

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L.1984/S397

BETWEEN	HARRY SOBERS SOBARAM	PLAINTIFF
A N D	RUBY BICKNELL O/C RUBY PLUMMER	FIRST DEFENDANT
A N D	WINSTON BICKNELL	SECOND DEFENDANT

R.S. Pershadsingh Q.C. and A.C. Mundell for Plaintiff.

John Vassell and Patrick Foster instructed by Dunn, Cox & Orrett for the defendants.

HEARD: JUNE 4, 5, 1990 and MARCH 6, 12, 13, 22 and SEPTEMBER 27, 1991

WALKER J.

On September 1, 1979 the plaintiff, a contractor and farmer, was injured in a motor vehicle accident which occurred along the main road at Innswood in the parish of St. Catherine. This accident involved a motor car being driven by the plaintiff and another motor car which was owned by the first defendant and being driven by the second defendant in an opposite direction. In his Statement of Claim the plaintiff alleged that the accident was occasioned by the negligence of the second defendant who was, at all material times, acting as the servant and/or agent of the first defendant. In her defence, while admitting ownership of the particular motor car, the first defendant specifically denied the plaintiff's allegation of negligence. She also specifically denied the plaintiff's allegation of the existence of a master/servant or principal/agent relationship as between the second defendant and herself. As it turned out, when the action came on for trial the defendants called no witness, nor did either of them give evidence. In the circumstances they were hardly in a position to sustain the Defence filed and, in actual fact, did not do so. Consequently, I have had no difficulty in finding for the plaintiff against both defendants on the issue of liability.

I turn then to determine the much more difficult matters of the nature and extent of the plaintiff's injuries and loss and the quantum of damages in which he should be compensated. As between the parties there was no consensus as to the nature and/or extent of several of the injuries which the plaintiff allegedly sustained.

In his Statement of Claim the plaintiff alleged personal injuries as follows:

- " (a) Shock
- (b) Excruiating pains
- (c) Unconsciousness and concussion
- (d) Blackouts
- (e) Dizzy spells
- (f) Headaches
- (g) Head injury
- (h) 3" Laceration over right forehead
- (i) Abrasion of right arm
- (j) Closed fracture right humeral shaft
- (k) Laceration right knee
- (l) Open comminuted fracture right femur
- (m) Separation of symphysis pubis
- (n) Permanent loss of memory
- (o) Permanent loss of concentration
- (p) Permanent brain damage
- (q) Permanent intermittent pains. "

The plaintiff gave evidence and called several witnesses on his own behalf. He said that he was rendered unconscious by this collision which occurred at about 7 p.m. on a Saturday, and that he regained consciousness in the Spanish Town Hospital on the following Tuesday. As to this state of unconsciousness the plaintiff was corroborated by his witness, Henry Prendergast. Mr. Prendergast was, himself, an eye-witness to the accident. The plaintiff said further that upon regaining consciousness he felt pain all over his body, the pain being especially severe across his back. He sustained a large cut over the right knee and another which healed leaving a scar across his forehead. His right arm and right leg were both fractured. He remained in the Spanish Town Hospital for about eight weeks. After being discharged he attended that institution for about three months as an out-patient. Later on he received treatment from various doctors. Nowadays he suffers periodically from headaches, dizzy spells and pain in his right upper arm and right leg. These conditions are relieved by medication prescribed by his doctors. In addition to all of **this**, he said

that his memory is now impaired as also his powers of concentration. Dr. Ellen Buchignani, a medical doctor attached to the Spanish Town Hospital, gave evidence on the plaintiff's behalf. She said that she saw and examined the plaintiff on September 1, 1979, the same day of the accident. On external examination she observed the following injuries:

1. A closed head injury i.e. an injury not involving any opening between the brain and outside environment;
2. A 3" laceration of the right forehead;
3. Abrasion to the right arm;
4. A closed fracture of the right humeral shaft;
5. A laceration to the right knee;
6. An open comminuted fracture of the right femur;
7. A separation of the symphysis pubis

The plaintiff was treated in the hospital and the arm healed in approximately eight weeks. Afterwards traction which had been applied to the arm was removed and the plaintiff was given physiotherapy to rebuild the muscles of the arm. As regards the right femoral fracture, although that injury had not completely healed after the space of thirteen weeks, the healing process had progressed to the stage where the traction that had been applied could be removed. Thereafter the plaintiff received physiotherapy for the leg. The plaintiff was discharged from hospital on November 20, 1979. At this time he was unable to put any weight on the fractured leg but was able to walk with the aid of crutches. The plaintiff was seen again on January 14, 1980 after he had fallen and refractured his right femur. For this he was treated initially at the Kingston Public Hospital. Later he was transferred to the Spanish Town Hospital where he was admitted and treated again with skeletal traction. He was discharged, walking on crutches, on March 18, 1980. Subsequently the plaintiff visited the latter hospital as an out-patient for follow up treatment until June 10, 1980 when he was able to walk without crutches and was finally discharged. It was Dr. Buchignani's opinion that a closed head injury such as that suffered by the plaintiff would necessarily imply some consequential period of unconsciousness, however short. It would also necessarily imply some consequential damage to the brain, however slight. The doctor was unable to give an opinion as to

the extent of brain damage that was suffered by the plaintiff. The doctor said that had the plaintiff been deeply comatose for as long a period of time as claimed by him (i.e. approximately 60 hours) she would most certainly have recorded that condition in her medical report. Such a condition was not, however, recorded in her report. Finally Dr. Buchignani opined that following immediately upon his misfortune the plaintiff may have been confused over a period of time to the sense of not being completely oriented in terms of time and place. In such a state the plaintiff would not have been fully conscious. Another of the plaintiff's medical witnesses, Dr. Emran Ali said that he first saw and examined the plaintiff on April 19, 1989. On this occasion he observed that the plaintiff had a well healed 3" long scar above the right eyebrow. A fracture of the mid-shaft of the humerus was solid with a slight bony bump over the fracture site. There was full range of movement at both the shoulder and elbow joints. The plaintiff also had two well healed pin-track scars over the olecranon and a well healed 1" x 3/4" scar over the mid-lateral aspect of the right thigh. The fracture of the femur was solid and without deformity or shortening and the plaintiff had full range movements of the knee joint. There was also a well healed 2" scar over the patella and the plaintiff complained of pain over the fracture sites. It was Dr. Ali's assessment that the plaintiff had suffered permanent partial disability of 10%. Dr. John Hall, a medical practitioner and specialist in the field of neurology, examined the plaintiff on January 10, 1991. At this time the plaintiff gave a history of his accident and the injuries he sustained. Dr. Hall said that the plaintiff also complained of experiencing episodes of dizziness which were sometimes accompanied by ringing sounds in the ears, periods of black-outs and frontal headaches since his misfortune. Having been given such a history and after examining the plaintiff, Dr. Hall testified that he found no demonstrable neurological abnormality. However, in spite of this clinical finding of normality, it was Dr. Hall's opinion, based on the plaintiff's clinical history, that there were anomalies which stood out unequivocally. These anomalies included:

- (1) Protracted period of unconsciousness;
- (2) Damage to the utricle of the inner ear;
- (3) Post-traumatic epilepsy in one of its forms;
- (4) Post-traumatic neuritis.

Dr. Hall thought that the presence and persistence of the anomaly at (3) above was in keeping with a 5% - 10% incidence of post-traumatic epilepsy in cases of a closed head injury. That condition, which in one of its forms manifested itself in black-outs, also raised the probability of the occurrence of other sequelae of a severe closed head injury, namely Parkinson's Shaking Palsy and Alzheimer's Dementia, both of which were disabling and potential life threatening diseases. Another prognostication of significance was a personality change. The plaintiff had complained of failing energy, pathological sleep pattern and an inability to carry on his former occupation as a contractor. That complaint was indicative of post-traumatic depression, a well known aftermath of head injuries. In Dr. Hall's opinion the plaintiff was afflicted by tinnitus which was a well known neurological symptom of sounds in the ear. The frequency and severity of the combination of tinnitus and occasional attacks of dizziness as related by the plaintiff indicated damage to the utricle or organ of balance in the inner ear. Under cross-examination Dr. Hall said that the history of unconsciousness described by the plaintiff was regarded by him as significant. It was significant because it related to the lacerations sustained by the plaintiff to his forehead and right cheek, and also to the attacks of dizziness, persistent headaches, blackouts and the condition of tinnitus being experienced by the plaintiff. That history played a role in his postulating the probability of the plaintiff being overtaken by Parkinson's and/or Alzheimer's disease at some future date. Dr. Hall conceded that, as to the fact and duration of any period of unconsciousness experienced by the plaintiff, he had only the plaintiff's word to go on, nothing more. Dr. Hall said that, in assessing the plaintiff, he made no request to see any hospital dockets or records pertaining to the plaintiff, and saw none. On examination of the plaintiff he found the plaintiff's cognitive functions, which included thinking, memory, appreciation of concepts, proverbs, writing to dictation and handling numbers in the course of simple arithmetical problems, to be normal. There was no deficit in any of these functions. Also normal were the plaintiff's ocular movements, cranial nerve and motor and sensory pathways from the brain to the periphery. Dr. Hall made it clear that the anomalies to which he referred arose from, and were based on, the plaintiff's history as given to him the plaintiff. Dr. Hall said that the probability

existed that, in giving his history, the plaintiff might have done so with a view to obtaining a higher award of damages in a court of law. Dr. Hall agreed that the plaintiff's history of unconsciousness played a critical role in his evaluation of the plaintiff's condition of epilepsy. Indeed, said Dr. Hall, that history was of critical importance to his whole clinical appraisal of the plaintiff. It was the plaintiff's condition of epilepsy which led him to view as a probability the plaintiff being prematurely overtaken by either Parkinson's or Alzheimer's disease at some future date. While saying this, Dr. Hall readily agreed that these diseases were such as could affect a person in later life irrespective of whether or not such a person had sustained injuries in an accident. Finally, in concluding his evidence, Dr. Hall conceded the possibility of a clinician like himself being "taken in" by a patient. However, Dr. Hall said that in the instant case he had got the impression that the plaintiff had given him precise and correct information.

The plaintiff also consulted Dr. Ruth Doorbar, a clinical psychologist. Dr. Doorbar saw the plaintiff on three separate occasions in 1983, the first of these being May 26, 1983. A part of the plaintiff's history as related by the plaintiff to Dr. Doorbar at this time was that this accident occasioned to the plaintiff a period of unconsciousness of approximately 60 hours. On the basis of that history and her examination of the plaintiff Dr. Doorbar concluded that the plaintiff had suffered organic brain damage, with psychoneurosis, all of which manifested itself in acute depression which was clinically apparent. Dr. Doorbar also noted personality changes in the plaintiff, changes which included such depression as well as a very high degree of irritability. She found the plaintiff to be a man of basically bright, normal endowment who was then functioning in the low average range with 18% impairment. She saw the plaintiff for the last time on September 21, 1989 when she noted that the personality change still persisted. She conducted further tests of memory functioning and intelligence. These tests revealed a 39% deficit in memory functioning as compared with 18% in 1983. This deficit of 39% translated into an I.Q. of 70 which put the plaintiff on the border line of being rated as a mental defective.

During the cross-examination of this witness the following questions and answers ensued between counsel for the defendants and the witness:

Q. "Would it surprise you that Dr. Hall examined plaintiff on 10/1/91 and found no deficiency in memory, thinking, appreciation of concepts, proverbs, writing to dictation, handling numbers i.e. simple arithmetic problems?"

A. "That would only surprise me if I knew that Dr. Hall had given plaintiff psychological tests before making these findings."

Q. "Assuming that Dr. Hall had administered psychological tests to determine these matters, would the basis of your surprise be merely that Dr. Hall came to a result which was different from yours?"

A. "Yes, but then I would seek to challenge the validity of his tests and conclusions."

Continuing her evidence Dr. ~~Doobar~~ agreed that the plaintiff's history of unconsciousness and duration of that state influenced her in coming to her diagnosis of organic brain damage with post-traumatic psycho-neurosis. The witness admitted finally that she was not competent to state a medical position as to whether or not a closed head injury such as that suffered by the plaintiff would necessarily involve brain damage. She said she was not a physician. She possessed a Phd. degree which was an academic degree.

In defence neither of the defendants gave evidence or called any witness.

On the foregoing evidence I find that the plaintiff did, in fact, suffer the injuries enumerated in paragraphs (a), (b) and (g) - (m) of the Particulars of Personal Injuries set forth in his Statement of Claim. It follows that I accept the evidence of the plaintiff and his witnesses relating to these matters. With regard to the injuries alleged in paragraph (c) i.e. unconsciousness and concussion, while I am prepared to concede that the plaintiff did suffer in that way, I remain unconvinced that such a period of unconsciousness approached anywhere near the period of approximately 60 hours as was the plaintiff's contention. Had this been so, I am of the opinion that Dr. Buchignani, who attended the plaintiff on the same day of the accident, could not have failed to record this vital information as she said she would have done, presumably in keeping with standard hospital procedure. As it was, the plaintiff's hospital docket which was prepared in the initial stage by Dr. Buchignani contained no such record. I find that in all probability the plaintiff was rendered unconscious

for a short period of time immediately following his accident; that he regained consciousness the same day before he was seen by Dr. Buchignani in the Spanish Town Hospital; that having regained consciousness he remained in a state of disorientation for some time thereafter, a probability which was expressly conceded by Dr. Buchignani. Furthermore, I think I am fortified in coming to these findings by the evidence of Dr. Buchignani which I accept and which was to the effect that the plaintiff suffered a closed head injury which necessarily implied that he must, as a consequence, have suffered a period of unconsciousness, however short. Turning next to consider the injuries alleged in paragraphs (n) and (o) I am convinced in my own mind that the plaintiff suffered no such injury in either case. In giving evidence before me the plaintiff had no difficulty whatsoever in recalling events which occurred nearly 11 years ago. He was able to recall dates, times, places, names of relevant persons, sums of money expended by him and several other important details of his case. In my view he was unconvincing where his credibility was concerned, but he was, nevertheless, a lucid, coherent, articulate witness. Certainly he could not be faulted for either a lack of memory or concentration. His performance as a witness, I must say, was entirely inconsistent with the evidence of Dr. Doerbar in so far as that evidence bore on the condition of the plaintiff's memory and his powers of concentration. Furthermore, my conclusions here are reasoned on the basis of my finding that the plaintiff suffered no more than minimal organic brain damage in this matter. Which brings me to an examination of the injury alleged by the plaintiff in paragraph (b) i.e. permanent brain damage. I am of the opinion, based on the evidence of Dr. Buchignani and Dr. Hall, that the plaintiff did suffer some brain damage as a consequence of his injuries. Indeed, this was conceded, though somewhat tentatively, by counsel for the defendants in his closing address. In particular I accept as factual the evidence of Dr. Buchignani that some brain damage would necessarily have resulted directly from the closed head injury which the plaintiff undoubtedly sustained. She was, however, quite unable to essay an opinion as to the extent of that damage. As I have just said I find that such damage was minimal. Furthermore, it was not of a permanent nature. I recall to mind the performance of the plaintiff in the witness box

(to which I have already alluded) and I prefer the evidence of Dr. Hall to that of Dr. Doorbar on this aspect of the matter. Dr. Hall, who was clearly the more competent witness being the expert in the neurological arena, stated categorically that when he examined the plaintiff as recently as January, 10, 1981 he found in the plaintiff no neurological abnormality, no cognitive deficit. As regards the injuries alleged by the plaintiff in paragraphs (d) - (f) and (g). I find that these are matters which are largely and peculiarly within the knowledge of the plaintiff. As far as the injury of the black-outs is concerned, nowhere did the plaintiff, himself, give any evidence of such an injury. The plaintiff's claim in paragraph (d) therefore fails on that account. Regarding the injuries of dizzy spells, headaches, and permanent intermittent pains, none of these injuries was corroborated by any other evidence whether of a medical nature or otherwise. The plaintiff, it must be inferred, made no mention of any of these conditions to Dr. Ali who examined him on April 19, 1989, although, according to Dr. Hall, the plaintiff reported to him that these conditions had arisen as early as three months after the plaintiff's discharge from the Spanish Town Hospital in 1979. So, as regards these three injuries, the plaintiff must stand or fall on his word alone. I fear that he has fallen. I have not found the plaintiff to be a credible witness on any of these matters and, accordingly, I reject his claim in relation thereto.

So I come now to quantify the damages that the plaintiff should have. In doing so I will deal firstly with the plaintiff's claim for special damages. Here I award the plaintiff a sum of \$6,980.00 being the aggregate amount of the sums claimed in paragraphs (a) - (c), (e) and (g) of the Particulars of Special Damages set out in his Statement of Claim. As was conceded by leading Counsel for the plaintiff, the plaintiff's claim for extra nourishment made in paragraph (f) was not proved. Consequently, that claim for a sum of \$300.00 is not allowed.

Concerning the plaintiff's claim under paragraph (d) for \$50,000.00 for loss of earnings for one year as a road contractor, this claim was, in my opinion, eminently speculative. The plaintiff was unable to adduce any documentary evidence in proof of a contract or contracts relative to this item of his claim, nor was he able to produce as a witness Mr. Francis, Superintendent attached to the St. Catherine Parish Council, by whom he said he was awarded the lost contracts. The plaintiff testified that he had requested Superintendent Francis

to attend Court as a witness. In the event, Mr. Francis did not appear, and no reason was given for his non-appearance. The remarkable ignorance of the plaintiff as to matters affecting important details of these alleged lost contracts appears from the following extract of his evidence given under cross-examination:

"I did not lose \$15,000.00 on any contract or set of contracts. I don't recall having said yesterday that I did lose such a sum of money. If I said so, that would have been an untruth. Not as at date of accident that I was supposed to get other contracts. I really don't know how many contracts I was supposed to get after the accident. I don't know when I was supposed to get them. I don't know where work under these contracts was to be carried out. I don't know how many chains of road were to be involved in these contracts. I know what value of these contracts would be. Value would have been about \$100,000.00. I went to Parish Council to Superintendent in February 1980 and he told me that he had something in excess of \$100,000.00 worth of work in his possession and asked me if I thought I was well enough to do the work. At this time I told him no, I was still feeling pain and not well enough to do the work. Then he said he would have to find somebody else. I had gone to see Superintendent just to say hello as I had not seen him for a long time. Superintendent was Mr. Francis. Don't know his first name. I don't know when work should have started. Quite sure I am speaking truth about this. Last saw Mr. Francis Saturday last week. He is Superintendent stationed in St. Mary now. I made no enquiry so as to ascertain what it would cost me to perform lost contracts."

I reject the plaintiff's claim in this regard. Finally I come to general damages. I approach this matter on the basis that the plaintiff has suffered injury as I have found, including minimal organic brain damage and a permanent partial disability of 10%. In my judgment under this head of damages the plaintiff is entitled only to an award for pain and suffering and loss of amenities of life. I take the view, agreeing with the submissions of Mr. Vassell, that the plaintiff has not proved that he is likely to suffer loss by way of handicap on the labour market. Prior to his accident the plaintiff was a contractor and farmer. He now carries on the business of a wholesale butcher from which he earns "much less" than the income he used to earn as a contractor. But the court was not told how much less; nor was any evidence

given in terms of actual figures of the plaintiff's earnings as a butcher. Subsequent to his accident the evidence discloses that the plaintiff owned and operated a club in May Pen, Clarendon for a period of two years. The club closed down in 1983. As a guide to an award for general damages in this case the plaintiff's counsels referred me to the case of Anthony Rose (by next friend Yvonne Walker) et al. v. Thomas Smith, Suit NO. C.L.1979/R41 reported at Page 210 of Volume 2 of Mrs. Khan's work on Personal Injury Awards. In that case the plaintiff, an infant aged 11 years, suffered extremely serious personal injuries in a motor vehicle accident. These injuries included the following:

1. unconsciousness
2. severe bleeding from the nose;
3. fracture of medial malleolus of the lower left leg;
4. damage to the left frontal and temporal areas of the brain affecting the memory.

In an award made in 1983 the learned trial judge awarded the plaintiff an amount of \$18,000.00 (including a sum of \$8,000.00 for loss of earnings) for general damages. On appeal (see SCCA No. 32/84) this award was increased to \$80,000.00 for pain and suffering and loss of amenities, the Court of Appeal also **finding** that there was no evidence in the case on the basis of which an award for loss of earnings could properly be made. On the other hand, as an authority which he submitted was more in point, counsel for the defendants cited the case of Elaine Russell (by next friend Ilene Griffiths) et al. v. Bancroft Broomfield Suit No. C.L.1978/R137 reported at Page 206 of Volume 2 of Mrs. Khan's work. Here the plaintiff, aged 19 years, was seriously injured in a motor vehicle accident. The report of this case reads, inter alia, as **follows:-**

" PERSONAL INJURIES

1. Blow in the head rendering her unconscious - shock, haemorrhage bled from nostril and mouth
2. Fracture of skull
3. Loss of one tooth
4. Incisor chipped
5. Haematoma on right forehead
6. Right eye black and blue

TREATMENT AND RESULTING DISABILITY

She was admitted to hospital where she remained unconscious for 5 days. After recovery she was kept in hospital for a few days. X-Rays confirmed fracture of the skull. After release from hospital she complained of frequent headaches, dizziness, foggy eyes, (myopia) and running eyes.

DISABILITY

Moderate brain damage resulting in partial loss of memory, loss of ability to concentrate, headaches, dizziness and running eyes. Agreed Medical Reports and joint report by Dr. Theisiger and Dr. Doobar were admitted in evidence by consent.

LOSS OF AMENITIES

Unable to dance, swim or play games because of headaches and dizziness. Now operated at dull normal level of intelligence. Unable to achieve ambition to be a Secretary. "

In his award made in 1983 the learned trial judge awarded the plaintiff a total sum of \$108,200.00 for general damages, of which the sum of \$25,000.00 represented general damages for pain and suffering and loss of amenities.

In my view in both cases referred to above the plaintiffs concerned were more seriously injured than the plaintiff in this case. In Anthony Rose there was significant brain damage which the court found blighted the future prospects of the plaintiff. In the Russell case the injury to the plaintiff was, inter alia, moderate brain damage, the plaintiff having remained in a state of unconsciousness for a period of 5 days immediately following the accident. In the instant case the plaintiff, who is now 42 years of age, sustained what I will call orthopaedic injuries which are all completely healed. He sustained as well other injuries including brain damage which, as I have found, is of a minimal extent. In the result, taking everything into consideration and doing the best I can, I award the plaintiff a sum of \$150,000.00 as general damages for pain and suffering and loss of amenities of life.

Accordingly, there will be judgment for the plaintiff in the sum of \$156,980.00 with costs to be agreed or taxed.

Interest at a rate of 3% p.a. on the sum of \$6,980.00 from September 1, 1979 to the date of judgment.

Interest at a rate of 3% p.a. on the sum of \$150,000.00 from the date of service of the Writ of Summons to the date of judgment.