IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1988/R077

BETWEEN	SEYMOUR REEVES	PLAINTIFF
A N D	NORMAN MORGAN	FIRST DEFENDANT
A N D	OSBOURNE STERN	SECOND DEFENDANT
A N D	UBE POWIS	THIRD DEFENDANT

SUIT NO. C.L.1988/S121

BETWEEN	FERDINAND SMITH	PLAINTIFF
A N D	NORMAN MORGAN	FIRST DEFENDANT
A N D	OSBOURNE STERN	SECOND DEFENDANT
A N D	UBE POWIS	THIRD DEFENDANT

[Actions consolidated by order of the Master dated 3rd February, 1991]

Mrs. D. Alleyene for Plaintiffs.

Mr. F. Williams for first and second Defendants.

[Action discontinued against third Defendant]

HEARD: April 22, 1996 and September 30, 1996.

K. HARRISON J:

Tragedy struck on the 12th day of September, 1983 when several persons were killed and others injured as a result of a motor vehicle accident along the Sandy Bay main road in Clarendon. These two plaintiffs are survivors and their actions have finally come on for trial although they were filed in 1988. Another five years had elapsed when the Master of the Supreme Court made an order consolidating both actions. They were first set down for trial on the 24th day of May, 1994 and have been adjourned several times since that date.

When the actions came up again for trial on the 11th day of April, 1996, Counsel for the plaintiffs requested an adjournment on the ground that she was new in the matters and needed to take instructions. This request was granted but the cases were adjourned for trial on the 22nd April, 1996 when they were heard and completed. I reserved judgment but was unable to deliver same during last term as I was presiding in the criminal courts for the greater part of the term. I do apologise for the delay.

CAUSE OF ACTION

Both plaintiffs have alleged in their respective statement of claim that on or about the 12th day of September, 1983, they were passengers on motor truck licensed UA 0024 when the first defendant so negligently drove the aforesaid motor vehicle along the Sandy Bay main road that it collided with motor vehicles licensed number KX 611 and W 2208 resulting in the said motor truck overturning. As a consequence of this collision the plaintiffs alleged that they have suffered severe injuries and have incurred losses and expenses.

In the suit brought by Smith, it was alleged that at all material times the first defendant was a servant and/or agent employed to the second defendant and third defendant, the former being the owner of the motor truck involved in the accident. These allegations were admitted by the first and second defendants in their defence.

In Reeves' suit, it was alleged that the first defendant was at all material times the servant and/or agent or employee of the third defendant and the second defendant was the owner of the motor truck in question. These allegations were also admitted in the defence filed for and on behalf of the first and second defendants.

At trial, Counsel announced that the plaintiffs were discontinuing their actions against the third defendant.

REEVES' CASE

Reeves testified that on the 12th day of September, 1983 he was a passenger on the second defendant's truck which was being driven at the material time by the first defendant and was conveying logs from Brayhead in Clarendon to Kingston. He and four others were travelling in the carrier which overhangs the cab of the truck as there were no available seats in the truck which was filled with logs. Some men were seated on a seat board at the rear of the truck whilst others were standing between the logs which were packed from the flooring to the top of the truck's body.

He further testified that on reaching Sandy Bay he saw a bus ahead of a motor car and that both vehicles were travelling towards Kingston direction. According to him:

> "...the truck was behind the car. Bus, car and truck were travelling in same direction. My driver ketch a gear to go round the bus and car at the same time. The bus stop and the car pulling out from being the bus and at the same time car pull out from round the bus, is the same time Mr. Morgan was there. I feel when he step on the brakes and the truck vibrated. He was trying to go around the car and the truck bounce the car and it turn cross the road.
>
> I said Lord the whole a wi dead off now. I find myself on the ground..."

When he was further examined he said:

> "We were about two chains from bus and car when truck try to overtake bus and car. The truck driver start to drive fast to overtake. I never really see any other vehicles on road at that time.
>
> I was in carrier lying down facing the road at time of accident.
>
> The car pull out from behind bus. It never totally pull out. The front of car was out and truck trying to overtake bounce the car. The truck was over right hand side of the road..."

Under cross-examination he said that the truck was over the white line when it began to overtake. He was unable to say however, if all of the truck was over this line. What is clear however, is when he said:

> "At that time the car was positioned at the side of the bus overtaking it. The car was closer to the back of the bus when it was overtaking it."

Of interest however, is what he said following the above evidence. He said:

> "The truck started to overtake first. The car just swing out when it started to overtake. Right after car swing out I felt Mr. Morgan touch brakes.
>
> After car swung out from behind bus it slowed down. I never see a vehicle coming from opposite direction at the time car pulled out."

SMITH'S CASE

Smith recalled that he was standing at the rear of the truck after it started its journey to Kingston. He said:

> "I was standing at time of accident. I do

not know what caused accident. I had my back to where the truck was going and face to where I was coming from.

Accident happened out by by-pass - Sandy Bay main road."

THE FIRST DEFENDANT'S CASE

This defendant testified that on the 12th September, 1983 he left Brayhead in Clarendon with a load of logs on his truck for delivery in Kingston. He was the driver of the truck and the third defendant was traveling with him in front. He recalled as follows:

"...I reach Sandy Bay main road. I was travelling about 25-30 m.p.h. speed limit there about 40 or 35 m.p.h. I believe.

Going down the hill I saw a "Doreen" bus. I was travelling behind it. A car overtake me and stopped sudden before me. I slammed my brakes. To avoid hitting in car I slammed brakes and truck got out of control and turn across the road on the right hand side, hit on the bank and turn right over on its side."

Under cross-examination he denied seeing a car travelling behind the bus and has repeated his story that the car came from behind him and stopped suddenly before the truck thus causing him to slam his brakes. He also denied that he had attempted to overtake the car. He maintained that the car was trying to overtake the bus and that it stopped on him. He then said:

"The car was beside the bus. The bus stopped on the left hand side and the car was in middle of the road. The car was about ½ a chain from me.

I touched car on its bumper on the right hand side. My right hand side touched car bumper."

SECOND DEFENDANT'S CASE

The second defendant gave evidence that he had instructed the first defendant to proceed to Brayhead along with two sideman in order to pick up a load of logs on behalf of the third defendant. He said that he saw the truck late and a number of men were seen travelling atop of the logs. He stopped the driver and he observed that Reeves was one of the men on the logs and Smith was standing in the truck. He told the

men to get off the truck but they used indecent language to him. He eventually persuaded them to alight, and to use his own words, "all scattered." Thereafter he dispatched the driver. The only occupants in the truck at that time according to him, were the driver, the third defendant (seated in front) and two sidemen who were seated on a seat board at the back of the truck. He denied under cross-examination that the third defendant had shown him the men working for him and further disagreed that both plaintiffs were allowed to return to the truck in his presence before he dispatched the driver to Kingston.

THE DEFENCE PLEADED

The frist and second defendants have pleaded inter alia that:

> "The first and second defendants state that the accident was caused by the negligence of Raymond Azan, owner and driver of motor car registration number KX611 who started to overtake a passenger bus when a vehicle approaching from the opposite direction was very close to him and braked suddenly and violently and without warning in the attempt to pull back in behind the passenger bus with the result that the second defendant's truck which was travelling behind him collided into the rear of the car despite the exercise of all reasonable care and skill by the truck, then lost control and overturned on the other side of the road."

SUBMISSIONS

On the issue of liability, Mr. Williams submitted that the plaintiffs had failed on a balance of probabilities to prove their cases. It was his view that the first defendant had exercised all reasonable care and skill in order to avoid the collision with the motor car. He further submitted that Reeves had placed himself in a dangerous position on the truck and could have at least been contributorily negligent for the injuries he sustained. Mr. Williams also urged the court to accept the evidence of the defendants that the plaintiffs ought not to have been on the truck and that they were told to get off.

Mrs. Alleyne on the other hand, had submitted that the court ought to accept the evidence of the plaintiffs and find in their favour.

ISSUES

Liability of carrier for negligence.

It has been settled by the decision of **Readhead v. Midland Rly. Co. (1869) LR 4 QB 379**, that the obligation of a carrier of passengers is to carry with due care. So, before one can determine liability of a defendant to pay damages for negligence, the plaintiff must prove:

1. That the defendant failed to exercise due care;
2. That the defendant owed to the injured man a duty to exercise due care; and
3. That the defendant's failure was the cause of injury.

Disobedience of Order

One other issue for consideration is whether or not the plaintiffs had disobeyed the orders not to travel on the truck. There is evidence from both plaintiffs that on the day of the accident they were employed by the third defendant. It was their job to roll out and load lumber on to the second defendant's truck and to travel with the truck to Kingston in order to assist with the unloading of the lumber.

In relation to Reeves, no issue was joined in relation to his employment. The defence specifically admits that Reeves was employed to the third defendant. Each plaintiff testified that he earned $500 weekly in the employment of the third defendant. Smith told the court that he was employed by the third defendant just one week before the accident.

Reeves also testified that the second defendant did not know who worked on the truck, hence the third defendant had to show him the workers and that both Smith and himself had reboarded the truck in the presence of the second defendant when they were pointed out by the third defendant.

It was the evidence of the second defendant that after the men were told to get off the truck he saw both plaintiffs proceeding up the road. The first defendant said:

> "....I know plaintiffs. They were there that morning. They were on the truck. Reeves was on top of the logs. He was sitting on top of the logs. Smith was there also. He was standing at back of truck.

> Mr. Stern came out and ordered men to come off. All of them come off and scatter.
>
> When I left Crooked River, three persons and self in truck. They were Powis, in the front with me and other two guys sitting on seat board at back of truck.
>
> The men who had come off go back on the truck. I stop at level, come out and spoke to men. Some come off again. I go back in truck. Before I proceeded about five persons in truck. I never saw the two plaintiffs when I stop the second time."

He denied under cross-examination that he had taken Reeves to Kingston to unload the logs and that he was a passenger on the day of the accident but admitted however, that he had taken him to Kingston sometimes when he needed a lift. He agreed that both plaintiffs were assisting with the unloading of the logs before he left for Kingston.

Volenti non fit injuria

The defendants have pleaded and are relying upon the maxim "volenti non fit injuria." It was alleged as follows:

> "Further or in the alternative these defendants will say that the plaintiff was the author of his own misfortune and either solely caused or contributed to his own injury in disobeying the second defendant's instructions to him not to travel on the said truck, and putting himself in a precarious position on the said truck."

The particulars of negligence alleged in respect of each plaintiff are:

> 1. Boarding the said truck despite the second defendant's clearly telling him not to do so.
>
> 2. Sitting atop logs which the said truck was loaded;
>
> And the defendants will rely on the maxim volenti non fit injuria."

What the maxim means is that a person who expressly or impliedly assent to an act cannot claim for its consequences. The maxim does not really negatives negligence, rather it merely absolves a party from the consequences of his negligence. The defendants are saying that despite the orders not to board the truck, the plaintiffs have disobeyed those orders and have placed themselves in a precarious position in the truck thereby exposing themselves to greater risk of injury.

Defence and Pleadings

There seems to be a departure from the pleadings. An examination of the pleadings in the defence and the evidence given by the first defendant reveal the following:

1. (a) The defence states inter alia, that a motor car started to overtake a bus and because of an approaching vehicle the car braked suddenly and violently and without warning pulled back behind the bus.

   (b) The first defendant had testified that he was travelling behind the bus and that the car overtook his truck and stopped suddenly before him. To avoid hitting into the car, he slammed his brakes and the truck got out of control.

2. (a) The defence alleged that the truck collided into the rear of the car despite the exercise of all reasonable care and skill by the truck driver.

   (b) The first defendant testified that his right side of the truck had touched the car's right bumper on the "right hand side."

Contributory Negligence

The defendants have also pleaded that the plaintiffs have contributed to their injuries having placed themselves in a dangerous and precarious position on the truck.

In **Jones v. Livox Quarries [1952] 2 Q.B. 608** Denning L.J. had said a person was guilty of contributory begligence if he ought reasonably to have foreseen that if he did not act as a reasonably prudent man he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless. The question in every case was: what faults were those which caused the damage? Was the plaintiff's fault one of them?

FINDINGS

Credibility is an important factor in these proceedings hence the demeanour of witnesses falls for consideration. Both plaintiffs have impressed me as frank and fortright witnesses. Their honesty as far as I am concerned is unquestionable and at the end of the day I must say that their credibility have remained un-impeached.

I accept their evidence that the third defendant did point out

to the second defendant a number of men on the truck who were identified as workers of the third defendant. I also accept that both plaintiffs boarded the truck again in the presence of the second defendant after they were pointed out to him by the third defendant who was also travelling on the truck.

I accept the evidence of Reeves that the truck was travelling behind a motor car and that a bus was ahead of the car. I believe also what Reeves told this court that after the bus stopped, the car pulled out from behind the bus and at the said time Mr. Morgan commenced overtaking the motor car. This must have been the reason therefore why the plaintiff said "is the same time Mr. Morgan was there" To use his words, "his driver (that is, Mr. Morgan) ketch a gear to go round the bus and the car at the said time." But how does one reconcile this account with his evidence under cross-examination when he said:

> "The truck start to overtake first. The car just swing out when it started to overtale."

I am of the view that his evidence that the truck started to overtake first must be looked at in conjunction with the evidence given in chief when he said:

> "...the car pull out from behind the bus. It never totally pull out. The front of the car was out and truck trying to overtake bounce the car...."

It was never suggested to this witness that the car was not the first vehicle to move from behind the bus. What is clear is that it began pulling out but the truck at that time began to overtake.

I also bear in mind that the first defendant had said under cross-examination that:

> "The car was beside the bus. The bus stopped on the left hand side and the car was in the middle of the road. The car was about ½ chain from me."

How is the above narrative to be reconciled with his story told in court that the car overtook him and stopped suddenly before him. I find it difficult to believe this defendant when he tells the court:

> "....I was totally on my left. The car was trying to overtake the bus and it stop on me..."

What then could have caused him to go to the right, if he was "totally" on his left and the car was then trying to overtake the bus? There is no evidence that another vehicle was coming from the opposite direction which could have caused the car to stop in its track. As a matter of fact Reeves did say that there was no vehicle coming from the opposite direction.

It is further my view that the first defendant was travelling down hill at a fast rate of speed whereupon his application of brakes caused the vehicle to vibrate and then bounced the motor car travelling ahead of it and then lost control.

I reject the first defendant's evidence that this car had overtaken his truck and had stopped suddenly before him. I find that the first defendant had commenced overtaking at a time when it was not safe to do so. I find also that he failed to keep the said truck under proper control and that he was driving at an excessive speed having regard to the circumstances. He has been far from frank with this court. His credibility has been badly eroded. He gives one set of instructions for his defence to be pleaded, yet he comes to court and tells a different story.

I reject both defendants accounts that the plaintiffs were not on the truck when it left Crooked River for Kingston. I accept the evidence coming from both plaintiffs that at the material time they were employed by the third defendant to load the truck with logs and that it was also part of their job to travel with the truck to unload these logs at the place of destination in Kingston.

I find therefore, that on a balance of probabilities these two plaintiffs were travelling lawfully on the truck on the day of the accident and that as a result of the negligence on the part of the first defendant they were both thrown from the truck after the collision with the motor car whereby both sustained losses and personal injuries.

The question arises whether or not the plaintiffs have contributed to the injuries they received. It was pleaded as I have said before that they had sat atop logs on a fully loaded truck and had placed

themselves in a precarious position on the said truck. There is no evidence to support the contention that Smith was sitting atop logs. I accept his evidence that he was standing at the rear of the truck holding on to a piece of iron. As for the plaintiff Reeves I accept that he was lying in the carrier which overhangs the truck cab. That was indeed a most unusual position to occupy. He explained that there was no where else to occupy and that that three others and himself were in this carrier.

There are a number of authorities concerning passengers and whether they had contributed to their injuries arising from a motor vehicle accidents. In **Davies v. Swan Motor Co. [1949] 2 KB 291**, the facts show where a passenger who was riding on the steps of a lorry was thrown from it during an accident and died consequently from his injuries. It was held that he was contributorily negligent for taking up a dangerous position on the lorry. He had failed to exercise reasonable care for his own safety.

In **Jude v. Edinburgh Corpn. (1943) SC 399**, the plaintiff was standing on the upper of two steps below a platform for a bus, holding on to the handrail and was preparing to alight from the bus. The bus suddenly and without any warning swerved violently in order to pass another bus already at the stop. As a result of the swerve, the plaintiff was thrown on to the roadway and was injured. The plaintiff was held contributorily negligent in placing herself in a position of danger on the steps of a vehicle in motion.

There is no dispute in the instant case that the plaintiff Reeves was travelling in the carrier which overhangs the cab of the truck. He did say that he was lying in it becuase the truck was filled to capacity with logs. It is therefore, for the defendants to show that if he had not been sitting in the carrier he would have been less seriously injured. Has the defendants discharged this onus?

The evidence further revealed that Reeves was admitted in hospital for one week having suffered from a fractured wrist. Smith on the other hand who I find to be standing at the rear of the truck had sustained a far more serious injury and was hospitalised for approximately five weeks due to a dislocated hip. In his address to the Court

Mr. Williams made no mention of Smith being contributorily negligent and probably he was convinced having regard to the evidence that he was not. I am of the firm view however, that the defendants have not discharged this onus and I do not find any of the plaintiffs contributorily negligent. I hold that the defendants are fully to be blamed for this accident and must stand the full consequences of damages.

DAMAGES

I now turn to the quantum of damages each plaintiff is entitled to receive.

Reeves

General Damages

Reeves had testified that after the accident he was taken to May Pen Hospital where he was admitted for one week. His medical reports dated 4th June, 1984 and 23rd January, 1996 respectively, were agreed and admitted in evidence as exhibit 1. The earlier report states inter alia:

> ".....Mr. Reeves Seymore, male, 26 years old who was involved in a motor vehicle accident on the 12th September, 1983 was admitted to May Pen Hospital. On examination the patient was conscious.
>
> Left wrist is swollen and tender. X-ray shows comminuted fracture of left radius at left wrist joint. The fracture was reduced under general anaesthetic on 16th September, 1983 after giving A.K. Plaster of Paris of left hand. Six weeks appointment was given. The fracture healed well but dinner fork deformity of left wrist present."
>
> Sgd. Dr. K.V. Krishna Prasad
> Medical Officer.

The report dated 23rd January, 1996 from Dr. Percival Duke of May Pen Hospital, speaks of Reeves having multiple concussions about the body in addition to the fracture of the distal 1/3 of the left radius. According to Dr. Duke, the fracture had healed with a "dinner fork" deformity with associated muscular weakness of the right hand.

On the question of general damages in respect of Reeves, Mr. Williams referred me to the case of **Byron Bailey v. A.J. Webb and anor** reported at page 23 of "Casenote" No. 2 dealing with personal injury

awards. Damages were assessed by Malcolm J. in that case on the 24th June, 1992. The plaintiff had sustained a fracture of the left ulna and radius and was hospitalised for nine days. After his discharge he was treated as an out-patient. His disability included severe scarring to the face with pronounced cosmetic deficit requiring plastic surgery. He also had an ulna deformity with permanent functional impairment of 10% of the left upper limb. He was awarded $80,000.00 for pain and suffering and loss of amenities. It was therefore Mr. Williams' view that since the plaintiff in Webb's case sustained more serious injuries then an award of $100,000.00 would be appropriate. He pointed out that at today's money value, an award of $80,000.00 would now value $189,094.00 using a consumer price index of 921.6 Mrs. Alleyne also referred to the Webb case but maintained that an award of $190,000.000 would be considered reasonable.

I do agree with Mr. Williams that the injuries sustained by Webb are more serious having regard to the cosmetic disabilities. Reeves now has a dinner fork deformity of the wrist. The medical report does not state the percentage of disability and how it relates to the whole person. I would think however that an award of $130,000.00 for pain and suffering and loss of amenities would be reasonable.

Special Damages

Under the head of special damages the following items have been proved:

1. Medical report ..... $ 700.00
2. Transportation ..... $ 60.00
3. Loss of earnings
   8 weeks @ $500 p.w..... $4000.00

Total: $4,760.00

Smith

General Damages

Smith had testified that after the accident he was taken to May Pen Hospital where he was treated and admitted for one week. He was later transferred to Kingston Public Hospital where he remained for four weeks. By consent his medical report was admitted in evidence

as exhibit 3. It reads inter alia:

> "Ferdinand Smith was admitted to the Hospital on 12th September, 1983. Diagnosis at that time of admission was fracture of right hip (iliac crest).
>
> Mr. Smith was transferred to Orthopaedic Surgery, Kingston Public Hospital (K.P.H.) on 16th September, 1983.
>
> Mr. Smith now ambulate well and has no clinical evidence of gross muscular skeletal deficit or deformity."
>
> Sgd. Dr. Percival Duke
> Medical Officer

Mr. Williams did submit that an award not exceeding $150,000.00 under the head of pain and suffering and loss of amenities could be considered reasonable in all the circumstances. He referred to the case of **Jackson v. Grace Kennedy** at page 16 of "Casenote No. 2." The plaintiff in that case had sustained a dislocation of the hip joint and a fracture of the hip. On the 3rd June, 1992 Bingham J, assessed damages and by consent a global award of $105,000.00 inclusive of costs was awarded. At today's rate, taking into consideration the rapid rate of inflation and using a consumer price index of 922, those damages would worth approximately $248,186.00 today.

Mrs. Alleyne also referred to the Jackson case, but was of the view that the court ought to make an award of $220,000.00.

I take into consideration that the plaintiff, Smith has had no permanent physical disability. The Doctor has said there was no clinical evidence of gross muscular deficitor deformity. The fact still remains however, that he was hospitalised for five weeks. From his evidence he had to do physiotherapy for six sessions at Kingston Public Hospital. He also testified that his hip gave him a little pain at times. He was unable to put any strain on his foot at time of accident as it would hurt and he had to use crutches for about two months.

I am of the view and I do hold that a reasonable award under pain and suffering and loss of amenities would be $200,000.00. I hereby make such an award.

Special Damages

The following items of special damages have been proved:

1. Loss of earnings for 10 weeks @ $500.00 per week $5,000.00

2. Transportation - 6 trips @ $50 per trip ..... $ 300.00

Total: $5,300.00

In fine there shall be judgment for the plaintiffs as follows:

1. Judgment for the plaintiff Seymour Reeves in the sum of $130,000.00 being general damages for 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 to today and in the sum of $4,760.00 being special damages with interest thereon at the rate of 3% per annum from the 12th day of September, 1983 to today. Costs to the plaintiff to be taxed if not agreed.

2. Judgment for the plaintiff Ferdinand Smith in the sum of $200,000.00 being general damages for 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 to today and in the sum of $5,300.00 being special damages with interest thereon at the rate of 3% per annum from the 12th day of September, 1983 to today. Costs to the plaintiff to be taxed if not agreed.