) on the counter-claim which when set off aga t plaintiff's special damages of one-half Thirty-one Thousand, Five Hundr nd Seventy-five Dollars ($31,575.00) will leave in the latter's favour l judgment as follows:

S l damages of Five Thousand, Five Hundred and Fifty-two Dollars and Fifty- ($5,552.50) with interest at the rate of 3% per annum from 10th July, o date of judgment.

Genera es of one-half of One Hundred and Seventy-five Thousand Dollars ($175, ($87,500.00) wit which is Eighty-seven Thousand, Five Hundred Dollars ($75,000.00) from st at 3% on the sum of Seventy-five Thousand Dollars NOTE: Each party w uary, 1985 until date of judgment.

awarded to def to bear own costs, the one day's costs previously ing waived.