

Judgment Book

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. HCV 02480 OF 2005**

**BETWEEN BERESFORD DUNCAN CLAIMANT
AND NOVA LEE DEFENDANT**

Miss Christine Hudson instructed by K. Churchill Neita and Co. for Claimant.

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

Negligence - Motor Vehicle Colliding with pedal cyclist – Damages for personal injury – Damage to liver – Internal bleeding - Extensive scarring over the body - Loss of earnings

HEARD 11TH AND 13TH APRIL, 2007

BROOKS, J.

On 18th July 2004, Mr. Beresford Duncan was riding his pedal cycle along Camp Road in the parish of St. Andrew. He collided with a bus owned and driven by Mr. Nova Lee. Mr. Duncan sustained injuries and now seeks to recover compensation from Mr. Lee. The collision occurred at 7:30 p.m.

Mr. Duncan alleges that the collision occurred as a result of Mr. Lee's negligence. He testified that while he (Duncan) travelled on his correct side of the road toward Cross Roads, Mr. Lee's vehicle approached from the opposite direction at a fast rate of speed and negligently made a right turn unto Arnold Road without stopping or indicating a change of course. It was in doing so that Mr. Duncan says that Mr. Lee's vehicle struck him as he was in the process of crossing Arnold Road.

Mr. Lee on the other hand testified to a very different scenario. He said Mr. Duncan was not travelling towards Cross Roads but was travelling in the same direction

as the bus, on the right or incorrect side of the roadway, and had no light on the cycle. Mr. Lee says he passed Mr. Duncan, came to the junction where he stopped, checked to make sure the way was clear and then made the right turn into Arnold Road. It was while conducting that manoeuvre that, he says, Mr. Duncan rode into the right front door of the vehicle, broke the right headlamp and dented the area above that headlamp.

The main issue is therefore one of credibility, but neither litigant was shaken in cross-examination. Three things however assist the court in resolving the issue. The first is that Mr. Duncan called as a witness, Mr. Omar Miller, who testified that he was an eyewitness to the event. He says that he was journeying with Mr. Duncan, but on a separate bicycle, at the time of the collision. He supported Mr. Duncan in every material particular, including the fact that there was a light and reflectors on Mr. Duncan's bicycle. Mr. Miller was also unshaken in cross examination and the court had no hesitation in accepting that he was present at the time and witnessed the collision.

The second item which assists the court is the physical damage to Mr. Lee's vehicle. The major damage is to the right front of the vehicle. This is more consistent with Mr. Duncan's account and that of his witness, that it was the front of the vehicle that struck him. Mr. Lee did point to two scratches on the right door of the vehicle one high and one lower, but I cannot accept that those scratches were caused in the manner as was described by Mr. Lee.

Finally, though perhaps less significantly, the injuries which Mr. Duncan sustained are more consistent with being propelled at some speed after the impact, as opposed to him being struck by a slowly moving vehicle just moving from rest.

I accept the testimony of Mr. Duncan and his witness as truthful and reject that of Mr. Lee. I also find that Mr. Lee was negligent in his driving of the vehicle and that that negligence was the sole cause of the collision and Mr. Duncan's injuries.

I now turn to the matter of damages.

Special Damages:

Special damages were mostly agreed by the attorneys-at-law for the parties. The agreed figure is \$100,125.88. In addition to that sum Mr. Duncan also seeks damages for travelling expenses; \$10,000.00, extra help; \$52,000.00, loss of earnings; \$572,000.00 and the cost of future medical expenses of \$390,000.00 - \$450,000.00.

In respect of all but the last item Miss Hudson on behalf of Mr. Duncan submitted that the figures were reasonable and had not been disproved by the defendant. That submission however is not in accordance with the law as to the burden and standard of proof in respect of special damages. Mr. Duncan provided no documentary evidence whatsoever in respect of any of these items (other than for the cost of future medical expenses). He did not particularize the transportation cost, he did not provide any evidence to support the expense said to have been incurred by his mother, in providing him with extra care and he did not provide any information from his employer, who was his cousin, nor did he explain the absence of any of these bits of evidence. Though I appreciate that there are circumstances where the absence of documentation can be excused as in the case of *Walters v Mitchell* (1992) 29 J.L.R. 173, I do not think that this is one of those cases. Documentation could have been produced with a minimal amount of effort. I shall therefore not award damages for any of these items. This

position is based on the principle outlined in *Robinson and Company Ltd. and anor. v Lawrence* (1969) 11 J.L.R. 450 at p. 453, that special damages must be strictly proved.

In respect of the cost of future medical expenses the report of Dr. Guyan Arscott dated July 4, 2006, discloses that figure to be between \$390,000.00 and \$450,000.00. Miss Hudson submitted that the median figure of \$420,000.00 be used and I agree that that approach is appropriate.

General Damages

Pain and Suffering and Loss of Amenities:

Mr. Duncan was taken by ambulance from the scene of the collision to the Kingston Public Hospital. There he remained for 2 weeks. He had to undergo an emergency laparotomy operation to remove blood from his abdominal cavity. This was due to lacerations to his liver. His injuries included musculo-skeletal abrasions to 2nd, 3rd and 4th digits of the left hand, left zygomatic arch, right chin, left anterior shoulder, arm and forearm, right hip, right anterior chest wall, left anterior thigh, left anterior knee and left anteromedial wrist as described by Dr. C. Thompson of that hospital. A second operation had to be performed to remove insertions made pursuant to the emergency operation. The second operation was delayed because of bleeding and sepsis. A thoracostomy tube was also inserted as part of Mr. Duncan's treatment.

After his discharge Mr. Duncan continued to suffer difficulties including inability to lift things and to bend. He has also had problems with his stomach and passing his stool. He had to be re-admitted to the Kingston Public Hospital after about a year, where he had to undergo another laparotomy to correct a small bowel obstruction. He is unhappy with his appearance resulting from the scarring arising from his injuries. The

Gail Rankine v Kenneth Smith and anor. Khan 3 page 145,

Clive Scott v The Attorney General for Jamaica Khan 3 page 148,

Pauline Douglas v Damion Dixon and anor. Khan 5 page 188,

Jamaica Telephone Co. Ltd. v Barrymore Hill and anor. Khan 5 page 239,

Mary Hibbert v Reginald Parchment Khan 5 page 191,

Hopeton Wauchope v Attorney General Khan 5 page 193

Marsha Page v Malcolm Campbell (unreported) C.L. 2002/P006 (delivered 29/6/04)

Of these I found the case of *Jamaica Telephone Co. Ltd. v Barrymore Hill and anor* and that of *Marsha Page v Malcolm Campbell* to be most helpful, as being more in-keeping with the level of scarring observed by Dr. Arscott in his examination of Mr. Duncan. When updated, the awards in those cases fall in the vicinity of \$2,000,000.00 to \$2,200,000.00. I shall however discount those figures in Mr. Duncan's case, firstly because the major scar is on his abdomen and is not publicly visible and secondly because there is hope for significant improvement as a result of the proposed skin surgery. I am therefore of the view that the sum of \$1,500,000.00 is the appropriate award in this case.

Handicap on the labour market:

Miss Hudson submitted that Mr. Duncan should be awarded the sum of \$300,000.00 as compensation for what she submitted is his handicap on the labour market. Mr. Duncan, on his testimony, was learning the trade of air-conditioning and refrigeration repairs. He says that he can still work on the units but that he is unable to

scar from the laparotomy is prominent and he consulted with Dr. Guyan Arscott who opined that corrective surgery could be 50-60% effective.

Mr. Duncan also consulted with Dr. Ramphal of the University Hospital of the West Indies. In his report, dated July 14 2006, Dr. Ramphal, who is a Consultant Cardiothoracic Surgeon, opined that Mr. Duncan:

“should be able to expect diminution of these symptoms over time , it is possible that he may be left with some degree of permanent intermittent abdominal scar discomfort, and reduced exercise tolerance as a result of his chest wall trauma, in the order of 5% to 10% disability.... In addition... he will always be at an increased risk of developing acute small bowel obstructive symptoms....5% to 10% above that of the general population, especially in view of the fact that he has already had one such episode.”

Mr. Duncan submitted an extensive witness statement (covering 98 paragraphs over 20 pages) detailing all his various ailments and disabilities. The impression of exaggeration given by the effort, was confirmed when he stated in cross-examination that he didn't go to a gym. The answer was accompanied by such a sense of disconnection to the topic that it was clear that Mr. Duncan had never had anything to do with gymnasiums. This is despite the fact that at paragraph 70 of the witness statement he said:

“I also love working out at the gym. This help to keep me (sic) body fit, muscular and sexy but because I can't lift any weights I can't really go to the gym again. I can't even do regular exercises anymore. I can't stretch or jog to keep fit either.”

I therefore am inclined, with respect to his injuries and disabilities, to give weight only to those aspects of Mr. Duncan's testimony which were supported by the independent medical testimony. I have already highlighted the major ones.

In seeking to quantify compensation for the loss, I have looked at the cases cited by counsel. These were:

lift them. I have indicated my reluctance to accept Mr. Duncan as reliable in the area of his disability. Dr. Ramphal on the point opined as follows:

"While he should be able to expect some diminution of these symptoms over time, it is possible that he may be left with some degree of permanent intermittent abdominal scar discomfort, and reduced exercise tolerance as a result of his chest wall trauma, in the order of 5% to 10% disability. He was advised to engage in abdominal stretching exercises to try to decrease subsequent scar contraction."

In *Dawnette Walker v Hensley Pink SCCA 158/01* (unreported - delivered 12/6/03), at p. 11 of the judgment, Harrison P. (Ag.) (as he then was) reiterated that there must be medical evidence to support a claim for handicap on the labour market. This is not evident from Dr. Ramphal's report. Mr. Duncan testified that he was not able to return to his job as a refrigeration technician. He says that he is now selling cigarettes and telephone cards. He says that he earns less than he did as a refrigeration technician. He has no formal qualification for that or any job, and unfortunately, is functionally illiterate though he went to school up to at least Grade 9. I do not think that Mr. Duncan qualifies for an award under this head.

Conclusion

The physical evidence of the damage to the vehicle driven by Mr. Lee, coupled with the evidence of Mr. Duncan's companion Mr. Miller, is such that on a balance of probabilities judgment should be entered on behalf of Mr. Duncan.

He should be awarded special damages in the sum of \$100,125.88 as agreed between the attorneys -at- law together with a sum of \$420,000.00 representing the cost of future corrective surgery.

For general damages he is entitled to an award for pain and suffering but not for handicap on the labour market.

The order therefore is as follows:

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

General Damages

Pain and suffering and Loss Amenities \$1,500,000.00

With interest thereon at 6% *per annum* from 21/9/05 to 21/6/06, and at 3% *per annum* from 22/6/06 to 13/4/07.

Special Damages

\$520,125.88

With interest at 6% *per annum* on \$100,125.88 from 18/7/04 to 21/6/06, and at 3% *per annum* from 22/6/06 to 13/4/07.

Costs of \$100,000.00 to the claimant.

Stay of execution granted for fourteen days.