Personal Injury
Damage

#032

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 205 of 1994

BETWEEN:

FENTON AUGUSTE

Plaintiff

and

FRANCIS NEPTUNE

Defendant

Mr. H. Deterville and Mr. S. Anthony for Plaintiff
Mr. D. Theodore for Defendant

1995: November 24;
1996: June 17 and 18;
July 31.

J U D G M E N T

MATTHEW J.

By writ of summons indorsed with statement of claim and filed on March 29, 1994 the Plaintiff claimed damages for personal injuries and related costs arising from the overturning of a vehicle in which he was being driven on June 18, 1993. The Defendant entered appearance on May 10, 1994 and filed a defence on October 14, 1994 in which he denied liability and by a late amendment during the trial he alleged contributory negligence on the part of the Plaintiff.

A request for hearing was filed on February 7, 1995. As a result of the accident which occurred on the Dennery - Praslin high road the Plaintiff was hospitalised for six months.

Dr. Richardson St. Rose attended to the Plaintiff. He said he first saw the patient on July 1, 1993 when he found there was a fractured dislocation of the eleventh and twelfth thoracic vertebrae which resulted in a complete spinal cord transection and paraplegia. He said the spine was stabilised by a posterior spinal

fusion in situ. The orthopaedic surgeon stated that the above condition resulted or will result in the following:

(a) confinement to a wheel chair;

(b) urinary incontinence;

(c) constipation and foecal incontinence;

(d) recurring bedsores;

(e) recurring low back pain.

He said the situation will be permanent and the Plaintiff will not walk again. He said the Plaintiff will have no control over his bowels or his urine and he will not be able to look after himself after he has urinated or passed stool.

He said the patient will have to be well nourished to avoid the frequency of bed sores. He said he will need to wear pampers for his incontinence and he will need a urinal for his urine problem. Under an extraordinarily lengthy cross-examination he said:

"I am 100 per cent sure he will not walk again."

When he was re-examined the surgeon stated that when one is in such a condition there is occasionally a lot of severe pain. He also stated that for the Plaintiff to be properly taken care of he would need regular nursing care for the rest of his life, that is, to be seen by someone such as a nurse or doctor once every two or three months and he would need someone to look after his personal hygiene on a daily basis.

In the vehicle on the day in question was the Plaintiff who was sitting in the left front of the vehicle, the Defendant driver on the right hand side and between them was Prisca, the Plaintiff's girlfriend who is the Defendant's daughter.

According to the Defendant on the day in question the three persons mentioned above left the home of the Plaintiff's mother about 5.30 p.m. and proceeded past Mandeville in the Quarter of Dennery when

something happened there. He said when he took the corner he met a motor car and a container vehicle and the car was overtaking the container. He said he was closer to Praslin and was facing Micoud. He said he met the two on-coming vehicles in the corner and when he saw the speed the car had, he pulled the van to the gravel and he was frightened at the time. He jammed his brakes and the van capsized on the left side. He said he was travelling about 30 miles per hour before he saw the two vehicles. He said the Plaintiff was sleeping at the time and was sleeping as far back as La Caille. Then he went on to say -

> "The reason why I left the left side. There is a precipice on the left hand side and the gravel was pulling my van to the precipice so I jammed my brake, the stones turned the vehicle and then it capsized on the right hand side."

He stated that after the accident a friend arrived and they lifted the van to remove the Plaintiff from underneath. The Plaintiff was taken to the Dennery hospital then later transferred to the Victoria Hospital.

Prisca is in Martinique and did not give evidence. The only other eye witness was the Plaintiff. His account is that the Defendant was driving in the direction of Ti Rocher, Micoud but they did not reach Ti Rocher, Micoud at all. He said they had passed Dennery and approached the Praslin hill when he saw the van going out of control and went up the hill and overturned and this resulted in the damage to his spinal cord. He said the van turned over on a straight road. He said he used to drive a motor vehicle before and he estimated the speed of the Defendant on the day and time in question as between 55 and 60 miles per hour. He said there was no other vehicle coming at the time and there was no vehicle approaching from behind.

He said further that he was travelling in the van on the left hand side and the van turned over on the right hand side. He said there

was no container on the road before the accident and the van in which he was driving was a pick-up.

He was not spared a mauling cross-examination and he stood up to it admirably. He denied on several occasions that while in the van he was dosing off from time to time or that when the accident happened he was sleeping. He said he did not see any container vehicle or car approaching them. He reiterated that he saw the van go out of control and he did look at the speedometer which read between 55 - 60. He admitted he did not read miles but he only saw "55". He said he did not know whether one kilometer is 5/8 of a mile and he denied that the Defendant was driving less than 30 miles per hour.

I might interject here that even if it is held Defendant was travelling at 55 kilometers, if a kilometer is 5/8 of a mile, he would have been travelling at over 34 miles per hour.

I find that the Plaintiff was not at any time on the journey dosing off and I find more specifically that he was not sleeping at the time of the accident. I find too that there was no oncoming traffic in the way of the Defendant and there was neither container nor car which put him into any situation as to cause the accident.

Defendant in his own examination in chief did not say he was driving less than 30 miles per hour. He said "I was travelling about 30 miles per hour before I saw the two vehicles." And when he was cross-examined he said: "The reason why I did not stop the vehicle is because I had too much speed."

I am of the view that the sole cause of the accident was the excessive speed of the Defendant which prevented him from keeping proper control of the vehicle on the road. I find the Defendant was driving at a speed which was too fast in the circumstances and because of that he failed to exercise or maintain any proper control of his vehicle.

I accept the authority of NORTHROCK LTD. v. JORDINE Civil Appeal No. 12 of 1991 on the requirements to establish the tort of negligence.

I find the Defendant to be solely liable for the accident.

It is unnecessary for me to consider contributory negligence since I find the Plaintiff was not asleep at the time of the accident, but even if that were not so the Defendant would have much difficulty in persuading me that a person who is asleep on a vehicle makes himself contributorily negligent in the event that the vehicle gets into an accident and the Plaintiff is injured.

It is now necessary for me to quantify the damages but before doing so I should like to refer to three affidavits which were tendered in evidence on behalf of the Plaintiff.

Andrina Landers, a retired nurse, stated in an affidavit that she is engaged in providing nursing care to persons who are bed-ridden and she swares that nursing care should be provided to the Plaintiff every day for three hours at $20.00 a day. Dr. St. Rose, however, under cross-examination stated:

> "For him to be properly taken care of he would need regular nursing care, say for the rest of his life, to be seen by someone, a nurse or doctor, once every two to three months."

I find the affidavit of Andrina Landers to be self-serving and I reject it. I shall be making provision for nursing care but certainly not in terms of her affidavit.

The second deponent was Thomas Walcott, a qualified civil and structural engineer, who estimated that to alter the access to the Plaintiff's home to facilitate a wheel chair would cost $49,045.82 in addition to $3,234.56 for the cost of his services. I do not recall any of the witnesses describing the house in which the

Plaintiff lives. I rather suspect it to be a chattel house since it was stated that there is no internal bathroom. When one considers the vulnerability of such houses in a hurricane area I wonder whether it would not be possible for the house to be blown away leaving intact the extravagant service walkway which may almost be the value of the house. I reject that claim for in my view the average mason could build an adequate walkway for not more than $10,000.

The third deponent, Terencia Gaillard, states that she is familiar with the prices of wheelchairs and she said that a wheelchair suitable for the Plaintiff would cost US$595.00. Indeed this deponent who is Director of the Red Cross Society visited the Plaintiff at the Victoria Hospital and made available to him the wheel chair which he now uses. This is a most reasonable claim which I shall grant in due course.

An abundance of cases was cited and I do not propose to examine them all or even to refer to all of them. I am also not going to undertake any economic or statistical analysis of the cases, with or without price index, in order for me to determine the quantum of damages which I regard as appropriate for the Plaintiff.

Any consideration of general damages in personsl injury cases ought to begin with a reference to the well known case of CORNILLIAC v. ST. LOUIS (1965) 7 W.I.R. 491. In that case Sir Hugh Wooding laid down the considerations which ought properly to be borne in mind in assessing the general damages as the following:

(a) the nature and extent of the injuries sustained;

(b) the nature and gravity of the resulting physical disability;

(c) pain and suffering;

(d) loss of amenities;

(e) the extent to which pecuniary prospects were affected.

These considerations have been consistently referred to in the cases. They were mentioned in JULIUS COOLS v. ST. LUCIA AGRICULTURISTS ASSOCIATION LTD, a case decided by Peterkin J in St. Lucia on June 11, 1974 and they were mentioned in GODFREY GILBERT v. CARLTON SAMUEL, a case decided in Saint Vincent on October 19, 1990. These two cases were paraplegic cases.

In the present case there is no doubt that the Plaintiff will remain in that condition for the rest of his life and there is no evidence of loss of expectancy of life. The Plaintiff would probably have 40 more years working life.

Besides Cools and Gilbert I considered three other paraplegic cases in DE SOUZA v. TRINIDAD TRANSPORT ENTERPRISES LTD. No. 1, (1971) 18 W.I.R. 138; AZIZ AHAMAD LTD. v. RAGHUBAR (1967) 12 W.I.R. 352 and RAMCHARAN v. LUTCHMANSINGH Trinidad and Tobago H.C.A. No. 731 of 1978. The case which most resembles the present is GILBERT v. SAMUEL. Having regard to the cases referred to above and the evidence in this particular case I award the Plaintiff damages in the sum of $55,000 to cover the first four considerations referred to by Sir Hugh Wooding in CORNILLIAC.

The fifth consideration is a pecuniary head. As learned Counsel for the Plaintiff quite rightly said, after the consideration of the first four heads, the other calculations are arithmetical. In the consideration of loss of future earnings the Court must resort to figures based on the contingencies of life. Resort is had to the multiplier/multiplicand form of calculation. Multipliers and multiplicands were adopted in the following cases, to name a few:

DE SOUZA v. TRINIDAD TRANSPORT ENTERPRISE LTD No. 1 (1971) 18 W.I.R. 138.

AZIZ AHAMAD LTD. v. RAGHUBAR (1967) 12 W.I.R. 352. 355.

In GRAHAM v. DODDS 1983 1 W.I.R. 808, H.L. the House of Lords assumed that a multiplier of 18 in the case of a breadwinner

between 20 and 30 could not be considered excessive.

In MORIARTY v. MCCARTHY 1978 2 AER 213, another paraplegic case, in the case of a woman of 24, it was said by O'CONNOR J, that in the case of a young man aged 24 a multiplier of 15 would have been appropriate in calculating the damages for loss of earnings. In HUNT v. SEVERS 1994 2 WLR 602 the Judge at first instance in assessing the cost of future care and loss of future earnings took an overall multiplier of 14 on a life expectancy of 25 years. The Court of Appeal increased the multiplier to 15. The House of Lords did not disturb that factor in the case. In all the circumstances of this case I shall apply a multiplier of 15 as from the date of trial.

But one must find the appropriate multiplicand. I believe that the Plaintiff's real wages was $200 a fortnight or $400 a month. The Plaintiff had not got a secure job and employment may well have been seasonal or dependent upon harvesting. The fortunes of banana farmers vary and so must their workers. Besides the usual disturbance by storms some people have now resorted to other methods of living because of the uncertainty of the industry. I would arrive at a multiplicand of $2,500 per year. My estimate of loss of future earnings would therefore be $37,500.

Another head of general damages would be cost of future nursing care. Under this head I shall consider an appropriate allowance for the Plaintiff's mother, the cost for the occasional visit by a nurse or doctor, an amount for medicine and the cost of pampers. As seen above, allowance for future care was granted in Hunt v. Severs. The same was the case in RAMCHARRAN v. LUTCHMANSINGH and again in LIM POH CHOO v. CAMDEN AND ISLINGTON AREA HEALTH AUTHORITY 1979 2 AER 910, H.L., a case where a senior psychiatric registrar suffered cardiac arrest and irreparable brain damage due to the negligence of a hospital controlled by the Defendant health authority.

The Plaintiff's mother has no permanent employment. She is a week-end vendor of fruits. She also has to look after her sick husband. Her other son Emilton is at home doing practically nothing. I would allow her $100 a month for that extra attendance to the Plaintiff. I would allow $300.00 a year for the occasional doctor's visit and medicines. I would allow $1200 a year for pampers. That would in my estimation amount to $40,500 for nursing care. The total general damages would therefore be $133,000.

I now turn to the special damages. The first item to be considered would be approximately 36 months employment lost from the date of the accident to the date of trial. For that relatively short period I'd use the actual wages of $400 a month and so the total earnings lost would be $14,400. The pampers spent at $1,200 a year would be $3,600 and the amount for the mother's care would be likewise $3,600. I would allow transportation costs of $1,000 for the visits to the hospital by the Plaintiff's mother and the Plaintiff himself under cross-examination as to amounts paid when he subsequently visited the hospital said. "I paid $60.00 once." I shall allow the Plaintiff the $60.00. I shall allow the costs of the wheel chair as previously stated and this I calculate to be approximately $1,600.

In a local case, LINDA CHARLERY v. RISCA ALCEE, Suit No. 190 of 1984 and decided on December 1986 at page 13 I awarded the Plaintiff 20 per cent of $25,000 which I assessed to be the capital cost for new accommodation. I award the Plaintiff $10,000 for cost of the service walkway referred to in the evidence as a ramp.

Finally, there is the cost of medicines. When he gave evidence the Plaintiff tendered without objection two sets of receipts for medicines and/or pampers in the amounts of $495.00 and $14.75. His mother, Theresa Mark, tendered three exhibits for medicines. The total amount for medicines in T.M.I and T.M.2 was $360.29 and T.M.3 was for $45.69 from which was deducted $15.25 for deodorant spray

and aquafresh. The total amount for medicines was therefore $901.28.

In my calculation the special damages would amount to $35,161.28.

Finally, there are the questions of N.I.S. deductions and income tax as well as interest.

In JOHNSON v. BROWNE (1972) 19 W.I.R. 382 Douglas C.J. in the High Court of Barbados stated at page 385 that both on the authorities and on principle it appeared to him that both the tax element and national insurance contributions must be taken into account in assessing loss of earnings.

In that case the Plaintiff was an employee of Mr. Ian Niblock and there was evidence of his liability to tax and to pay national insurance contributions. In this case the only evidence on these matters arose in cross-examination of the Plaintiff when he said:

> "I was going home with the whole of the $300.00. There were no deductions like N.I.S. from it."

In my judgment there is no evidence or basis upon which I can make deductions for income tax and N.I.S contributions.

It would appear that in JOHNSON v. BROWNE AT PAGE 392 interest at the rate of 4 per cent was awarded on the damages for loss of earnings from the date of the service of the writ until judgment.

In DE SOUZA v. TRINIDAD TRANSPORT ENTERPRISES LTD No. 2, (1971) 18 W.I.R. 150 it was held that a claim for interest need not be pleaded and that the Plaintiff was entitled to interest on the special damages.

My order is that the Defendant is ordered to pay the Plaintiff:

(i) General Damages $133,000;

(ii) Special Damages $35,161.28;

(iii) Interest on the Special Damages at 4 per cent from March 29, 1994 to this day; and

(iv) Costs to be agreed or taxed.

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A.N.J. MATTHEW
Puisne Judge