

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1987/S261

BETWEEN

BALDWIN SHIRLEY

PLAINTIFF

AND

JAMES HAMILTON

DEFENDANT

Horace Edwards Q.C., Alvin Mandell and Ainsworth Campbell for the Plaintiff.

Charles Piper for the Defendant.

Heard: November 13, 15, 1990.

CORAM: WOLFE J.

This action arises out of an accident which occurred on the 20th day of April, 1987 along the Rockfort Main Road in the parish of St. Andrew.

Briefly, the plaintiff was a passenger in a mini-bus licensed PP1903 owned by the defendant and driven by one Vincent Jackson. The said bus overturned and the plaintiff suffered injuries as set out hereunder:

- i) fracture of cervical vertebrae;
- ii) damage to the spinal cord;
- iii) shock and concussion;
- iv) unconsciousness;
- (v) tenderness over the cervical spine with limitation of all movements;
- (vi) fracture of the cervical (5th) with subluxation of the cervical 5th and 6th.

Following the accident the plaintiff was admitted to Kingston Public Hospital in an unconscious state. He regained consciousness about 8:00 a.m. the following day and found himself wearing a cervical collar. He was taken to the operating theatre where his head was shaved and "a pin ball placed on top of it." Plaintiff had to remain in bed, on his back, without being able to change his position. To quote the plaintiff "He felt as if he was carrying the world on his head." He experienced severe pain to his neck and shoulder for about 6 months and was unable to walk without assistance. His right hand was lifeless. Since the accident he has had to be wearing the cervical collar. He was released from hospital after a period of one (1) month.

The Plaintiff continues to receive treatment as an out-patient of the Kingston Public Hospital on a monthly basis. The nature of the treatment was not disclosed. However, the indications are that he is receiving physiotherapy treatment.

Significantly, none of the doctors who examined and treated plaintiff on his admission to the Kingston Public Hospital was called to testify neither was any medical certificate tendered in evidence. Worthy of note is the fact that Mr. Piper for the Defendant indicated that he was willing to consent to all medical certificates being tendered in evidence. This generosity on the part of Mr. Piper was despised. The defence must have been mindful of the passage from Virgil "Timeo Danaos et dona ferentis" literally translated "I fear the Greeks when they bring gifts".

Dr. John Hall, an eminent Neurologist, who examined the plaintiff two years after the accident occurred, stated that at the time of his examination of the plaintiff he had the benefit of two medical reports from Dr. Ali, a Consultant Orthopaedic Surgeon, and Mr. R.E. Cheeks a Consultant Neuro-surgeon both of the Kingston Public Hospital.

Dr. John Hall found as follows:

1. Neurological anomalies confined to the neck and upper limbs.
2. Wasting of the cervical muscles at the back of the neck.
3. Weakness and wasting of the sterno-mastoid muscles at the back of the neck.

As a result of these anomalies the neck could not be held in its normal erect position. This was occasioned by the weakness and wasting of the muscles to the front and back of neck.
4. Damage to the cervical nerve roots 2 - 4 coming out of the spinal cord at that level.
5. Neurological anomalies of the upper limbs.
6. Wasting and weakness of the supra and infra spinatus muscles. These are the fatty bulks over the shoulder. They assist in all movements of the shoulder joints and upper limbs.
7. Wasting and weakness of the deltoid muscles.
8. Wasting and weakness affecting the biceps and forearm muscles.
9. Specific reflex anomaly of the Supinator Jerk - it was inverted.
10. Biceps girth was wasted and measured only 14" at the mid upper arm.
11. Forearm girth was wasted and measured only 9" at a point 4" below the elbow.

12. There was sensory loss to pin prick in the right upper limb dermatome.

This sensory loss indicates unequivocal damage to nerve roots.

13. Permanent weakness and wasting of the muscles of the upper limb.

Dr. Hall confidently anticipates that with the passage of time osteophytes, i.e. bony out growth, will develop in the cervical vertebrae. There is no known medication to relieve this condition. As the condition develops it causes spinal cord compression with resultant paraplegia. The prognosis is that these conditions will develop within 3-5 years and will eventually result in incontinence.

The onset of post-traumatic epilepsy and to a lesser extent Parkinson's disease, caused by damage to the Brain transmitter, are anticipated. There is the possibility of the plaintiff developing alzheimer's disease. The doctor was unable to state any specified period in which Parkinson's disease or alzheimer's disease would develop.

Dr. Hall opined that the plaintiff will be totally unable to cope with employment as a steel fitter as there is a less than eighty percent (80%) ability to use his hands. Further he was of the view that the plaintiff was unable to undertake any kind of manual work at the present time.

Finally, the doctor said the plaintiff's condition is a deteriorating one and irreversible and that all the injuries indicated damage to the nerve roots leading from the spinal cord.

Under cross-examination by Mr. Piper the doctor said he found no evidence of the following:

1. Alzheimer's disease.
2. Parkinson's disease.
3. Post traumatic epilepsy.
4. Brain damage.
5. Compression of the spinal cord.
6. Paraplegia.

Dr. John Hall made it abundantly clear that what he was saying is that the effects of which he spoke, are likely to result where the injuries suffered are similar to those suffered by the plaintiff.

He recognizes that the anticipated effects may never occur.

Plaintiff could do the job of a telephone operator but the doctor did not see him participating in operating a shop.

The cervical collar will be a permanent feature of the plaintiff's garb.

Anomalies is used to mean damage. The defence did not call any evidence on its behalf.

Re Special Damages

The plaintiff testified that upon release from hospital he had to return to hospital for treatment on about fifteen occasions at a cost of Forty Dollars (\$40.00) per visit totalling Six Hundred Dollars (\$600.00). The statement of claim was duly amended to accommodate this additional amount.

As a result of the accident he lost a pair of tested glasses valued at Eight Hundred Dollars (\$800.00).

Dr. John Hall stated that he was paid Eight Hundred Dollars (\$800.00) for his examination of the plaintiff.

At the time of the accident the plaintiff was in receipt of a weekly wage of Five Hundred and Twenty Eight Dollars (\$528.00). The statement of claim was amended to claim loss of earnings up to the 13th November, 1990, a total of 177 weeks totalling Ninety Three Thousand Four Hundred and Fifty Six Dollars (\$93,456.00).

Workmen of the plaintiff's category are paid an annual increase of eighteen percent (18%). At Five Hundred and Twenty Eight Dollars (\$528.00) per week the increase in the 1st year would be Ninety Five Dollars and Four Cents (\$95.04) per week and in the second year would be One Hundred and Twelve Dollars and Fourteen Cents (\$112.14) per week. The eighteen percent (18%) increase for a period of two (2) years would amount to Ten Thousand Seven Hundred and Seventy Three Dollars and Thirty Six Cents (\$10,773.36).

In addition thereto the plaintiff is paid an end of year bonus of sixteen percent (16%) on his gross earnings. Total earnings over the period amounts to Ninety Three Thousand Four Hundred and Fifty Six Dollars (\$93,456.00) + Ten Thousand Seven Hundred and Seventy Three Dollars and Thirty Six Cents (\$10,773.36) = One Hundred and Four Thousand Two Hundred and Twenty Nine Dollars and Thirty Six Cents (\$104,229.36).

Sixteen percent (16%) of One Hundred and Four Thousand Two Hundred and Twenty Nine Dollars and Thirty Six Cents (\$104,229.36) = Sixteen Thousand Six Hundred and Seventy Six Dollars and Sixty Nine Cents (\$16,676.69) amounting to a total loss of income of One Hundred and Twenty Thousand Nine Hundred and Six Dollars and Five Cents (\$120,906.05).

Mr. Piper offered no resistance to the claim for special damages.

GENERAL DAMAGES

In dealing with the question of loss of future earnings the evidence is that the plaintiff at this point in time would be earning Eight Hundred and Sixty Seven Dollars and Fifty Cents (\$867.50) per week, an annual income of Forty Five Thousand One Hundred and Ten Dollars (\$45,110.00).

The first Ten Thousand Eight Hundred Dollars (\$10,800.00) of his salary would be tax free, leaving him with a taxable income of Thirty Four Thousand Three Hundred and Ten Dollars (\$34,310.00). Tax is paid on 1/3 basis hence the annual net income of the plaintiff would be computed as follows:

$$\$34,310.00 - \$11,436.66 + \$10,800.00 = \$33,673.34$$

The plaintiff is now aged 55 years. The average worker in Jamaica retires at 60 years of age, meaning the plaintiff would be retiring in another five (5) years. Applying the usual considerations of the contingencies which are associated with this advanced payment I would hold that a figure of four (4) years would be a suitable years of purchase. I have selected 4 years because I am of the view that the nearer one gets to the retirement age the more the possibility of the contingencies occurring is reduced. Loss of future earning is therefore computed at $\$33,673.34 \times 4 = \$134,693.36$.

Mr. Campbell for the plaintiff suggested that a figure of Four Hundred Thousand Dollars (\$400,000.00) would be an adequate award for the injuries sustained by the plaintiff. No authority was produced to support this suggested figure.

Mr. Piper on the other hand referred to the case of C.L.1983/L114 NARVAL LEWIS V. GRAY'S INN SUGAR FACTORY LIMITED AND REUBEN MONGAL, reported at Volume 2 of Khan's digest of Recent Personal Injury Awards made in the Supreme Court of Jamaica.

Mr. Piper quite rightly indicated that the injuries in the cited case were to the lower limbs but that the resultant effect was the same as the instant case, namely that both plaintiffs were adjudged totally incapable of further gainful employment in their chosen field of occupation. He invited the court to make a similar award as was made in the cited case with the necessary adjustment to meet the concept that an award must be made to reflect "the money of the day."

I found Mr. Piper's approach inconsistent as he conceded that the plaintiff in the instant case had suffered more serious injuries than the plaintiff in the cited case.

The evidence of Dr. John Hall requires some comment. The doctor did not actually see any evidence of brain damage. A certain condition which was revealed to him in the plaintiff's history led him to conclude there was brain damage. Having had the opportunity of viewing the plaintiff and the very lucid and alert manner in which he answered questions, I am not satisfied that he sustained any brain damage. The likely consequences of the plaintiff's injury, with due deference to the expertise of Dr. John Hall, are highly speculative. They may occur or they may not occur. There can be no gain saying that the plaintiff received a serious injury. I take the view that a proper award for pain and suffering in the circumstances of this case is Two Hundred Thousand Dollars (\$200,000.00).

There will be no award for handicap on the labour market. This award is usually made where there is a real likelihood that plaintiff would lose his present employment and would be handicapped on the labour market, as result of his injuries, in obtaining new employment. In this case the plaintiff has been adjudged unable to work again. This is compensated for in the award for loss of future earnings.

Damages are assessed for the plaintiff as set out hereunder:

Special Damages -

Travelling Expenses	-	\$1,146.54
Medical Expenses	-	\$ 800.00
Loss of Glasses	-	<u>\$ 800.00</u>
		<u>\$2,746.54</u>

B/F		\$ 2,746.54
Loss of income	-	<u>\$120,906.05</u>
		\$123,652.59

General Damages

Loss of future earnings	-	\$134,693.36
Pain and Suffering	-	<u>\$200,000.00</u>
Total	-	<u>\$458,345.95</u>

Interest at three percent (3%) on Special Damages from 20th April, 1987 to 21st November, 1990.

Interest at three percent (3%) on Two Hundred Thousand Dollars (\$200,000) from 31st July, 1987 to 21st November, 1990.

Costs to be taxed if not agreed.