JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 14/2005

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

BETWEEN	**DALTON WILSON**	**APPELLANT**
A N D	**RAYMOND REID**	**RESPONDENT**

Hilary Phillips Q.C., and Kevin Williams instructed by **Grant, Stewart, Phillips & Company** for the appellant

Lord Gifford, Q.C. and Richard Reitzin instructed by **Reitzin & Hernandez** for the respondent

24, 25th, and 26th July, 2006 and 20th December, 2007

SMITH, J.A.

This is an appeal against a decision of Sinclair-Haynes J, made on the 20th day of December, 2004 on an Assessment of Damages.

On Monday, 17th September 2002, the respondent was a fare-paying passenger on a bus owned by the appellant and driven at the time by one Mr. Donald Mitchell. The bus driven crashed into another bus which was parked on the Six Miles overpass thereby causing the respondent to suffer injuries, loss and damage. The liability of the appellant was not disputed in the court below.

The order the learned trial judge made on the 20th December, 2004 is as follows:

"...That:

1. The claimant be awarded the sum of $2.79 million for general damages;

2. The claimant be awarded the sum of $2. 548 million for loss of future earnings;

3. The claimant be awarded the sum of $647,100.00 for future medical expenses;

4. The claimant be awarded interest on general damages at the rate of 6% per annum from June 16, 2003 to December 20, 2004;

5. The claimant be awarded loss of past earnings of $636,679.45 (being $7,000.00 per week from September 17, 2002 to September 30, 2003 plus $2,750.00 per week from October 1, 2003 to July 31, 2004 and $7,000.00 per week from August 1, 2004 to December 20, 2004);

6. The claimant be awarded other special damages in the sum of $222,766.80;

7. The claimant be awarded interest on special damages at the rate of 6% per annum from September 17, 2002 to December 20, 2004; and

8. Costs to the claimant to be agreed or taxed."

The grounds of appeal are:

(a) The Learned Trial Judge erred in law in her assessment of the quantum of damages for pain and suffering and loss of past and future earnings.

(b) That the aforesaid quantum assessed by the learned trial judge is manifestly excessive.

(c) That the finding in respect of the head of damages for security guard and for electrical work was not specifically proved.

Miss Phillips, Q.C. told the Court that the appellant's complaint is in relation to items 1,2 and 5.

Grounds (a) and (b)

The appellant challenges the quantum of damages for pain and suffering and loss of past and future earnings.

General Damages for Pain and Suffering

The amount awarded is $2,790,000.00. Miss Phillips, Q.C. contends that this award is manifestly excessive.

Three medical reports were tendered in relation to the injuries suffered by the respondent. The first dated May 7, 2003 is an interim report signed by Dr. N. N. Than. The second and third reports dated March 3, 2004 and April 16, 2004 were issued by Dr. Grantel Dundas, a Consultant Orthopaedic Surgeon.

The medical evidence reveals that the respondent suffered the following injuries:

(a) Shortening of the left lower limb by 2cm resulting in short leg limp and a mild antalgic gait.

(b) A posterior dislocation of the left hip and a fracture of the acetabulum on the left.

(c) A 6cm T-shaped laceration over the medial aspect of the right foot.

(d) A 14.5 cm oblique hypertrophic scar in the left gluteal area.

(e) Abrasion over left medial aspect of the right thigh.

(f) Reduction in the range of movement of the left thigh.

(g) Fracture of the 3rd metatarsal bone

(h) Wound over the left buttock

(i) Deep vein thrombosis

(j) Osteoarthritis of right hip secondary to fractured acetabulum

As regards (c) above the respondent said that he sustained an extensive degloving injury to the sole of the right foot which was sutured and later skin grafted. Dr. Dundas opined that the respondent's residual impairment was 48% of the left lower extremity or 19% of the whole person. His prognosis was that the hip joint would go on to develop severe osteoarthritis probably necessitating Low Friction Arthroplasty in the future.

In the second report Dr. Dundas stated:

(i) That the pin scars in the left leg were puckered and the skin was adherent to the underlying tissues; and

(ii) That there was pain in all the extremes of motion.

The relevant aspects of the evidence of the respondent in this regard may be summarized as follows:

Whilst he was pinned between the seats he experienced excruciating pain. When he was pulled from the wreck he experienced severe pain from his "belly down". The bottom of the right foot was torn. The bone at the right side was protruding. When he was being transported to the hospital the pain was almost unbearable. He was conscious whilst the doctor used a bit to drill into his left foot. According to him during this procedure he "felt out of the world with pain". An eight pound weight was attached to his leg and a pin inserted. The

operation lasted for 3 ½ to 4 hours. About 1 ½ hours through the operation the anaesthetic wore off and he experienced untold trauma.

After his discharge from the hospital he was not ambulant. He could not even sit up in bed; he had to remain supine. His condition deteriorated and he was re-admitted to the hospital. A blood clot was discovered in his foot near the pin. The wound was re-opened and cleaned. This he said was a painful experience.

After discharge he underwent a skin graft operation. Skin was removed from his buttocks in this procedure. After this he continued to lie on his back as it was extremely painful when he attempted to put his feet on the ground.

In May, 2003, that is 8 months after the accident, he began to move around but only with the assistance of someone or crutches. In June, 2003, he was able "to put weight on his feet."

As a result of the accident he has become sexually dysfunctional. Up to the time of hearing of this matter he was experiencing pain in the right foot. At nights in order to abate the pain, he has had to place pillows under his leg. He can no longer play cricket or football. He is still a patient at the clinic and still takes painkillers.

The burden of Miss Phillips, Q.C.'s submissions is that the judge's award was erroneous. She contended that the learned judge misrepresented the evidence when she stated that the respondent remained conscious throughout four procedures. The learned judge she argued did not take into consideration the

respondent's evidence that he had no feelings from the waist down. The medical report, she pointed out, made no mention of sexual dysfunction although the respondent said he told the doctor what was happening to him. Learned Queen's Counsel emphasized that although the judge found that the injuries in the case of ***Otis Gordon v. Carlton Brown*** SCCA No. 48/98 delivered on December 20, 1999 were more severe than those in the instant case, she did not adequately reflect that difference in the quantum awarded. Miss Phillips, Q.C. asked this Court to say that the learned trial judge was plainly wrong in this regard.

Lord Gifford Q.C., on the other hand, submitted that the learned judge's award was fully justified having regard to the evidence. The judge he contended correctly took account of the three main features of the evidence:

(1) The history of severe pain and suffering experienced by the respondent in the year following the accident.

(2) The serious permanent disability arising from the fracture of the hip.

(3) The probability of severe osteoarthritis developing in the future.

In my view there can be no doubt that this was an exceptionally painful experience for the respondent. The immediate post accident period was one of extreme pain, frustration and immobility. The learned judge correctly took into consideration these features. The learned judge was entitled to take account of the consequential difficulties and disabilities in making her award. This Court will not interfere on the ground that it would have awarded a different figure had it tried the case. The court will only interfere if it is shown that the

learned judge acted on any error of principle or misapprehension of the facts or if it is satisfied that the court below made a wholly erroneous estimate of the damages suffered. See ***Desmond Walters v. Carlene Mitchell*** SCCA No. 64/91 delivered 2nd June, 1992. I am not persuaded that the learned judge acted in any misapprehension of the evidence. The important question is: Was the judge's award for general damages wholly erroneous?

Using the relevant Consumer Price Index the award in the ***Otis Gordon*** case (supra), if it had been made at the time judgment was given in the instant case, would have been $2,804,297.34. The learned judge was of the view that having regard to the respective circumstances, an award less than the award in the ***Gordon*** case was appropriate. She went on to award $2,790,000.00, that is, $14,297.34 less than the award in the Gordon case. Miss Phillips Q.C. argues that this award does not adequately reflect the difference.

The judge's conclusion that Mr. Gordon's injuries were more severe than the respondent's has not been challenged. The judge's conclusion was clearly based on the fact that Mr. Gordon also suffered neurological deficits assessed at 22% of the whole person. His neurological residual disabilities and the residual disability in respect of the pelvic injury make his injuries much more serious than those of the respondent. The learned judge described them as "some what more serious". In considering the term "erroneous estimate of the damage" Lord Wright in ***Davies and Another v. Powell Duffryn Associated Collieries, Ltd.*** [1942] 1 All E.R.657 at pages 664 to 665 said:

> "It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

In ***Jamaica Telephone Company v. Delmar Dixon (by his next friend Olive Maxwell)*** SCCA No.15/91 (unreported) delivered June 7, 1994 Rattray, P. said:

> "The Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases in the past with necessary adjustments having regard to inflation and any special features of the injury on the other assessable factors of the particular case, is directed at achieving this uniformity."

It seems to me, as Mrs. Phillips contends, that a sum just over $14,000.00 does not adequately reflect the difference between the two sets of injuries. In my opinion the award of $2,790,000.00 is an erroneous estimate of the damage in that it is not consistent with the judge's findings. I think that an award of $2,500,000.00 would be fair compensation for pain and suffering.

Loss of Past and Future Earnings

Past Earnings

Counsel for the appellant challenges the findings of the learned judge that the respondent was earning $5,000.00 per week as a security guard and $2,000.00 per week as an electrician. The respondent's evidence is that at the time of the accident he was a security guard and that he did electrical work "on the side". Since the accident he had not done any electrical work. The respondent began working as a security guard in 2002. He testified that the

money he earned from security work went into his bank account at RBTT by way of direct deposit. He was paid fortnightly. When he commenced employment as a security guard his employer held back two fortnights' pay. He had to work three fortnights before getting his first pay. His bank book was received in evidence without objection, as exhibit 1. The first entry was for February 8, 2002 and shows a deposit of $9,006.71. There are four entries relating to his pay for security work on the first page of exhibit. 1. The second page has six such entries. The third page begins with an entry dated June 15, 2002. The fourth page shows deposits of $11,340.28, $12,863.04 and $6,748.72 – all for security guard work, he said.

The entry for August 8 represents a cash deposit of $4,000.00. He said that at times he received part of his pay in cash; hence the cash deposit. The last entry of $2,645.48 was just before the accident. The pay he got would depend on the number of hours he worked hence the fluctuations in his income. He said that the bank book represents all the income he received from security work during that period.

In September, 2003, one year after the accident, he "tried to go back to work as a security guard." He went to the same company. He was sent to a location where he had to walk around perimeters, climb stairs and check buildings. He was unable to perform his duties properly. He was in pain when he climbed steps and walked around. He spoke to his boss and was sent to his boss's wife's business place to work. There he did not have much work to do.

He sat for the most time. Because of the constant pain in his back he had to get up and stretch often. He stayed at this location from September 2, 2003 to August 1, 2004. He has not worked as a security guard since. On August 1, he was bitten by dog. Because of his injury he was unable to evade the dog's attack. After the wound had healed he went back to the company and was refused work. He made attempts to get work at other security firms, all to no avail. He said he could not do any other work.

The learned trial judge found the respondent to be a witness of truth. She accepted his evidence that the deposits in the bank account were his salary as security guard. She concluded that the sum of $5,000.00 per week was reasonable in light of the fluctuations in his earnings.

Miss Phillips Q.C. complains that there was no proper evidence before the learned trial judge to substantiate the respondent's claim of loss of earnings as a security guard. There is no indication in the bank book of the source of these entries. There is, she also contends, no entries relating to the period September, 2003 to August, 2004. The respondent has failed to produce even one pay slip and has not mentioned the name of the company which employed him, she contends.

Lord Gifford, Q.C. for the respondent submitted that the evidence established that the respondent was working as a security guard, that he was unable to work by reason of the injury and what his earnings had been in the period before he was injured. No particular mode of proof is required, he

submitted. He contended that there is no rule that a claimant must call a witness or produce a document. What is important he said, is that the claimant must show:

(1) that he was working;

(2) that he was unable to do work because of the injury and;

(3) that he can establish how much his earnings had been in the period before the accident.

I am inclined to agree with Lord Gifford. In a claim for damages the claimant must specifically plead and prove each item for which he makes a claim. The respondent's evidence that he worked as a security guard was not challenged. In his particulars of claim under the caption "Particulars of Loss of Earning Capacity," the respondent averred that at the time of the accident he was working full time as a security guard and used to do electrical work in his spare time. There was not even a hint of a suggestion that he was not speaking the truth in this regard. Generally where the court is to be asked to disbelieve a witness, the witness should be cross-examined in that regard. Failure to cross-examine the witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence – See ***Markem Corporation and Anor v. Zipher Ltd.*** [2005] EWCA Civ. 267 following ***Browne v. Dunn*** [1894] 6 R 67. In my view it was clearly open to the judge to find that the respondent was at the material time working as a security guard.

The respondent's undisputed evidence is that as a result of the injury he sustained he was unable to work. The real issue therefore is whether or not he has established on a balance of probabilities how much his earnings were in the pre-accident period.

The learned judge found him to be a witness of truth and accepted his evidence that the deposits in the RBTT bank book represented his salary as a security guard. These deposits were fourteen (14) days apart. The respondent's evidence is that he was paid fortnightly. His average income was $10,495.00 per fortnight. The learned judge concluded that $5,000.00 per week was reasonable in light of the fluctuations in his earnings. In my judgment the judge's conclusion was based on evidence. It cannot, in my view, be said that the figures were thrown at the court.

I am inclined to agree with Miss Phillips that in the circumstances of the case one would expect the claimant to submit pay-slips to prove his salary. This is certainly desirable. However, failure to do so is not necessarily fatal to his claim. The court must look at all the evidence offered to substantiate the claim, however tenuous each aspect may be. This Court will not intervene unless the trial judge's conclusion was shown to be plainly wrong. I am not convinced that the learned judge's findings of fact were plainly wrong and that the award of $5,000.00 per week was unreasonable.

Counsel for the appellant also contended that the respondent's liability to pay tax was not taken into account by the learned judge. We have in this

country a pay-as-you-earn tax system in respect of employees. It is the obligation of an employer to deduct tax from the salary of an employee. The learned trial judge, as Lord Gifford correctly submitted, was entitled to assume that the law had been observed in the absence of any evidence to the contrary. It seems to me that the maxim *omnia praesumuntur rite esse acta* operates to place the burden of proving illegality or fraud upon the party asserting it.

Electrical Work

The contention of Miss Phillips Q.C. is that the respondent had merely plucked figures from the air. There has been no specificity with regard to any work he had done not even one particular job was mentioned, she complained. She submitted that this case is not like the push cart vendor case. Counsel was referring to ***Desmond Walters v. Carlene Mitchell*** (1992)JLR 173.

The respondent testified that he did electrical work, part-time. He was trained as an electrician at the St. Andrew Technical Vocational School. He received a certificate. He did further electrical studies at the Burke Trade School in the United States of America where he obtained a diploma. He was qualified to do residential wiring for light fittings, fans, air-conditioners and plugs. He has to stand on ladders and use drills in performance of his tasks as an electrician. Since the accident he is unable to use ladders; he is unable to go on the roofs of houses. He said he earned about $5,850.00 per fortnight. He obtained jobs

from his friends and used to work in the Portmore area. He did not keep business records.

The learned judge accepted the respondent's evidence that he did part-time electrical work. In considering whether the respondent's evidence was sufficient, the learned judge referred to **Mayne and McGregor on Damages** 12th Edn. at paragraph 994, ***Desmond Walters v. Mitchell*** (supra) and ***Hepburn Harris v. Carlton Walker*** SCCA No. 40/90 delivered December 10, 1990.

In the ***Hepburn Harris*** case evidence of the claimant's (a welder) earnings came from his oral testimony "unsupported by even a tittle of documentary evidence". Yet this Court declined to disturb the trial judge's assessment of the claimant/welder's loss of earnings.

In ***Central Soya Jamaica Ltd. v. Junior Freeman*** SCCA No. 18/84 (unreported) delivered on March 8, 1985 Rowe, P. said:

> "In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence."

In ***Ratcliffe v. Evans*** [1892] 2 Q.B. 524 C.A. Bowen L.J. in relation to special damages said at pages 532 to 533:

> "...the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with

> which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in proof of damage, as is reasonable, having regard to the circumstances and to the nature of the act themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The above passage was quoted by this Court in ***Walters v. Mitchell*** (supra) with obvious approval. In light of the above cases, it is my view that on the evidence tendered, which was accepted by the judge, this court should not interfere with the judge's award of $2000.00 per week under this heading.

Future Earnings

Learned Counsel for the appellant told the Court that she had no complaint with the multiplier of seven (7). The challenge was in respect of the respondent's earnings. In light of my opinion that the learned judge's findings and conclusions should not be disturbed, this challenge must also fail.

Conclusion

I would reduce the sum of $2.79M awarded for general damages to $2.5M for the reasons given. I would not interfere with the other awards. Accordingly, the appeal should be allowed in part. I would make no order as to costs in this Court.

McCALLA, J.A.

I agree.

MARSH, J.A. (Ag.)

I agree.

SMITH, J.A.

ORDER:

The appeal is allowed in part. The award of $2.79M for general damages is reduced to $2.5M. No order as to costs.