Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 60/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	DONALD WILLIAMS	PLAINTIFF/APPELLANT
A N D	ENNETTE COPE	DEFENDANT/RESPONDENT

Ainsworth Campbell for appellant

Miss Ingrid Mangatal for respondent

June 29 & October 5, 1992

WOLFE, J.A.(AG.)

This appeal is against the judgment of Patterson, J., who on the 10th day of October, 1990 found that the appellant and the respondent both contributed to the accident which occurred and apportioned liability as to 80% to the appellant and 20% to the respondent. The appeal is concerned both with the question of liability and the quantum of damages awarded in respect of pain and suffering and loss of amenities.

Two main arguments were advanced before us. The first argued that the learned trial judge came to an unreasonable conclusion on the facts of the case and that the said conclusion could not be supported in law or on the facts. We wish to state at the outset that this ground lacked merit. There were before the Court two versions as to how the accident occurred. The trial judge found the version offerred by the respondent to be more credible. There was evidence before the Court to support that finding. There was nothing unreasonable about the conclusion at which the judge arrived. A brief summary of the evidence will be of assistance in enabling an understanding of the conclusion arrived at by us.

The appellant testified that he was riding his motor cycle along the Christian Pen main road, from the direction of Ferry, proceeding towards Caymanas Park. The road in the area is straight. As he travelled along on his left side of the road, he observed a bus parked on the opposite side of the road as also a red toyota corolla motor car travelling towards him on its correct side of the road. He continued merrily on his way when suddenly the red toyota motor car swung from behind the bus onto the appellant's correct side of the road and hit him from his motor cycle. As he lay on the ground he heard the respondent saying "she late for work and look how she hit the youth off his bike." He was unable to recall where on the road he fell. He denied that he had been travelling on his incorrect side of the road prior to, and at the time of the collision. Junior Smalling who may be viewed as an independent witness supported the appellant's version as to how the accident took place.

The respondent gave evidence to the effect that as she travelled along the Christian Pen main road, in the direction of the Spanish Town highway at a speed of 30 m.p.h., she observed a bus parked at a bus stop on her side of the road. She approached the bus, reducing her speed and observed through her rear view mirror that there was no vehicular traffic behind her. Similarly, there was no traffic approaching from the opposite direction. Having satisfied herself that it was safe, so to do, she indicated, by putting on her indicator, that she intended to overtake the parked bus. She overtook the bus and then positioned back into her lane. She then observed the appellant riding a motor cycle in acrobatic style, on her side of the road and about two car lengths away. She blew her horn, the rider of the motor cycle did not respond. The respondent swung to her right to avoid the oncoming motor cycle, which collided with the left front of her car. Her vehicle ended up about four feet from the right hand side of the road as one travels towards Spanish Town. The motor cycle ended up behind her car.

The motor cycle rider fell to the left of the respondent's car.

Barbara Spence, a passenger in the respondent's vehicle, supported the respondent's version in every material particular. An agreed assessor's report, admitted into evidence showed that there was an impact to the left front and side of the respondent's car resulting in damage to:

1. Left front fender
2. Left front door
3. Left head lamp
4. Front bumper
5. Left inner side shield
6. Left front door glass
7. Left front blinker lamp
8. Left head lamp panel
9. Left door mirror

The damage to the respondent's car was clearly not consistent with the respondent overtaking and swinging to the right and colliding with the appellant who was travelling to the right of the respondent. On the contrary, the resultant damage to the car driven by the respondent was compellingly consistent with the respondent swerving to her right and the appellant riding into the left side of her vehicle.

The trial judge, faced with these two irreconcilable versions as to how the collision occurred and the physical damage to the motor car, had to resolve the issue of liability on the basis of the witnesses' credibility. In this regard, he accepted the evidence of the respondent as to where the collision occurred and that the respondent swerved to her right to avoid the appellant's motor cycle which was travelling on the respondent's correct side of the road. He further concluded that the respondent had failed to see the appellant earlier because she herself had not been keeping a proper look out. Finally, he concluded that the appellant's manner of riding on the incorrect side of the road, not being properly seated on the motor cycle and not keeping a proper look out was indeed very

dangerous and a failure on the part of the appellant to take ordinary care for his own safety, as any reasonable man would. This failure contributed to a very great extent to the collision which occurred. As a natural consequence of his findings, he apportioned liability as he did. As we indicated, the judge's approach to the evidence, his conclusion as to liability and his apportionment thereof can in no way be faulted.

With reference to the award in respect of pain and suffering, the complaint is that the award was low. The principle on which an appellate court will interfere with the award of the trial judge is a well settled one, capable of standing repetition. To justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled: See **Davis v. Powell Duffryn Associated Galleries Ltd.** [1942] A.C. 601; **Flint v. Lovell** [1935] 1 K.B. 354.

Diplock, L.J. in considering the import of the phrase "Erroneous estimate of the damage" in **Every v. Miles** [1964] C.A. 261 (unreported) opined that the phrase meant no more:

> "...than an acknowledgement that the bracket within which error cannot be demonstrated is a wide one even where the court is supplied with detailed findings as to the consequences of the defendant's breach of duty for which the sum has been awarded as compensation."

The learned author of the "Quantum of Damages, Personal Injury Claims" Vol. I 3rd edition at p. 136 commenting on the dictum of Diplock, L.J., observed:

> "...a judge makes a wholly erroneous estimate, when his award falls above or below the bracket within which awards of the appropriate standard are contained. The width of this bracket will vary according to the nature of the case. The more

> "imponderable the elements involved in making the assessment, the wider the bracket will be. It is therefore impossible to say that a given percentage of error will invoke the interference of the Court of Appeal. A given percentage of error might invoke the Court's interference in one case, where the bracket of permissible award is fairly narrow, but might be quite insufficient to invoke the Court's interference with another award of the same sum where there are many imponderables and where the bracket is much wider. ... If practitioners can establish comparable margins of error in comparable cases, it is reasonable to suppose that the Court of Appeal will think it right to interfere in a similar manner."

In an effort to convince this Court that the award for pain and suffering was wholly erroneous, in that it was too low, Mr. Campbell cited three cases which he regarded as comparable to the instant case. We propose to examine the cited cases to see how the awards compare with the award in the present case. However, before embarking upon the proposed examination, we set out in some detail the injuries sustained by the appellant as well as the treatment received to facilitate a ready comparison of the awards made in the cited cases with the award made in the instant case.

The appellant sustained the following injuries:

1. Lower back was swollen and tender over the right lumbar region.

2. The pelvis was painful on touch over the symphis pubic - swollen.

3. Left lower limb had abrasions to the lateral interior aspect of the knee (right side of knee).

4. 10 cm. abrasion to right leg - anterior aspect.

5. Small puncture wound over anterior aspect distal turn of left leg.

6. On X-ray the pelvis was seen to be fractured to the roof of the right acetabulum. There was separation of the pubic symphis. There was displacement of the right sacro-iliac joint.

7. The left leg had a compound comminuted fracture of the tibia and fibula.

The appellant was admitted to hospital where his wounds and abrasions were cleaned and dressed. He was put on a strict bed rest and a steinmann pin was inserted in the right leg for traction for the pelvic and acetabulum fractures. His left leg was manipulated into position and an above knee plaster applied with a window to facilitate dressing of the wound. Antibiotic and tetanus drugs administered. He was discharged on December 31, 1987 to be followed up as out-patient in Fracture Clinic. He left with plaster cast to continue bed rest at home and with appointment to the Fracture Clinic. The injuries to the left tibia and fibula were considered serious. Both injuries caused a lot of pain. The fracture to the acetabulum is likely to affect his walking and will be painful for ever and will affect him in his work as a labourer when he has to walk and move things. There is a 15% disability of the whole man. The left leg healed with a "bow leg" deformity and a one inch shortening. The appellant now walks with a limp which will affect his balance. As the appellant gets older, it is likely that he will develop osteo-arthritis in the right hip joint. This is likely to develop in five to seven years after the injury was received. The injury to the pelvis occasioned swelling of the scrotum. In September, 1990 when the appellant was last examined medically, he complained of pain, when he walks too long or stands too long, over the right pelvic area and also over the left ankle.

The undermentioned cases were cited and relied on by Mr. Campbell.

1. Suit C.L. 1986 V041 - **O'Brien Vassell v. Lennox Jackson & Delroy Lindsay** - Khan's Recent Personal Injury Awards Khan's Report Vol. 3 page 19

PERSONAL INJURIES

A. Loss of consciousness
Laceration above and below the right eye on right cheek
Posterior fracture of right hip.

B. Plaintiff had an operation on the 11th May, 1986 and under general anaesthesia his hip was manipulated and traction set up. Subsequent X-ray showed that reduction was inadequate as a retained fragment of bone

was blocking reduction. On 19th May, 1986 he underwent open reduction operation and the fragment of bone was removed. A later X-Ray revealed fixed flexion contracture of the right hip due to myositis ossificans in muscle surrounding right hip.

C. By August 1987, the internal rotation of the hip was 30 degrees and the external rotation zero degree. Adduction and abduction were also zero degree. X-kay showed massive formation of myositis ossificans in soft tissue surrounding hip. On 2nd September, 1987 further surgery was performed and a large amount of heterotropic bone was excised but the range of movement did not improve significantly. On the 9th September, 1987, there was a further operation to evacuate blood clot found after the operation of the 2nd September, 1987. By 8th October, 1987, hip had 90-degrees flexion but no internal or external rotation or adduction.

D. Dr. Rose, Orthopaedic Surgeon in his evidence at the hearing, said that the marked restriction of motion of the hip was as a result of the fracture as well as the massive amount of heterotropic bone formation which was a complication of this type of fracture. That this prevented the plaintiff from running or sitting in the normal manner and that the plaintiff could have increasing back pains with time due to his unevenness in gait.

RESULTANT DISABILITY

Strong possibility of recurring myositis ossificans

Restricted movement of hip

Permanent stiffness in hip

Permanent limp

Lower back pains

Permanent partial disability assessed at 20% of whole person.

Walker, J., on the 8th of December, 1988 awarded the plaintiff $100,000 for pain and suffering and loss of amenities. Both sides are agreed that such an award would represent an amount of $135,000 - $136,000 in October 1990. Miss Mangatal urged that the injuries in Vassel's case were far more serious than those received by the appellant. We agree entirely with that observation.

2. Suit C.L. 1987 M087 - **Desmond McLean v. Yorkwin Walters & Claudius Joseph** - Vol. 3 Khan's Report page 28

Damages assessed on 9th November, 1989. Plaintiff a Sergeant of Police aged 39 years.

PERSONAL INJURIES

A. Unconsciousness

Severe fracture dislocation of left hip

Fracture of shaft of left humerus

Small cuts in face and head.

B. His hip fracture was reduced and plaster cast applied to the left arm. He was placed in traction and confined to bed with the left arm suspended. He could only move if assisted. He could not wear clothing up to two weeks before his discharge. His arm cast was removed after 2 months. Traction lasted 3½ to 4 months. He had a second operation to reduce hip and was discharged in a wheel chair. Later he used crutches. He resumed duties in early 1980.

C. He had out-patient treatment and physiotherapy. He could not wear regulation boots provided by the force or the cummerbund as it caused pain.

D. In a joint medical report dated 24th February, 1984 by Professor Golding and the late Dr. J. McNeil Smith, the doctors confirmed his then disability:

½ inch shortening of left lower limb

Limp

Restricted movement of the left hip

Considerable new bone formation around the hip

They agreed that total hip replacement would be required at some stage but not then, as if done then, it carried great risk of new bone formation degrading the results of the operation.

E. The plaintiff was examined by Dr. R.E.C. Rose, F.R.C.S. Specialist Orthopaedic Surgeon on 15th June, 1988. The findings were:

(a) 80 degree flexion in left hip.

(b) No internal or external rotation.

(c) No adduction or abduction of hip.

(d) No flexion contracture of left hip.

(e) X-Rays revealed masses of heterotropic bone formation in the soft tissue mainly in the superior and superolateral aspects of the left hip.

(f) Irregularity of the acetabulum of the left hip secondary to severe fracture dislocation of the left hip.

F. The plaintiff was further evaluated by Dr. Rose on the 26th October, 1989 when he was experiencing lower back pain which the doctor said was due to increased stress in the sacro-iliac joint and lumbo-sacral spine as a result of lack of movement in the left hip joint and that this was likely to get worse as he grew older. That the bone formation narrowed the joint space and that his whole person disability was assessed at 20%.

G. Further it was Dr. Rose's opinion that the hip joint restriction would considerably affect his work and recreational activities — as it limited how fast he could walk, his ability to run, to squat, to cross legs, to put on socks, his ability to get in and out of a car. That sitting put more stress on his back. That the total hip replacement when done would relieve pain and the function of the hip but would be complicated by bone formation recurrence. That with no recurrence of bone formation his whole person disability could be put at 6%.

H. He was unable to swim or fish and his sex life was affected.

Patterson, J., made an award of $190,000 for pain and suffering and loss of amenities. Again the injuries in McLean's case appear to have been of a more serious nature than the injuries sustained by the appellant. An award of $190,000 would represent the amount of $233,309 in October, 1990. This case offers little assistance in ascertaining whether the award in the instant case is in line with awards in comparable cases for the reasons that the injuries are far more serious and the attendant complications were themselves very serious.

3. Suit C.L. 1978 T001 - **James Thomas v. Ferdinand Lewis & Cecil Hanson** - Khan's Report Volume 1 page 45

Damages assessed 24th June, 1980. Plaintiff aged 65, Mechanical helper injured in a motor vehicle accident.

PERSONAL INJURIES

Contusion of right wrist

Severe contusion of left thigh with fracture

Fracture of middle third of right femur.

TREATMENT

He was hospitalized from the 21st July 1976 to 4th November, 1976 and thereafter attended for treatment as an out-patient. A steinmann's pin was inserted into the upper end of the right tibia and traction was applied. This was retained until the

21st September, 1976 when skin traction was substituted for skeletal traction. He was discharged from hospital on crutches after a stay of 106 days and thereafter attended as an out-patient.

PARTICULARS OF DISABILITY

(1) 3/4" shortening of right leg

(2) Some muscle wasting of right thigh

(3) 20% limitation of flexion of right knee

(4) All movements of right hip restricted by about 10°

(5) Walks with obvious limp

(6) Permanent partial disability was 15% to 20%.

Wright, J., as he then was, awarded a sum of $30,000 for pain and suffering and loss of amenities. This amount represents the sum of $128,038 in October 1990.

The injuries received by the appellant were more serious than the plaintiff in the cited case. The award of $128,038 may be regarded as the lower end of the bracket within which awards appropriate to the kind of injury sustained by the appellant would fall.

From the cited cases, the bracket lies between $128,038 to $233,309. We therefore consider the award of $110,000 in respect of pain and suffering and loss of amenities to be on the low side. The award is therefore set aside and we order that the amount of $130,000 be substituted as the award for pain and suffering and loss of amenities. The judgment of the Court below is affirmed in all other respects. So that the judgment now reads:

> " There will be judgment for the plaintiff on the claim for $7,338.00. Special damages with interest thereon at 3% per annum from the 26th November, 1987 to today and $140,000 general damages with interest on $130,000 at 3% per annum from the date of service of the writ on 15th April, 1988 to today such damages to be reduced by 80%.
>
> Judgment for the defendant on the counter claim for $11,295.10 special damages with interest thereon at 3% from 26th November, 1987 to today. Such damages to be reduced by 20%. Costs on the claim to be the plaintiff's costs to be agreed or taxed and costs on the

"counter claim to be the defendant's
costs to be agreed or taxed."

For purpose of clarity, we would mention that the award of $140,000 for general damages includes an award of $10,000 for handicap on the labour market which does not attract interest. We hereby order that the costs of this appeal be the appellant's to be taxed if not agreed.