

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1987/G005

BETWEEN	CLIFFORD GRAHAM	PLAINTIFF
AND	LLOYD KIRLEW	DEFENDANT

Mr. John Graham, Miss Camile Meikle for Plaintiff instructed by
Messrs. Broderick and Graham, Attorneys-at-Law.

Miss Dorothy Lightbourne for Defendant.

Heard: JANUARY 8, 9, 10, 17, 18, 21, 22, 23, AND APRIL 26, 1991

CORAM: RECKORD J.

In this action the plaintiff claims that the defendant so negligently operated his motor car along the Cambridge Main Road in the parish of St. James, that it violently collided with the defendant's motor cycle as a consequence of which the plaintiff sustained severe injuries, suffered loss, damage and incurred expenses.

The plaintiff testified that at about 3.30 p.m. on Sunday the 28th of July, 1985, as he drove his Honda C 50 motor cycle from the direction of Cambridge towards Catadupa on the left hand side of a dry asphalted and winding road slightly uphill, that the defendant drove his Capri motor car from the opposite direction at a fast rate of speed and in negotiating a corner failed to keep on its side of the road and crashed into the plaintiff's motor cycle.

His right foot was fractured in several places - a three fragment fracture of the right femur also fracture of the tibia and fibula. He was taken in defendant's car to the Cornwall Regional Hospital and remained there until he was discharged on the 21st of December, 1985. He was re-admitted on two other occasions for further treatment.

He started working with Jamaica Railway Corporation in 1973 as trackman. In 1985 before the accident he was still working with the Jamaica Railway Corporation as a trackman earning a take home pay of Five Hundred Dollars (\$500.00) per fortnight and in addition would work overtime and that in 1984 - 85 he worked about Six Thousand Dollars (\$6,000.00) as overtime.

He also did some amount of farming from which he earned approximately Nine Thousand Five Hundred Dollars (\$9,500.00) per annum.

Since the accident he has been re-employed as a gateman in 1987, at a reduced rate.

In cross-examination plaintiff denied he was a gateman with the Jamaica Railway Corporation in 1983 or 1984. He admitted signing a proposal form for motor cycle insurance in 1983 with Central Fire Insurance Company but did not recall telling the insurers then that he was a gate keeper. (Proposal form tendered in evidence as Exhibit 1). Again he agreed that while he was in hospital a gentleman from Central Fire Insurance Company visited him and he gave him a report of the accident but did not recall telling him that he was a gate keeper and that on the date of the accident he was travelling to Catadupa "to perform my duty as a gate operator."

Under further cross-examination plaintiff said "I told him my right leg and thigh were fractured in several places. I never told him right foot of pillion was also fractured. I never told him that pillion was taken to hospital in same car. I did tell him that a lady was also injured in the same accident and was taken to hospital in the same car as me. This lady was travelling on foot in the same direction that I was when she got injured." (Be it noted that it was only in cross-examination that any evidence came from the plaintiff that a pedestrian had also received injuries in this accident). He did not know the pedestrian before and denied giving her name 'Lisa Headley to the insurers. (Accident Report Form signed by plaintiff was admitted in evidence as Exhibit 2).

He admitted speaking to the driver of the car but denied that the driver asked him what he was doing on his (the driver's) side of the road. He denied that he replied that "I was taking my pillion to catch the diesel at Catadupa which she had missed at Cambridge." He was not aware that the left hand side of the car was damaged on the left hand bank. He admitted he had a motor vehicle accident in 1976 and was asked this question. "Was it after the 1976 accident that you ceased being a trackman?" And he answered "Yes," and then added "After I got better after the 1976 accident I returned to work as a trackman until 1985."

In re-examination the plaintiff said that "between 1973 and up to 1985 I did a period of time as gate keeper (after) the 1976 accident until my foot got strong. While plaster of paris was on foot I got a little work at the gate. I worked as gate keeper from 1976 to sometime in 1978. After this I started doing track work with the Jamaica Railway Corporation."

Miss Lisa Headley, testified for the plaintiff. She said that she was walking on the left hand side of the road towards Catadupa about 3:30 p.m. on a Sunday in July 1985, when she saw a car coming down around a corner on her side of the road; that accident happened after the car passed her. She had heard the bike coming from behind and then heard the collision; she did not know what collided; she found herself on the ground but don't know how she got there; she was taken to Cornwall Regional Hospital in defendant's car and was admitted with a broken right foot. At the time of the accident she was living in Bog Walk, St. Catherine, but had come to visit her grandmother who lived in Retrieve District. She was walking towards her grandmother's home when she was hit.

In cross-examination this witness admitted speaking while in the car but denied saying that "I saw car coming but before I could say anything to Mr. Graham it was too late. I never said in the car that I and Mr. Graham were hurrying to catch a train. I was not a pillion rider on Mr. Graham's bike." She had not reported the accident to the police and never contacted the Insurance Company until about 2 years afterwards when Mr. Graham invited her to his lawyer Mr. Robb who sent her to see another lawyer as he could not deal with the two cases. She was not going to Catadupa that afternoon to catch the diesel. Although she had incurred lots of expenses and was anxious to get compensation she did not like the courts and made no effort to enquire about the car or driver. She did not know that Mr. Graham was a learner driver of the motor cycle.

In an amended statement of claim the plaintiff stated that his loss of earnings and expenses incurred was to the extent of One Hundred and Eleven Thousand Six Hundred and Seventy Eight Dollars and Seventy Six Cents (\$111,678.76).

Dr. Pierre Herald, Orthopaedic Surgeon from Montego Bay gave detail and extensive evidence of the injuries the plaintiff suffered and the treatment that was administered. Professor John Golding of the University of the West Indies

examined the plaintiff on the 18th of December, 1990, and made an assessment of the result of the plaintiff's injuries.

The defendant's case was that he was returning to his home in Montego Bay this Sunday afternoon coming from St. Elizabeth, driving his car and accompanied by his then girl-friend and their 4 year old daughter. At about 3.30 p.m. as they drove through Retrieve district he was going along a slight down grade towards an S bend in the road about 20 m.p.h. As he completed the first corner in this bend he heard the sound of a motor cycle racing towards him. He decreased his speed and tooted his horn, he was then driving on his extreme left. He then saw a motor cycle coming towards him with a lady pillion on it. "Bike was midway my left, that is, in the middle of my side of the road. I banked the car and stopped and the bike came right into my right front fender." Both rider and pillion fell on his side of the road. He asked the rider, (plaintiff) why he riding like that, that fast and he replied that he "was hurrying to catch the diesel at Catadupa that had left the pillion at Cambridge." He estimated the speed of the motor cycle to be 50 m.p.h.

A passing police car stopped and acting on the advice of the police driver he marked the position of his car and the motor cycle which had fallen on his side of the road. He took the injured persons to Cambridge Police Station and then to Cornwall Regional Hospital. Along the way the pillion said that the rider was going very fast and on seeing the car it happened so quickly she was unable to tell him to get out of the way. She was trying to catch the diesel going to Kingston.

Both front fenders of his car were damaged in the accident.

The following day, he returned to the scene with police from Cambridge who did measurements from the marks he had made. His right front wheel was 4 ft. 6 inches from his left bank. The damage to his car was repaired at a cost of One Thousand Five Hundred Dollars (\$1,500.00) and he spent about Four Hundred Dollars (\$400.00) to travel around while his car was being repaired. He identified the witness Lisa Headley as the pillion rider.

He gave a statement to his insurance company the day following the accident.

Mr. Michael Evans Administrative Assistant from the Jamaica Railway Corporation was called by the defendant. He had the records concerning the plaintiff's employment with the Jamaica Railway Corporation. From the records, the plaintiff started working as a temporary worker with the corporation on the 26th of September, 1977, as a gate keeper and from the records was still at the time of this trial employed as a gate keeper. The rate of pay for a gate keeper on 28th July, 1985 was One Hundred and Sixty Three Dollars and Ninety Six Cents (\$163.96) per week. They are paid for overtime if they work for over five days per week. This witness gave details of payments made to the plaintiff between January 1986 to December, 1989. The rate of pay for gate keeper in 1988 was Two Hundred and Twenty Eight Dollars and Twenty Six Cents (\$228.26) per week; 1989 - Two Hundred and Fifty One Dollars and Nine Cents (\$251.09) per week; 1990 - Two Hundred and Eighty Two Dollars and Forty Seven Cents (\$282.47) per week and 1991 - Three Hundred and Seventeen Dollars and Seventy Nine Cents (\$317.79) per week.

Mr. Claude Smith former claims clerk with Central Fire Insurance Company testified that acting upon instructions from his superiors he went to the Cornwall Regional Hospital on the 14th of October, 1985, to obtain report of an accident involving the plaintiff who was insured with his company. He wrote down the plaintiff's statement, read it back to him and he signed it as correct. He identified the statement in court as Exhibit 2. It was the plaintiff who told him that he was accompanied by a pillion rider on the motor cycle; that the pillion rider's right foot was also fractured and that he, the plaintiff, was a gate keeper with the Jamaica Railway Corporation.

This was the extent of the defendant's case. There was no denial that the plaintiff suffered serious injuries in this accident. However, before the question of damages can be dealt with the issue of liability must first be considered and determined.

The plaintiff and his witness contend that the vehicles collided on the extreme left of their side of the road. The defendant is equally adamant that it happened near to the middle of his half of the road. Both could not be correct, especially in view of the fact that one vehicle is a motor cycle and the other a small motor car. The defendant had estimated that the width of the

road in the vicinity of the accident was about 30 feet. The credibility of the witnesses have been called in to question and must therefore be looked at with care.

The burden lies on the plaintiff to prove on a balance of probability, that it was the defendant's negligence that caused this accident. If the court accepts the plaintiff's version, then he would be entitled to a judgment. If, on the other hand, his evidence turns out to be so unreliable as to make it unsafe for a court to act upon, then his action will fail and judgment given in favour of the defendant.

The plaintiff's credibility was challenged in five main areas of his evidence.

1. That Lisa Headley was a pillion rider on his motor cycle.
2. That he was taking Miss Headley to catch the diesel in Catadupa which she had missed at Cambridge.
3. That in his application for motor cycle insurance in December 1983, he gave his occupation as a gate keeper.
4. That he was a gate keeper with the Jamaica Railway Corporation at the time of the accident.
5. The inexplicable injury to Miss Headley.

Re 1. The defendant testified on oath that he saw Miss Headley sitting on the pillion seat clinging to the plaintiff. Mr. Smith said that the plaintiff not only told him in the hospital that he was carrying Miss Headley as a pillion rider; that they were both thrown off the motor cycle and that they both had fracture to their right foot, but also that he took a statement in writing from the plaintiff to this effect which the plaintiff signed as correct.

Re 2. The defendant said he questioned the plaintiff as to the manner of riding and the reason he gave was that he was hurrying to catch the diesel at Catadupa which she had missed at Cambridge. At the time of this accident Miss Headley lived at Bog Walk in St. Catherine. It is common knowledge that the distance between Catadupa and Cambridge is relatively short. An intending passenger missing the diesel at Cambridge can easily reach Catadupa if immediate transport is available to take her there quickly by road. Both plaintiff and defendant said the accident happened about 3.30 p.m. On the plaintiff's evidence this is the time the diesel is scheduled to be at Catadupa. All this gives credence to the defendant's evidence as to what the plaintiff said to him when he questioned the plaintiff as to the manner of his riding.

Re 3. The plaintiff admits that in his application for motor cycle insurance he signed a proposal form on the 5th of December, 1983. He denied that he was a gate man in 1983 or 1984. He did not recall telling his insurers when he signed proposal form that he was a gate keeper.

Re 4. In his evidence the plaintiff said that in 1985 he was a trackman earning approximately Five Hundred Dollars (\$500.00) per fortnight exclusive of overtime pay and washing and duty allowance. He estimated that he earned Six Thousand Dollars (\$6,000.00) in 1984 to 1985 for overtime. Mr. Evans from the Jamaica Railway Corporation personnel department said on 28th July, 1985 the salary of a gate keeper was One Hundred and Sixty Three Dollars and Ninety Six Cents (163.96) per week and that at the time the plaintiff was a gate keeper. It is patently clear that if the plaintiff is successful on the question of liability that damages would have to be assessed on the higher basis if the court accepts that he was in fact a trackman.

Re 5. The only evidence by the plaintiff concerning Miss Headley came out in cross-examination. Nothing at all was said in examination-in-chief of a pedestrian or any other person being injured. It came out only when he was being questioned about the statement he gave to the insurance agent Mr. Claude Smith. He acknowledged that a lady was injured in the same accident and taken to the hospital in the same car "the lady was travelling on foot in the same direction that I was when she got injured." He never gave the lady's name to the agent as he never knew her before. "She was before a shop approaching a shop." He gave absolutely no evidence of how Miss Headley sustained her injuries.

How did Miss Headley say she received her injuries? She was walking on the left hand side of the road and saw car coming around a corner on her side. "the accident happened after the car passed me. I heard the bike coming from behind me and then I heard a collision. I did not know what collided. I found myself on the ground - don't know how I got there." Here again, there is absolutely no evidence from Miss Headley as to how she was injured. What is clear, however, from her evidence, it was not the car that hit her.

The defendant's case which I have already set out, is straight-forward and clear.

It is against this background that I must determine liability.

Miss Lightbourne for the defendant submitted that there were disputes as to the point of impact, the speed of the vehicles and the occupants of the motor cycle and to the purported admissions made by the plaintiff and Miss Headley to the defendant. It was significant that Miss Headley having received serious injury consistent with defendant's case that she was pillion rider who was hit on right leg by car, makes no report to the police or seek out Insurance Company to get compensation. She did not behave like an independent person who had been wronged. Both Miss Headley and the plaintiff were travelling illegally on the motor cycle and were open to prosecution. Although this would not have affected liability, this may have been the reason why Miss Headley never went to the Police. The damage to both side of defendant's car was consistent with his evidence.

Mr. Graham, for the plaintiff, ask the court to reject the defendant's evidence that the plaintiff was travelling about 50 m.p.h. The motor cycle was a small one. The defendant a big man over 6ft. tall weighing over 200 lbs. It was improbable to travel at that speed up a slope with a pillion. He pointed to areas of conflict in defendant's case e.g. Defendant was able to see the corner 3/4 chain away. Yet he only saw the motor cycle when it about 4 yards from him. He charged that the defendant changed his evidence as the case went on.

Dealing with the evidence of Mr. Smith, Mr. Graham submitted that although both parties were insured with the same company if liability was attached to the defendant it would be more to the detriment of the insurance company and that Smith had gone to the hospital to look after the interest of the company and therefore no reliance should be paid the circumstances of the taking of the statement. He asked the court to accept the plaintiff and Miss Headley as witnesses of truth, as they were consistent throughout.

FINDINGS

There was overwhelming evidence which I accept as true that Miss Headley was a pillion rider on the plaintiff's motor cycle. The injuries they received were consistent with defendant's evidence that the right side of the motor cycle crashed into right side of the motor car causing injuries to the right foot of each of the occupant of the motor cycle. This was re-inforced

by the evidence of Mr. Smith which I also accept as true. I accept the evidence of the defendant that both the plaintiff and Miss Headley told him that they were hurrying to catch the diesel.

I accept the evidence of Mr. Evans that the the plaintiff was employed as a gate keeper from inception of his contract and was so employed at the time of the accident. I find that the plaintiff in order to bolster his claim lied regarding the nature of his employment and the salary he was receiving.

At the end of the plaintiff's case there was no evidence before the court as to how Miss Headley was injured. Suggestions to both plaintiff and herself in cross-examination were flatly denied. Quite unnecessarily, they had conspired to mislead the court on the question of the occupancy of the motor cycle and to answer all questions about her injuries on an "I don't know" basis. Clearly they had forgotten that over five years ago in October of 1985, the plaintiff had given a signed statement while in hospital as to how they both sustained their injuries.

What therefore is left of the plaintiff's and Miss Headley's credibility. The credibility of each of them has been severely shattered in the areas I have highlighted and there are others which are questionable but need not be gone into.

If the plaintiff is so discredited in these areas which do not affect liability how then can I rely on him on his challenged evidence as to where in the road the vehicles collided.

Based on this totality of the evidence I reject the plaintiff's version and accept the defendant's. I find that the plaintiff with pillion aboard drove his motor cycle recklessly to catch the diesel. That in cutting this corner he crashed into the car of the defendant who was not driving negligently causing serious injuries to himself and the pillion and causing damage to the fenders of the defendant's car.

Of course, there were conflicts in the defendant's case but these were mainly on the question of estimated distances at the scene of the accident. This accident occurred over five years ago and such conflicts are not unexpected.

There will therefore be judgment on the claim for the defendant with costs against the plaintiff to be taxed if not agreed. On the counterclaim there will be judgment for the defendant in the sum of One Thousand Nine Hundred Dollars (\$1,900.00) as claimed with interest at three percent (3%) from the 28th July, 1985 to today.