IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1990/R 159

BETWEEN	**KENNETH RICHMOND**	**PLAINTIFF**
AND	**CARIBBEAN STEEL COMPANY LIMITED**	**DEFENDANT**

Miss Nancy Anderson instructed by Crafton S. Miller and Company for the plaintiff

David Henry instructed by Nunes, Scholefield, DeLeon and Company for the defendant

Heard: November 6,7,10,11 and 12, 1997, January 26, 1998.

WALKER J.

The plaintiff, Kenneth Richmond, was injured when on November 30, 1989 he was struck down by a quantity of steel which was being loaded on to a truck he had driven to the premises of the defendant located at Spanish Town, St. Catherine. His misfortune has given rise to these proceedings in which there has been no contest as to liability. The matter now comes before the court for assessment of damages.

The plaintiff is now 57 years of age. He gave evidence on his own behalf and presented a grotesque countenance. So twisted was his face that the sight of it revived memories of the Hunchback of Notre Dame as that character was portrayed by the great actor, Charles Laughton, in the celebrated motion picture of the same name. The plaintiff's evidence revealed that he was rendered unconscious by the blow which he

received to the right side of his head. He regained consciousness in the Kingston Public Hospital where he was taken. He was treated there by Dr. Cheeks and Dr. Lue. Prior to the accident he worked as a truck driver earning $500.00 fortnightly. He can no longer drive a motor vehicle because the sight in his right eye is substantially impaired. Nowadays his head hurts frequently and at times he experiences giddy spells. The present condition of his face is a source of embarrassment to him, affects his speech and causes him to be irritable and depressed. As a consequence of all of this he has become a veritable recluse.

By consent of the parties two medical reports of Dr. Cheeks were tendered and admitted in evidence. The first report dated August 28, 1990 reads in part as follows :-

> "Mr. Richmond was admitted as an emergency on the 30th November, 1989 after being allegedly hit by a truck following which he was admitted to the Spanish Town Hospital and subsequently transferred to the Kingston Public Hospital the same evening when the following injuries were noted :
>
> Head injury :
>
> He was conscious when admitted and was able to answer questions but periods of boisterous behaviour were noted.
>
> Bruising and swelling around right eye with dilatation of right pupil.
> Abrasions on the right side of the face and the right ear.
> Weakness of the right facial musculature and a distinct paresis of the left lateral rectus.
> X-rays of the skull revealed a linear fracture of the left temporal bone and an air ventriculogram was noted providing strong corroborative evidence of a basal skull fracture which had already been suspected on clinical grounds.

> He was treated with general supportive measures and antibiotics plus steroid therapy to combat brain swelling, resulting gradual improvement in his condition but poor vision in his right eye persisted leading to his referral to the Ophthalmological Department; he was discharged home on the 14th December, 1989.
>
> I reviewed him in the out-patient department on the 8th February, 1990 at which time he said that he was "coming on fine" but that his memory was not totally reliable. Weakness of the right facial nerve, reduced vision on the right and weakness of the left lateral rectus muscle persisted, and were still present when he re-attended on the 31st May, 1990. His memory is improving and he occasionally experiences headaches.
>
> At this time he remains under review and it is not possible to make a statement regarding permanent residual disability."

The second report dated October 1, 1991 revealed that on neurological examination the plaintiff was found to have suffered the following permanent residual disabilities -

> "1. Defect of recent memory of ten percent (10%)
>
> 2. Loss of vision in the right eye to the extent that he cannot read with the right eye but can see sufficiently with to count fingers. The left eye is normal.
>
> 3. Paralysis of the left sixth cranial nerve resulting in a squint.
>
> 4. Paralysis of the right seventh cranial nerve resulting in facial asymmetry."

Dr. Albert Lue, an Opthalmologist, who also treated the plaintiff gave viva voce evidence on the plaintiff's behalf. Dr. Lue testified that he first saw the plaintiff on December 18, 1989 in the eye clinic of the Kingston Public Hospital. At that time

examination revealed facial asymmetry to the extent that the plaintiff's face was pulled to the left side. His right eye was not closing adequately which suggested damage or paralysis of the right 7th cranial nerve. Visual acuity in the right eye was diminished and the pupil of that eye was not responding normally to light. The left eye was deviated towards the nose as a result of damage to the left 6th cranial or abducens nerve. Visual acuity in the left eye was apparently normal. Dr. Lue next saw the plaintiff on February 20, 1990. On this occasion it was observed that the movements of the plaintiff's right eye were normal while those of the left eye remained the same. The facial asymmetry previously seen also remained the same. When next Dr. Lue saw the plaintiff on June 21, 1990 he noticed that the plaintiff's eye was red and he opined that that condition resulted from the plaintitff's inability to close the eye properly and over-exposure of the eye due to paralysis of the muscle on that side of the face. The condition of the left eye remained the same. Subsequently the plaintiff was seen several times by other doctors in the out-patients clinic. Dr. Lue saw the plaintiff yet again on January 22, 1992 at which time the plaintiff's right eye was observed to be red, watery and infected. Dr. Lue determined then that two operations to partially stitch together the upper and lower lids of the right eye and to re-align the left eye would alleviate the plaintiff's condition. From his observations of the plaintiff on the day on which Dr. Lue gave evidence, Dr. Lue said that the plaintiff's head was still tilted and his left eye was still deviated towards the nose. The right eye looked "a bit red". The skin of the upper right eye lid was drooping and seemed to be impinging on the visual axis i.e. blocking the sight from that eye. It was Dr. Lue's opinion that the plaintiff would likely need a third operation - a minor operation - to remove the

sagging skin. The plaintiff would need to spend 1 - 1 1/2 weeks in hospital to have these operations done. That was as far as evidence of the plaintiff's injuries, his present condition and medical prognosis went.

I come now to consider the matter of damages. As regards special damages, the parties agreed an amount of $680.00 of the total sum claimed. But beyond that the plaintiff is also entitled to an award for loss of earnings under this heading. Mr. Henry did not dispute that this is so. However, Mr. Henry submitted that such an award should be computed over a period of time commencing on the date of the accident i.e. November 30, 1989 and extending to say December, 1991. On the other hand Miss Anderson suggested an award covering a period of some 8 years from the date of the accident. Her submission was based on the plaintiff's evidence that, except for a short period of 6 weeks, he had not worked since the accident. In actual fact the plaintiff testified that some 3 1/2 - 4 years after the accident he resumed work doing "light work" but that after a little more than 6 weeks he "couldn't take it anymore". Notwithstanding the fact that I believe the plaintiff's evidence on this aspect of the matter, I am bound to take into account the evidence of Dr. Lue which I also believe and which was to the effect that the plaintiff can work and has been able to work for some time, though not as a driver. Furthermore, I must bear in mind that the plaintiff is under a duty to mitigate his loss. In these circumstances, therefore, I regard as eminently fair and reasonable Mr. Henry's submission as to the period of time over which an award for loss of earnings should be computed. Using the agreed figure of $500.00 per fortnight I award plaintiff a sum of $27,000.00 for loss of earnings. The total award for special damages is, therefore, a sum of $27,680.00.

As usual the matter of general damages presents a more complex problem. Here counsel on both sides were poles apart. On the one hand Mr. Henry's overall submission was that the plaintiff was blameworthy for displaying inordinate and inexcusable delay in prosecuting his claim. He argued that liability was never at any time in issue, and that with due and ordinary diligence on the part of the plaintiff and his attorneys at law this matter could have come on for assessment of damages by the end of May, 1993 at the latest. The logical consequence of this, so Mr. Henry submitted, is that any award to the plaintiff today should be quantified at the money value of, at the latest, May, 1993. As authority for this proposition Mr. Henry cited the case of ***James v Woodall Duckham Construction Co. Ltd.*** (1969) 2 All E.R 794. In his submissions before me Mr. Henry argued that culpable delay on the part of a plaintiff must necessarily impact on the quantum of damages to be awarded by a court. In James, the Court of Appeal in England was concerned with a situation where the writ of summons of the injured plaintiff had not been issued promptly after receipt of the surgeon's opinion. Had that been done, the plaintiff's action would have been tried at an earlier date and the plaintiff would have returned to his old job sooner. In these circumstances damages awarded the plaintiff by the learned trial judge were reduced by limiting the award for loss of earnings to the period from the accident to the date when, had the action been tried, the plaintiff would have returned to work. In addition the Court of Appeal also awarded the plaintiff by way of general damages a fair sum of money for pain and suffering. So I ask myself the question: Is this plaintiff guilty of culpable delay in bringing his claim to assessment? If he is, then I must go on to consider whether and, if so, to what extent an award of damages

should be influenced by that circumstance. On the other hand, if he is not guilty there can be no argument against a full award of damages being made to him. A chronology of events occurring between the date of filing of the plaintiff's writ of summons (November 29, 1990) and the date of this assessment reveals a lapse of time of some 7 years. Prima facie this is, indeed, an inordinately long time. How is it explained? As I find there was never a contest as to liability. The defendant was from the outset prepared to pay damages. What was in dispute was the quantum of such damages. On the one hand the attorneys at law for the plaintiff were anxious to ascertain the full extent and effect of the plaintiff's injuries, whether he was left with any permanent or partial disability and, if so, the extent of such partial or permanent disability as well as the extent of his future loss, if any. On the other hand the defendant's attorneys at law were consistent in expressing a desire to settle the matter once and for all. There was correspondence between both sides to this effect. In a letter from the defendant's attorneys at law to the plaintiff's attorneys at law dated March 25, 1991, the former explicitly requested the latter not to proceed to judgment. In deference to this request the plaintiff's attorneys at law delayed further action, and they also determined that they should await the result of surgery on the plaintiff that had been recommended by Dr. Lue. As Dr. Lue, himself, explained to the court, that surgery has not yet been done due to no fault on the part of the plaintiff. The surgery was scheduled several times, but had to be postponed time and again due to the work load and inadequacies prevailing at the Kingston Public Hospital. At times the plaintiff's surgery was postponed in order to accommodate emergencies and trauma cases with which that public institution is perpetually deluged. Dr. Lue explained that such

cases had to be accorded priority over the plaintiff's case which involved elective surgery. On one occasion the plaintiff's surgery was deferred due to the unavailability of nursing staff. I accept Dr. Lue's testimony without hesitation. The scandalous conditions which prevail at the Kingston Public Hospital and which Dr. Lue so graphically described have over very many years become a notorious fact. From all of this I have concluded that no fault can be ascribed to the plaintiff for not having brought his claim to assessment in a more timely manner. Nor are his attorneys at law blameworthy for having dared to hope that the plaintiff would, somehow, have received the medical attention he needed within a reasonable time so that the full extent of his injury could have been more precisely determined for purposes of assessing the adequacy of compensation due to him. The plaintiff must, therefore, be awarded general damages free from any taint of culpable delay in bring his claim to assessment. And such damages must be quantified at today's money value. That much is clear from the decision of the Court of Appeal of Jamaica in ***Central Soya of Jamaica Ltd. v. Junior Freeman*** (1985) 22 JLR 152 (hereinafter referred to as the Central Soya case). There, treating with the subject matter of an award of general damages, Rowe P. expressly approved of the dictum of Lord Diplock in ***Wright v. British Railway Board*** (1983) 2 All ER 698. In the course of his judgment Rowe P. said at p. 167:

> "It is clear that in awarding general damages the trial judge must do so in the money of the day at the time of the trial. As Lord Diplock said in Wright's case supra this is not a guideline from which a trial judge has a discretion to depart. At page 703 he said:
>
> > (Trial judges should) "carry out their duty of assessing damages for non-economic loss in the money of the day at the date of

> the trial, and this is a rule of practice that judges are required to follow, not a guideline from which they have a discretion to depart if there are special circumstances ..."

In considering the whole question of the quantum of general damages to be awarded this plaintiff I have found as a most helpful reference point the case of ***Vin Jackson v. E. Punancy and D. Gibbs*** decided June 4, 1990 and reported at p.228 of Volume 3 of Mrs. Khan's Reports. That case, on which both counsel relied, and which, quite incidentally, was decided by me, bears striking similarities to the instant case in terms of the injuries sustained by the respective plaintiffs. In the Jackson case the report reads inter alia as follows :

> "**PERSONAL INJURIES AND RESULTING DISABILITY**
>
> Concussion
> Swelling of head
> Basal fracture involving temporal bone
> Contusion of 7th cranial nerve with
> paralysis of same
> Injury to right facial nerve
>
> He was left with reduced hearing, a twisted face, speech impediment, pains in his back, loss of concentration and impaired memory.
>
> **AWARD**
>
> SPECIAL DAMAGES $28,450.00 and interest
>
> GENERAL DAMAGES $427,760.00 with interest on $200,000.00."

Miss Anderson submitted that the injuries suffered by the plaintiff in the instant case are more serious that the injuries suffered by the plaintiff in the Jackson case and so should attract a greater award for general damages. I agree with that submission. Doing the best

I can I award this plaintiff a sum of $1,500.000.00 for pain and suffering and loss of amenities of life. The plaintiff is also entitled to an award for loss of handicap on the labour market which, as I find, he will suffer. Indeed, Mr. Henry did not dispute the plaintiff's entitlement to an award under this heading. Again, doing the best I can, I award the plaintiff a sum of $50,000.00 in this regard. I also award the plaintiff a further sum of $28,000.00 which it was agreed he would need to pay for the cost of future surgery as recommended by Dr. Lue.

Lastly, I must address the matter of interest. Unlike the rule of practice relating to an award for general damages from which a judge has no discretion to depart, an award for interest lies in the discretion of the court see the Central Soya case (supra). Again, a dictum of Rowe P. in that case, though obiter, is instructive. At p. 167 in making an award of interest to the plaintiff Rowe P. said:

> "But plaintiffs and their legal advisors however would do well to remember that where a plaintiff has been guilty of unreasonable delay in bringing his action to trial, it may be appropriate for the trial judge to make a corresponding reduction in the period for which interest is given."

In the instant case I am prepared to award the plaintiff interest on both special and general damages at a rate of 6% per annum.

Accordingly, damages herein are assessed in the sum of $1,605,680.00 detailed

as follows:

(1)	Special damages	$27,680.00
(2)	General damages for	
	(a) Pain and suffering and loss of amenities of life	$1,500,000.00
	(b) Handicap on labour market	50,000.00
	(c) Future surgery	28,000.00
		$1,605,680.00

The plaintiff is to have interest on the sum of $27,680.00 at a rate of 6% per annum from November 30, 1989 to the date of this judgment, and interest on the sum of $1,500.000.00 at a similar rate from the date of service of the writ of summons to the date of this judgment.

Costs to the plaintiff to be taxed if not agreed.