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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1991/B112

BETWEEN	CECIL BROOKS	PLAINTIFF
AND	MAURICE WHITTINGHAM	1ST DEFENDANT
AND	WINSTON REID	2ND DEFENDANT

Mr. L Haynes instructed by Vernon Ricketts & Co for the Plaintiff
Mr. David Henry instructed by Nunes Scholefield and DeLeon for Defendants.

Heard November 18, 19, 20, 21 1997 and March 23, July 10, 1998

HARRISON J

CAUSE OF ACTION AND DEFENCE

The Plaintiff's action sounds in negligence. It has been alleged that the second defendant, the servant and/or agent of the first defendant negligently drove motor vehicle registered CC 554E thereby causing same to collide with the plaintiff's motor bus and as a consequence thereof, the plaintiff sustained serious injuries, suffered loss and incurred expenses.

The defendants on the other hand, have denied negligence and have averred that the collision occurred solely as a result of, or was contributed to by the negligence of the plaintiff. The first-named defendant has counterclaimed and has alleged that by virtue of the plaintiff's negligence he has suffered loss, injury and damage.

THE EVIDENCE

Plaintiff's case

The plaintiff testified that he is a 64 year old tour operator who on the 11th day January 1989 was driving his Volks-waggen bus from Sangster's International Airport heading home. He was proceeding down Queens Drive, Montego Bay, and on reaching in the vicinity of Leader Avenue and Queens Drive he saw a motor car travelling behind him. It was trying to overtake him and he used his right hand to signal the driver of that car to slow down.

He then saw a Lada motor car approaching from the opposite direction and behind it was a Max Pick-up which was being driven by the second defendant. The Lada began slowing down as if to stop and in order to avoid running into the back of the Lada, the driver of the pick-up overtook

it and swerved over to his extreme right. He then collided with the bus thereby injuring the plaintiff's hand which was resting on the right door of his bus.

The plaintiff maintained that at the time of the collision he was travelling on the extreme left side of the road. He tried to pull over closer on the left when the pick-up overtook the Lada but the collision could not be avoided. He stepped on his service brakes, pulled up the hand brake and then stopped in close proximity to a utility post.

He admitted under cross-examination that the accident took place at a left hand bend for him. He denied however, that he was straddling the white line and had negotiated the bend incorrectly and that this caused him to go over to the side of the road on which the pick- up was travelling. He denied that he had travelled for a distance of 3-4 chains down the road and then stopped. He also denied that the driver of the pick-up pursued him after the collision. He explained under cross-examination that it was a wing-mirror on the side of the Pick-up that had hit his vehicle. This wing-mirror, he said was on a door to the side of the Pick-up. According to him, damage was done to the right front door and right "rear view" mirror of his vehicle.

He admitted that he had one hand on the steering but he denied that he went around the bend with one hand on the steering. He could not go further left after he saw the pick-up approaching him as he was already on the extreme left and very close to the embankment. He said he did not pull in his right hand as he did not expect the driver of the pick-up to pull over on him and neither did he expect the driver to travel so close to another vehicle. He claimed that his hand had only rested on the window for the door and it was not hanging outside.

The Defendant's case

The second defendant, Winston Reid was driver of the Max Pick-up. He testified that he was travelling up Queens Drive and on reaching a corner which was a right hand bend for him, he saw the plaintiff's bus coming around the corner. The bus did not make the corner and it came straight towards him and slammed into the right side of the pick-up. The plaintiff did not stop immediately and he had to chase him for about 3-4 chains before he stopped.

He denied that he was proceeding behind a Lada motor car and neither did he have to swerve to avoid colliding with any Lada car. He claimed that he had swerved further to his left to avoid an accident. He also denied that his vehicle had a wing mirror.Under re-examination, he said that the "plaintiff came straight over on my side, slam into the side where the door started down to the back wheel arch of my vehicle." He contended that it was the right hand front door of the bus which made contact with the side of his vehicle.

Findings

I must now determine the issue of liability. Two diametrically opposed versions of the accident have been given. The plaintiff on the one hand, is contending that this accident occurred because of

the second defendant's act of overtaking and moving to the extreme right into his path. The second defendant on the other hand, is saying that the plaintiff negotiated a corner improperly and collided with him as he proceeded in the opposite direction.

How then should this issue of liability be resolved? The credibility of witnesses is an important factor and also of importance, are the resulting damages to the respective vehicles.I had the opportunity of seeing and hearing the parties as they gave evidence and their demeanour have been assessed. The plaintiff has impressed me as an honest and truthful witness. He has been quite frank with the Court and I find his account of this accident more credible. Unfortunately, I cannot say the same regarding the second named defendant. I do not believe his story and I reject his account.

I accept the plaintiff's account that as he negotiated the bend he saw the second defendant's Pickup overtaking a Lada motor car and in carrying out this manoeuvre he wnet too far right and made contact with the plaintiff's bus which was approaching, thereby causing damage to the said bus and serious injury to the plaintiff.

The Assessors' reports which were agreed as exhibits in the case also tell a stroy. Exhibit 2 reveals that the point of impact in respect of the bus was to the right front. There were damages to the right front door and glass, pivot window, front panel, middle panel,door regulator, door post and flooring. The plaintiff also said in his evidence that there was damage to the right wing mirror but the loss adjuster made no mention of this in his report. Exhibit 3 revealed that for the Pick-up, the point of impact was to the right side. The damages to that vehicle included the right cargo body panel, right door locking panel and the right door. The plaintiff maintained that there was a wing mirror on the Pick-up but the second defendant denied that such a mirror was on the vehicle. The plaintiff further maintained that it was that right wing mirror which made contact with his right door when the vehicle came across to the right. According to the second defendant however, the bus came straight over in his side and slammed into the side where the door started. Subsequently, he said that it was the right hand front door of the bus which "came in contact" with his vehicle.

On a preponderance of probabilities, it is my considered view that the damages seen on the vehicles are more consistent with the evidence given by the plaintiff. I accept the plaintiff's evidence that his "rear view" mirror was damaged albeit, that the adjuster made no reference to it in his report. I also accept his evidence that the right wing mirror of the Pick-up did collide with his right front door and mirror. In all the circumstances, I find that the second defendant failed to keep any or any proper look-out, failed to observe the plaintiff's vehicle in sufficient time; overtook at a time when it was manifestly unsafe to do so; drove on the incorrect side of the road and collided with the plaintiff's motor bus when it was travelling on its correct side of the road.

The Defence had alleged that the accident was as a result of, or was contributed to by the negligence of the plaintiff. In addressing me, Mr. Henry urged the Court to find that if there was negligence on the part of the second-named defendant he was not to be blamed fully as the plaintiff had contributed to his injury. He pointed to the evidence where the plaintiff had testified that prior to the collision he had his hand on the door of his bus. He relied upon the cases of Davies v Swan

Motor Co. Ltd [1949] 1 AllE.R 620 and Nance v British Columbia Electric Railway Co. Ltd [1951] 2 All E.R 448. These authorities suggest that a plea of contributory negligence should be treated as setting up want of care by the plaintiff for his own safety and all that is necessary to establish such a defence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed, by want of care, to his own injury. Mr. Haynes on the other hand, submitted that this plea ought not to be entertained by the Court as there were no pleadings alleging facts of contributory negligence on the part of the plaintiff.

An examination of the pleadings reveal that the defence alleged that the accident was contributed to by the plaintiff. Particulars of his negligence are set out as follows:

"1. Driving at too fast a speed in all the circumstances.
2. Driving on or unto the incorrect side of the roadway.
3. Failing to keep close to his nearside of the road while negotiating a bend.
4. Failing to have any, or any sufficient regard to other users of the roadway.
5. Failing to heed the presence of the first defendant's vehicle driving along the said roadway.
6. Colliding with the first named defendant's vehicle while it was lawfully on its correct side of the road way.
7. Failing to stop, slow down, swerve or otherwise manage or control his said motor vehicle so as to avoid the collision."

The pleadings do not reveal any allegation of the plaintiff's carelessness as it relates to where his hand was kept or positioned at the time of the collision. In my view, the submission by Mr. Haynes is correct. Order 18,r 12/8 of the 1967 Supreme Court Practice state inter alia:

> "18/12/8 - Contributory Negligence - Particulars should be given or will be ordered where necessary....."

It is my considered view however, that even if the mere statement that the plaintiff contributed to this accident is considered sufficient, I hold that the mere fact that he had his hand on the door would not be sufficient to constitute want of care for his own safety. In the final analysis, I find that the defendants are solely responsible for this accident.

I now turn to the award of damages.

DAMAGES

General

The Plaintiff testified that he lost consciousness after the accident. He found himself in Cornwall Regional Hospital. He was in pain and he spent four days in that institution. He noticed that his hand was severely injured and it was placed in a cast. He was transferred to the Kingston Public Hospital where he remained for about three weeks and was thereafter sent to The Medical Associates

Hospital to do an X-Ray. He was also admitted into St. Josephs Hospital where an operation was done on the right arm. There was no improvement after the operation so, he went to Canada and was examined by a Doctor there. Another operation was done on the arm and according to him he got a little relief. Since his return from Canada he has not felt any pain.

Whilst in Canada he received a nerve block injection which eased the pain in the hand. The Doctor also slit the upper arm which enabled him to move the hand to some extent. Before this slit was done he could not move the hand from side to side. He is unable to put the hand across the chest unless he holds it and brings it across.

The right hand is now smaller than the left. He was right handed before the accident and he has not been able to drive since. He claims that he should not drive because under the law he is a disabled person. He says that he can do "absolutely nothing" with the right hand as it is completely gone and he is now practicing to use the left hand. He cannot write with the right hand and is unable to grip anything with that hand His wife has to button his shirt collar, tie his neck-tie, and tie his shoe lace.

He has not worked since the accident. He was a waiter before he took up driving but he could not resort to the waiter job as he cannot use his right hand.

He had undergone physiotherapy after the accident and he feels embarrassed now with his deformed right hand. People constantly looked at the hand.

Dr. Warren Blake an Orthopaedic surgeon, saw the Plaintiff at Kingston Public Hospital on the 18th day of January 1989. His medical report was admitted by consent as Exhibit 1. This report states inter alia:

> ".....Injuries sustained were mainly to his right arm, forearm and neck. Examination revealed the following injuries:
>
> 1. Healing wounds three inches by two inches to the dorsum of the mid right forearm.
>
> 2. Paralysis and loss sensation of the right upper limb.
>
> 3. He was wearing a (sic) above elbow plaster cast with a window cut out to allow dressing of the wound. X-Rays revealed a displaced fracture of the distal third of the right radius.
>
> He had regular wound dressing whilst in hospital. This improved satisfactorily and he was discharged on the 6th February 1989. His care thereafter continued in my offices at his request. On the 4th April 1989

> he had internal fixation of the fracture radius as this had failed to unite. He was in St. Joseph's Hospital from the 3rd April 1989 to 6th April 1989. He has had several investigation to determine the extent of the damage to the nerves of the upper limb. The possibility of nerve surgery was also considered. The sum total of these investigation(sic) are that he has a damage to the brachial plexus. This is such as not to be amenable to surgery. His paralysis and loss of sensation will therefore be permanent.
>
> His total permanent disability is assessed at 50% of the bodily function."
>
> Sgd Warren Blake FRCS

Dr. Blake testified that in 1989 when he assessed the plaintiff's disability at 50% of bodily function he had used the British method in arriving at this percentage but had changed over to the American standard in 1993. This resulted in a a change in the rating of the permanent disability to 60% of the whole person.

Mr. Haynes in addressing me submitted that an award $3,000,000.00 would be appropriate in the circumstances. He urged the Court to consider the following cases in making its award:

1. Hinds v Edwards p. 100 of Khan's Vol. 4.

2. Smythe v Attorney General - p. 91 "Assessment of Damages for Personal Injuries" by Harrison.

3. Eubanks v Thorpe - p 91 "Assessment of Damages for Personal Injuries" by Harrison.

Mr. Henry on the other hand has submitted that an award between $1,400,000 and $1,600,000 would be reasonable. He referred to :

Campbell v Johnson p. 89 Khan's Vol 4

In deciding what is a reasonable award it must be appreciated that so far as possible comparable cases should be compensated with comparable awards.

In Smythe's case the plaintiff had a 60% permanent disability of his normal bodily function. He was unable to move his lower extremeties and had been incontinent. The bullet which injured him was lodged in the thoracic vertebra. He was awarded $333,000.00 on the 17th Jaunuary, 1990 in respect of pain and suffering and loss of amenities. This award when updated now values $2,873,861.00.

The plaintiff Eubanks also sustained a 60% whole person disability. There was complete division of the spinal cord and she was completely paralysed from the 9th thoracic vertebra down. She was also incontinent. An award of $300,000.00 was made on the 14th December 1990 for pain and suffering and loss of amenities.

In Victor Campbell v Samuel Johnson and Anor reported at page 89 of Khan's Vol. 4 the plaintiff's right arm was crushed and had to be amputated at the shoulder. The total loss of the right arm resulted in 60% impairment of the Plaintiff. He was awarded $250,000.00 for pain and suffering and loss of amenities on the 22nd day of March 1991. A consumer price index of 11086.8 at March of 1998 would upgrade this award to $1,006,000.00.

Of the cases cited, I would think that the case of Campbell v Johnson is most helpful.It is therefore my considered view that at this time where the index is much higher than it was in March, an award of $1,500,000.00 would be reaasonable in all of the circumstances.

Special damages

Items (a) to (f) in the Particulars of Special Damages were agreed. They are as follows:

(a)	Cost of repairs to the bus	$3,860.00
(b)	Assessor's report	$120.00
©	Medical expense	$160.00
(d)	Physiotherapy	$300.00
(e)	Medical Reports	$600.00
(f)	Travelling expenses	$3600.00
		Total $8640.00

Mr. Haynes submitted that the court should allow the period claimed for loss of earnings but agreed that the plaintiff has a duty however, to mitigate his loss. Mr. Henry on the other hand submitted that the Plaintiff would only be entitled to loss of earnings only from January to November of 1989 and for period he travelled to Canada. He maintained however that there was no evidence how long this latter period was.

The Plaintiff testified that as a tour operator he would take 10 persons on tour. He did 2 tours per day and was based at Verley House Hotel. He charged U.S$150 pertrip. He worked six days per week. His net earning was U.S$1000 per week. Since the accident he has lost his tour job as he has not been able to work. He has sold the bus after repairing it. He could not get some to drive it. He had employed someone initially to do the tours but due to dishonesty on the part of the driver he had to dispense with his service. He never thought of going along with bus and collect the money. He just wanted to get rid of it. He was hoping to retire at age 65 years and that this would take place in 1998.

I would allow an award of U.S $36,000.00 in respect of loss of income from his tour

operations. In these cases, a plaintiff must mitigate his losses so in allowing this sum, I have concluded that a period of six (6) months would be reasonable and using a figure of U.S $1000 as the loss earning per week. When converted U.S $36,000.00 would value J$1,296,000.00 using a ratio of 36:1.

CONCLUSION

There shall be judgment for the Plaintiff on both the claim and Counterclaim as set out hereunder:

General Damages
Pain and suffering and loss of amenities
A sum of $1,500,000.00 with interest thereon at the rate of 3% per annum from the date of service of the writ up to today.

Special Damages
A sum of $1,304,640.00 with interest thereon at the rate of 3% per annum from the 11th day of January 1989 up to today.

There shall be costs to the Plaintiff to be taxed if not agreed.