JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 40/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	HEPBURN HARRIS	PLAINTIFF/APPELLANT
A N D	CARLTON WALKER	DEFENDANT/RESPONDENT

Miss Dorothy Gordon for Appellant

John Vassell instructed by
Dunn, Cox & Orrett for Respondent

November 26 and December 10, 1990

ROWE P.:

As a result of a motor vehicle accident on December 4, 1988, the appellant suffered severe injuries to his left leg and left hip which resulted in some permanent disability. The respondent did not contest liability and on May 10, 1990 Langrin J. assessed special damages at $121,9[illegible] and general damages under two headings:

(a)	Hardship on labour market	- $ 22,500.00
(b)	Pain and Suffering and loss of amenities at	- $100,000.00

Langrin J. did not record any reason for his award which in the end was unsatisfactory to both sides. Mr. Vassell conceded that the special damages should be increased by at least $40,000.00 to reflect the sum payable to a substitute minibus driver up to August 1990 while Miss Gordon vigorously attacked every assessed sum awarded.

The eminent Professor Golding, Orthopaedic Surgeon confirmed the pleading that the appellant suffered a fracture of the upper end of the tibia and fibula with an unusual fracture of the acetabulum socket. Consequential injuries include wasting of the quadruped muscles, swelling around upper third of left lower leg, scarring, 3/4" shortening of left leg and pain in left hip. Prof. Golding estimated the impairment to be 50% of left leg and 20% of the whole person. He recommended a total hip-replacement as his treatment of the appellant between January 7, 1989 and at the time of his giving evidence in May could not prevent persistent pain in the hip. Treatment in hospital included immobilising the left leg in a plaster cast for three weeks in December-January. A further plaster cast was applied to the hip for four weeks as of April 1, and extensive physiotheraphy followed later. The appellant was discharged from hospital on crutches and confined to bed for some three months. Disabilities of which the appellant complained included inability to stoop or stand for long periods; a limping gait resulting in pain in the hip, some anxiety and depression; inability to garden or swim; inability to drive a minibus. In recommending the hip-replacement Prof. Golding opined that this would effectively eliminate

the pain in the hip but the wasted, shortened leg, would not be ideal for a minibus driver, an occupation he would advise the appellant to eschew.

Notwithstanding that since 1976 he suffered from a heart condition, the appellant was an unusually active man who operated a minibus from Kingston to Montego Bay six days each week and one way from Kingston to Bog-Walk or Linstead each day. On the seventh day he assisted as a specialist welder in his way-side welding business at Bog-Walk where he lived, and found time overall to tend his kitchen garden and keep trim his fences and lawn. In calculating his claim for special damages the appellant put forward a figure of gross earnings of $1,900.00 from the operation of his minibus less expenses of $400.00 and at $300.00 per week from welding.

Evidence in support of these earnings came from the oral testimony of the appellant, unsupported by even a tittle of documentary evidence. What was a trial judge required to do? Accept the appellant's assertion that he operated a minibus on a maximum capacity basis, six days each week between Kingston and Montego Bay, unencumbered with the responsibility of conveying low-fare school-children? Should he accept that this vehicle would not be subject to mechanical break-downs or other operational problems? If the appellant was to be believed he kept no books of account, paid no income tax and could produce no financial record from which a reliable earning pattern could be inferred.

Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned. Courts have experience in measuring the immeasurable, to borrow a phrase of

Carberry J.A. in C.A. 65/81 - United Dairy Farmers Ltd. et al v. Lloyd Goulbourne (27/1/84) but when they have so acted their determinations ought not to be unreasonably attacked. We were told in argument that the appellant gave inconsistent evidence as to the volume of his earnings from the operation of the minibus. At the prevailing fare-rate structure the appellant could scarcely justify a gross of $1,900.00 per day. Having regard to all the factors which could depress this optimum figure, we are of the view that the learned trial judge acted reasonably by adopting a gross take of $1,000.00 per day with expenses set at $200.00 per day, giving a net daily intake of $800.00.

An important head of damage claimed by the appellant was the loss which he suffered for his handicap on the labour market. In an unusual show of confidence in the submissions of the respondent's attorney, the trial judge awarded $22,500.00 under this head, in the exact sum suggested by Counsel. Earlier he had assessed loss of earnings at a net figure of $21,600.00 again the very sum which the respondent found most reasonable and with which we have determined that we will not interfere. Miss Gordon submitted that the trial judge's approach to handicap in the labour market was based on incorrect principles and ignored the evidence of Prof. Golding. Clearly Prof. Golding did not wish to see the appellant operating a minibus ever again. With the replaced hip it would in the view of Prof. Golding "be somewhat dangerous" for the appellant to drive a minibus. Without the new hip, "he could not do minibus driving" and in any event, "I don't think he should return to minibus driving".

As for welding, the most positive opinion that Prof. Golding could express is that the appellant could return to light welding jobs.

Mr. Vassell was over-optimistic in his submissions that the appellant, relieved from his responsibility to drive a minibus could devote all his time to welding and consequently earn an income equal to or in excess of his pre-accident total income. There was no evidence to support such a proposition. The respondent's concession that the appellant was entitled to employ a driver for the minibus up to August 1990 when, if the hip-replacement had been timely performed, he would have been able to resume light welding, is indeed a concession that during the remainder of the apellant's working life, he will not be able to drive a minibus as an occupation. It seems that the proper basis for assessing the hardship in the labour market is to enable the appellant to employ a driver for at least one half the week to operate the minibus. This would mean that during the active period of his driving life, the appellant would have part-time assistance and could therefore without danger to himself or to the public be able to operate his minibus. Although Prof. Golding, looking into the future, did not regard the appellant as fully equipped to drive the minibus he did admit that if the appellant was prepared to take it gently he could drive the minibus, that is to say if he did not exceed the speed limit. Giving all the evidence the most reasonable interpretation, a substitute part-time driver could be employed at $80.00 per day, three days per week over a period of five years from a date three months after the notional hip-replacement operation, that is August 1990. When a deduction of one-third is made for tax purposes the resulting net amount would be $41,267.00.00. This sum added to the $40,000.00 conceded by the respondent

as assessable to August 1990, would swell the damages awardable for hardship on the labour market to $81,267.00.

Miss Gordon bravely argued that the trial judge should have made a more generous award for extra-nourishment during his post-accident period and following upon the projected hip-replacement operation. This item is of nuisance value only in the context of the overall award and we can find no basis upon which the sum of $1,000.00 was fixed nor why it should be increased. There is no merit in those submissions.

Another major ground of appeal argued by Miss Gordon was to the effect that the award of $100,000.00 for pain and suffering and loss of amenities was manifestly low and unreasonable and did not accord with the evidence. She pinned her argument to the alleged similarity between the instant case and that of C.L. M007/81 Desmond McLean v. Yorkwin Walters and Another, decided by Patterson J. on November 9, 1989 in which he awarded $190,000.00 for pain and suffering and loss of amenities, past, present and future. That plaintiff was taken from the scene of the accident unconscious. He was admitted to and remained in the University Hospital for five months under the care of Prof. Golding. His injuries included a severe fracture dislocation of the left hip, fracture of the shaft of the humerus, and small cuts in the face and head. Treatment included an operation to reduce the fracture of the hip, and application of plaster cast to left arm. Traction was applied to the leg and the patient was confined to bed naked, lying on his back with his left arm suspended. He could only move if assisted and was unable to wear clothes. The cast was removed from his left hand after two months and the traction from his leg

after 3½-4 months. He was discharged from hospital after five months, in a wheel-chair, and thereafter with the aid of crutches re-commenced to walk. He received out-patient treatment at the hospital for three months and physiotherapy for fourteen months. Up to the time of trial, ten years after the accident, the injured man was suffering pain.

These facts demonstrate that there is absolutely no similarity between the seriousness and extent of McLean's injuries with those of the appellant and therefore the award therein provided no guide for Langrin J. McLean's award is nevertheless valuable to demonstrate that to advocate as Miss Gordon did in her written submissions, for $270,000.00 in the instant case, for pain and suffering, is to be unrealistic.

Cases tried between 1984 and 1987 were cited to support the proposition that general damages awarded in those years should be massively increased to reflect the rapid growth of inflation. Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A. 16/84 suggested that the depreciation of the value of the Jamaican dollar over a given period of time can be used as a measure to preserve the real value of the damages to an injured person who receives his money at a future date. It is time that a more precise and sophisticated method be devised to find the quantum of the money of the day, taking into account inflationary trends in the economy. This should now be a matter of evidence and moreso when substantial sums are being claimed.

Thomas v. Arscott and Patterson S.C.C.A. 74/84 was decided in the Court of Appeal in May 1986. Thomas suffered a wound 6" long and 4" deep to the right thigh extending 3" above the knee going proximally to the hip joint. The femur

protruded through the wound. There was a comminuted circular fracture which extended to the knee joint and was, on admission to hospital, found to be contaminated and dirty. There was severe blood loss necessitating a blood transfusion. A skeletal traction was applied to the injured limb and remained in place for over two months, completely immobilising the patient. Complications including a chest infection developed while the patient was hospitalized. After the removal of the plaster-of-paris cast, X-Rays revealed that the large segment of bone which projected from the wound was dead but had not separated sufficiently for safe removal. A further operation was projected. For over two years the fracture site oozed malodorously.

There was marked similarity between the injury to the plaintiff in Thomas v. Arscott (supra) with that of the instant appellant. Both men suffered 3/4" shortening of the leg and both would be likely to suffer a 10% permanent disability after a second operation. Thomas was awarded $40,000.00 for pain and suffering. Absent any evidence of the effect of inflation upon the value of money since 1986, the yardstick of 150% increase upon the 1986 award for a similar injury, which was used in this case represents the upper limit for such an award today.

Where there is a spirited contest on the question of the quantum of damages in personal injury cases, the parties are entitled to know from the tribunal of fact, the reasons which impel it to award one figure rather than another. In this case we will allow the appeal in part by varying the amount awarded for hardship in the labour market and substituting $81,600.00 for the sum of $22,500.00. The judgment of the Court below is affirmed in other respects. There will be costs to the appellant to be agreed or taxed.

MORGAN J.A.:

I concur.

GORDON J.A. (AG.):

I concur.