

2. There is no point in hesitating to state unambiguously that I have rejected the account proffered by Mr. Gayle and his witness, a Miss Florence Lugg. This does not necessarily mean that Mr. Clahar has proved his case though that has in fact occurred. I shall state briefly the reasons for rejecting the case put forward by the defendants.

The evidence for the defence – Mr. Gayle

3. Mr. Gayle's witness statement contains these words:

On reaching apposite (sic) the Scotia Bank Building. I saw two (2) pedal cyclists riding in single file on my left. I sounded the horn on the bus to alert them of my presence, as I was about to pass them, the cyclist at the back suddenly started to overtake the one in front and as a result rode out into the path of the bus. I swerved to avoid hitting him, but when I looked in my left rear view mirror, I saw that the handle of the bicycle had collided with the mid-section of my bus.

4. This passage gives the impression that Mr. Gayle is saying that Mr. Clahar rode in front of the bus and he (Gayle) had to swerve to avoid hitting him and that is how Mr. Clahar came in contact with the bus. He explained that when he used the phrase "into the path of the bus" he did not mean that the cyclist rode in front of the bus. What he meant was that the cyclist rode into the side of the bus. This occurred because Mr. Clahar was drifting towards the bus while overtaking another cyclist. Mr. Clahar began this maneuver just at the moment in time when he (Gayle) began overtaking Mr. Clahar. He began to overtake Mr. Clahar just as he (Gayle) tooted the horn. The sense of the evidence is that the tooting of the horn, Mr. Clahar's act of overtaking the other cyclist and Mr. Gayle's overtaking of Mr. Clahar occurred, if not simultaneously, certainly almost so. In re examination a differently nuanced version appeared. He said, in re examination, that the time between tooting the horn and when he began his overtaking manoeuvre was about three minutes and Mr. Clahar hit the bus four minutes after the sounding of the bus horn. This latter bit of evidence contrasts sharply with the impression he had conveyed

earlier. He now introduced a time delay between the blowing of the horn and the overtaking manoeuvre that was not there before. This is a fundamental inconsistency on the most vital issue in the case. At best, Mr. Gayle is an unreliable witness.

The evidence for the defence – Miss Lugg

5. I now examine the evidence of Miss Lugg. She was the conductor on the bus at the material time. She said in her witness statement that when she first saw Mr. Clahar he was to the left of the bus. Later on she changed this to say that he was in front of the bus when she first saw him. It may be said that there is no necessary inconsistency between being to the left and in front of the bus but as I shall attempt to demonstrate there is no way to reconcile the two positions.

6. According to Miss Lugg when she first saw him she was looking through the windows on the left side of the bus. Indeed she indicated by pointing out distances (which were estimated) that showed Mr. Clahar was at least a chain in front of the bus. I have looked at the photograph of the scene of the accident that was tendered in evidence. Based on the photograph and the oral evidence, the accident took place just after the intersection of Victoria Avenue and South Camp Road, in the vicinity of the Dragon Gym. It is agreed that at the point of impact there is a median separating the two lanes of traffic. If the bus is in the left lane, which is to the left of the median it is difficult to see someone at least one chain in front of the bus by looking through the windows on the left side of the bus. Unless the cyclist is some distance in front and far to the left of the bus it would be virtually impossible to see the cyclist. The picture and evidence demonstrate that there was no space on the roadway that would permit the cyclist to be sufficiently far to the left and in front of the bus so as to enable Miss Lugg to see him while looking through the left windows. If she first saw him while he was a chain from the bus she must have been looking through the front windscreen of the bus. If she first saw him while looking through the left windows of the bus he must have been much closer to the bus – a matter of feet, not nearly as much as one chain. Her testimony goes on to say that when the bus was about to pass Mr. Clahar (which would mean Mr. Clahar

would be just to the left front of the bus) he, just at that point, moves from behind the second cyclist and hits the bus just behind the left front wheel. These internal contradictions make her an unreliable witness.

7. The photograph served to highlight significant differences between Mr. Gayle and his witness. Mr. Gayle marked in red the spot where he said Mr. Clahar came in contact with the bus. However, when Miss Lugg was asked to indicate where Mr. Clahar was when she first saw him, she indicated a spot just to the left of where Mr. Gayle had said the collision took place. On Miss Lugg's version, the bus was behind the point of contact. Another significant discrepancy between the defence witnesses is this: Mr. Gayle said that the second cyclist was a male, approximately thirty something years old whereas Miss Lugg said that the second cyclist was a male approximately fifty something years old. Mrs. Brown-Rose suggested that in the circumstances neither Mr. Gayle nor Miss Lugg had a good look at the second cyclist and they were speculating. That may be so but it does demonstrate their unreliability. If they did not see the second cyclist well enough to be able to form an accurate impression of his age, the proper thing to do is to say "I am not able to estimate his age because I did not get a good look at him and in any event, I only saw him from behind." They were attempting to convey the impression of certainty when the circumstances prevented any high degree of firmness on the point. Additionally, Miss Lugg was quite sure that the bus did not swerve. Yet Mr. Gayle was equally adamant that he swerved to avoid hitting Mr. Clahar. For these reasons I found it difficult to accept the defence's version of events.

The evidence for the claimant – Mr. Clahar

8. Mr. Clahar's version could hardly be simpler. He testified that he was riding along Victoria Avenue when he saw that two buses had stopped on the left side of the road. They had stopped on the same side of the road on which he was riding. He stopped because he did not wish to overtake the buses for fear that he might be hit by oncoming traffic. He stated that he was standing over his bicycle when he felt the impact of being hit. I understood his evidence to mean that the bicycle was

stationary, he had both feet on the ground but he had not dismounted his bicycle. It was while in this position that he was hit by the bus driven by Mr. Gayle.

9. The photograph to which I have already referred provided further evidence from Mr. Clahar. He pointed out on the photograph where he was when he was hit. The spot he indicated was out in the road but still on the left side of the roadway. In fact he was in the middle of the left lane that itself was separated from the right lane for traffic going in the opposite direction by a concrete median. If this is correct this would mean that he ought to have been seen by Mr. Gayle.

10. Mrs. Brown-Rose made the optimist submission that I should make a finding that Mr. Clahar was fifty percent contributorily negligent. She submitted that even on his account he was in the middle of his correct lane and did not pay sufficient attention to his own safety. The evidence of this she said is to be found in his admission that while he was behind the buses he did not give any hand signal and neither did he look behind him. I do not agree that there is any contributory negligence. The evidence from Mr. Clahar that I accept is that he stopped behind the buses because he did not wish to take the risk of overtaking them. Based up on the evidence this was quite a sensible view to have. This is a man who at the time of the accident was over seventy years old. Up to that time he had been riding bicycles for over fifty years. The possibility of being hit by oncoming traffic was obvious. The passage cited by counsel from *Charlesworth and Percy on Negligence* (8th ed) (1990)(Sweet and Maxwell) paragraph 9-290 does not assist here. This passage would only be helpful if I were to accept Mr. Gayle's version of events. In light of my conclusion there is no basis for me to conclude that Mr. Clahar was contributorily negligent.

11. I have examined the witness statement and cross examination of Mr. Clahar and I have not found any internal or logical difficulties in his account and neither have I found that the photograph has exposed weaknesses in his testimony. The closest that one comes to an inconsistency is that where he said that four ribs were fractured and the medical report says only one rib was broken. However, on close examination there is really no conflict because the reference to four broken ribs was

referring to what he was told by the doctor at the hospital. I therefore find that he has proven his case on a balance of probabilities. Thus my findings are

- a. Mr. Clahar was riding his bicycle on Victoria Avenue, in the vicinity of Dragon Gym about on the morning of October 31, 2000;
- b. he stopped behind two buses that had stopped on the left side of the road;
- c. he was hit from behind by the bus driven by Mr. Gayle and he suffered personal injuries, damage to his bicycle and other items of personal property;
- d. Mr. Gayle was negligent in that he either failed to keep a proper look out or if he did, he failed to take sufficient steps to avoid hitting Mr. Clahar.
- e. the defendants' case that Mr. Clahar either caused the accident totally or contributed to his own injuries is rejected.

12. The only task remaining is to assess damages.

Assessment

The nature and extent of the injuries sustained

13. The claimant was rendered speechless for a brief while at the scene of the accident. The medical report of Dr. E Martin-Clarke, dated March 26, 2001, indicated that the claimant had a fractured left first rib. There was tenderness over the posterior aspect of the right elbow. On his return on November 2, 2000, the claimant complained of persistent pain in the right rib region.

14. The report of Dr. R. C. Rose, Consultant Orthopaedic Surgeon, dated April 30, 2004, revealed that Mr. Clahar suffered mild pain along the left side of the neck on the extremes of movement. There was very mild tenderness localized along the olecranon. The x-ray of January 13, 2004, showed that the chest and ribs were normal. The surgeon concluded that the disability rating was zero percent and while the claimant had mild and intermittent post-traumatic pains there was no functional disability.

The pain and suffering endured

15. Mr. Clahar testified that he was in terrible pain when he was taken to the Kingston Public Hospital (KPH). He was treated and sent home. When he went home, the pain was so severe that he could neither stand up, sit down nor lie down comfortably. He says that since the accident he experiences pain on the left side of his body when he is ascending stairways.

Quantum of damages

Special damages

16. The special damages have been agreed at \$83,450. This sum is awarded to the claimant at six (6%) percent interest from October 31, 2000 to November 10, 2005.

General damages

17. A number of cases was cited to me by both counsel. Those cited by Mrs. Brown-Rose were of greater assistance and I propose to rely on those. She cited the case of *Ruby Dunn v Densley Duhaney* assessed on September 21, 2004. In that case the claimant suffered fractures to the 4th, 5th and 6th ribs. There was no permanent disability. Analgesics were administered during the three-day hospitalisation of the claimant. The general damages awarded for pain, suffering and loss of amenities were \$350,000. Updating this using the August 2005 CPI of 2214.7, the award today would be \$407,499.21. The report of the case does not indicate whether the claimant there suffered any post-traumatic pain that persisted even up to the time of the assessment.

18. In the case before me the claimant was not hospitalised; he was treated with oral analgesics. On his return on November 2, 2000, he was sent home with more potent medications to assuage his suffering. There is evidence that the claimant here is still suffering pain which has persisted up to the dates of trial. I have to take this into account.

19. It is well known that loss of good health is the loss of something of intrinsic value even if the claimant is a couch potato. I award the sum of \$400,000 for pain, suffering and loss of amenity.

Conclusion

20. Mr. Seymour Gayle is solely responsible for the accident that occurred on October 31, 2000, along Victoria Avenue in the parish of Kingston. The testimony of Mr. Gayle and Miss Lugg is unreliable and therefore unacceptable to me. The claimant has been logically consistent and his account satisfies me on a balance of probabilities that the accident occurred in the way he said it did.

21. The sum of \$83, 450 is awarded as special damages at six (6%) percent from October 31, 2000 to November 10, 2005. The sum of \$400,000 is awarded as general damages at 6% interest from the date of the service of the writ to November 10, 2005. Costs of \$150,000 to the claimant.

22. Mrs. Brown-Rose cited cases from an online service known as pecamonline.com. This website I understand undertakes the very helpful task of providing an up to date database of recent cases in which damages have been assessed by the Supreme Court. There is also an up dated value of past awards. It is my view that there should be full and complete citation of the case using the suit number or claim number so that, if necessary, the file may be consulted. The cases cited by Mrs. Brown-Rose did not have the full citation. This ought to be corrected for the future.