

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1988/1082

BETWEEN GARY LAWRENCE PLAINTIFF
AND LOREEN LLEWELYN DEFENDANT

Anthony Pearson for Plaintiff instructed by Playfair, Junor and Pearson.
Christopher Samuda for Defendant, instructed by Piper & Samuda.

Heard: April 2, 3, 6 and June 18, 1992.

RECKORD, J.

JUDGMENT

This matter came before me for assessment of damages for negligence arising out of a motor vehicle accident involving the motor car in which the plaintiff was a back seat passenger and a motor car owned by defendant.

The plaintiff testified that at about 7:30 p.m. on the 4th of May, 1986, he boarded a motor car at the Texaco Service Station in Ocho Rios, St. Ann, to go to St. Ann's Bay. On the way something happened and he next found himself in the St. Ann's Bay Hospital in a bed. He did not know either date or time. He was treated by Dr. Wilson and he got a report that he spent seventeen days in that hospital. He had bandage over his head on the right side, strap on his right knee and right forearm.

At the time of his injury he was earning \$200.00 as a woodworker and was absent from his workplace for three months during which time he was

He recalled while in hospital paying a hospital bill for \$250.00. He also paid \$50.00 for a medical report and \$46.00 for medication. He also paid \$1000.00 for another medical report from Dr. John Hall.

Since his return to work he discovered that he lost things easily he can't remember where he put things. He forget things that he goes to borrow. Because of this memory loss he is sometimes referred to by his workmates as a madman. He was now having sleeping problem. Where formerly he slept from 10:00 p.m. to 5:00 a.m. he was now going to bed at 7:00 p.m. and sleeping to 6 or 7.00 a.m. He could not cope with the amount of work he did before.

The plaintiff gave details of test that Dr. Hall did as also other test on him by Dr. Randolph Cheeks at the request of the defendant.

Under cross-examination the plaintiff said he recalled telling Dr. Cheeks he suffered from headaches but never used the words "pounding" or "severe". He did not recall telling the Doctor that "the headaches are mild and do not really bother me." He had seen Dr. Cheeks report but disagreed with it. He had also seen Dr. Hall's report and agreed with it that his short term memory was good.

He had returned to work after the accident either in September 1988 or early July. "The evidence which I gave as to absence from work is what my mother and employer told me." He denied telling Dr. Cheeks that he was able to perform work as before accident. He did not recall being taken to the hospital. Apart from what he was told he did not remember about his stay at the hospital. He did return for treatment but can't say when and how many times. He had seen on a file that it was Dr. Wilson who treated him. He did not recall being treated in hospital by doctors and nurses. He did not recall his mother or anyone else visiting him in the hospital. It was the day that he was going home that "I came to myself and recognised then that I was going home from a hospital."

At the end of the cross-examination, by consent, the medical reports of Dr. Hall dated 28th May, 1990 and Dr. Cheeks dated 28th January, and the Consumer Price Indices for January 1992 were admitted as exhibits 1-3. This closed the plaintiff's case.

Mr. Samuda announced then that the defendant did not propose calling any witness and rested the case for the defence.

From test carried out by Dr. John Hall on the plaintiff in May, 1990, he found that his short term memory was good. His report further states:-

"The ultrasound ecoscan of the brain done in our clinic showed a normal disposition of the intracranial structures, thereby excluding a subdural haematoma.

There were 3 significant scars 1) a curvilinear scar about 4" long located over the right fronto-temporal area of the scalp and just within the hair line 2) a 4½ linear scar on the posterior surface of the right forearm, running along the ridge of the ulnar bone 3) a 2½" transverse scar transecting scar number 2.

Despite the overt normality of the neurological findings and the ultrasound scan of the brain the history of post traumatic headaches is unassailable. Further a protracted period of retrograde amnesia in the St. Ann's Bay Hospital underscores the severity of the serious head injury sustained. The post-traumatic headaches exist per se, and will find a further self-perpetuating mechanism in the post-traumatic neuritis of the right Auriculo-temporal Nerve and the right Supraorbital Nerve branches damaged in scar, number 1, described earlier. He also has a Depression needing treatment.

In addition closed head injuries of this nature are a known precursor of post-traumatic epilepsy in 5-10% of cases, premature Alzheimer's dementia and premature Parkinson's disease (shaking palsy) in a smaller percentage. These are very disabling and life-threatening diseases, which would adversely affect the prospects of a young man at the work place and in the community.

Dr. Randolph Cheeks, a consultant Neurosurgeon saw the plaintiff on the 20th of February, 1992. On examination the plaintiff did not seem depressed. On memory function he was assessed as showing definite deficiency in recent memory function. This is assessed at about thirty

The site of his head indicates that the impact was focused over the right frontal and temporal lobes resulting in injury to the memory apparatus in the temporal lobe, and the clinically evident disturbance of memory. His judgment, insight personality and reasoning ability are unaffected, but the processing of new information, dependent as it is on the ability to store and recall new data, would be impaired. He is thus able to return to his old job and perform at his pre-accident level because new skills are not involved.

- (2) This head injury carries a small risk of epilepsy developing as a late sequel. It is six years since the accident and no seizures have occurred thus far. The risk is assessed at between one and two percent now.
- (3) Apart from the epilepsy risk it is very unlikely that he will suffer from any other complication in the future arising out of this single episode of head injury six years ago.

Mr. Pearson for the plaintiff submitted that the cross-examination of the plaintiff established that he had a defective and faulty memory. No matter how small the risk of epilepsy was the court should have regard and give effect to it.

The special damages pleaded have been proved and on the question of general damages referred to Court of Appeal decision in CCA No. 50/90 Black v. Bhalai et al where in July 1991, the Court of Appeal made an award of \$100,000.00. He viewed the injuries in the instant case as more serious than the cited case. He also cited the case of Showder v. Walters at page 1 of Volume 3 of Mrs. Khan's works and suggested that an amount between \$280,000.00 to \$300,000.00 would be appropriate for pain and suffering and loss of amenities.

Mr. Samuda for the defendant submitted (i) That the plaintiff was not a witness of truth (ii) the claim for emotional and mental trauma had not been sufficiently established. (iii) The evaluation of the plaintiff as given in the medical reports was based on information and data given by the plaintiff himself and such evaluation cannot be verified.

No evidence of any difficulty with his present joint-venture business there was no pleading of depression, loss of memory or unconsciousness. His faltering in the serial sevens test could have been contrived knowing he was coming to court soon or that the test was a request by the defendant or through deficient education.

On the question of Special Damages Mr. Samuda submitted that there was no evidence to enable the court to find that the plaintiff did not work for three months - having regard to injury suffered he suggested one month as reasonable. The loss of clothing is not sufficiently proved as also cost of medical report.

On the question of General Damages, he was of the view that case of Black (supra) was much more serious and that the instant case would have attracted an award of between \$25,000.00 to \$35,000.00 if court accepts that there is an impairment of memory. If this court reject that memory impairment is proved all would be left is laceration for which an award of \$10,000.00 would be appropriate.

Mr. Samuda referred to the case of C/L S 397/84 Harry Sobaran v. Ruby Bickwell et al dated 27th September, 1991.

It was his opinion that the evidence was wanting in so far as the allegations of impairment and the attendant problems of which the plaintiff complained. Unconsciousness for 17 days is an alarming medical fact. The cat scan examination was normal. Unconsciousness for a long period would suggest brain damage which would show up on the cat scan. Other cases referred to were Ivan Tulloch v. Esso Standard Oil - Khans Volume 3 page 222. Sylvester Charlton v. Super Star Bus Company & others Khans Volume 3 page 192.

Mr. Samuda said that the injuries in the Showder case were far more serious than the instant case and therefore irrelevant.

Conclusions

On the plaintiff's own admission, all the evidence he gave of injuries he received, time he spent in hospital and time he absent from work, were hearsay. He remembers nothing about the accident, save that he recalls the day his mother took him from the hospital.

In the case of United Dairy Farmers v. Goulbourne SCCA 65/81, Carberry J.A. said

"Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognised heads of damage must offer such evidence directed to that head, however tenuous it may be. In making awards the courts do their best to measure the incomprehensible or the immeasurable (e.g. pain and suffering or loss of amenities) but there is a stage at which this ends and sheer speculation begins"

The plaintiff called no other witness to support his claim and medical reports tendered by consent were all the court had to determine what were the injuries and the extent of those injuries. These are two eminent neurologists. Dr. Hall saw the plaintiff in May 1990 while Dr. Cheeks saw him in February 1992. They both based their reports on information supplied to them by the plaintiff himself. The reports are in conflict in several areas.

Both Doctors found a healed scar to right side of his head which confirms that he did have an head injury and I so find. I understand both Doctors to be saying a long stay in the hospital was indicative of a severe head injury. But his history of a 17 day stay in the hospital has not been supported - also no support that during his stay in hospital he was suffering from a loss of memory and only 'came to himself' when he was being taken home.

Against the background of Dr. Hall's finding that the plaintiff's short term memory was good, how can this be reconciled with Dr. Cheeks' finding of a 35% deficiency in recent memory function. The plaintiff while giving evidence had no difficulty in answering questions as to what he had for lunch the day before, the costs, how he travelled to court, how he travelled to see Dr. Cheeks and the costs and who accompanied him. He also gave clear evidence of the amount he claimed for the various items under particulars for special damages.

As counsel for the defendant has suggested it may be that the plaintiff, knowing he was coming to court soon and knowing that Dr. Cheeks' report was requested by the defendant, he deliberately contrived to put on a poor show. Dr. Cheeks concluded his reports that it was very unlikely that he will suffer for any complication in the future apart from a 1-2% risk of epilepsy.

Turning to the particulars of injuries pleaded I find that there is evidence to support the claim for (i) emotional and mental trauma, (ii) laceration of the right frontal region of the head (left pleaded) (iii) laceration of the right hand (left pleaded)

The claim for Terminal Insomnia has not been supported. Indeed his evidence was to the effect that he was sleeping for longer hours than before the accident. There is also no support for his claim for unconsciousness. His final claim for retrograde and post traumatic amnesia has support from both doctors and is accepted as proved.

Under Special Damages I award the amount of \$346.00 as claimed for hospital expenses and the sum of \$420.00 for items lost and \$1,000.00 for cost of medical report. The claim for 3 months loss of income has not been proved. However, he had an head injury for which he was hospitalised. He could have lost income for a period. I award 4 weeks @ \$200.00 = \$800.00 per week.

On the question of General Damages, I will be relying on Dr. Cheeks report as it is the more recent in so far as the likelihood of epilepsy is concerned. This I find is now so remote that no award is being made to cover that unlikely event.

The cases quoted by both Attorneys are far more serious than the instant case. The closest I can find is one I assessed on the 29th of January, 1991. C/L R017/89 - Donald Henry v. Robinson's Car Rentals & Another. There the plaintiff suffered a blunt head injury resulting in cerebral concussion. X-rays suggested he had a closed underpressed fracture of the right frontal bone. He had head pains for one month and bouts of amnesia. He spent ten days in the University Hospital. He was fully recovered after 6 weeks. For pain and suffering I awarded him \$25,000.00. In today's money

this is equivalent to about \$50,000.00. It is apparent from the medical reports and from his evidence that he still suffers from headaches and an increase is made of the above sum to \$60,000.00 due to this prolonged suffering from headaches.

The awards will therefore be as follows.

Special damages- \$2,560.00 with interest @ three percent (3%) from 4th May, 1986 to today.

General damages- \$60,000.00 with interest @ three percent (3%) from date of service of writ to today.

Costs to the plaintiff to be agreed or taxed.