IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1989/T115

BETWEEN	IVAN THEODORE TULLOCH	PLAINTIFF
AND	ESSO STANDARD OIL S. A. LIMITED	FIRST DEFENDANT
AND	STUART MARSTON	SECOND DEFENDANT

Ms. Janet Stanbury and Miss Marjorie Shaw for Plaintiff.

Miss Hilary Phillips and Miss Carol Davis for Defendants.

HEARD: NOVEMBER 21, 22, 23, 1990.

CORAM: WOLFE J.

This action is grounded in negligence and arises out of a motor vehicle accident, which occurred on the 23rd day of September, 1988. The locus in quo is the dual carriage way along the Rockfort Road in the parish of Saint Andrew.

The plaintiff, a retired Railway Clerk formerly employed to British Railways in London, resides at 19 Camrose Drive which is situated along the road leading to Bull Bay, St. Andrew. He is seventy (70) years of age. As he ascended the witness stand to testify he presented an image which epitomized integrity, truth and honesty. The image presented was no misrepresentation. This was supported by the frank and honest manner in which he gave his evidence, making concessions which favoured the defence. Needless to say I was very impressed with him and found that he was a witness who was the very quintessence of truth and one upon whom the court could unhesitatingly rely.

The veteran Mr. Tulloch testified that on the 23rd day of September, 1988 he alighted from a bus, which was proceeding towards Kingston, along the southern section of the dual carriage way in the vicinity of Harbour View Housing Scheme. Exercising due care he crossed the southern section of the carriage way onto the island or to use his word the "green" which divided the southern section of the carriage way from the northern section.

As he stood on that middle strip he looked left and with unimpaired view, along the straight piece of road, for a distance of some five to six chains he could see to the Cement Factory. There was no vehicular traffic on that section of the dual carriage way, save and except a bus which was parked on the left hand side of the carriage way as one looks towards St. Thomas. The bus was parked slightly off the paved area of the roadway. Having thus assured himself that it was eminently safe to cross the northern section of the carriage way he set out so to do. With all the candour in the world he said "As I was crossing I was not looking to my left." Understandable indeed. He had satisfied himself that there was no other traffic on the roadway for a distance of some 5 - 6 chains, save the parked bus which had been loading passengers. The plaintiff, continuing the narrative, stated that he was crossing about a distance of 1 chain away from the bus and on reaching a point which would be "in front of the bus" and about one chain away, he could remember nothing more.

On regaining consciousness he found himself in a car at the corner of Charles and Princess Streets. He was admitted to Kingston Public Hospital. The plaintiff said his body was numb. On regaining his sense of feeling he felt pain in the lower portion of his body from his hips downwards. He had a laceration extending from the front to the back of his head. He was transfused with a unit of blood and a unit of plasma. The injury to his head was sutured. Twenty eight (28) stitches were necessary to close the wound. He received a cut on his right knee which required eight (8) stitches. Another cut on his right shin bone required six (6) stitches. After a period of twelve to thirteen days he was released from hospital.

Upon his release from hospital he was "feeling quite wobbly" and he felt very weak. He experienced difficulty in controlling his legs. Because of his condition he required the use of a wheel chair upon discharge from the hospital. Notwithstanding his condition, the plaintiff expressed the view that he was recuperating reasonably well until he observed that in attempting to put a spoon in his mouth his hand would end up to the side and back of his neck. His condition worsened. He was unable to balance when walking and he would fall down and was unable to pick himself up when he fell. His family physician Dr. Ken Yuk referred him to Dr. John Hall, neurologist, who in turn referred him to Mr. Randolph Cheeks F.R.C.S. Consultant Neurosurgeon.

A CAT head scan revealed that the plaintiff had developed a chronic sub-dural haematoma, which is a recognised complication of delayed onset which is known to develop in some patients some weeks after apparently recovering from a head injury. The condition existed on both sides of the head overlying the cerebral hemispheres and causing significant brain compression. Emergency surgery was performed to evacuate these life threatening sub-dural collections of blood and blood clot. The paralysis to his left limbs subsided after surgery. He was discharged from St. Joseph's Hospital on the 23rd day of November after a period of eight (8) days.

Mr. Cheeks F.R.C.S. in his medical report which was admitted into evidence, by consent, as Exhibit 1 concluded.

> "This man suffered multiple injuries with involvement of the head, the left hip area and the right knee. The bruising and laceration of the left hip area is healed but he is still experiencing symptoms from the acute sprain of his arthritic right knee. The life threatening complication of bilateral chronic subdural haematomata has been successfully treated surgically, but there remains a theoretical risk of 10 percent of epilepsy developing as a late sequel. There is no evidence of intellectual loss or personalty change.
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> This subject is considered unfit to carry out his normal occupation from 23rd September, 1988 and is at present not considered sufficiently recovered from the effects of his injuries to resume working."
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> This report is dated the 3rd January 1989.

The plaintiff appeared in court walking with the aid of a stick. He had to sit to give evidence. He is no longer able to pursue his past-time of "Angling," to quote him. He is no longer able to do his own gardening and he is unable to pursue his post retirement occupation of rent collection on behalf of two of his overseas friends.

Having lived in England for a considerable period of time he seemed to have developed and enjoyed the habit of walking. He is unable to enjoy this pleasure any longer.

Barbara Johnson, assistant manager of operations at the New kingston Branch of Mutual Security Bank Limited testified that sometime between 8:30 a.m. and 9:30 a.m. on the 23rd of September, 1988 she was on her way to work. On arriving at the junction of Seashore Place and the northern section of the dual carriage way at Harbour View she stopped, looked right and observed a car approaching from Kingston at a very fast rate of speed. She estimated that the car was travelling in excess of 50 m.p.h. As soon as the vehicle passed her she heard the screech of tyres and on looking to her left she saw a man spinning in the air. He fell to the ground. The car was in the middle of the northern section of dual carriage way. She drove onto the southern section of the carriage way, parked her vehicle and went to where the man had fallen. Worthy of note is that when the vehicle was in the act of passing her it was straddling the white line which is in the middle of the carriage way.

Under cross-examination she denied that the car was travelling at 40-45 m.p.h. in the right lane. To quote her, "If it had been travelling at 40-45 m.p.h. when I saw it I would have been able to cross the northern section of the carriage way onto the southern section before it reached to where I was." So it can be safely said that she did not attempt to cross because of the speed of the oncoming vehicle.

I regard Miss Johnson as an independent witness and also a witness of truth. She did not hear the car blowing its horn.

The second defendant Mr. Stuart Marston, the driver of the car, gave evidence and stated that he observed the plaintiff standing on the Island when he was some 130 feet away. He blew his horn and removed his foot from the accelerator pedal and on reaching approximately 100 feet from the plaintiff he stepped off theisland into the road. The second defendant applied his brakes but to no avail.

The second defendant was far from impressive as a witness. He displayed an air of uncertainty as he testified. Under cross examination he had the following to say -

"When I blew my horn and took my foot off the accelerator
I was about 20 ft. from the plaintiff"

Pressed further he said -

"I travelled 20 feet after I blew my horn and removed my foot from the accelerator before I applied my brakes."

Pressed still further he said -

"I was about 100 - 110 feet from plaintiff when I blew my horn and took my foot from the accelerator".

And finally

"I was about 130 ft. away from plaintiff when I blew my horn and took my foot from the accelerator."

The second defendant agrees that a bus was present on the carriage way but he says that the bus was moving.

To crown it all the second defendant testified that when he hit the plaintiff he was in the act of overtaking the moving bus and that the front of his vehicle was slightly ahead of the bus. As a matter of fact he said that when plaintiff stepped off the island to cross the carriage way both vehicles were abreast of each other with the front of his vehicle slightly ahead of the bus. So the court is being asked to believe that this plaintiff a man with a 20/20 vision stepped from the island to cross the carriage way when both lanes of the carriage way were occupied with two vehicles travelling abreast of each other.

I reject the defendants version of how the accident happened. I find that the defendant hit the plaintiff whilst the plaintiff was travelling in the left lane of the northern section of the dual carriage way. Having used that particular stretch of road on numerous occasions I estimated that section of the road to be about 20 - 22 feet wide.

It is clear that in passing the parked bus the defendant was not keeping a proper look out and did not see the plaintiff in the left lane and collided with him. I am satisfied that the second defendant could have avoided the accident by swerving to the right lane which was unoccupied at the time when he became aware of the plaintiff. Instead he applied the brakes suddenly and the car skidded and hit the plaintiff.

The plaintiff's act of crossing without looking left as he crossed was in my view not a contributory factor in causing the accident. If it was so

negligible as to be disregarded. The damage to the vehicle was to the right hand. A post and right front section of the car. This the defence says is potent evidence that the plaintiff was hit as he stepped from the island onto the right lane of the dual carriage way. With this I disagree. I find that the damage occurred to the right side of the vehicle as the car skidded onto the plaintiff.

I reject the evidence of the second defendant that the accident occurred at about 11.00 a.m. I find that Miss Johnson was a witness to the accident which occurred between 8.30 a.m. and 9.30 a.m.

In respect of Miss Johnson's evidence that she did not observe the bus on the carriage way I regard this as understandable. Miss Johnson was parked at the T junction, intending to go across to the southern carriage way to proceed to Kingston. She looked right, the only direction from which traffic ought to be proceeding. On hearing the screeching tyres she looked left and saw the plaintiff "spinning in the air." She then drove across to the southern carriage way parked her car and went to see what had happened. On her arrival at the point of impact a crowd of persons had already gathered. She did not remain at the point of impact for long. It is obvious that Miss Johnson would have been pre occupied with the man who was lying on the ground. It is therefore understandable in the circumstances that she did not observe the bus.

On the question of negligence Miss Davis submitted that the failure of the plaintiff to use the nearby pedestrian crossing is evidence of negligence on his part. She cited and relied on Adamson v. Roberts (1951) 101 EJ. 511 (Ct. of Sess., Scot). In that case "the plaintiff began to cross the road near a road junction and not far from a pedestrian crossing which had a central refuge. He threaded his way through the north bound traffic, which was stationary and then stood in the middle of the road just over the centre line looking to his left for any approaching south bound traffic. Whilst standing there he was struck from his right by a motor cycle ridden by the defendant, who was travelling north overtaking the stationary vehicles. The County Court judge held the defendant wholly to blame rejecting, inter alia, a suggestion that the plaintiff was negligent in not using the pedestrian crossing."

Held On Appeal: "The plaintiff was not negligent in failing to use the pedestrian crossing but he was negligent in taking on himself the hazard of being marooned in the centre of the road at the mercy of on-coming traffic instead of crossing where there was a central refuge. He was 25% to blame. A pedestrian who elected not to use a crossing took upon himself a higher standard of care."

The cited case is readily distinguised from the instant case. In the cited case the plaintiff failed to use the pedestrian crossing whilst there was traffic on the roadway, albeit stationary, and then stood in the middle of the road like a lost sheep. In the instant case the plaintiff whose evidence I accept as true, was crossing the roadway when there was no vehicular traffic on the roadway except for the parked bus. He was not standing in the middle of the road and looking around. He had crossed onto the left lane when he was struck. The second defendant had he been keeping a proper look out could have avoided him by driving in the right lane which was wholly unoccupied. I find that the second defendant's manner of driving was the sole cause of the accident.

Re Damages

On the question of Special Damages the medical expenses of the Plaintiff were agreed at Thirteen Thousand Two Hundred and Fifty Seven Dollars and Sixty Seven Cents ($13,257.67). The plaintiff testified that he paid Forty Dollars ($40.00) by taxi to take him home after his discharge from hospital and that he paid 4 - 5 visits to the hospital after his release, each visit costing One Hundred and Twenty Dollars ($120.00). I accept that as true and award the plaintiff the sum of Six Hundred and FORTY Dollars ($640.00) for transportation expenses.

With regard to general damages Miss Davis for the defendants cited and relied upon C.L. 1979/M185 Louis Mullings v. Atlanta Traders and Merrick Alexander reported in Khan's digest of Recent Personal Injury Awards made in the Supreme Court of Jamaica Volume 1 at page 159 in which an amount of Twenty Five Thousand Dollars ($25,000.00) was awarded for pain and suffering and loss of amenities in 1981. She stated that the award of Twenty Five Thousand Dollars ($25,000.00) would be equivalent to Eighty Five Thousand Dollars ($85,000.00) in today's money. Continuing, she urged that the injuries

in the cited case were more serious than those in the instant case and consequently, she submitted that an award of Forty Two Thousand Dollars ($42,000.00) would be adequate compensation for the plaintiff.

Mrs. Stanbury for the plaintiff cited and relied upon an award made in C.L.1985/C447 Cunningham v. McKenzie et al (unreported) in which the plaintiff suffered -

1. A blow to the skull.
2. Abrasions to forehead and nose
3. Subdural haematoma
4. Cerebral concussion.
5. Cranial fracture.
6. Loss of consciousness.
7. Nose bleeding.

For pain and suffering and loss of amenities the court awarded Four Hundred Thousand Dollars ($400,000.00). The plaintiff was 78 years of age.

I take the view that an award of Four Hundred Thousand Dollars ($400,000.00) in the instant case would be excessive but that Forty Two Thousand Dollars ($42,000.00) would be far too low.

In the circumstances of this case I make an award of Five Thousand Dollars ($5000.00) for loss of amenities to compensate the plaintiff for the deprivation in enjoying his past-time of Angling and Gardening. In an age where a number of elderly persons walk to keep fit and thus enjoy a healthier life, the inability of the plaintiff to indulge himself in this habit is also taken into consideration in the award for loss of amenities.

For pain and suffering I make an award of Ninety Five Thousand Dollars ($95,000.00)

Accordingly there will be judgment for the plaintiff against both defendants as set out hereunder.

Special Damages

Medical Expenses	-	$ 13,527.67
Transportation Expenses	-	$ 640.00
		$ 14,167.67

Brought forward		$14,167. 67
General Damages		
Loss of Amenities	-	$ 5,000.00
Pain and suffering	-	$ 95,000.00
		$114,167.67

Interest of three percent (3%) on Special Damages from 23rd September, 1988 to 23rd November, 1990.

Interest of three percent (3%) on General Damages from the date of the service of the writ to 23rd November, 1990.

Costs to be taxed if not agreed.