BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.23 OF 2004

BETWEEN:

CEDRIC DAWSON

Appellant

and

CYRUS CLAXTON

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C. — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal
The Hon. Mr. Hugh Rawlins — Justice of Appeal [Ag.]

Appearances:

Mr. Terrence Neal with Ms. Heather Tull for the Appellant
Dr. Henry Brown with Ms. Benedicta Samuels – Richardson for the Respondent

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2005: January 13; 14;
May 23.

JUDGMENT

[1] GORDON, J.A.: This appeal deals solely with the issue of the quantum of damages awarded by the learned trial Judge after judgment by admissions had been entered in favour of the Respondent establishing the liability of the Appellant. The Respondent was injured in a motor vehicle accident when the Appellant's vehicle struck his vehicle from behind. As a result of the accident the Respondent suffered a C3-C4, C4-C5 disc herniation.

[2] The learned trial Judge in a most careful and detailed judgment awarded the Respondent the following sums as General Damages:

- Pain, suffering and loss of amenities $36,000.00
- Loss of future income $30,843.00

- 20% contingency for loss of earning capacity $73,164.00
- Cost of future medical attention. $20,000.00

In addition, the learned trial Judge awarded the following sums as Special Damages:

- Loss of income between the date of accident to the date of judgment: $164,500.00
- Medical expenses $15,084.14
- Interest on loss of income at 5% (2 years) $17,204.20
- Interest on medical expenses at 2.5% (2 years) $754.20

[3] The Appellant is dissatisfied with the various awards and has appealed to this Court on a variety of grounds.

[4] The first complaint of the Appellant is with the conclusion of the learned trial Judge that the Respondent earned $50,000.00 per year. This conclusion impacts in three areas of the award, namely, in special damages for loss of income between the accident and the date of judgment, and in general damages for loss of future earnings and loss of future earning capacity. The learned trial Judge found that the Respondent was in receipt of a gross salary of $50,000.00 per annum from which he deducted various expenses, including what the Respondent would have had to pay by way of income tax, arriving at a net figure of $40,647.00 per year.

[5] In sum, the Appellant takes issue with this finding of fact by the learned trial Judge. There are a number of cases in which this Court has opined on the circumstances in which an appellate court will interfere with a finding of fact in the court of trial. In a recent case, Grenada Electricity Services Limited v Isaac Peters[1] the learned Chief Justice, Sir Dennis Byron, found cause to restate the well known dictum of Viscount Simon in Watt v Thomas[2]. Sir Dennis said:

> "It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a

[1] Grenada Civil Appeal No. 10 of 2002
[2] [1947] AC 484

> rational basis for differing from the trial judge who had the advantage of observing the witnesses in the process of giving the testimony."

This statement is really a distillation of the classic statement made by Viscount Simon In Watt v Thomas (supra) to the following effect:

> If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

[6] The learned trial Judge had this to say in regard to this aspect of the evidence in this case:

> "I find it would be futile to attempt to determine the claimant's income by using the incomplete data that was before the Court. What I am left to do is to decide whether I believe the claimant as to his income. I found the claimant to be a credible witness after seeing him under cross examination. Such documentation as he produced, which I expressly do not take as representative, proved that for almost all the months for which job estimates were produced the claimant made in excess of $1,000.00 for a single job. This tended to go some distance towards confirmation of the claimant's testimony. I am satisfied that there is sufficient evidence before me to find on a balance of probability that the claimant's annual income before the accident was in the region of $50,000.00 and I so find."

[7] I am satisfied that taking the evidence as a whole it can reasonably be regarded as justifying the conclusion of the learned trial Judge. I will, however make one comment in passing. It is the obligation of the claimant in any claim for damages to provide the best evidence of which he is capable. In this case, the claimant stated that he paid income tax. He can be considered extremely lucky that the trial Judge found him a credible witness and based his award on his credibility. It might well be that another Judge would have found the absence of income tax returns to be a deficiency redounding to the disadvantage of the claimant.

[8] The next ground of appeal was that the learned trial Judge erred in law in holding that the Court could take into consideration the Respondent's fraudulent criminal practice of misrepresenting the true cost of parts to the insurance company and compensate him for the profit so derived. This is what the learned trial Judge said on this aspect of the evidence:

> "I would add that I believed the claimant when he testified that he made a profit on parts that he would buy more cheaply in Puerto Rico than for what the parts sell locally. He said he would bill the customer at the higher price and keep the difference for himself."

[9] From the evidence it would appear that the Respondent, when he was required to present an estimate, used the price of parts as if purchased in Tortola. Once he obtained the job, he then, at his own expense attempted, and usually succeeded, to source and purchase the parts at a cheaper price, usually in Puerto Rico. I can find nothing inherently wrong with this practice. The estimates formed an offer by the claimant to do a particular job for a price and the client had the option to accept or reject the offer. As long as the client got the job at the agreed price, then I can see no reason for complaint. I would reject this ground of appeal.

[10] The next complaint of the Appellant is that the learned trial Judge was wrong in law to hold that the Appellant failed to satisfy the burden of proof that it was unreasonable for the claimant to pursue no form of employment for a period of four years. In other words, the Appellant was urging that the Respondent had failed to mitigate his loss. The Respondent's evidence on this issue was that (a) he could not work because he was left handed and that sometimes his left arm would cramp up giving him a lot of pain, and additionally, the kind of work he did involved using heavy equipment; (b) that it would have been very difficult to have gotten a work permit to employ someone from outside, though he never tried, and, (c) that he did not consider employing an assistant because he was used to working alone and his customers relied on him personally.

[11] In The Solholt[3] Sir John Donaldson M.R delivering the judgment of the Court said the following:

> "A Plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

In that same case, the Master of the Rolls, following Payzu v Saunders[4], said that "whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not of law." As McGregor on Damages 16th Edition says at paragraph 300, one result of this is that once a Court of first instance has decided that there has been, or has not been, a failure to mitigate, it is difficult to persuade an appellate Court to come to a different view. In other words the principles of Watt v Thomas (supra) apply.

[12] The argument of Counsel for the Appellant was twin pronged. Firstly, he argued that the learned trial Judge placed an unreasonable burden of proof on the Appellant to show that the Respondent had done as much as he could to reduce his losses. Secondly, learned Counsel complained that the trial Judge failed to take into account the unchallenged evidence of the Respondent's witness who had given evidence of seeing the Respondent daily at his garage "attending to various chores such as washing vehicles and general maintenance of vehicles." I agree with learned Counsel for the Appellant in both respects. As was stated above, the Respondent was under no "duty" to mitigate his loss. However, the Appellant cannot be liable for the respondent's failure to either try for a work permit or to try to source an assistant to deal with that part of his work that he felt unable to do. Once the Respondent raised these issues in the way that he did, I am of the view that the evidentiary burden shifted to the Respondent to rebut the allegation of unreasonable behaviour and to show that he had behaved in a way that would have minimized his losses. Further, the learned trial Judge seems to have ignored

[3] [1983] Lloyds Rep. 605 C.A.
[4] [1919] 2 K.B. 581

the unchallenged evidence of the Appellant's witness of seeing the Respondent apparently at work on a daily basis. He certainly did not refer to it in his judgment.

[13] Learned Counsel for the Appellant also complained that the learned trial Judge erred in law in holding that the Court could make an award for future loss of earning capacity when there was no evidence before him of any such loss. By definition, loss of future earning capacity is incapable of precise proof, absent a crystal ball. As McGregor (opus cited supra) puts it at paragraph 370:

> "Claims for loss of prospective earnings arise every day in personal injury cases, and two factors militate against any exactness in the assessment of the loss, namely the uncertainty as to the precise length of time that the plaintiff's disability will last, and the uncertainty as to the precise pattern that the plaintiff's future earnings would, but for the injury have taken. Niether of these uncertainties prevents the court from making an assessment of the probable loss."

In this case there is evidence that the Respondent has been incapacitated and that remedial surgery has a 20% chance of failure, which would leave the Respondent in his state of incapacity. The Court is well able, in those circumstances to assess a probable loss of future earning capacity. In this, case the trial Judge predicated prospective loss of future earnings (as opposed to loss of future earning capacity) based on the Respondent having surgery and recovering within 9 months. I find the argument of Counsel on this point to be lacking in merit.

[14] I therefore would vary the trial Judge's award for both loss of earnings before the trial and loss of future earnings in accordance with the following formulae:

Loss of earnings before trial - $40,647.00 x 50% x 4years = $81,294.00 (special damages)

Loss of prospective earnings - $40,647.00 x 50% x 0.75 years = $15,243.00 (general damages).

In addition I would vary the trial Judge's award for loss of future earning capacity in accordance with the following formula: $40,647.00 x 50% x 20% x 9 (multiplier) = $36,582.00 (general damages).

[15] The next ground of appeal that was argued by the Appellant was that the learned trial Judge erred in law in allowing as part of the special damages the travel expenses of the Respondent's companion as she accompanied him to visit various doctors. The Respondent gave evidence that he needed the services of his companion on his travels. That evidence was not challenged by the Appellant in cross examination. In the circumstances, it stands uncontroverted. In Donnelly v Joyce[5] the head note reads:

> "In an action for personal injuries in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant.; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need."

In the circumstances I see no reason to disturb the learned trial Judge's finding in this regard and would dismiss this ground of appeal.

[16] Allied to the complaint by the Appellant for the costs of the Respondent's companion's travel, and based on the same arguments, the Appellant challenges the award of $3,660.00 within the sum of special damages awarded for medical expenses which sum was paid out to (or charged by) one Ornette Lee, a friend of the Respondent who had put up the Respondent and driven him to and from his appointments in New York. The quantum was not challenged, but the principle was. Clearly, the cost of staying and getting to and from his medical interviews was a direct result of the wrong committed by the Appellant. I find no merit in this argument.

[17] The final ground of appeal related to the award for future medical care. The learned trial Judge accepted that the appropriate situs for the carrying out of the remedial surgery was Trinidad and accepted the evidence that the cost of the surgery would be $8,000. He then doubled the figure to account for after care and

[5] [1973] 3 All ER 475

added a further $4,000.00 for miscellaneous expenses including the cost of having the respondent's companion travel with him. I am unable to find any recommendation in the medical evidence that such a companion would be necessary, or even, at a lower level, desirable. I would remove the sum of $4,000.00 added on by the trial Judge as miscellaneous costs from the award for future medical expenses.

[18] In conclusion, the following is the award of this Court:

General Damages

(i)	Pain, suffering and loss of amenities	$36,000.00
(ii)	Loss of future income	15,243.00
(iii)	Loss of earning capacity	36,582.00
(iv)	Cost of future medical attention	16,000.00

Special Damages

(i)	Loss of income between date of accident and judgment	$81,294.00
	Medical expenses	$15,084.14
Interest on (i) above at 2.5% for two years		$2,032.00

Costs

[19] The costs order is varied to prescribed costs on the above award in the trial Court. No order is made as to costs in this Court reflecting partial success by both sides.

Michael Gordon
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Hugh Rawlins
Justice of Appeal [Ag.]