

NMS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 04918

BETWEEN	RUEL ELLIS	CLAIMANT
AND	TRISTAN WIGGINS	1 <sup>ST</sup> DEFENDANT
AND	LENA BAILEY	2 <sup>ND</sup> DEFENDANT
AND	DALE BAILEY	3 <sup>RD</sup> DEFENDANT

BETWEEN	LENA BAILEY	1 <sup>ST</sup> ANCILLARY CLAIMANT
AND	DALE BAILEY	2 <sup>ND</sup> ANCILLARY CLAIMANT
AND	TRISTANT WIGGINS	ANCILLARY DEFENDANT

Ms. Nestle-Claire Smith & Marsha Smith Instructed by Ernest Smith & CO for the Claimant

Mr. Alexander Williams instructed by Usim, Williams & Company for the 1<sup>st</sup> Defendant

Ms. Tashia Madourie instructed by Nunes, Scholefield, Deleon & Company

**Heard: 14<sup>th</sup> July and the 8<sup>th</sup> December 2010**

**G. Brown, J.**

On the 19<sup>th</sup> day of April 2003, at about 10:00 pm the claimant was seriously injured as a result of a collision involving three motor vehicles in the vicinity of the intersection of the Ocho Rios by-pass and Tay Street in the parish of St. Ann.

He alleged that he was a passenger in the motor car owned by the 2<sup>nd</sup> defendant and

driven by the 3<sup>rd</sup> defendant. He was seated in the right front passenger seat of the left hand drive motor car as it drove along Tay Street.

On reaching the intersection, the 2<sup>nd</sup> defendant drove onto the by-pass in to the path of the 1<sup>st</sup> defendant, thereby causing a collision. As a result, he was hospitalised at the St. Ann's Bay Hospital and then transferred to the Kingston Public Hospital.

The claimant alleged that the collision was caused by the negligence of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants (ancillary claimants) also sought to recover damages arising from the collision. The motor car was damaged and the 3<sup>rd</sup> defendant also suffered injuries

The claimant discontinued his action against the 2<sup>nd</sup> defendant as she claimed that at the time her son was not her servant or agent and had no knowledge that he left the house.

The claimant in the Amended Particulars of Claim set out the Particulars of Negligence of the 1<sup>st</sup> defendant as follows:

- a. Driving at a speed which was excessive in the circumstances. Failing to keep any or any proper look out or to have any or any sufficient regard to other users of the said road, particularly motor vehicle licensed 7455 BD.*
- b. Overtaking or attempting to overtake without first ascertaining or ensuring that it was safe so to do (and when it was unsafe and dangerous so to do).*
- c. Failing to reduce his speed on his return to the correct side and colliding into the rear of the motor vehicle licensed 7455 BD.*
- d. Pushing motor vehicle licensed 7455 BD into the path of oncoming traffic, in particular Toyota Land Cruiser motor licensed 3322 DL.*
- e. Failing to stop, to slow down or in any other way so as to avoid the collision.*

*(2) Particulars of Negligence of the 3<sup>rd</sup> defendant:*

- a. Entering a major road from a minor road when it was unsafe so to do;*
- b. Entering a major road from a minor road without first ascertaining or*

*ensuring that it was safe so to do;*

- c. Failing to have sufficient regard for other users of the road in particular the 1<sup>st</sup> defendant;*
- d. Failing to give way to traffic on the Ocho Rios Bypass, which was a major road;*
- e. Failing to stop, to slow down, to swerve or in any other way to manage or control the motor vehicle as to avoid the collision.*

The 1<sup>st</sup> defendant denied the claimant's Particulars of Negligence against him and blamed the 3<sup>rd</sup> defendant for causing the collision. He adopted the claimant's Particulars of Negligence of the 3<sup>rd</sup> defendant. It was his contention that the latter emerged from a minor road onto a major road into his path. This caused him to swerve to his right into the right hand lane to avoid colliding into the said motor car. He then quickly steered to the left to avoid a head on collision with an approaching vehicle. His motor vehicle then hit the left rear section of the 3<sup>rd</sup> defendant's car which then collided into the approaching vehicle. He maintained that the collision was due solely to 3<sup>rd</sup> defendant's negligence. He particularised his negligence as follows:

- 1) Driving at a speed which was excessive in the circumstances*
- 2) Failure to have sufficient regard for the speed at which the defendant's vehicle was travelling before driving onto the Ocho Rios by-pass road.*
- 3) Failure to have sufficient regard to the distance of the defendant's vehicle from the intersection, before attempting to drive onto the main road.*
- 4) Attempting to drive onto the main road at a time when it was manifesting unsafe to do.*
- 5) Failure to yield to traffic travelling along the said Ocho Rios main road, which traffic included the defendant's said vehicle.*
- 6) Driving without due care and attention.*

The 3<sup>rd</sup> defendant and ancillary claimants also alleged negligence of the 1<sup>st</sup> defendant.

It was their contention that speeding and improper overtaking by the 1<sup>st</sup> defendant was the cause of the accident. They set out the 3<sup>rd</sup> defendant's Particulars of Negligence as follows:

- a) drove at an excessive speed and / or improper speed.*
- b) he failed to keep any or any proper look out;*
- c) he drove in a reckless and dangerous manner;*
- d) he failed to have any or any adequate regard for other road users who might reasonably be expected to be proceeding along the Ocho Rios by-pass in particular the occupants of motor vehicle 7455 BD;*
- e) he failed to give any or any adequate warning of his intention to overtake;*
- f) he failed to exercise due care and skill in overtaking motor vehicle registered 7455 BD thereby causing motor vehicle registered 4870 DH to collide into the rear of motor vehicle registered 7455 BD;*
- g) he failed to stop, slow down, swerve, or in any other way so to manage or control the said motor vehicle so as to avoid the said collision.*

The thrust of the case against the 1<sup>st</sup> defendant as set out in the pleadings by the claimant was based on improper overtaking. However the evidence adduced at the trial was at variance with his pleadings as set out in the Particulars of Negligence against the 1<sup>st</sup> defendant and contradictory to the 3<sup>rd</sup> defendant's case.

He had not observed any vehicle been overtaken that night or been driven at an excessive speed. In his witness statement he said:

"At the intersection, Dale Bailey stopped and then turned left, entering the Ocho Rios by-pass main road. Tay Street is a minor road and the Ocho Rios by-pass is a major road. At the time when Dale Bailey entered the Ocho Rios by-pass, I could see the headlights of a vehicle coming down the by-pass in the same direction we were headed. As soon as Dale Bailey drove onto the by-pass he sped up. I could not tell the distance of the vehicle whose headlights I saw from the intersection but it appeared close to the intersection. I could not tell how fast this vehicle was also coming . . . .

As soon as we entered the by-pass Dale Bailey shouted to me, 'look how this

guy is going to hit up in the vehicle.' I turned and saw lights close to the back of the Toyota Corolla motor car."

Dale Bailey, the 3<sup>rd</sup> defendant disagreed with the claimant's version of the collision. In his witness statement he said:

"When I got to the intersection, I stopped and looked left and right. There was a car approaching from my right but it was a good distance away and it was approaching. This vehicle had round headlights like the ones on a Toyota Corolla. Based on how far this vehicle was and the speed at which it was travelling, I determined that it was safe to come out so I made a left turn onto the by-pass, straightened up the car and continued driving along the by-pass towards the Town Centre. I looked in my rear view mirror and saw this vehicle still a good distant away and still travelling slowly.

At a point further along the By-pass I again looked in my rear view mirror and saw headlights that had a different shape from the ones I saw earlier. These headlights were square like the ones on a pickup. The lights were brighter. This vehicle appeared to have overtaken the first vehicle I saw and was travelling very fast and seemed that it was heading straight into the back of the car. When I saw this I tried to speed up to get out of the way. I also tried to pull to my left and was almost on the soft shoulder when I felt an impact to the . . . rear of my mother's car."

In cross examination he stated that he had stopped at the intersection for about 40 to 60 seconds and allowed 3 or 4 cars to pass by.

He observed a line of cars about 50 to 55 feet coming and one in front was not coming at a fast speed so he decided to proceed onto the by-pass. He then drove about 20 to 30 feet and had straightened up when he observed the 1<sup>st</sup> defendant's car coming at a fast speed. He tried to avoid the collision by speeding up and pulling to his left.

He further stated that the accident occurred about 60 feet from the intersection, i.e. about 5 or 6 car lengths.

This was denied by the 1<sup>st</sup> defendant. In his witness statement he said:

"While approaching the Buckfield intersection, I observed a white motor car approaching the main road from Buckfield.

Upon reaching the intersection this white car drove out into my path. On seeing this, I sounded my horn, applied my brakes and steered right to avoid a collision.

However, at this point, I observed the approaching headlight of a vehicle travelling in the opposite direction so I steered back to the left in an attempt to avoid a head-on-collision."

In cross examination he said he was travelling at about 30 miles per hour and had not reduced the speed. When he first saw the corolla motor car it was about 30 feet away. He was travelling down a hill on a dry asphalted surface. The accident took place 10 to 15 feet from the intersection. The Highway Code gives the following stopping distances in perfect conditions, i.e. good weather, good dry roads. At 30 m.p.h. the stopping distance is 75 feet (thinking distant 30 feet, braking distance 45 feet).

In this instant case there was no dispute as to whether or not the 3<sup>rd</sup> defendant disobeyed the stop sign. He said that he had come to a stop. The 1<sup>st</sup> defendant in his cross examination said "the vehicle stopped at the intersection for a while."

It was always the 3<sup>rd</sup> defendant's contention that the collision occurred some distant from the intersection as the 1<sup>st</sup> defendant overtook a number of vehicles before hitting the rear of his mother's car. In cross examination he estimated the distance to be about 60 feet. He had looked into his rear view mirror more than once to observe the vehicles travelling behind. He was able to distinguish the headlights but never saw the 1<sup>st</sup> defendant overtaking the other vehicles. The claimant on the other hand asserted that the car was close to the intersection when he drove onto the by-pass. Shortly thereafter the 3<sup>rd</sup> defendant alerted him as to the danger.

As stated earlier, the 1<sup>st</sup> defendant said it occurred 10 to 15 feet from the intersection. He was not injured, unlike the claimant and the 3<sup>rd</sup> defendant. He was

therefore in a better position to state/describe the accident scene.

The claimant and the 1<sup>st</sup> defendant corroborated each other that

- (1) the 3<sup>rd</sup> defendant drove onto the highway as the vehicle was approaching.
- (2) The 1<sup>st</sup> defendant did not overtake a number of vehicles.
- (3) The collision occurred in the vicinity of the junction.
- (4) The 1<sup>st</sup> defendant was not driving at an excessive speed.

They also contradicted the 3<sup>rd</sup> defendant's assertion that he had driven some distance from the junction before the collision.

*Section 51 (1) of the Road Traffic Act provides that the driver of a motor vehicle shall observe the following rules - a motor vehicle*

- (d) shall not be driven so as to cross or commence to cross or to be turned in a road if by doing so it obstructs any traffic;*
- (e) proceeding from one road to another shall not be driven so as to obstruct on any such traffic on such other road;*

*(3) For the purpose of this section –*

*(a) a vehicle obstructs other traffic if it causes risk of accident there to.*

The Road Traffic Act and the Road Code requires that at a road traffic 'stop sign' all drivers are required to come to a complete stop at the sign and before continuing shall ascertain that there is no oncoming traffic near enough to cause danger of an accident. Disobeying a stop sign is a criminal offence.

*Section 97(1) reads:*

*The driver of every vehicle and the rider of bicycle shall obey-*

*(a) all red lights and stop signs;*

*(2) any person who fails to comply with such traffic sign shall be guilty of an offence.*

Part 2.17 of the code reads:

*Bring your vehicle to a full stop at all stop signs and proceed only when it is safe to do so.*

Thus, a driver on a minor or side road must not enter the major road unless it was safe.

The claimant and the 3<sup>rd</sup> defendant also submitted that the 1<sup>st</sup> defendant was negligent as he had a duty to traffic on the minor road.

They relied on the dicta of Luckhoo, J.A. in **Hall and Spence v Shepherd** (1968), 10 J.L.R. 515 at p. 519. He said;

"There is no absolute prohibition against a motorist driving on a minor road entering the intersection and the possibility of danger emerging from the minor road is therefore always present. A duty of care is therefore owed by a motorist driving on the major road to one approaching the intersection along the minor road. . . . I do not agree that he is entitled to assume that the traffic approaching the intersection from the minor road would act in obedience of the regulation in the sense that such traffic will remain at the stop sign until he clears the intersection . . . . Depending on the circumstances, the driver of a vehicle emerging from a minor road may or may not be guilty of negligence where he is in breach of duty imposed by regulation."

In **Watson v Everall and Tebbett** (Bingham and Berrymans' Motor Claims Cases 11<sup>th</sup> Ed p.384) *a motor coach and a van collided at a cross road where a main road was crossed by a subsidiary road in the hours of darkness. The van was been driven along the main road and the coach along the subsidiary road, which had a 'Halt' sign and stop line at the point where the coach emerged on to the main road. The trial judge held the drivers equally to blame. The Court of Appeal held that the driver on the main road was not negligent. Per Sellers LJ: It depicts the typical case of a vehicle coming out from the side road directly in front of the van which had the right to use the main road*



*expecting that traffic coming out from the side road on the left would conform with the requirements of the law that it should halt and the further requirement that being a side road it should give way to traffic passing on the main road.*

In Hall and Spence v Shepherd the collision had occurred about 84 feet from the intersection. Thus, the appellant had sufficient time to avoid the collision if he was keeping a proper look out. In the present case the 1<sup>st</sup> defendant struck the rear of the other vehicle within 20 feet from the intersection after it drove on to the main road. He saw that the motor car had obeyed the stop sign and would have expected the driver to wait until he passed the intersection before emerging.

The claimant did not adduce any evidence to support the Particulars of Negligence for the 1<sup>st</sup> defendant. His evidence was that the 3<sup>rd</sup> defendant drove out onto the by-pass as the car approached the intersection. He was sitting to right and was in a better position to see the 1<sup>st</sup> defendant's vehicle. He saw no vehicle been overtaken as alleged by the 3<sup>rd</sup> defendant. He also claimed that the approaching vehicle was close to the intersection. He was however unable to say the speed at which it was travelling.

I accepted the 1<sup>st</sup> defendant's evidence that the 3<sup>rd</sup> defendant emerged on to the major road and into his path. The car had stopped at the stop sign and he was therefore justified in thinking that it would have remained stationary until he had passed. The 3<sup>rd</sup> defendant was therefore in breach of his duty to the claimant and the 1<sup>st</sup> defendant as he had moved off from the stop sign when it was not safe to do so. He ought to have seen the vehicle approaching from his right on the by-pass.

It is clear that he misjudged the distance of the motor car. As a result he emerged onto the by-pass when the oncoming motor car was too close for him to proceed safely;

and too close to allow the driver to brake sufficiently or to take any other avoiding action to prevent the collision. In addition the driver had swerved to his right to avoid the collision but had to quickly manoeuvre to his left to avoid the approaching motor vehicle that was in its correct lane.

The 3<sup>rd</sup> defendant had created by his negligence a position of extreme danger for the 1<sup>st</sup> defendant and the latter was not to be blamed if in the agony of the moment he collided into his motor car.

He was wholly to be blamed for the collision and the ensuing injuries to the claimant.

**DAMAGES:**

The claimant is now 26 years old. He sustained multiple traumas to his right lower limb, face and right eye. He is blind in the right eye and was fitted with a false prosthetic eye. He was a patient at the Kingston Public Hospital for 2 weeks. After he was discharged from the hospital he had to attend various clinics for treatment. He was treated by Dr. M Wong, Dr. Rory Dixon, and Dr. S. Donaldson. Their medical reports are as follows:

(a) Dr. M. Wong. (Ophthalmology Department)

*Mr. Ruel Ellis was admitted to the Kingston Public Hospital on the 20/4/03, after being involved in a motor vehicle accident the previous evening.*

*He was diagnosed as having*

*- multiple facial lacerations and*

*- a right ruptured globe*

*He had no perception of light in the right eye at the time (blind in the right eye).*

*He had a right evisceration (to remove the contents of the eyeball), performed on the 21/4/03.*

*The post-operative period has been uneventful. He is to have prosthesis (false eye) fitted in the right orbit and at his last clinic visit on the 29/5/03, he was given a seven to eight month's appointment.*

(b) Dr. S. Donsldson (Facio-maxillary Department)

*He presented with the following to the Facio-maxillaryclinic.*

*Clinical Examination*

- 1. Multiple lacerations to the face (sutured)*
- 2. No vision in the right eye*
- 3. Fractured right zygomatic complex*

*Radiographic Examination*

*Fractured right zygomatic complex*

*Diagnosis: fractured right zygomatic complex*

*Treatment*

- Placement of conformer post-enucleation of right eye*
- Dressed face and eye socket post operation and subsequent visits*
- Adjustments made to conformer*
- No surgical intervention necessary for facial bones*
- Teeth fracture upper 6<sup>th</sup> and lower 4<sup>th</sup> teeth were extracted*
- Prosthetic eye fitted, no complaints from patient*

*Patient was discharged from our clinic*

*Prognosis: 1) the facial fractures healed well*

*2) Prosthetic eye fitted well*

*There will be permanent complete loss of sight in the right eye. The patient will only have (one) monovision as a result.*

*Dr. Rory Dixon – Orthopaedic Department*

*He was referred to the Orthopaedic service for management of a fractured right femur.*

*He was assessed by the Orthopaedic team and his orthopaedic injury was a comminuted segmental fracture of the upper third of the right femur. He was placed on skeletal traction and on April 29, 2003 he was taken to the operating theatre where intramedullary fixation of the right femur was performed. He recovered well and was discharged home on May 3, 2003 now weight bearing on crutches, to be followed up in the Fracture Clinic.*

*He commenced partial weight bearing after two months and full weight bearing after six months. He was last seen on November 22, 2004. He was fully weight bearing and had good range of motion of the right knee. There was no shortening of the right lower limb.*

*Ruel Ellis sustained multiple traumas including a fractured right femur for which he was incapacitated for at least one (1) year. He has recovered satisfactorily with respect to the femur and no permanent impairment is anticipated with respect to femur.*

The claimant also consulted Dr. Guyan Arscott, a Plastic Surgeon on the 14<sup>th</sup> June 2004. His examination disclosed scarring as follows:

- 1. Over the molar aspect of his (R) cheek, there was a 6 x 2 cms. Hypertrophic scar.*

2. At the root of the nose there was a 3 x 2 cms. Hyper pigmented hypertrophic scar.
3. *Over his (R) upper lip outer aspect, there was a 3 cms. Hypertrophic scar which extended unto the vermilion of the lip, where the scar became nodular in nature.*
4. *The centre of the upper lip also had smaller linear scars. Small linear scars were also seen over the sub mental area.*
5. *Over the (R) lower limb, there was a 10 x 1cms hyper pigmented hypertrophic surgical scar extending to the upper thigh.*
6. *Over the outer aspect of the (R) knee, there was a 4 x 1 cms hyper pigmented hypertrophic surgical scar.*
7. *Over the upper third of his (R) leg there was a 1cm hyper pigmented hypertrophic scar, representing a traction site for his lower limb.*

The claimant was not treated by Dr. Arscott who estimated that the costs for plastic surgery would be \$360,000.00. The claimant would be entitled to this sum.

Each counsel made written submissions in respect of damages.

The claimant claimed a sum of \$98,000.00 as his mother's travelling expenses to the hospital to assist with his care and attend to his personal needs. She was dissatisfied with the care provided by the hospital. She travelled by taxi from Ocho Rios to the Kingston Public Hospital with food and clean clothes for him. She submitted the receipts to prove her claim.

On the other hand Counsel for the defendants submitted that this sum cannot be recovered by the claimant.

It is settled principle of law that a claimant is entitled to claim damages in respect of services provided by a third party which were reasonably required by the claimant

because of his physical needs directly attributable to the accident. In Michael Thomas v James Arscott and another (1986) 23 J.L.R. 144 @ p.149 Rowe, P. said

*“a person who is hospitalised in Jamaica whether in a public or private institution has the personal responsibility to launder his or her own clothes. A claim for laundry is a perfectly legitimate one and when made and proved ought to be allowed. A person who is a vegetarian ought not to be compelled to have meat dishes when he is confined to hospital and if he has to incur additional expense to provide vegetarian meals, when such services are claimed and proved they ought to be allowed in damages. If in the instant case, the court accepted that the mother travelled to Kingston to bring fresh clothing and fish dishes for the appellant, then reasonable travelling expenses ought to have been allowed.”*

The claimant would also be entitled to recover his mother’s travelling expenses.

He also claimed loss of income for 156 weeks @ \$4,500.00 per week. At the time of the accident he was employed as a part-time mechanic and was not re-employed thereafter. The medical evidence disclosed that he was incapacitated for at least a year. He was entitled to recover his income for that period. He also had a duty to mitigate his loss by seeking employment. He failed to do so. In the circumstances an award of 52 weeks for loss of income is allowed.

It was also submitted by the counsel for the 3<sup>rd</sup> defendant that the claimant’s travelling expenses be limited to one year i.e. for the period his incapacity. Thus, the sums claimed thereafter should not be allowed. I agree with the defendant’s submission.

Personal Damages are therefore assessed as follows:

a. Loss of income	\$234,000.00
b. Medical expenses	\$139,511.58
c. Travelling expenses`	\$120,000.00
d. Loss of articles	\$84,805.00
e. Mother’s travelling expenses	\$98,000.00

f. Total \$676,316.58

## **GENERAL DAMAGES**

Counsel for the claimant admitted that she found no cases with a similar combination of injuries as the one sustained by the claimant. She cited the following case

1. Linden Palmer v Neville Walker & Michael St John (Khan's Recent Personal Injuries Award Volume 5)
2. Ruby Teape & James Teape v Leon Whitworth ( Khan's Vol. 5)

She submitted that the severity of the claimant's injuries the instant case is between the two cases cited above and recommended an award of \$10,000,000.00 for pain and suffering and loss of amenities.

The claimant also submitted a claim for loss of future earnings.

The medical certificates clearly indicate that the only permanent disability was the loss of his eye. There was no shortening of his right lower limb. There was no medical evidence that the injuries he had suffered would affect him adversely as a mechanic.

I therefore make no award for loss of future earnings.

I have read the cases cited by the 3<sup>rd</sup> defendant and agree that the sum of \$3,500,000.00 is reasonable for pain and suffering and loss of amenities.

To summarise, there should be judgment for the claimant against the 3<sup>rd</sup> defendant with costs to be agreed or taxed. Damages are assessed as follows:-

Special Damages: - \$ 676,316.58 with interest at 3% from the appropriate date.

General Damages: - future medical expenses: - \$360,000.00.

Pain and suffering and loss of amenities: - \$ 3,500,000.00 with interest at 3%.

Judgment to be entered for the 1<sup>st</sup> defendant against the claimant and the 1<sup>st</sup> 2<sup>nd</sup> ancillary claimants with costs to be agreed or taxed.

Costs for the 2<sup>nd</sup> defendant against the claimant to be agreed or taxed.