

GRENADA:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 of 1975

BETWEEN: MORALIS BRUNO - Plaintiff/Appellant

Vs.

FITZROY THOMAS - Defendant/Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: G. Clyne for Appellant
M. Bishop for Defendant

1976, May 24, 25, June 25

J U D G M E N T

PETERKIN J.A.

This is an appeal by the Plaintiff/Appellant against the decision of Bishop J. awarding him \$15,250.00 general damages, and \$55.00 special damages against the Defendant/Respondent for injuries received as the result of a motor vehicular accident on 10th February, 1970. The Plaintiff/Appellant filed his action in June of 1972, and the matter came on for hearing on 5th May, 1975. Judgment was delivered on 19th November, 1975.

The Plaintiff/Appellant who has appealed against the assessment of damages only seeks by way of relief to have both the special damages and general damages awarded increased.

The grounds of appeal are:-

- (a) The Learned Trial Judge acted upon wrong principles of law in the assessment of damages.
- (b) That the amount of damages awarded by the Learned Trial Judge is so very small as to make it an entirely

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erroneous estimate of the damage to which the Plaintiff/Appellant is entitled.

The Learned Trial Judge has stated in his judgment that there was no serious dispute over the nature and extent of the injuries suffered by the Plaintiff/Appellant. The Plaintiff/Appellant's own account is as follows:-

"After he crashed into the rock, at that stage I knew nothing.

Around 1.00 a.m. to 2.00 a.m. I opened my eyes and found I was in the General Hospital. I noticed dressings on the left side of my face, on my left leg; I tried to move my limbs, I could not move the left leg at all.

I got cut in the accident in my face. I got cut on my left leg where the dressings were. From the left hip socket down I couldn't move. I received medical attention. I was taken to the x-ray room for x-rays. After the x-ray room they prepared me for the operating theatre. I knew when I got to the theatre but I knew nothing after till I was back in the ward. I saw a steel pin below the left knee in the flesh. I saw a nickel plate like a horseshoe attached to that. About an hour or two after the leg was put in traction. I was lying on bed and couldn't move there. I had to do everything there.

At the time the surgeon was Dr. Friday. He put on the traction. I felt terrible. I felt uncomfortable and I had severe pain in the leg, hip, face and foot.

I remained in this Hospital up to 30th June, 1970. From there I went to Port-of-Spain General Hospital. Because of medical advice and attention. I paid my passage to go down. Government assisted me with hospital bill. I paid passage one way. I can't remember now. I think it was sixty or seventy something dollars. I think I have the ticket stub.

Dr. Agan Kazim attended to me there. I arrived at Port-of-Spain General Hospital on 30th June 1970. I remained as a patient up to the 15th January, 1971. I had another operation in Trinidad when they cut me open the length of my left thigh, a steel cup placed in there to form back the socket. I was placed in traction again. This operation was done I'd say in August or September 1970. Before that I was in bed.

/While.....

While there in traction I used to get physiotherapy attention from the physiotherapist. On the bed.

While I was taken out of traction I used to be taken in a wheel chair for the physiotherapy.

During all this I was felling pain.

I had been having abscesses in Trinidad. I left Trinidad Hospital on the 15/1/71 for Grenada Hospital.

I wouldn't doubt that Dr. Kazim wrote a formal discharge for 15th December, 1970, but I remained in hospital until January 1971 awaiting completion of arrangements between Governments. During that time I still got medicines and treatment.

I arrived in Grenada in 15th January, 1971, by plane. I went to Piarco by the ambulance - Government services. I went out to the plane using crutches.

From Pearls I went to the General Hospital by Grenada, ambulance. I was hospitalised in Grenada. I remained quite a while from 15th January, 1971. At that time Dr. Holgate attended to me. From that time onward. I was having antibiotics, medicine. I was still suffering from abscesses and being treated for it. I was a bed patient.

I was still having pains. Dr. Robertson a bone specialist from Trinidad came up. I was seen by him. After he saw me they took an x-ray. I had to go for an operation again. This time I was operated on by Dr. Holgate. After the operation I was back to bed again - a bed patient. I can't remember how long I remained in hospital. I went out. I was still having problems with abscesses in the left hip socket.

The accident caused the socket to be bad. I felt pain. All the time pain.

I was re-admitted to hospital. I can't recall how long I spent home before I was re-admitted.

My last discharge from Hospital was February to March this year. (1975)

Between 10th February 1970 and my last discharge I was hospitalised in Grenada about 9 to 10 times.

/After.....

After the operation Dr. Holgate performed on me after I came back from Trinidad, I had about three other operations.

Up to today I still have problems with the socket. I am still having the abscesses and pain. I have to be taking drugs all the time I am using crutches I cannot walk on my leg without using the crutches. Sometimes I use a crutch and a walking stick.

I have lost 3" - 4" on the leg and I have to wear build-up heel. The leg is shorter than the other. It cannot stand the weight on my body.

Before the accident nothing was wrong with me. I was fit as a fiddle. The accident cause me to be in this position."

There was also a medical certificate from Dr. Kazim which stated as follows:-

"This patient was admitted to the General Hospital, Port-of-Spain on 30/6/70 with a history of a Road Traffic Accident. He states he was involved in a Road Traffic Accident in February, 1970.

Clinical and Radiological examinations showed a fracture dislocation involving the left hip joint.

He was operated on by me and the procedure adopted was left Vitallium Cup Athroplasty of the left hip. Post operative recovery was uneventful. He was discharged from the ward on 15/12/70.

Examination then showed the left hip -

Flexion - 25
Abdaction - 45°

Shortening of the left lower extremity by - 1"

He was fitted with a raised heel on the left side.

The Permanent Partial Disability is assessed at 25%."

Finally there was the testimony of Mr. Holgate, the surgeon specialist at the St. George's hospital. It is in part as follows:-

/"According.....

"According to the Hospital record Mr. Bruno was admitted 10th February, 1970, not treated by me on his first admission. First time I treated him was 15th January, 1971. He was suffering from infection of his left hip. Subsequently re-admitted on several occasions.

The infection was following his injury which according to the record was a fractured dislocation of his left hip. In January 1971 he was suffering from infection of bone in left hip. Treatment was drainage of such abscesses as occurred from time to time. For opening of abscesses he underwent surgery about six or seven occasions. The type of operation I performed was just to open the abscesses except on one occasion - he was admitted on 15th May, 1972 for removal of a metal prosthesis. This was a replacement part of the head of the thigh bone. I removed it because of the infection. In my opinion it was put in because of the damage to his hip.

Subsequent to 15th May, 1972 I saw him. Exhibit MB2 - now shown me is a medical report dated 27th November, 1971. I expressed an opinion then.

I saw him after May 1972 for the recurrence of abscesses. I saw him on numerous occasions as an outpatient. These would not be recorded. He was also admitted to Hospital after May 1972 on several occasions. The last time he was admitted was 30th December 1974. He was treated for same condition - abscesses. I have seen him as an outpatient since December, 1974. Last time was about a month ago or two weeks.

In my opinion he is still suffering from the infection of his hip. The position has not yet stabilised. He is still unable to work. The present degree of disability is 60%. I should say that as he is unable still to work there is a temporary disability of 100%. The 60% would be the degree of disability when his infection has cleared up. It is likely to continue at 60% for ever. Yes Sir, I am satisfied that all of this is a direct result of the injury."

The issue of special damages poses little difficulty. There was clear evidence that at the time of the accident the Plaintiff/Appellant was working as a daily paid worker

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for between \$10.00 to \$15.00 per day. The trial judge found that he had worked for 15 months in the 3 year period prior to the accident. Counsel for the Defendant/Respondent has conceded that the trial judge should have fixed a sum as special damages for loss of earnings on that basis. Instead, he fixed nothing, stating that he would take it into account in quantifying the general damages.

In my view the Plaintiff/Appellant is entitled to receive a sum calculated on that basis up to the date of judgment, namely, for a period of approximately 28 months. I would assess this at \$7,000.00. Counsel for the Defendant/Respondent has also conceded that the court should have fixed a sum for the payment of the Plaintiff/Appellant's laundry etc. while he was hospitalised. The claim made under this head is for \$360.00. I would allow this.

I would accordingly assess special damages in the sum of \$7,415.00.

On the issue of general damages, the trial judge in referring to the evidence of Mr. Holgate stated, in part, as follows:-

"I have interpreted Mr. Holgate's opinion to mean that by the year 1980, in the absence of unusual circumstances, the bone infection suffered by Moralis Bruno as a direct result of his leg injury will stabilise. Before and until then, the infection will fluctuate in its seriousness and the plaintiff will be faced with 60% partial permanent disability. It is clear that the disability given by Mr. Kazim in his report did not contemplate bone infection. Not only was there no reference to any osteomyelitis but there was the positive statement by him that "post operative recovery was uneventful." It is equally clear and undenied that osteomyelitis set in and was treated from 15th January 1971 onward. Between 15th January 1971 and the 25th February this year, Moralis Bruno had been admitted and discharged as a patient at the General Hospital, on seven different occasions and for a total of about 15 months, all

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connected with the injury to his left hip."

In dealing with the pain and suffering which the Plaintiff/Appellant had to endure the trial judge stated:-

"As far as pain and suffering were concerned, the testimony of the plaintiff, though dramatised at times, remained unchallenged. While there was no evidence from a medical expert to support the plaintiff's assertion I believe that he suffered severe pain for about four months. Thereafter he continued to have pain in his left hip joint until the date that he gave his evidence. This situation is likely to continue, with fluctuating intensity, for about another 4½ to 5 years: and the plaintiff may sometimes have to use pain-killing treatment in the form of drugs."

The trial judge in my opinion quite rightly found that the evidence did not establish that there had been a diminution in the Plaintiff/Appellant's sexual prowess as a result of the accident, nor did it establish that his injuries were responsible for his wife having left him.

He went on to state that the most difficult consideration for assessment was that of effect on pecuniary prospects. He then stated that he could find no good reason to regard the Plaintiff/Appellant's assertion that he earned at the rate of about \$450.00 per month at times as a construction contractor as being untruthful or unreliable. He found that these jobs were for 15 months during the 3 year period prior to the accident. Finally, he stated,

"I have regarded it as morally reasonable that in this ten year period the plaintiff would have been awarded contracts from Government, and I have used the rate established by the evidence i.e. 15 months work in a three-year period, as a reasonable basis."

Counsel for the Plaintiff/Appellant, after going through the evidence in some detail, has submitted on the one hand that the general damages in all the circumstances was inordinately low. On the other hand Counsel

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for the Defendant/Respondent has asked the court to find that all the judge's conclusions were correct. He then submitted:

- (i) that no sufficient nexus has been shown in the giving of the medical testimony so as to join all of the links in the claim of circumstances as regards the injuries claimed; and
- (ii) that in any event the amount awarded for general damages was not so unreasonable as to constitute a wholly erroneous estimate.

With regard to (i), I do not agree. My own view is that it is made plain from the evidence of Mr. Rolgate in which he stated as follows:-

"The type of operation I performed was just to open the abscesses except on one occasion - he was admitted on 15th May, 1972 for removal of a metal prosthesis. This was a replacement part of the head of the thigh bone. I removed it because of the infection. In my opinion it was put in because of the damage to his hip."

The rest has been connected by the evidence of the Plaintiff/Appellant himself.

As regards the second submission, when one takes into account that the Plaintiff/Appellant's degree of disability will be 60% for ever, and the fact that his bone infection, with its concomitant pain, is not likely to stabilise before the year 1980, I am of the view that the award of general damages was inordinately low. I would increase the general damages to \$22,000.00.

Accordingly, I would allow the appeal, and grant the relief sought. The total award for damages should amount to \$29,415.00. The Appellant should have his costs here and in the Court below.

/N.A. PETERKIN.....

(N.A. PETERKIN)
JUSTICE OF APPEAL

I agree

(E.L. ST. BERNARD)
JUSTICE OF APPEAL

I also agree

(MAURICE DAVIS)
CHIEF JUSTICE

MONTSERRAT

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO. 1 of 1975

BETWEEN: JOSEPH (BUXIE) BUFFONGE - Appellant

And

 JOSEPH LEE - Respondent

Before: The Honourable the Chief Justice
 The Honourable Mr. Justice St. Bernard
 The Honourable Mr. Justice Peterkin

Appearances: John Kelsick for appellant
 K. Allen for respondent

1976 March 9, 10

J U D G M E N T

ST. BERNARD J.A.:

The respondent was awarded the sum of \$590 damages against the appellant for trespass to his motor vehicle on the 25th June, 1973.

The facts found by the Magistrate were that the respondent owned, on the above date, a motor car which he had purchased for about two years previously for \$1,000. The car was, about six weeks before, parked, with the assistance of the appellant and others, onto an empty lot of land in the possession of one Joseph Greer. On the 24th June, 1973, the appellant and the respondent had a quarrel and the following day the appellant, using a stick as a lever and with assistance, pushed the car into a nearby ghaut where it remained for about a year prior to the hearing of this action.

At the hearing of this appeal counsel abandoned the first ground which dealt with liability and argued ground 2 which related to mitigation and the quantum of damages.

On this ground counsel submitted that the respondent took no steps to mitigate the damages since he left the car in exactly the same place where it was pushed. He stated that the respondent gave no evidence

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which indicated that the use of a crane to move the car was unreasonable in the circumstances; neither did he cause any investigation into the extent of damage done to the vehicle, nor did he give any approximate value of the car immediately before the act of trespass. He finally submitted that the respondent was not entitled to any damages at all, as he had not proved any. He conceded, however, in answer to a question from the Court, that the respondent would be entitled to damages for the act of trespass but that the damages should be nominal.

The learned Magistrate, although he stated in his reasons for decision at page 19 of the record, that the respondent had not strictly proved what damage flowed from the appellant's wrong doing, nevertheless proceeded to make an assessment and awarded damages. In my view this assessment was based on wrong principles. The only evidence on the record which showed the value of car was the price paid for it in 1971. The car was involved in a collision previous to the 25th June 1973, and was laid up by the side of the road for some time. There was no evidence of the extent of damage caused by the act of trespass.

In my opinion, in these circumstances, the only damage which could properly be awarded by a court was exemplary damages for the trespass. In *Mayne & McGregor on Damages*, 12th edition, at page 198 paragraph 209, the learned authors state as follows:-

"Not, however, until the Court of Appeal decision in *Owen & Smith v. Reo Motors* (1934) 151 L.T.274, was it established that exemplary damages could be awarded in trespass to goods."

In the present case the conduct of the appellant appears to me to merit punishment as it was malicious and vindictive and I would award exemplary damages. Accordingly I would allow the appeal in part, set aside the damages and order made by the Magistrate and in place thereof

/award.....

award the sum of \$250.00 damages. Costs of appeal agreed at \$75.00

(E. L. ST. BERNARD)
JUSTICE OF APPEAL

I agree.

(MAURICE DAVIS)
CHIEF JUSTICE

I also agree.

(N. PETERKIN)
JUSTICE OF APPEAL