Supreme Court: - Negligence - Motor vehicle accident - Liability - Evidence whether contributory negligence - Damages - including personal injuries - quantum - appropriate.

Cases referred to p.14(end)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T118/84

BETWEEN	OWEN THARKUR	PLAINTIFF
A N D	CLEVELAND WILLIAMS	DEFENDANT

Claim and Counter Claim in Negligence

EVIDENCE

D. McKoy instructed by J. V. Ricketts for the Plaintiff.
M. March instructed by Dunn, Cox and Orrett for the Defendant.

REMEDIES

Hearing on April 3, 4, and 13, 1989

JUDGMENT

BINGHAM J.

The Claim and Counter-Claim in this matter is the result of a collision between two motor vehicles, being a Cortina motor car owned and driven by the plaintiff, and a volkswagon motor car owned and driven by the defendant. This collision took place on Christmas Day, December 25, 1983 along the Barham main road in the parish of Westmoreland.

As a result of the collision both motor vehicles were extensively damaged. The plaintiff's car was completely written off and the defendant's vehicle received damage from its right front and side which extended to the right rear bumper. This car could, however, be driven away following the collision.

As a further consequence of the impact, the plaintiff and a passenger in his car, one Simon McIntosh as well as the defendant all received injuries.

The plaintiff suffered a laceration over the posterior aspect of the right elbow with a comminuted compound fracture of the right humerus involving the joint surface of the bone with a corresponding injury to the right elbow joint. This has now left him, when he was last examined by the Orthopaedic Surgeon who attended to him at the Cornwall Regional Hospital on April 11, 1984, with a permanent partial disability due to the loss of flexion of the right hand of a range of between 40° - 70°.

The plaintiff's claim in negligence was launched accordingly under two main heads of damages namely:-

1. Special Damages resulting from the damage to his motor car and the injuries to himself with the incidental expenses flowing therefrom, and included a consequential claim for loss of income for the period that he was incapacitated following the collision.
2. General Damages - this based upon:-
   a. Pain and suffering resulting from the injuries and Loss of Amenities.
   b. Loss of Prospective earnings as a result of the permanent disability to his right hand.

The defendant suffered a laceration of the cornea of the right eye caused by broken glass from a shattered right front vent window which resulted in his having to undergo two operations to the eye. As a result of this injury, he now has to wear eyeglasses and a contact lens is recommended for use in his right eye.

His counter claim in negligence has also been launched under two main heads namely:

1. Special Damages based on the damage to his motor car, and for loss of use while the vehicle was undergoing repairs, as for medical and other incidental expenses incurred in connection with the visits made to the hospital for the operation to his right eye and for follow-up treatment.
2. General Damages - This has its genesis in the Claim for personal injuries resulting from the injury to the right eye and falls to be assessed on the basis of pain and suffering and loss of amenities.

The nature and extent of the Claim and counter claim will be explored more fully later on in this judgment, as the need arises after the primary issue as to liability has been determined.

The Evidence

It is clear from the outset that having regard to the manner in which the case for both sides was presented, and on the evidence which emerged in support of the respective claims, there can only be a determination either that the plaintiff was fully blameworthy, or that the defendant was liable for the collision that occurred.

In my view, the Court cannot in the absence of any evidence or an inference leaving room for a probable finding of contributory negligence arrive at such a conclusion, as it is not the duty of a Court to determine a case based upon non-existent facts, or in the case of doubt as to which of the two accounts i the more probable, to speculate as to what might have been the true position. The Court has to come to a final determination in all these cases based upon the evidence before it and such reasonable inferences as can be drawn from that evidence.

With these factors, therefore, firmly fixed in one's mind, I will now proceed to examine the respective accounts given by the plaintiff and his witness and that given in response by the defendant.

It may be convenient at this stage to mention, in passing that on the evidence which emerged during the hearing, there were two persons travelling in the plaintiff's car, namely the plaintiff, and Simon McIntosh. Both gave evidence as to how the collision took place. The defendant, on the other hand, sought to rest his case on his own testimony. He called no witnesses in support of his account as to how he was saying the collision occurred. This, despite the fact that it emerged from the evidence that there were five other male adults travelling along with the defendant in his car at the time of the collision. All these persons are close relatives of the defendant.

Of these persons there was evidance that at least one is still available, and there was no evidence emerging from the defendant that of the other four there are not others who were available at the time of the hearing to give evidence supporting the defendant's account.

Nevertheless, the final determination on the issue of liability will ultimately rest when these two accounts are examined, as to which of the two is the more probable.

The Plaintiff's Account

The plaintiff testified that on December 25, 1983, a Sunday afternoon around two to three o'clock he was driving his Cortina motor car on the Barham main road travelling in the direction of Amity. Along with him in the car was Simon McIntosh. While negotiating a blind left hand corner he blew his horn and was keeping to his extreme left proceeding at a speed of about 20 miles per hour. On reaching in the middle of the corner, he suddenly came upon a Volswagon motor car driven by the defendant which was proceeding in the opposite direction and was then about a half of a chain away. This car was travelling at a fast rate of speed, which the plaintiff estimated around at 40 miles per hour cut the corner and was heading for a head-on collision with the plaintiff's car. He applied his brakes and swerved to his left, but was unable to avoid the collision. The right front section of both vehicles collided. The force of the impact caused his car to come to rest with the left front wheel at a distance of about two feet from its left bank.

The defendant's vehicle continued following the collision pass the plaintiff's car and came to rest about one chain to the rear of the plaintiff's car, on the same side of the road as that vehicle.

Following the collision, one Wellesley Williams, the defendant's uncle and a passneger in the front of defendant's car, came out of that vehicle along with the defendant. The plaintiff also alighted from his vehicle. A statement was made by Wellesley Williams to the plaintiff concerning his manner of driving and the cause of the collision. This statement which sought to attribute the blame for the collision to the defendant was made in his presence and hearing. This statement coming as it was from one who was the uncle of the defendant and a passenger in his car evoked no response from him.

A passing motorist assisted the plaintiff in being taken to the Savanna la Mar Public Hospital where he was admitted and treated for

his injuries. He remained there for some three weeks. He was later transferred to the Cornwall Regional Hospital for further treatment.

The plaintiff's account was supported to a large extent by the witness, Simon McIntosh. It is clear from Mr. McIntosh's demeanour that here was a plain, simple rural tradesman who was the sort of person not given to mincing his words. His account was related in a simple and direct manner and I was impressed by the frank manner in which he gave his testimony. His account was that while travelling in the front seat of the plaintiff's car which was proceeding from Red Hills in the Burnt Savannah area to Georges Plain in the course of the journey along the Barham main road he saw a car approaching and "it chopped the corner and run right into the plaintiff's car." He estimated the speed of the plaintiff's car at the time of the collision at about 20 miles per hour and that of the defendant's car at about 40 miles per hour. He further supported the plaintiff's account as to his reaction on the approach of the defendant's vehicle and the distance and position that the defendant's car eventually came to rest following the collision. His account differed from that of the plaintiff in that he denies hearing the plaintiff sounding his horn on approaching the corner and describes the plaintiff's vehicle as being still in motion when the collision took place. He further related hearing the statement made by Wellesley Williams, who he knew as Baba Williams, in the presence and hearing of the defendant.

The Defendant's Account

The defendant who hails from Westmoreland was at the time of the collision living and working in Kingston. On Christmas Day 1983, he had taken his wife and children to visit his relatives leaving Kingston from 6:30 a.m. According to him he arrived in Westmoreland around 12:30 p.m. and after having lunch and visiting relatives, around 5:30 p.m. he was on his way to visit his sick grandfather. Also in the car, which is licensed to carry five persons including the driver, were his father and Wellesley Williams both of whom were seated in the front of the car with him. In the rear seat were his two elder brothers and a family friend. While proceeding around a right hand corner, travelling about 30 miles

per hour and keeping close to his left he blew his horn. He then saw the plaintiff's motor car approaching about ten yards away and on his side of the road. He swerved to his left to avoid the approaching vehicle but he could not escape it from hitting into his car. It was while his car was touching the left bank that the plaintiff's vehicle collided into it. His car came to rest on his correct side of the road. The plaintiff's car eventually came to a stop behind his car and on the same side of the road.

Although the defendant under cross examination sought to testify that the corner was not a blind corner and strongly contended that one could see around it, he could give no rational explanation as to why in the circumstances as related by him he was not able to see the plaintiff's car as it made its approach before it was ten yards away from his vehicle. Although on the evidence of the plaintiff the width of the road was estimated to be about 16 feet, the defendant sought in his account to estimate the width of the road as being about ten to twelve feet. Both the plaintiff's account as to the estimated width of the road as well as the corner being a blind right hand corner for the approaching vehicle (the defendant's car) had not been challenged in cross examination.

On the basis of the respective accounts it is clear that the account as related by the plaintiff and his witness ought to be accepted as the more probable of the two versions as to how the collision occurred and that a finding of culpability on the part of the defendant followed inexorably from the evidence.

Conclusions and Findings of Facts.

1. Having regard to the unchallenged evidence of the plaintiff as to the corner being a left hand curve for his car to negotiate it would be more reasonable to expect that he would 'hug the corner' and there would not be the necessity for him to have to encroach over unto the defendant's half of the road in negotiating it.
2. The account as to the corner being a blind corner and a right hand corner for the defendant's vehicle

to negotiate is consistent with both drivers not being aware of the presence of the other vehicle until they were positioned at what on the evidence was a short distance from each other, which is borne out by the evidence, being half-a chain according to the plaintiff and his witness, and ten yards according to the defendant.

3. In the light of the foregoing, it would equally cast grave doubt on the credibility of the defendant's account that he was able to see around the corner. Had this been so then one would be lead to conclude that the defendant in those circumstances could not have been keeping a proper look-out in failing to observe the approach and position of the plaintiff's vehicle from a much greater distance.

4. Apart from the oral testimony of the plaintiff and his witness being the more probable of the two accounts, there is the added weight to be attached to the plaintiff's account from the support to be found in the evidence as to the damage to the respective vehicles as:

   a. The damage to the plaintiff's car was concentrated to the right front of the grill, bumper and fender. This is consistent with the vehicle being struck a glancing blow to that area while almost stationary.

   b. The damage to the defendant's car on the other hand extending as it does from the right front bumper and along the entire right side down to the right rear bumper is consistent with the right front of the defendant's car colliding into the right front of the plaintiff's vehicle and attempting to swerve away from the plaintiff's vehicle back to its correct hand thus causing the entire

right side of the defendant's car to come into contact with right front section of the plaintiff's vehicle.

5. A finding or question of liability in favour of the plaintiff is further fortified by concluding that the defendant in all probability was unable to properly control his vehicle due to the excess of passengers in the vehicle having regard to the presence in the front of his father and uncle Wellesley Williams in a situation which properly called for only one adult person in that section apart from the driver.

When all these factors are taken into consideration and the oral testimony is weighed and examined along with the real evidence as to the physical layout of the area, coupled with the damage to both vehicles, I was lead irrestibly to the conclusion that the collision took place in the manner as described by the plaintiff and his witness, and I rejected the defendant's account and found the defendant was solely blame for the collision. For the reasons which I had indicated from the outset based on the evidence there exists no rational basis for a finding of contributory negligence on the plaintiff's part.

Damages

The question of liability having been determined, I will now turn my attention to the issue of damages.

This falls to be considered under two broad heads:-

1. Special Damages.
2. General Damages.

Special Damages

It may be convenient to refer to the particulars of Special Damages as set out in the Statement of Claim. In this regard my task has been somewhat made easier as certain of the items claimed have been agreed to.

In respect to the claim for the value of the plaintiff's car, where a sum of $3500 was claimed, this sum has been agreed at $2590.

The amount of $240 claimed for travelling expenses to Cornwall Regional Hospital is also agreed.

This is also the position in respect to the sum of $70 claimed for the cost of obtaining the medical reports.

In so far as the total sum claimed for loss of income $10,000 being 20 weeks at $500 per week, a sum of $7,200 was agreed.

This leaves the claim for loss of use of $3,600 as being the only area under this head in issue. In this regard the evidence is that the plaintiff used his motorcar in his business as a mechanic for travelling from Grange Hill to Savanna La Mar and elsewhere to obtain motor vehicle parts for use in his work. He has claimed loss of use for six weeks at a cost of $600 per week. This is the normal period allowable in cases where a vehicle has been written off as a total loss to enable a plaintiff to secure a replacement vehicle. During this period the plaintiff hired a car from one Tony Muthra of Burnt Savannah at a cost of $600 per week for rental. This evidence was not challenged. The sum claimed appears to be reasonable and accordingly I find that there has been sufficient proof of such an expenditure and award the sum as claimed.

When all these amounts are quantified the total amount recoverable under the head of Special Damages is $13,370.

General Damages

This head of damages falls to be assessed on the basis of pain and suffering and loss of amenities as well as having regard to the extent of the plaintiff's injury being assessed in 1984 as a permanent partial disability of the range of 40° - 60° loss of flexion of the right hand, a further award for loss of prospective earnings having regard to the reduction in the plaintiff's income brought about by the resultant injury to his right hand.

The Nature and Extent of the Plaintiff's Injury

Following the collision on 25th December, 1983 the plaintiff was admitted to the Savanna La Mar Public Hospital. The Medical report of Dr. Y. S. Mohan dated July 6, 1984 (Exhibit 1A) stated that:

"This is to certify that Owen Tharkur aged 35 years was admitted at Savanna La Mar Hospital on December 25, 1983 with a history of having been involved in a Motor vehicle accident.

Injuries Noted

1. A laceration of 3" x 2" over the posterial aspect of the right elbow with comminuted compound fracture of the right humerus in its lower end. The fracture line involved the joint surface of the bone with a subluxation of the right elbow joint.

He was taken to Operating Theatre on December 26, 1983 and the wound was thoroughly cleaned and sutured and fracture was manipulated and immobilised in a back slab. He was covered with broad spectrum antibiotics.

He was ataken to Operating on January 6, 1984 and remanipulation was done. He was sent to Cornwall Regional Hospital the second week in January for a Orthopaedic Specialist opinion, and they continued on the same treatment for two weeks and was asked to exercise his elbow joint. He actually was put on exercises at the Physiotherapy Department at Cornwall Regional Hospital. There was a loss of 45 degrees of extension and flexion of the elbow joint, and for the same reason he was put to sleep at Cornwall Regional Hospital and manipulation was done for more movement of the elbow.

COMMENT

Inspite of all this, he loss 40 degrees of flexion and extension of the elbow which is expected complication for a fracture of this nature. Weight lifting with his hand would limited comparing to the other hand. He will be prone for early arthritis of the elbow joint. His initial stay in hospital was fifteen days."

Following his treatment at the Savanna La Mar Hospital the plaintiff was referred at Cornwall Regional Hospital to the Orthopaedic Clinic where he was then attended to by Dr. A. Ravi Kumar. His report on the plaintiff dated June 27, 1984 (Exhibit 1B) reads as follows:-

"The above patient was referred to Orthopaedic Clinic from Sav-la-mar Hospital. He was seen on 11th January, 1984. He was involved in a motor vehicle accident on 25th December 1983 and sustained compound communited fracture lower end of right humerus and severe soft tissue injury. He was treated at Sav-la-mar Hospital and was referred to Orthopaedic Clinc at Cornwall Regional Hospital. When seen on 11th January 1984 there was mobility at fracture site and a high arm back slab was applied. He was seen again on 1st February, 1984, slab was taken out and physiotherapy started for mobilization of elbow joint. There was not much improvement at the range of motion of elbow joint. On 5th March, 1984 under general anaesthetic closed manipulation was done to increase the mobility. Later physiotherapy was continued.

He was last seen on 11th April, 1984 when elbow movements were 40° - 70°. It is unlikely that he would get complete range of mobility at that joint."

None of these doctors were called to give evidence at the trial. The Court was accordingly deprived of the benefit of an up to date

assessment of the extent of the plaintiff's present disability. What was clear, however, from a demonstration given by him in Court was that there was little if any improvement in the range of mobility in the joint of the injured right arm.

When the report of Dr. Ravi Kumar is examined and taking an approximate mean average figure from that canvassed in his opinion, one is here looking at a permanent partial disability of say 55° which converts to a 30.5°% permanent partial disability of the right elbow joint.

The plaintiff, a 37 year old man at the time of the injury is now unable to lift weights and carry out his normal day to day activities as a master mechanic. He will also be prone to early arthritis of the elbow joint. He is also unable to dfess himself properly and has to be assisted in this area by his wife. This it has been submitted by his Counsel would cause the plaintiff to experience some degree of indignity and embarrassment. He is further prevented from playing with his children as he was accustomed to.

As a guide to what award would be considered as reasonable under the head of Pain and Suffering and Loss of Amenities, the Court was referred by Counsel for the defendant to two cases in Volume 2 of Mrs. Ursula Khan's Book on Recent Personal Injuries Award made in the Supreme Court of Jamaica namely:

1. C.L. 1981/MO 48 Stafford Mitchell vs. Anthony Halliman. reported page 143 and,
2. C.L. 1980 L105 Karl Lindo vs. J.O.S. Limited et al /at page 144, et al.

On an examination of the former cases, although the injury was a fracture to the right hand, the plaintiff made an excellent recovery and was not left with any permanent disability. The award of $12,000 in November 1982 is with respect, therefore, of no assistance.

The latter case cited, although the injuries do not in my view fall within the range of the extent of the injury in the instant case, it can be of some assistance. In that case, in respect of which the damages were assessed by Wolfe J. on November 30, 1982 the plaintiff 45 years of age at the time of the accident suffered the following injuries:-

"1. Abrasions on the right side of his forehead.

2. Fracture of the shaft of his right humerus with possible dislocation of an acromio-clavicular joint.

3. Three inch laceration of the flexor surface of his right forearm."

Treatment

He was hospitalised at the Kingston Public Hospital on the 30th April, 1980 and then discharged on 1st May 1980. He was treated by means of a U Slab. He had his wounds on his right flexor forearm sutured. He developed paralysis of muscles in back of forearm, varies deformity of the right humerus, scar in front of elbow and prominence of lower end of the elna - Able to make a good fist.

His permanent partial disability of the right upper limb was assessed at 10°%.

Loss of Amenities

He had difficulty in lifting weights especially if he has to lift palm downwards. His fingers and wrist are likely to become swollen.

He will experience difficulty using knife and also in writing."

The General Damages awarded based upon pain and suffering and loss of lamenities was $8500. Having regard to the date of the award and applying the principle enunciated by our Court of Appeal in Central Soya vs. Junior Freeman (the plaintiff being entitled to an award for general damages having regard to the value of money at the date of the award), this case would now attract an award of about $21,500,being an award made between the period 1980 to 1984, and updating it by say 20% to account for the rate of inflation between 1985 and the present.

When the above mentioned figure is applied to this case, making such necessary adjustments to allow for the more serious nature of the plaintiff's injury which is of a range of 30.5% permanent partial disability this would result in an award under this head of damages of $65,525. The Loss of Amenities in this case being also of a more serious nature makes it necessary to increase this figure upwards to say $67,000 to properly meet the justice of the case.

This leaves the question of the award for loss of prospective earnings to be addressed. The facts of this case make it very clear that the plaintiff's income has been reduced by about a half as a result of this injury. At the time of the incident the plaintiff had already accumulated some 16 years working experience as a mechanic. It would not be possible for him, given his present condition, to adjust himself to some other vocation. But for the injury he would have been able to look forward to at least another 23 good years of useful work, enjoying a steady increase in income over the years, while allowing for the fluctuating circumstances of life. The facts of this case calls for a multiplier in arriving at the award to be made under this head of the claim. Learned Counsel for the defendant suggested that a multiplier of 2 ought to be reasonable. Not to be outdone Learned Counsel for the plaintiff has suggested that a multiplier of 14 would better the justice of this case. Taking all the circumstances into consideration, I would consider that allowing the plaintiff another 23 years and halving it, when the vagaries of life are taken into consideration, a reasonable multiplier would be 12.

In so far as the evidence of reduced earning capacity is concerned one is left with the unchallenged evidence of the plaintiff that, but for the injury, his present weekly income after clearing expenses would have risen from $600 to $2000. He is now only able to earn a weekly income of $300. In this regard I have to bear in mind that there is always the tendency in these cases for litigants to seek to exaggerate their income in order to inflate the award for general damages. It is necessary therefore, for a Court to strike a balance in arriving at what would amount to a more conservative sum. That apart, one also has to bear in mind that whereas the plaintiff's income would have increased, there would also have been a proportionate increase in his expenses as well. I would regard that a reasonable weekly estimate of his income to be in the region of $1 000, which when his present weekly income of $300 is deducted would leave a datum of $700. Taking this sum, therefore, one would arrive at an annual sum of $36,400. Applying the multiplier of 12 to this amount

would produce a total sum of $436,800. When this is reduced by 1/3 to take care of income tax, this leaves a sum to be awarded under this head of general damages of $291,200.

The total sum awarded for General Damages, therefore is $358,200.

There will be accordingly be judgment for the plaintiff on the Claim and Counter Claim for $371,570 with costs to be agreed or taxed being:

1.	Special Damages -	$13,370
2.	General Damages (a) 'Pain' and Suffering and Loss of Amenities	67,000
	b. Loss of Prospective earnings	291,200
		371,570

Interest awarded on Special Damages at 3% from 25th December, 1983 to 13th April, 1989 and on the General Damages of $67,000 at 3% from date of entry of appearance 15th November, 1984 to 13th April, 1989.

Cases referred to

(1) CL 1981/M048 Stafford Mitchell v Anthony Hallinan
— Khan — Volume 2 p 143

(2) CL 1980/L 105 Karl Lindo vs J O S Limited et al
— Khan — Volume 2 p 144

(3) Central Soya vs Junior Ferguson