IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1982/T106

BETWEEN	ERROL TURNER	PLAINTIFF
A N D	CIGARETTE COMPANY OF JAMAICA LIMITED	FIRST DEFENDANT
A N D	ANTHONY GOPIE	SECOND DEFENDANT
A N D	THE ATTORNEY GENERAL FOR JAMAICA	THIRD DEFENDANT
A N D	HEADLEY NICHOLAS	FOURTH DEFENDANT

Noel Edwards Q.C. and Miss Phyllis Dyer for the plaintiff.

Mrs. Pamela Benka-Coker, Michael Levy and Christopher Samuda instructed by Clinton Hart and Company for the first and second defendants.

Neville Fraser and Frank Williams for the third defendant.

Fourth defendant not served and not appearing or represented.

HEARD: JUNE 14, 19, 20, 21 and 27, 1990, MARCH 18, 19 and SEPTEMBER 20, 1991

WALKER J.

In these proceedings which are grounded in negligence the plaintiff claims damages for injury and loss he sustained as a result of a motor vehicle accident which occurred at Summerfield in the parish of Clarendon on October 14, 1981.

CASE FOR THE PLAINTIFF ON THE ISSUE OF LIABILITY

On October 14, 1981, the plaintiff, an electrician's assistant then aged 26 years, attended a football match at Chapelton in the parish of Clarendon. At the conclusion of the game he commenced to walk home accompanied by a lady friend, Veronica Johnson. The time was about 5:30 p.m. As the plaintiff and his companion walked along the Chapelton main road the plaintiff saw the second defendant who was previously known to him. The second defendant was then driving an Isuzu pick-up. It was raining at the time. The plaintiff stopped the second defendant and asked for a lift. His request having been granted, the plaintiff got into the open back of the vehicle along with his female companion. There they joined other persons who were travelling as passengers in that section of the pick-up. As he was driven along the plaintiff sat on the floor of the back of the pick-up. Upon reaching the district of Summerfield the plaintiff requested the second defendant to stop.

The second defendant complied with this request after swerving his vehicle to the left. It was still raining and the road was wet. The pick-up having been brought to a complete stop, the plaintiff got up from where he had been sitting and prepared to disembark. In the course of doing so he moved his left leg over the centre of the tailgate of the vehicle and rested that leg on the rear bumper. He was in the process of bringing his right leg over the tailgate when he felt a blow to his left leg. The impact knocked him from the pick-up on to the road. Soon afterwards the plaintiff came to a realization that his left leg had been severely crushed. He saw bones from the leg scattered over the road and tried to pick up some of them. At this time he also saw for the first time a Land Rover which was positioned just in front of him as he sat on the road. It was the vehicle that had crashed into the pick-up crushing his leg. The road was straight and about twenty-two feet wide at the point of impact. Up to that point and going in the direction of Chapelton from which both vehicles had been driven the plaintiff could see for a distance of about three and one-half chains. Prior to the collision the pick-up had been stopped as close as was possible to its left bank of the road. The plaintiff specifically denied that while travelling in the back of the pick up he had been sitting with his left leg hanging over the tailgate of the vehicle.

The plaintiff's witness, Corporal Derrick Baker, who was then stationed at the Chapelton Police Station, gave evidence of having investigated this accident. It was Corporal Baker's testimony that on arrival at the scene of the accident he saw and spoke to the fourth defendant. At this time the fourth defendant reported that he had been driving behind the pick-up in pouring rain; that the pick-up stopped suddenly and that in an attempt to bring his own vehicle to a halt he applied his brakes causing his vehicle to run into the rear section of the pick-up, in the process injuring the plaintiff who was then preparing to alight from the pick-up. Corporal Baker further said that then and there the fourth defendant identified the point of impact which was located on the left hand side of the road coming from the direction of Chapelton.

CASE FOR THE FIRST AND SECOND DEFENDANTS ON THE ISSUE OF LIABILITY

The case here rested on the evidence of the second defendant, Anthony Gopie, and that of his witness, Lolita Cohen. Mr. Gopie said that on the date of the accident he lived at Summerfield and was employed to the first defendant.

On that date, accompanied by Lolita Cohen, he attended a football match at Clarendon College in Chapelton. On that occasion he drove an Isuzu pick-up, the property of his employers. After the game, during heavy rainfall, he prepared to leave the ground driving this vehicle. He was then carrying Mrs. Cohen as his passenger. As he drove through the gate of the ground at a slow pace several persons unauthorizedly jumped into the open back of the pick-up. He stopped the vehicle, got out and ordered these persons to leave the vehicle. No one obeyed him. As the position in which he had stopped was causing an obstruction to the free flow of traffic, and having regard to the inclement weather, he re-entered the vehicle and drove on carrying these persons in the open back of the vehicle. He drove for a distance of about one and one-half miles when upon reaching the district of Summerfield he heard a knock on the right window of the cab of the vehicle. He interpreted this sound to mean that someone travelling in the back of the vehicle required him to stop. Although the pick-up was equipped with a rear view mirror, he was unable to see through this mirror as his vision was obstructed by the presence of the passengers in the back of the vehicle. Instead he looked into the wing mirror of the vehicle. He saw nothing behind him at this time so he pulled over further to his left hand side of the road and stopped. In actual fact, according to the witness, he stopped the pick-up at a distance of about six feet to seven feet away from the embankment to his left. About four seconds later he felt an impact to the rear section of the vehicle. The impact propelled the pick-up forward for about two feet. He alighted from the vehicle and walked to the rear where he saw the plaintiff sitting on the road. The plaintiff was then bleeding from his left leg. It was then that Mr. Gopie saw for the first time the Land Rover that had been driven by the fourth defendant. Mr. Gopie took the plaintiff to the hospital at Chapelton and afterwards reported the accident to the police there. Extensive damage was caused to the rear section of the pick-up. The accident occurred during rainfall on a wet road. The witness said that beyond the point of impact going in the direction of Chapelton the road was straight for a distance of some six to seven chains. The evidence of Lolita Cohen was, substantially, to the same effect as that of Mr. Gopie. She said further that after the collision she observed the plaintiff lying on the road in "terrible pain" and with bones protruding from his leg.

CASE FOR THE THIRD DEFENDANT ON THE ISSUE OF LIABILITY

The case for the third defendant depended entirely on the evidence of Mr. Headley Nicholas who was, himself, sued as the fourth defendant in these proceedings. However, Mr. Nicholas was never served and did not enter an appearance. He admitted that he was the driver of the Land Rover, the property of the third defendant. On the day in question he was employed to the Survey Department of the Government of Jamaica. He drove the Land Rover from Chapelton where he had worked that day and was on his way back to his base at Pennants. He drove behind the pick-up for a distance of about three-quarters of a mile from Chapelton to Summerfield where the accident occurred. The witness said that upon reaching the vicinity of the Donald Sangster Community Centre at Summerfield the pick-up stopped suddenly in the middle of the left half of the roadway. In the back of the pick-up were eighteen to twenty persons, some of whom were standing while others sat with their feet hanging over the back and side of the vehicle. The witness saw no signal given by the driver of the pick-up indicating his intention to stop. The pick-up having stopped in these circusmtances, Mr. Nicholas said he applied his brakes but his vehicle slid into the rear section of the pick-up. Subsequently he observed that the plaintiff who had had his left leg hanging over the rear section of the pick-up had suffered injury. He took the plaintiff up from the roadway and placed him in the Land Rover intending to take him off to the hospital. He was, however, prevented from doing so by a hostile crowd. In the result he requested Mr. Gopie to take the plaintiff to hospital. Mr. Gopie did so. Afterwards, on account of the hostility of the crowd, he left the scene. Later the same day the witness reported the accident to Constable Baker at the Chapelton Police Station. Mr. Nicholas denied that he saw or spoke to Constable Baker at any time that day on the scene of the accident. Prior to the accident Mr. Nicholas said that he had been driving behind the pick-up all the way from Chapelton at a distance of fifteen feet to sixteen feet. It was when he applied his service brakes that his vehicle skidded into the rear of the pick-up. Mud had accumulated on the wet surface of the road but he had not noticed the mud on the road before applying his brakes. He agreed that the accident occurred during rainfall and said that he saw water collected on both sides of the road. At the point of impact the road was eighteen feet to twenty feet wide. Mr. Nicholas said that immediately before the collision occurred he was driving the Land Rover at a speed of between

20 m.p.h. to 25 m.p.h. He said that in similar circumstances today he would not drive in the way he did when the accident occurred. In answer to a question posed by leading counsel for the plaintiff, Mr. Nicholas answered thus:

> "I kind of realise that, as you have suggested, I was driving too near to the pick-up at the time of the accident."

FINDING OF COURT ON THE ISSUE OF LIABILITY

As to the circumstances in which the plaintiff boarded the pick-up, I prefer the evidence of the plaintiff to that of the second defendant. It was common ground that the parties were previously known to each other. The second defendant admitted that prior to the date of the accident he had visited the plaintiff's beer joint at Summerfield and had had drinks there. He agreed that the plaintiff was a person to whom he would grant the favour of a lift in normal circumstances. It is my finding that in this instance the second defendant did grant the plaintiff such a favour. In my judgment the plaintiff travelled in the back of the pick-up with the full knowledge and consent of the second defendant.

As to the circumstances in which the collision occurred I find that upon reaching the Summerfield area and in response to a signal to stop (given in the form of a knock on the window of the cab of the pick-up), the second defendant stopped the pick-up to let off the plaintiff. It is common ground that at this time it was actually raining and that the roadway was wet. I accept the evidence of Mr. Nicholas that in bringing the pick-up to a stop the second defendant did so suddenly and without indicating in any way his intention to stop. I also accept as true Mr. Nicholas' evidence that the pick-up was brought to a stop in the middle of the left half of the road where both vehicles had been travelling. It follows, therefore, that I reject the evidence of the plaintiff and second defendant on this aspect of the matter. In doing so I am fortified, I think, by the real evidence i.e. by the area of damage to the pick-up. That damage was occasioned to the rear section of the pick-up. The damage to the tailgate of the vehicle suggests that the tailgate was struck at its centre. This is, in my opinion, entirely consistent with the evidence of the plaintiff which I accept and which is to the effect that he was struck on the left leg by the Land Rover as he attempted to leave the vehicle by stepping over the centre of the tailgate. **Consequently, on the basis of the evidence which I accept I have concluded that the pick-up was struck squarely rather than with an angled or glancing blow,**

the latter position being more likely if the pick-up had been swerved to its left immediately before the collision occurred as contended for by the plaintiff and the second defendant. So I find that the second defendant did stop the pick-up in the middle of the left half of the roadway, and that he did so suddenly and without giving any indication of his intention to stop. He was, therefore, negligent in this regard. Furthermore, the second defendant admitted that up to the time that he stopped the pick-up he did not see the Land Rover. So the question must be asked: how could the second defendant have failed to see the Land Rover earlier? Undoubtedly the Land Rover was there on the roadway. It did not fall suddenly out of the sky. On the evidence of the fourth defendant the road was straight for six to seven chains leading up to the point of impact. On the evidence of the second defendant he could have seen for a distance of approximately three chains leading up to that point. Again, on the testimony of the second defendant, there was a brief lapse of time (four seconds) between the moment when the pick-up came to a stop and the moment of impact. In these circumstances, before stopping the pick-up, the second defendant said he looked through his wing mirror and saw nothing. He was unable to use the rear view mirror with which the vehicle was equipped because his vision through that medium was obstructed by the presence of the persons who were positioned in the rear section of the vehicle. In my opinion, in permitting this state of affairs to exist, the second defendant disabled himself from keeping a proper look out. This indulgence accounts for his failure to observe the presence of the Land Rover and constitutes negligence on his part.

But I have also come to the conclusion that the second defendant is not solely to blame for this accident. In my opinion Mr. Nicholas is also blameworthy, I hasten to say to a greater extent than the second defendant. Mr. Nicholas is negligent on his own admission which I have quoted in this judgment. He was, too, remorseful. Indeed, in observing the demeanour of the witness as he gave evidence from the witness box, I was left with the impression of a contrite man who had been careless, who knew he had been careless and who was genuinely sorry for the consequences which flowed from his carelessness.

So I find that Mr. Nicholas was negligent in the following respects:

(1) driving too close behind the pick-up in the prevailing circumstances of rain and a wet roadway;

(2) driving too fast in those circumstances;

(3) failing to keep a proper look-out;

(4) failing to stop in time so as to avoid colliding into the rear of the second defendant's pick-up.

In the result as between the second defendant and the fourth defendant I would apportion blame for this accident as to 25% to the former and as to 75% to the latter.

WAS THE PLAINTIFF CONTRIBUTORILY NEGLIGENT?

It was submitted to me by counsel appearing for the first, second and third defendants that the plaintiff was contributorily negligent. They submitted that he did not take reasonable care for his own safety in that he failed to observe the approach of the Land Rover as he prepared to leave the pick-up. Furthermore, I was invited by counsel for the third defendant to accept as true the evidence of the fourth defendant which was to the effect that the plaintiff, while travelling in the back of the pick-up, sat astride the tailgate of the vehicle with his left leg hanging outside. Let me say straight away that I am prepared to make no such finding. To the contrary, on this aspect of the matter I accept the plaintiff's testimony and find as a fact that during the journey the plaintiff sat on the floor of the back of the pick-up with his entire body wholly within the vehicle, and that he only got up after the vehicle had been brought to a stop. It is true, as the plaintiff admitted, that, having got up, in preparing to leave the pick-up he did not up to then see the Land Rover. However that may be, the fact of the matter is that the plaintiff had not left the vehicle before being struck by the Land Rover. It was the Land Rover that hit the plaintiff off the pick-up in whatever position the plaintiff was at the time. As to the position of the plaintiff at this time, I accept his evidence that in preparing to leave the pick-up he put his left leg over the tailgate of the vehicle resting that leg on the rear bumper, and that he was in the process of bringing his right leg over the tailgate when he was struck by the Land Rover.

It seems to me that the real question that arises here is this: Ought the plaintiff reasonably to have expected that the fourth defendant might so carelessly have driven the Land Rover as to cause that vehicle to crash into the pick-up? I think not. In the circumstances of this case I am of the opinion that the plaintiff cannot be faulted in contributory negligence, and I so find.

THE CASE ON DAMAGES

From the scene of the accident the plaintiff was taken to the Chapelton Hospital whence he was transferred the same day to the Kingston Public Hospital. He was admitted to the Kingston Public Hospital at this time and remained there until November 21, 1981 when he was discharged. Thereafter the plaintiff was re-admitted and discharged from the hospital several times during a devastating experience of pain and suffering which extended for over seven years and up to the month of March, 1989 when a troublesome sore on his left leg finally healed. Having been admitted to the Kingston Public Hospital for the first time on October 14, 1981 the plaintiff was given three units of blood and otherwise treated with saline and antibiotics. His leg was placed in a plaster cast which extended from the toes to the waistline. He remained in hospital until November 21, 1981 when he was discharged home. At home he had to use two crutches to move around. Subsequently he visited the Chapelton Hospital twice weekly for a period of approximately five weeks to have his leg dressed. Notwithstanding all of this treatment, the plaintiff's leg deteriorated to the extent where it had to be dressed on a daily basis over the period August to October, 1982. On June 3, 1983 the full length plaster cast was removed and replaced by a shorter cast which remained in place until August 12, 1983. Upon removal of this cast it was discovered that a large sore had developed on the leg and was draining. In this condition the plaintiff was unable to walk and had to be treated with antibiotics over a protracted period of time. The plaintiff's leg did not improve or respond to treatment and he was referred back to the Kingston Public Hospital. At this time he consulted the eminent orthopaedic surgeon, Dr. McNeil Smith, who, to the plaintiff's chagrin, recommended amputation of the plaintiff's left leg. The plaintiff did not accept this advice. He returned to the Chapelton Hospital where the leg was dressed on a daily basis continuously up to the year 1988.

In that year he returned again to the Kingston Public Hospital on a referral to the orthopaedic surgeon, Dr. Guyan Arscott. The plaintiff was first seen by Dr. Arscott on April 20, 1988. On examination Dr. Arscott found the plaintiff to be suffering from a chronic ulceration of the junction of the middle and lower one-third of the left leg. There was an area of marked hypertrophic scarring covering the anterior surface of the lower one-third of the left leg. The scar was pale and adherent to the bone. Repeated breakdown of this scar was evident. The plaintiff had a marked deformity of the leg which involved circumferential constriction at the junction of the middle and lower one-third of the leg. There was also significant shortening of the leg to an extent of five inches. In Dr. Arscott's opinion these findings were consistent with the plaintiff having sustained a severe crush injury. X-rays showed that a segment of the tibia was missing. The plaintiff was re-admitted to the Kingston Public Hospital on May 16, 1988 for further investigation. On the following day an angiography of the left leg was done for the purpose of assessing the blood supply in the leg. The plaintiff was allowed home the next day and re-admitted to the hospital on June 6, 1988 for reconstructive surgery. At surgery the unhealthy scar and ulcer were excised and a fascio-cutaneous flap from the proximal healthy tissue of the leg was used to cover the defect. The donor defect from which this flap was taken was then skin grafted with skin taken from the plaintiff's right thigh. Post-operatively the plaintiff did very well and was discharged from hospital on June 23, 1988. Thereafter, on follow up treatment, a small unhealed area was further skin grafted. This was done on August 29, 1988. The plaintiff was then advised to wear supportive stockings for an indefinite period of time. In Dr. Arscott's opinion the plaintiff's deformity and shortening of the left leg is permanent damage. In view of his limping gait the plaintiff would most likely develop osteo-arthroses in the future. On sustaining the crush injury it was Dr. Arscott's opinion that the plaintiff would most likely have experienced bone and soft tissue pain. The bone pain would have been particularly troublesome having resulted from an unstable comminuted fracture of the tibia. Severe crushing of the soft tissues would have resulted in a long period of infection and chronic ulceration as was demonstrated in the lower one-third of the leg. Pain would be intermittent and protracted and, at times when infection flared, it could have been excruciating

The plaintiff's condition would have to be reviewed from time to time, for which purpose the plaintiff would need to be medically examined at intervals of six months. Initially the plaintiff suffered a severe injury as a result of which he lost the use of approximately 70% of the leg muscles of his left leg, was Dr. Arscott's assessment of the plaintiff's misfortune. The plaintiff now walks and throws his left leg. He has a foot drop which has resulted from the damage to his leg muscles. From a cosmetic standpoint Dr. Arscott said that the plaintiff has suffered tremendously. Dr. Arscott expressed the view that in his present condition the plaintiff can participate in sedentary games like cards and dominoes. His ability to stand for a long period of time has been affected by his injury, but for the future the plaintiff can take any form of employment of a sedentary nature.

In giving evidence before me the plaintiff said that he was now unable to walk without the aid of a walking stick. He could no longer climb a ladder or walk for long distances. His left ankle became swollen whenever he walked on it. He could no longer dance or play cricket or football as he used to do before sustaining his injury. He now wears support stockings on a regular basis and, even then, he still feels great pain whenever he walks or otherwise puts pressure on his left leg.

As to the nature and extent of the plaintiff's injury and the medical treatment received by the plaintiff in relation thereto, I accept the evidence of the plaintiff and Dr. Arscott entirely. There can be no doubt that the plaintiff sustained a very severe crush injury to his left leg. His was, indeed, a long, devastating period of pain and suffering which extended over a period of nearly eight years. One can well imagine how the feelings of the plaintiff must have alternated between hope and despair over this protracted period of time. It must have taken great courage and infinite faith for the plaintiff to have rejected the advice for amputation that was tendered by such an eminent specialist as the late Dr. McNeil-Smith. The plaintiff has retained his leg but has done so at a great price to himself. The leg is, today, from a cosmetic standpoint, nothing short of a disaster. As the court was able to see, it is extensively scarred and grossly deformed. It presents, altogether, an ugly, unsightly member of the human body.

So I come now to determine the quantum of damages which the plaintiff should have. The plaintiff's claim for special damages as set out in paragraphs 3, 5, 6 and 7 of the Particulars of Special Damages of his Statement of Claim was ignored by counsel for the third defendant but conceded by counsel for the first and second defendants. A total sum of $3,840.00 (which includes an amount of $3,450.00 for the cost of support stockings) is awarded in this regard. I accept the plaintiff's evidence of having worked as an electrician's assistant at a weekly wage of $300.00 up to the time of the accident, and that out of this salary he paid N.I.S. contributions of $1.50 weekly. I, therefore, award him a sum of $116,415.00 for loss of income covering a period of 390 weeks. His claim set forth in paragraph 2 of the Particulars of Special Damages was eventually abandoned and, accordingly, I make no award in that regard. In respect of the plaintiff's claim for travelling expenses (see paragraph 4 of the Particulars of Special Damages) I accept the plaintiff's evidence that he travelled by taxi-cab from his home in Summerfield to the Chapelton Hospital and back for medical attention on 2, 179 occasions at a cost of $20.00 for the return trip on each occasion. I also accept that he travelled by the same means from Summerfield to the Kingston Public Hospital in Kingston on 62 occasions at a cost of $300.00 for the return trip on each occasion. Accordingly, I award the plaintiff a sum of $62,180.00 under this head of damages. The total award for special damages is, therefore, $182,435.00.

I turn next to address the plaintiff's claim for general damages. I have already alluded to the protracted period of pain and suffering, extending over a period of nearly eight years. That was the plaintiff's experience. I have, too, made reference to the loss of amenities suffered by the plaintiff. As compensation for pain and suffering and loss of amenities of life I award the plaintiff a sum of $250,000.00. Lastly I must consider the plaintiff's claim for damages for the handicap which he contends he will suffer on the labour market. I accept the evidence of the plaintiff and his witness, Dr. Arscott, as to the disabilities that the plaintiff has suffered. I also accept Dr. Arscott's prognosis as regards the plaintiff's ability to work in the future. On this evidence I am satisfied that in the future the plaintiff will, indeed, be handicapped on the labour market.

He will no longer be able to work as an electrician's assistant and, as a consequence, he is likely to suffer a loss of income over the years to come. At the present time the national minimum wage for labourers in the category of the plaintiff stands at $160.00 per week. I am prepared to assess the plaintiff's prospective loss of income in an amount of $140.00 weekly (i.e. $300.00 less $160.00). The plaintiff is now 36 years of age and in considering his claim under this head of damages I have been invited by his Counsel to utilize a multiplier of 8. I agree and accept that invitation. Accordingly, doing the best I can, for handicap on the labour market I award the plaintiff a sum of $58,240.00 (computed on the basis of a weekly loss of $140.00 over a period of 8 years).

JUDGMENT OF THE COURT

There will, therefore, be judgment for the plaintiff against the first, second and third defendants for the sum of $490,675.00 with costs to be agreed or taxed. Interest on the sum of $182,435.00 at a rate of 3% per annum from October 14, 1981 to the date of judgment. Interest on the sum of $250,000.00 at a rate of 3% per annum from the date of service of the writ to the date of judgment.

Finally, I need hardly say that the special relationship of master and servant and/or principal and agent as between the first and second defendants on the one hand and the third and fourth defendants on the other hand not having been matters in issue in this case, the liability of the first defendant (in like proportion as that of the second defendant) and the liability of the third defendant (in like proportion as that of the fourth defendant) follow inevitably as legal consequences of this judgment.