JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO: 107 OF 1998

SUIT NO: C.L. B. 112 OF 1991

BEFORE: **THE HONOURABLE MR. JUSTICE HARRISON**
THE HONOURABLE MR. JUSTICE PANTON
THE HONOURABLE MR. JUSTICE COOKE (Actg)

BETWEEN	**MAURICE WHITTINGHAM**	**DEFENDANT/APPELLANT**
AND	**WINSTON EVERTON REID**	**DEFENDANT/APPELLANT**
AND	**CECIL BROOKS**	**PLAINTIFF/RESPONDENT**

Miss Hilary Phillips, Q.C. for the appellant
instructed by Nunes, Scholefield, DeLeon and Co.

Lawrence Haynes for the respondent
instructed by Vernon J. Ricketts.

10th, 11th, 12th, and 14th July, 2000; 6th April 2001

HARRISON, J.A:

This is an appeal from the judgment of Karl Harrison, J., on 10th July, 1998, entering judgment for the plaintiff for general damages in the sum of $1,500,000.00 plus interest from the date of service of the writ and special damages in the sum of $1,304,640.00, plus interest from 11th January, 1998, each award to be at 3% to 10th July, 1998, and costs to be agreed or taxed.

On 14th July, 2000, we allowed the appeal, and varied the order of the court below. We apportioned the liability and found the appellant to be 85% to blame and consequently, the respondent to be 15% to blame.

In substitution we ordered that there should be judgment for the plaintiff/respondent as to general damages, $1,500,000.00 reduced by 15% plus interest at 3% from the date of service of the writ, and special damages $359,640.00 reduced by 15% plus interest at 3% from 11th January, 1989, and costs to be agreed or taxed. As promised these are our reasons in writing.

The facts are that on 11th January, 1989, the plaintiff/respondent was driving his Volkswaggen motor bus along the Queen's Drive, Montego Bay on his left side of the road, with a car travelling behind him. A Lada motor car approaching him from the opposite direction slowed to a stop. A pickup truck owned by the first defendant/appellant and driven by the second defendant/appellant, in order to avoid running into the back of the Lada motor car moved over onto its incorrect side of the road, attempted to overtake the Lada motor car and hit into the side of the Volkswaggen bus damaging its right front door, right front window and right door panel, and severely injuring the respondent's right arm which was extending outside the right window of his motor vehicle. When the respondent had seen the appellant's pickup come onto his side of the road 20 - 40 feet in front of him, with his right hand outstretched, he signalled the motor vehicle behind him to slow down. He then swerved to his left and his motor vehicle came to rest with his left wheels on " ... a part of the soft shoulder", but there was then a further 4 to 5 feet of soft shoulder to his left.

The grounds of appeal, summarized, were that the learned trial judge was in error to accept the evidence of the plaintiff as truthful, in view of the

discrepancies in his evidence, the physical damage to the respective vehicles, to the contrary, and that the plaintiff contributed to his own injury by his carelessness, due to his positioning of his hand at the time of the collision. Counsel for the appellant argued the said grounds, maintaining that the learned trial judge should have found the plaintiff to have been contributorily negligent despite the fact that no details of contributory negligence were pleaded. The award of damages was excessive.

Counsel for the respondent argued that on the evidence, the finding as to liability should not be disturbed. The learned trial judge correctly found non-contribution in the plaintiff, both due to the pleadings and the state of the law, and the award was not excessive.

A defence of contributory negligence operates, if successful, to reduce the claim of a plaintiff, to the extent to which a court hearing the case, finds such a plaintiff to be at fault. Section 3 of the Law Reform (Contributory Negligence) Act, reads:

> **"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 recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

If a statutory defence is relied on by a party, such defence should be pleaded, and particulars thereof should be given.

In ***Fookes*** *v* ***Slaytor*** *[1979] 1* All ER 137, it was laid down by the Court of Appeal in England, that the defence of contributory negligence was only available if it was pleaded. The headnote reads:

> "**Held -** The defence of contributory negligence was only available if it was pleaded. It followed that in the absence of a pleading by the defendant of contributory negligence the judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff."

In East Coast Berbice Village District Council vs ***Shambool Hussian*** (1982) 31 WIR 250, Crane, C, relying, by analogy, on ***Snook*** v ***London and West Riding Investments Ltd*** [1967] 1 All ER 518, that failure to plead the defence of estoppel by conduct was not fatal to the defence, maintained that ***Fookes*** v ***Slaytor*** (supra) is distinguishable on its own facts. He said, at page 266:

> " ... if the court is satisfied on the material before it (as in ***Snook*** v ***London and West Riding Investments Ltd*** [1967] 1 All ER 518, i.e. of an estoppel by conduct) that the justice of the case is involved and must be attended to notwithstanding that there is no such plea, then damages may be apportioned regardless of the absence of the pleading."

I maintain that the latter view is correct. That being so, a fortiori where such a plea is expressly made, although the details of the plea are not specifically particularized, a court ought to act on it.

Paragraph 4 of the defence reads:

> "**4** The Defendants aver that the aforementioned collision occurred solely as a result of, or was contributed to by, the negligence of the Plaintiff.

PARTICULARS

(a) Driving at too fast a speed in all the circumstances;

(b) Driving on or unto the incorrect side of the roadway;

(c) Failing to keep close to his nearside of the road while negotiating a bend;

(d) Failing to have any or any sufficient regard to other users of the roadway;

(e) Failing to heed the presence of the First-named Defendant's vehicle driving along the said roadway;

(f) Colliding with the First-named Defendant's vehicle while it was lawfully on its correct side of the roadway;

(g) Failing to stop, slow down, swerve or otherwise manage or control his said motor vehicle so as to avoid the collision. (Emphasis added)

Consequently, the finding of the learned trial judge, that, "the submission of Mr Haynes is correct" that the details of the contributory negligence must be particularized cannot be supported on the facts and pleadings. In circumstances where the evidence reveals that the plaintiff contributed to his own misfortune by his own fault, the authorities, justice and common sense, demand that a court take such conduct into consideration.

In the instant case, the plaintiff/respondent said, inter alia, in examination:

> " ... car behind was trying to overtake me, I had my hand out signalling him to slow down ... (I)

> swerve over on my extreme left and my hand was resting on the door and he break up hand on the right door ... When pickup overtake Lada I tried to pull closer to the left."
>
> "I got hit on my right forearm. Both hands were not on steering wheel at time I got hit. My left hand was on steering wheel. My right hand was resting on door at time."

Having signalled with his right hand outside his vehicle the respondent then executed a manoeuvre with his left hand only, to swing to his "extreme left." His right hand was even then not on the steering wheel. The clear inference from this evidence is that there was some degree of nonchalance in the one-handed steering of his vehicle. In addition, his preference to have his right hand on the right window despite the dilemma created by the nature of the driving by the appellant, together should be seen as contributing to the cause of the accident. The respondent's Volkswaggen bus ended up with its left wheels adjacent to the left edge of the asphalt. Seeing that to the respondent's left was 4 to 5 feet of soft shoulder, a further inference is that the absence of his right hand on the steering wheel prevented him swerving further left to avoid the collision. In so far as the learned trial judge found, (at page 33 of the record of appeal) that,

> "It is my considered view however, that even if the mere statement that the plaintiff contributed to this accident is considered sufficient, I hold that the mere fact that he had his hand on the door would not be sufficient to constitute want of care for his own safety. In the final analysis, I find that the defendants are solely responsible for this accident."

cannot be supported on the evidence.

This finding of the learned trial judge, by regarding the evidence as insufficient "to constitute want of care for his own safety," omitted to consider that that conduct of the respondent failed to enable him to take further sufficient steps to avoid the accident, added to the dilema created by the appellant, and he thereby contributed to the accident. The learned trial judge was therefore in error.

Accordingly, this Court, on the authority of ***Watt (or Thomas)*** v ***Thomas*** [1947] 1 All ER 582, based on the evidence on the record, may properly conclude that the action of the respondent contributed to the accident.

The respondent sustained severe injuries to his right arm. He spent four days in the Cornwall Regional Hospital, where it was placed in a cast, three weeks in the Kingston Public Hospital and was also treated at the Medical Associates and St. Joseph's Hospitals where at the latter hospital an operation was performed. A further operation was performed by a doctor in Canada. A right handed person, he cannot now write or grip anything with his right hand. His wife has to button his shirt collar, tie his tie and shoe laces and his right arm is now smaller than his left and is deformed. Dr. Warren Blake, an orthopaedic surgeon, in his report stated, inter alia, (at page 35 of the record) that:

> " ... he has a damage to the brachial plexus. This is such as not to be amenable to surgery. His paralysis and loss of sensation will therefore be permanent.
> His total permanent disability is assessed at 50% of the bodily function."

Dr. Blake stated that the 50% permanent disability was based on the British standard, which he had changed to American standard in 1993, resulting in a change of rating to 60% of the whole person.

The case of ***Victor Campbell*** v ***Samuel Johnson et al*** reported at Volume 4 page 89 of Khan's Personal Injuries, relied on by the learned trial judge concerned a crushed right arm which was amputated. An award for pain and suffering and loss of amenities of $250,000.00 was made on 22nd March 1981. Using the consumer price index, that award, upgraded in March 1998, amounted to $1,006,000.00. In the instant case, although the respondent's right arm was not amputated its presence and retention by the respondent is no greater than aesthetic value. The respondent said at page 16 of the record):

> "I can do absolutely nothing with the right hand. It is completely gone."

For all practical purposes, the respondent's right arm is useless. Being right handed he has lost a major functional existence. There is no compelling reason to disturb this award. It is not inordinately high. It is a comparable award in the circumstances. The award of $1,500,000.00 general damages for pain and suffering and loss of amenities should stand. The award of US $36,000.00 for special damages reveals a mathematical error. The respondent said in evidence:

> "As a tour operator, I did two tours per day ... For one trip I charge US$150.00. For the day I made two trips. I worked 6 days per week.
>
> There are expenses, I charge US$180.00 per week for the tours. In the $150.00 per trip lunch is

> provided. My net earning would be US$1,000.00 per week."

Maintaining that a plaintiff must mitigate his losses, the learned trial judge found that a period of six months was reasonable during which the respondent was unable to operate his tour business. Six months loss of earnings amounts to 26 weeks at US$1,000.00 per week and totals US$26,000.00 instead of $36,000.00 as stated by the learned trial judge.

Although however, the period of six months was found to be reasonable by the learned trial judge, the evidence is that the respondent's Volkswaggen bus "was in use after the accident doing tours." He did have someone driving for him, but finding out that he was dishonest the respondent presumably ceased his business because he "could not find someone else." We are of the view that the respondent should have continued to employ someone to drive because of his own disability. He could have accompanied the driver on the tours. Although he stated that it would be uncomfortable "... to sit and supervise bus," Dr. Blake stated:

> "If plaintiff is a seated passenger in vehicle he should not have any difficulty."

The learned trial judge did not consider this aspect of the respondent's obligation to mitigate his losses. We are of the view that the respondent could have resumed his business within three months of the accident, because the nature of his business did not depend solely on his personal driving of the said bus. He could have employed a driver.

The respondent stated that he had "expenses" relative to the operation of his business. However, there is no evidence that he paid income tax. This

earning would attract a deduction of 25% for income tax on the basis of ***British Transport Commission*** v ***Gourley*** [1956] A.C. 156, [1955] 3 All ER 796.

The loss of earnings is therefore US$13,000.00. At the rate of exchange of J$36.00 to US$1.00 it would amount to $468,000.00. With the reduction of 25% for income tax, the true net earnings are $351,000.00.

The appeal is allowed in part, as to liability and as to damages. The judgment of the court below is varied.

Judgment is accordingly entered for the plaintiff, as to:

General damages	$1,500,000.00 plus interest at 3% from the date of service of the writ to 10th July, 1998.
Special damages	$359,640.00 plus interest at 3% from 11th January, 1989, to 10th July, 1998.

These sums payable to the plaintiff are to be reduced by 15% and costs of the appeal awarded to the appellants to be agreed or taxed.