

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1992/017

BETWEEN	BOYSIE ORMSBY	PLAINTIFF
A N D	JAMES BONFIELD	
	CONROY YOUNG	DEFENDANTS

SUIT NO. C.L. 1992/S230

BETWEEN	REGINALD STEPHENS	PLAINTIFF
A N D	JAMES BONFIELD	
	CONROY YOUNG	DEFENDANTS

SUIT NO. C.L. 1992/R116

BETWEEN	LEROY ROBINSON	PLAINTIFF
A N D	JAMES BONFIELD	
	CONROY YOUNG	DEFENDANTS

(Actions consolidated by Order of the Master  
dated 17th January, 1994.)

Mr. B. E. Frankson for Plaintiffs instructed  
by Gaynair and Fraser.

Mr. Roy Stewart for First Defendant instructed  
by H. G. Bartholomew & Co.

Heard: May 6, 7, 10 & September 23rd, 1996

KARL HARRISON J.

**THE PLAINTIFFS' CASE**

The plaintiffs, Boysie Ormsby and Reginald Stephens are dray operators living in Bartons District in the parish of St. Catherine. They make regular trips to Kingston on their dray carts to sell charcoal. The third plaintiff, is a labourer, who is also living in Bartons District.

All three plaintiffs have brought actions against the defendants claiming damages as a result of the second defendant's negligence in a motor vehicle accident which occurred on the 2nd day of November 1991.

The evidence revealed that on the 1st day of November 1991, Stephens and Ormsby left Bartons District for Kingston as usual, to sell coal.

The following day, at about 3:00 p.m. they were on their way home and on approaching the "Mighty Gully" bridge, a mile or two from Old Harbour, it was observed that construction work was in progress on the bridge. Stephens was then travelling ahead of Ormsby on the left hand side of the road leading towards Old Harbour.

Stephens testified that two flagmen were controlling vehicular traffic to and from the bridge and that the flagman on his side of the bridge signalled him with a green flag to proceed. On reaching the middle of the bridge he saw a truck coming at a fast rate of speed from the opposite direction. He also testified that the flagman who was on the opposite side of the bridge, flagged down the truck man with a red flag but the truck driver nevertheless continued towards him. The truck then hit his cart and he was "flashed" off. He heard a sound behind him and on looking, he saw Ormsby and two of Ormsby mules "flat on the ground." The truck eventually overturned after the impacts.

Ormsby has corroborated the account given by Stephens except to say that he did not actually see the flagman giving him the signal to proceed. He testified however, that he was travelling closely behind Stephens' cart when Stephens was heading towards the bridge and had entered it. Although he saw the flagman on the opposite side of the bridge he could not say what colour flag was being used to stop the truckman. According to him, the "truckman come down on us and never ease up. A feel the lick before he reach me."

The third plaintiff, Robinson, recalls that on the day of the accident he was a passenger in the back of the defendant's truck which was transporting sound boxes to Portland for a dance to be held there. According to him, the truck was coming from Old Harbour direction and was travelling "fast" as it went around a curve. He then saw a flagman at Mighty Gully Bridge waving a red flag as the truck approached the bridge, but the driver

of the truck did not stop. He saw two dray carts travelling behind each other coming from the opposite direction and one of them was already on the bridge when the truck entered the bridge and hit it. The truck then proceeded to hit the other dray and finally overturned on it. He fell out of the truck unto the roadway and received injuries. Under cross-examination he explained that the truck had "scraped" the first dray and then went and hit the second dray front ways causing it to be "mashed up" leaving one mule dead and the other "shaking."

#### THE FIRST DEFENDANT'S CASE

The first defendant, James Bonfield who was the owner of the truck, gave evidence that on the 2nd day of November 1991, his truck was chartered from Old Harbour to transport sound boxes to a dance in Portland. He was on the truck and it was being driven at the material time by the second defendant.

According to Bonfield, the truck was travelling between 25-30 m.p.h. On approaching the Mighty Gully Bridge he saw a flagman at the end of the bridge coming from Old Harbour direction waving a green flag and his driver proceeded towards the bridge. He did not see a flagman on the other side of the bridge. A car which was travelling ahead of the truck was moving and the truck went through behind the car. No cart was on the bridge when the truck entered it but he had seen one approaching the bridge however he then stated:

"the cart entered the bridge. Truck was then about quarter into the bridge. The driver go down to that cart and take away from the front cart. It came in back to the road and hit into Mr. Boisy cart. The truck hit into the side of the cart, that cross thing called the harness. It hit the truck fender. The truck could not get back the lock and the truck turn over on the side, left side. The truck turned over on the right side of the road at end of bridge going towards Kingston...."

Bonfield did agree that the second cart was destroyed, that one mule died and the other had sustained a broken foot. He denied however, that the truck made any contact with the first cart and neither was it

damaged by the truck nor was any of the mules injured.

This was the case for the first defendant.

### LIABILITY

I now turn to the issue of liability. What was the cause of this accident? Two questions arise initially for consideration. Was it that the truck driver had the green flag in his favour and was proceeding lawfully on the bridge but in order to avoid a collision with the first dray, took away to the left and that on straightening a piece of wood protuding outwards from the shaft on the second cart, "hitched up" under the truck's right front fender thereby causing the wheel to jam and to collide with the second cart? Or, was it that the truck driver had disobeyed the flagman's signal to stop, continued despite the flagman waving him down with a red flag and then he collided with the carts which were given the clearance to proceed and were already on the bridge?

The point of impact, whether there was a flagman on the side of the bridge that the carts were approaching, and whether a motor car was travelling ahead of the truck before it entered the bridge are other relevant issues to be decided.

The evidence of both Stephens and Ormsby revealed that the roadway at the point of impact was not wide enough to allow both the truck and the dray to pass each other without touching. Both contend that they were travelling on the left side of the road when their drays were hit by the truck and that no other vehicle but for the truck had entered the bridge. According to Ormsby, they were travelling "timely" coming on to the bridge. Both Stephens and himself contend that the truck had collided with the side of Stephens' cart and Ormsby who was behind Stephens, maintained that the truck had "head on full" into his dray.

It was Robinson's evidence that only the truck alone could go through bridge and that the dray cart could "barely go through" it.

The first defendant on the other hand, has said that both truck and dray cart could go through the bridge together with about 2ft to spare.

What is clear from Bonfield's evidence is that no cart was on the bridge when the truck entered it. He did see a cart coming towards the bridge however, and when that cart entered the bridge the truck had already travelled about a quarter of the distance of the bridge. It was also his evidence that the driver of the truck went down to the first cart and "took away" from it. According to him, a part of the truck was on the bridge when the driver swung away from that cart.

Bonfield also testified that he did not see a flagman on the side of the bridge where the carts were approaching from, but he did see a man with two flags in his hands however, "peeing" on a bank after the accident. He also testified that other vehicles were moving slowly behind the dray carts. Could this then have given the truck driver the opportunity to proceed briskly from the other end of the bridge hoping to get across before the first cart entered? Bonfield did say that the bridge was about one half to to three quarters of a chain in length. Could this distance have given the truck driver sufficient time to get across bearing in mind that Bonfield had estimated the first cart to be about 4 - 5 ft. away from the bridge as the truck approached it? The inference to be drawn in my view is inescapable. The truck driver must have sped up as he went across the bridge. Bonfield's evidence is that the cart in front had entered the bridge when the truck was about a quarter of the distance of the bridge. How then could the driver otherwise have reached to the end of the bridge according to him, meet the first dray and swing away from it when part of the truck was off the bridge, had he not been speeding?

Bonfield also testified that his truck did not collide with the first dray cart; that it was not damaged and neither were any of the mules on it injured. It does seem however that his evidence that the truck did not collide with the first dray is in conflict with his pleadings. Paragraph 5 of the Defence to Stephens claim states inter alia:

"5....the first defendant's servant and/or agent, Conroy Young, was lawfully driving motor vehicle registered CC 274 M, the property of the first defendant, when the plaintiff and/or his servant so negligently drove and/or operated a dray cart that the same came violently into collision with the first defendant's said motor vehicle....

The pleadings reveal therefore, that Stephens' cart "came violently" into collision with the truck whereas, Bonfield's evidence is that the truck did not collide with this cart.

There is also conflict with his evidence and the pleadings at paragraph 3 of the particulars of negligence in respect of Ormsby. This paragraph reads:

"Driving at or into the defendant's said motor vehicle."

His evidence on the other hand was that the truck had hit into the side of Ormsby's cart.

There is no doubt that the first defendant must have given instructions to have caused the pleadings to allege that the "dray cart came violently into collision with the truck" and that the plaintiff Ormsby drove into the defendant's truck. One must therefore ask the question, "if those were Mr. Bonfield's instructions' why has he come to Court to say that his vehicle never collided with Stephens' cart and that the truck collided into the side of Ormsby's cart? He has given no explanation for these variations which in my view are major.

Now, how do I view the case concerning the plaintiffs Stephens and Ormsby. The burden of proof rests squarely on the plaintiffs' shoulders and I have to consider each case on its own merit. The plaintiffs must therefore satisfy this court on a balance of probabilities that they have proven the allegations of negligence against the defendants. Credibility is therefore one of the factors to be taken into consideration. I have assessed the demeanour of these witnesses and I must say that I am most impressed with the evidence of both Stephens and Ormsby. Stephens told

me that he was seventy-nine years of age. His recollection of the details of this accident was so remarkable. He was very alert and was frank in his answers. Ormsby did not give his age but from my own observation he was about the same age as his colleague Stephens or perhaps older. He too was very alert and gave a vivid account of what happened on that ill-fated day. His choice of words and demonstration of what took place between the truck and carts were equally impressive. I find them to be very honest and truthful witnesses and accept their version of how this accident occurred. It is highly improbable in my view, for the truck to have taken away from the front dray and while still in motion to have gotten back to the other side of the road and collide with the other dray cart.

There is yet one other issue to be resolved. This concerns whether Mr. Robinson was a passenger on the first defendant's truck on the day of the accident. The first defendant has pleaded at paragraph 4 of the Further Amended Defence:

"4. The first defendant denies that the plaintiff was lawfully travelling on his said motor vehicle as alleged or at all; further, if which is denied, the Plaintiff was travelling on the said motor vehicle, he was travelling without the knowledge and/or consent and/or permission, either express or implied, of the first and second defendants."

When it was suggested to him that Robinson was on the truck before it left for Portland his response was, "no, he never even come to my yard after the accident." He further contended that after the truck moved off, some "guys" hopped it and the driver stopped. They came off but about 2-3 of them ran down the truck and hopped it again. He said he did nothing about them hopping the truck again, but contended that they were taking their own risk at that time.

Robinson on the other hand maintained that he was indeed a lawful passenger on this truck. It was also his evidence that he worked for the lady who had chartered the truck and that he was going to cook soup for sale at the dance and to be the bar man.

Upon examining the evidence it is seen that there is some difficulty

on the part of the first defendant in so far as it concerns the persons who travelled on the truck. His account was that the driver came to his house with the sound boxes on his truck. According to him, "a couple of guys" were on the truck and after the driver spoke to him he got in and they went to Bammy man's yard. At that point the lady joined them and other men who had wished to travel on the truck were told they could not. He contended that "Dog Man", "Dr. Bird", Bammy man's brother and another man who he said was not Robinson were on the truck when it went to Bammy man's yard. Under cross-examination he admits that he did not go to the back of the truck to inspect the faces of the persons on the truck. It was also his evidence that he did not know Robinson until this trial began. He said:

"I never knew Robinson until yesterday. If he was there I would know. I never see him face..... "

So, how was he to know that Robinson was not on the truck when it left for Portland? And, was it because Robinson did not come to his yard after the accident, why he says that he was not on the truck?

But what does Robinson say? The boxes were loaded at Bammy man's house; the box men, the lady who chartered the truck and himself boarded the truck. The lady had joined the driver in the front and the boxmen and himself were in the back. Thereafter the driver went to pick up the owner (the first defendant).

I must say that Lamore impressed with the account given by Robinson. I have assessed his demeanour and find him to be a very frank and honest person. He has not been discredited in my view. The first defendant on the other hand has been far from truthful. I reject his evidence and hold that he has not been frank with the court.

I accept the evidence of the plaintiffs that the bridge was not wide enough to accommodate both truck and dray cart passing each other. I also accept the evidence of Stephens that there was a flag man on his side of the bridge and that he was given the green flag to proceed across



the bridge. I further accept the evidence of both Stephens and Robinson that the second defendant had disobeyed the flagman's red flag signal to stop and that he continued even after he was flagged down by the flag man totally disregarding the plaintiffs. Stephens and Ormsby who were already on the bridge having been given the green flag to proceed.

I find that both dray carts were proceeding "timely" (to use the words of Ormsby) as they entered the bridge when the truck came down and collided with Stephens' cart throwing him off and then finally colliding with Ormsby's cart causing Ormsby to fall from his cart and leaving his cart a total wreck and truck finally overturning as it came off the bridge.

I accept the evidence of Robinson that he was a lawful passenger on the truck and that the second defendant knew of his presence on the truck and neither did that defendant nor the first defendant object to him travelling on it. I also accept the evidence that he was thrown from the body of the truck on to the road surface.

It is my considered view and I do hold that the truck driver was travelling at a fast rate of speed at the material time. Stephens seemed to be the more fortunate in relation to his dray as the evidence reveals that the truck had "scraped" the dray from the side but there was a direct impact in so far as Ormsby's dray was concerned. It was a miracle that Ormsby was not killed or more seriously injured. The second defendant was in my view driving without due consideration for other users of the roadway and that he did fail to stop, slow down, or in any other way so to manage or manoeuvre the truck as to avoid the collisions. Indeed, the first defendant did testify that when the front dray had entered the bridge, the truck went down to where it was and took away from it. Is this the action of a prudent driver even if he had the benefit of the green flag? I would think not. But what did he do apart from taking away? He could have stopped bearing in mind the distance he was from the dray. But, as I have said he was the one who disobeyed the flagman's signal to stop. The damages done, are in my view, consistent with speeding.

I reject the first defendant's contention that a part of the harness from Ormsby's cart had hitched up under the truck's front fender thereby causing the vehicle to loose control. I also find that the car which the first defendant claimed was travelling ahead of the truck was a "mere figment of his imagination." I therefore find in these circumstances that the second-named defendant, the servant and/or agent of the first defendant was driving in a negligent manner thereby causing the plaintiffs to suffer injuries and sustain losses. The first-named defendant is therefore liable in damages to the plaintiffs.

I now turn to the question of damages.

#### Ormsby - Special Damages

The under mentioned items in respect of Special Damages were agreed:

		\$
1.	Two mules killed at \$10,000.00 each	20,000.00
2.	Damage to dray cart	5,000.00
3.	Harness destroyed	5,000.00
4.	Hat lost	50.00
5.	Knife lost	25.00
6.	Kerosene pas lost	10.00
7.	Medical expenses	965.00
8.	Loss of earnings	30,000.00
	Total	\$65,050.00

An award of \$61,050.00 in respect of special damages is therefore made in respect of Ormsby.

#### General Damages - Ormsby

Exhibit 1 - Agreed medical report in respect of Ormsby states inter alia:

"....I examined and treated 61 years old Mr. Boisy Ormsby ... on the 3/11/91 for injuries he recieved when he was allegedly involved in an accident between a truck and his dray on the 2/11/91.

Physical examination revealed:

1. Multiple superficial wounds to the left supraorbital area.
2. muscular tenderness in his upper limbs

The injuries were not serious. He was unable to work for ten days as a result of his injuries...."

Sgd. Dr. R.C. Firench MB.BS(U.W.I)

Ormsby had testified that he felt pain and was unable to work for about twenty (20) weeks although the Doctor mentioned a period of ten days incapacity. I bear in mind that the injuries were not serious. I find the case of Eric Ward v Lester Barcoo C.L. 1989/W245 in which damages were assessed by W.A. James J. Ag. on the 29th day of May, 1991 a useful guide. In that case the plaintiff sustained blows to the right foot and right side of his chest which resulted in tenderness and pain in the lower back. He was treated at hospital and sent home. An award of \$16,000.00 was made for pain and suffering and loss of amenities. In May 1991 the Consumer Price Index was 188.8. Today, having regard to the rapid growth of inflation that index stands at 936.3 in March 1996. The award of \$16,000.00 would value approximately \$79,347.00 at the time of trial. It therefore award a sum of \$82,000.00 in respect of pain and suffering and loss of amenities under general damages.

#### Stephens - Special Damages

The undermentioned items of special damages were agreed in respect of Stephens:

		\$
2.	Dray cart destroyed	4,000.00
3.	Harness destroyed	5,000.00
4.	Medical expenses	249.00
5.	Loss of earnings	30,000.00
	Total	\$39,249.00

Item No. 1 has not been proved so the sum claimed in respect of a mule which was killed is not allowed. The plaintiff did say that he had taken home the mule and worked on it to the extent where it had recovered. The plaintiff is therefore entitled to an award of \$39,249.00 in respect of special damages.

Stephens - General Damages

EXHIBIT 3 - Agreed medical report for Stephens states inter alia:

"...Reginald Stephens was examined and treated on the 12.11.91. He was suffering from:

1. Abrasion of left leg.
2. Bruise on right foot.

"The above injuries are consistent with being involved in a motor vehicle accident."

Sgd. Dr. A.E. Wainwright MB,BS(London)

Stephens had testified that he had pain for about four(4) weeks. He disagreed with the suggestion of Counsel that he did not receive a cut on the day of the accident. He admitted that some ten days had passed before he went to the doctor but this was due to the fact that he was taking the injury simple. However, when it took effect on his body according to him, he had to see the doctor.

Having regard to the nature of the injuries received it is my considered view that an award of \$40,000.00 would be reasonable in all of the circumstances. I therefore award that sum for pain and suffering and loss of amenities under the head of general damages.

Robinson - Special Damages

The undermentioned items in respect of special damages were agreed in respect of Robinson:

		\$
1.	One shirt destroyed	250.00
2.	One pair pants destroyed	400.00
3.	Watch lost	300.00
4.	Medical expenses	155.00
5.	Travelling expenses	300.00
6.	Loss of earnings	2,400.00
	Total	\$3,805.00

Robinson is therefore entitled to an award of \$3,805.00 in respect of special damages.

Robinson - General Damages

Exhibit 2 - the agreed medical report in respect of Robinson inter alia:

"...Mr. Robinson was seen in Casualty, Spanish Town on 2nd November, 1991. He was allegedly involved in a motor vehicle accident.

Examination revealed multiple abrasions to the left hand, tender swelling to the left elbow and abrasions to the eyebrows. X-rays done showed a fracture of the right wrist. Treatment consisted of:

1. Dressings
2. Tetanus toxoid
3. Plaster of Paris Cast to the affected limb.

When seen after six weeks the fracture had healed satisfactorily, the same was removed and patient discharged from surgery clinic. Total period of incapacitation is about eight weeks. Except for slight deformity of the wrist, no permanent disability is expected."

Sgd. Dr. Windell Miller  
Medical Officer.

Mr. Frankson referred me to three cases to be used as guides in order to quantify Robinson's damages. They were Michael Gardner v Llewellyn Clarke reported at page 23 of Casenote 2; Stanley Campbell v Inwood Estate and Ors reported at page 14 of Casenote No. 2; and finally Pauline Willis v Fitzroy Hamilton reported at page 17 of Casenote No. 2.

Gardener's case in my view can be distinguished from the instant case. In that case the plaintiff had suffered a compound fracture of the left wrist and left carpal and had received burns including the chest, abdomen, both forearms and hands.

In the instant case the plaintiff had multiple abrasions and a fracture of the right wrist.

The plaintiff Wills had sustained the following injuries:

- "1. Fracture of the right humerus shaft with deformity and tenderness of the right upper arm.
2. Minor injuries including tenderness over the right buttock and upper outer quadrant, a 1" laceration over the left palm and multiple bruises over the left side of the body.

Her disabilities included an inability to extend her right elbow fully for some time. She was fully recovered at the time of trial except for arm pains when she lifted heavy objects. She was awarded \$40,000.00 on the 20th day of June 1990 for pain and suffering and loss of amenities by Harrison J.

Campbell's case can also be distinguished from the instant case. That plaintiff had received more serious injuries in my view, than the instant plaintiff ~~and~~ Willis was awarded \$40,000.00 by Panton J on the 8th day of February, 1990.

Mr. Stewart on the other hand had referred me to Gordon v D & G reported at page 59 of Khan's Volume 3 on Personal Injury Awards. He suggested that an award of \$107,000.00 would be most appropriate.

Mr. Frankson was asking for an award between \$133,629.00 and \$285,457.00 having regard to the awards made in the three cases that he sought to rely on.

I am of the view that the case of Willis is a very useful guide. Robinson testified that his left wrist is now raised and even at the time of trial he feels pain. At the time he fell, he had pain in the wrist and it lasted for about twelve weeks. He returned some six weeks later to the hospital to have the plaster removed. He was unable to resume his work as the wrist was not fully healed. According to him it was healed but it "never get better as how it should get." He cannot now do the work he usually did because of the wrist. In June 1990, the consumer price index stood at 139. It was roughly 936.3 at the date of trial. By applying the latter index to the award of \$40,000.00 made in June 1990,

that award would now value approximately \$269,438.00. I would therefore award the sum of \$269,438.00 in respect of pain and suffering and loss of amenities under the head of general damages.

In fine there shall be judgment against the first named plaintiff in favour of all three plaintiffs as set out hereunder:

1. Judgment for the plaintiff Ormsby against the first defendant in the sum of \$82,000 for general damages in respect of pain and suffering and loss of amenities with interest thereon at the rate of 3% per annum from the date of service of the writ up to today and in the sum of \$61,050.00 being special damages with interest thereon at the rate of 3% per annum from the 2nd day of November, 1991 up to today. There shall be costs for the plaintiff to be taxed if not agreed.
2. Judgment for the plaintiff Stephens against the first defendant in the sum of \$40,000.00 for general damages in respect of pain and suffering and loss of amenities with interest thereon at the rate of 3% per annum from the date of service of the writ up to today and in the sum of \$39,249.00 being special damages with interest thereon at the rate of 3% per annum from the 2nd day of November, 1991 up to today. There shall be costs to the Plaintiff to be taxed if not agreed.
3. Judgment for the Plaintiff Robinson against the first defendant in the sum of \$269,438.00 for general damages in respect of pain and suffering and loss of amenities with interest thereon at the rate of 3% per annum from the date of service of the summons up to today and in the sum of \$3,805.00 being special damages with interest thereon at the rate of 3% per annum from the 2nd day of November, 1991 up to today. There shall be costs to the plaintiff to be taxed if not agreed.