

1/10/01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C.371/1993

BETWEEN	TREVOR CLARKE	PLAINTIFF
AND	NATIONAL WATER COMMISSION	1 ST DEFENDANT
AND	KENNETH HEWITT	2 ND DEFENDANT
AND	VERNON SMITH	3 RD DEFENDANT

Mr. Terrence Williams & Miss Arlene Gaynor instructed by Mr. Jeremy Palmer for the Plaintiff.

Mrs. Ursula Khan & Mr. Charles Campbell instructed by Khan & Khan for the 1st & 2nd Defendants.

Heard: 18TH November, 1999, 5th, 6th & 7th June, 2000
& 25th October, 2001

GLORIA SMITH, J.

On the 4th October 1999 the action was withdrawn against the 3rd defendant.

The Plaintiff Mr. Trevor Clarke brought this action against the 1st Defendant, the National Water Commission & the 2nd Defendant Mr. Kenneth Hewitt for negligence.

- (1) The plaintiff in his statement of Claim pleads that on the 10th day of November 1992 he was a passenger in a motor vehicle Registration Number 4485 AO which was travelling along the Treasure Beach Main road in the parish of St. Elizabeth. This motor vehicle was Driven at the time by Mr. Vernon Smith.
- (2) The 1st defendant is a Public Company and was the owner of motor truck registration number CC886B which was being driven at the material time by the 2nd defendant Kenneth Hewitt an employee and agent of the 1st defendant – National Water Commission.
- (3) On the 10th day of November 1992, Kenneth Hewitt the servant and/or agent of the National Water Commission and acting as such negligently drove the 1st defendant's (N.W.C) motor vehicle onto the Treasure Beach main road, in the parish of St. Elizabeth, so as to cause it to collide into the motor vehicle in which the plaintiff was a passenger causing personal injury to the plaintiff as a result of which he suffered damage and loss.

The particulars of negligence pleaded against the 2nd defendant were:

- (a) Reversing onto the main road from a private road.
- (b) Failing to keep any or any adequate look out or to have any or any sufficient regard for vehicular traffic along the said main road.
- (c) Failing to have any or any adequate regard for other users of the road .
- (d) Failing to stop, to slow down , to swerve, or in any other way so as to manage or control the said motor vehicle so as to avoid the said collision.
- (e) Failing to maintain and/or exercise any or any proper or effective control of the 1st defendant's said motor vehicle.
- (f) Failing to observe the presence of the said motor vehicle in which the plaintiff was a passenger in sufficient time to avoid colliding with it or at all.
- (g) Reversing into the side of the motor vehicle that the plaintiff was a passenger.

The defendants denied the particulars of negligence alleged and they specifically denied that the second defendant was reversing from a private road or that he failed to maintain an adequate and sufficient look out, or to have regard for other users of the road, or that he failed to stop or that he

failed to maintain effective control of his vehicle or that he failed to observe the presence of motor vehicle registered number 4485 AO, or that he reversed into the side of the said motor vehicle

- (2) The 1st and 2nd defendants say that there was no collision between their vehicle and the said motor vehicle 4485 AO driven by Vernon Smith and in which the plaintiff was a passenger.

That at all material times their motor vehicle was stationary with its back occupying 1½ - 2ft. of the main road and there was adequate room for the said motor vehicle 4485 AO to pass safely but that Vernon Smith drove at an excessive speed, swerved violently to the right and collided into a foot bridge on the right side of the road way, demolishing same, where upon the left rear wheel of his said motor vehicle swung towards the 1st defendants vehicle and brushed against its rear causing a scrape.

- (3) The 1st & 2nd defendants states that the plaintiff injuries if any, (which are not admitted) were caused by the sole negligence of Vernon Smith or that he materially contributed to the same by his negligence.

BACKGROUND

The plaintiff called Mr. Vernon Smith as his first witness in support of his claim.

Mr. Smith testified that he was a driver by occupation and was the holder of a drivers licence for 19 years.

On the 10th November 1992 at about 11:00 a.m. he was driving a Peugeot motor vehicle Registered number 4485 AO along the main road from Black River to Frenchman – (commonly referred to as the Treasure Beach main road). The plaintiff Trevor Clarke was a passenger in his motor vehicle and was seated in the right front passenger seat. Motor vehicle was a left hand drive vehicle.

As you travel along this road towards Frenchman there is a gateway to the left which leads down to a beach. Mr. Smith stated that as he got to this gateway, he saw a N.W.C. truck suddenly reversed out of the gateway onto the main road. The back of this truck hit the left back panel of his motor vehicle causing him to lose control of his vehicle. The vehicle then swerved to the right and crashed into the wall of a culvert on the right side of the road. The plaintiff Trevor Clarke sustained injuries to his foot which was badly smashed as a result.

This witness described the road condition as being dry at the time of the collision. He further stated that there is a corner in the main road before you get to the roadway on the left which leads down to the beach, thereafter the roadway in this vicinity is straight. He estimated the distance from the corner to the gate way which leads to the beach as between 40-45ft. The main road was estimated at about 10-12ft. wide.

It was Mr. Smith's view that it would be difficult for someone reversing out of the beach road onto the main road to see vehicles approaching from the left (Callabash Bay) as there were cassia trees on the embankment which had a lot of leaves and limbs (heavily bushed).

Mr. Smith further testified that after the impact he saw 3 men alighted from the cab of the N.W.C truck registered number CC886B. This truck was a Chevrolet truck with an iron body and an iron bumper at the back. He observed that the 2nd defendant Kenneth Hewitt was the driver of the truck.

Mr. Smith said that as he spoke to Mr. Hewitt, the other two men stepped away. The plaintiff was taken away from the scene in the N.W.C truck while the Police were contacted. He described the damage to his motor vehicle in the following way:-

“The right front section of the motor vehicle was crushed, the left side of the back where the truck reversed into it was dented.”

Mr. Trevor Clarke the plaintiff gave evidence to the effect that he is 63 years old and was a farmer and a fisherman prior to the accident.

On the 10th November 1992 he was a passenger in a motor vehicle driven by Vernon Smith. He confirms that he was seated in the right front passenger seat. While travelling along the Treasure Beach main road, as they came around a corner he saw a N.W.C truck suddenly came out of a private road onto the main road and crashed into their vehicle. He testified that he was unable to see inside this yard where the truck came from as there were trees there which obstructed his view.

He continued that after the N.W.C truck reversed from this private gateway and crashed into the motor vehicle he was in, this motor vehicle then crashed into the wall of a culvert on the opposite of the road and his foot was badly smashed. The plaintiff indicated that he was unable to see what part of the N.W.C truck collided with the vehicle he was in, as it happened quickly.

After the accident the plaintiff was taken to the Black River Hospital where he was hospitalized initially for 2 weeks. He stated that he suffered a lot of pains. Two days after being hospitalized his right foot was amputated. The wound was not healing satisfactorily, consequently a second amputation was done. After his release from the hospital he remained as an out patient

for 7 months. As an outpatient he was required to visit the hospital 3 times per week. On these occasions he travelled by taxi at a cost of \$200 per trip.

Prior to the accident, the plaintiff stated that in his capacity as a Fisherman he earned approximately \$5000 - \$6000 per week. As a farmer he earned about \$2000 - \$3000 per week.

Since the accident he has been unable to carry on any of these occupations because of his condition. He also said that before the accident he used to play cricket and swim a lot. He is unable to carry on these activities any longer. He contends that it has also affected his marriage very badly, as things are not the same in bed with his wife as they were prior to the accident.

The plaintiff further gave evidence that although his foot has healed he still gets a lot of pains from it. This causes him to lose sleep some times at nights as the foot "jumps and bites a lot and sometimes I have to use my hand to hold it down".

The plaintiff further stated that he purchased an artificial leg which he is unable to wear because it causes him a lot of pains when he puts it on.

He was subsequently seen by Dr. Warren Blake – See Medical Reports in Evidence. Total permanent disability suffered equates to 90% impairment of the lower extremity and 36% impairment of the whole person.

The plaintiff then closed his case.

The defendants called one witness – Mr. Nathaniel Bailey who is employed to the National Water Commission. In November of 1992 he was a Supervisor for Operations and Maintenance in St. Elizabeth.

On the 10th November, 1992 he was in a N.W.C truck CC886B driven by the 2nd defendant Kenneth Hewitt. The truck was travelling on the main road towards Frenchman in St. Elizabeth to do work on behalf of the commission. While proceeding he gave Mr. Hewitt some instructions, as a result Mr. Hewitt turned on to a road by Ina Taylor's house. This road he stated took you down by the beach.

After the truck turned onto this road, it started to sink as the road was soft. All the occupants of the truck came out to see exactly what was happening. Mr. Bailey explained that he gave Mr. Hewitt further instructions and he went back onto the main road to direct him to reverse the truck from this minor road. Mr. Bailey said he looked to see if anything was coming. It was clear. He so indicated to Mr. Hewitt who then proceeded to reverse from the minor road to the main road. He said when the truck came to the edge of the main road he heard a vehicle approaching so he told Mr. Hewitt to wait. A motor vehicle then came around the corner, by then the

N.W.C truck was stationary and was occupying about 1ft. of the asphalted surface of the main road.

Mr. Bailey further stated that as the motor vehicle came around the corner, he heard brakes applied and he saw the motor vehicle swerved to the right. It then crashed into the column of a bridge on the right after which the "tail" of the motor vehicle swung to the left and touch the right up right of the truck where the flooring starts.

Mr. Bailey's evidence is that after the motor vehicle crashed into the column of the bridge, the driver Vernon Smith jumped out put his hand on his head and said "What happen to me, what happen to me" This incidentally was never put to Vernon Smith, when he gave evidence.

The witness then went up to the car where he saw the plaintiff who was holding his leg and crying. He then got assistance from Mr. Hewitt (the driver) and Mr. Banton who was another passenger on N.W.C. truck to remove the injured Mr. Clarke from the motor vehicle. They placed him in the N.W.C truck and took him to the Black River Hospital. This witness stated that the N.W.C truck was a left hand drive truck. He described the main road in the area of the collision as about 18-20ft. wide and that the asphalted section was about 15ft. wide with soft shoulders on both side. He said there was no thick growth of vegetation in the area only "one, one tree"

and this could not obscure the vision of persons travelling along this road. He further stated that as the motor vehicle approached that day on the main road it was travelling fast, in his estimation approximately 60-65 mph.

He maintained even after vigorous cross examination that the truck did not reverse into the approaching motor vehicle which caused the driver of the car to lose control and forced the Peugeot into the bridge.

He reiterated that the motor vehicle swerved to its right and it was only after the impact with the bridge it rebounded to the left and got a slight touch at the back end on the truck.

That in essence was the case for the defendants. Evidence was given that neither Mr. Hewitt nor Mr. Banton were available to give evidence as both men are no longer employed to the N.W.C, Mr. Hewitt is somewhere in the U.S.A and the whereabouts of Mr. Banton is unknown.

In her submissions Mrs. Khan urged the Court not to accept the plaintiff's account of how the collision took place. The plaintiff's witness stated that it was this sudden reversing by Mr. Hewitt onto the main Road which caused the collision that resulted in a dent to the back of his motor vehicle and then forced it into the bridge.

Mrs. Khan submitted that had her client the 2nd defendant, suddenly reversed over a hump into the main road, this would have necessitated him

having to accelerate and certainly this would have caused more than a mere dent to Mr. Smith's vehicle.

She further submitted that if as Mr. Smith said his car was straight on the main road and was hit and pushed over to the right side of road, then certainly one would have expected to see property damage to the side of the vehicle, not the back. The point was also made that there were passengers in the back of the vehicle in the very area where the truck is alleged to have collided with the car, yet none of these persons were injured.

Miss Gaynor asked the Court on behalf of the plaintiff to reject the defence as presented and on a balance of probabilities accept the plaintiff's case and so find in his favour.

CONCLUSION

On a balance of probabilities I find the following facts proved:-

- (1) That on the 10th day of November 1992 the plaintiff Mr. Trevor Clarke was a passenger in a Peugeot motor vehicle registration Number 4485 AO which was travelling along the Treasure Beach Main road from Black River to Frenchman in the parish of St. Elizabeth.
- (2) That Vernon Smith was the driver of this said motor vehicle.
- (3) That the motor vehicle 4485 AO was a left hand drive vehicle

and that the plaintiff was seated in the right passenger seat beside the driver at the material time.

- (4) That the National Water Commission (1st defendant) was the owner of motor truck registration number CC886B which was being driven at the material time by the 2nd defendant Kenneth Hewitt an employee and servant of the 1st Defendant (N.W.C.) This vehicle was also a left hand drive vehicle.
- (5) That on the 10th November 1992 the 2nd defendant reversed motor truck Registered number CC 886B from a minor road on the left as you travel towards Frenchman onto the Treasure Beach main road, a major roadway.
- (6) That at the time when the defendant was executing this manoeuvre his two passengers were seated inside the truck with him.
- (7) That in the process of reversing the N.W.C truck, it collided with the Peugeot motor vehicle, causing it to get out of control and crash into a bridge (culvert) on the opposite side of the road.
- (8) That the 2nd defendant did in fact reverse suddenly onto the main road and the truck was still in motion when it collided with the Peugeot 4485 AO.
- (9) I rejected the evidence of Mr. Bailey for the Defence when

he said that he along with the side man were outside the truck directing the 2nd defendant while he reversed the truck onto the main road.

- (10) I also rejected that the truck was then stationary occupying only about 1-2 ft. of the roadway.
- (11) That as a direct result of 2nd defendant's actions this collision occurred and Mr. Clarke received his injuries.
- (12) That Mr. Hewitt's action of reversing suddenly from a minor road onto a major roadway without anyone to direct him or to keep a proper lookout especially when his vehicle was a left hand drive and the vegetation in the area (which I accept was much more than sparse) leads me to conclude that Mr. Hewitt was negligent and therefore liable in all the circumstances.
- (13) As a consequence I also find the 1st defendant liable being the owner of motor truck registration number CC 886B for causing personal injury to the plaintiff as a result of which he suffered damage and loss.

Judgment is therefore awarded to the plaintiff against both the 1st and 2nd defendants with Costs to be taxed if not agreed..

On the question of Damages:

Special Damages

- (1) \$16,800.00 for 48 trips to The Black River Hospital @ \$350 per trip - allowed.
- (2) Items 2 and 3 under this head were not allowed as there was insufficient proof presented to the Court to substantiate them.
- (4) Loss of income from 10/11/92 up to 31/10/93 – under this head the plaintiff claimed that his loss was \$225,000.00.

The plaintiff's evidence is that prior to this incident he was a fisherman and a farmer who earned on average of between \$5000.00 - \$6000.00 per week, as a fisherman and \$2,000.00 - \$3,000.00 per week as a farmer. As a result of the injury he sustained he is unable to work at any of these occupations.

Mr. Campbell for the defence argued that only an omnibus figure was pleaded, there were no particulars to suggest how this figure was arrived at and no documentary proof was presented to the Court to assist with this claim therefore the Court should not allow this sum.

The Court accepted Mr. Clarke's evidence on this aspect of his claim as being credible and will award the sum of \$225,000.00 for loss of income from 10/11/92 – 31/10/93.

(5) Prosthesis –

(U.K.) £2,000.00 or J\$130,000.00 – this amount is allowed as it was not disputed by the parties.

(6) \$20,000.00 for the plaintiff's airfare to England.

In the discretion of the court this sum is allowed as I considered that it was a necessary expense which was incurred to enable the plaintiff to have his first prosthesis fitted.

Total amount awarded for Special damages \$391,800.00.

(7) Future Medical Care – no substantial evidence offered therefore no sum will be allowed.

(8) Pain and suffering and Loss of amenities.

When the plaintiff was injured he was approximately 54 years old. Dr. Warren Blake's report indicated that the plaintiff's injury equates to a 90% permanent functional impairment of the lower extremity and 36% permanent functional disability of the whole person.

The court had an opportunity to observe the plaintiff now at 63 years old and despite his physical impairment appears to be a strong and vibrant person.

Counsel for the plaintiff cited the case of *Suit C.L. 1991/S109*

Lealan Shaw v. Coolit Ltd. & Coleman in support of an award to the plaintiff in the region of \$3,312,412.03 for pain and suffering and loss of amenities. In addition Ms. Gaynor urged that the court should consider a further sum under the head of loss of amenities where the plaintiff is a married man his sex life is no longer vibrant and is impaired, due to his injuries. Under this head, based on all the authorities cited for and against the sum requested the court makes an award of \$3,000,000.00 for pain and suffering and loss of amenities. The court also took into consideration that the plaintiff used to play a lot of cricket and enjoyed swimming.

(9) Loss of Earning Capacity

The plaintiff's attorney urged the court to use a multiplier of 8 and a multiplicand of \$7000.00 . Mrs. Khan on the other hand urged that based on the plaintiff's age the multiplier that should be applied is "one".

The court came to the conclusion on the totality of the evidence presented that the appropriate multiplier should be "4" – using "4" as the multiplier an award of \$1,456,000.00 is made under this head.

Total sum for general damages would therefore be \$4,456,000.00.

Interest on special damages awarded at the rate of 3% per annum from 10/11/92 – the date hereof.

Interest on general damages except the sum awarded for loss of earning capacity of 3% per annum from 4/11/93 to the date hereof (i.e. on the \$3,000,000.00).

Costs to the Plaintiff to be agreed or taxed.