1977/4

IN THE ROYAL COURT OF JERSEY

(INFERIOR NUMBER)

Before: Mr. P.L. Crill, Deputy Bailiff.
Jurat L.V. Bailhache.
Jurat the Honourable J.A.G. Coutanche.

BETWEEN

HARRY EDGAR PHILLIP COWLEY — PLAINTIFF

and

JAMES JENNER — DEFENDANT

JUDGMENT

Advocate K. Hooper Valpy for the plaintiff.
Advocate A.J. Olsen for the defendant.

On the 17th July, 1975, on the Airport Approach Road, St. Peter, the defendant's motor car ran into the motor car driven by the plaintiff who sustained multiple injuries. On the 5th December, 1976, in the Royal Court, the plaintiff obtained judgment by default on the issue of liability. The assessment of damages was left over and now falls to be decided by this Court. Special Damages have been agreed at £4,842.19. The remaining heads at issue are damages for pain and suffering, loss of the amenities of life and loss of expectation of life (all three of which it is convenient to take together and call the 'personal loss') and for loss of future earnings. As regards the latter the multiplicand also has been agreed at £2,125. so that, under this head, we are left with the multiplier to determine.

We had before us four medical reports. These were:

(1) A report of Dr. Tessa Hunt, dated 9th October, 1975, formerly of St. Thomas' Hospital.

(2) A report of Dr. R.P.Butt, M.B., B.S., M.R.C.S., M.R.C.P. dated 18th February, 1976.

(3) A further report of Dr. Butt, dated 26th October, 1976, and

(4) A 'Joint Opinion' by Dr.G. Spencer, F.F.A.R.C.S., and Dr. Butt, dated 25th February, 1977.

As regards the last one its title is misleading. Neither doctor examined the plaintiff in Feburary, 1977, in order to prepare the joint opinion. It was compiled by Dr. Butt from papers in his possession and sent to Dr. Spencer for his approval. He appears to have signed it after a cursory reading on the 25th February, 1977. In fact the last time when both doctors were present at an examination of the plaintiff was in October, 1976. We also had a letter from Dr. Spencer to Mr. Valpy of the 24th May, 1976, a letter from Dr. J.G. Parish, M.D., F.R.C.P.(C), D. Phys.Med., the consultant at the Passmore Edwards Medical Rehabilitation Centre to Dr. Spencer of the 28th September, 1976, and a report from Dr. B.S. Jenkins, Senior Lecturer and Honorary Consultant Physician at the Department of Cardiology, St. Thomas' Hospital of the 4th April, 1977. It is difficult to understand why, if two doctors sign an opinion without reservation, then it cannot be said to be an agreed medical report, in the sense that it sets down the joint opinion of the doctors on the patient's condition. However, in this case we accept Mr. Valpy's submission that in the event of any discrepancy between the written reports, including the separate ones of Dr. Butt, and the oral testimony of the doctors, the latter is to be preferred. Dr. Spencer has been the consultant in charge of the intensive care unit at St. Thomas' since 1963. He is therefore a physician of considerable experience. Dr. Butt is in private practice and has been the consultant to a number of insurance companies for twelve years. While not a consultant in medical hierarchy terms, in his own sphere he, too, may be said to be experienced for he told us that he sees between 300 and 500 cases annually. As it turned out the evidence of the two doctors agreed in most respects. The areas of disagreement were limited to:

(1) the plaintiff's life expectancy;

(2) the degree of risk in an operation for the replacement of an aortic valve;

(3) arthritic changes in the plaintiff's right knee; and

(4) the extent to which the plaintiff could resume work.

There was no disagreement about the nature of the injuries, the treatment and the general prognosis.

Before the accident, the plaintiff, who is now fifty-three, was a cheerful person of somewhat higher intelligence than average. He was a chef with many years experience and for fourteen years had worked during the summer at the Hotel Santa Monica, in Jersey, and in the winter at the Swandean Hospital, Worthing. The hotel caters for seventy-two guests and at the Swandean Hospital the plaintiff was responsible for about two hundred meals a day and had a full staff of kitchen assistants under him. There is no reason to suppose that, but for the accident, he could not have continued to work at these establishments until the normal retiring age of sixty-five. Mrs. Le Gros, the proprietress of the Hotel Santa Monica told us that he was treated as one of the family and had never let her down in whatever he did. In Hove he lived with Mrs. Drury and has been there for twenty-three years; he is still there. The Drury family, likewise, regarded him as one of the family who could be trusted to look after the house when they were away. He read a little, walked, danced and ice skated. He drove a motor car.

As we shall see, the picture has altered drastically, but two elements remain: the plaintiff's cheerfulness and the friendship of Mrs. Le Gros and Mrs. Drury towards him. To this we must now add his tremendous courage and willpower that manifested themselves throughout the long and painful period of operations and treatment that he endured. Without these two attributes the task of the surgical and medical teams, whose skill and devotion we feel it right

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to acknowledge, could have been set at nought. The injuries sustained by the plaintiff placed him, in the words of Dr. Butt, in th 1st division of those severely injured. In fact he was lucky to have lived at all.

A summary of the plaintiff's injuries is contained in Dr. Butt's report of the 18th February, 1976, with which Dr. Spencer agreed, at any rate when he wrote to Mr. Valpy in May of that year. In brief, the injuries were:

(1) Serious head injury and shock.

(2) Bilateral fractured ribs; seven in all.

(3) Extensive rupture of the aorta.

(4) Comminuted fracture of the right femur; and

(5) General bodily brusing and scattered minor abrasions. So serious did the doctors at the General Hospital, St. Helier, consider his condition after the accident that they arranged for an emergency flight to London and he was admitted to the intensive care unit at St. Thomas' Hospital where he became a patient of Dr. Spencer and under whose general care he has remained. Although conscious on admission he lapsed into unconsciousness and remained so for three weeks. He had no recollection of the accident and first remembered waking up in hospital some six to eight weeks later.

At St. Thomas' it was confirmed that he had an extensive rupture of the aorta. An emergency operation was carried out and the rupture was repaired with a Dacron graft. This operation lasted from 6.30 a.m. until 10.45 a.m. He was on a cardio pulmonary by-pass for a total of seventy minutes. Whether this contributed to the brain damage which later became apparent is immaterial. No suggestion has been made that that manoeuvre was not necessary or was performed negligently. The plaintiff was then turned over and a laparotomy performed to see whether there was any damage to the abdominal organs. It disclosed(we quote from Dr. Hunt's report)

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> 'a pint of unclotted blood in his peritoneal cavity, and some oedema and haematoma in the lesser omentum and retroperitoneally..'

The rest of the viscera appeared undamaged. Two drains were inserted. The plaintiff was returned to the intensive care unit at 2 p.m. His right tibia pinned and the leg placed on traction. On the 23rd July a tracheostomy was performed to help him to breathe. On the 25th July, because he had developed a grossly distended abdomen a second exploratory laparotomy was carried out. Nothing was found but a feeding gastrostomy was performed. The tube remained in situ until the 17th August. Thereafter he made slow progress. His chest injuries, including a paralysed left phrenic nerve, prevented his being taken off the ventilator until the 18th August, when the respirator was discontinued. The tracheostomy was allowed to close on the 21st August, but he had a relapse and a new tube had to be inserted in the site of the partially healed wound. On the 25th August he was fit enough to be taken to the Phipps Respiratory Unit at the South Western Hospital. By then he had developed a large bed sore over his sacrum. In the Unit he made steady progress; we need not trace each development. He had also a mild left hemiparesis which was due either to the head injury or to the time he had spent on the heart-lung bypass. In mid-October a third laparotomy was performed because his abdomen had become grossly distended. He was found to have (we quote from the report of Dr. Butt, dated the 18th February)

> '... intestinal obstruction with adhesions blocking the jejunum and attached to the liver, stomach and peritoneum

He remained on intravenous fluids for a week. On the 26th November his second tracheostomy was closed. Over the whole time he was being treated either as an in-patient or after he had been discharged, four attempts were made to improve his voice and ability to cough by injecting his left vocal chord. They were only partially successful.

The paralysed left phrenic nerve which affected his coughing also meant that his air intake into his lungs was only about a quarter of a normal person's. He also had developed a recurrent laryngeal nerve palsy. These deficiencies in his chest meant that he was liable to infection in the left lung. However although we were told by Dr. Spencer that the risk of catching other people's germs is greater in, rather than out of, hospital, in fact the plaintiff did not become infected. It will be apparent from the foregoing that we have drawn heavily on the report of Dr. Butt of the 18th February, 1976, which in turn, was taken very largely from that of Dr. Hunt.

Dr. Butt saw the plaintiff again on the 26th October, 1976. He was flabbergasted at the improvement. In the meantime, Dr. Spencer had written to Mr. Valpy on the 26th May. In that letter he describes the details of a major orthopaedic operation that had been performed on the plaintiff's right hip on the 4th April, called a right femoral osteotomy and adductor tenotomy to correct the severe deformity of the plaintiff's right femur. That operation lasted four hours. The effect was that the plaintiff was able to walk again more or less normally, whereas before, his gait had been severely affected. But his right leg is still some 2" shorter and he has to wear a raised heel on his shoes. In the same letter Dr. Spencer says that he agrees with Dr. Butt's report of the 18th February, 1976.

Supporting Dr. Butt's assessment of the plaintiff's improvement, though perhaps in not such enthusiastic terms, Dr. Parrish wrote to Dr. Spencer on the 28th September, 1976. His letter indicated that the plaintiff's main problem then was lack of initiative, and it would be many months before he would be mentally fit for work.

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Reverting to the plaintiff's treatment, on the 9th July, he underwent psychometric testing and was found to have a verbal I.Q. of 121 and a performance I.Q. of 97. We were told by Dr. Spencer that the difference between these two figures indicates brain damage. Dr. Butt was not quite so positive, but he did not suggest that there was no residual impairment of his mental faculties.

On the 27th July he was transferred to the Pasmore Edwards's Centre for rehabilitation and intensive physiotherapy. In the same month he was seen for the first time by Dr. Jenkins, the Cardiologist. On the 28th September he was discharged and went to stay with Mrs. Drury at Hove. In October he came to Jersey and stayed with Mr. Le Gros. On the 18th October he was re-admitted to the South Western Hospital; he remained there for one week. He was examined by Orthopaedic, Ear Nose and Throat and Cardiac specialists, but was given no further treatment. In all he spent 356 days in hospital. He was seen by Dr. Jenkins again on the 13th January, 1977. He diagnosed that the plaintiff has significant aortic valve disease of the heart, which will require an aortic valve replacement in the next few years. Dr. Jenkins considers that the mortality rate for this operation is of the order of five per cent. He says no more than that it is at least possible that the valve disease is related to the accident. Having regard to the chest trauma suffered by the plaintiff and Dr. Spencer's evidence on this point we are satisfied, nevertheless, that we may attribute the plaintiff's present heart condition to the accident. In any case the defendant has not sought to show that the disease was present before.

By the time of Dr. Butt's second examination in October, 1976, the bed sore had healed and the operation to it that at one time was thought might become necessary was no longer contemplated. The

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plaintiff's condition has improved slightly since that examination.

So much for the medical history. We now set down the plaintiff's residual disabilities under the following heads.

1. Mental deterioration

In our view this is the most significant. It is related to the damage to his voice and together they make up what Dr. Spencer called a very serious impairment. There is no doubt that a man who previously was above average intelligence and who has such an impairment feels ashamed and embarrassed. While both Dr. Spencer and Dr. Butt would like a further psychometric test in a few months time, neither suggested that this impairment was anything but permanent.

2. Change in character

We have already said what the plaintiff was like before the accident. Now he is unable to concentrate for long periods, is easily flustered, although with his verbal capacity he attempts to hide this, and has become somewhat aggressive. He was described by Mrs. Drury as a pathetic little boy and by Dr. Spencer as being a little like a child.

3. Changed voice

While we were able to hear the plaintiff without difficulty and his performance was described by Dr. Spencer as very good it is apparent that under normal conditions his voice would be much less strong. The volume will not increase and even with the strength he achieved in the witness box it could by no means be called loud.

4. The rib cage

The seven fractures have impaired the rib cage. Taken with the paralysis of the left diaphragm his ability to cough is impaired. He has no respiratory margin and may therefore be more liable to infection even taking into account the fact that he did not succumb to it while in hospital.

5. The right femur

His right leg is 1½ to 2 inches shorter than the left leg. If anything went wrong with the hip it would be an orthopaedic challenge to put it right. The hip is liable to be painful from osteoarthritic changes, but these, if affecting also the knee, may, in that case, have been present before the accident.

6. The operation to replace the aortic valve

We have already referred to this. Dr.Butt put the mortality rate of 1%.

7. Abdominal complications

There is a risk that the plaintiff will suffer adhesions which might cause intestinal obstructions and necessitate further abdominal operation. However, the mortality rate for such an operation is exceedingly small.

8. Scarring

He is permanently scarred on the neck, chest, abdomen, both legs and the sacrum.

There is some disagreement about whether the plaintiff's life expectancy has been reduced. Mr. Valpy abandoned the claim under that head. Mr. Olsen, paradoxically, argued that the plaintiff's life expectancy had been diminished. In the so-called 'joint opinion' of Doctors Spencer and Butt there is a categorical assertion that the life expectancy has been affected. On the other hand, when giving evidence, and even allowing for their concern about his chest, neither went so far as they had in the 'joint opinion'.

We find that his life has been shortened, but only to a small extent and that reduction is not likely to impinge on the period in which he would normally have continued working. We have accordingly included a small sum for the loss of expectation of life under the head of personal loss.

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There have been a number of cases in recent years in this Court reported in Jersey Judgments in which the principles of the assessment of damages have been reviewed (Dowling v Fontaine at page 1651; Le Maistre v Bodeau at page 1371 and Thomas v Mark Amy Limited at page 233 Volume 11). It is not necessary for us to repeat them. No two cases are exactly alike on the facts. Here the plaintiff, if not a paraplegic, certainly is entitled to be considered as coming under the scale appropriate for someone who has sustained multiple injuries. To compare awards made, either in the English or the Jersey Courts, can be misleading, apart from giving some general guides as to the appropriate level but we may properly take into account changing economic factors (Thomas v Mark Amy and another. Jersey Judgment p.233). The plaintiff has suffered a severe impairment of his bodily integrity. Nevertheless, although he will not be able to dance or skate again there is some hope that, in time, he will be able to drive a motor car. His digestive and excretory systems appear to function normally, as do his genital organs.

We award the plaintiff the sum of £12,500 for personal loss.

Turning to the claim for loss of future earnings we have already said that before the accident the plaintiff was an experienced chef. He will never again achieve the sort of level and position he held, and his claim is put forward on the basis of being totally incapacitated for work. None of the written reports indicate that his capacity for work has been extinguished. On the contrary, Dr. Spencer, in his letter to Mr. Valpy of the 24th May, 1976, said that he would find employment as a chef. In evidence, however, Dr. Spencer said that he was doubtful if the plaintiff could cope with that sort of work, particularly because of his limited voice and the impaired strength of his arms. The objective before the plaintiff at best could

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be to become the chef in a small guest house, but that was some way off. Dr. Spencer also thought it would be difficult to re-train him for another job. Dr. Butt was not so pessimistic. He considered that the plaintiff could be re-trained for kitchen work and could undertake some part-time light employment. On the other hand, Mrs.Le Gros said that she would not re-employ him and Mrs. Drury, even if she might be considered as being over-protective towards the plaintiff, said that she would not allow him alone in her kitchen.

We think, looking at the evidence as a whole, that his incapacity as regards work is in the region of 75 to 80%. He could, physically speaking, do some work, even on a part-time basis until the age of sixty-five. But we cannot ignore economic trends. It is too much to say that there will be the right sort of work available throughout the whole of what would normally have been the rest of his working life. We think that he could find work suitable for him to undertake for no more than about one-third of this time. The authorities are clear that some allowance has to be made for the risk of redundancy. We have, therefore, reduced slightly the figure suggested as the appropriate multiplier by Mr. Valpy, to that of 7½.

Accordingly we award the following:-

1. SPECIAL DAMAGES:

   £4,842.19p to which will be added interest at the rate of 5% from the date of the accident until today.

2. PERSONAL LOSS:

   £12,500 to which will be added interest at the rate of 10% from the date of the accident until today.

3. LOSS OF FUTURE EARNINGS: £15,937.50p.