IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV1374

BETWEEN	ERROL McDONALD	CLAIMANT
AND	ZOUKIE TRUCKING SERVICES	1ST DEFENDANT
AND	AINSLEY WALLACE	2ND DEFENDANT

Mr. Orane Nelson, instructed by K. Churchill Neita & Co.
for Claimant
Mrs. Pauline Brown-Rose and Mrs. Nicosie Dummett
for the Defendants

MOTOR VEHICLE ACCIDENT – PEDESTRIAN CROSSING – RESPECTIVE DUTIES OF DRIVER AND PEDESTRIAN

DELIVERED AS AN ORAL JUDGMENT

Heard 6th, 7th, and 14th April 2011

IN OPEN COURT

Mangatal, J

This is a claim in negligence arising out of a motor vehicle accident which occurred in the afternoon on the 2nd of July, 2008. It involved the Claimant and motor truck Registration CA1331 owned by the first Defendant, Zoukie Trucking Services Limited, and driven by the 2nd Defendant, Ainsley Wallace.

I will deal firstly, with the issue of liability. The Claimant's case is that he was crossing on a pedestrian crossing along Hagley Park Road in the vicinity of Cockburn Pen All Age School in the parish of St. Andrew. There were four lanes of traffic

travelling along that road with two lanes for traffic travelling towards the Half Way Tree direction and two lanes for traffic travelling in the opposite direction, that is, towards Three Miles Roundabout. The Claimant says he had already cleared the two lanes travelling in Three Miles direction and had cleared the right lane of the lanes travelling towards the Half Way Tree direction. When he was stepping on to the sidewalk, he had put his left foot on the sidewalk and whilst his right foot was still on the pedestrian crossing, the 2nd Defendant negligently drove the motor truck switching from the right lane to the left lane and hit him in the extreme left lane. He suffered a number of injuries including fractures.

The 2nd Defendant, Mr. Wallace, on the other hand, said that he parked the truck on the soft shoulder on the left hand side of the road facing in the direction of Half Way Tree, in the vicinity of the Cockburn Pen All Age School, and in the vicinity of a branch of the National Commercial Bank Limited. He walked across the road and used the ATM machine, NCB, and crossed back over to the truck, he got back into the truck and was about to drive off when he saw a man pointing as if he was asking for a ride. The 2nd Defendant wound down his window and signalled with his hand indicating, no, and he did this while telling the man, 'no'. He, the 2nd Defendant started to move off when he heard the driver of the motor vehicle, a truck, which was behind him, honk his horn. The 2nd Defendant stopped immediately and saw a man lying under the truck. The man was taken from under the truck by the 2nd Defendant and three other persons and placed in a police vehicle.

The defence called another witness, Mr. Melvin Findlay, who is himself a truck driver. He indicated that on the date in question he was travelling behind the truck which

was being driven by Mr. Wallace, and he was travelling towards the Half Way Tree direction. Mr. Findlay said that they were in a line of traffic and the vehicles came to a standstill. He saw a man come across from the left side of the road and climbed on to the left side of the truck in the area between the gas tank and the steps. Mr. Findlay said that it seemed that the man did not get a proper hold of the handle of the side of the truck as he slipped and fell and the middle set of wheels of the truck drove over the man's feet.

The Claimant and the 2nd Defendant's version of what happened are quite different and both cannot be true. They are indeed as counsel for the Defendant, Mrs. Brown Rose puts it 'they are diametrically opposed'. Much will therefore turn on the credibility of the witnesses and the plausibility of the accounts being given by them.

I have, as the trial judge, had the opportunity of seeing and observing the demeanour of the witnesses. I found that the Claimant, Mr. McDonald, seemed to be a truthful and forthright witness. I also assessed him as unpretentious and unsophisticated. The 2nd Defendant on the other hand, I found to be an evasive witness and I do not believe that he was speaking the truth, although I do take into account the fact that a witness can be evasive or appear evasive for a number of reasons, whether nervousness or for other reasons. But firstly, the 2nd Defendant appeared not to want to answer a number of questions in cross examination which he should easily have been able to do in relation to the width of the cab and other features of the road and the truck. But more importantly, I found that there was a glaring inconsistency between what he said in the Witness Statement which stood as his examination in chief and what he said in amplification of his Witness Statement.

There was also a serious omission which affects his credibility adversely in my judgment. In the amplification he said that the Claimant not only pointed in the Half Way Tree direction but made a shout of, 'Half Way Tree.' Nowhere is that in his Witness Statement which was filed on November 2, 2010. I would have expected that if indeed the Claimant had said those words, it would have been important for the 2nd Defendant to say so since it would be consistent with the case that the Claimant negligently jumped on his truck while attempting to secure a ride to Half Way Tree. But additionally, in his Witness Statement, the 2nd Defendant stated at Paragraph 4, "I checked in my rearview mirror and saw a man pointing...' (and) I emphasize the following words, 'as if he were asking for a ride.' It is inconsistent for the 2nd Defendant to say that the Claimant was pointing, 'as if he was asking for a ride' when in amplification he claimed the Claimant actually shouted, 'Half Way Tree' while pointing. The words, as if he was asking for a ride, suggests it is only from the Claimant's action that the 2nd Defendant was able to deduce that the Claimant was asking for a ride and not that the Claimant expressly asked for a ride with words. The importance of this point in relation to the 2nd Defendant's credibility is that it seems obvious that he was merely trying to embellish the story while giving evidence in court. In the Witness Statement, the 2nd Defendant also said that he saw the Claimant before he moved off. In amplification, he said that when he saw the man, the truck was in motion. In the Witness Statement, the 2nd Defendant said that he had seen this man in the rearview mirror, but then, in cross examination, he said that the Claimant was ahead of him, and not only was the Claimant, this man ahead of him, but also that he was ahead of his, the 2nd Defendant's rearview mirror. It is very difficult to understand how someone could be ahead of the rearview mirror yet still be seen in it; that

defies common sense and physics; wherever the mirror is positioned a person cannot be in two places at the same time and therefore cannot both be ahead of you and behind you. The 2nd Defendant said he had to wait until the lane was clear to proceed from the soft shoulder into the extreme left lane and claimed that when he proceeded into the lane the nearest vehicle was forty to fifty feet behind him. He can't remember, he says, the exact vehicle that was behind him, yet Mr. Findlay claimed to have been travelling behind him. And in his evidence, the 2nd Defendant said that it was a truck driver who honked his horn, the truck driver being behind him.

In answer to me, the 2nd Defendant said that he was travelling about seventy feet from where he moved off before he stopped and for about a minute or two.

There are some telling discrepancies also between the accounts of the 2nd Defendant and the witness, Mr. Findlay. Mr. Findlay said in cross examination, that he had been travelling behind the 2nd Defendant's truck from down by the traffic lights at Three Miles Roundabout. There was no other vehicle he said between them from then until the point of the accident, and he, Mr. Findlay, did not lose sight of the truck which was being driven by the 2nd Defendant. He did not at any point see the 2nd Defendant cross the road, and Mr. Findlay uttered words which, if I may borrow words from one of the popular T.V. stations where they speak about, 'The bite of the week.' Mr. Findlay uttered words which might be dubbed, 'The bite of the case' when he said the 2nd Defendant could not have been crossing the road because, 'he could not cross the road when he sit down in the truck.' Mr. Findlay also said that he did not at any point in time see the truck leave a sidewalk and come on to the road.

Mrs. Brown Rose valiantly tried to explain this inconsistency away by referring to the witness. Mr. Findlay's evidence, that the 2nd Defendant came through the traffic lights at Three Miles Roundabout ahead of him, and that it was after the 2nd Defendant reached up to the post office that he, Mr. Findlay, caught up with him. It would seemed I was being asked to draw the inference that there was a gap in time and space when the 2nd Defendant could have stopped on the soft shoulder and gone to the ATM without Mr. Findlay noticing.

However, in my judgment that seemed quiet improbable because Mr. Findlay said that from the point when he first saw the 2nd Defendant's truck, he never lost sight of him and that he had been behind the 2nd Defendant's truck from then and there. He had been behind the 2nd Defendant's truck from down by the traffic lights and there had at no time been any other vehicle between his truck and the 2nd Defendant. Mr. Findlay admitted that he was a co worker of the 2nd Defendant and that they both draw containers on the wharf. When asked if he knew the 2nd Defendant before the accident, his answer was an immediate, 'of course'. The 2nd Defendant's version of what happened and Mr. Findlay's version are quite different. I reject both accounts. It appears to me that Mr. Findlay not being an independent witness was more concerned with assisting the 2nd Defendant to stay out of trouble.

It is the Claimant who must prove the case on a balance of probability, and I find that he has met that standard.

Mrs. Brown Rose very thoroughly pointed out to me the fact that the Claimant was adamant that the truck hit him on his right side and that it would be incongruous with his case that he was crossing the pedestrian crossing and not climbing on to the truck

since on his case it would be his left side that would be nearest the truck. However, I do not believe that that aspect of the Claimant's evidence is correct or accurate. In the heat and suddenness of the impact, I think that the Claimant's recollection and ability to recall precisely where he was first hit was affected and to some extent, based on the fact that he does have an injury to the right side, at his waist area. However, he also suffered a number of injuries including fractures to his left side. Alternatively, if the truck was switching from the right to the left lane, it is possible that such a manoeuvre, if it was still in process in close proximity to and on impact with the Claimant, given that it would increase or vary the potential angles and direction from which the Claimant could have been hit, it could have resulted in impact to the Claimant's right side, especially if the Claimant himself was walking somewhat at an angle. In other words, not dead straight, and also if he was walking at an angle and an impact for example, while mounting the sidewalk. In any event, I do not believe that this goes to the root of the Claimant's case in the sense that if I accept that the 2nd Defendant drove negligently in hitting the Claimant whilst he was on the pedestrian crossing, it does not go to the root of the Claimant's case if I accept that the 2nd Defendant drove negligently on the day in question. The exact point of Mr. McDonald's body upon which the impact occurred would not go to the core of his case.

I also find to be immaterial and slight, the inconsistency between the Claimant saying in his Witness Statement, that he put his right foot on the sidewalk and his left foot was still on the crossing, and saying in cross examination that it was his left foot that he put on the sidewalk and his right foot that remained on the crossing.

On a balance of probability, I also accept that the Claimant was speaking the truth when he said he was before the impact, heading to Cling Cling Avenue, and that from the vicinity of the Cockburn Gardens All Age School, that avenue is on the right side of the road when going in the direction of Three Miles. Further, that to reach Cling Cling Avenue, from the point where the impact occurred, Mr. McDonald, the Claimant, would have had to go down towards Three Miles Roundabout direction. That is the opposite direction to the Half Way Tree direction. The Claimant's answer was elicited in cross examination and it was in my judgment answered; this question was answered frankly and without hesitation. If Cling Cling Avenue was indeed the destination of the Claimant on that ill-fated day, which, as I have said I accept, then it would be senseless for him to have sought a ride going in the Half Way Tree direction, or for him to attempt to mount the 2nd Defendant's truck which was travelling on all accounts towards the Half Way Tree direction.

I think Mr. Nelson quite rightly highlighted this important aspect of the case. I am satisfied on a balance of probability that the Claimant was crossing the road on a pedestrian crossing, whether faded or otherwise, and had almost fully reached the sidewalk on the left side of the road when the 2nd Defendant drove the truck and hit him in the extreme left lane. The 2nd defendant admits that there was a traffic warden stationed near to the school, and Mr. Findlay, although he says the accident happened elsewhere, is saying the pedestrian crossing was about sixty feet from where the accident happened, he says that there was a pedestrian crossing up by the school. Well, it is up by the school that the Claimant says that the accident happened, and I accept his evidence when he says that he was crossing on the pedestrian crossing at the time of the accident.

I find as a fact, that the Claimant did have his hand in the air as he crossed the road, but did not have his hand in the air pointing in the area of Half Way Tree direction or seeking a ride. I reject the 2nd Defendant's contention and find that the Claimant did not say the words 'Half Way Tree' to him. I think that that was an ill advised embellishment on the 2nd Defendant's part. I accept that when the Claimant saw the truck first he was on the side of the road with lanes travelling in the direction of Three Miles Roundabout and he was on the crossing near to the median concrete structure in the middle of the road. I find that at that time, the 2nd Defendant's vehicle was in the right lane and he switched to the left lane and hit the Claimant. I accept that it is the side of the truck that came in contact with the Claimant; It is improbable that it would only be the back wheel that hit the Claimant yet he ended up right under those wheels. I accept the Claimant did attempt to cross the road at a time and in a manner that he ought to have been able to cross the road safely. From the manner in which the accident occurred, I find that the 2nd Defendant failed to keep a proper look out and was driving at a speed and manner that was unsafe in a built up area in the vicinity of a school and pedestrian crossing.

I therefore, find that this accident was caused by the negligent driving of the 2nd Defendant.

However, the Defendants have also pleaded that this accident was contributed to by the negligence of the Claimant. As Mrs. Brown Rose pointed out, and as demonstrated in the case of **Clifford vs. Drymond,** to which the defence attorney helpfully referred, reported at (1976) RTR, Page 134, and referred to in Bingham and

Berrymans' Motor Claim Cases, 11th Edition, Page 407, as pointed out and demonstrated by that case, a pedestrian has a duty not only to use the road with care but also to use the road in such a way as to look out for his own safety. Although under the relevant Road Traffic Regulation and code, a pedestrian is entitled to precedence, when on the crossing before a motor vehicle comes to it, this does not mean that a pedestrian is entitled merely to step on to the crossing no matter what distance away approaching motor vehicles are or irrespective of what speed they are travelling at. The pedestrian is also not entitled, once stepping on to the crossing, to proceed without regard to other traffic on the road.

I would wish to just refer to the report in relation to **Clifford and Drymond**. In that case, 'whilst walking across the road on a Zebra crossing, the plaintiff was struck by a car coming from her right. She was thrown or carried forty five feet and sustained serious injuries. She was ten feet on to the crossing when hit. The judge found on the available evidence that the car, travelling not more than thirty miles per hour had been about seventy five feet away when the plaintiff began to cross. He considered whether the plaintiff was guilty of contributory negligence in stepping on the crossing when the approaching car was within seventy five to eighty feet and decided she was not.' It was held on appeal that the plaintiff should bear 20% of the blame. Rules 13 & 14 of the 1968 Highway Code require a pedestrian not only to allow vehicles plenty of time to slow down or stop before starting to cross but also to look right and left while crossing. If the Plaintiff did not look at the approaching car she was negligent. If she did look she should have seen the car was near enough to make it doubtful whether it would pull up. She must also have been guilty of a measure of negligence in having failed to keep the car under observation as she proceeded to cross the road. If she had, she would have seen

it was not going to stop and could have allowed it to pass. In my judgment, the Claimant, Mr. McDonald, is guilty of contributory negligence in that he failed to keep a proper look out at the approaching truck or keep it under observation while crossing or while continuing to cross as he proceeded across the road.

In cross examination, the Claimant stated that at a certain point, for example, when he saw the truck in the right lane, he held up his hand and continued to cross. He also did quite a graphic demonstration of his actions for the court. He did not, in my judgment, keep the truck under observation as he continued to cross the road. If he had, he would have seen that it was not going to stop and could have allowed it to pass. In my judgment, the Claimant should bear 30% of the blame and liability should therefore be apportioned 70\30 against the Defendants.

So, I therefore now turn to look at the question of quantum, the issue of damages. Now, in this case there were two medical reports, Exhibits 2 and 3, were admitted into evidence by consent, and these medical reports showed that the Claimant suffered the following injuries.

(a) Undisplaced fractures to the left superior and inferior pubic rami

(b) Fracture of left ankle medial malelous

(c) Abrasions to lower limbs, pelvis

(d) Anterior pelvic tenderness

(e) 7cm laceration with degloving injury to left ankle

(f) Flat soft scars over the right waist area of 5cm diameter and 4cm over inner left ankle.

(g) 4% lower extremity impairment from the ankle fracture motion loss.

He complains of pain in the ankle on slipping or missing a step or after standing and walking for protracted periods. So, those were essentially his injuries and the effect thereof. But happily, the Claimant appears to have made a good recovery. In relation to that, the attorneys informed me that Special Damages were agreed as follows. Medical Expenses $45,500; Loss of Earnings $48,000, Extra Help $40,000 totalling $133,500. I, therefore, award Special Damages in that sum.

I now turn to examine the appropriate award for pain and suffering and loss of amenities. Although in the further amended Particulars of Claim, there is a claim under the head of 'Handicap on the Labour Market Loss of Earning Capacity'. Mr. Nelson, during his closing submission, abandoned this aspect of claim based upon the evidence. My view is that he did so advisedly.

With regard to General Damages, Mrs. Brown Rose submitted that an appropriate award would be in the range of $1.3 to $1.5 Million for pain and suffering and loss of amenities. Mr. Nelson, on the other hand, submitted that an award in the region of $2.3 Million would be appropriate.

I am grateful to the attorneys on both sides for the range of cases to which I was referred, and I agree with Mrs. Brown Rose that none of the cases examined, involved injuries of a nature and extent that are on all fours with those suffered in this case. The cases do however, provide useful guidance as to the appropriate range of award.

I find the case of **Collette Brown vs. Dorothy Henry & Rescue Enterprise Limited** reported at Volume 5, Page 42 of Mrs. Khan's invaluable series of work on 'Recent personal Injury Awards made in the Supreme Court of Jamaica' useful as regard

the injuries which Mr. McDonald, the Claimant in this case, suffered to his pubic rami. The Claimant in Brown had a permanent partial disability of 5% of the whole person, and Mr. McDonald suffered a 4% lower extremity impairment relating to motion loss in his left ankle. Mr. McDonald's residual outcome is of less severity than in Brown. At the same time, Brown did not suffer fracture and degloving injury to the ankle and other injuries suffered by Mr. McDonald. The award was $500.000.00 and updated using the latest available consumer price index of February 2011, which is, 167.1, updated. The award in Brown comes to $1,532.746.28. **Cecil Gentles vs. Artwell's Transport,** Volume 5 of Khan's, Page 60, is also useful. The Claimant suffered a bimalleolar fracture of left ankle which healed well with very little residual problems and an award was made of $300.000.00 in February 2000, and updated; it equals $946,563.44.

In **Cecil Bassaragh & Sheldon Bassaragh vs. Roger Brown**, in Volume 6 of the Khan's Report, Page 51, this Claimant suffered a number of injuries. He had fractures of the right acetabulum and of the metatarsal, swelling and tenderness in the right foot, injuries to the face and the right side of the body. He healed with little permanent impairment or disability. The award was $850.000.00 at trial but which was reduced to $750.000.00 by the Court of Appeal. The award, September 2005, updated is $1,883.327.41.

Mr. Nelson said that while he thought **Bassaragh's** case was helpful, he thought the Claimant in the instant case had suffered more serious injuries, in that he suffered fractures of both left superior and inferior rami and also he had the degloving injuries to his left ankle; he also had some scarring. I think Mr. McDonald, the Claimant's injuries in this case, are slightly more serious than those suffered in **Bassaragh** and am of the

view that an appropriate award for pain and suffering and loss of amenities, is $2, 000.000.00. There will therefore be judgment for Claimant against the Defendants with liability being apportioned 70% against the Defendants and 30% to the Claimant. Special Damages assessed as agreed in the sum of $133,500.00 with the balance due to the Claimant after apportionment being $93,450.00 with interest thereon at the rate of 3% per annum from the date of the accident; that is, 2nd July, 2008 to the 14th April 2011. General Damages are assessed at $2,000.000.00 with the balance due to the Claimant after apportionment being $1.4 million with interest thereon at the rate of 3% per annum from the date of service referred to in the Defendants' acknowledgement of service, that is, from the 26th of March, 2009 to the 14th April, 2011. Costs are summarily assessed and awarded in full to the Claimant in the sum of $88,000.00, being basic costs in accordance with Part 65 of the Civil Procedure Rules, 2002.