IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. 1978 - S 132

BETWEEN	ALVIN SMITH	PLAINTIFF
AND	LOWELL PRINCE	DEFENDANT

Mr. L.O.B. Williams for Plaintiff
Mr.F.S. Beckford for Defendant.

Hearing: 22nd, 23rd, 24th April, 1981.

JUDGMENT

ROSS; J.

First of all, let me say that I am grateful to Mr. Beckford and Mr. Williams for their assistance in this matter. The evidence is quite short. The plaintiff and the defendant have given evidence as to the circumstances in which the incident leading to this action occurred and, in addition to their evidence, the plaintiff called Dr. Douglas, a specialist in urology, to support his case.

So let us look, firstly, at the evidence in regard to the question of liability. We had the plaintiff giving evidence that on the 5th of October, 1974, he was riding his motorcycle, licensed No. E-653, along the public road leading from Harkers Hall to Bog Walk at around 10:00 o'clock in the morning on the left-hand side of the road, and while riding he felt a "lick" from behind him.....
As a result of this blow he said that he and the bike went up in the air, came back down, the bike dropped on one side and he came down on the foot-rest which was, according to him, 'cock up'. He came down on his bottom and the foot-rest injured him in the vicinity of his scrotum and the foor-rest broke off after it had pierced him in that area. He drew it out with his hands and laid down on the ground

and was bleeding and Mr. Prince, the defendant, came up - he was riding a 175 motorcycle, a more powerful motorcycle than that being ridden by the plaintiff; the defendant passed, went a little distance, stopped and walked back to where he was and told him that they are all motorcycle riders, that it was just a little scrape he (the plaintiff) had got and he must get up. The defendant went on to say that 'it could happen to anyone of us' and that he, the defendant, had just been gazing a little. This has been denied by the defendant.

The plaintiff then asked the defendant to assist him and he was put in a van and taken to the Linstead Public Hospital. From there, after he had received some treatment, he was transferred that same day to the Public Hospital, Kingston, where he was seen by Dr. Dawes who operated on him the same night. He went on to tell us about the various stages of treatment, how he remained at the Kingston Public Hospital for some three weeks, came out with a tube in his belly; he was treated for some time as an outpatient, and then he told us how one day he found he could not urinate, his belly was swollen and he had to be taken back to the hospital and he had a further operation; then in October, 1976 he saw Dr. Douglas who has been treating him up to now. He was operated on at the Andrews Memorial Hospital and he told us about the operation and of the expenses in connection with these operations, his loss at the time that the incident occurred; and then he went on to tell us about other matters with which I will not deal just now.

He was cross-examined at some length and in the course of cress-examination in relation to how the incident occurred: he said that the bike went over once on the right side.....

The whole of his weight came down on it and he came down

on his bottom and that was when the foot-rest went into him in the vicinity of his scrotum and he received these injuries.

On the other hand, the defendant has told quite a different story; according to the defendant, on this morning of the 5th October, 1974, he saw the plaintiff ride out of his (the plaintiff's) gate. He had known the plaintiff before for about ten years and they were on quite friendly terms; he saw the plaintiff and they were talking before this incident happened: They were then going in the same direction and they were both riding and going down easy. He, the defendant, was travelling at about 20 to 25 miles per hour and a couple of yards behind the plaintiff. He said, "We were riding beside each other but I was about three or four yards behind him".

Then he went on to say that while riding along the plaintiff came to a pothole. The plaintiff shifted from the pothole towards the centre of the road and at the same time held on to his brake and this caused the two bikes to collide. As a result of this collision, his (the defendant's) bike fastened on to the plaintiff's bike and he jumped off immediately and pulled off his bike. As he pulled off his bike the plaintiff fell down on the other side and after the plaintiff fell down on the other side he was on the ground making a lot of noise and so the defendant went up to see what had happened to him and the plaintiff said that he could not get up. He asked to be assisted to get up and was assisted. The defendant said that he saw that the plaintiff had a slight cut right on his bottom or buttocks and the plaintiff asked that he be taken to the doctor at Linstead. This was done.

Now, that is what the defendant had to say about how this incident happened. He told us further on that

he did pick up a footrest off the ground but not the one that the plaintiff pulled out. He told us, too, that at the time when the plaintiff fell off his bike, that both bikes were stationary, that the two bikes were tangled together with his front left-hand blinker hitched on to the plaintiff's right blinker, and he told us, further, how he stepped sideways off his motorcycle on the right hand side quickly.

What the plaintiff said as to how the incident occurred was put to him in cross-examination and he denied it.

Having heard the defendant's version of what happened, it seems to me highly improbable that if that was how this collision had taken place that the plaintiff would have suffered any or any serious injury at all; and it seems to me that he support the plaintiff's story by his evidence about the broken footrest and by agreeing that the plaintiff had suffered some injury in the area where the plaintiff told the court he had received this injury. On the other hand, I would say the account given by the plaintiff was given in a straightforward manner and, as I said, he is to some extent supported by the defendant in so far as he admits the plaintiff was injured in the same part of his body where the latter said he suffered injury.

Looking at the evidence of both these men, looking at their demeanour in the witness-box as they gave their evidence, I accept the plaintiff's account of how he came to receive his injuries and I accept his evidence, too, of the injury which he received at the time, his having to be hospitalized that day, his having to remain in hospital for operation and treatment, and his having to be seen at a later date by Dr. Douglas.

Consequently, I find that the defendant was negligent when he was riding this powerful motorcycle along the road that day, and I find that by his negligence he caused the injuries which were suffered by the plaintiff and on a balance of probabilities I find that the defendant is entirely liable to the plaintiff.

I turn next to the subject of damages. I will deal, firstly, with the special damages. The plaintiff in the statement of claim set out a long list of particulars of special damages, and I will deal with them as I go along.

The first item of claim is the loss of earning, thirty three (33) weeks at $250.00 per week, giving a total amount of $8,250.00. The period for which the plaintiff claims loss of earnings was not challenged but the rate of his earnings was challenged by the defence. I must say that the evidence of the plaintiff as to his earnings was not convincing. It seems to me that the figures are inflated. His occupation as a salesman was challenged by the defence and while I accept that he did sell readymade pants and pants lengths, from his own evidence it seems to me quite unlikely that his earnings would be $250.00 per week. I formed the impression that at one time he was saying that this was the best that he ever did, when business was very good. I incline to the view that the average earnings were considerably less. He produced no record whatsoever to support his evidence as to his earnings, as to his sales, and I have to arrive at a figure as I am satisfied that he did earn his living in some way, and I accept that it was by selling of pants lengths and readymade pants. It seems to me that he was rather weak on his arithmetic: he could not tell the answer to four multiplied by six, and I doubt very much that the business

that he carried on was on any extensive scale, which he claimed it was. In all the circumstances I incline to the view that he was earning something in the vicinity of a figure less than $100.00 per week; it is difficult to arrive at any figure because of the absence of evidence generally on this point. But, as I say, I accept his evidence that he was earning a living by selling these articles and I would be inclined to allow him $80.00 per week for these thirty-three (33) weeks, which would give a figure of $2,640.00

The second item was for medical expenses with Dr. Clarke at Linstead in the sum of $20.00, which was agreed and allowed.

The third item was for the cost of medical report from Dr. Dawes for which $30.00 was paid; and a fourth item was the payment of $70.00 to Dr. Dawes for his services. Both these claims are allowed.

The fifth claim related to travelling to the Kingston Public Hospital nine times by taxi at a cost of $60.00 return on each occasion, and this gives a total figure of $540.00 which is allowed.

The sixth claim is for travelling to the Kingston Public Hospital by bus and taxi twenty times at $2.60 return, making a figure of $52.00, and this was agreed and is allowed.

The seventh itme relates to his travelling to the Kingston Public Hospital in 1976, (re operation by Dr. Vaughan) on nine occasions by car at a cost of 25 cents per mile and over a distance of 54 miles. This gives a figure of $121.50, which is allowed.

The eighth item relates to the cost of prescriptions and tablets purchased prior to the issue of the writ and this comes to some $10[illegible].64. That, too, is allowed.

The ninth item relates to clothes destroyed at the time of the accident. The claim is for $70.00 and on evidence given by the plaintiff in regard to this item I allow $50.00 for this item.

The tenth item relates to shoes destroyed at the time of the accident for which the sum of $20.00 is allowed.

The eleventh item relates to the medical report from Kingston Public Hospital from Dr. Vaughan for which $15.00 was paid, and this is allowed.

The twelfth item relates to fees paid to Dr. Lawson-Douglas, and here the sum of $2,000.00 is allowed. The original claim for $1,445.00 was amended on application by plaintiff's counsel to the sum of $2,000 which, it emerged from the documents, was the amount paid to Dr. Douglas up to now.

The thirteenth item was fees to Dr. Rao, the anaesthesist, for $130.00, and that was agreed. So too was the fourteenth item, fees to the Huttall Hospital, $30.00.

The fifteenth item was fees to the Andrews Memorial Hospital for $1,079.75, which I accept and allow.

The sixteenth item, it was agreed, was for travelling to the Andrews Memorial Hospital by car seven times a /distance of 54 miles return, at 25 cents per mile, giving a figure of $94.50, which was agreed.

Now, the seventeenth item, the cost of repairs to the plaintiff's motorcycle: Here the plaintiff claims $250.00 but no statement was produced as to these costs or the parts to be replaced, and having heard the evidence of the plaintiff I am satisfied that some repairs were necessary and in fact were done but it doesn't seem to me that those repairs were substantial and I consider that the amount of $100.00 should adequately cover any repairs to the motorcycle as a result of the accident, and that is the figure I allow.

In addition to these amounts, the plaintiff proved that subsequent to the issue of the writ he spent for drugs and prescriptions $194.78 and I accept the evidence in respect of this and this amount is allowed as well.

In addition, the plaintiff also produced evidence that subsequent to the issue of the writ he travelled on some twenty occasions to Kingston for treatment by Dr. Lawson-Douglas covering a distance of fifty four miles at 25 cents a mile amounting to $270.00 which amount is allowed.

This gives us a total for special damages of $7,564.19, according to my calculations.

Now, I turn to the question of general damages. I accept the evidence that the plaintiff suffered injuries to the perineum and a partial rupture of the urethra which resulted in stricture of the urethra. I accept the evidence given by Dr. Douglas as to his findings and the operation and the treatment which was given to the plaintiff, as well as his evidence that the plaintiff will require periodic dilation of his urethra for the rest of his life.

The plaintiff claimed to be impotent as a result of the accident. Dr. Douglas was unable to confirm this and explained the causes of impotence. Now, when we look more closely on the evidence of the plaintiff on this point, he said at first when he was asked about his sexual potency, and I quote:

> " To really go to a woman I have to beg and force, and I can't succeed. My ptivate goes down and comes up. It doesn't stay up".

Now, it seems to me that when the plaintiff used the words "I can't succeed", it was somewhat in the nature of an after-thought. It seems to me from his evidence that the plaintiff could get an erection and that he could have

sexual intercourse, but it wasn't as satisfactory as it used to be. And then he went on to tell us, "My private goes down and comesup; it does not stay up".

Now, taking into account the evidence of the plaintiff and of the doctor who couldn't say whether or not the plaintiff was impotent but he could only tell us that injuries to the urethrahave a high incidence of impotence associated with them which, of course, tends to lend support to the plaintiff's claim that he is impotent, I incline to the view that the plaintiff's sexual potency has been adversely affected by the injuries he sustained but I do not find that he is completely impotent and I would be inclined to say that he is partially impotent, having regard to the evidence we have heard. I note, too, that although unmarried, at the age of thirty-seven years he has five children, according to his evidence. It was a little suprising that he could not recall the names or ages of all of them. I accepted this evidence and it seems to me that he has made more than a fair contribution to the population and if he is unable to have any more children I do not consider that that is any deprivation, or that he should be compensated for that particular loss of that ability.

Now, various cases were cited to me in regard to the question of impotence and the sort of damages which it should attract, and I bear this in mind, the cases to which reference has been made, and I also bear in mind the case with which I dealt in 1978. This was the case of ... Gardner v. L.C. McKenzie Construction Ltd. Here the plaintiff was crushed by the rear wheel of the defendant's truck which moved off while the plaintiff was removing a stone which had lodged between the two wheels on one side. As a result, he suffered the following injuries: fracture of his pelvis and permanent deformity of

his pelvis; the rupture of his urethra and permanent impairment of his urethra, as well as permanent impotence and permanent partial disability of fifteen per cent of his trunk. He underwent several operations and was still receiving treatment from time to time in regard to the injuries which he suffered. There was evidence that the plaintiff was completely impotent and would be for the rest of his life; and he was forty-one years old at the time of the accident. For the pain and suffering, for the loss of amenities, the permanent impotence and the permanent partial disability in respect of his capacity to earn his living in the construction industry, his injuries having resulted in a reduced earning capacity, he was awarded general damages of $22,000 for all these various disabilities as well as for the pain and suffering. There was no break-down of this figure to show how much was awarded for the particular items of damages and so it is rather difficult for us to use this case in order to arrive at some figure for the particular loss of amenities, namely, for his impotence, so that this case does not really take us very much further although it is useful so far as it goes.

I have noted the submissions which have been made by counsel on both sides in regard to this particular item and it seems to me that the award for the loss of amenities including the partial impotence which I have found, should be $8,000.00.

I turn now to the further treatment which the plaintiff will have to receive from time to time for the rest of his life. The evidence is that it will cost $30.00 (?) for each visit. The evidence of the plaintiff is that he should visit every six weeks, and this visit, of course, is to Dr. Lawson Douglas for dilation of the urethral tract; and I note that while the plaintiff told us he was required to visit every six weeks, Dr. Lawson Douglas merely said he was required

to visit regularly; and , of course, I note, too, that Dr. Lawson Douglas gave evidence that the last occasion on which he had seen the plaintiff was on the 26th of January, this year, just under three months ago, so that I cannot really say that this plaintiff visits Dr. Lawson Douglas every six weeks, although that is the basis of the calculation which was made by counsel for the defendant as well as for the plaintiff. As I understand the submissions which have been made in respect of this item - cost of further treatment - that would cost, if the plaintiff is required to visit every six weeks, some 9 visits per year at thirty dollars - that would be some $270.00 per annum, and on this basis Mr. Beckford submitted that if one took this figure and assumed that the plaintiff would live for another thirty years or so, then that would attract an award of some $7,500.00 or thereabouts. I must say that even though this submission came from the defence it seems to me to be far too generous and that the approach was not the correct approach.

To look at this figure for a minute, if one were to award $7,500.00, this figure invested at present day rates of about ten per cent or so which one would get from the bank, would yield some $750.00 per annum. This would be more than twice the cost of the treatment which the plaintiff will have to pay and, of course, while compensation should be paid to persons who suffer injury, they should not make a profit out of it or the award should not be such as to let them make a profit, so that I do not consider that that approach is correct. Further it doesn't take into account the fact that the plaintiff is now receiving payment in respect of expenses which he may not incur at all as he may die before or by some miracle he may be cured, or if he does have to incur that expenditure he would not do so far another thirty years or so, so that all this has to be borne in mind.

Mr. Williams pointed out that the award in respect of future treatment was in fact inadequate. He suggested that it was so because it didnot include an amount to cover the cost of the plaintiff's travelling to get his treatment and it is necessary for him to travel some fifty-four miles each time he needed to be treated; I will bear in mind the fact that the defendant has to travel to get to his doctor and to pay some thirty dollars each time he is treated; but I muts also bear in mind the fact that although the defendant is supposed to attend Dr. Lawson Douglas every six weeks, that doesn't always happen and, in fact, the last time he attended the doctor was just about three months ago.

It will be obvious from the above that an award of the amount suggested by Mr. Beckford is far too high and that the basis on which he arrived at that figure is not without fault. It seems to me that a far more realistic figure is the sum of $3,500.00 and that is the amount I will award.

Under the heading of pain and suffering, Mr. Beckford referred to a case in which there was an award of $3,000.00 made in 1974 and, as I understand it, he doubled the amount to arrive at a figure of some $6,000.00 which he suggested was appropriate here. Now, as I understand it, there was nothing about the circumstances or the injuries suffered in that case which in any way can form a basis for comparison with the present case and it seems to me that pain and suffering must vary from one case to another, and that one cannot make one award for pain and suffering in every case that comes before the court. Even if you can find two cases where the injuries are identical or very similar, it wouldn't necessarily follow that the pain and suffering of the victims would be the same because different people respond differently to circumstances, and the way that one person might respond physically and mentally in the case of

a particular injury to that person may not be the way that another person would respond in a case of an identical injury. And so I would say that each case has to be dealt with and looked at on its merits, although assistance may be had from previous similar cases after making allowances for such differences as exist as well as for other relevant matters such as inflation.

In this case I note that the plaintiff experienced pain and suffering for some years. He had about five operations. He is now not in pain but it is necessary for him to go for treatment from time to time and this treatment is no doubt uncomfortable or is painful. In fact, counsel for the plaintiff submitted that the court ought to make an award for pain and suffering in the future but I am of the view that I should not adopt that course because, first of all, one doesn't know for how long in the future the plaintiff may have to experience this pain and suffering because, as I have said, life is uncertain and he may die or the advance of science may find some painless way of giving this treatment or there may be some other way of dealing with this matter which may be less painful. We don't know, but, of course, it is a matter which I should and will take into account in deciding how much ought to be allowed for pain and suffering.

Considering all the evidence as to pain and suffering up to now, considering the possibilities of infection of the urinary tract due to the treatment which the plaintiff now has to undergo from time to time, and the condition of the urethra, and bearing in mind, too, the cases and the principles to which reference has been made by counsel on both sides, it seems to me that a fair award for pain and suffering, past and future, should be $5,000.00.

There is no evidence to suggest that there has been any loss of earnings apart from the thirty-three weeks with which I have already dealt, which has resulted from the injuries the plaintiff received.

Accordingly, there will be judgment for the plaintiff on the claim made up as follows:

Special Damages	$7,564.19
General Damages comprising loss of amenities, partial impotence;	$8,000.00
Pain and Suffering;	$5,000.00
Future treatment	$3,500.00

making a total of general damages, $16,500 and total damages, $24,064.19.

In addition, of course, plaintiff would have his costs taxed or agreed, to be paid by the defendant. The plaintiff is to be awarded interest on general damages at 6% from the date of service of the writ, namely, 7th October, 1978, and interest on special damages at 3% from the date of the accident, 5th October, 1974, to date of judgment.

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