IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G 153 OF 2000

BETWEEN	**GLENROY**	**GLANVILLE**	**CLAIMANT**
AND	**CLOVIS**	**THOMAS**	**FIRST DEFENDANT**
AND	**DELROY**	**REECE**	**SECOND DEFENDANT**
AND	**LABELS & BOXES LTD.**		**THIRD DEFENDANT**

Mrs. Marjorie Shaw-Currie instructed by Brown & Shaw for the claimant

Mrs. Arlene Harrison-Henry for the first and second defendants

Mr. Garth McBean instructed by Charmaine Rhoden & Company for the third defendant

October 14, 15, 22, November 5 and 26, 2004

Sykes J (Ag)

NEGLIGENCE

On January 9, 1996 the claimant, Mr. Glenroy Glanville, a welder was travelling from the hot plains of Liguanea to the lush green parish of Portland in a van that was driven by Mr. Andrew Lee, who regrettably, did not survive the collision. While the van was driving along a straight stretch of road between Annotto Bay in the parish of St. Mary and Buff Bay in the parish of Portland, it collided with a bus owned by Mr. Clovis Thomas, the first

defendant, and driven by Mr. Delroy Reece, the second defendant. Mr. Glanville received injuries for which he now seeks compensation.

In this case, the real question is who is liable for the injuries? There is no question of contributory negligence on the part of the claimant. The contest is between the defendants.

One of the most important issues in this case is to determine whether Mr. Darrio Lee is speaking the truth when he said that on January 10, 1996 he took photographs of the area where the accident occurred and the vehicles involved in the collision. He says that he received information about the accident on January 9, 1996. He went out there the next morning at approximately 9/10 o'clock. While there, he took a number of photographs. These photographs were tendered in evidence and were numbered exhibits 5a to 5h.

Mr. Darrio Lee was extensively cross-examined and I am unable to detect anything that would cause me to doubt his word. He has not prevaricated on any issue. He has not tried to withhold evidence and consequently I accept him as a witness of truth. The significance of this finding is that I accept his evidence when he says that he went to the scene of the accident on January 10, 1996 and took photographs. I also accept his evidence that he photographed the vehicles that were involved in the accident. These photographs provide useful evidence about the lay out of the accident scene and the physical damage done to the vehicles. The pictures have had an impact on the credibility of witnesses.

The accident

Mr. Glanville does not provide much detail about how the accident occurred. He says that he was sitting in the back of the van driven by Mr. Andrew Lee. This was about 2:00 pm on January 9, 1996. He recalls that shortly before the accident he had glanced quickly towards the front of the vehicle in which he was travelling. He saw a bus that was on the van's side of the road. He then resumed his position which was that of facing the rear of the van. He said that he thought the bus would have cleared the van. By this, I understand him to be saying that the distance between the van and the bus was great enough for the bus to go back to its correct side without colliding with the van. He pointed out the distance that he thought the van was from the bus. This was estimated to be approximately 80 metres. He said that his glance was quick. It was not a prolonged stare. He estimates the speed of the van to be approximately 45 – 50 mph. At the end of his evidence, the picture then is that of the bus on the same side of the road as the van, which was proceeding on its correct side towards Buff Bay from Annotto Bay. Mr. Glanville cannot assist with whether the road had white lines or potholes.

Mr. Delroy Reece was the driver of the bus. He said on the day in question he was driving towards Annotto Bay from the Buff Bay direction. He was on his correct side of the road. In the distance, he saw this van speeding towards him. Mr. Reece stated that he was crawling along at 30 mph. He testified that from the time he first saw the van to the time of impact it was either on his side of the road or in the middle of the road. When the van was quite near to the bus it suddenly swung over to his side of the road and hit his bus. He says that a pothole was on the van's side of the road. This was no doubt being put forward as the reason why the van swung to his side of the road.

In support of this pothole theory, the second and third defendants called the Constable Dale Bennett. He says that he arrived on the scene shortly after the accident. He testified that the stretch of road was divided by a white line and there were potholes present on both sides of the road. There were potholes on the left as one travels from Buff Bay to Annotto Bay and there was a huge pothole on the opposite side of the road as one travels towards Buff Bay. Mr. Andrew Lee is supposed to have swerved from this hole.

Under cross-examination, the officer admitted that the photographs did not show any white line and neither did they show any potholes. He said that the photographs showed that the holes were patched. What he was suggesting was that between 2:00 pm on the afternoon of January 9, 1996 and 9/10 am on January 10, 1996 the holes were patched. Well, if that is so what happened to the white line?

An attempt was made to suggest that exhibit 5b showed an area where it was possible that the pothole from which Mr. Lee swung. A close examination of the photograph does not enable one to draw this conclusion. Having regard to the close proximity in time to the accident when the photographs were taken, I find on a balance of probabilities that there were no potholes at the accident scene. Mr Darrio Lee does not recall seeing any potholes when he went there. I accept his testimony on this point. I find as well that there was no white line at the accident site. The pothole theory is not supported by the photographs. I also consider the likelihood of the holes being filled out between the time of the accident and the following morning. That likelihood is remote, so remote that on a balance of probability I find that it did not happen. It follows from this that I conclude that any swerving of the van cannot be attributed to any pothole.

It is common ground that the van ended up on the right side of the road or to put it another way, on the bus' correct side of the road. Is there any evidence that points to a possible explanation for this? Yes there is. A close examination of exhibits 5a and 5g shows that the damage done to the bus must have been caused by a severe impact. The left front of the bus was actually pushed back towards the left front wheel. Exhibit 5f shows severe damage to the van that suggests that it was struck more to its left front (near the door) rather than a full head on collision.

There are two witnesses that provide evidence of what actually happened. Mr. Delroy Reece, who has already been mentioned, and Mr. Mark Evans, a front seat passenger in the van. Mr. Reece did not mention any pothole on the van's side of the roadway in his police statement. This is quite a remarkable omission in the context where the police were investigating an accident in which a person died. Mr. Reece, who was directly involved in the accident, did not tell the police that the reason for the accident was that the van swung from a pothole. His explanation for this omission was that the police did not ask him about any pothole. This explanation is not acceptable because he knew at the time that the police were investigating the cause of the accident. How could he fail to mention what would have been, on his account, so obviously, the cause of the accident? This undermines severely the credibility of Mr. Reece.

Mr. Reece said that no part of the bus went over the white line. He, like the Constable, is wedded to this non-existent white line. He claimed that when his bus stopped after impact, the front rested on the wall. In his examination in chief Mr Reece stated:

I immediately swerved further to my left to avoid the pick-up, which was now in my lane. In swerving to my left I hit the retaining stonewall causing damage to the left front side, left front step and left front of bus.

He was clearly, in this bit of testimony, attributing the damage seen on the bus to the stonewall. In the next paragraph of his testimony, he said that the van came across and hit the wall and the bus. He does not say that the van caused the damage.

When cross-examined he said that the "pick up push front of door into wheel". He added, "The stone wall did not cause damage." These accounts of the damage to the bus are not reconcilable. To emphasize the point, he finally said, "I am sure that it is not the stone wall that cause that damage." The change in his testimony concerning how the bus was damaged came after he was shown the photographs. No doubt when confronted with the photographs and his witness statement, Mr. Reece, like me, found that his original position was not tenable. It is not surprising that he now had to say that the van hit the bus and caused the damage. This is further evidence of Mr. Reece's unwillingness to speak the whole truth. However, his new-found position still had a difficulty which was this: if he was on his correct side and travelling with the left front near to the wall, how does one explain the location of the damage to the bus?

In my view, the photographs of the bus, van and wall show that the accident is more consistent with both vehicles colliding further away from the wall and then the impact sent both vehicles in the direction of the wall.

Mr. Mark Evans stated that after the accident the van was not facing the banana plantation. Its back was towards the plantation and the front out in the road. He also said that the bus was coming down on the van's side of the road and when an accident appeared imminent, the van swung to the right and then there was the impact. If the van swung to its right then its front would be heading in the direction of the banana plantation shown in exhibits 5d, 5d, 5e and 5h. It is difficult to see how the front of the van could end up pointing away from the plantation if it was struck on its left side. The most likely explanation, if Mr. Evans is accurate on this point, is that after the van swung to its right, thereby exposing its left side, the impact forced it around so that it spun more than 180°. In light of the evidence in the case, this seems very unlikely. I therefore conclude that Mr. Evans is not accurate when he said that the van stopped after the impact with its front out in the road and its back towards the banana plantation. However, this does not mean that Mr. Evans' testimony is valueless. I will refer to it later because it does provide a credible explanation of the accident.

Mr. Mark Evans, the front seat passenger in the van, stated that the van was travelling at approximately 40 mph. The stretch of road was straight. When he first became aware of the bus, it was some 80 – 100 metres away. At least that was his examination in chief. When cross examined he said that it was 50 metres away when he first saw it. Later he said that it was between 50 – 75 metres from the van when he "took real notice" of it. He estimates the speed of the bus to be about 40 – 50 mph. There is no mention in his evidence of Mr. Andrew Lee slowing down or pulling to the left before the accident when it should have become apparent that the bus was now bearing down on the vehicle. It seems that Mr. Lee continued at the same speed in

the hope that the bus would return to its correct side. It was only moments before what had by then become an inevitable collision that Mr. Lee attempted to avoid the collision.

It seems to me that Mr. Lee's manoeuvre coincided with the evasive action of the bus. According to Mr. Evans, Mr. Lee was now attempting to pass the bus by driving on the van's incorrect side of the road. It was while the van was moving across the line of travel of the bus that the bus changed its line and began heading in the new direction in which the van was heading. That, in my view, explains why the bus hit the van on the van's left. It also explains adequately the damage to the bus that is shown in the photographs.

I have come to the conclusion that Mr. Glanville was speaking the truth when he said that he peeked and saw the bus on the van's side of the road. This is consistent with Mr. Evan's evidence that the bus was on their side of the road. The photographs are more consistent with an impact away from the wall rather than close to the wall as Mr. Reece was trying to make out. Only an impact further away from the wall can explain the location of the damage to the bus.

In these circumstances, the third defendant cannot escape liability. Mr. Lee undoubtedly contributed to the accident that occurred. The only remaining issue is what percentage of liability should be attributed to each of the defendants.

Findings of fact

1. The bus was on the van's side of the road.
2. The bus did not stop or return to its correct side of the road.

3. The bus did not have regard to the presence of the van that was approaching.

4. The bus only tried to get back on its correct side when an accident seemed inevitable.

5. I am also satisfied on a balance of probability that the van did not slow down.

6. The van did not stop or take any measures to avoid the accident other than trying to swerve at the last possible moment.

7. Andrew Lee did not swerve to avoid any pothole. There was no pothole. Andrew Lee swerved to avoid hitting the bus.

8. The bus hit the van while the van was going to the van's right, to pass the bus. The bus then came back to the bus' left and hit the left side of the van.

9. This was a situation where both drivers left evasive action until they passed the point of no return. After that point, it was simply whether or not it would be a head on collision.

Liability

I have concluded that drivers of the bus and the van were negligent. Mr. Clovis Thomas is liable on the basis of vicarious liability for the negligence of Mr. Delroy Reece. Labels & Boxes Limited is vicariously liable for the negligence of Mr. Andrew Lee. The pleadings of Labels & Boxes Limited admitted that Mr. Andrew Lee was its agent.

Based upon all the evidence I have formed the view that Mr. Delroy Reece has to take the lion's share of liability. He was on the incorrect side of the

road well before the accident. He did not attempt to return to his side of the road until it was too late.

Based upon the testimony of Mr. Glanville and Mr. Evans the bus was on the van's side of the road. Mr. Lee took no action to avoid the collision until the bus was within a few metres of the van.

This case is such that no authority is needed to establish liability in both drivers. But in the event that authority is needed, we need look no further than ***Baker v. Market Harborough Industrial Cooperative Society Ltd. Wallace v. Richard (Leicester) Ltd*** [1953] 1 W.L.R. 1422 where Denning LJ (as he was at the time) stated that where both drivers kept their course and there was no evidence of evasive action then both are to blame. There is no question of either one escaping liability because both would have contributed to the accident.

The first and second defendants have not pursued their counter claim.

I apportion liability in this way: 80% to Mr. Reece and 20% to Mr. Andrew Lee.

Injuries received by the claimant

(a)the nature and extent of the injuries sustained

The claimant says that he lost consciousness. He was taken to the Annotto Bay Hospital and later transferred to the Kingston Public Hospital (KPH).

To support his claim he tendered two medical reports. One was by Dr. J Buschmann from KPH. This report is dated August 16, 1996. The other report is from Dr. Tun Tun OO from KPH dated April 30, 1999.

Dr. Buschmann's report

Mr. Glanville presented with neck pain, tenderness below the right lateral knee and weakness in his right leg. X rays showed a fracture at C2 vertebral body and the right fibular head.

The neck was immobilised in a collar, the right leg was placed in plaster of paris and he was given pain killers. The claimant was discharged on January 29, 1996. The cast was removed on April 14, 1996. On examination of the leg, it was not tender. There was no neurological deficit of the right leg. Extension/flexion views of the X ray of the spine did not show any instability. The collar was removed.

The doctor concluded his report on the optimistic note that no permanent disability was expected and the fractures healed satisfactorily. The paresis resolved completely.

Dr. Tun Tun OO's report

This report repeats much the same information as Dr. Buschmann's. He adds however, that on Mr. Glanville's last visit to the Orthopaedic clinic on February 2, 1999 there was no permanent disability at the neck or at the right lower limb. The doctor noted that there was a period of time when the claimant could not carry out normal activity because of the collar and plaster of paris.

(b)The nature and gravity of the resulting physical injuries

The medical evidence says that there is no evidence of permanent disability. This was stated in both reports. Mr. Glanville said that he was unable to do anything for ten months to one year after the accident.

(c) The pain and suffering which had to be endured

He alleges that he experienced severe pains in his back, neck and right foot. He stated that he had a plaster cast from his ankle to his hip on his right foot. He claims that he has pain even now.

(d) The loss of amenities suffered

He was clearly not able to perform his usual activities for nearly one year. This affected his enjoyment of life. There is no specific evidence of how his quality of life was affected by the accident but the injury and resultant inconvenience must have affected the claimant's quality of life.

(e) Damages

Special damages

Special damages, other than loss of income, were agreed at $2,830.

The claimant says that he should receive an award for loss of income calculated at $5,000 per week for forty weeks. He has presented no other evidence to support this claim other than his say so. In this kind of case, this is simply not good enough. In ***Murphy v Mills*** (1976) 14 J.L.R. 119 the Court of Appeal deprecated the following evidence: the claimant in that case testified that he usually earned $120/$130 per month. He could not work for six months. He had no salary slips. He worked for Sharp Construction in Montego Bay. Hercules J.A. said this kind of evidence was not sufficient to support a claim for loss of earning of $960 at $120 per month. The Court of Appeal has recently affirmed its fidelity to ***Murphy's*** case in ***Walker v Pink*** SCCA 158/01 (June 12, 2003). The Court in ***Pink*** did acknowledge that in

some cases it might be appropriate to take a more lenient view. This is not one of those cases. The evidence is that the company to which the claimant was employed is still in operation but no effort was made to obtain supporting evidence from the company. The defendants were generous in suggesting that I should use the minimum wage. The difficulty with this is that the minimum wage is subject to change from time to time and so evidence of what the minimum wage was over the relevant period would have had to have been tendered. This has not happened and consequently I am unable to adopt that approach. The company that employed Mr. Glanville is still in operation. There is no explanation for the failure to attempt to procure evidence to support this claim. I make no award for loss of earnings.

General damages

The claimant relied on a number of cases to support his claim for general damages. The first was ***Douglas Fairweather v Joyce Campbell***, Suit No. C. L. 1982 F 059 (assessed May 14, 1999) found at *Khan, Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Volume 5* at page 74. The claimant had a laceration to the chest wall, compound fracture of left tibia and fibula, chipped right upper molar tooth, severe tenderness & stiffness to back of neck, marked tenderness & stiffness of upper spine, battered & painful shoulder and whiplash. He suffered from a 7% – 10% permanent functional impairment of the left lower limb. That is not the case here. It is quite clear that that case had far more severe injuries than the claimant in this case. I will not be relying on this case.

The next case was that of ***Paul Jobson v Peter Singh***, Suit No. 1995 J171 (assessed July 3, 1997) found at *Khan's Volume 4* at page 169. The

claimant had head injuries, bruises to arms and legs and pains to neck, down the back and across shoulders. He had intermittent pains and could no longer play football. There is nothing in the report to say whether there was any permanent disability. I will assume that there was none. The sum awarded at the time was $430,000. The Consumer Price Index (CPI) at the time was 1055. The most recent CPI available is for August 2004 which is 1897.3. The current value of that award is $773,307.11.

The claimant also relied on ***Ilene Gardener v Janet Chin*** Suit No. C.L. 1993/G 167 (assessed March 13, 1996) found at *Khan's Volume 4* at page 156. The claimant there suffered unconsciousness, severe neck pain and a fracture of the atlas vertebra with dislocation of the bone in front of the axis. Her total disability was 14% of the whole person. She was awarded $420,000 as general damages. This case is not the best guide. The factures were at a different part of the body and the claimant there had a permanent disability.

Of the three case cited, ***Jobson*** seems closest to the mark. I note the points of distinction between the instant case and **Jobson**. First, there are broken bones in this case and none in ***Jobson***. Second, there was more evidence of loss of amenity suffered in ***Jobson*** than in this case.

I start with the well known principle that impairment of health is not just the cause of pain and suffering but also the loss of something of intrinsic value (see Lord Roche in ***Rose v Ford*** [1937] A.C. 826, 859). Mr. Glanville has suffered the pain of which he has spoken. His vitality was impaired because of the accident and continues to be impaired because of the pain he is still suffering. He must have suffered some loss of amenity and continues to suffer loss of amenity. Thus although the fractures have healed to the satisfaction of the doctors there is still intermittent pain. For all this, he ought

to be compensated. I take into account that he has not suffered any impairment in the actual use of his limbs. That is, even though he experience pain he is not deprived of the use of his limbs. An appropriate award is $850,000.

Conclusion

Mr. Delroy Reece and Mr. Andrew Lee were both negligent in the manner in which they drove on January 9, 1996. Mr. Reece is 80% responsible and Mr. Lee 20%.

Mr. Glanville has not made good his claim for loss of earnings between the date of the accident and the trial. There is no claim for loss of future earnings or handicap on the labour market.

For special damages, the agreed sum in respect of damages other than loss of earnings was $2,830. This attracts interest at 6% from January 9, 1996 to November 26, 2004. General damages awarded in the sum of $850,000 at 6% interest from the date of service of the writ of summons to November 26, 2004 – 80% payable by Mr. Reece and Mr. Clovis Thomas and 20% payable by Labels & Boxes Ltd. Costs to the claimant to be agreed or taxed and apportioned in the same manner as liability.