JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 60/89

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	JAMES DOUGLAS	PLAINTIFF/RESPONDENT
AND	ST. JAGO CEMENT BLOCK FACTORY LIMITED	1ST DEFENDANT/APPELLANT
AND	ESSO STANDARD OIL S.A. LIMITED	2ND DEFENDANT/RESPONDENT

SUPREME COURT CIVIL APPEAL NO. 25/90

BETWEEN	JAMES DOUGLAS	PLAINTIFF/APPELLANT
AND	ST. JAGO CEMENT BLOCK FACTORY LIMITED	1ST DEFENDANT/RESPONDENT
AND	ESSO STANDARD OIL S.A. LIMITED	2ND DEFENDANT/RESPONDENT

David Batts and Ransford Graham instructed by Livingston, Alexander & Levy for 1st Defendant/Appellant

Maurice Frankson and E. E. Frankson instructed by Gaynair & Fraser for Plaintiff/Respondent

W. K. ChinSee, Q.C. and Dennis Morrison instructed by Dunn, Cox & Orrett for 2nd Defendant/Respondent

October 16, 17, 18, 1990 and March 11, 1991

WRIGHT, J.A.:

On October 18, 1990, both appeals were disposed of as follows:

C.A. 25/90: Appeal dismissed. No Order as to costs.

C.A. 60/89: Appeal dismissed. Judgment of the Court below affirmed save and except that the award of $55,000 for loss of future earnings varied to $45,000. Final total being $157,050.

Costs to 2nd Defendant/ Respondent against 1st Defendant/Appellant.

Half costs of appeal to 1st Defendant/Appellant against Plaintiff/ Respondent. Costs to be taxed or agreed.

As promised then, we now put our reasons in writing. These will, of course, relate only to C.A. 60/89 because no arguments were advanced with respect to C.A. 25/90.

The appeal was against an award of $167,050 with costs in favour of the plaintiff/respondent against the 1st defendant/appellant by Malcolm, J. on June 22, 1989, in respect of injuries sustained by the plaintiff/respondent in a collision between the truck of the 1st defendant/appellant, on which the plaintiff/respondent was a passenger, and a car belonging to the 2nd defendant/respondent on August 23, 1982.

Although Mr. Batts filed seven Grounds of Appeal, impeaching the judgment of the Court below, his real problem had its genesis in his conduct of the appellant's case at the trial. He took what the learned trial judge, with some diffidence, regarded as a bold step. He elected at close of the plaintiff's case to stand on his submission of no-case to answer and called no evidence. This was not a course which was advised by the state of the pleadings. The Particulars of Negligence alleged by the plaintiff against the 1st defendant's servant and/or agent are as follows:

"(a) Driving at a speed which was too fast in the circumstances.

(b) Failing to keep any or any proper look-out or to have any or any sufficient regard for other traffic.

(c) Overtaking or attempting to overtake a motor vehicle without first ascertaining or ensuring whether it was safe so to do and when it was unsafe and dangerous so to do.

(d) Failing to see the said motor vehicle Registered NF 5392 in sufficient time to avoid the said collision.

(e) Failing to have or to keep any or any proper control of the said motor vehicle.

(f) Driving onto the incorrect side of the roadway.

(g) Failing to stop, slow down, to swerve or in any other way so to manage or control his said motor vehicle as to avoid the said collision."

With the exception of particular (c) and a different registration number in particular (d) the identical allegations are made against the 2nd defendant. Further, the plaintiff pleaded reliance on "Res Ipsa Loquitur".

The issue of negligence was further compounded by the fact that the 1st defendant/appellant in its defence pleaded that -

> "the said accident was solely due to the negligence of the second defendant or alternatively contributed to by the negligence of the second defendant and in Particulars of Negligence alleged particulars a, b, d, e, f, g (supra).

while the 2nd defendant/respondent pleaded in paragraph 4 of the defence that -

"This Defendant says that the said collision was caused entirely by the negligence of the driver of the First Defendant."

The Particulars of Negligence were stated thus:

"(a) This Defendant adopts and relies on the particulars of negligence set out in the Statement of Claim.

(b) Driving in a manner which was dangerous to the public having regard to all the circumstances including the nature, condition and use of the road and the amount of traffic which might reasonably be expected to be on the road."

The sense of security evidenced in the stance adopted by Mr. Batts at the end of the plaintiff's case must have been induced in some measure, at least, by the plaintiff's evidence, which showed him resiling from certain allegations of negligence made against his client.

The plaintiff, who at the material time was an employee of the 1st defendant, testified that on the day in question he was returning to his employer's factory standing in the back of a flat body Leyland truck while his witness, Norris Watson, was seated in the cab with the driver. The truck was otherwise empty. The time was about 4:30 p.m. and the truck was travelling about 30 m.p.h. As they neared a slight corner "I saw a car coming round a slight corner and the car started swinging two sides of road - come straight into truck". As a result of the collision he sustained injuries and was hospitalized. He suffered from concussion and was unconscious for some time. Said he, "Three weeks after I came to myself". The injuries, as pleaded, were:

"(a) Wound on left leg and projection of bones.

(b) Injury to left eye.

"(c) Injury to head.

(d) Fracture to left tibia and fibula.

(e) Injury to shoulder and arms."

He said he spent three months in hospital and since discharge he returned seven times and "each time I go they take off plaster and put it on back". One of the three medical reports admitted in evidence revealed that up to April 23, 1987, he had an unhealed ulcer two inches in diameter from which fragments of bone extruded. Indeed, up to the time of trial, said he, fragments of bone were appearing and there was need for regular dressing of the wound. He displayed a very bad scarring and disfigurement of the left leg in the region of the shin. The left leg is shortened and there is a resultant twenty percent permanent partial disability. The shortening of the leg has resulted in a pelvic tilt and a compensatory scoliosis of the lumbar spine which is likely to pre-dispose to the early development of spondylosis of the spine. He did not seek re-employment as a block loader with his employer. His job required him to load and unload the blocks that were dispatched by the truck. He had turned to barbering from which he now earns $40 - $45 per week.

Cross-examination of the plaintiff/respondent by Mr. Batts was innocuous relating as it did to the truck being on its left side and that he had continued to receive wages from his employer up to the 4th November, 1983.

If that was generosity of treatment it did not enter into Mr. ChinSee's considerations. He would have the plaintiff/appellant's account for the day's events. While he denied that the truck had overtaken a blue Zephyr Six motor car just before crashing into the on-coming car he nevertheless admitted the presence of such a car on the road. He said it passed the

truck and they did not catch up with it again. At one time he said the accident car swung across the road into the truck but subsequently said that the only movement of the car was to its left. He denied that the truck was on the right side of the road and despite maintaining that the truck's speed was 30 - 35 m.p.h. he said the truck travelled some three to four chains beyond the point of collision and then over-turned off the road in a drain pinning his leg under it. He saw the accident car only after it came around the bend and the collision was near to the bend.

The plaintiff/respondent and his witness, Norris Watson, did similar work and received equal pay which, at the time of the accident, was $80 per week. Mr. Watson said at the time of trial it was $160 per week. To Mr. Batts he said the car was coming down with a speed but apart from the truck going nearer to its left he did not recall the driver doing anything else until the truck fell into the drain.

Cross-examined by Mr. Chin See, he said the accident occurred "right in corner" and that by the time he saw the car the collision took place. He was thrown through the windscreen of the truck. Significantly he said:

> "Just before collision truck change course so car could pass. Car pass but him did lick it already - Over car side is embankment went to where car was, but not near to it. Car back was edge up against the embankment on its side - close to bank head pointing to Naggo Head."

He agreed that after the accident an Indian gentleman came to the rescue of the accident victims and took them to the hospital.

It was with the evidence in that state that Mr. Batts made a no-case submission and elected to stand on his

submission and call no evidence should his submission fail. It did and thereafter until time for closing addresses he was a spectator to the proceedings because, obviously accepting the finality of his election, he did not seek to cross-examine the 2nd defendant's witness.

The defence projected in Mr. ChinSee's cross-examination, namely, that the accident occurred on the right side of the road - the correct side for the car - was supported by Daniel Lewis, the driver of the blue Zephyr, a taxi-cab. He testified that while travelling on the Naggo Head to Spanish Town road at 35 m.p.h. the truck, which was travelling behind, was blowing to overtake so he pulled over and allowed it to pass. He observed the plaintiff/respondent standing in the left back of the truck and the witness, Norris Watson, seated in the cab. However, before the truck could regain its correct side of the road it crashed into the on-coming car, which was being driven properly on its correct side of the road. The car was thrown back about five yards into its left bank and then overturned. The windshield of the truck flew out and with it went Watson. He observed the plaintiff/respondent pinned beneath the left side of the truck. He saw an Indian gentleman come along and render assistance. After he had completed his trip to Spanish Town he returned to the scene and gave a statement to the police. Concerning the road, he said it was asphalted, dry and winding. The plaintiff/respondent had given the width to be about twenty feet but that the driving surface had been reduced to about fifteen feet by grass growing along the side of the road. No question was put to the witness Lewis by the plaintiff's attorney suggesting negligence on the part of the 2nd defendant/respondent's driver. Indeed, the only question put to him elicited the response that the witness could not recall

whether there were potholes in the road but he knew the road was bumpy.

The trial judge did not accept the account of the accident presented by the plaintiff/respondent and his witness but accepted the account of Dazel Lewis whom he regarded as truthful and reliable and made his findings accordingly. Additionally, he regarded the distance travelled by the truck after the accident as related by the plaintiff/respondent - four to five chains - as evidence of speed far in excess of what the latter had said.

The following seven Grounds of Appeal were filed:

> "1. That the learned trial judge erred in law in ruling that there was a prima facie case for the First Defendant to answer at the close of the Plaintiff's case.
>
> 2. That the learned trial judge's finding that the collision was caused entirely by the negligence of 1st Defendant was manifestly unreasonable, unsupported by the evidence adduced by the Plaintiff and contrary to the weight of the evidence in that:
>
> (i) The evidence of the Plaintiff and his witness was that the 1st Defendant's vehicle was proceeding at a speed not exceeding 30-35 miles per hour.
>
> (ii) The evidence of the Plaintiff and his witness was that the Second Defendant's vehicle was travelling very fast and came across onto the First Defendant's side of the road thereby colliding with the First Defendant's motor vehicle.
>
> (iii) The evidence of the Plaintiff's witness was that the driver of the First Defendant's vehicle took evasive action and

swung to his left mounted the left banking, entered a ditch and overturned.

(iv) The Second Defendant led no evidence as to the speed of its motor car and its only witness concurred with the Plaintiff and his witness' evidence that the Second Defendant's vehicle was proceeding at 30-35 miles per hour.

3. The learned trial judge erred in law when he ruled that the 1st Defendant had no right to cross-examine the 2nd Defendant's witness and further, having precluded the First Defendant's Counsel from examining the witness of the Second Defendant, the learned trial judge erred as a matter of law, when he relied upon and used the evidence of the Second Defendant's witness against the First Defendant to come to his adverse finding against the First Defendant.

4. The learned trial judge erred in law when he awarded General Damages for Pain, Suffering and Loss of Amenities of $85,000.00, which said amount was unreasonably high having regard to the nature of the injuries and the authorities cited to him of:-

1. Tyrone Morrison -v- A.G. et al C.L.M.-031/1983

2. Beverly Dryden -v- Layne SCCA No. 44/87

5. That the learned trial judge erred in law when he awarded $5,500 for scarring as there was no claim for cosmetic defect nor was there evidence from which he could infer that any or any alleged cosmetic defect in any way affected the Plaintiff.

6. That the learned trial judge erred in law when he awarded $55,000 to the Plaintiff for loss of future earnings as:

(a) The Plaintiff's evidence was that since the

accident he became a full time barber and earned $18 per head and had a very busy shop.

(b) The evidence was that pre-accident earnings were $30, $35 and $40 per day at barbering.

(c) The Plaintiff's evidence was that he had not returned to the St. Jago Block Factory as the NIS doctor told him he should no longer lift blocks and there was no evidence that the Plaintiff attempted to find similar paying employment with St. Jago Block Factory or with any other employer and consequently he had failed to establish that the injury caused him to lose his job and/or that he had failed to mitigate his losses.

7. The award of $21,450 for loss of earnings was unreasonable and unsupported by the evidence and the reasons stated in Paragraph 7 (a) to (c) are repeated herein."

Ground 1:

This ground is postulated on the basis that there was a lack of evidence in the plaintiff's case imputing liability to the 1st defendant. Indeed, Mr. Batts submitted that the plaintiff's evidence pointed only in one direction and that is against the 2nd defendant. If that is correct, how must the following be regarded?:

Plaintiff: "When I saw car first we were 4-5 chains from it. It was right in the bend. Only movement of car was to the left."

How could such a movement bring the car into collision with the truck if the truck was on its correct side of the road? Consider, also, the distance travelled by the truck after the collision. What but great speed would account for that?

Watson: "Accident happened right in bend. Car dey pon truck side. Car try to pass but it couldn't pass."

Here the question must be asked, why would the car try to pass if there was no obstruction in its path? And what was that obstruction if not the truck?

> "Car was close to where accident took place.
>
> Just before accident truck changed course so car could pass. Car pass but him did lick him already. Over car side is embankment went to where car was but not near to it. Car back was edge up against the embankment on its side - close to bank - head pointing to Naggo Head."

In my opinion, the probability arising on these bits of evidence is that the accident occurred on the car's side of the road due to the manoeuvre of the truck which put it in the path of the car.

The endeavour to make an exit from the case via the no-case route was bold but unwise. This is a case in which, on the pleadings, liability could be joint as well as several. Further, there were allegations of negligence by each defendant against the other. Issues were thus joined which called for determination by the trial judge. It is obvious that he could not properly resolve these issues until he had heard all the evidence of all the parties. The difficulty in which the 1st defendant/appellant found itself was of its own making. In making the submission of no-case to answer, its counsel elected to stand on his submission and call no evidence. Counsel must have advised himself well before adopting so daring a stance when it could not be said that in fact there was no evidence whatsoever against his client. The judge may well have reserved his ruling until the close of the case because he had a discretion in the matter but where counsel had made it clear that he would call no evidence, I can see nothing wrong with the judge making his ruling then. Had he yielded to counsel's submission he would simply have repeated

the error of the judge in **Hummerstone and another v. Leary and another** (1921) K.B. 664. There the plaintiff sued to recover damages for personal injuries alleged to have been caused by the negligence of both or one of the two defendants whom they sued jointly and in the alternative. Acceding to the submissions of counsel for one defendant, the trial judge dismissed that defendant from the action at the close of the plaintiff's case only to find that the other defendant was able to prove conclusively that the dismissed defendant was solely to blame for the accident. He, accordingly, had no option but to dismiss the second defendant. The result was that there had to be a re-trial. That is exactly what would have happened here.

In the instant case, counsel was treading on very thin ice when he made his election. I would have thought that the governing principle is now so well-established as not to be now the subject of debate. See **Yuill v. Yuill** (1945) 1 All E.R. 183, where Lord Greene, M.R., in dealing with the very question, said at page 185:

> "The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission."

Here there was an unequivocal election by which counsel is bound. Ground 1 accordingly fails.

Ground 2:

In addition to the evidence gleaned from the plaintiff's case, the trial judge had the evidence of the independent witness, Hazel Lewis, whom he regarded as truthful and reliable. On this witness' testimony the sole cause of the accident was the dangerous manoeuvre by the driver of the 1st defendant/appellant's truck in overtaking the witness' car so close to the bend that the truck was placed in the path of the on-coming car which had no opportunity of avoiding the accident. As I said before, the fact of the truck after the collision supported a finding of speed. Add to that the point of impact on the car's side of the road in the vicinity of the bend and there is nothing unreasonable about the conclusion that the 1st defendant/appellant's negligence was the sole cause of the collision. This ground also fails.

Ground 3:

Although this ground raises a very serious question of the irregularity on the part of the trial judge, we could not entertain any argument with respect thereto for the simple reason that the records disclosed no basis for the complaint. Counsel could not point to any such ruling and inasmuch as he it was who settled the grounds of appeal he had the opportunity, if there was, indeed, such an omission from the Judge's Notes, to seek to have the matter rectified. Counsel merely contented himself with submitting that assuming he had no right to cross-examine then the evidence not tested by cross-examination cannot be used against him and he cited for his authority **Allen v. Allen and Bell** (1894) P 248. In that case the President, who tried the case with a jury, refused the application by counsel for the co-respondent to cross-examine the respondent but proceeded thereafter to contrast their evidence. Lopes, L.J., giving the judgment of

the Court, said at page 253:

> "In our judgment he was wrong in contrasting the evidence as he did, after refusing liberty to cross-examine the respondent. It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination."

I concur with such a statement of the law. However, for reasons stated, it cannot avail the appellant. The complaint under consideration viewed in the context of counsel's conduct of his case would suggest that counsel may by adopting a certain strategy opt out of a case and by so doing virtually tie the hands of the Court. A travesty of justice would result and that is not permissible.

Grounds 4 and 5:

These grounds were not seriously pursued though it was at first contended that by comparison with an award of $60,000 for General Damages in **Tyrone Morrison v. Attorney General et al** C.L.M. 031/1963 (18.11.68), the award of $85,000 was manifestly excessive. Be it noted, however, that the injuries here are more extensive than in that case. It was submitted that so far as the award of $5,000 was concerned, there was neither a claim nor supporting evidence. But it is my opinion that the latter complaint is sufficiently met by the pleading of -

> (a) "Wound in left leg and projection of bones"

supported by medical reports, two of which refer to -

> (i) "Scarring amounting to 9 inches by 4 inches of the left leg with obvious deformity."

(2) "A compound fracture of his leg and a breakdown of the skin".

This is certainly not among the awards disapproved of in **Gravesandy v. Moore** S.C.C.A. 44/85 dated 14. 2. 86 (unreported) for want of evidence.

Ground 6 sought the elimination of the award for loss of future earnings on the basis that the respondent had failed to prove such a loss. Indeed, it was my opinion that there was nothing to commend the contention of failure to prove this claim because the respondent, rather than continuing to seek employment in the arduous task of loading and unloading blocks, had chosen the less stressful engagement of barbering from which he earned less than he might have earned with the defendant/appellant. But who was best suited to determine whether the respondent, with his greatly reduced physical ability, could meet the rigorous demand of that job? Certainly the respondent. Had he sat with folded arms and did not seek to earn anything the submission would have been valid.

We were in favour of Mr. Batts' submission on the aspect that no discounting was done to take care of the imponderables and the fact that a lump sum payment was being made. We accordingly reduced this award by $10,000 making it $45,000.

Finally, **Ground 7** took issue with the award of $21,400 for special damages as not being justified. However, this ground was not pursued.

We, therefore, came to the conclusion earlier announced and but for the concession on Ground 6 the appeal was dismissed.

MORGAN, J.A.:

I agree.

GORDON, J.A. (Ag.):

I agree.