

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1991/S-289

BETWEEN

AINSLEY SMIKLE

PLAINTIFF

A N D

ROY CUNNINGHAM

DEFENDANT

Mr. Arthur Williams instructed by Kelly, Williams and McLean for Plaintiff.

Mr. David Johnson of Piper and Samuda for Defendant.

HEARD: July 5, 6, 199; October 28, 29,  
1996 and December 13, 1996

KARL HARRISON J:

The Pleadings

The plaintiff brings this cause of action in negligence and is seeking to recover damages as a result of an accident involving a motor vehicle and himself. He alleges that on the 14th day of February, 1990 he was lawfully crossing Half-Way-Tree Road when the defendant so negligently drove, managed and/or controlled his motor car that he caused same to collide violently with him causing severe personal injuries. The particulars of negligence are set out hereunder:

"PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that:

1. He collided with the plaintiff while the plaintiff was standing on the white line waiting to be given a chance to complete crossing the said road.
2. He failed to keep a proper look out.
3. He drove at a rate of speed which was excessive in the circumstances.
4. He failed to give any or any adequate warning of his presence or approach along the said road.
5. He failed to stop, slow down, swerve or in any way so to drive, manage and or control his said motor vehicle as to avoid the said collision."

The defendant admits that there was a collision between the plaintiff and the defendants' motor vehicle on the day in question but denies that he was negligent. He avers that the accident was caused solely or alternatively contributed to by the negligence of the plaintiff. He has particularized the plaintiff's negligence as follows:

PARTICULARS OF NEGLIGENCE OF PLAINTIFF

1. Failing to keep any or any proper look-out or to have any or any sufficient or proper regard for vehicular traffic along a busy thoroughfare.
2. Crossing or attempting to cross a major thoroughfare without first ascertaining or ensuring that it was safe to do so and at a time when and in a manner whereby it was manifestly dangerous so to do.
3. Crossing or attempting to cross a major thoroughfare at its junction with Collins Green Avenue and not at a designated pedestrian crossing or at traffic light.
4. Failing to take any or any special care for his own safety and the safety of others.
5. Failing to heed the warnings given by the defendant.
6. Failing to observe the presence and approach of the defendant's said vehicle in sufficient time to avoid colliding with it or at all.
7. Suddenly and without any prior or proper warning retracting his steps, shuffling then jumping late into the path of the defendant's vehicle and into the side thereof.
8. Failing to stop, slow down, to turn aside or to take any other evasive action so as to avoid the collision.

The Evidence

The plaintiff testified that on the 14th February, 1990, he had to go across Half Way Tree Road in order to purchase some cigarettes. Half Way Tree at the point where he was crossing, accommodates four lanes of traffic. Two lanes are for traffic proceeding southerly towards Cross Roads and the other two lanes for traffic going in the opposite direction towards Half Way Tree. In attempting to return to the side of the road where he had his stall, he stood in the road waiting to cross as it was busy. He said:

"I stop said place on white line where I was. I was looking to see if I could get a clearance to go back on the other side. The next thing I find myself in Public Hospital."

He further testified that he was standing in the right lane going towards Half Way Tree but cannot say who or what collided with him. Under cross-examination he said he was looking up and down before he crossed and can't recall if he had jumped whilst in the road. When it was suggested that he had jumped back into the car driven by the defendant, he denied this. He also said that he was not aware of any motor car coming from Half Way Tree direction trying to overtake a bus and that it

had encroached into the lane where he was standing causing him to jump backwards.

The plaintiff called a witness, Duet Walker. According to this witness, he was standing at a bus shed at the intersection of Half Way Tree Road and Collins Green Avenue waiting on a bus. He was facing Cross Roads direction when he saw a man coming across Half Way Tree Road. This is what he said:

"I saw a man coming across the road. Traffic was flowing heavily. While he was coming across the traffic stopped to give him the go ahead to cross. On reaching over white line in middle of road an Encava bus stop to allow him to go across. Then come a yellow Toyota motor car swing around the bus and hit him on white line where he was standing."

When asked about the direction the bus and car were proceeding, he said:

"The bus was coming from Cross Roads direction. The car was coming from same direction. Coming from Cross Roads you had two lanes of traffic. The bus was in the lane to sidewalk."

Under cross-examination, Walker denied that a bus was in the second lane on other side of the road near to the centre line going towards Cross Roads. He further denied that a car had swung out from behind the bus and had gone into the lane where the plaintiff was standing. He did not see the plaintiff then jumped back at this point in time into the path of the defendant's motor car. Neither did he agree when it was suggested that the plaintiff was moving from Beechwood Avenue side of Half Way Tree Road and that his back was turned to Beechwood Avenue when he was hit. Rather, he said the plaintiff was trying to get back to the side where Beechwood Avenue is when the impact occurred.

The defendant testified that on the day in question he was driving his motor car along Half Way Tree Road towards Half Way tree along with passenger, Elaine Harris. He said:

"While in left lane close to sidewalk I observed a pedestrian standing in other lane next to the one I was driving in. He was about 1 ft. over into other lane.....He was facing easterly direction side.

I was travelling at 20 m.p.h. I was about one (1) ft. or more from white line that divides other lane but I was still in my lane.

A bus approached from Half Way Tree direction going towards Cross Roads...bus came down and slowed down. It was in right lane closer to centre line. Just as it slowed down a car came around the bus from Half Way Tree direction and swerve into lane where pedestrian was. My

vehicle was about a few feet from pedestrian. My car almost before him. I had not passed him yet. Pedestrian was then closer to right front fender. After vehicle swerved around bus, pedestrian jump backwards and he banged right against my wing mirror.....I immediately applied my brake and swerved to the left. I stopped car at a point...."

It was also the defendant's evidence that he had swerved a little to the sidewalk when the car came around the bus and that he could have <sup>been</sup> about 1½ ft. from the left sidewalk when he swerved. Further, he said that the plaintiff was about one ft. over the white line and had jumped backwards roughly about 2-3 ft. It was his back he said which hit his wing mirror. Then, he said the plaintiff came across and hit the rear passenger door and fell to his side.

Eric Douglas testified on behalf of the defendant. He was driving his motor car along Half Way Tree Road towards Half Way Tree and was proceeding in the right lane. To his left was vacant for although traffic was also proceeding in that lane, none was beside him. Then he said:

<sup>a</sup>  
"I noticed/young man crossing Half Way Tree Road coming from left going towards the right. He was coming from west going towards east. He was about one foot from the white line that divides my lane and lane to the left. At this point in time he was about 10 ft. from me when I came to a stop. The man crossing came to a stop too because a bus which was in the right hand lane going towards Cross Roads and behind the bus there was this car that suddenly come from behind the bus. It came so suddenly that the young man who was standing at the time jumped backwards so as to avoid the oncoming car. The car was coming towards the lane I was in. Suddenly when he jumped backwards there was at that point a car on my left. As car to my left pass me, the young man jumped back....into path of the car passing me on my left."

Miss Elaine Harris a passenger in the defendant's car had supported his story. She said:

"I saw a bus in the right lane going towards cross Roads. A car that was behind the bus overtook the bus coming to the left lane. The man who was standing in that lane suddenly moved backwards into the extreme left lane in which Mr. Cunningham's car was. I heard a bang on Mr. Cunningham's car and some splinter came in..."

Under cross-examination she said no car was in the right lane to them going towards Half Way Tree then. She was seeing the pedestrian for the first time when the defendant's car was about 4 ft. away from him. She did not see any bus travelling

ahead of the defendant's motor car. Neither did she see any motor car in the lane close enough to the defendant. She also testified that the plaintiff had jumped about 2 ft. backwards into the path of the defendant's car. She did observe the bug going towards Cross Roads Road but it had not stopped and was in motion when the car came around it.

The major issues for determination are:

1. Whether the defendant who was travelling towards Half Way Tree had collided with the plaintiff because he had swung out from behind a bus which had stopped to allow the plaintiff to cross.
2. Whether a motor car proceeding in the opposite direction (i.e. towards Cross Roads) had overtaken a bus and had encroached in the lane where the plaintiff was standing thereby causing him to jump backwards into the path of the defendant's motor vehicle proceeding towards Half Way Tree.

Assessment of the evidence and findings:

One got the distinct impression from the evidence of Walker that the defendant was not the driver of the motor car which had collided with the plaintiff. He testified that the defendant's vehicle had stopped some two chains ahead from the point of impact and he saw when a man came from the passenger side and walked around to the driver's side of the car. He said he saw a lady seated in the driver's seat; she "drew" over to the passenger seat.

Another aspect of the evidence is somewhat puzzling. The witness Walker has said he saw when a bus travelling towards Half Way Tree "in the lane to the sidewalk" had stopped to allow the plaintiff who was then standing in the middle of the road to cross and that the defendant's motor car swung around the bus and then collided with the plaintiff. The defendant and his witnesses on the other hand are claiming that it was a motor car coming from the opposite direction that had overtaken a bus, came in the lane where the plaintiff was and caused him to jump backwards into the defendant's car which was then travelling in the opposite direction.

Certainly, someone is not speaking the truth. But let me examine the evidence further. The defendant says he was travelling in the left lane close to the sidewalk

when he observed a pedestrian standing about one (1) ft. over in the other lane, that is, the right lane and that he was facing east. The distant of one (1) ft. and position the plaintiff was facing were also supported by Douglas, witness for the defendant. This would mean that the plaintiff's back would have been turned to his motor car. He also says that he was about one (1) ft. or more from the white line which divides the two lanes. It was also the defendant's evidence that he had swerved a little to the sidewalk when the car came around the bus and that he could have been about 1½ ft. away from the curb when he swerved. He also testified that the plaintiff had jumped backwards roughly about 2-3 ft. and that it was his back which made contact with the wing mirror. What this evidence shows is that whilst the defendant is moving away further to his left that the plaintiff jumped backwards for 2-3 ft. and made contact with his motor car. But what does Douglas say when he saw the plaintiff in the road. He was about 10 ft. away from the plaintiff when he came to a stop. The plaintiff had also stopped in his path and then he saw when the motor car suddenly came from behind the bus, the plaintiff jumped backwards as the defendant's car which was to his left passed him.

Now, if the defendant is travelling in the extreme left lane and Mr. Douglas is to his right, why didn't he see that Douglas was stationary and why did he decide to proceed to pass Douglas, if Douglas is to be believed? If Douglas was indeed stationary at the time and the defendant was seeing the plaintiff in the road, then he too should have come to a stop to allow the pedestrian to cross. But, what is meant by Walker when he said:

".....On reaching over the white line in the middle of road an Encava bus stop to allow him (the plaintiff) to go across. Then come a yellow Toyota motor car swing around the bus and hit him on the white line where he was standing."

Could it be that the defendant was travelling in the said left lane behind the bus and got around it because it had stopped, went into the right lane and collide with the plaintiff who was then standing in that lane? In my view the probabilities are, and I accept the evidence of Duet Walker, that the defendant did come around the stationary bus in the left lane and collided with the plaintiff who was then standing in the road waiting to return to the Beechwood Avenue side of Half Way Tree Road from whence he had come. I reject the evidence of the defendant and his witness regarding their accounts of how this collision took place. On the balance



of probabilities, the accident could not have occurred in the manner described by them. I therefore find that the defendant failed to keep any or a proper lookout or to control his vehicle as to avoid the said collision. He is negligent in my view and must be held liable for this accident. Has the plaintiff contributed in any way to this accident?

There is no evidence which shows that there was a pedestrian crossing in the vicinity of this accident. Neither is there evidence that there are regulated traffic lights controlling vehicular traffic and pedestrians. Did the plaintiff then cross or attempted to cross a busy thoroughfare without first ascertaining or ensuring that it was safe to do so?

#### The Law

All pedestrians have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it. (See *Boss v. Litton* (1832) 5 C & P 407. The plaintiff said he had stopped on the white line looking to see if he could get a clearance and the next thing that happened was that he found himself in hospital. His witness Walker said, whilst the plaintiff was coming across traffic had stopped to allow him to go across. On reaching the other side of the road, the Encava bus had also stopped to allow him to cross. Had the accident occurred whilst the plaintiff was proceeding from the right to the extreme left lane and had not waited for vehicles in that lane to halt, then certain consequences would flow. He could not say that because one vehicle had stopped he could proceed without first ascertaining that it was safe to proceed. But this is not the case. Since the bus was already in the extreme left lane and had stopped to allow him to cross, it could not have been reasonably foreseen that a vehicle would have come around the bus at that point in time. I therefore cannot say that the plaintiff has contributed to this collision. I find the defendant fully to be blamed.

#### Assessment of Damages

##### Special Damages

The particulars of special damages pleaded were as follows:

1. Medical report	\$100.00
2. Cash lost	405.00
3. Goods missing from stall	250.00

4.	Pants damaged	150.00
5.	Shirt	80.00
6.	Transportation expenses	1,000.00
7.	Loss of earnings for 10 weeks @ \$300 per week	3,000.00
		<hr/> \$4,985.00 <hr/>

In giving evidence he testified that he had lost stock valued at \$2,000.00. The costs of his pants and shirt which were blood stained were said to value \$450.00. He said his travelling to hospital for treatment on three occasions had cost him \$1,000.00. The medical report he said cost him \$500.00 and his loss of earnings from the stall he operated totaled \$6,000.00. These figures are in excess of the sums pleaded. No attempt was made to amend his pleadings during the trial so he must be bound by his pleadings. He had given no evidence of any lost cash so, the sum of \$405.00 is not allowed. In the circumstances, I will allow him the sums for other items pleaded and which total \$4,580.00.

#### General Damages

Two medical reports from Dr. R.E. Cheeks, Neurological surgeon were agreed and admitted in evidence Exhibit 1. The first report is dated July 17, 1990. It states as follows:

#### HOSPITAL (KINGSTON REGION) MANAGEMENT BOARD

##### Medical Report

Ainsley Smikle

The above captioned individual was admitted to this institution on the 14th February, 1990 for the treatment of injuries sustained the same day in a motor vehicle accident.

On admission he was drowsy and restless with stable vital signs and the following injuries were noted:

1. Swollen bruised area on the right side of the forehead.
2. Bleeding from the right ear, nostrils and mouth.
3. Abrasions and 4cm laceration on left forearm.

X-rays revealed no skull fracture but there was a linear fracture of the mandible (lower jaw) for which he was referred to the Maxilla -Facial Department.

Treatment consisted of general supportive measures in additon to antibiotics and



suturing of his forearm laceration, and he gradually became fully conscious and was mobilized, to the extent that he was discharged home on the 5th March, 1990 after an in-patient stay of nineteen (19) days.

At the time of discharge he was a little irrational and it was explained to his next of kin, that this was temporary. Subsequently he was observed to be making good progress when seen in the out-patient department on the 5th June, 1990, and he is considered to be still recovering from the effects of his head injury at this time."

Sgd. Dr. R.E. Cheeks FRCS  
Neurological Surgeon  
Kingston Public Hospital

The second report is dated October 28, 1994 and it states as follows:

DIVISION OF NEUROSURGERY  
DEPARTMENT OF SURGERY  
KINGSTON REGIONAL HOSPITALS

FINAL MEDICAL REPORT re: Ainsley Smikle 36-62-90

This report reads in continuity with my previous medical report dated 17th July, 1990 regarding this individual.

Mr. Smikle was not seen again in the neurosurgical OPD until 27th October, 1994, which means that more than four years had elapsed since the accident and it is therefore reasonable to assume that he has reached MMI (Maximum Medical Improvement).

This subject says that the only problem he now has is that he experiences aching in the region of the right upper ribs with heavy physical exertion. To direct questioning he is not having any neurological problems and is not experiencing any headaches or epileptic fits; indeed he is self employed, doing "a little farming" which he manage himself.

General and neurologic examination are unremarkable apart from that some tenderness in the right upper chest walls which suggests that injury to the chest wall (which was bruised) has resulted in a traumatic intercostal neuritis. This would be liable to cause pain at times of physical exertion. It is not likely to worsen with the passage of time, and as a disability it is rated at three percent (3%) of the whole person."

Sgd. R.E. Cheeks FRCS  
Neurological Surgeon

Mr. Johnson submitted that the plaintiff had improved almost 100%. He referred to the case of Francis v. Nugent at page 67 of Casenote No. 2, a judgment of Cooke J. on the 19th September, 1991. Damages awarded in respect of pain and suffering was \$40,000.00. It was his view that the injuries in the present case were consistent with those in the Francis case. That award would be valued today at \$160,000.00.

Mr. Williams submitted that the plaintiff had sustained head injuries which caused bleeding from the nostrils and ear so, an award by the court ought to exceed a mere mandible fracture. He referred to the case of Tulloch v. Esso at page 22 of Khan's Vol. 3 on Personal Injuries. In that case the plaintiff had sustained a head injury with loss of consciousness for twenty (20) minutes and Wolfe J. had awarded \$95,000.00 in November 1990 for pain and suffering. He further submitted that if the court were to use both authorities, that is Francis case and the Tulloch case to balance each other, then an appropriate award in the instant case would be \$300,000.00.

Upon an examination of the case of Tulloch, the facts reveal that he was a seventy year old pensioner. Prior to the accident he had osteoarthritis. The injury he sustained did cause loss of consciousness for twenty (20) minutes and he was hospitalized for 13 days. He suffered an extensive degloving laceration over the left frontoparietal area of the scalp. He had a large abrasion with bruising over the left parietal eminence of the skull, a large bruised area with two lacerations over the left hip, and an acute sprain of the right knee.

Although the plaintiff in the instant case testified that he did not know what happened after he was hit until he found himself in hospital, it would appear that his state of unconsciousness was brief. The medical report states that on admission he was drowsy and restless with stable signs and gradually became fully conscious. Fortunately, he suffered from no neurological problems as a result of the head injury. When Dr. Cheeks saw him on the 28th October, 1994 he stated that it was reasonable to assume that he had reached maximum medical improvement. He was not experiencing any headaches nor any epileptic fits. His early signs of irrationality were described by Dr. Cheeks as temporary and he did make good progress when seen in the out-patient clinic.

In the case of Donald Henry v. Robinson's Car Rental Ltd. and Anor the plaintiff

was a 20 year old security guard who was struck from his pedal cycle by a car. He had cerebral concussion with a closed underpressed fracture of the right frontal bone. He had head pains for about one month and bouts of amnesia. He had spent ten days in hospital and after six weeks he had fully recovered without disability. He was awarded \$25,000.00 by Reckord J. on the 29th January, 1991 for pain and suffering and loss of amenities. I would think however, that the plaintiff here seemed to have had a longer period of disability than in Henry's case. The medical report shows that up to June, 1990 he was still recovering. That was some four (4) months after the accident. When he was seen four years later he still had aches in the region of the upper ribs with heavy physical exertion. He did say he was now doing some farming which would call for much physical exertion but his evidence does not reveal where he is having any further discomfort two years after he was last seen by Dr. Cheeks. I would think it is reasonable in the circumstances to use a datum figure of \$50,000.00 to arrive at a proper assessment. The plaintiff was injured in July, 1990 so I would think it proper to use the consumer price index for that period which would be approximately 154. The current index now stands at approximately 970. In my view, an award of \$300,000.00 would be appropriate in the circumstances.

#### Judgment

There shall be judgment for the plaintiff as follows:

1. General Damages - \$300,000.00 for pain and suffering and loss of amenities with interest thereon at the rate of 3% p.a. from 13th December, 1991 up to today.
2. Special Damages - \$4,580.00 with interest thereon at the rate of 3% p.a. from the 14th day of February, 1990 up to today.

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