

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003 HCV 1358

BETWEEN	DALTON BARRETT	CLAIMANT
A N D	PONCIANNA BROWN	1 ST DEFENDANT
A N D	LEROY BARTLEY	2 ND DEFENDANT

Mrs. Ursula Khan for Claimant instructed by Khan and Khan.

Mr. Keith Bishop for Defendants.

Motor Vehicle Collision – Damages for personal injury – Whiplash – No measurable PPD – Loss of use of destroyed truck – Loss of earnings as driver – Defendant punching Claimant - Damages for assault

HEARD 25TH, 26TH OCTOBER AND 3RD NOVEMBER, 2006

BROOKS, J.

It is not an uncommon situation; a collision between two motor vehicles with each driver accusing the other of negligently trespassing on the incorrect side of the road.

It was about 3:40 a.m. on 5th December 2002. It was a straight stretch of roadway along the Priory Main Road in the parish of St. Ann. At the trial, neither driver was discredited in cross examination. Each told a credible tale as to the way the collision occurred.

The claimant Dalton Barrett was the driver of a Leyland stake-body truck. The vehicle was heavily laden with building material; bundles of steel, timber lathes, plyboard, tiles, Thin Set and bags of cement. According to Mr. Bartley, the driver of the other vehicle, a mini-bus, the truck was full and the goods were piled high. Mr. Barrett testified that Mr. Bartley's mini-bus hit the right front of the Leyland, chopping off the

truck's steering box and damaging the right bumper, fender and tie rod end. He says the mini-bus "then (hit) the truck along its right side toward the back and then went into a tractor trailer that has been travelling behind (him) for some distance".

Mr. Bartley denied that his vehicle collided with any vehicle other than the Leyland. He testified that the Leyland swung suddenly to its right to avoid a sink in the road and he reacted by swerving to his left. He said that he managed to get the front of his vehicle out of the path of the Leyland but it hit the right side. He was by then very close to the left soft shoulder of the road. He testified that the Leyland tore off the right side of the mini-bus from just behind the driver's door and turned the mini bus over on its left side. The mini-bus skated along the road banking and the road surface for some 25 feet on its side and then came to rest. A passenger, Mr. Barrett's co-worker, who was seated right behind him, was extracted from the vehicle by the blow. That passenger unfortunately died.

Each driver denied that it was he who transgressed across the centre of the road.

There was no evidence as to the presence of debris on the road surface to assist the court. Two bits of evidence however did assist. The first was from the testimony of a Mr. Sheldon Hamber, a passenger on the Leyland. He did not see how the collision occurred as he was lying down at the back of the truck, on top of a part of its load. He was able to say, however, that after the collision the Leyland was to the left side of the road and there was an altercation between Mr. Barrett and Mr. Bartley in the middle of the road, but to the right of the Leyland.

Mr. Hamber struck me as an entirely credible witness. The distances he outlined and the impression that he gave of the distance between the Leyland and the mini bus at rest was very convincing. I accepted his testimony in this regard.

The second bit of evidence which I find as making the difference is taken from Exhibit 19. This is a Police Report as to the collision. It is dated June 30, 2003. I accept that this type of report is comprised of a mixture of the investigating officer's observations and reports given to him by witnesses to the collision. However, in one of the sections concerning damage to the vehicles the report indicates that there was damage to the windshield, gas tank and side rail of the second truck which was travelling behind the Leyland. The witnesses have stated that the police visited the scene. I therefore accept that this description of the damage is a first hand account. I accept that the damage to the side of the second truck was caused by the mini bus. I find that it struck the Leyland, scraped along its side and hit the side of the second truck as Mr. Barrett testified. I reject Mr. Bartley's testimony as to how the collision occurred and I find that it occurred as a result of his negligently driving on or unto the incorrect side of the roadway and hit the Leyland as it swerved to its left away from the mini bus. I find that the Leyland, being heavily laden, stopped within a very few feet of where it was struck and incapacitated by the mini bus, while the faster travelling mini-bus ploughed on, on its path of destruction.

Still on the question of liability, I also accept the evidence of Messrs. Barrett and Hamber that Mr. Bartley punched Mr. Barrett on his face and mouth shortly after the collision took place. I accept Mr. Hamber's testimony, where it contradicted Mr. Barrett's as to how Mr. Bartley held each of them during the fracas which followed the

collision. Mr. Barrett said that Mr. Bartley held them both at their respective necks with one hand. Mr. Hamber said Mr. Bartley held them with both hands, one with each hand. Mr. Hamber also described how another man came from the minibus and cut him (Hamber) with a knife on his ear while Mr. Bartley held him. I reject Mr. Bartley's evidence to the contrary. I find that he had no lawful basis for striking Mr. Barrett. The question of liability thus determined, I now turn to the issue of damages.

SPECIAL DAMAGES

Mr. Barrett's Leyland was considered a total loss; though he did eventually repair it. The assessors appraised the net value of the loss as \$150,000.00 (Exhibit 3). There has been no contest as to this figure. Where there is a contest, is in respect of the matter of loss of use of the vehicle.

Mr. Barrett had a contract with Hardware & Lumber Ltd., and used the Leyland to transport goods belonging to that company. A letter from the company (Exhibit 7(b)), confirmed his testimony that he would transport their goods on 3-4 days per week. His net monthly earnings for the year 2002 between January and October ranged from a low of \$72,195.87 to a high of \$115,069.32. From my calculation, the average would be in the region of \$90,000.00 per month or \$22,500.00 per week.

Mr. Barrett said that in addition to that contract with Hardware & Lumber, he also earned approximately \$18,000.00 per day on the days that he was not carrying goods for that company. He said that sometimes he was able to combine the two; taking Hardware & Lumber's goods on one leg of a trip and his other jobs on the return leg. He testified that his expenses per day in respect of these 'private' jobs totalled approximately \$3,000.00, depending on the length of the trip and the type of load. These expenses, he

said in his witness statement, included the "sidemen, gas oil, wear & tear, insurance and other sundries".

The difficulty with quantifying this loss is that Mr. Barrett was both owner and driver. Not only did he lose the use of his truck, but he himself was incapacitated, as will be later examined.

No evidence was forthcoming as to what it would have cost to employ a driver, or indeed to hire a truck to fulfil his contractual responsibilities. A defendant is not liable for losses, which could have been avoided if the claimant had acted reasonably. It is for the defendant however to show that the loss could have been mitigated. In cross-examination, Mr. Barrett admitted that he could have employed another vehicle to carry out his haulage business.

In *Tharkur v. Williams* CL T118/84 (delivered 13/4/89) Bingham J. (as he was then) in an unreported decision, referred (at p. 9 of the judgment) to a practice in this court, in cases of total loss, of allowing 6 weeks for acquiring a replacement motor car. Motor vehicles can be much more easily acquired since the days of that case. I am convinced that, in the normal case, an award for 6 weeks for a total loss would now be excessive. The major part of the time to be now allowed would be for securing the insurer's decision. *Martindale v Duncan* [1973] 2 ALL ER 355 is authority for a reasonable time being allowed for that to be done. In the instant case, the repairer's appraisal is dated December 30, 2002. The assessor's report is dated January 17, 2003. It therefore took six weeks, just to have the loss assessed. These reports could perhaps have been more promptly produced, but December is a particularly difficult month to

have business done in Jamaica. I am therefore prepared to allow a period of eight weeks for loss of use of the Leyland.

Mr. Barrett decided to repair the vehicle. That was achieved in October of 2003. The repercussions of Mr. Barrett's decision cannot, however, be visited on the defendants. The reasonable course would have been the purchase of a replacement vehicle.

There is evidence that Mr. Barrett was, up to August 2003, experiencing significant pain, and was unable to carry on his accustomed occupation. His loss of earning as a driver, as opposed to that as owner should have been demonstrated. It was not. His inability to drive for that period of time would only allow for loss of earning as a driver. He has only demonstrated, to the required standard, loss for a period of eight weeks, as was assessed above. At a weekly average of \$22,500.00 this amounts to a gross award of \$180,000.00 (8x \$22,500.00). I shall not award anything for any of the other earnings, claimed as lost. Mr. Barrett has not provided any documentation to support his testimony. For the level of business claimed one would expect documentation. In order to provide some level of compensation however, I shall not make any deduction from income tax for the earnings from the Hardware & Lumber contract. A deduction of \$3,000.00 per day or \$12,000.00 per week for expenses is however in order, as the earning from Hardware & Lumber is gross income. This results in net weekly income of \$10,500.00 (\$22,500.00 - \$12,000.00). Eight weeks loss would make a total of \$84,000.00.

There was no contest in respect of any of the other items of special damages.

Special damages may therefore be totalled as follows:

Loss of vehicle	150,000.00
Assessor's fee	5,715.50
Repairer's Inspection Fee	2,875.00
Wrecker Fee	23,000.00
Hospital Fees	800.00
Medicine (as pleaded)	1,246.50
Liniments (not proved)	_____
Police Report	1,000.00
Medical Report – St. Ann's Bay Hospital.....	500.00
Medical Report – Dr. Glegg	1,500.00
Medical Report – Dr. Bullock (not proved)	_____
Loss of Use 8 weeks at \$10,500 per week	<u>84,000.00</u>
Total	<u>\$270,637.00</u>

GENERAL DAMAGES

In respect of general damages the injury to Mr. Barrett commands immediate attention. I shall deal with the issue of the assault later.

Dr. Peter Glegg was the first doctor to see Mr. Barrett. It was on the day of the collision and in the Emergency Room of the St. Ann's Bay Hospital. Dr. Glegg noticed tenderness around the right eye and face. There was also tenderness in the left hand and lumbar spine.

Dr. Bullock examined Mr. Barrett on 9th December 2002. He reports that he observed pain in the lower back, left shoulder and left wrist. He saw contusions on the mouth, especially the upper lip and contusions to the lower back and left shoulder.

Mr. Barrett's injuries continued to cause him pain and it prevented him from driving. In August of 2003 he consulted Dr. R.C. Rose; an experienced and well

recognized consultant orthopaedic surgeon. Dr. Rose diagnosed mechanical lower back pains and a very mild cervical strain. He prescribed physical therapy and lifestyle modifications for Mr. Barrett. The physical therapy proved very effective and Mr. Barrett was pain free by the time Dr. Rose examined him again in October 2003. The orthopaedic surgeon opined that Mr. Barrett's permanent partial disability (PPD) would be "zero percent". He cautioned however, that Mr. Barrett would quite likely experience lumbar pain upon resumption of prolonged driving.

For the quantification of the award, a number of cases were cited by Mrs. Khan. They were *Marcia Leslie v. Panoë, & ors.* 5 Khan 150, *Desmond Poyser v Superior Party Hireage Ltd. & anor.* and *Shirley Maynier Burke v. Ervine Wilson & anor.* Both of the latter cases are reported in *Harrison's Assessment of Damages for Personal Injuries Cases* at pages 86 and 87 respectively.

These, and other cases which I have reviewed, include a range of cases with similar injuries and prognosis. The awards made ranged from \$220,000.00 to \$550,000.00, and were handed down between 1997 and 2000. The majority were for \$400,000.00 and over. Updating these awards using the September 2006 Consumer Price Index (CPI) of 2419.8 results in the range of \$458,000.00 to just over \$1,000,000.00 with the majority being in the range of \$800,000.00.

Mrs. Khan sought to minimize the appraisal of zero percent PPD made by Dr. Rose. She asked the court to look at the effect of the injury on Mr. Barrett's life and the fact that he will be unable to drive for prolonged periods, a necessary part of his chosen vocation. She relied on the case of *West v. Shephard* [1963] 2 All E.R. 625. The point is

well made, but there is significance in the appraisal of the PPD, and it cannot be ignored. It must be taken into account along with the evidence of the effect on the claimant's life.

As a method of checking the award, I have also looked at the case of *St. Helen Gordon v. Royland McKenzie* 5 Khan 152. In that case Ms. Gordon suffered a whiplash injury but was left with a 3% PPD. She was left with difficulty in doing her daily chores. She was awarded \$400,000 in July 1998. That figure when updated using the CPI for September 2006 results in a figure of just over \$832,000.00.

In the circumstances I am of the view that an appropriate award for Mr. Barrett is \$750,000.00 for pain and suffering and loss of amenities.

In respect of the assault on Mr. Barrett, guidance may be had from the cases of *Douglas v Warp* 4 Khan 210 and *Vincent Dixon v. Inspector Alrick Reid and anor.* 4 Khan 208. In *Douglas v Warp* the plaintiff Mr. Douglas was beaten by a policeman with a baton and a piece of rubber. He suffered bruises to his upper limbs and swelling and tenderness to the left arm, left forearm, left thigh and over the area of the humerus. The policeman also kicked Mr. Douglas and hit him with his fists. The award was \$195,000.00 of which \$140,000.00 was for personal injuries. The \$55,000.00 awarded then (April, 1994)), presumably for the assault, is now valued about \$220,000.00 using the Consumer Price Index (CPI) for September 2006. On the face of it, Mr. Barrett's injuries, arising from the assault, were significantly less severe than Mr. Douglas'.

In *Vincent Dixon v. Inspector Alrick Reid* Mr. Dixon was awarded \$100,000.00 for pain and suffering and loss of amenities for an assault by the police. The attack left him bruised about the head and with generalized tenderness. That award is now worth about \$300,000.00. It was a more severe beating than in the instant case and it was done

by a police officer, to whom Mr. Dixon should have been able to turn for protection, not abuse. I find that that award should be deeply discounted for those reasons.

For the two punches he received, which only caused bruising, but nonetheless involved an insult and aggravation, I would award Mr. Barrett \$80,000.00 as general damages for the assault.

CONCLUSION

The evidence in respect of the damage to the truck travelling behind the Leyland allowed for a finding that it was the mini bus which crossed into the incorrect lane rather than the other way around. The second defendant Mr. Bartley is therefore found to be the negligent party.

Judgment is granted to the claimant on the claim and counter-claim with damages assessed as follows:

General Damages

Pain and suffering and Loss Amenities	\$750,000.00
Assault	<u>\$ 80,000.00</u>
Total	<u>\$830,000.00</u>

With interest thereon at 3% from 7/8/03 to 3/11/06

<u>Special Damages</u>	\$270,637.00
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With interest at 6% per annum from 5/12/02 to 21/6/06, and at 3% per annum from 22/6/06 to 3/11/06.

Costs of \$88,000.00 to the claimant.