IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C/L T.106/89

BETWEEN	**RUBY TEAPE**	**1ST PLAINTIFF**
A N D	**JAMES TEAPE**	**2ND PLAINTIFF**
A N D	**LEON WHITWORTH**	**DEFENDANT**

Miss Nancy Anderson and Miss Michelle Brown attorneys-at-law for the plaintiffs instructed by Messrs. Crafton S. Miller and Co.

Mr. Norman Samuels, attorney-at-law for the defendant.

HEARD: 12TH, 13TH, 14TH,15th, OCTOBER, 1999

AND 13TH SEPTEMBER, 2000

RECKORD, J.

This suit for negligence arises out of a motor vehicle accident which occurred as far back as the 18th of August, 1987, when a motor truck owned by the 1st plaintiff and driven by her son the 2nd plaintiff, collided with a truck owned and driven by the defendant along the Yallahs main road in St. Thomas.

Two years later the plaintiffs' writ was filed on the 30th of August 1989. The defendant entered appearance on the 18th of December, 1989 and the plaintiffs' statement of claim was filed on the 18th of April, 1990. On the 21st of May, 1990 the defendant filed his defence and counter claimed for negligence against the plaintiffs and the defence to the counter claim was filed by the plaintiff on the 28th of May, 1990.

After this sluggish start the matter was set down for trial on four different occasions between 1992 and 1994 which was not reached. Thereafter, the parties seemed to have gone to sleep as the records do not disclose that anything was done until five years later in October, 1999 when it came before me.

THE PLAINTIFFS' CASE

The first plaintiff Mrs. Teape visited the scene of the accident which was near mile post 13. There she saw the engine and body of her truck. She went to the Yallahs Police Station and saw the cab of her truck there. She next went to the Princess Margaret Hospital where she saw her son, the 2nd plaintiff. His face was bandaged also the whole of one leg.

The truck had been used for haulage on a daily or weekly basis. She could earn $8,500 per week for jobs done by the truck. She referred to a number of receipts shown to her for jobs done by the truck. She had the damage to the truck assessed. She was claiming $35,000.00 for the salvage value and paid $308.00 to Motor Insurance Adjusters. She also paid $600.00 to Ken's Auto Repairs for Wrecker fees.

James Teape told the court that in August, 1987 he was the driver of his mother's truck. He was paid $2,000.00 to $2,500.00 per week and sometimes an additional $1,500.00 for outside jobs. On the 18th of August, 1987, about 4 am he was driving the truck from Linstead in St. Catherine to Seaforth in St. Thomas. One Mr. Cecil Buchanan was sitting in the front with him. It was a 3 ton Bedford cab over, metal body truck, right had drive, 4 speed forward, hydraulic air brake.

Shortly before the accident Mr. Teape was driving the truck on the left hand side of the road at about 20 miles per hour on asphalted roadway. The two headlamps were turned on. He had just finished the brow of a hill and started negotiating a left hand corner when he saw the 2 lights of an oncoming truck. They both dipped their lights and passed each other. Immediately after that "I saw a shadow behind the next truck. I

realized it was another vehicle behind it without light. He was partially on my side. I tried to shadow my brakes and pulled over a little bit to embankment on the left side and there was the crash. My front cab, the right hand side, was hit. I realized after the accident that it was a truck".

The driver got injured, blood was all over his face. His truck swung over to the right as the right front wheel had been hit off. The truck stopped on the right hand embankment. He was pinned inside his truck. He never saw what happened to the other truck. The front of his cab came in and pinned his foot. The front panel cut his face. Mr. Buchanan assisted in prizing away the panel that was holding his foot. He came out the truck and lay on the bank.

There was a continuous white line in the middle of the road, no street lights, in the area. There was one embankment about 3 feet high, no soft shoulder. He could go no closer to the embankment. Road at point of impact was about 18-20 feet wide, his truck was on the left side of the road when hit.

Mr. Teape suffered a broken right leg in the accident and admitted to the Princess Margaret Hospital. The injury to his face was stitched from above his right eye down to his lip. His right eye was bandaged, got stitches to right side of his nose. His leg was put in a cast from the bottom of his foot up to his hip. He spent 2 to 3 weeks in the hospital and obtained a medical report.

Mr. Teape was sent to the Kingston Public Hospital for observation of his right leg. After discharged from hospital he had to return for treatment for face and leg injuries. He saw Professor Sir John Golding about his leg. Dr. Emran Ali also treated his leg and Dr. Hugh Vaughn treated his eye. Since the accident Mr. Teape can't see out of his right eye and it was now smaller than the left. (Four medical reports were admitted in evidence).

Mr. Teape said the cast was on his leg 2 to 3 months. Up to now his right leg is not back to normal as it was before and it was now shorter than the left. He was not able to bend down or stoop properly, he can't do any form of strenuous work; can't stand or walk for long. He can't now drive a motor vehicle due to injuries to his leg and eye.

Under cross-examination, Mr. Teape said his eyes were full of blood. He never saw the truck again after it hit him although he was conscious at all times. There was a corner where accident occurred. He could not see how far the truck was on his side as it was dark and incident happened quickly.

The body of the plaintiffs' truck fell off from the accident. The body was left on the spot when he left for the hospital. The right side of his cab was hit. The steering wheel came off. He never fell on the ground with the steering wheel and the steering column in his hands. They had left Linstead that night about 1 am and had not stopped on the way. The plaintiffs' truck was empty. He denied he was driving fast, he was travelling in 3rd speed. He denied he had taken the corner wide. He never had to swerve to get out of the way of the first truck. He was not driving on the incorrect side of the road. He never hit into the defendants' stationary vehicle. The defendants' truck never ended up on the embankment. After the collision the front of defendant's vehicle was over the plaintiff's side of the road while the back was on its correct side across the road. He denied that the head lights on the defendant's vehicle were flashing. The defendant's vehicle had no lights on the front at all. Defendant was not blowing his horn.

THE DEFENDANTS' CASE

Mr. Leon Whitworth, the defendant testified that he was driving his truck heavily loaded with jelly coconuts from Dalvey in St. Thomas going to Kingston in the early morning of the 18th of August, 1987. Another truck was travelling in front of him with market load. About 4 am he was approaching the 13th mile post driving on his left. The

defendant said he saw the vehicle before him going up a little hill to negotiate a right hand corner, then he saw this truck "dash further to the left". Then he saw another truck coming towards him, he kept further to the left and went on the bank. He could go no further because of a fire hydrant. During this time he flicked his light and blew his horn. All he could do was to shift out of his seat - a right hand drive vehicle. The oncoming truck hit the right side of his vehicle and "paste up the cab onto the body." His truck swung across the road and stopped by jamming on the right hand bank.

After the accident he saw the plaintiffs' truck on the right hand side towards St. Thomas and below his truck. To get out his truck he got assistance from one Mr. Walker who was sitting beside him. He saw the driver of the other truck on the embankment but never spoke to him. Shortly afterwards he was taken in a car to the Kingston Public Hospital where he was admitted. His right leg was broken; he was in lots of pain. He had cuts on his feet and his back was hurting him. He remained in the hospital for 7 to 8 weeks. His foot was put in traction and he was laying in bed with his foot up. This lasted for about 6 weeks. After he was discharged he got around on 2 crutches for about a year. He visited Dr. Dundas at Tangerine Place and obtained medical report from him and from Kingston Public Hospital.

As a result of Dr. Dundas' recommendation he was treated by a physiotherapist. Visited thereafter 36 – 37 times in Kingston. For each visit he paid $50. On one occasion he paid $60. His wife visited him in hospital. She paid about 50 visits. He returned to Kingston Public Hospital about 10 times for observation travelling by bus at $20.00 for each return trip. Travelling to therapist also cost him $20 for return trip.

The defendant said he was a haulage contractor with Eastern Banana Estates and paid his wife $200.00 per week. The truck was out of work for 1 year and 4 months. His contract with Eastern Banana Estates was suspended. When he returned working it

was for 3 days per week. He earned $1,200 per day. $600.00 per trip for market people and $1,000.00 for merchants goods.

The defendant was not fully able to drive when the truck was repaired, so he employed a driver at $350.00 per week. He used driver for about 35 weeks. He paid Mr. Lindo $11,470.00 for repairing his truck. He also paid $3,000.00 for purchasing a starter.

When cross-examined, the defendant said he was now 54 years old and was the holder of General CMC drivers license. His truck was bigger than the plaintiffs'. The truck was fully loaded with jelly coconuts but about 5 persons including his workers were on the back of his truck. When the accident happened he had not yet started the hill, but he was very close. He was travelling about 20 – 25 m.p.h. when the truck in front of him dashed to the left and he was following him up. He kept closer to the left, climbed the embankment and stopped. He denied embankment was about 3 feet high. It was no time after he stopped that his truck was hit. A small part of the body of his truck was damaged. He denied he was partially on the incorrect side of the road at time of the accident. He was not immediately behind the other truck. He had on his head lights. At point of impact the road was about 24 feet wide. He had measured it after he came out of hospital. He never examined either vehicle after the accident. The plaintiffs' truck stopped about 1 ½ chains away from his. His truck is right hand drive with fully air brake system. It was clear morning not raining. He had two workers on his truck and paid for gas oil and tyres. Workman was paid about half of what he paid driver.

The defendant said his wife came to the hospital to make his bed, clean him up, and change his clothes. He first employed a driver in November or December, 1988. About 2 weeks after the accident his truck was taken to Lindos' Garage where they started repairs but never finished it. About a year later his truck was taken to another garage in Prospect.

The defendants' wife Mable Whitworth testified that she visited defendant in the Kingston Public Hospital about 50 times. He was laying an his back with one foot in the air, sometimes she went two times per day. She visited him so many times because he could not help himself. She tided him, carried food and clothes for him and had to pay $20 per trip. She collected fees from higglers who travelled by defendants' truck and she was paid a fee of $200 per week.

Under cross-examination Mrs. Whitworth said that while she was looking after her husband she never took any of her food to sell. She admitted that there were nurses at K.P.H. when she visited the defendant.

Mr. Glen Newell testified that early morning in 1987 he was driving a truck to Kingston. The defendant's truck was about 3 truck lengths behind him. As he took a right hand bend he saw a truck coming down on his side. He turned away from it and stopped. He looked in his rear view mirror and saw this truck still continuing on the right hand coming down. He heard the two trucks crashed. He walked back and saw both drivers sitting on the embankment. Both were crying for injuries to their feet. He saw a steering wheel on the road. The defendants' truck was on the left hand side on the bank. The other truck was on the right hand side going to St. Thomas.

When cross-examined, Mr. Newell said his truck was loaded with dry coconuts, jelly coconuts and bananas. Just before the accident he was travelling up a straight grade at not more then 5 – 6 m.p.h.. His and defendant's truck were travelling together from Dalvey. He denied that the defendant's truck was immediately behind his. No white line was on the road. He denied that the plaintiff passed him on its correct side of the road. He had looked through the right mirror outside the truck. He never saw the crash; only heard it. He knew the defendant before the accident but not the plaintiff.

In answer to the court this witness said that each vehicle including the defendant's had an headlights. He never saw the defendants' vehicle being driven without lights that night.

Mrs Anderson applies to amend the statement of claim under particulars of special damages for loss of use:-

(a) 20 weeks @ $8,500 per week = $170,000.00

(b) Hireage contracts between 18.8.87 to 2.2.88 = $50,740.

Under special damages – 2nd plaintiff. - By adding loss of earnings @ $3,250 per week from 18.8.87 to 18.4.90 and continuing.

Mr. Samuels objects - special damages must be strictly pleaded and proved - no evidence to support amendment. Miss Anderson: pleadings can be amended at any stage of trial up to judgement.

This was the end of the defendant's case.

Judgement was reserved pending written closing submissions from both attorneys.

On reading over the notes of evidence recently and on reading written submissions of the attorneys I became aware that I made no ruling on the plaintiffs' application to amend their claim for special damages. I do so now.

In so far as the application to amend for loss of use of the truck is concerned that application is being granted in order to bring the pleadings in line with the evidence.

However, on the application to add a claim for hireage of haulage contractor and to add claim for loss of earnings of the 2nd plaintiff these are refused for the reason that the plaintiffs' attorneys could have made these applications over the past ten years which they failed to do. The doctrine of laches applies.

SUBMISSIONS

As agreed, at the end of the evidence, both attorneys submitted their closing submissions in writing. On behalf of the plaintiffs, Miss Anderson submitted that the defendants version of the accident was highly improbable especially where the defendant said his heavily loaded truck was stationary at the time of the impact and thereafter swung across the road without touching the water hydrant close to which he had stopped. She also referred to contradictions between the defendant and his witness, Mr. Newell, with reference to their speed, the flicking of lights and the blowing of horn.

On behalf of the defendant, Mr. Samuels contended that the second plaintiff's evidence was "less than frank and ought not to be believed on a balance of probabilities." He pointed out that in the his evidence, it was only after the accident he recognized that it was a truck that he collided with. He did not know which part of his truck was hit or what part of the other vehicle hit his. He had seen a shadow behind the front truck (Newell's) and later could give no account of the vehicle which hit him it seemed to have vanished. The plaintiff had failed to prove any of the particulars of negligence pleaded.

FINDINGS

It is acknowledged by both parties that in that area where the accident occurred there were no street lights. The drivers therefore had to rely heavily on the head lights of their vehicles in order to safely negotiate the winding road. The second plaintiff estimated the width of the road at the point of impact as 18 – 20 feet while the defendant claims under cross-examination he measured it and it was 'about 24 feet'. Neither party gave the width of their vehicle but it is generally accepted that the ordinary truck is not wider than eight feet. This means that both vehicles could pass each other quite easily

without an impact. Indeed, the plaintiffs' truck and Mr. Newells' did just that. Whatever happened thereafter, the second plaintiff claims that the defendant's vehicle was partially on his side of the road and without any lights. The defendant says otherwise - it was the plaintiff on his side. Then there was the crash although each driver took evasive action by going even closer to their left bank. How then did they ever meet?

The plaintiffs truck was a 3 – tons Bedford with metal body and was empty (without any load) and also travelling about 20 m.p.h.). The defendant's truck was bigger than the plaintiffs' and was fully loaded with jelly coconuts and travelling about 20 – 25 m.p.h.. Defendant was travelling behind Mr. Newell whose truck was also fully loaded but Newell says he was going about 5 – 6 miles per hour uphill just before the accident. This sounds more than a little absurd. The defendant and Mr. Newell had been travelling together from as far away as Dalvey , they had known each other before; they were both transporting jelly coconuts and both were going to Kingston. According to the defendant, just before the accident he saw Newell's vehicle going up hill and it "dashed further to the left" and he, defendant, was following him up. It was then he saw the plaintiffs' truck. It was at this time the defendant claims he did several things – He kept further to the left; flicked his lights, blow his horn went on the bank; stopped by the hydrant and shifted out of this seat. His vehicle was hit while it was stationary and this sent his loaded vehicle across the road and jammed it on the right hand bank. This sounds incredible. The small empty truck hit the larger fully loaded truck which was stationary and sent it across the road where it jammed on the bank.

In paragraph 5 of the counter-claim the defendant claims that his truck was "extensively damaged". In the particulars of special damage at paragraph 14, the cost for repairs of the truck amounted to $11,470.00 - labour $4,450 – parts $7,020.00. The defendant said in cross-examination that "a small part of the body of his truck was

damaged. By no stretch of the imagination could this be regarded as an extensive damage.

After carefully examining all the evidence and considering the written submissions, on a balance of probabilities I find for the plaintiff and further find the defendant to be wholly responsible. I accept the 2nd plaintiff's evidence that the defendants' truck was partially on his side of the road and was without head lights at the time of the impact. In my mind this accounted for the reason why the defendant was so closely following Newell's truck in order to get the benefit from his lights.

Accordingly, the defendant's version of the accident is rejected. This leaves to be considered the question of assessment of the plaintiffs' damages.

Special damages for the first plaintiff: as agreed - value of unit $35,000.00; assessors' fee $308.00, wreckers fee $1,300.00 = $36,608.00. Loss of use for 20 weeks at $8,500.00 per week - $170,000.00, granted on application to amend = $206,608.00.

Special damages for second plaintiff - Medical reports $880.00.

GENERAL DAMAGES

This claim relates to the second plaintiff only: There were medical reports from four doctors which were admitted in evidence by consent. Dr. Soe Win, the resident medical officer for the Princess Margaret Hospital found that he suffered a fracture of the right tibia, and lacerations to the right knee, upper lip, right side of nose and forehead. The lacerations were sutured and plaster of paris applied to the fracture. The plaintiff was later referred to the orthopedic clinic and suffered a disability of about 10%.

Dr. Emerson Ali saw the second plaintiff on the 7th September, 1987. X-rays confirmed there was delayed union. A new above knee plaster cast was applied.

Professor Dr. John Golding examined the second plaintiff on the 29th of April, 1992. He found a palpable lump of bone under the scar. There was 1/8 shortening and slight varus deformity at the fracture site. There was limitation of full flexion and

extension of the right knee. The ankle showed some stiffness with no dorsiflexion and only about 25 degrees of planter flexion present. He had a severe right ptosis with multiple fine scars around the inner side of the right upper eyebrow, forehead and inner side of the nose on the right side. He had a permanent impairment of 24% of his right lower extremity equivalent to a whole person impairment of 7%.

Dr. Hugh Vaughan consultant ophthalmologist saw the second plaintiff on the 16th of March, 1992. There was partial ptosis (drooping) of the right upper lid occluding the pupil. The optic nerve was atrophic and the retina was scarred at the macula of the right eye. The doctor formed the opinion that the plaintiff was functionally blind in the right eye from injuries sustained in the 1987 motor vehicle accident. The droop of the right brow gives the appearance of a partially closed eye and is also due to the same accident. The blindness to the right eye is permanent and irreparable. This blindness represents 45% loss of total visual function. The drooping can be corrected by surgery at an estimated cost of $25,000.00.

CASES

Counsel for the plaintiff referred to three cases where awards were made in the Supreme Court with respect to disability arising to the fracture of a leg **C/L E053/86. Edwards vs. Browning** (Khans, volume 3, page 238 **C/L G.083/86 Stewart vs. Isaacs**. Khan's volume 3, page 57 **C/L M097/88 Manning vs. DeSouza Harrison's** assessment of damages page 213. Save for the loss of sight, the other injuries in these three cases are more serious then in the instant case.

Counsel submitted a list of some 6 cases where awards were made for loss of sight in one eye over the period December, 1989 to July 1992. These awards, when updated, range from a low of $295,000.00 to high of $710,000.00.

Using these cases as a guide a global figure for plain and suffering and loss of amenities to cover the plaintiffs' injuries would be an award of $1.5 million.

For surgery to correct his drooping eyelid, the award of $20,000.00 is made.

The question of loss of future earnings arises under the heading of general damages. It is to be noted that no claim was originally made for loss of earnings under special damages, perhaps through an oversight. Application to amend to include this claim was refused. However under general damages, loss of future earnings must be considered. He is no longer working as driver because of loss of sight and fracture of a leg. His counsel quite correctly pointed out that the plaintiff has a duty to mitigate his loss. There is no evidence of any effort on the part of the plaintiff to mitigate.

This plaintiffs' age was not given. On his evidence he earned between $2000 to $2500 per week and a further $1,500 per week if he did any outside job. He always lived at home and he never had job outside the family. I assume he was not over 26 years when he testified. Counsel suggested a multiplier of ten. His annual salary at $2,000 per week - $2,000 x 52 = $104,000; for 10 years. = $1,040,000.00; less ¼ for immediatecy of payment ($1,040.000) - $260,000.00) = $780,000.00.

In summary, there is judgement for the first plaintiff on the claim and the counter claim with special damages assessed at $206,608.00. Special damages on the second plaintiff assessed at $880.00. General damages assessed in favour of the second plaintiff for pain and suffering and loss amenities, - $1,500.000.00. For corrective surgery $20,000.00. Loss of future earnings $780,000.00.

On special damages, there will be interest at the rate of 6% per annum from the 18th of August, 1987 up to date of judgement.

Interest on general damages at the rate of 6% per annum from the date of service of the writ up to the date of judgement. Costs to the plaintiff on the claim and counter claim in accordance with schedule A of the rules.