BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 9 of 2010

BETWEEN:

TRANSPORT BOARD	**First Appellant**
JONATHAN BOYCE	**Second Appellant**
AND	
DENNIS PENNISTON	**Respondent**

Before: **The Hon. Marston Gibson, Chief Justice, The Hon. Sandra Mason and the Hon. Andrew Burgess, Justices of Appeal.**

2011: 15 November

2012: 20 February

Mr. Leslie Haynes, Q.C., and Mrs. Laura Harvey-Read for the Appellants.

Mr. David Comissiong for the Respondent.

DECISION

Introduction

[1] **MASON JA:** This appeal is from the decision of **Richards J** in which she found the second appellant to be "one hundred percent" responsible for the motor vehicle accident which occurred on 8 August 1998 at Pegwell Main Road in Christ Church and which caused the respondent to suffer severe injuries.

[2] The judge's award consequent upon that decision was:

(i) special damages in the sum of $12,370.00 with interest at the rate of 6 % from the date of filing of the writ until judgment, and thereafter at the rate of 8% until payment;

(ii) general damages in the sum of $120,000.00 with interest at the rate of 7% from the date of judgment until payment;

(iii) costs to be agreed or taxed.

[3] The appellants now appeal that decision on the grounds that:

(a) the decision that the accident was due solely to the negligence of the second appellant is against the weight of the evidence **and that the inferences drawn by the learned trial judge amounted to errors of law** (this latter part was added at the hearing of the Appeal); and,

(b) the quantum awarded by the learned trial judge in respect of general damages for pain, suffering and loss of amenities is excessive.

As a result the appellants ask this Court to set aside the judgment and hold the respondent to be contributorily liable for the accident. They are also asking for costs.

Background

[4] On the morning of 8 August 1998 at approximately 7.30, two buses, BM400 and BM550 owned by the first appellant, collided on Pegwell Main Road in Christ Church. It had been raining on that morning.

[5] Bus BM400 was being driven by the respondent from the direction of Bridgetown towards the airport while BM 550 driven by the second appellant, was going in the opposite direction and towards Bridgetown. As a result of the collision the respondent suffered injuries to his legs causing him to be hospitalised and to undergo several surgical procedures.

Pleadings

[6] On 2 August 2001, the respondent filed a writ claiming damages against the two appellants alleging that the collision was caused wholly by the negligent driving of the second appellant. The particulars of negligence alleged were *inter alia,* excessive speed, failure by the second appellant to keep his motor omnibus on its left and proper side, failure to have regard for oncoming vehicles, failure to see the other motor omnibus in sufficient time to avoid the collision and failure to exercise or maintain any or any proper effective control over the said motor omnibus.

[7] On 27 September 2001, the appellants filed a defence in which they admitted that a collision occurred between the two motor omnibuses, but denied that the second appellant was guilty of any negligence. They pleaded that the collision was caused by or was contributed to by the respondent driving at an excessive speed, driving on the wrong side of the road and there colliding with the other omnibus by overtaking or attempting to overtake or pass a motor vehicle without first ascertaining that it was safe to do so, and failing to stop or slow down or to manage or control the motor omnibus so as to avoid the collision.

[8] A reply to the defence was filed on 25 September 2002 which, in addition to joining issue with the appellants, pleaded that by a letter dated 10 November 1998 sent to the respondent's then attorney-at-law, the appellants had admitted liability for the collision and consequential loss and damage to the respondent.

[9] On 9 April 2003 the appellants filed a summons requesting permission to withdraw admission of liability which was granted by order of the Court on 15 June 2005.

Evidence at the Trial

[10] The judge heard the evidence of ten witnesses over a period of nine days from 12 June to 22 December 2009 on which latter date, by oral decision, she entered judgment in favour of the respondent on the issue of liability. She then invited Counsel to make submissions in January 2010 on the question of quantum of damages. A final written decision was rendered on 26 May 2010.

[11] In light of the appellants' position that the Judge's inferences were erroneous, we now recount and review the salient parts of the evidence adduced before the judge who heard from seven witnesses testifying on behalf of the respondent and three for the appellants.

[12] The respondent related that, as he drove past a car in a driveway to a house on his left near a bend in the road, he observed another bus "coming down on the wet road with excess speed". He looked into his rear view mirror to check whether the back of his bus had cleared the vehicle in the driveway because he realised that the two buses would "arrive" in the bend at the same time. A passenger screamed. The second appellant, driver of the other bus, pulled his steering wheel to the left but instead of going left, the bus skidded, crossed the road and crashed into the right front of his bus trapping him inside.

[13] Sergeant Kendrick Spooner of the Royal Barbados Police Force carried out investigations and took measurements at the scene. David Griffith was the occupant of the car in the driveway but did not witness the collision although he heard the impact of the vehicles. He said that the bus "coming down had a little speed". Bystander Jean Ward's eyewitness account was of the bus "coming from town" driving at "normal" speed while the bus "coming down on the other side driving fast", and under cross-examination, "going so fast that I had to look at it". Verona Jones, a passenger seated towards the front in the second appellant's bus remembered that the rain had fallen that morning, that the bus was being driven fast and that she was frightened. She witnessed the collision: the bus she was in headed towards the other bus on the right hand side of the road; the driver tried to stop the bus by slamming the brakes. Sonia Thompson-Solloway lived next door to the house in front of which the collision occurred. She did not witness the collision but heard the "loud bang" and went outside and saw the respondent removed from the bus.

[14] For the appellants, the second appellant testified that while driving his bus that morning, he found that when he stepped on the brakes, that particular bus which was known for "sliding" would "wash" to the left or the right. His speedometer was not working. When he reached the point at which the collision occurred, he saw the other bus overtake a parked car and he "slammed home" his brakes. The bus slid to the right, he "let go" of the brakes and then pressed them again but the two right corners of the buses collided.

[15] Under cross-examination, he reiterated that the bus had been sliding "at certain points" and that it had slid several times even on "flat level road when the bus was driving straight and not going around a curve". He admitted that the "majority of the buses slide on wet roads. Majority of times that a vehicle slides it constitutes a danger". He also admitted that he did not stop the bus and inspect the tyres after experiencing the sliding nor did he report these faults to headquarters. He acknowledged that when he went down Pegwell Hill that morning he knew that the road was wet from rain. He stated that as he came around a corner in the road he attempted to steer the bus to the left but that it slid to the right, slid offside and struck the respondent's vehicle while that vehicle was on its left and proper side. On re-examination he maintained that the respondent was overtaking the car on his (second appellant's) side of the road and that the two buses met in the centre of the road.

[16] Martin Goddard, the loss adjuster, spoke of taking a written statement from the respondent while he was hospitalised and of carrying out his own investigations into the accident.

[17] Catherine McClean, the final witness to give evidence, was a passenger in the front seat of the respondent's bus. She recounted that there was a car coming out of a driveway on her bus' side of the road, that its front bumper and front tyres were on the roadway and that the respondent "pulled off a bit" to the right to go around the car. She continued:

> He proceeded around the car and then I looked up and saw a bus coming down. Having pulled to the right he had to go to the right side of the road but not fully on right side, and he was pulling back over to his left side of the road. It was a gentle manoeuvre because my bus was not moving at any great speed. I was looking up all the time because he had veered slightly to the right so I looked up to see why and that is when I saw the car. The bus driver made his manoeuvre around and he was going back over to the left side. I looked up and saw a bus coming down. You could also hear the bus coming down, I heard the sing song of the engine. It is a sound I associated with a Marco Polo bus. The bus coming down slammed into us. As it was approaching I screamed because I realised it might not stop in time.

[18] Under cross-examination, Mrs. McClean stated that the bus being driven by the respondent did not have to pull very far out into the road to pass the car in the driveway, that it had already gone around the car and was going back over on its left side, that the other bus was not driving very slowly. She declared that prior to that morning she had travelled that route from age 11 and during that time she would have seen buses being driven at various speeds down that road. She asserted that she knew enough about buses travelling on that road to make her able to make judgments about their speed and that in her judgment the other bus was driving quickly. She was not sure whether the respondent's bus had completed its manoeuvre but she knew that the front was back on its left side before she saw the other bus. She emphasised that the respondent had been driving "fairly slowly from Bridgetown, had been driving "slow around the curves" and that when the respondent made the manoeuvre to go around the car in the driveway, he did not go "right over" to the right side of the road.

Judge's Findings on Liability

[19] Much of what is set out hereunder is taken largely verbatim from the judge's reasons for decision which we regard as careful and detailed.

[20] At the outset the judge recognised that she faced a quandary on this matter. In highlighting the fact of the approximately 12 year hiatus between the collision and trial, she apprehended the "very real possibility" that memories might have dimmed and "perceptions overshadowed by the passage of time". She also noted certain shortcomings in relation to the provision of witnesses: although several passengers had been on board the two buses, only two of these were available to give evidence at the trial; although statements had been taken from a number of these passengers at the Oistins Police Station after the accident, these statements no longer existed; the Station Daily Diary which had contained the names of these witnesses had somehow been destroyed; neither the respondent nor the witnesses who lived adjacent to the scene of the accident had been interviewed by the police following the accident. The judge also found that the measurements taken by the police sergeant who attended the scene had been compromised owing to them having been taken subsequent to the "separating" of the buses by the Fire Service after the collision.

[21] While the judge found that the respondent's account of the accident varied in part from his version of events in his written statement given to the loss adjuster and was somewhat in conflict with that of Mrs. McClean, one of the passengers in his bus and on whose evidence the judge relied, she nevertheless determined that the respondent was not negligent in executing his manoeuvre around the vehicle parked in the driveway adjacent to the road and was therefore not responsible in any way for the collision.

[22] The judge was also of the view that the reason which the respondent gave for looking in his left wing mirror as he passed the car in the driveway i.e. to check the rubbing of the wheel against the edge of the road and to see whether the bus had cleared the front of the car in the driveway, was consistent with Mrs. McClean's version of events immediately prior to the collision. This according to the judge was part of the manoeuvre described by Mrs. McClean.

[23] The Court also found as a fact that prior to his decision to go around the vehicle protruding from the driveway which she found on the evidence could be no more than a foot to a foot and a half, the respondent had been driving slowly and carefully during his journey from Bridgetown up to the time of the collision. Also there was no evidence that the respondent had seen the other bus or any other traffic coming through the bend towards him before he made the manoeuvre.

[24] The Court accepted the undisputed fact that the road was wet at the time of the collision – it was the single fact on which all of the witnesses were agreed – and that water was flowing on the road.

[25] The judge found the evidence to be "overwhelming" that just before the collision, the second appellant had been driving "neither very slowly, nor slowly, nor at a moderate speed", that the bus was being driven at a rate that drove fear into the two passengers who gave evidence and caused the other witness to comment on its unusual speed. Thus the second appellant with his knowledge of the "behaviour" of the particular bus and of the wetness of the road was unable to take the appropriate evasive action and caused the collision.

Submissions of Counsel for the Appellants

[26] Mr. Leslie Haynes, Q.C. for the appellants was strong in his criticism of the judge's findings. In attempting to justify this criticism, he centred his arguments around the view that the respondent's manoeuvre in avoiding the car parked in the driveway was inherently dangerous because it meant that the respondent had to go over to the right hand side of the road approaching a corner and not knowing what might have been coming around that corner.

[27] He argued that the respondent by going over to the right hand side of the road put the second appellant in a dilemma and that he consequently had to take evasive action which resulted in the accident. Mr. Haynes, Q.C. was therefore of the view that the respondent had to be found to have been partly responsible for the accident.

[28] Mr. Haynes, Q.C. further contended that the judge, having accepted the evidence of the appellants' witness, Mrs. McClean, over the evidence of the respondent, should have rejected the respondent's evidence in its entirety. He considered that the judge made a finding that the accident happened in such a manner as had never been put to her. He maintained that the second appellant had satisfactorily explained the reason for skidding over to the left hand side of the road where the collision occurred: that is, that at the time he came around the corner there was a vehicle on his side of the road. As a consequence the burden of proving negligence would have shifted to the respondent who contrarily had failed to explain why he had been over to the right hand side of the road. Thus in light of this failure the Court ought to have inferred some contributory negligence on the part of the respondent.

Approach of the Court of Appeal

[29] The reported cases are myriad in which are stated the general and accepted principle that an appellate tribunal should be hesitant to interfere with findings of primary fact made by a trial judge who had the advantage of seeing and hearing the witnesses thus determining their credibility unless it can be shown that the judge had failed to use or had "palpably misused" that advantage or could be found to be "plainly wrong".

[30] In words reminiscent of ***Lord Walker* of *Gestingthorpe*** in ***Martin Rago v Indra Ragoonath, Privy Council Appeal No. 58 of 2001*** from Trinidad and Tobago, we wish to state that this was not a case in which the judge was found to have wasted her advantage in seeing and hearing the witnesses or to have overlooked or misunderstood some important item of evidence. In our opinion, there was sufficient evidence for the judge to come to the conclusion that she did.

[31] The judge in accepting the evidence of the witness for the appellants, Mrs. McClean, was satisfied that the manoeuvre of which the second appellant complains was in Mrs. McClean's words a "gentle" manoeuvre which had been completed before the respondent saw the second appellant's bus come around the corner. The judge was also persuaded that the respondent did not "go fully on the right side" but had "veered slightly to the right". The judge accepted Mrs. McClean's description of the manner in which the respondent had been driving – slowly and carefully. As indicated previously the judge also determined that conversely the second appellant drove neither slowly, very slowly nor at a moderate speed. It was from his own evidence that she was able to determine that it was his negligence that was wholly responsible for the accident: that he continued to drive – not slowly- a bus which was known for sliding and which, on that morning when the road was wet, had been "sliding" and "washing" even on "flat level" road. The judge resolved that there was no evidence of any negligence on the part of the respondent.

[32] It is our view that the judge identified the relevant parts of the evidence and stated why she accepted that evidence. She carried out her duty of assessing the oral evidence given before her and recorded those matters which she thought critical to her decision. She left this Court in no doubt as to which parts of the evidence factored in her decision. Her reasons were appropriately full.

[33] Having fully accepted the judge's findings on liability, the court did not see the need to elicit a response from counsel for the respondent. We therefore find that the arguments of counsel for the appellants to be wholly misconceived.

Judge's Findings on Quantum

[34] The judge determined that based on the categories as designated by the guidelines of the United Kingdom Judicial Studies Board**,** the respondent's injuries were within the classification of "severe leg injuries". She made specific mention of the several fractures suffered, namely:

(a) to the left knee cap;

(b) below the knee to the left leg;

(c) to the left side of the right ankle; and

(d) to the right side of the right ankle.

and noted that the factors which influenced the award were the nature of the injuries suffered, the several surgical operations performed, the degree of pain endured and ongoing, the onset of arthritis, the cosmetic challenges to the areas of injury and the degree of permanent disability which resulted.

Submissions of Counsel

[35] Mr. Haynes' argument against the amount of damages awarded by the judge was based on the principle in ***Flint v Lovell (1935) 1 K B 354*** namely, that the Court of Appeal will be justified in reversing the judge on the question of the amount of damages if convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled.

[36] Mr. Haynes contended that the judge in making the award which in his view was excessive seemed to have been of the opinion that the United Kingdom Judicial Studies Board Guidelines applied without more to Barbados. He asserted that in coming to her decision, the judge ought to have taken into account comparable cases, and consequently had a duty to ascertain whether there were such comparable cases first within the jurisdiction and then within the region before considering the United Kingdom situation. He also criticised the practice of our Courts in personal injury cases of employing the rate of 3.5 for the conversion of the pound sterling to the Barbados dollar. He stated that awards ought to depend on economic factors and the standard of living within the local jurisdiction rather than a reliance on and acceptance of English cases.

[37] Despite these arguments, Mr. Haynes never provided or produced any local or regional authorities and himself referred the Court to the classifications as set out by the said Judicial Studies Board. He suggested that the respondent's injuries consigned his case to the category "to the top of less serious or towards the bottom of moderate leg injuries" for which the award is £25000 or approximately BC$90000 which he considered to be the appropriate award.

[38] In response, Mr. Comissiong for the respondent noted that while it is commendable, there is no settled rule of law that a judge in this jurisdiction must first consider local precedents before the judge can have recourse to precedents from a foreign jurisdiction and therefore there had been no application of a wrong principle of law by the judge in the instant case. He contended that the only issue to be determined was whether the award was so extreme as to have been an entirely erroneous estimate of the damages.

[39] Mr. Comissiong refuted the suggestion by Mr. Haynes that the injuries sustained by the respondent should be categorized as moderate rather than serious, he made reference to the multiple fractures suffered by the respondent: (a) to the respondent's four months of hospitalisation; (b) to the six different surgical procedures which the respondent had to undergo; (c) to the respondent on his discharge from hospital being unable to walk and having to use a wheelchair and crutches for approximately one year; and, (d) to the resulting unsightly scarring.

[40] Mr. Comissiong suggested that despite the fact that the Guidelines are merely persuasive they have tended to be particularly helpful to both counsel and the courts in the classification of severity of injuries. He asserted that in the respondent's case, while the injuries suffered could individually be categorised as either moderate or less serious, the fact that there was a combination of the features of both of these categories in the injuries suffered caused the respondent's injuries to be classified as serious.

Approach of the Court of Appeal

[41] It is the accepted principle that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all of the questions involved in the action, including what damages ought to be awarded and so the Court has the power to increase or reduce the damages. But the Court of Appeal will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the Court thinks that if they had tried the case in the first instance, the award would have been a lesser amount.

[42] This was the view of ***Greer LJ*** in the celebrated case of ***Flint v Lovell (supra)*** in which he made the oft quoted statement:

> "To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

[43] This principle has been reiterated and applied in a number of local cases: see e.g. ***Philip Greaves v. Hamel Lorde et al, Civil Appeal No. 34 of 2005, unreported decision of 15 May 2008,*** as well as the recently decided case of ***Nigel Ward v. Milton Lowe and Edward Roach, Civil Appeal No. 17 of 2003, unreported decision of 28 November 2011*** in which this Court cited with approval ***Hulse v. Knights Limited, Civil Appeal No. 4 of 2005, unreported decision of 18 September 2008*** and ***Crane Construction Incorporated v. Fort Dignity Limited, Civil Appeal No. 12 of 2006, unreported decision of 17 February 2009*** where the principle had been enunciated. The Court also made reference to ***paragraph 46.026 of McGregor on Damages,*** Eighteenth Edition, in which the principle was clearly set out.

[44] There are a limited number of decided cases in this jurisdiction on quantum in personal injury litigation. In the circumstances, it is appropriate and helpful to refer to the Judicial Studies Board Guidelines and the English cases.

[45] We are of the opinion that in the circumstances of this case it is unnecessary for us to make a definitive statement on the correct approach that the court should adopt to the conversion rate of the Barbados dollar in relation to awards in pounds sterling made in the English cases. Suffice it to say that the rate of Bds $3.50 to the pound has proved a convenient benchmark in view of the fact that the pound has fluctuated around that rate for a number of years.

[46] The evidence as found by the judge revealed that the respondent's injuries resulted in him undergoing six surgical procedures as follows:

(1) On 8 August 1998 – an operation under full anaesthesia where the fractures of the maleoli of the right ankle were fixed with a screw and a lateral fibular plate. Direct repair was done to the tendon of the patella, and it was decided to defer internal fixation of the tibia until it was clear that there was no infection of the bone.

(2) On 10 September 1998 – as a result of X-rays confirming that the tibial fracture had slipped and that the alignment was less than perfect, a second operation was performed in which the tibial fracture was fixed with a tubular plate and screws.

(3) On 15 October 1998 – as a result of an early infection of the wound to the left leg by a very resistant Staphylococcal bacterium known as Methicillin Resistant Staphyloccus Aureus manifesting itself, the respondent underwent yet another operation where the wound was re-opened, and antiseptic impregnated bone cement was fashioned into small beads and inserted around the fracture site.

(4) On 5 November 1998 – there was an operation to remove the bone cement beads.

(5) On 12 November 1998 - the penultimate procedure was performed in order to remove the metal from his tibia and to have the wound debrided and cleaned.

(6) On 14 February 1999 – this sixth and final operation was for the removal of some of the remaining metal ware.

[47] In addition the respondent, according to the medical report, has been left with a left leg which is mildly bowed by five degrees compared to the right leg and thus one centimetre shorter. He has also suffered a darkening of the skin on the left leg, and a surgical scar over the anterior aspect of the knee and leg which is hyperpigmented and 30 centimetres in length. The respondent has also developed degenerative arthritis in his left knee and right ankle, causing pain. His overall disability is about twenty-five percent. He also has the experience of pain in the lower back, radiating into his buttock and coccyx.

[48] In accordance with the principle in ***Flint v Lovell*** set out above at para [42], we can find neither any evidence that the judge has acted on a wrong principle of law nor that the award could be considered excessive.

[49] Like the judge we have determined that the extent of his injuries place the respondent at the top of the "serious" and the bottom of the "very serious" categories – which incidentally both call for the same award – as provided by the Judicial Studies Board Guidelines. In coming to this decision we took into account the extent of the injuries suffered, the number of surgical procedures which the respondent was forced to undergo, the residual incapacitation as well as the pain which he continues to suffer and which has now been exacerbated by increasing age. In addition he can no longer wear enclosed shoes.

[50] While at first blush there might seem to be some merit in Mr. Haynes' argument that the award should be reduced given that the respondent has made a complete recovery from the fracture of the maleoli of the ankle and the fracture to the kneecap, regard must still be had to the issues of permanent problems with mobility, deformity and limitations of movement which are features of the classification of very serious injuries.

Disposal

[51] In the result, the appeal is dismissed with costs to the respondent both in this court and the High Court and the decision of ***Richards J*** is affirmed.

[52] We conclude this judgment with the wish that given the time this matter has taken to be adjudicated – in excess of 10 years – the respondent be paid immediately the damages and interest due to him.

Chief Justice

Justice of Appeal

Justice of Appeal