IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S239/90

BETWEEN	EGLON SMITH	PLAINTIFF
AND	PAMELA BRYAN	DEFENDANTS
AND	DESMOND DENNIS	

Messers David Henry and Lowell Morgan
for plaintiff

Mr. H. Haughton Gayle for defendants

January 7, 8, 11 - 13, and 20, 1993

PANTON J.

On September 19, 1989, an accident occurred while two vehicles - one driven by the plaintiff, the other by the second defendant - travelling in opposite direction, were negotiating a corner on the road near Moneague, St. Ann. Each party has asserted that the other party was driving on the incorrect side of the road. Strangely, there is even a dispute as to whether the bend was a right-hand one or not. Both vehicles were "written off". The plaintiff was stuck in his car for approximately one hour before the efforts of passing motorists and some soldiers resulted in his release.

The major factual issue for determination is the position of the vehicles at the time of the collision. Allied to that would be a determination of the direction of the bend in the road.

The plaintiff testified as to driving around a "right hand" curve, and having his vehicle damaged by the second defendant's vehicle. His evidence indicates that at the time of the accident the second defendant's vehicle was about a foot over the centre of the road. He said that as he entered the middle of the corner he saw a "Lada coming on" to him. He tried to pull away, yet the Lada "still came over" on him. When he first saw the Lada, half of it was on his side of the road and it was "coming at an angle towards **him on (his) side of the road. He swung to his left.**

A close look at the plaintiff's evidence shows a clear unexplained conflict. If the Lada had half of its body on the plaintiff's side of the road, and it was still coming over on to the plaintiff, how could it have ended up only a foot over the centre of the road? How could the impact have been a mere foot away from the centre of the road? There is no answer; no explanation that I have been able to see.

The plaintiff called Curtis Grey, his passenger, as a witness. Grey is a waiter. Although he is a mature individual he does not possess driving skills. He lives at the same address as the plaintiff. This latter fact does not, in my view, affect the quality of his evidence. There is no doubt, and the defence agrees, that Grey was indeed a passenger in the plaintiff's vehicle. Grey's evidence ought to have been of some assistance to the plaintiff but, alas, it was not. This is what he said in examination-in-chief:

> "Coming round a corner, plaintiff driving, we bucked up on a car coming towards us. The car was over to our side of the road. Our vehicle was on the right hand side. When we took the corner, the car was about half chain from us. Then the plaintiff tried to get away from it, but couldn't. Plaintiff tried to squeeze pass it; he got hit on his right side. The accident occurred on the right side of the road. When I say right side I mean he got hit on the right side of his vehicle".

That was not all. When the learned attorney-at-law for the defence painstakingly demonstrated, with his hand, a left hand curve, the witness agreed that that was the nature of the curve that the plaintiff had been negotiating.

It is obvious that the witness's evidence was a far cry from the plaintiff's in relation to the direction of the curve, as well as the position of the vehicles at the time of the accident.

The second defendant had a female passenger in his vehicle. She was not called. That was a choice that was open to the second defendant. Instead, he called another driver - Errol Mullings - who testified that he arrived on the scene shortly after the accident. He gave evidence as to the position of the vehicles as he saw them. In short, his evidence indicates that the plaintiff's vehicle was on its incorrect side of the road; so far over that there was space for his (Mullings') vehicle to pass on the left of the plaintiff's.

It should be noted that Mullings was the first witness called by the defence. This was done at the request of the defence to facilitate Mullings' early

departure from the precincts of the Court in order to attend to his private business. Due to this unusual order of the calling of the witnesses for the defence, I excluded both defendants from the court-room while Mullings testified. This was agreed to by the defence. As soon as he had completed his testimony, he left the court-room having received the permission of the Court. The defendants were immediately recalled, and the second defendant took the witness stand.

I have mentioned these procedural details as the learned attorney-at-law for the plaintiff suggested to Mullings that he was not present at the scene that day. The question and answer are as follows:

> "Ques: You were not there that day.
>
> Ans: I was.
>
> Ques: You never helped the witness Grey.
>
> Ans: Well, if he says that, he was either drunk or unconscious. If he never saw me, I repeat, he must be either drunk or unconscious".

That was how he ended his testimony. His credibility is clearly in issue.

The second defendant's evidence was to the effect that while he was driving along, he heard the screeching of the tyres of an approaching vehicle, chains away; that he took the necessary precaution of tooting his horn and positioning his vehicle to the extreme left of the road. He was calmly dramatic while I recorded him as saying:

> "With fixity of gaze, looking towards the approaching vehicle, I continued with extra caution".

He testified that the plaintiff's vehicle came around the corner very fast and swerved across the road straight into the right hand front of his car in a manner indicating that the plaintiff's vehicle was out of control. He said that he was very frightened as that was the nearest he had been to death.

The credibility and reliability of all the witnesses are issues for consideration and determination. In cases of this nature, this is the usual situation. Having considered the demeanour of each witness, and the content of the evidence given, I have concluded that I cannot safely rely on the evidence of the plaintiff and his witness. I would not say that they have been untruthful. I would simply describe it as unreliable. I think that this is understandable in that the plaintiff had a traumatic experience which, probably, he has not yet overcome. He was

unconscious for some while after the impact. When he regained consciousness, he found himself trapped in the car, amid frantic efforts to release him.

The witness Grey said that he was "shaken up" by the incident. His evidence has caused me to wonder whether he is still shaken by it, and so was unable to offer to the Court a reliable account of what transpired.

The witness Mullings was quite detailed in his account of the events on the scene after he arrived. He appeared to have been speaking the truth. I have very grave doubts that he would have been able to testify as he did, unless he was indeed present. I have no doubt that he was present.

I find that the version of the accident that has been offered by the defence is the more probable version. Although I have so found, it should be noted that I found further that the second defendant exaggerated in some respects; for example, his evidence as to hearing the screeching of tyres several chains away, and also his evidence as to his financial losses as a result of the accident. It is not surprising that he has not offered any documentary proof of his losses.

Figures cannot be plucked like a bird from out of the air, and then thrown at the Court for acceptance. They have to be proven. They have also to be not too remote.

So far as the first named defendant is concerned, I find that the claim for the radio/cassette player and the pump is too remote. The plaintiff cannot be held liable for thievery by citizens at a police station. Her other claims totalling $3,850.00 are allowed.

In relation to the particulars of special damages suffered by the second named defendant, the claims for transportation, medical and laboratory expenses, and for damage to his clothes are allowed. I also accept his evidence of having to employ extra help at a total of $300.00 per week for twelve weeks, the period of his incapacity as certified by the doctors who attended him. The claims for loss of earnings and lost goods and lost groceries have not been proven.

In closing, I should say that I find some humour in the claim for special food and nourishment. It may well be that milk and eggs ought to have been part of the second named defendant's diet in any event. If he had had to take an extra amount, surely that would have been balanced by a reduction in the intake of other foods. I can see no loss there. It is more likely that his body has gained in nourishment.

So far as his injuries are concerned, I think that a sum of $10,000.00 is adequate considering the nature of the injuries, the period of incapacity and the fact that there has been no permanent disability.

Judgment is entered for the defendants against the plaintiff as follows:

For the first named defendant

Special damages: $3,850.00 plus interest at 6% from September 19, 1989, to January 20, 1993.

For the second named defendant

Special damages: $5,855.00 plus interest at 6% from September 19, 1989, to January 20, 1993.

General damages: $10,000.00 plus interest at 6% from the date of the service of the writ to January 20, 1993.

Costs to the defendants are to be agreed or taxed.