NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W 101 OF 1990

BETWEEN	RONALD WEBB	PLAINTIFF
A N D	ANTONIO RAMBALLY	DEFENDANT

Mr. Ainsworth Campbell for Plaintiff

Mr. Gordon Robinson & Mr. David Henry instructed by Nunes Schofield DeLeon & Co. for Defendant.

Heard: June 14, 15, 16, 28, 29, & November 18, 1994

JUDGMENT

Theobalds, J.

By Writ of Summons dated 25th day of April 1990 the plaintiff claimed to recover damages for negligence arising out of a collision between a pedal bicycle he was riding along Bay Farm Road in the parish of Saint Andrew and a motor vehicle owned and driven by the defendant. The plaintiff is claimed to have sustained severe bodily injuries; details of these injuries, as particularized in the amended statement of claim, included -

i) Head injuries with unconsciousness.

ii) Brain damage.

iii) Fracture to the neck.

iv) Fracture of the left hand.

v) Fracture of the left tibia and fibula and femur.

vi) Injuries to head, neck, right forearm and both lower limbs.

vii) Tenderness in neck on both sides aggravated by movements.

viii) Pain and swelling on neck over the posterior aspect.

ix) Two small puncture wounds to the forehead.

x) 3 cm. laceration to the chin.

xi) 4 cm. laceration over the anterior aspect proximal third of the leg.

xxi) Exposed tibia bone through a wound to midshaft of the left leg.

xiii) Deformity of the midshaft of left leg.

xiv) Liner fracture of the accipital bone.

xv) C/spine with loss of normal lordisis.

xvi) Fracture of the right forearm with displacement of the ulna.

xvii) Persistent headaches and pains in the neck, chest, left shoulder and forearm.

xix) Dizzines.

xx) Scars over the right wrist.

xxi) Scars to the right knee joint area and spreading medially to the head of the tibia and on the left mid shin area.

xxii) Bursts of delta slow wave activity and sharp wave complexes in the frontal areas bilaterally, in the temporal area and the right parietal accipital area.

xxiii) Post traumatic epilepsy.

xxiv) By reason of the Plaintiff's serious injuries, there is prognosticated the:-

a) Development of overt seizure disorder;

b) Development of post traumatic Alzheimer disease;

c) Development of post traumatic Parkinson's disease;

d) Development of personality changes of a billingerent aggressive combative type.

xxv) By reason of his injuries the Plaintiff will be handicapped in social intercourse, the earning of a living and the proper care of himself.

xxvi) Ten percent (10%) permanent partial disability of the right limb and ten percent (10%) permanent partial disability of the lower limb.

xxvii) Impairment of recent memory amounting to 15%.

The items No. (vi) through (xxvii) underlined were added by way of an undated amended statement of claim filed on the 15th day of January 1993.

The defence filed was the usual denial of negligence on the part of the defendant's driver and additionally there was an allegation of contributory negligence on the part of the plaintiff. There was some vacillation in the pleading as to whether the plaintiff rode a pedal cycle or a motor cycle and

as to whether the incident took place in daylight or at night; as there were no such suggestion(s) put by way of cross-examination of the plaintiff I accept the plaintiff's evidence on both these issues. I found that the plaintiff was riding a pedal cycle and that the incident took place at about 4:30 p.m. Also no evidence having been called by the defence to support the particulars of negligence on the part of the plaintiff alleged in the defence I proceeded on the basis of no contest on liability. I will therefore treat the matter as a plain assessment of damages with such apportionment as I find justified by the plaintiff's version.

On the plaintiff's account there can be no issue as to some of the particulars of negligence alleged on the defendant's part. I find that the defendant:

a) Failed to keep any or any proper look out.

b) Failed to have any or any sufficient regard for other users of the road including the plaintiff.

c) Failed to stop, brake, slow down, swerve or otherwise manoeuvre to avoid the collision.

d) Drove on the incorrect side of the road.

From the same plaintiff's evidence however I find an element of contributory negligence on his part clearly established. It would seem to me that one need do no more than look at the definition of negligence laid down from as far back as Blyth v. Birmingham Waterworks Co. (1856) 11 EX. at p. 784 viz "doing something which a prudent and reasonable person would not do or the omission to do something which a prudent and reasonable person would have done." Added to this basic definition there are further concepts of the duty owed by all users of the road to other persons using the road. This duty extends to all persons including pedal cyclists or pedestrians not only to avoid injury or loss to other persons but also to take reasonable steps to avoid injury to oneself. Sadly this particular concept is frequently ignored. As a result one observes in these Courts and on the streets so many cases of want of reasonable care on the part of the injured party being a contributing factor to many cases of serious injuries and often fatalities which form the frightening statistics of today.

This plaintiff painted a scene in which in broad daylight he saw the defendant's bus approaching from a distance of some five chains away. He was then about one foot from his left sidewalk. Before the impact he describes himself as being a young, strong, alert person some 18 - 19 years of age at the time. It seems that in those circumstances he was under a duty to do something to avoid the consequences of this impact. He did do something; he moved some six inches closer to the left sidewalk and so remained till he was hit by the right front of the bus. On my view of these facts the plaintiff ought to have done more than move six inches to his left to escape the consequences of serious injury to himself. He had ample time in which to do so. He could not know whether the bus was out of control, whether the brakes had failed, the steering cut or the driver had a stroke, but the fact that he moved at all demonstrates his awareness of approaching danger. The criminal law puts it this way albeit in relation to driving rules governing the operation of motor vehicles:

> ".... it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other vehicle from the duty imposed on him by this sub-section."

See Sec. 51 of the Road Traffic Act. In civil law the duty of course, is not quite so high. The Law Reform (Contributory Negligence) Act states:

Sec. 3(1)

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recovered in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage.

In Davies v. Swan Motor Co. (Swansea Ltd.) [1949] ALL ER 600 at p. 632 Lord Denning interpreted the correspondence section of the English Counterpart to this Act and stated that the Act, -

> seemed to contemplate that if the plaintiff's own fault was one of the causes of his injury, his damages were to be reduecd by the same amount as against any of the others whose faults was a cause of his injury, whether he sued one or more of them, and they bore the amount so reduced in the appropriate proportions between themselves. Whilst causation was the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, the amount of the reduction was such an amount as might be found by the Court to be 'just and equitable' having regard to the plaintiff's 'share in the responsibility' for the damage. That involved a consideration not only of the causative potency of a particular factor, but also of its blame-worthiness.

A finding of contributory negligence is independent of the existence of a duty of care of a pedestrian towards other users of the road. He is entitled to use the road whenever he likes providing he takes reasonable care for his own safety. Tremayne v. Hill [1987] R.T.R 131. In Nance v. B.C. Electric Railway Co. Ltd. [1951] 2 ALL Er 448 the appellant brought an action for damages against the respondent company with respect to the death of her husband, who was run into by a street car and killed instantly while crossing the street. It was held that when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care to his own injury. This is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Generally speaking, when two parties are so moving on the public roads in relation to one another each party owes a duty to avoid the consequence of a collision. Each owes to the other a duty to move with due care and this is true whether one is on foot and the other is controlling a moving vehicle.

In Chapman v. Post Office [1982] R.T.T 165, the plaintiff was standing on the curb when the wing mirror of the defendant's car hit her. The Court held that she was not negligent even if she had leaned out or had her back to the oncoming traffic, or went an inch or two into the roadway. The fact is she was legitimately standing on the curb.

This case is distinguishable from one where the plaintiff was actually crossing the road. In Williams v. Needham [1972] R.T.R 387, the plaintiff without looking in the direction of the defendant's approach, stepped into the path

of the defendant's car and was hit down. The Court held that the greater proportion of the blame lies on the plaintiff and the driver was one-third to be blamed for the accident. Similarly, in Hurt v. Murphy [1971] R.T.R 186 in giving judgment for the plaintiff the Court stated that while the substantial and real cause of the accident was the negligence of the defendant, the act of the deceased in not looking or not again looking to her left as she crossed the road constituted negligence by her and was of the probable causes of the accident. She was one-fifth to blame.

Although it is clear from my findings above that this defendant was primarily at fault, still the plaintiff by his own fault was one of the causes of the injury suffered by him. Fault is used in the wider sense of an ommission or failure. He failed to move out of the path of the uncoming vehicle when he had ample time in which to do so. His damages must be reduced accordingly. A clear message should be sent to pedal cyclist and pedestrians (the most vulnerable sector of the road users) that callous in difference for their own safety will not be condoned or encouraged by a full award of damages. Of course a timely reminder is that a motorist should also exercise reasonable consideration for pedestrians and cyclist. Total lack of consideration for other road users is fast becoming endemic in our society. This plaintiff's damages are accordingly reduced by 30%.
Where a man was part author of his own injury, he could not call on the other party to compensate him in full Per Denning in Davies v. Swan Motor Co. (1949) 2 K.B 191.

When the plaintiff was in the witness box I seized the opportunity to ask him a few questions. The intention was two-fold. First I wanted to know what explanation, if any, he had for the most unusual lack of interest in his own personal welfare. Secondly I could not understand the circumstances that could allow a young able-bodied person to sit on his cycle and allow himself to be hit by an uncoming vehicle when he could, perhaps with loss of dignity, have moved completely out of its path. Loss of dignity may be more serious to this plaintiff than loss of life and limb but this cannot be the view of the ordinary reasonable man. I shall return to this later on in this judgment.

In putting forward his case the plaintiff alleged a number of injuries details of which I have already set out. The records of the pleadings will show that on 25th April, 1990 a Writ of Summons and Endorsement was filed. It is not clear when the first Statement of Claim was filed but it appears that only item 1 - 5 of the Particulars of Injuries were included. Item (1) speaks of 'head injuries with unconsciousness.' The senior Orthopaedic Registrar at the Kingston Public Hospital Dr. Adolph Mera saw the plaintiff on admission; his evidence is that plaintiff was conscious when he came in, conscious throughout his first day of treatment, and conscious the next day when he received further treatment. The plaintiff said he was unconscious for two days after the accident. I find the plaintiff untruthful in relation to this. He was also untruthful when he said he was in hospital for about two months.

The evidence discloses that some two years after the Writ on 23rd March, 1992 the plaintiff was seen by Dr. John Hall. The plaintiff himself was not clear as to why he consulted Dr. Hall. His own words were "I think I went to Dr. Hall for pain all over my body and pain in my head." This was some two years after the incident. The plaintiff had spent some eleven days in the Kingston Public Hospital. He had been discharged from that institution with a follow-up appointment which he failed to keep. His explanation was that he could not afford the bus fare at the time "and after that he made no effort to attend his clinic and so up to today, expense being one of the reasons." Instead he claims that he paid Dr. Hall $3,500 "for his head" and there is an item of $3,400 as medical bill under his particulars of special damage. There is also evidence from the plaintiff that his "lawyer stood the expense eventually."

Because of the gravity of the prognostication (sic) advanced in the statement of claim filed on the plaintiff's behalf I have been obliged to do extensive research on "the development of seizure disorder, of post traumatic Alzeheimer's disease, of post traumatic Parkinson's disease, and of personality changes of a billigent (sic) aggressive combative type." I have also considered carefully the evidence of the eminent specialist in neurology who testified on behalf of the plaintiff.

Among the writings which I have consulted are - Taylor's Principles and Practice of Medical Juris Prudence and Schmidst's Attorney's Dictionary of Medicine. I do not propose to go into details as it is my view, that the plaintiff has failed to establish on a balance of probability or at all that all or any of these very reasons complaints could result from this accident. These complaints are almost always preceeded by a state of unconsciousness in the victim after the accident followed by retrograde amnesia.

The plaintiff has not been truthful as to his loss of consciousness. Unconsciousness is introduced merely to inflate his claim for damages. Additionally he is referred to as a ducoman, when his own evidence was "before accident I had never sprayed a vehicle." The witness, Dennis Williams was called presumably to establish that the plaintiff was 'handicapped in social intercourse, the earning of a living and the proper care of himself' (item xxv of the statement of claim). Mr. Williams confessed that he was asked for the first time to give evidence in this case on the day before he testified and he was speaking from his memory of nearly four years. The same neurologist who opined that the plaintiff may well develop avert fits, epilepsy, Parkinson's disease and alzheimeiners disease gave evidence and here I quote:-

"Comprehension	-	excellent
Similarity	-	well done
Multiplication	-	good
Past memory	-	good
Family test	-	did well

> These tests important in determining plaintiff's ability to function in real world. Plaintiff able to think well and his functions normal. His cranial nerves normal. This means he was fortunate not to have had such damage at time of his accident. It would seem plaintiff suffered no intellectual loss".

I now turn to an assessment of the damages suffered by the plaintiff. No loss of future earnings is contemplated. The plaintiff underwent a miraculous recovery. He was out of hospital in less than two weeks. He has use of his hands to do his job.

He is able to function normally. Headaches can be treated. I award him special damages for loss of earnings for 24 weeks from 12th March 1990 to 12th September, 1990 at $600. per week = $14,400.00

Medical bill	-	3,400.00	
General Damages pain suffering & loss of amenities	-	400,000.00	
Total:		$417,340.00	ess 30%
		$125,340.00	
		$292,540.00	

Judgment for the plaintiff for $292.540.00 with costs to be taxed if not agreed. Interest on special damages allowed at 3% from 12th March, 1990 and on general damages at 3% from the date of service of writ both to the date hereof.