

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 559/2004

<i>BETWEEN</i>	<i>STEPHEN HULL</i>	<i>CLAIMANT</i>
<i>AND</i>	<i>GUYAN WARREN</i>	<i>DEFENDANT</i>

***Mr. Leslie Campbell instructed
by Miss Linda Wright for Claimant.***

Mr. Alexander Williams instructed by

Miss Althea Wilkins for Defendant

Heard: April 25, and May 12, 2006

McDonald J, Ag.

On August 10, 2003 at about 2:40 p.m. an elderly gentleman, Mr. Stephen Hull was walking along the Stony Hill Main Road towards Kingston pushing his bicycle on the left hand side of the road on his way to work.

He is a retired aviator from Shell and was employed as a supervisor at the Petcom Gas Station in Stony Hill, St. Andrew.

Mr. Hull's evidence in chief took the form of his witness statement. In his statement he said that on reaching the vicinity of Carl's Bar he looked in the direction of Stony Hill, then Golden Spring and up again and saw one vehicle coming towards the Kingston direction. This motor vehicle stopped to allow him to cross. He started to cross the road from the left hand side to

the right pushing his bicycle, holding onto the handle with his right hand. He was on the inner side of the bicycle.

He cleared the left half of the road and on reaching the right side he was hit by a motor car travelling from Golden Spring end at a fast speed. The car hit the back wheel of the bicycle and himself.

When he felt the impact he fell to the ground, the car stopped on the back wheel of the bicycle. He heard no horn blow neither did he see the vehicle before he was hit. He said that at the time of the accident the road in the area was dry, it was about 20 feet wide, and very straight. He said motor vehicle #5510 DS hit him on the wrong side of the road; it should have been in the left lane.

After a little while he got up and was taken to the Stony Hill police station by police officers. On reaching the station he saw Mr. Warren the driver of the motor vehicle which hit him. He made a report to the police and was taken for medical treatment.

As a result of the accident he received injuries to his left foot (shin) and right foot. He felt pain in his right shoulder and right ankle and pain in his hand.

At the time of giving the witness statement on 31st December 2004 he said that he was still-undergoing treatment. Medical report prepared by Dr.

Audley Betton dated 15th December 2003 together with written questions addressed to him by the Defendant's Attorney and his reply in affidavit form were tendered and admitted into evidence as Exhibit II. Receipts in proof of costs of medical report, police report and medical expenses were admitted into evidence as Exhibit III.

Under cross-examination the claimant said that before he crossed the road, he looked up and down the road. He saw a parked vehicle on the left side of the road. He crossed in front of the parked vehicle then a vehicle came up and stopped and he passed over the white line and was then hit by another vehicle.

Later in cross-examination he said that the motor vehicle hit the cycle and the cycle hit him and pushed him a little distance from the cycle. He explained that when he said the car hit him in his witness statement that was a misunderstanding.

Mr. Hull said that at the time of the accident he was pushing the bicycle, holding onto it with his right hand and walking on the outer side of the bicycle. However in re-examination he said that he was walking on the inner side of the bicycle.

He said that he was rushing across the road. He elaborated on this, by saying that he meant that he did not stop to look at the gentleman's car

which had stopped to allow him to go across. He said that he went normally across the road. He was unable to say how fast the car was travelling before it hit him and he was unable to give any description of the car that stopped to allow him to pass or of the car that hit him.

Mr. Hull stated that when the car hit the back wheel of the bicycle he was pushing, he was closer to the front wheel; and he fell over on the right side of the road. He said that he was on the right side of the road when the accident happened.

He took up a stone and marked the four wheels of the car that hit him. He did not write down any distances. He did not remember if he told the police that he had marked the wheels of the car.

He said that apart from Mr. Warren the driver he did not speak to anyone else at the scene. He did not see Mr. Higgins at the scene and cannot remember how long after the accident he approached him to give a statement, although it could be more than months.

The claimant called Mr. Winston Higgins as his witness. In his witness statement he said that on August 10, 2003 at about 2:40 p.m. he was standing at the bus stop along Stony Hill Main Road in the vicinity of a bar when he saw Mr. Hull walking along the Stony Hill Main Road pushing a bicycle.

On reaching the bar, Mr. Hull looked up and down the Main Road and started to cross from the left to the right side. Another car which was coming from Golden Spring direction towards Kingston swung from behind the car that stopped to allow Mr. Hull to cross and hit the bicycle on the right side of the road with Mr. Hull holding on to it.

Mr. Higgins said that when the car hit Mr. Hull, he fell in front of it and the bicycle was under the front wheel of the car. Mr. Hull was still holding on to the bicycle after he fell. The car was on the right side of the road when it hit Mr. Hull.

He said that the car that hit Mr. Hull "brake up" but the brakes did not hold and there was a drag mark. He rushed over to see if Mr. Hull was alright and saw that both his feet were bleeding from bruises/cuts he received. He was trying to walk when he got up but was hopping. Police came on the scene, and took away Mr. Hull. The car had to reverse so that the police could take up the bicycle.

In cross-examination Mr. Higgins said that the car had come out of the road before the police came. He saw the police looking at the line where the tyre had marked. Mr. Hull got up by himself, he helped him by holding his hand and then assisted in taking the bicycle from under the car wheel.

He said that Mr. Hull was on the left side of the bicycle when the accident occurred. He waited with him but did not stand with him until the police arrived. He followed him to the police station with the bicycle. He did not give the police a statement, neither did he speak to them on the scene.

Mr. Higgins said that he spoke to Mr. Hull at the scene.

He stated that he saw the car that hit Mr. Hull from it was coming up Stony Hill Road. He said there was a car parked, having a tyre fixed, on the left hand side of the road in front of the bar. He saw another car overtake it slowed down when seeing the bicycle and the man and stopped to give him pass.

He testified to knowing Mr. Hull before the accident as an attendant at the Gas station where he goes to purchase cooking gas.

Defendants Case

Mr. Warren who is currently a life underwriter said in his witness statement that on the 10th August 2003 at approximately 2:15 p.m. he was driving his 1996 Hyundai Elantra motorcar on the Stony Hill Road heading towards Constant Spring. On reaching in the vicinity of the Stony Hill Market, he noticed that there were cars parked on the right hand side of the road.

He saw the claimant walking along the road on the left hand side with his head down. He was about 15 – 20 feet away. The claimant suddenly and without warning turned his bicycle across the pathway of his motor vehicle as if he intended too cross the road from the left to the right.

Mr. Warren said on seeing this he swung away and applied his brakes. The left front bumper of his motor vehicle collided with the front bicycle wheel. He could not swing too far to the right because of the car parked there.

He was going at less than 15 - 20 mph because he was involved in a previous accident on the Junction and damage was done to the tyre, so he was unable to travel fast. His motor vehicle never collided with the claimant directly, but with the bicycle's front wheel. The bicycle's pedal scratched the claimant's skin and the injury to his elbow was from the bicycle. He did not roll or tumble.

The police were called to investigate and he w as not fined, charged or warned. The accident occurred in his driving lane heading down Stony Hill towards Constant Spring.

Under cross-examination he said that his vehicle hit the front wheel of the bicycle and that Mr. Hull fell on the left side of the road heading to

Kingston. He said the bicycle did not have to be pulled from underneath the car.

He said that to his knowledge there were no drag marks on the road after the collision. It was suggested to him that his speed was such that when he applied his brake it left a tyre mark on the road; he replied that that was a false suggestion.

Mr. Warren said that he was the sole occupant of his car and when he saw the claimant in his path, he applied his brakes and simultaneously applied his hand to his horn. He swerved from his travelling lane and travelled an estimated 4 feet across the road. He collided with the bicycle at the end of the swerve.

At the point of collision his left tyre was 4 feet from the left hand sidewalk. Before he started to swerve his car was 1 foot from the left edge of the road. On applying his brakes, his stopping distance was anywhere between 5 to 8 feet from point of application.

Mr. Warren said that although there was damage to his tyre, he did not have to fit on his spare, because the tyre was not deflated but was damaged.

He denied that there was a vehicle parked on the left hand side of the road, and that a vehicle in front of his had stopped to allow the claimant to cross the road. He denied swerving from behind this vehicle and colliding

with the bicycle. He denied that the accident took place on the right hand side of the road going to Kingston. He said that it was false to suggest that Mr. Hull fell on the right side of the road after the collision.

The accounts given by the parties are diametrically opposed. The Court has to decide on a balance of probabilities whether the claimant has proven the allegations of negligence against the defendant. Credibility is one of the factors to be taken into account in this exercise.

Did the Defendant drive at a fast and excessive speed?

Neither the claimant nor his witness have given any evidence as to the speed at which the Defendants' motor vehicle was travelling. In fact the Claimant did not see the car before the impact.

Mr. Higgins has not stated that the Defendant was travelling fast or at an excessive speed, although he speaks to the Defendant braking up, brakes not holding and leaving a drag mark.

There is no evidence from the Claimant and his witness as to the rate of speed at which the Defendant's car was travelling. Harris J.A. in *Garfield Hawthorne v. Richard Downer* SCCA 12/2003 (July 29, 2005) stated that in that case

“The Respondent said he could not say whether the vehicle was travelling at a fast rate of speed. Although he was unable to do so, this would not in anyway operate against the proof of his

claim. The question as to whether or not he was driving at an excessive speed has to be determined within the context of the circumstances. Excessive speed, as the cause of an accident may be inferred A Respondent may prove his case by direct as well as circumstantial evidence."

Reliance was placed on *Almon v. Jones* (1974) 12 JLR at 1476

Graham Perkins JA said:

"..... it is a mistake to think that because a witness is unable to give evidence of relative speeds and distances the cause of action cannot reasonably be inferred."

If the court were to accept that there was a drag mark, this would be indicative of some degree of speeding.

The Claimant gave no evidence of observing any drag mark. He heard nothing before the car hit the cycle. The inference therefore is that he heard neither screeching of brakes nor the tooting of a horn.

Whilst Mr. Hull was under cross-examination and confronted with an inconsistency between what was said in his witness statement and what he was then saying, he said that there could be a misunderstanding from the lawyer seeing that he is not hearing properly.

However judging from his ability to hear and answer questions in Court, I am of the view that this "difficulty" is quite limited in scope.

The Defendants evidence is that he was driving at 15 to 20 mph at the time, that when he saw the claimant 15 – 20 feet away suddenly turn the bicycle across his path he applied his brakes and swing to the right. If this account is true, it is improbable that one would expect to find drag marks.

The claimant told the Court that he took a stone and later said “ a piece of metal something” and marked the four wheels of the car that had hit him down. When asked about the significance of doing so, he responded that he had been driving for the past 50 odd years and he noticed that whenever there was an accident people generally mark the wheels of the vehicle.

Mr. Hull's case is that he was in the road marking the wheels, the Court must ask itself how is it that he saw no drag mark if it was in fact there.

I find that there were no drag marks on the road as a result of the accident.

I also find that Mr. Hull did not mark the four wheels of the car or the road that day. I find it significant that he failed to tell this to his Attorney and cannot remember if he told the police. Further his witness makes no mention of seeing him do so, having assisted him up off the ground, waited with him until the police came and accompanied him to the police station. If

the witness saw these marks, they ought to have impinged on his memory. Such evidence would have assisted in identifying where the car stopped after impact.

There is no evidence as to any damage to the car coming from either the Defendant or Claimant. The evidence concerning the condition of the bicycle coming from the claimant's witness is that it was under the front wheel of the car and removed and could not ride again. Evidence as to the respective damages might have offered some assistance to the Court as to how the accident happened.

Mr. Higgins' evidence is that Mr. Hull fell in front of the car, the bicycle was under the front wheel of the car and Mr. Hull was holding unto the bicycle after he fell.

I am of the view that for the claimant to be still holding unto the bicycle with one hand having been pushed some distance away from it on impact, would imply that the impact could not have been forceful and is inconsistent with a vehicle travelling at a fast speed.

It is clear that the car stopped without running over the bicycle and stopped on the bicycle wheel. I find that no occasion arose for the bicycle to be taken from under the car wheel by anyone as the car reversed thereby enabling the police to take up the bicycle.

I find that the injuries sustained as a result of the bicycle hitting the Claimants are not consistent with great speed.

I find that the Defendant was not traveling at a fast or excessive rate of speed at the time of the accident.

Did the Defendant fail to keep any or any proper lookout?

The Defendants case is that he first saw the claimant walking along the road with his head down. This evidence is unchallenged.

He saw him when he was 15 – 20 feet away, and suddenly and without warning the claimant turned the bicycle across the pathway of his motorcar.

It is undisputed that the road was 20 feet wide, straight, and dry and that it was a bright day.

Mr. Warren agreed with the suggestion that he could have seen the claimant before 15 – 20' as there was nothing blocking his view. He said that there was no reason why he did not see him before 15 – 20'.

Based on the above, it is my view that the inescapable conclusion as to why he failed to see the claimant earlier was because he was not keeping a proper lookout.

I find Mr. Warren to be a more reliable witness than Mr. Hull and Mr. Higgins.

On a balance of probabilities I find that:-

- (1) The claimant was attempting to cross the road when it was unsafe to do so.
- (2) Mr. Hull without looking up and down the road pushed his bicycle suddenly and without warning across the road into the pathway of the Defendant's motor car and that Mr. Warren was unable to avoid hitting the front wheel of the bicycle despite swinging away to the right, applying his brakes and tooting his horn.
- (3) Mr. Warren was not driving at a fast or excessive speed at the time of the accident.
- (4) He first saw the claimant when he was 15 – 20' away
- (5) The accident occurred on the Defendant's driving side of the road.
- (6) I reject the claimant's case that a motor vehicle had stopped to allow him to pass, and that Mr. Warren overtook that vehicle and collided into the rear wheel of the bicycle.
- (7) I find that Mr. Warren failed to keep a proper lookout. In my view that is something I ought to consider as one of the probable causes of the accident. The real and substantial cause being the negligence of the claimant. I find that the Defendant contributed to the accident in a proportion of 20% and the claimant 80%.

Special Damages

The Claim for loss of earnings for 14 days from 11th August 2003 to 12th December 2003 has not been proved. Receipts evidencing proof of payment for police report, medical report and medical expense totalling \$5,884.00 were tendered in evidence as Exhibit III. These sums are allowed.

General Damages

Medical report, Exhibit II indicates Dr. Betton's findings on examination of Mr. Hull on 11th August 2003.

It reads inter alia-

"He had linear scars along his left forearm and hypothenar eminence of his left palm. There were jagged lacerations down his left leg calf and lateral malleolus. He complained of pain in his right shoulder, but said he was not unconscious and did not have any evidence of internal injuries. He was hypertensive and arthritic.

His wounds were cleaned and dressed. He was given a tetanus toxoid injection and received a prescription for antibiotics and a prescription for antibiotics and analgesics.

On 20th August, 2003 he returned with marked cellulitis of his right leg. He was given additional antibiotics and dressings.

On 4th September, 2003 he was limping with induration down the outer aspect of his right leg. He was again noted to be hypertensive and was given vasodilators, antibiotics and antihypertensives. A diagnosis was then made of several peripheral vascular disease with thrombophlebitis, and a course of antibiotic injections was initiated.

On 11th September, 2003 his wounds were crusted (healing).

On 18th September, 2003 he continued to complain of leg and hip pains. X-rays confirmed severe osteoarthritis of his right hip. He was given antibiotics and anti-inflammatory analgesics.

On 21st October 2003 he appeared with large ulcer craters of all leg wounds, which he said were being dressed at the Health Centre.

On 11th December, 2003 he presented with difficulty walking and said he had continued treatment at the Public Health Centre.....

It is my opinion that he has osteoarthritis, hypertension and severe peripheral vascular disease of long onset, which has been aggravated by his accident, and hence his continued pain and protracted healing.”

Mr. Williams submitted that the medical evidence indicated that Mr. Hull's medical condition has been aggravated by the accident and not caused by it. The osteoarthritis, hypertension and several peripheral vascular disease being pre-existing conditions leaving him with bruises and lacerations.

He placed reliance on **Stephens v. Bonfield & Anor 4 Khans Report 212** in support of this head of damages. The claimant age 79 years suffered abrasions of left leg, bruise on right foot and experienced pain for about 4 weeks. On 23rd September 1996 he was awarded General Damages of \$40,000 for pain and suffering and loss of amenities. That sum today would amount to \$92,825.07 (using CPI 2295.1 for February 2006).

Mr. Williams submitted that an appropriate award would be \$150,000.

Mr. Campbell, on the other hand submitted that an award of \$600,00 would be appropriate. He relied on the following cases:-

Stephens v. Bonfield & Anor. 4 Khan's Report 212

Scott v. Cheddesingh & Anor 5 Khan's Report 276

Protz – Marcocchio v. Smatt 5 Khan's Report 284.

I do not find the last two cases referred to as being helpful in computing an award, as the instant claimant suffered no puncture wounds or scarring as a result of the accident. In addition the claimants in those cases had no pre-existing conditions which contributed to their present condition. **Stephens v. Bonfield (supra)** offers some assistance in calculating an award.

I am of the view that Mr. Hull suffered greater pain for a much longer period coupled with protracted healing than the claimant in Stephen's case. Mr. Hull's only medical report records his medical history for a period of 4 months from the accident.

Mr. Hull in his witness statement said that to date (i.e. 31.12.04) he was still undergoing treatment.

Dr. Betton was of the opinion that if Mr. Hull was still seeking medical treatment it would be for his underlying complaints and not those associated with the motor vehicle accident.

The Doctor was also of the view that given Mr. Hull's age and pre-existing condition he would have been feeling pain even before the accident. I accept the Doctor's opinion.

I am of the view that the "thin skull" principle that the Defendant takes his victim in the physical condition he finds him (*Smith v Leech Brain & Co. Ltd.* 1962 2 QB 405) is applicable to the instant case.

Lord Parker CJ in *Smith v. Leech Braine (supra)* at page 414 stated:-

"I am quite satisfied that the Judicial Committee in the Wagon Mound case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him The work of the courts for years and years has gone on on that basis. There is not a day that goes by where some trial judge does not adopt that principle, that the tortfeasor takes his victim as he finds him. If the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so."

In all the circumstances, the Court is of the view that a reasonable award for pain and suffering would be \$320,000.00. No evidence has been adduced relating to loss of amenities.

In accordance with my findings on the liability ratio stated earlier the claimants General Damages will be reduced by 80%.

$$\$320,000 - \$256,000 = \$64,000.00$$

General Damages

Pain and Suffering \$64,000

Interest at 6% from 20th July, 2004 to 12th May, 2006.

Special Damages of \$5884.00 reduced by 80%

$$\$5884 - \$4707.2 = \$1,176.80$$

Interest at 6% from 10th August, 2003 to 12th May, 2006

20% of Claimant's costs to be paid by Defendant to be agreed or
taxed.

