

HOLDEN AT GEORGE TOWN

ON March 30 and 31, April 3, 4, 5, and 6 and October 25 1978.

BEFORE HIS LORDSHIP, SIR JOHN SUMMERFIELD, C.B.E., Q.C.

Cause No.395 of 1977

BETWEEN : DONALD FITZ THOMPSON : PLAINTIFF

AND : MARTIN ROSS COE
and
EDDINGTON E. EBANKS : DEFENDANTS

Mr. John Harding for plaintiff
Mr. Lennox Sanguinette for defendant.

JUDGMENT

This action arises out of an accident on the West Bay Road on the 11th August 1974 when the Plaintiff, a pedestrian, was injured by a motor vehicle driven by one Eddington Ebanks, since deceased. The action is brought against the representative of Eddington Ebanks' estate (named as second defendant) who was also the owner of the vehicle involved in the accident and, as such, is named as the first defendant.

Liability is not in issue. The only issue is the quantum of damages.

As to special damages, items 1 - 26, inclusive, set out in the particulars of special damages in the statement of claim are not in issue. These amount to \$4,245.50. The remaining item in dispute relates to the claim for loss of earnings.

The quantum of general damages is in dispute with particular reference to brain damage and mental impairment, said to have been suffered as a result of the accident, and related consequences.

Loss of Earnings

The plaintiff, who at the time of the accident was 23 years of age, was trained in Jamaica for the hotel catering industry. He is Jamaican and gained his initial experience in the hotel catering industry in Jamaica. In August 1971 he came to these Islands and became an assistant maitre d'hotel at the Holiday Inn. He claims to have been promoted to the rank of maitre d'hotel

The period over which he thus sought work is not very clear. What is plain, however, is that this was long after the accident and after he had recovered sufficiently to seek work. It was not established in evidence why he was unable to find work in hotels in these Islands - whether it was because he had no work permit or because no vacancy existed when he applied or otherwise. In either of those specified events the defendant cannot be held responsible for this failure to obtain work. The plaintiff had not lost any job here because of the accident. He had no vested right to work here - a work permit was a pre-requisite. It follows that loss of earnings during the period of incapacity should not be gauged by reference to the level of wages in these Islands in any event. His earning capacity must be related, in the circumstances of his case, to what he could earn in Jamaica (where he had a right to work) or Costa Rica where he was permitted to work.

When not seeking work in these Islands the plaintiff spent time in Jamaica where, he admits, he made no attempt to engage in gainful occupation. He stated that he could more efficiently employ his efforts in assisting his father on his father's farm. His parents were keeping him at the time, when he was not living with his wife whom he married in 1976. His wife also supported him and gave him financial assistance before and after their marriage. He received further financial assistance from his sister through his mother - to the tune of U.S.\$50 a week. His "adopted" uncle also gave financial support over the period in the sum of \$9,000. In my view the defendant is in no way accountable for the plaintiff's failure to engage in any gainful occupation while in Jamaica or while being supported by his wife in these Islands.

There was no evidence as to why the plaintiff, after substantially recovering, did not continue with the venture in Costa Rica which was earning him about \$120 a week. There was no evidence as to whether this venture would have been more or less remunerative than working in Jamaica had he sought to do so. There was no evidence to the effect that he was precluded from continuing this venture or was, because of some disability associated with the accident, unable to continue with it. Hauling coffee to a mill would not appear to call for any special skills. Nothing in the agreed reports of the doctors associated with him at the relevant time, Dr. Soto, Dr. McNeil-Smith and Dr. McHardy, suggest any disability precluding him from his activity.

His injured leg had the final cast removed on 15th December 1974.

In all the circumstances, allowing a reasonable period for convalescence and rehabilitation I assess the period of incapacity for undertaking the gainful occupation he was following immediately before the accident at 21 weeks at \$120 a week. I, therefore, assess loss of earnings at \$2,520. This period of 21 weeks incidentally, falls within the period he intended to be in Costa Rica studying languages, living with his "adopted" uncle and, presumably, following the occupation he was following at the time of the accident.

Any diminution in earning capacity over any subsequent period falls for consideration under the assessment of general damages.

General Damages

It should be noted that the agreed reports of the plaintiff's medical advisers were based in part on information supplied to them by the plaintiff himself. In some instances that information is demonstrably incorrect. For example, he appears to have told Dr. V. O. Williams (report of 7th November 1977) that his unfortunate marriage was right after the accident (demonstrating impaired judgment). In fact it was contracted some twenty months after the accident. Further, he appears to have told Dr. Williams (report of 26th July 1977) and Dr. McHardy (report of 17th March 1975) that he lost consciousness as a result of the accident. However, if one examines his statement to the police on the day following the accident (Ex.B) it is obvious from his memory of events following the accident that he had not lost consciousness. There is no suggestion in that statement that he struck his head on anything at the time - an embellishment that has crept into later reports. The report of Dr. F. J. Williams, who was medical officer at Georgetown Hospital at the time of the plaintiff's early treatment after admission following the accident, makes no mention of head injuries, unconsciousness or symptoms consistent with any form of concussion. Nothing of this nature appears in the case history given in Dr. Soto's report who was the next doctor to treat him in Costa Rica. There is nothing to suggest a head injury in that report. The first suggestion of a head injury appears in Dr. McNeil-Smith's report of 14th February 1975. It is noteworthy that in Dr. McHardy's report of 17th March 1975 the plaintiff^{is} reported as having told that doctor that he remembered being picked up and taken to hospital when he

passed out (which *incidentally* conflicts with what he said in evidence in court). It is possible that the plaintiff is confusing loss of consciousness following the accident with the general anaesthetic administered to him shortly after his arrival in Georgetown Hospital. However, these inaccuracies undermine the value of the medical reports to some degree on some aspects, notably the claim relating to brain damage.

The most difficult part of this case has been trying to resolve the different conclusions of the two psychiatrists, Dr. V. O. Williams, who was called by the plaintiff, and Dr. Neihall, called by the defendant. Both were eminent in their field. Both were confident and convincing in giving their evidence. Both displayed a mastery of their subject.

I appreciate that it is open to a court to reject the evidence of an expert witness in favour of another. A court would wish to have sufficient cause before doing so. When faced with two such able masters in their particular specialty it is a bold layman who can say that one is more probably correct in his assessment than the other.

On the resolution of this conflict turns the most important aspect of this case - in brief whether the plaintiff suffered post traumatic psychosis (that is to say a mixed psychosis with organic and functional (emotional) components - the organic component being the result of permanent brain damage) as a result of the accident or whether there was a personality change, which is temporary, brought about by reactive depression and, if so, whether there is a casual relationship between that reactive depression and the accident.

I have given a great deal of thought to this problem. It is true that Dr. Williams actually examined the plaintiff and that Dr. Neihall did not; but Dr. Neihall reached his conclusions on the same basic background material having examined the medical reports and listening to the evidence on the material facts. In some ways Dr. Neihall's critique of Dr. V. O. Williams' report and evaluation of the plaintiff's condition had an appeal to the layman and its logic was persuasive to a layman.

In the end I have concluded that I am not in a position to prefer the expert evidence of either to the other. It follows that the plaintiff has failed to satisfy me on the balance of probabilities that he suffered the post

traumatic psychosis alleged either as a result of the accident or at all. Further he has not so satisfied me on any aspect on which there is a conflict between the opinion of Dr. V. O. Williams and Dr. Neihall. Even if he has been suffering from a mixed psychosis, as alleged, its organic origin, if it has one, has not been shown to be attributable to the accident. Tests to eliminate other causes were not performed and the time interval between the accident and the onset of the symptoms throws serious doubt on the accident being the cause, bearing in mind also the partially inaccurate information given to Dr. Williams and taken into account in his evaluation. It is significant that in the statement of claim (paragraph 5 of particulars of injury)"possible" brain damage only is alleged. Further, in his report of 7th November 1977, Dr. V. O. Williams describes the plaintiff as no longer psychotic.

However, Dr. Neihall concedes that the plaintiff has suffered a profound personality change by reason of reactive depression. A reactive depression is a depression which is a reaction to an environmental situation. It cannot be caused by a blow on the head. It could be reactive to an injury to the leg caused in a motor accident.

There are three elements in this case to which the depression could be a reaction. One is the injury to the plaintiff's leg, another is his inability to solve his employment problem and the third is his unfortunate marriage. The second and third are the ones which feature mainly in the evidence and the reports. Neither is attributable to the accident. The only one which could be attributable to the accident is the injury to the leg and it is for consideration whether, in fact, it was and, if so, to what extent.

It is significant that neither Dr. F. V. Williams nor Dr. Soto who were the first to see the plaintiff, the latter having had him under his care for about four months, make any mention of any symptom suggestive of reactive depression or any other psychiatric problem. The first suggestion appears in Dr. McNeil-Smith's report of 14th February 1975. However, the plaintiff's "adopted" uncle, John McGregor, who took care of the plaintiff in Costa Rica did give evidence of serious emotional problems in the plaintiff immediately after the accident. One must make due allowance for the special relationship of this witness to the plaintiff. He was also the plaintiff's representative in this case, with full powers of attorney, at one stage. But making full

allowance for the exaggeration this special relationship may have brought about, and taking what I believe to be a fair view of the evidence as a whole, I do believe that the onset of the plaintiff's depression (and personality change) was reactive to the leg injury received in the accident. It was obviously comparatively mild at first and Dr. McHardy in his report of 17th March 1975 had this to say :

"This young man apparently sustained some mild to moderate cerebral concussion at the time of the injury which could have been responsible for some of his headaches. Six weeks to three months should be as long as they should last, and I find it difficult to relate his poor intellectual performance to his relatively mild head injury.

There should be no permanent disability."

The reactive depression was compounded by the frustration over the failure to solve his employment problems and his unfortunate marriage. From the evidence and the reports these were the most significant causes of his condition. But some weight must be given to the causal relationship with the accident which precipitated the condition.

Under treatment by Dr. V. O. Williams the plaintiff's condition improved dramatically. Unfortunately, he did not receive treatment from Dr. V. O. Williams until 25th July 1977. By 27th February 1978 the prognosis appeared reassuring. One can only assume, and Dr. Williams so stated in evidence, that had he received this treatment earlier not only would his condition have not deteriorated as it did in the face of his problems but he would have reached an improved state much earlier. As, according to Dr. Neihall, this condition is temporary, no doubt the plaintiff would have been restored to normal in so far as any reactive depression was related to the accident had he received treatment timeously. The failure to receive treatment timeously cannot be the responsibility of the defendant.

In this connection it should be borne in mind that most of the witnesses who spoke of the change in the plaintiff's personality were speaking of ^{the} recent past when the main ~~elements~~ contributing to his reactive depression - his frustrations in his attempts to obtain employment here and his unfortunate marriage - had been having their effect for some considerable time in causing that change. With exceptions, such as the "adopted" uncle, they were not speaking

of the plaintiff's condition shortly after the accident. The plaintiff's own wife, Cora, who obviously saw much more of him, gave an account of his activities and condition in 1975 to 1977 which were brighter and more hopeful than the picture painted by the witnesses who observed him for short periods shortly before the trial.

As to the plaintiff himself, I formed the opinion that his intellectual capacity was of a higher level than he would have this court to believe. This came through on occasions when his guard was down while sparring with counsel. These occasions revealed him to be articulate and alert. As to his evidence generally, I am of the opinion that there has been some ex post facto rationalisation and no doubt the reactive depression may well have distorted events in his mind and led to some exaggeration.

For the foregoing reasons, while I am prepared to accept that the initial onset of reactive depression was precipitated by his reaction to his leg injury in the accident, only moderate weight must be given to it in assessing damages. The main causes came later and, in so far as the initial onset was concerned, it was relatively mild and would have disappeared at an early date with earlier treatment. The extract from Dr. McHardy's report of 17th March 1975 quoted above (albeit postulated on the plaintiff having sustained concussion - which I do not accept) places the nature and extent of this temporary disability in the most favourable perspective from the plaintiff's point of view. The effect on his earning capacity was, therefore, minimal and should be weighted accordingly.

So far as his marriage in April 1976 to a 70 year old lady is concerned, I am inclined to the view, particularly from what the wife herself said, that this was a marriage of convenience to further the plaintiff's plan to obtain employment here. It is not possible to say whether on the balance of probabilities it would or would not have taken place had the plaintiff received earlier treatment - Dr. V. O. Williams said it was equally likely either way.

A fair amount of stress was placed on this marriage as showing impaired judgment. Foolish it may have been, but Dr. V. O. Williams assessed the plaintiff's intelligence as average. It was nevertheless a financially rewarding venture even though it has so far failed in its primary purpose.

There remains for consideration the leg injury, partial impairment, disfigurement, pain and suffering and loss of amenity.

There is no doubt that the plaintiff suffered considerable pain as a result of his injuries, including mental stress and headaches. He had to undergo several operations and was incapacitated for some four months. This aspect is described in full in Dr. Soto's report of 17th January, 1975. I accept Dr. J. C. Williams' unchallenged assessment of the plaintiff's present position and the prognosis. This was as follows:

- "(1) His gait was within normal limits.
- (2) Right lower limb was $\frac{1}{4}$ " shorter than the left.
- (3) There were two healed scars over the middle third of the right shin - both of which were mobile over the bone.
- (4) Squatting was full.
- (5) Power was approximately equal in both lower limbs.
- (6) There was wasting of the muscle of the right thigh - this being about $\frac{1}{2}$ " smaller in circumference than the left at approximately 1 hand's breadth above the knee. That was as a result of the muscle not having been used for a protracted period of time. This is permanent.
- (7) Two inverted semi lunar scars at the back of the right knee and upper calf - the area was approximately $5\frac{1}{2}$ " x $1\frac{1}{4}$ ".
- (8) There was a slight right knock knee.
- (9) A healed scar on the front of the left thigh approximately 5" x 4" consistent with corrective surgery.
- (10) The plaintiff has suffered a permanent disability of 15% loss of function of his right lower limb.
- (11) He can stand properly.
- (12) There is no necessity for any skin grafting.
- (13) The broken bones have healed satisfactorily.
- (14) There is an ugly scar at the back of the right knee. It is over pigmented and there is some loss of contour of the calf."

The plaintiff led an active social and sporting life before the accident.

This is now slightly impaired by reason of the permanent disability suffered in his right leg.

Taking account of all the factors discussed above I assess general damages at \$11,000. This includes \$1,000. for temporary diminution of earning capacity.

There will, therefore, be judgment for the plaintiff in the sum of \$17,765.50 with costs.

SIR JOHN SUMMERFIELD.

6th February, 1979.