# JAMAICA

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO: 57/2004**

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.**
**THE HON. MR. JUSTICE SMITH, J.A.**
**THE HON. MR. JUSTICE MARSH, J.A. (Ag.)**

| | | |
|---|---|---|
| **BETWEEN** | **WINSTON EDWARDS** | **APPELLANT** |
| **AND** | **GERALD STEVENSON** | **1st RESPONDENT** |
| | **HOWARD STEVENSON** | **2nd RESPONDENT** |

**David Johnson instructed by Piper & Samuda for appellant**

**Miss Sherry-Ann McGregor & Miss Ayana Thomas instructed by Nunes, Scholefield, DeLeon & Co., for respondents**

**9th, 10th, 11th, October 2006 & 16th November 2007**

**HARRISON, P.**

This is an appeal from the judgment of Miss Justice Paulette Williams on 15th June 2004 in favour of the respondents/claimants against the appellant in the sum of $1,082,870.00 special damages with interest on $365,245.00 at 6% per annum from 25th December 1997 and $717,625.00 general damages with

interest at 6% per annum from 1st July 2002. The interest in each case is to be calculated to 21st May 2004.

We heard the arguments of counsel and we dismissed the appeal, in part. The appeal against liability was dismissed. The damages were reduced in part. Damages recoverable are $1,014,245.00 with interest on $329,245.00 at 6% from 25th December 1997 to 21st May 2004 and interest on $685,000.00 from 1st July 2002 to 21st May 2004. Costs of appeal to the respondents to be agreed or taxed. These are our reasons in writing.

The relevant facts, as found by the learned trial judge are that on 25th December 1997, the respondents' motor truck was being driven by one Mark Thompson along the main road in the parish of St. Ann, on its correct side of the road. It was not travelling at a fast rate of speed as it approached a left hand corner in the said road, at a distance of one foot from its left bank. A Honda motor car driven by the appellant, travelling at a fast rate of speed, and travelling on its incorrect side of the road, failed to negotiate the said corner properly and crashed into the right front wheel of the respondents' motor truck. This caused the truck to veer to its right, to crash into a Volkswagen motor car driven by one Christie, and end up resting on top of the said Volkswagen motor car. This car had been following closely behind the Honda motor car and was being driven by Christie at a fast rate of speed. Christie was pinned in the said car. He sustained injury and the car was extensively damaged. The Honda motor car continued and came to rest near to the rear of the motor truck.

The grounds of appeal argued, as summarized were:

(1) The learned trial judge failed to consider properly the evidence of the respondents' driver, which was inconsistent with that of the assessor, and consequently arrived at a decision unsupported by the evidence.

(2) The learned trial judge erred in law by finding that the respondents had adduced sufficient evidence to prove that the payment of $615,000.00 to Glenmore Christie, in separate proceedings was reasonable.

(3) The learned trial judge erred in law by finding that the evidence of payment of $102,000.00 to Nunes, Scholefield DeLeon & Co., as 'Attorneys' fees and incidentals', in the proceedings involving Christie, was sufficient to prove that the said sum was reasonable and recoverable in the circumstances.

(4) There was insufficient evidence to prove a claim for loss of use.

**Ground 1**

Mr. Johnson for the appellant argued that the finding of the learned trial judge as to the liability of the appellant was inconsistent with the evidence of the respondents' witness Thompson. He said that the evidence of the damage to the appellant's motor vehicle, was more consistent with the evidence of the appellant and therefore the finding was plainly wrong and ought to be reversed by this Court.

The learned trial judge, having examined the evidence at page 13 of the record said:

> "It is my finding that at the time of the initial impact, the truck was not on its right side of the road travelling at a fast speed. Further it is my finding that it was the Honda Civic that had been traveling fast and was more likely encroaching on the truck's side of the road. I find it more believable in the circumstances that the Honda Civic and the Volkswagon (sic) were traveling close to each other at a fast speed. I find that it is the defendant who had failed to negotiate the approach to this corner which was for him a right hand corner and that he is the one liable for the collisions that followed."

Findings of facts are essentially the province of the trial judge. Consequently, an appellate court will be slow to interfere with such findings unless the trial judge was plainly wrong. This approach has consistently been adverted to and followed by this Court. In the oft-quoted words of Lord Thankerton in ***Watt or Thomas v Thomas*** [1947] A.C. 484 (H.L.) at page 487:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; ..."

In ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** [1986] 35 WIR 303, Lord Oliver of Aylmerton, in delivering the opinion of the Judicial Committee of the Privy Council quoted with approval, the above speech of Lord Thankerton in ***Watt or Thomas v Thomas,*** (supra). (See ***Union Bank of Jamaica Ltd v Dalton Yap*** Privy Council Appeal No: 17/2000 (unreported) delivered 28th May 2002). These cases were relied on by both counsel before this Court.

In our view, on the facts, the appellant was clearly at fault in relation to the collision, and consequently liable.

The learned trial judge had ample evidence from which she could and did make her decision. She saw and heard the witnesses and ably assessed their credibility. There is no basis on which this Court should interfere. This ground therefore fails.

**Ground 2**

Counsel for the appellant argued further that there was insufficient evidence before the learned trial judge of the nature of the claim of Christie, the driver of the Volkswagen motor car and the apportionment of the payment for personal injuries, damage to property and costs. This evidence was necessary, in order to enable the learned trial judge to determine whether or not the sum of $615,000.00 paid to Christie, in settlement of his claim in other proceedings, on the advice of counsel for the respondents' insurance company, was reasonable in the circumstances.

In respect of this aspect of the claim, the learned trial judge, at page 15 of the record said:

> "The evidence of Ms Gretchen Garrigues was that on her instructions Mr. Lowel Morgan as their Attorney-at-Law negotiated a settlement on the best possible terms. She said based on the advice received from Mr. Morgan she authorized the settlement without admission of liability for a sum of $615,000.00 inclusive of cost. The said cheque was in fact drawn in the amount in favour of the attorneys-at-law for Mr. Christie.

> On the evidence it is clear that Mr. Christie's vehicle was extensively damaged and he was pinned inside for at least five minutes. He was in fact asked about his injuries but this was objected to by Mr. Johnson who questioned the relevance of such a question. Mr. Christie explained further that he had retained attorneys on a contingency basis.
>
> I find that there was enough evidence before the court for a finding and that this settlement arrived at under legal advice was a reasonable one. In the absence of evidence to the contrary and although there was no specifics as to the apportioning of the award, I find that this figure of $615,000.00 is to be recovered."

Gretchen Garriques, in her witness statement, stated that she was employed to the Insurance Company of the West Indies ("ICWI") which provided insurance coverage in respect of the respondents' motor truck on the relevant date. ICWI received copies of a writ and statement of claim on behalf of Glenmore Christie "against" Mark Thompson (the driver of the insured's motor truck) and Howard Stephenson to recover damages for "personal injuries and property damage arising from the accident." In respect of the trial date of the said suit, Ms. Garriques, at paragraph 10 of the said statement, said:

> "10. The insured's witness was absent from Court. Accordingly, it was impossible to raise a proper Defence to Glenmore Christie's claim. In the circumstances, I instructed Mr. Lowel Morgan to negotiate a settlement on the best possible terms.
>
> 11. Based on advice received from Mr. Morgan I authorized him to settle Mr. Christie's claim, without admission of liability, for a sum of $615,000.00 inclusive of costs."

In ***Biggin & Co Ltd and Another v Permanite Ltd; Berry Wiggins & Co Ltd, Third Parties*** [1951] 2 All ER 191, (C.A.), it was held that an amount of money paid by a plaintiff to a third party, in settlement of a claim by that third party against the plaintiff, may be claimed as damages by the plaintiff against a defendant, if on the evidence the said settlement sum was reasonable, especially, if on the facts the settlement had been made on legal advice. This case was relied on both by counsel for the appellant and Miss McGregor for the respondents. The facts are that the Dutch government requested the plaintiffs to supply an adhesive for use on roofs on houses. The plaintiffs ordered the adhesive, called Permasec, from the defendants who themselves ordered it from third parties. The government passed on the adhesive to contractors who applied it on roofs. The adhesive though it should not, began to "drip and run or 'creep' ". Claims were made on the government who sought to return tons of the remaining Permasec to the plaintiffs and defendants. They refused to accept it. The government withheld £55,000 due to the plaintiffs. Referred to arbitration, the plaintiffs settled the dispute, accepting liability and paid £43,000 in settlement. The plaintiffs then claimed the said sum from the defendants together with the plaintiffs' own costs of the arbitration. Somervell, L.J. in the Court of Appeal, at page 196, said:

> "I think the effective question left was: Was the compensation reasonable? I think that indicates that there must have been at any rate some evidence (as, for instance, the nature of the injuries and so on) on which the jury could come to a conclusion on that point.

> I think the learned judge, with respect, was wrong in regarding the settlement as wholly irrelevant. I think, though it is not conclusive, the fact that it is admittedly an upper limit would lead one to the conclusion that, if reasonable, it should be taken as the measure. The result of the learned judge's conclusion is that a plaintiff must prove his damages strictly and must show that they equal or exceed £43,000. If that involves, as it would here, a very complicated and expensive inquiry, still that has got to be done. The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion, is: <u>What evidence is necessary to establish reasonableness? I think it is relevant to prove that the settlement was made under legal advice.</u> The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say 'normally,' for it may be in special cases that they might be. The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether the sum paid was reasonable. The defendant may, by cross-examination, as was done here, seek to show that it was not reasonable, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked. In the present case, of course, counsel for the defendants relies, rightly, on the learned judge's finding with regard to the first head of damage, on the fact that the evidence showed that too much was bought, and so on, but if there is evidence at the end of the matter of the kind which I have indicated, on which the court can come to a conclusion that this was a reasonable settlement in the circumstances, then I think it should be the measure." (Emphasis added)

Singleton, L.J. at page 198 said:

"Before the court can award a sum as damages, there must be evidence on which the court can act. If the evidence they call satisfies the judge or a jury that the settlement was a reasonable one, the damages awarded will be the amount of the settlement and the costs reasonably incurred. I do not think that any good purpose is served by calling counsel who advised the settlement to say that he did so advise, even if the evidence is admissible. It could only be followed by questions as to why he so advised, and that would be asking him to do the work of the judge.
...
It is a matter for consideration that the settlement was arrived at under advice, the more so as the party settling may be quite uncertain whether he can recover anything against someone else. If, on the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs have settled, he will be justified in awarding the settlement figure. I do not consider that it is part of his duty to examine every item in those circumstances. The plaintiffs put forward their claim and call evidence to establish it. The defendants have an opportunity of cross-examining the plaintiffs' witnesses and of calling evidence themselves. The plaintiffs must establish a *prima facie* case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages. The position is much the same, though, perhaps, not quite so strong, as in a case in which damages have been assessed in a suit between other parties involving the same facts. The judgment is not binding, but the court will not lightly disregard it in the absence of fresh evidence or new factors.

In this case, there was before Devlin J some evidence which may not have been available at the time of the settlement. I refer to the answers of Mr. Hijdelaar which show that the Royal Netherlands government had over-bought to some extent. It may be that this was before the plaintiffs' advisers at the time of the arbitration, for it was clearly indicated in the documents. Nonetheless, the answers did provide

> material on which the defendants were able to base an argument that the damages were not so high as the plaintiffs claimed. After full examination of all the evidence, I do not think it was sufficient to displace the case which the plaintiffs had set up, that this was a reasonable settlement. The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one, and, in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation was continued. That is one reason for saying that it is sufficient for the purpose of the plaintiffs if they satisfy the judge that a figure in the neighbourhood of the settlement would have been awarded as damages."

In the instant case, Glenmore Christie was called as a witness. The notes of evidence, on cross-examination, at page 98 of the record, reads:

> "Yes my vehicle was damaged as a result of accident I was also injured (Johnson objects to further questions re nature of injury as being irrelevant.)
> I did make a claim arising from that.
> Yes I did attend court.
> The matter was settled.
> I was told it was settled out of court.
> Yes I received payment.
> Don't remember how much was the total paid out know how much I got - $335,000.00 I did not pay legal fees out of this amount. The legal fees were deducted from the sum paid.
> Don't remember what sum legal fees represented – It was charged as a percentage of the settlement sum. Didn't keep track as to what percentage actually – could have been around 40 – 45 percent.
> Was dependent on court day went into court one day.
> Yes General Consumption Tax was also charged on these fees."

This evidence of Christie was reliable evidence that his motor car was damaged and that he was injured. The learned trial judge was, unfortunately, in error, to

accede to counsel Mr. Johnson's objection to any evidence from Christie, of the nature of his injuries. Counsel for the respondents was entitled to so enquire. That knowledge of his known injuries was admissible from Christie. It sounds ill in the mouth of counsel for the appellant to complain, now before us, of the absence of evidence of proof of damages, when he was the one who successfully, by his objection, kept out the evidence of Christie's injuries. The learned trial judge may well have also inferred that the aspect of the claim in respect of Christie's injuries were, in effect, not being challenged.

Christie in his witness statement, said:

> "My car was totally destroyed as a result of the collision."

Gretchen Garriques was aware of Suit No. CL 1998/C160 filed on behalf of Christie for hearing on 5th June 2002 including, the Statement of Claim. Unable to defend the suit a settlement was effected between both Mr. Lowell Morgan and Mr. Lynden Wellesley, attorneys-at-law, on behalf of the respondent and Christie, respectively, at the trial. Somervell, L.J., in the ***Biggin*** case, supra, said that the reasonableness of a settlement may be inferred from the fact that it is made under legal advice.

In the instant matter the learned trial judge had before her, evidence of the fact of the total destruction of the Volkswagen motor car, the injuries to Christie, and found that "... he was pinned inside for at least five minutes." Christie in his witness statement said:

> "A front end loader had to remove the front of the truck from my said car."

The learned trial judge, on the above evidence, may have inferred that the settlement was in the nature of a "consent" judgment, and although "... there was no specifics as to the apportioning of the award" found the settlement in the sum of $615,000.00 to be a reasonable one. We did not disturb this award.

**Ground 3**

The third area of challenge by the appellant was the payment of $102,000 as "attorneys' fees and incidentals" in the claim by Christie.

The learned trial judge found that the payment of $102,000.00 to Messrs, Nunes, Scholefield, DeLeon & Co in the suit involving Christie was reasonable. We did not agree.

The Civil Procedure Rules in Appendix B "Table 1 Table of basic costs" provides that:

> "entry of final judgment after trial to end of first day..."

is $64,000.00. The evidence was that Christie's suit was settled on the first trial date. We saw no basis for an award of $102,000.00 in the circumstances. Consequently, we reduced the award to $70,000.00 as reasonably incurred for costs "and incidentals."

**Ground 4**

Counsel for the appellant argued that the evidence led in respect of the number of trips made by the respondents' truck was not adequate to prove the amount of $180,000.00 claimed. There was therefore no evidence to prove that this sum was reasonable. He said that the learned trial judge should not have awarded the said sum having decided that the evidence "was not as precise as it could have been."

The learned trial judge, disclosing her reason for making the award for loss of use, at page 14 of the core bundle, said:

> "I agree figures given were far from as precise as they could have been but I am satisfied especially after the cross-examination of Mr. Gayle that there must have been some loss of use based on his usage of the truck. As Miss McGregor submitted, the figure claimed was a reasonable one and the demonstrated calculations were sufficient to support the claim made. There will be an award of the amount claimed under this heading."

In any claim for special damages, the areas of loss must be strictly proven (***Murphy v Luther Mills*** [1975] 14 JLR 119). There must therefore be sufficient evidence led before the learned trial judge in order to enable her to make such an award.

The respondent Garland Stephenson, in his witness statement, at paragraphs 8 & 9, said:

> "8. Prior to the accident the truck was used to transport construction material for Lorgay Construction & Equipment Ltd. We were paid a rate $8,000.00 per trip for hauling aggregate from

> Mandeville, $10,500.00 per trip for hauling sand from May Pen, $4,500.00 per trip for transporting water from Hunslow, and $3,500.00 per trip for transporting marl.
>
> 9. We were without the use of the truck for the period December 1997 to February 1998 while it was being repaired, and we lost earnings of $180,000.00 during this period as confirmed in letter from Lorgay Construction & Equipment Ltd."

In cross-examination, before the learned trial judge, the witness Loren Clinroy Gayle, at page 89 of the core bundle said:

> "Question: Correct to say there would be days when demand would be low and then demands high on other day.
>
> Answer: Yes.
>
> Question: Correct to say rate charged would depend on weight.
>
> Answer: Rate charge would go by the trip.
>
> Yes correct to say there would be days he would not be pulling any material. On average would pull for me four (4) days of the week."

In our view, on this evidence of Stephenson, the average weekly earnings of the respondents' motor truck for haulage was approximately $6,625.00 per trip. Because of the weekly fluctuation of the haulage trips, a reasonable sum per haulage trip is $6,000.00.

The respondents were without the truck for a period of eight weeks from December 1997 until February 1998. Assuming that the haulage was one trip per day, and, in the words of Garland Stephenson:

> "On average [the respondents] would pull for me four (4) days of the week"

the weekly earning was, on the evidence $24,000.00. The gross earnings would therefore be $192,000.00 and the net earnings would be $144,000.00. Consequently, we awarded the sum of $144,000.00 as reasonable to be recovered under this head, as loss of use.

For all the above reasons we dismissed the appeal, in part, and made the order indicated.

**SMITH, J.A.**

I agree.

**MARSH, J.A. (Ag.)**

I agree.

**HARRISON, P.**

**ORDER**

Appeal dismissed in part. Damages recoverable $1,014,245.00 plus interest on $329,245.00 at 6% from 25th December, 1997 to 21st May 2004 and on $685,000.00 at 6% from 1st July 2002 to 21st May 2004. Costs of the appeal to the respondents to be agreed or taxed.