IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1993/S205

BETWEEN	LINCOLN SCOTT	PLAINTIFF
A N D	LUXEMBERGH SALMON	FIRST DEFENDANT
A N D	DELANO REID & ASSOCIATES LIMITED	SECOND DEFENDANT
A N D	VALRIE REID	THIRD DEFENDANT
A N D	SYBIL JONES	FOURTH DEFENDANT
A N D	RUPERT JOHNSON	FIFTH DEFENDANT

Mr. Ransford Braham instructed by Livingston, Alexander and Levy for Plaintiff.

Mrs. U. Khan instructed by Khan and Khan for First Defendant.

Mr. David Henry instructed by Nunes, Scholefield and Delcon for Second and third Defendants

Miss Chambers for Fourth Defendant.

Mr. Hector Robinsan instructed by Patterson and Graham for Fifth Defendant.

Heard: October 31, 1996, November 1 and 7, 1996 and December 13, 1996

KARL HARRISON J.

CAUSE OF ACTION AND DEFENCES

The plaintiff brings this action against the defendants and is seeking for negligence as a result of a motor vehicle accident along Hope Road, Kingston on the 11th day of September, 1992.

The first defendant avers that the accident was caused solely by the negligence of the fifth defendant, the servant and or agent of the fourth defendant.

The fifth defendant alleges on the other hand, that the accident was caused by the negligence of the first named defendant.

The second and third defendants contend that the said collision was caused by the negligence of the first defendant or alternatively by the negligence of the fifth defendant and have counterclaimed against these defendants in respect of damage to their motor vehicle.

On a summons for Third Party Directions it was ordered on the 3rd day of May, 1994 that these directions were applicable to all the parties who had filed Notices

to Co-Defendants claiming Indemnity and/or contribution and damages.

THE EVIDENCE

Case for the Plaintiff

There are four lanes for traffic along Hope Road leading from the intersection of East Kings House Road and Lady Musgrave Avenue towards Half Way Tree. Vehicles proceeding towards Half Way Tree occupy two of these lanes going down, whereas, vehicles proceeding towards Papine use the other two on the opposite side.

The plaintiff testified that at about 7:15 a.m. on the 11th day of September, 1992, he was travelling at about 25-30 m.p.h. going down Hope Road towards Half Way Tree in the right lane when on reaching somewhere in the vicinity of the Police Officers' Club and Ardenne Preparatory School an accident occurred. He described this accident as follows:

> ".....A Ford pick-up driven by Salmon, the first defendant.....cut across from the left lane into the right lane I was in and encroached in the path of on-coming traffic. In other words it crossed the unbroken white line in the middle of the road.
>
> A part of the first defendant's vehicle collided with an on-coming pick-up that subsequently got out of control.....that pick-up came across in my lane and hit me head-on.
>
> That collision forced my car in left hand lane going in Half Way Tree direction and I was hit again by another car driven by a Lady...."

Under cross-examination he said that the first defendant was about two (2) car lengths in front of him when he cut across. When asked how far over the white line the first defendant's vehicle went, he said:

> "Not very far. A few feet maybe. About 2-3 feet. It could have been the rear wheel part of pick-up to the side that collided with the on-coming vehicle."

He was unable to say however, what part of the on-coming vehicle the first defendant collided with. He could not recall seeing a stationary bus in the left lane going towards Half Way Tree but he admitted that there might very well have been one. He denied however, that two vehicles travelling ahead of him in the right lane had stopped in order for the first defendant to move from the left lane to the right because of the stationary bus. He further denied that the first defendant was travelling in the right lane, straight alongside the bus, when he was hit by the on-coming vehicle. It was suggested to him that the collision between the first

and fifth defendants occurred at a time when the fifth defendant was swerving into Ardenne Preparatory School gate, but he denied this.

CASE FOR FIRST DEFENDANT

The first defendant testified that he was travelling in the left lane going towards Half Way Tree when a bus in front of him stopped at bus stop below Ardenne Preparatroy gate. After the bus stopped he had put on his indicator to change lanes. Two vehicles were in the right lane and the one in front stopped to allow him to move to the right lane. After that vehicle stopped he pulled out and went around the bus. Then he said:

> ".....I was alongside the bus and Mr. Johnson... was heading towards Papine; Mr. Johnson, I think had on his indicator...Johnson somehow swing out from his right lane he was travelling in...and swing into my right lane going down. His right front wheel....hit into my right front wheel; he got out of control and the accidents start to occur behind me."

He stated that he continued driving for about fifty (50) feet when he stopped in the left lane. He alighted and examined his vehicle but found no damages.

When he was cross-examined by Mr. Braham he told the Court that he had sufficient space between the bus and the car which had stopped, to proceed safely to the right lane. That space he said, was about 10ft. from the rear of the bus to the front of the car. In response to a question asked by Mr. Henry, he said he had stopped about four (4) feet behind the bus before he went around it. He agreed that at a pont in time his vehicle would have to be positioned diagonally across the road to get around the bus.

He said he first saw the fifth defendant's vehicle when it was about five (5) feet away and that it was travelling in the right lane riding the unbroken white lines. He Salmon, was then parallel with the bus. He also noticed that the vehicle was indicating to turn right as it approached him. He took no evasive action when he observed the vehicle approaching because he did not consider himself to be in any danger. When he was further asked by Mr. Braham what steps if any he had taken to avoid a collision he said:

> "I continued straight down. What you want me to do, swing in the bus?"

He admitted to Mr. Henry that his vehicle is equipped with anti-lock brakes and that they were in good working order on the day of the accident. He said the

fastest he travelled was 10 m.p.h. and that he could easily have brought his vehicle to a halt but he did not. He said:

> "I thought I could pass Johnson when I saw him coming over the white line towards me."

He told Mr. Robinson that he did not know how Johnson's vehicle proceeded from the time he saw it up to the time of the collision. Then later in cross-examination he said:

> "Johnson's vehicle swerved over the right lane. It swerved 5 ft. away. I saw how it proceeded."

According to him anything moving over the unbroken white line amounts to a swerve.

Mr. Salmon agreed that the point of collision between himself and the fifth defendant was more than thirty-five (35) feet below the gate of Ardenne Preparatory. He also agreed that two vehicles (i.e. the vehicles that had stopped for him to change his lane) were behind him and the plaintiff was some three (3) lengths down behind him.

CASE FOR SECOND AND THIRD DEFENDANTS

The third defendant gave evidence on behalf of the second defendant and herself. The motor vehicle she was driving was at all material times owned by the second defendant.

Mrs. Reid testified that she was driving this car down Hope Road on the morning of the accident and that she was in a line of traffic. A bus in front had stopped at a bus stop so traffic had to stop behind the bus. A motor car was in front of her and the first defendant's pick-up was immediately behind the bus. She saw the pick-up started to go around the bus and she did not know what else happened. She only heard vehicles crashing. She also said that another pick-up came across Hope Road and hit into the right front of her car; it bounced off and hit her again the right side. She claimed that she was stationary when the impacts occurred and that when she alighted from her vehicle she saw Mr. Scott's vehicle resting on her back bumper.

Under cross-examination, Mrs. Reid was unable to say if any vehicle had stopped prior to the first defendant going around the bus. She could not recall if there was a collison between her vehicle and the plaintiff's.

CASE FOR THE FOURTH DEFENDANT

The fourth defendant testified that she had sold the pick-up driven at the

time of the accident to the fifth defendant for $350,000.00. This transaction was done on the 26th day of August, 1992. Although no transfer was effected up to the time of the accident, she said she had collected her money from the fifth defendant and had handed over the vehicle to him. According to her, she had no further interest in it after the 26th August, 1992, neither was the fifth defendant driving the vehicle for her benefit after it was handed over to him.

The witness Dianne Watson was called on behalf of Miss Jones. She supported the fourth defendant's story regarding the sale as she was a witness to it.

CASE FOR THE FIFTH DEFENDANT

Mr. Robinson informed the Court that the fifth defendant was not available to give evidence and he would not be calling any witnesses. That being the case, he closed the case for that defendant.

SUBMISSIONS

Mrs. Khan submitted that the impact between the first and fifth defendant's vehicles by its very nature, that is, two wheels touching each other, could not have caused the fifth defendant to get out of control. She submitted that the fifth defendant had in fact caused the accident and should be liable for the multiple accidents.

Mr. Henry submitted that the plaintiff had failed to prove his case against the second and third defendants. There was nothing he said in the evidence that these defendants caused or contributed to the accident nor the plaintiff's injuries. It was his view also that the second defendant's case against the plaintiff had not been established.

In relation to the second defendant's case against the first and fifth defendants, Mr. Henry submitted that the Court ought to have regard to the totality of the first defendant's evidence and his demeanour. He submitted that his evidence was inconsistent and that the court ought not to believe him. He further submitted that on a balance of probabilities the Court should find that the first defendant had encroached on the right lane leading towards Papine to get around the bus and that it was at that point in time that the accident occurred. He was of the view that liability should rest solely on the first defendant.

So far as damages were concerned, he submitted that there should be judgment for the second and third defendants against the first defendant in the sum of

$74,468.16 being the sum agreed in Exhibit 3 (Report from Trans Jam Loss Adjusters Ltd. dated 24th September, 1992).

Miss Chambers was also of the view that the accidents were due to the negligent driving of the first defendant. She submitted that the fourth defendant had established on a balance of probabilities that the vehicle driven by the fifth defendant had dislodged the presumption that the fifth defendant was acting as her servant or agent at the material time. Accordingly, she submitted that the cause of action brought by the plaintiff against this defendant should fail.

Mr. Braham agreed also that liability should rest solely on the first defendant. He submitted that the plaintiff was quite straight forward and should be believed when he told the Court that he saw the first defendant encroached on the other side of the road which resulted in a collision with the fifth defendant thereby causing him to loose control and colliding with other vehicles.

Mr. Robinson submitted that the plaintiff ought to be believed from his description of the evidence. He was of the view that the first defendant's evidence was filled with inconsistencies and he ought not to be believed.

EVALUATION OF THE EVIDENCE AND FINDINGS

The evidence indicate that there was a head-on collision between the fifth defendant's vehicle and the plaintiff's vehicle. There was no suggestion to the contrary. Now, in chief the first defendant said he saw when the fifth defendant "swing out from his right lane he was travelling in.....And swing into my right lane going down." (emphasis supplied) Under cross-examination he used the words "Johnson's vehicle swerved over the right lane. It swerved 5 ft. away." He did give a meaning to the word "swerve" which he said meant "anything moving over the unbroken white line." Unfortunately, the court was not assisted with his meaning of the terms "swing out" and "swing into." But the question I ask is: "If Mr. Salmon is seeing the fifth defendant's vehicle indicating to turn right and that vehicle swings out of its lane and collides with his right front wheel, why is that defendant leaving two cars ahead of the plaintiff and finding sufficient space between the second vehicle and the plaintiff to collide with one of the two cars ahead of the plaintiff?

There is also evidence that the point of impact between the first defendant's vehicle and the fifth defendant was some 35 ft. below the Ardenne Preparatory.

Evidence was also elicited that there was a school child seated in the fifth defendant's vehicle. It would be reasonable to infer then that by him indicating to turn right he could be taking that child to Ardenne Preparatory. But, why would he be turning at that distance if he was going to Ardenne?

The demeanour of witnesses is very important when it comes to consider their credit-worthiness. The plaintiff has impressed me to be quite honest and truthful. At times he might have appeared to be insistent on certain answers but this did not detract from his ability to speak the truth. The first defendant on the other hand has not impressed me as someone who is frank with the Court. I rather believe that he was not speaking the truth so far as his account of this accident is concerned. His account as to the sequence of events leading to the collision between himself and the fifth defendant seem to be most improbable, if not impossible.

I find that the first defendant who was travelling in the left lane went around the bus after it had stopped, and then he entered the right lane going towards Half Way Tree. I do not accept his evidence that two motorists had stopped in the right lane in orde to allow him to change lanes. I further find that because of the position he had placed his vehicle in the right lane he had encroached in the right lane going towards Papine and this caused him to make contact with the fifth defendant's vehicle which was proceeding on its correct side of the road. I would agree with Mr. Henry that the reason why he was seeing the fifth defendant only five (5) feet away, was that he had only just emerged from around the bus. Having encroached, he collided with the fifth defendant who thereafter collided with the plaintiff head-on and the second defendant's vehicle. He admitted that he took no evasive action when, according to him, he saw the fifth defendant riding the white line. I find that he drove without due regard to other traffic on the road and continued in his path as if to say, the road belonged entirely to him that morning. It was a most dangerous manouevre he undertook and was fortunate that he managed to have emerged from all of this without much or no damage whatsoever. He was indeed the author of this chain of unfortunate accidents and must be fully blamed for them.

I further find on a balance of probabilities, that the fifth defendant was not acting as servant or agent of the fourth defendant at the material time.

I must now now consider the question of damages.

DAMAGES

General

I now turn to the question of general damages. The medical report, (Exhibit 2) from Dr. J. Stern M.B., B.S., M.S.P.H. is dated October 27, 1995 and states as follows:

ANDREWS MEMORIAL HOSPITAL

TO WHOM IT MAY CONCERN

Re: Lincoln Scott

"The above named person was seen here on September 11, 1992 after having suffered injury in a motor vehicle accident which resulted in trauma to the head, neck, and bruises to both knees.

Examination revealed 3/4 inch laceration to the mid forehead and pain in the left forearm and trapezius. The laceration to the forehead was sutured, and he was given medication for the pain.

X-rays were done of the skull and neck. There is no record that he returned for follow-up treatment, and how the sutures were removed or whether he had repeat x-rays as was suggested on the x-ray report. It is possible that the Doctor who saw him made arrangements for follow-up treatment otherwise. His present condition is not known."

Yours sincerely,
Sgd. Dr. J. Stern
Chief Medical Officer

The plaintiff's evidence was that he had hit his head on the windscreen which resulted in the wrenching of his neck. His forehead had bled and he felt dazed and also experienced pain. His blood pressure had risen, but his medical problem of high blood pressure had existed before the accident. He had spent the morning in hospital and according to him he was in a mild state of shock. This was the extent of his injuries.

He claims that he has difficulties with neck. He is unable play tennis which he had played regularly before the accident because when the neck moves suddenly it is painful. He has difficulty looking behind when he reverses his car and feels tired at the end of the day as fatigue sets in. Finally, he said:

"I have no other problem I can think of."

Mrs. Khan submitted that there was no evidence to support the pleading that the plaintiff had severely wrenched his neck. This she said is supported by the medical evidence and the evidence of the plaintiff himself when he said that he had "wrenched his neck." Further, she submitted that the plaintiff gave evidence that he had only worn a neck brace for two (2) weeks. On the evidence, there was no other medical treatment. In her view, having regard to cases of a similar nature reported in her book on personal injuries and those reported in Casenote No. 2, an award ranging between $160,000.00 and $170,000.00 would be appropriate for pain and suffering and loss of amenities.

Mr. Braham submitted however, that having regard to the circumstances of the instant case, a maximum of $200,000.00 for pain and suffering and loss of amenities would be reasonable. He too, did not refer to any particular case in support of his recommendation for this award.

It is quite evidence from the evidence of the plaintiff himself and the agreed medical report that the plaintiff did not suffer serious injuries. It may be, according to Dr. Stern, that the Doctor who saw him after he did, might have made arrangements for follow up treatments. But this Court cannot speculate and can only act upon the evidence presented before it.

In **Aneita Hall v. Denham Dodd & Anor C.L.1987/H-161** before Ellis J. on September 27, 1990 the plaintiff sustained a jagged laceration to the left parieto-occipital area and loss of tissue. She also had an abrasion to the left shoulder and haematoma to the left forehead. She underwent plastic surgery due to the loss of tissue and was hospitalized for four weeks. By consent she was awarded $30,000.00 in respect of general damages for pain and suffering and loss of amenities. This case is a little more serious than the instant matter albeit it is an injury to the back of the head. The need for plastic surgery and the time spent in hospital are factors to consider. When converted, the award of $30,000.00 would value approximately $183,673.00.

In **Basil Pennycooke v. Allan Wellington C.L.1989/P-074** before Langrin J. on the 12th July, 1991 the plaintiff was hit off his cycle and received abrasions to the shoulder, elbow, forehead and knees. He had an infection to the left supra orbital ridge and had expreienced back pain and reduced vision. He was awarded

$40,000.00 for pain and suffering and loss of amenities under the head general damages. When converted, this award would now value approximatley $164,383.00 taking into consideration the rate of inflation.

In **Poyser v. Superior Party Hireage Ltd. C.L. 1991/P158** before James G.G. J. (Ag) on the 14th day of MaY, 1992, the plaintiff sustained a whiplash injury resulting in pain in the neck, shoulder and back. He was awarded $40,000.00 for pain and suffering and loss of amenities. That award would now value $93,023.00.

Bearing in mind the facts of the instant case as it relates to the injury and the resulting disabilities I would think that an award of $170,000.00 would be appropriate in all the circumstances.

Special

Plaintiff

1. Loss of motor car

The plaintiff's motor car was written off as a result of the collision. Exhibit 1, is the agreed Damage Report of the MOtor Assessors and it confirms this. The net loss amounts to $155,000.00 and this is the sum to which the plaintiff is entitled. He is therefore awarded $155,000.00 for this loss.

2. Physiotherapy

I would allow the sum of $6,000.00 in respect of fees paid by the plaintiff for physiotherapy.

3. Loss of use

The plaintiff testified that he had to rent a motor car for three months and had paid $132,000.00 to Island Car Rental for this service. He said he had difficulty finding a vehicle of comparable price to the one which was written off and that he ended up purchasing a more expensive one.

Mrs. Khan submitted that the Court should only allow six (6) weeks for loss of use of the plaintiff's motor car. The evidence shows where he had depended on the use of the car for both domestic and business purposes. The question to decide then is what was a reasonable time after which the plaintiff ought to have bought another motor car. The accident had occurred on the 11th September, 1992 and it was not examined by the assessors until the 7th October, 1992. Their recommendations are contained in a report (exhibit 1) which is dated 12th October, 1992. I would think that by the time the Insurers bring this report to the

plaintiff's attention it would well be over a month since the accident. I would allow another four weeks for the plaintiff to exercise his options and for him to find a replacement. In the circumstances, a period of two months loss of use should be considered reasonable. The sum of $88,000.00 is therefore awarded in respect of loss of use.

Other Expenses

The plaintiff gave evidence that he had paid $700.00 for x-rays but this item was not pleaded. No attempt was made to amend the pleadings so, I will not make any award for this expense. He said he paid other fees but he can't recall the sums. Medical expenses, Assessor's Fee and Wrecker's Fee were pleaded but have not been proved. As Rowe P. said in **Hepburn v. Carlton Walker S.C.C.A. 4/90** (un-reported) delivered December 10, 1990:

> "Plaintiffs ought not to be encouraged to throw up figures at trial judge, make no effort to substantiate them and to rely on logical argument to say that specific sums of money have been earned (spent)...." (Words in bracked to be substituted).

No award is therefore made in respect of medical expenses, assessor's fee and wrecker's fee.

AWARD

Plaintiff

There shall be judgment therefore for the plaintiff against the first defendant as follows:

General Damages

Pain and suffering and loss of amenities in the sum of $170,000.00 with interest thereon at the rate of 3% p.a. from the date of service of the Writ of Summons up to today.

Special Damages

$249,000.00 with interest thereon at the rate of 3% p.a. from the 11th day of September, 1992 up to today.

There shall be costs to the plaintiff against the first defendant to be taxed if not agreed.

Second and Third Defendants

There shall be judgment for the second and third defendants against the

plaintiff and on the claim in the Third Party Proceedings against the first defendant in the sum of $74,468.16 with interest thereon at the rate of 3% p.a. from the 11th September, 1992 up to today.

There shall be costs to the second and third defendants against the plaintiff in the plaintiff's claim to be taxed if not agreed and costs for the second and third defendants against the first defendant in the third party proceedings to taxed if not agreed.

Fourth Defendant

There shall be judgment for the fourth defendant against the plaintiff with no order as to costs against the plaintiff.

Fifth Defendant

There shall be judgment for the fifth defendant against the plaintiff with costs to be taxed if not agreed. The costs payable by the plaintiff to be paid by the first defendant.