IN THE COURT OF APPEAL

CIVIL APPEAL NO. 22 OF 1969

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Hercules

B E T W E E N Delsie Scarlett and Stephen Brackett - Defendants/Appellants

A N D Dr. Leonard Bluestone - Plaintiff/Respondent

Mr. L. Robinson, Q.C. and Mr. W.B. Frankson for the Appellants

Mr. R.H. Williams for the Respondent

February 8,9,10 & March 12, 1971

LUCKHOO, J.A.,

On December 27, 1966, the plaintiff Dr. Bluestone sustained injury to the left arm and right hand when he came into contact with a motor car owned by the first named defendant Delsie Scarlett and driven by the second named defendant Stephen Brackett. The plaintiff claimed that the accident was caused by the negligent driving of the defendant Brackett. In an action brought by the plaintiff to recover damages from the defendants the learned trial judge found for the plaintiff but held that he was guilty of contributory negligence. The trial judge assessed the plaintiff's share of responsibility at 25%. He dismissed the first named defendant's counter-claim for £19 in respect of damage to her car on the ground that in the circumstances of the case the plaintiff was not in breach of any duty to the defendants. The defendants have appealed against these findings of the learned trial judge. They contend that he ought to have found the plaintiff solely to blame, alternatively, that the plaintiff's share of responsibility should have been assessed at 50%. They also challenge the trial judge's assessment of special damages. The first

named defendant further contends that judgment should have been entered in her favour on the counter claim. The plaintiff filed a notice of intention to challenge the trial judge's assessment of general damages but at the hearing of the appeal this was not pursued.

The evidence discloses that on December 27, 1966 at about 4 p.m. the plaintiff crossed the main road between Montego Bay and Falmouth in the vicinity of Coral Gardens in order to speak with his maid who had joined a bus parked facing west at a bus stop on the southern side of the road opposite to his home. After speaking with her the plaintiff proceeded along the near side of the bus to its rear with a view to re-crossing the road to get to his home. The bus was parked with its off-side wheels about two feet from the white centre line of the road the width of which the plaintiff estimated to be about 19' and the defendant to be about 22'. The plaintiff said that he proceeded to a point level with the offside of the bus and some 4 to 5 feet east of the rear of the bus. From there he observed that there was no traffic approaching on his right. He then peered around the rear off side corner of the bus. As he did so the bus moved off and he observed a car (driven by the defendant Brackett) about 40 feet away travelling towards him at a speed of about 50 - 60 m.p.h. The car was swaying in its motion. Its offside front wheel was about 6" - 8" south of the white centre line of the road and its offside rear wheel was on the centre line. The car continued on its course until it was a few feet away from him when it swerved to its left. Fearing that he would be struck down by the car he instinctively raised his

hands and arms in front of and about 5" - 6" away from his face. In a split second one of his hands came into contact with the right rear half of the car. Involuntarily he reached out and grasped the radio antenna affixed to the tip of the right rear end of the car, was spun about in a clockwise direction and fell on his knees and hands in about the middle of the road sustaining injury to the left forearm and right hand and wrist.

The defendant Brackett's account of the accident was as follows. He was proceeding at about 30 m.p.h. after negotiating a bend in the road some ¼ mile from the parked bus. He thought that the bus was picking up or discharging passengers and sounded his horn. The road was otherwise clear. He continued at 30 m.p.h. not paying attention to what was behind the bus as he approached and passed it. He admitted that the exercise of special care was required in approaching and passing the bus in case any one emerged from behind it because, as he said, there might be someone coming into the road from behind the bus. He passed the bus and - while doing so he heard a sound at the rear end of his car. On looking into his rear view mirror he saw the plaintiff standing in the roadway in a semi-crouched position. At all material times the bus was stationary with its offside about 2' from the white centre line of the road. His car had passed the bus with its offside some 4' from the white centre line.

Two passengers on the bus Uriah Brown and Ivan Campbell were called to testify for the defendants. The effect of their evidence was that they observed that the plaintiff had walked from behind the bus into the right rear half of the car

The learned trial judge disbelieved their testimony and counsel for the defendants on appeal did not seriously seek to contend that the learned trial judge was, in the circumstances, in error in so doing. Lloyd Spence, the bus driver, whose testimony the learned trial judge also rejected supported the defendant Brackett's testimony that he (Brackett) had sounded his horn on approaching the bus, that the bus was at a standstill when the car passed it and that the clearance between the two vehicles at that point of time was some 4' - 5'. This witness seems to have been cross examined with such effect as appears from the record that the learned trial judge thought fit to say "As to the evidence of Spence, Romans, Brown and Campbell, the most charitable thing that can be said of it is that it bears the unmistakeable stamp of that curious mental complex that derives from infantile imagination." Romans, an investigator attached to the Jamaica Claims Bureau had testified as to the result of his interview with the plaintiff's maid, who as the learned trial judge found,gave no evidence which threw any light on the way in which the accident occurred. It is clear that the learned trial judge disbelieved these witnesses even though he expressed himself in language which may not be wholly apt. It cannot, however, be successfully urged that this Court is in a position to upturn the trial judge's finding as to their credibility. In the end the learned trial judge had to arrive at a conclusion on the basis of the evidence given by the plaintiff and the defendant Brackett.

The learned trial judge rejected Brackett's testimony that he sounded his horn on approaching the bus. He found that the clearance between the bus and the car was rather less than 1' 6" and that in the circumstances for Brackett

to proceed at 30 m.p.h. in the manner he said he did was clearly negligent. He found that the plaintiff came to a stop not at a point in line with the offside of the bus but rather at some distance beyond that line though how far beyond that line he was unable to say. This finding he said followed from his finding that the clearance between the vehicles was rather less than 1' 6". He felt that he could not accept the plaintiff's estimate that the right front wheel of the car was 6" - 8" over the white centre line of the roadway though he accepted that the plaintiff did see the car, albeit for a fraction of a second, with some part of its body south of the white line. He concluded that the plaintiff did not walk blindly into the car but rather that standing in the position he did on the approach of the car so close to him he instinctively raised his hands but probably further away than 5" - 6" from his face and thus one of his hands came into contact with the car. In those circumstances the trial judge concluded that the defendant Brackett was negligent and that his negligence caused the accident. However, he held that the plaintiff ought not to have proceeded beyond the line of the rear end of the bus in order to observe whether traffic was coming from the west and that in so doing he was guilty of contributory negligence. He assessed the plaintiff's responsibility at 25% but found no causal, as distinct from contributory, negligence on his part.

On Brackett's account the accident was explicable only on the basis that the plaintiff had walked into the ~~left~~ RIGHT rear portion of the car. The absence of any sign of physical injury to the plaintiff's lower limbs apart, had the plaintiff done so Brackett travelling at 30 m.p.h. must have observed his presence on the

roadway on or about the centre line before the front of the car passed him by and this would be so even though Brackett was on his admission not exercising the necessary degree of care required of him in case any one emerged from behind the bus. It was therefore not unreasonable for the learned trial judge to find as he did that the car was being driven on a course south of the centre line of the roadway with rather less than 1' 6" clearance between bus and car. Once such a finding was made there was no difficulty in the learned trial judge finding as he did the way in which contact came to be made between the plaintiff's hand and the right rear end of the car. In the circumstances it was inevitable that the learned trial judge should conclude not only that Brackett was at the material time driving negligently but also that his negligent driving caused the accident. As to the proportion of blameworthiness for the accident the defendants could only hope to have a 50 - 50 allocation made if it was shown that the plaintiff had walked into the right rear portion of the car. There is therefore no good reason for disturbing the allocation of 75% - 25% made in this regard by the learned trial judge. Was there any causal negligence on the plaintiff's part? Counsel for the defendants Mr. Leacroft Robinson in submitting that there was relied on a passage appearing in the opinion of the Privy Council delivered by Viscount Simon in Vance v. British Columbia Electric Railway Co., Ltd. (1951) A.C. 601 at pp. 611, 612 -

> "Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.

> If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Denning, L.J.'s judgment in the Davies case, where he says, "when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down", is to be interpreted in a contrary sense, their Lordships cannot agree with it. "

Mr. Robinson urged that in stepping beyond the offside of the bus into the roadway the plaintiff owed a duty to traffic approaching him from the west to exercise due care to avoid risk of collision. The general proposition enunciated by the Privy Council must in each case be considered in the light of the particular circumstances that obtain. Here the plaintiff could not reasonably foresee that by standing a few inches beyond the offside of the parked bus he might come into contact with east bound traffic causing damage to such traffic where there was a clear roadway for east-bound traffic some 9' 6" wide. It cannot therefore be successfully urged that the plaintiff was in breach of any duty towards the defendants and the learned trial judge was quite right in holding that the first named defendant's counterclaim failed.

Lastly, Mr. Robinson submitted that the learned trial judge erred in including in his award (before reduction) of $10,775 as special damages the sum of

$10,000 as loss of income for the period January 2, 1967 to May 1, 1967. The evidence in so far as it relates to this aspect of the matter may be summarised as follows: The plaintiff an American citizen residing in New York was at all material times an oral surgeon earning prior to the accident a net income of some $30,000 annually. His injuries involved a fracture of the upper third of the left ulna, rupture of the tendons of the mid joint of the middle finger of the right hand and some damage to the right wrist. The injury to the left arm has resulted in permanent partial disability to the extent of 10%. The injury to the middle finger of the right hand can easily be corrected by a minor surgical procedure which however the plaintiff is reluctant to undergo. These injuries, the plaintiff said, caused him severe pain for some considerable time. He continues to suffer pain and discomfort when he uses his left hand over a prolonged period in certain surgical procedures. As a result he has had to employ a salaried oral surgeon on a full time basis to maintain his practice at its former level and will have to continue to do so as he is able to do only approximately one half of the volume of work he did prior to the accident. Prior to the accident he employed two nurses and one associate oral surgeon who assisted him two days a week. He would have resumed his practice on January 2,1967,but for the accident. From that date to May 1,1967 he said he earned nothing and claims $10,000 as loss of net income for the period of four months. During his holiday his associate carried on his practice part time and after the accident that associate stayed on until he got a full time surgeon. While alleging that since May 2, 1967, his net earnings have decreased by $1000 per month he was constrained to admit when cross examined that in 1967 his net income was about $34,000 - some $4000 more than it was in 1966. The learned trial judge found that it followed that the plaintiff had not in fact suffered any decrease in his net earnings but that on the contrary they had increased and that he

imagined that in the ordinary course of events his practice would continue to grow. However, the learned trial judge accepted that in the four month period January 2, 1967 to May 1, 1967 the plaintiff lost $10,000 by reason of his inability to work.

For the defendants it was submitted that as the plaintiff's net earnings for 1967 showed an increase over his net earnings for 1966 it could not be said that he had suffered a loss of earnings by reason of the accident and therefore an award for loss of earnings in the period January 2, 1967 to May 1, 1967 ought not to have been made. Further, it was urged as the plaintiff's evidence that his earnings from May 2, 1967 had decreased at the rate of $1000 per month had later been shown to be false, the learned trial judge should not have accepted the plaintiff's evidence as to a loss of earnings over the period January 2 - May 1, 1967.

In order to arrive at a figure of the plaintiff's likely net earnings during the period January 2 - May 1, 1967 had he been able to work it was necessary (in the absence of other more suitable material) for the learned trial judge to take as a yardstick the average monthly net earnings during the previous year or over a period of years immediately before 1967. The learned trial judge chose the former which in fact was somewhat less than that for the year 1965. That did not mean, however, as counsel for the defendants urged that it did, that if for some reason or other his net earnings over the remainder of the year 1967 were indeed greater than his net earnings for the previous year there would in fact have been no loss occasioned to the plaintiff by reason of his inability to work during the period January 2 - May 1, 1967. The proposition contended for on behalf of the defendants has only to be stated for it to be seen that it is fallacious.

The plaintiff although admitting that his part time assistant

continued to assist in his practice part time until May 1, 1967, was never cross-examined to show whether his gross earnings to that date exceeded the necessary expenditure incurred. As the matter stood the only evidence on that issue was that given by the plaintiff to the effect that his loss of income for that period was $10,000 on the basis of his net earnings during the previous year. As to the point sought to be made about the plaintiff's credit it is clear that the learned trial judge did not overlook the plaintiff's attempt to induce the belief that his net earnings had decreased in the period May 2, 1967 to the end of that year and indeed found that the evidence showed to the contrary. In these circumstances it is not competent for this Court to conclude that the learned trial judge was in error in holding as he did that the plaintiff suffered a loss in his net income for the period January 2 - May 1, 1967 as a result of the accident.

I would dismiss the appeal of both defendants with costs to be taxed or agreed.

SMITH, J.A.: I agree.

HERCULES, J. A.: I agree.