

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/M556

BETWEEN	JOSEPH MITCHELL	PLAINTIFF
AND	DESMOND LOWE	1 <sup>ST</sup> DEFENDANT
AND	MARK LOWE	2 <sup>ND</sup> DEFENDANT

Mr. N.O. Samuels for the plaintiff

Miss A. Walters instructed by D.O. Kelly and Associates for the Defendants

Heard: 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> February, 6<sup>th</sup> March and 25<sup>th</sup> October, 2001

GLORIA SMITH, J.

The plaintiff's claim is for Damages for negligence.

The plaintiff Mr. Joseph Mitchell alleged in his statement of claim filed on the 27<sup>th</sup> day of December 1995 that he was injured in a motor vehicle accident on the 3<sup>rd</sup> day of January 1991 along the main road at Whitehall in the parish of St. Catherine involving motor vehicle registered 8474 AA owned by the 1<sup>st</sup> defendant Desmond Lowe and driven by the 2<sup>nd</sup> defendant Mark Lowe.

It is further alleged that the plaintiff was injured when he was struck from behind by the first defendant vehicle while he was loading garbage onto a sanitation truck along the main road at Whitehall, St. Catherine

The plaintiff Mr. Joseph Mitchell was brought into Court with a view to have him give evidence. However this proved futile as he failed to respond to anything that was said to him. He never responded when his name was called on several occasions by the Court. Many attempts were made to communicate with him in various other ways but these too were unsuccessful. The Court then came to the conclusion that Mr. Mitchell would be unable to give evidence in the case.

Evidence as to the facts of the case on behalf the plaintiff then came from Mr. Derval Nathaniel.

He stated the following:-

1. That on a day sometime in 1991 some where between 8:35 a.m. and 9:00 a.m. he along with Joseph Mitchell and a driver were working on a sanitation truck in the Charlemount Housing scheme in the parish of St. Catherine. The witness and Joseph Mitchell were collecting garbage to be placed in the sanitation truck.

2. The sanitation truck was then parked on Pawpaw Way, Charlemount on the left hand side of the road as one faces Linstead, approximately 50 ft. away from a corner on Pawpaw Way.

3. The plaintiff was walking with garbage to be deposited in the truck, when on reaching about 25 ft. away from the back of the truck, he was struck from behind by the 1<sup>st</sup> defendant motor vehicle.

4. That this impact hurled the plaintiff in the air causing him to fall on the bonnet of the 1<sup>st</sup> defendant's motor vehicle.

5. That the plaintiff was carried for some distance on the bonnet of the motor vehicle before he rolled off onto the ground.

6. The motor vehicle swung from the left side of the road onto the right as one faces Linstead and this was where the plaintiff fell off onto the ground.

7. That at the time when the 1<sup>st</sup> defendant motor vehicle hit the plaintiff it was travelling at a fast rate of speed.

8. That when the defendant's motor vehicle came to a stop it was approximately 30 ft. away from where the sanitation truck was parked.

9. Mr. Nathaniel said categorically in his evidence that at the time of the accident he saw the person who was the driver of the 1<sup>st</sup> defendant's motor

vehicle. He went on to say that at first the driver was reluctant to take the plaintiff to the hospital and had to be prevailed upon to do so.

10. He also stated that there was a female in the car at the time of the accident.

11. Mr. Nathaniel was insistent that the accident occurred in the Charlemount Housing Scheme and not in "Whitehall" as was pleaded by the plaintiff originally in his Statement of Claim or "Whitehouse" Housing scheme as the defendants stated in their evidence.

The defendants' case on the other hand is that:

(1) On the 3<sup>rd</sup> day of January 1991 at about 7:40 – 7:50 a.m. the 2<sup>nd</sup> defendant Mark Lowe was driving the 1<sup>st</sup> defendant Desmond Lowe silver grey Cortina motor car along Whitehouse Boulevard, Whitehouse Housing Scheme on his way to work at Alcan which began at 8:00 a.m.

(2) He was accompanied by his brother Desmond Lowe (Jnr.), Cecile Burrell and Patrick Whyne.

(3) That he was travelling at about 20 – 25 mph. as the area was a residential one.

(4) He observed a truck which was parked on his right hand side of the roadway, as a result of which he slowed down in order to pass.

(5) That the road at this point was about 18 ft. wide. His car was about 4-4½ ft. wide, the truck was about 8ft. wide, truck was parked about 2-2½ from the curb wall (water table). This left him roughly 3-3½ ft. to pass the parked truck.

(6) That the 2<sup>nd</sup> defendant Mark Lowe further slowed down to approximately 10-15 mph. in order to pass the truck and when the front of his motor vehicle was almost in line with the back of the parked truck, the plaintiff suddenly stepped out from behind the truck into the path of his motor vehicle.

(7) That he braked up at this point but he could not avoid the plaintiff who was then right in front of his motor vehicle.

(8) The front right side of the 1<sup>st</sup> defendants vehicle hit the plaintiff and he fell onto the bonnet of the car.

(9) The 2<sup>nd</sup> defendant then stopped and the plaintiff rolled off the vehicle onto the ground about 2 – 3 ft. in front of, his motor vehicle.

The 2<sup>nd</sup> defendants brother Desmond Lowe (Jnr.) was called as the defendants' witness. He corroborated Mark Lowe's evidence on most of the material issues.

On a close examination of the evidence in this case there were some areas which were significant and noteworthy.

(1) The identity of the driver of the car

Mr. Derval Nathaniel, the sole eyewitness for the plaintiff states that he saw the driver at the time of the accident. He had had to prevail on him to take the plaintiff to the doctor – yet the 2<sup>nd</sup> defendant who it was pleaded was the driver of car and who admitted that he was the driver of the car was present in Court throughout Mr. Nathaniel's evidence and was not identified by him as the driver. Instead he sought to identify Mr. Desmond Lowe Jnr. the supporting witness for the defence as the driver of the car. This was interesting as Mrs. Dorothy Mitchell who gave evidence relating to other aspects of this case identified Mark Lowe the 2<sup>nd</sup> defendant as the driver of the car.

(2) The date of the accident

Mr. Nathaniel was very vague and evasive in respect to the date of the accident. His evidence was that the accident occurred sometime in 1991. He could not recall the month, the date or even the day of the week when it took place.

In cross-examination he stated that he had been employed to the sanitation company for some (8) months prior to the accident. He was certain that he was not employed to the Company before 1991. He was

quite specific that he started to work for the company in late January 1991.

This is against the background that the date of the accident as pleaded in the Statement of claim and acknowledged by the defendants is the 3<sup>rd</sup> day of January 1991.

(3) Time of the accident

Mr. Nathaniel was again very vague in his evidence as to what time this accident occurred. At first he stated that it happened at around 9:00 a.m. then he said it could have been earlier at about a quarter to nine, then later he said "The earliest the accident could have happened was twenty-five minutes to nine."

The unchallenged evidence of Mark Lowe (the 2<sup>nd</sup> defendant) and his witness Desmond Lowe (Jnr.) was that the accident occurred approximately 7:40-7:50 a.m. while they were on their way to work at Alcan which began at 8:00 a.m

(4) Location of the accident

This is an area of vital importance to the case especially in determining liability in this case.

Mr. Nathaniel the plaintiff's witness was adamant that the accident took place in the Charlemount Housing scheme.

The plaintiff's Statement of Claim originally alleged that the accident occurred along the main road in "Whitehall".

The evidence of the 2<sup>nd</sup> defendant and his witness is that the accident took place along Whitehouse Boulevard in the "Whitehouse" housing scheme.

At the end, of the plaintiff's case, the plaintiff's attorney made an application for the Statement of Claim to be amended in respect to the location of the accident from "Whitehall" to "Charlemount" in accordance with the evidence given by Mr. Nathaniel.

When this is examined against the background that at the commencement of the case the plaintiff's attorney had sought and was granted two (2) amendments to his pleadings and at that stage there was no mention made of the need to amend "the location of the accident." Significantly, when Mr. Nathaniel was asked if he spoke to the plaintiff's lawyer about where the accident happened, he responded that he had done so shortly after the accident and that he then told the lawyer that the accident happened in Charlemount Housing Scheme.

The Court is of the view that if those instructions were in fact given to Counsel, then certainly that would have been pleaded in the Statement of Claim. It would have been far easier to comprehend a mistake being made



with the names "Whitehall" and "Whitehouse" than with "Whitehall" and "Charlemount."

(5) Colour of the 1<sup>st</sup> Defendant's vehicle

Mr. Derval Nathaniel's evidence on the colour of the vehicle involved in this accident was remarkable.

First he described the car as "red". He then said it could have been "dark brown" or blue or even yellow. Finally he reverted to its colour being "red".

The evidence from the defence and this was supported by the plaintiff's wife is that the car was a "silver grey Cortina motor car".

(6) How the accident happened

Plaintiff's witness stated that the plaintiff was hit from behind on Pawpaw Way by the defendants' vehicle when it "burst" around the corner at a fast rate of speed. The front of the car hit the plaintiff when he was approximately 30 ft. from the back of the truck, the plaintiff went up in the air then fell on bonnet of car and rolled onto the ground some 6ft. from where he was hit. He further stated that the car swung away from the back of the truck and did not stop until he was 30 ft. away from the truck, which would in my opinion indicate how fast the vehicle was travelling.

However, the medical evidence as to the physical condition came mainly from Dr. Kotiah's Medical report "Ex.3". He was the first attending physician to see the plaintiff and he described that the plaintiff suffered a haematoma to the back of the foot and severe pains to the back. None of the medical reports in evidence spoke of any broken bones suffered or even bruises or abrasions to the plaintiff, they mainly spoke of his deteriorating mental condition.

Certainly had the car been travelling at a fast rate of speed as described by Mr. Nathaniel, would you not expect to see some broken bones, or some serious injuries after he had been hit up in the air, fallen onto the bonnet of the car and carried for some distance before he fell onto the roadway?

Overall I was not impressed with the accuracy of Mr. Nathaniel's evidence. Having taken into account the failing of his memory because of the lapse of time between when the accident happened and now, and the level of his intellect, I am not convinced that he spoke the truth. He was evasive in the way he gave his evidence and when it came to the details of what he alleged took place he prevaricated from one position to the next as was seen when he was being cross-examined on the colour of the car.

The Court was left at the end of the day to wonder if Mr. Nathaniel was really a witness to the accident or if he was a witness of convenience who had made himself available in an effort to help the plaintiff who it is alleged suffered some serious mental conditions as a result of the accident.

After careful consideration of the evidence as presented in this case on a balance of probabilities I find the following:-

1. That the accident occurred on the 3<sup>rd</sup> day of January 1991 at about 7:40-7:50 a.m. along Whitehouse Boulevard, Whitehouse Housing Scheme.
2. That the plaintiff was injured when he suddenly stepped from behind a stationary sanitation truck which was parked on the opposite side of the road into the path of the 1<sup>st</sup> defendant's vehicle, which was being driven by the 2<sup>nd</sup> defendant at the material time.
3. That the 2<sup>nd</sup> defendant was driving a silver grey Cortina motor car registration number 8474 AA which was owned by the 1<sup>st</sup> defendant.
4. That the 2<sup>nd</sup> defendant tried to avoid hitting the plaintiff by braking up but was unable to do so because of the plaintiff's sudden appearance from behind the parked truck.
5. That the 2<sup>nd</sup> defendant slowed down to about 10-15 mph. based on the space which was available for him to pass.

6. That the 2<sup>nd</sup> defendant and his witness were honest and candid in their evidence to the Court as a result of which I accepted them as witnesses of truth.

7. The plaintiff's sole witness as to fact I found to be evasive and unreliable and was either a witness of convenience or someone who was a total stranger to speaking the truth. His evidence was replete with inconsistencies which went to the very heart of the case for the plaintiff and the issues to be decided. I therefore rejected the account given by him.

8. I found that the 2<sup>nd</sup> defendant was not liable for the occurrence of this accident hence the 1<sup>st</sup> defendant would not be liable as well.

9. Neither did I find that there was any contributory negligence on their part.

I therefore dismiss the plaintiff's case in its entirety and award Judgment to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with costs to the defendants to be taxed if not agreed.