

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L.1989/W002

BETWEEN	ERNEST WALKER	PLAINTIFF
A N D	KIPLING DAVIDSON	FIRST DEFENDANT
A N D	OCLE REID	SECOND DEFENDANT

Norman Samuels for Plaintiff.

Christopher Samuda instructed by Piper and Samuda for the Defendants.

NOVEMBER 21, 22 1990 AND MAY 29, 1991

CLARKE, J.

On the night of June 25, 1987 the plaintiff, Ernest Walker, then 56 years old sustained injuries when the motor truck in which he was travelling overturned along the main road at Boscobel in the parish of St. Mary. At all material times the second defendant was driving the truck as the servant or agent of the first defendant, the owner.

The plaintiff has duly entered interlocutory judgment against both defendants in default of appearance. As liability is not in issue damages now fall to be assessed.

To do so I must first of all determine in the light of the evidence the nature and extent of the plaintiff's injuries resulting from the accident. He was admitted to the Port Maria Hospital on the same night of the accident. with the following injuries:

1. dislocated right elbow;
2. 3" to 5" laceration of the right knee;
3. 5" abrasion of the right flank;
4. 1" to 1½" laceration right frontal region with crack fracture of the frontal bone.

The plaintiff has no recollection of the accident but recalls regaining consciousness in hospital about 3 o'clock the following morning. Both the lacerations over the right frontal region and the laceration to

the right knee required suturing. On August 24, 1987 he was admitted to the Kingston Public Hospital for open reduction of the dislocated elbow. However, this operation was performed as late as October 6, 1987 because of his unsuitability for general anaesthesia before then. He made satisfactory post operative progress and was discharged from hospital on October 17, 1987 in an above elbow cast to be followed up in the fracture clinic. The plaster of paris cast along with K-wire was removed on November 30, 1987. The elbow was satisfactorily reduced by then, but there was stiffness in the joint which required physiotherapy.

Dr. Romer Rose, an orthopaedics surgeon examined the plaintiff on October 10, 1988 and on July 13, 1989. I accept his evidence that the injury to the elbow is consistent with the history the plaintiff gave him and could have occurred as a result of a motor vehicle accident on June 25, 1987. Dr. Rose found a longitudinal scar along the posterior aspect of the right distal arm and elbow. There was crepitus of the elbow. The range of movement of the elbow was restricted: 75 degrees to 135 degrees, the normal range being from zero to 135 degrees. The plaintiff had grade four power in the right hand and so there was some weakness in that hand. There was, however, full pronation and supination of the right forearm.

X-rays of the right elbow revealed:

- (a) loss of joint space with irregularity of the articular surfaces;
- (b) lateral subluxation of the joint with fragments of bone in the soft tissue.

This radiological finding indicates osteoarthritis in that elbow joint and confirms the plaintiff's evidence that he still feels pain in that joint. As Dr. Rose said, it is a painful condition and is most likely to have resulted from the dislocation of the elbow and the interval between injury and treatment.

Dr. Rose said that the injury to the elbow does not exclude all forms of work, only heavy manual work such as using a cutlass to do farming or lifting heavy loads with the right upper limb. The plaintiff had full internal and external rotation of the right shoulder. In respect to the elbow Dr. Rose opined that the plaintiff's permanent disability was not more than 15% of the whole person.

Although the dislocation of the elbow and the laceration to the right knee could have occurred at the same time, the findings revealed from x-rays of the right knee indicate degenerative arthritis in that knee. As Dr. Rose deposed, that condition in the knee is not attributable to any trauma caused by the accident, but results from the age of the plaintiff. Since any pain and suffering or loss of amenity arising from that arthritic condition in the knee is plainly too remote a consequence of the accident the plaintiff cannot be compensated in that regard.

Now, what is the nature and extent of the plaintiff's head injury? He sustained a 1" to 1½" laceration of the right side of the forehead with crack fracture of the frontal bone. I readily find, as he alleges, that he became concussed and lost consciousness for upwards of 5 hours after the accident. This was followed by post concussional headaches. But he also alleges inter alia in the particulars of his amended statement of claim that in consequence of the accident he suffered "damage to the brain resulting in 60% loss of function." Has it been proven that he has suffered brain damage? Much of the evidence and argument concerns that question.

Since any brain damage is a serious injury the resolution of the issue will affect the eventual quantum of damages to be awarded. The medical report of Dr. R. E. Cheeks, neurological surgeon, dated June 22, 1990 is instructive. He saw the plaintiff in August 1989 and had a CAT head scan done. The scan showed normal anatomy. He reassured the plaintiff that no brain damage had occurred and that the headaches would settle, as they were post concussional in origin. Dr. Cheeks finally saw the plaintiff on June 21, 1990. The plaintiff then reported that apart from the occasional ache over the right side of his forehead he was not having any problems. His mental state, speech and full neurological examination revealed no abnormality though he had a flexion deformity of the right elbow. The optic fundi were normal and all four limbs neurologically normal. Dr. Cheeks concluded that there was no evidence that the plaintiff's brain was damaged. He found that the plaintiff suffered a concussion followed by transient post concussional headaches which had subsided.

Yet before me the plaintiff made a complete volte-face. He testified that he has persistent headaches, "headaches all the while," and black outs about twice a week. He said that because his head was not "functioning right" he went to see Mrs. Hilda Evans who gave him some tests.

Mrs. Evans, a consultant clinical and educational psychologist, specialises in neuro-psychology. The plaintiff was not referred to her by the neuro-surgeon but by his attorney, Mr. Norman Samuels. Approximately a month after Dr. Cheeks finally examined the plaintiff she examined him and carried out certain psychological tests. She said that all that the plaintiff told her of an accident was where it occurred, that he had a black out and found himself in hospital, unable to lift his right hand. She said that because of what he gave as his pre-accident social history she held that he was psychologically healthy prior to the accident. From the data she obtained from the examination and tests she concluded that he suffered brain damage, more particularly damage to the right hemisphere in the frontal area of the brain resulting in not, be it noted, 60% loss of function (as pleaded) but in 60% disability of his potential at the time of the accident. She said that by "potential" she means what he could have been if it were not for the accident.

The plaintiff impressed me as an intelligent witness. He showed by his answers to questions asked of him that he comprehended them. He also showed a facility to recall certain salient facts advantageous to his case.

It is to be observed that the only data Mrs. Evans collected in relation to the plaintiff's pre-accident social history came from the plaintiff himself (a highly subjective and biased source) and concerned his schooling, family and business. She made no attempt to get information about his pre and post accident condition from his family and acquaintances. When I add to all that the fact that she did not recommend a course of treatment nor referred him to a neurologist or neuro-surgeon or any other medical man for the grave brain damage she said he suffered, I am led to look askance at her conclusions.

I am constrained on the other hand to hearken to and accept the objective finding of Dr. Cheeks as to the absence of abnormality on a full neurological examination as well as to the absence of brain damage. I find therefore, that the plaintiff suffered no brain damage.

GENERAL DAMAGES

(a) Pain and Suffering and Loss of Amenities

The evidence I accept paints a picture of a middle aged man who survived the accident but suffered: (a) a concussion followed by post concussional headaches which have subsided (b) lacerations to the knee and frontal region with crack fracture of the frontal bone and abrasions to the hip all of which have healed and (c) a dislocated right elbow which has been satisfactorily reduced after treatment in as well as out of hospital over a period of some four months. The evidential picture also depicts a resultant flexion deformity of the right elbow with osteoarthritis in that elbow joint leaving the plaintiff with a permanent disability of some 15% of the whole person.

The awards in the cases cited by counsel on both sides provide no guide as to the award I ought to make under this head in the instant case because I find no similarity between the injuries to any of the plaintiffs in the cited cases with the injuries of the plaintiff in the instant case. In my judgment an award of \$75,000.00 is realistic and reasonable. It represents fair and reasonable compensation to the plaintiff for pain and suffering and loss of amenities, past, present and future.

(b) Loss of earning capacity

Mr. Samuelis submitted that I should make an award for loss of future earnings. I find no credible evidence to support an award under that head. The plaintiff is still employable. As Dr. Rose pointed out the injury to the elbow excludes only heavy manual work such as using a cutlass to do farming or to lift heavy loads. Although the plaintiff said that up to the time of the accident he was a farmer and buyer and seller of agricultural produce his evidence shows that his income would come entirely from the latter activity. Subject to the vagaries of marketing there is no reason why he cannot continue to pursue it. He could continue to purchase produce in the field, pay someone to take it to a truck for transportation to the market place where he could as he would do prior to the accident pay another to off load and take it to his stall.

The plaintiff may, however, have to look to farming or manual work for a living or to supplement his income for sometime in the future before the estimated end of his working life. In that event he will be handicapped, for

he will be unable to use a machete to do farming, or lift heavy loads. I must therefore estimate and quantify the present value of the risk of financial damage if he has to resort to a type of farming involving heavy manual work. In that event he would have to employ extra help. He must therefore be compensated for the diminution in earning capacity as a farmer.

Taking into account his age, the nature of his disability and all the variable factors and making the usual discount for the immediate receipt of a lump sum, I assess his loss of earning capacity to be \$15,000.00.

SPECIAL DAMAGES

I allow the sum of \$1,605 agreed by the parties to have been incurred by the plaintiff as items of special damages as follows:

Eureka Medical Limited C.T. Read Scan	- \$ 1,325.00
Medical expenses paid to Dr. Cheeks	- \$ 200.00
Medical expenses at Kingston Public Hospital	- \$ 80.00

I allow a further sum of \$2,178.00 which represents the following items of special damages. These the plaintiff has proven:

Medical expenses paid to Dr. Rose	- \$ 430.00
Amount paid to clinical psychologist	- \$ 1,100.00
Cost of X-rays	- \$ 120.00
Travelling to seek medical attention	- \$ 528.00

An award for loss of earnings for three years is in my view reasonable representing as it does the period from the date of the accident on June 25, 1987 to June 21, 1990 when the plaintiff was last seen by Dr. Cheeks, the ~~neuro-surgeon~~. Dr. Cheeks found then that the plaintiff was neurologically sound and concluded that his post concussional headaches had subsided. I find that by then at the latest the plaintiff would have been able to resume buying and selling agricultural produce. Although on the evidence his net weekly profit works out to \$1,008.00 he has not satisfied me that he would have earned as much as that consistently every week. I accordingly reduce the weekly sum by one third and this comes to \$660.00 a week. Thus his loss of earnings for the ~~three year~~ period works out to \$104,364.00.

The Award

Having regard to the foregoing I assess general damages under two heads:

- | | |
|--|-----------------------|
| (1) Pain and Suffering and loss of amenities | - \$ 75,000.00 |
| (2) Loss of earning capacity | - <u>\$ 15,000.00</u> |
| | \$ 90,000.00 |

There will be interest at 3% p.a. on the sum of \$75,000.00 from 19th July, 1989 the date of the service of the writ, to today. Special damages I assess at \$100,147.00 with interest at 3% p.a. from June 25, 1987, the date of the accident, to today.

The defendants must pay the plaintiff's costs which are to be taxed if not agreed.