ORAL JUDGEMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

HELD AT

BETWEEN	ROY WILLIAMS	PLAINTIFF
A N D	CARLTON WILLIAMS	DEFENDANT

Before The Honourable Mr. Justice Marsh

The 14th day of November, 1983

The 15th day of November, 1983

The 16th day of November, 1983

Apart from the interesting point arising on the medical evidence this case is, with respect, essentially a common-place negligence action. It raises a straight question of fact as to who was responsible for the collision which occurred on the relevant date. In that respect, it differs in no material respect from other such cases where the Plaintiff tells one story, the Defendant another, and it is almost impossible to reconcile the one with the other.

It has been said, perhaps apocryphally, that most accident occur while both drivers are on their correct side of the road and 2 inches away from their respective curbs!

In most of these cases there is usually some independent evidence to assist the Court - perhaps the police who attended the scene and took measurements, or, the nature of the damage to the vehicles and so on. In the instant case however, there is not a great deal of that, although the Plaintiff did call a supporting witness; but her evidence contradicts him, on a material particular to which I shall refer later. The result therefore is that, as is so often the case, the issue boils itself down to a matter of mere impression; a fact which in Jamaica is not without its problems because of our societal structure. I refer of course to the fact that in Jamaica the poorer classes always tend to have a more difficult time in litigation because (and I mean no disrespect) they are less articulate and, therefore, more readily confused by experienced

Counsel in giving their evidence. It is a fact of life which I expect most Judges in this country must bear in mind. It is however a matter of regret because no amount of understanding of the Sociological nuances of the society entitles a Court to put words in the mouth of a witness. Some of those nuances are present in this case and the result is that in viewing the matter as one of impression, I have no hesitation in stating that the Defendant made a better impression on me than did the Plaintiff, who came across as being slightly uncertain and confused about certain aspects of his testimony.

According to the Plaintiff, the accident occurred above the junction of the Golden River Road with the Above Rocks-Harkers Hall main road (I think he later changed his mind about this); he also said that there were no pedestrians on his side of the road. But Miss Rhone, his own witness, contradicted both of those material facts. She said that the accident occurred below the road junction and, that pedestrians were in fact standing on the Plaintiff's side of the road. So, incidentally, did the Defendant. The Plaintiff also said that the Defendant's car - "came right down on the wheel," but under cross-examination he changed that to say that "the car hit his back shock absorber." His Counsel Mr. Frankson very skilfully sought to diffuse this by inviting the Court to agree that this is the way Jamaicans so express themselves. I think however that the Plaintiff's second answer that the car hit his back shock absorber is more consistent with some of the other evidence in the case.

The Defendant said that he was coming up the road - left-hand corner to him, right hand corner to Plaintiff - approaching the Trade Training Centre and he slowed down to about 18 to 22 m.p.h., changed down to a lower gear and was quite close to his proper side of the road - he said 12 inches. He then saw the Plaintiff coming from up by the Golden River Road in the centre of the main road or slightly over on his the Defendant's side of the road when they both collided. Was the Plaintiff

near the centre or slightly over on the Defendant's side of the road? Both the Defendant and the Plaintiff's witness Rhone have placed a group of people under a breadfruit tree on the Plaintiff's side of the main road. The Defendant said they extended about 5 feet into the main road, Miss Rhone was less specific. However, even taking the Defendant's 5 feet as a mere estimate, the fact is that the Defendant and the Plaintiff's supporting witness suggest that the Plaintiff's path on his side of the road was somewhat obstructed. This being so the probability is that the Plaintiff, in order to avoid the obstruction of people standing in the road, swerved more to the centre of the road.

The other factor to be considered is the Plaintiff's own evidence that he had "lined himself up for the corner." There was some debate at the bar as to the meaning of that phrase. The tendency of a lot of people in this country to cut right-hand corners when driving on the highway is notorious and one which frequently emerges in the trial of negligence actions in this Court; it may well be therefore that the Plaintiff in "lining himself up for the corner" was, as Mr. Small suggested, cutting the corner which was, to him, a right-hand corner. However, I do not decide the case on the basis of any such notoriety because, I am satisfied, for the reasons already indicated, that the probabilities are that the Plaintiff did swerve more towards the centre of the road to avoid colliding with the students who were standing in his path as he came down the main road from the direction of the Rock River Road.

On a balance of probability therefore I have come to the conclusion that the Defendant's version of how the accident took place is more reliable than that of the Plaintiff's and where it conflicts with the Plaintiff's is to be preferred.

That does not, however dispose of the case. The Defendant, under cross-examination, admitted that when he saw the Plaintiff coming down the road he recognised the possibility of a collision and his decision not to stop was in fact "a calculated

risk." It is quite probable that had the Defendant stopped, the Plaintiff, having skirted the pedestrians in his path, might have been able to return to his the Plaintiff's side of the road and so avoid the collision. Only a lunatic would continue on a collision course without in some way reacting to it. The better view therefore is that the Plaintiff, at the last minute, attempted to swerve to his left and that is why his right leg and the right side of the bike was damaged, since in such a manoeuvre that is the side that would have been more exposed to the Defendant's car, and it is also a probable explanation of his statement that the car "came down and hit his back shock absorber." However this may be, the fact is that the Defendant, in failing to stop, contributed to the cause of the accident, and I so find.

Accordingly I find that there is contributory negligence and the only question remaining is the degree of apportionment. Who is more to blame? On the totality of the evidence I find the Plaintiff is more to blame. His proper course was to wait for the Defendant's car to pass before attempting to overtake the group of people standing in his path. By failing to do so he was the major contributor to the cause of his injuries.

Overall, therefore, I make the following specific findings:

1. There were people on both sides of the road. As a corollary to that I accept that the people on the Plaintiff's side of the road had come out into the road and partially blocked the path of the Plaintiff.
2. I find that the Defendant was keeping to his proper side of the road.
3. I also find that the road had a curve - right-hand curve for the Plaintiff and left-hand curve for the Defendant. There is a grey area in the evidence as to the exact point of impact - I do not think it necessary for me to resolve that ..... It is I think sufficient to say that the accident occurred in the vicinity proximate to the Trade Training Centre below the

Golden River Road junction; and I reject the Plaintiff's evidence as to the point of impact being above the Golden River Road, as being improbable and contrary to the weight of the evidence generally.

4. I also find that the Defendant did not swing to his right. I say this even though Miss Rhone said that he swung but, she "did not know from what he swung;" and I tend to agree with Mr. Small's comment that had there been an obstruction in the path of the Defendant, causing him to swing, she would most likely have seen it. Since therefore she saw no such obstruction, her evidence on that point is unreliable. In any event it is improbable that the Defendant, who admits seeing the Plaintiff approaching more or less on his (the Defendant's) side of the road, would have swerved to his right and so increase the chances of a collision occurring.

5. I find that the Plaintiff swung to his right in order to avoid pedestrians who were blocking his path as he came down the road towards Harkers Hall and so collided with the Defendant's motor vehicle, which was proceeding in the opposite direction.

In my judgement the Plaintiff took insufficient action to avoid the collision which he must have known would have been likely if he swerved towards an approaching car, in order to avoid pedestrians in his path. He should have waited for the car to pass; and the Defendant contributed to the issue by himself refusing to come to a dead halt at the point where he realised that a collision was more or less likely, if not imminent. On the whole however, I would say that the Plaintiff was more to blame; I therefore apportion contribution at 70% - 30% in the Defendant's favour.

DAMAGES

It is an accepted principle in cases of this nature that the Plaintiff has a duty to mitigate his loss. I also accept

that in deciding whether the Plaintiff has in fact done so in this case it is a question of reasonableness and, therefore, one of degree, or of fact.

Dr. Paul Wright was called by the Plaintiff to explain the nature and extent of his injuries. During his evidence Dr. Wright admitted that he did tell the Plaintiff back in 1978 that the overriding probability was that the injured leg would have to be amputated. Counsel for the defence has made much of this admission and contended that the Plaintiff by refusing the Doctor's recommendation failed to mitigate his loss and therefore no damages can by awarded in respect of events subsequent to this date or within a short time thereafter. The Doctor also said that the position in 1978 still exists and that the leg will in his judgement have to go. A number of attempts to avoid the trauma of amputation were, he said, made more out of deference to the Plaintiff/patient than to any realistic prognosis based on medical science. To put it bluntly the Doctor's evidence is that from the outset he recognized that the leg would have to go. That was and is still the medical position; and, it was in response to this that Counsel submitted that assessment of damages must be restricted to the point where Plaintiff was so informed - that the Defendant ought not to be called upon to pay for his intransigence or stubbornness in refusing sound medical advice.

This is an interesting point. The burden of proof is of course on the Plaintiff. However I must bear in mind that medicine is not an exact science and perhaps equally important the Doctor's opinion that the mental attitude of a patient is an important factor in the success or otherwise of medical treatment. The question is, was it unreasonable for the Plaintiff to have refused to have his leg amputated when it was originally suggested in 1978? The answer to this must be set against the background of the Plaintiff's admission in Court, some five years after the event, that he is <u>now</u> prepared to do so. As I have already indicated the practice of medicine

is not an exact science and further there is also the philosophical concept embodied in the phrase "while there is life - there is hope." A view with which there seemed to have been general agreement, because the Doctors decided to make serious attempts to save the leg, despite their initial misgivings.

In my judgement the Plaintiff was justified in refusing amputation so long as there was some probability, however slim, of the leg being saved. Once all hope is dashed any further refusal would be unreasonable. The question, therefore, is - at what point in the medical history can it be said that all hopes were dashed? That point ..... in time occurred in my view when it became evident that the bone graft, with which the Doctors had been experimenting over the years, was clearly not going to succeed. Once it became certain that the bone graft was a lost cause, then, the reasonable, sensible and inevitable thing was to agree to amputation as the Plaintiff himself has now freely admitted. I therefore hold that in respect of the assessment of damages the cut off point was the date of the ultimate failure of the bone graft, which I think is sometime in November 1982.

FINDINGS RE DAMAGES

SPECIAL DAMAGES

Clothes	$ 120.00	
Motor cycle repair	250.00	
Hospital	963.90	
Travelling	1,415.70	(Agreed)

The figure suggested by Mrs. Forte for loss of earnings up to November, 1982 was $17,100. I am not happy about this - the rule is clear - special damages must be specifically proved and this the Plaintiff has failed to do. His evidence on the point is extremely vague and unspecific. I do accept however that the overriding probability is that he would have

earned **some** money as a mason or farmer during the relevant period. Purely therefore in an effort to do equity I have fixed that sum, for loss of earnings, at the figure of $12,000.

GENERAL DAMAGES

The question of general damages is more difficult and a number of cases and of alternative figures were submitted by Counsel for the guidance of the Court. However, I am strongly of the view that it is almost impossible to determine human suffering in terms of money; and, consequently, the assessment of damages, (with the greatest respect to all the valuable learning which exists on the point), very rarely ever amounts to more than a calculated guess by the Court as to what will compensate the litigant in monetary terms in any given instance. It is not in my view a very scientific, or even logical, aspect of our law.

Against that background I would award the following:-

1.	Loss of prospective earnings	$20,000.00	
2.	Pain and suffering and loss of amenities	50,000.00	
3.	Cost of future operations	8,000.00	
			78,000.00

INTEREST

Interest from April, 1980 to November, 1982 at 6% on $50,000 equal	2,400.00	
Interest at 3% on special damages from March 3, up to November 3, 1982	763.83	
		3,163.83
		$81,163.83

ORDER

Judgement for the Plaintiff on the claim in the sum of $4,428.00 by way of special damages, and in the sum of $23,400.00 by way of general damages - plus interest agreed at $3,164.00 - with costs, which are to be agreed or taxed.