IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. W029 OF 1989

BETWEEN	DELZORENE WILSON	PLAINTIFF
A N D	HOPETON CAVEN	DEFENDANT

Mr. Wendell Wilkins and Mrs. Joyce Honeywell for Plaintiff.

Mrs. Pamela Benka-Coker Q.C. for Defendant.

Heard: May 25, 26, 27, 1993 & July 30, 1993

Judgment

RECKORD J.

This is an action for negligence in which the plaintiff claims damages for injuries she received when the motor car driven by the defendant struck her down just as she was completing crossing Windward Road in Kingston on the 31st of July, 1987.

The plaintiff, now 73 years old, testified that about 7:30p.m. on that day she alighted from a bus and walked to the school children's crossing in front of the Windward Road All Age School (She referred to it as a 'Pedestrian Crossing'). The crossing was clearly marked out on the road in white lines and it was brightly lit. She intended going across the road to continue on her way home. She looked right towards Mountain View and saw nothing coming. On looking left towards Harbour View she saw a few cars coming but they were way up beyond Rockfort Police Station about 4½ chains away. She believed she could have crossed safely. She started walking across the road within the crossing lines. When she was more than half way across she noticed a car coming down on her. She walked a little faster. "By the time I about one step and a half from the sidewalk the car came right down on me and hit me." The car which hit her came from the Harbour View direction was travelling 'quite fast.' She never heard the blowing of any horn or screeching of any brakes. The road was

about 34 feet wide in that area.

The plaintiff regained consciousness in the University Hospital the following morning. She said she was in terrible pains. Her two legs were broken. She had bruises on her elbows and around the right eye. She spent six weeks in Hospital. She was discharged on a stretcher. She rented a walker for five months for which she paid $400.00, and afterwards used a walking stick on the advice of Professor Golding for about a year.

At the time of the accident the plaintiff was a dressmaker at Ting N Ting at Upper Manor Park Plaza at a salary of $250.00 per week. She resumed working in February 1989. At work she got an average of $12.00 per day lunch money. While away from the job she never received any salary. She spent $809.00 for Hospital expenses and $340.00 for Professor Golding's clinics. She lost her eyeglasses valued $600.00 and used to take taxi to the Doctor and to the market which costs a total of $710.00.

The pains have not ceased since the accident. She now has to walk slowly. The right leg is bent because of the fracture - she now walks with a limp and can't run.

Under cross-examination she said she had no documents to show what her salary was. National Insurance Scheme payments were deducted from her salary. The business where she worked had been sold out and the lady with whom she worked had since died. She now gets payment from the National Insurance Scheme. She admitted that Windward Road is a busy road and that the accident occured on a Friday evening. When she first saw the car it was travelling at a moderate speed. She had a basket in her hand as she crossed. It was the left side of the car which hit her. She did not recall speaking with the defendant that night after the accident. She denied that buses were parked on the left hand side above the crossing and that she walked out from behind a parked bus into the path of the car.

The Defendant's Case

The defendant testified that on the 31st of July, 1990, he was driving his car from Harbour View towards Kingston along the Windward Road between 7 and 8 p.m. at about 25 - 30 miles per hour - The headlights were on, the road was

very busy with traffic. It was the Friday of the Independence weekend. Vehicles were parked on the right hand side. "Miss Wilson came from behind a bus in the pedestrian crossing and walked into the car. When I first saw the plaintiff she might have been 6 - 9 feet from me." I applied my brakes and the car came into contact with her. She came on the bonnet and fell on the ground. It was the front of the car which hit her. He knew that the crossing was there as he travelled that road often.

With the assistance of others he put the plaintiff in his car and took her to the University Hospital. Along the way he heard her groaning and saying she was in the pedestrian crossing. She told him her address and gave him names of her children and telephone number to contact her son. He contacted them and they came to the hospital late that night. That same night he reported the accident to the Windward Road Police Station and left his car there to be examined. He was never charged by the Police in connection with the accident. He denied that the plaintiff had almost finished the crossing when she was hit. "She came from behind a parked bus - She shot out like a bullet." He applied his brakes. He could do nothing else to avoid hitting her.

When he was cross-examined the defendant agreed pedestrians are always out there. He estimated the width of the road to be about the length of the court room (measured 32ft.). He could not recall whether the plaintiff came from behind a big bus or a mini-bus. On emerging from behind the bus the plaintiff had walked about 5 feet when she was hit. He did not see her immediately she emerged from behind the bus. He did not recall how far she came from behind the bus when he first saw her. "All I know is that the impact took place somewhere on the left of the road within the school crossing maybe 4 - 5 feet from my left kerb wall." When he first saw her she was probably 1 - 2 feet from the middle of the road. "When I first saw the plaintiff she was in front of the vehicle I can't say whether she was directly in front." He could not recall whether she was walking fast or slow. He pointed out a distance which measured 10½ feet when asked distance the plaintiff was from the bumper of the car when he first saw her. He was keeping a proper lookout that night. "If I had seen her before I did the impact would not have taken place."

Submission

Mrs. Benka-Coker, for the defendant, submitted that the doctrine of Res Ipsa Loquitur did not apply. The burden of proof was on the plaintiff to prove the defendant negligent on a balance of probabilities. The plaintiff's evidence was not a credible version of the accident. It was her opinion that the defendant's version was far more credible.

The defendant owed only a common duty of care and satisfied that duty. Even if the court accepts the plaintiff's case in its totality, the court would have to find that the plaintiff was contributory negligent. The plaintiff had failed to take reasonable care of her own safety. **See Sharpe v. Southern Railway (1925) 2 K.B. 311** and **Kerry v. Keighley Electrical Engineering Co. Ltd. (1940) 3 AER 399.** Reference was also made to several cases reported in Bingham's Motor Claims Cases, 9th Ed. pages 100 - 102 and in particular **Clifford v. Drymand (1976) RTR 134 CA.** She asked for judgment in favour of the defendant.

On the question of damages, Counsel intimated that the claims for spectacles $600; Hospital expenses $809; Professor Golding $340; Rental of Walker $400; travelling expenses $685 were not been contested. However, the claims for loss of earnings (v) and valuad of lunch (vi) were being challenged and must be proved by the plaintiff. These claims ought not to be allowed. The plaintiff did not produce any documentary evidence in support, example National Insurance Scheme card. She had pleaded $10.00 per day yet in her evidence stated she got not more than $12.00 for lunch money.

In determining damages for pain and suffering and loss of amenities, Counsel submitted that regard should be had to awards made in similar cases with similar injuries. The amount should not be inordinately low nor manifestly excessive. She referred to several cases found in Mrs. Khan's books on personal injury awards and concluded that an award of $160,000.00 would be reasonable.

Mr. Wilkins for the plaintiff submitted that she took all reasonable care in crossing. She had waited at the crossing before starting to cross; she had looked both to the left and to the right. Seeing vehicles over 4 chains away on her left travelling at moderate speed she made a decision to cross. It was not the law counsel said, that she should only attempt to cross when the road was absolutely clear. The plaintiff had completed over 28 feet of the road

before the defendant saw her in front of his car. This by itself raised a prima facie case of negligence against the defendant which he must rebut, failing which he should be found negligent. The doctrine of Res Ipsa Loquitur applied - See the Judgment of Mr. Justice Smith in **Clifford Baker v. The Attorney General and another (unreported) C.L. B. 274/83.**

The instant case is not one in which the plaintiff came from the near side of the defendant.

Counsel submitted that not only had the defendant failed to rebut the prima facie case made out against him but in his own evidence he admitted negligence. He asked the court to say that defendant was the sole cause of the accident. If court finds the plaintiff contributed her liability should not exceed twenty-five percent.

On damages for pain and suffering Mr. Wilkins referred to several cases in Mrs. Khan's books and suggested that an award of $450,000.00 to $500,000.00 would be reasonable.

Mr. Wilkins applied for and was granted leave to amend the statement of claim for loss of earnings to read from 31st July 1987 to 30th January 1989 78 weeks at $250.00 per week = $19,500.00 and for lunch for same period at $12.00 per week = $41,680.00. He said that although no documentary evidence had been provided these claims have been unchallenged and are reasonable.

Findings

The plaintiff gave detailed and cogent evidence as to how she received her injuries. It is therefore in my view inappropriate and unnecessary to rely on the doctrine of Res Ipsa Loquitur as done in the particulars of negligence. This case is clearly **distinguished** from the case of **Clifford Baker v. The Attorney General (Supra)** where the plaintiff did not know what hit him or from where it came.

At the end of the plaintiff's case there was a strong prima facie case for the defendant to answer. He attempted to do so. In his evidence in chief he said the plaintiff "shot out like a bullet" from behind a parked bus. That she

was 6 - 9 feet from him when he first saw her. In cross-examination he did not see her when she emerged from behind the bus and did not recall whether she walked fast or slow. That the plaintiff was hit 4 - 5 feet from the kerb - he did not recall how far she came from behind the bus when he first saw her; she was probably 1 to 2 feet passed the middle of the road when he first saw her; when he first saw her she was in front of his vehicle. This painted a very confused picture of what happened that evening and a clear indication that the defendant was not keeping a proper lookout - He ended this aspect of his cross-examination in this way - "If I had seen her before I did the impact would not have occurred." The defendant was aware of the crossing and the plaintiff's evidence that it was brightly lit has not been challenged. What then prevented him from seeing the plaintiff as she crossed the street from the opposite side to where he was driving? Surely it was not the bus which he claims was parked over on that side.

Both parties agreed that the road there was fairly wide - over 32 feet. With the defendant's car over 4 chains away, I find that it was reasonable for the plaintiff to attempt crossing the road. Although she was not within a "pedestrian crossing" as such, it was reasonable for her to expect the car to slow down or stop if it came up before she completed the crossing. I find that the defendant was not keeping a proper lookout and thereby failed to see the plaintiff in time to avoid hitting her. On his own admission the impact was w. the plaintiff was just 4 - 5 feet from his kerb wall.

The note in the case referred to by Counsel for the defence in Clifford v. Drymond (Supra), reads

> "Whilst walking across the road on a zebra crossing the plaintiff was struck by a car coming from her right. She was thrown or carried 4 - 5 feet and sustained serious injuries. She was 10 feet on the crossing when hit. The Judge found on the available evidence that the car, travelling not more than 30 mph had been about 75 feet away when the plaintiff began to cross. He considered whether the plaintiff was guilty of contributory negligence in stepping on to the crossing when the aproaching car was within 75 feet to 80 feet and decided she was not. **HELD, ON APPEAL:** The plaintiff should bear 20% of the blame. Rules 13 and 14 of the 1968 Highway Code require a pedestrian not only to allow vehicles plenty of time to slow down or stop before starting to cross but also to look right and

> left while crossing. If the plaintiff did not look at the approaching car she was negligent; if she did look she should have seen the car was near enough to make it doubtful whether it would pull up. She must also have been guilty of a measure of negligence in having failed to keep the car under observation as she proceeded to cross the road. If she had she would have seen it was not going to stop and could have allowed it to pass."

I too, have considered whether the plaintiff was guilty of contributory negligence and find that she was not. She had looked both sides of the road before crossing. The defendant's car was over 4 chains away when she commenced. She looked at the car on at least three occasions as she crossed - the car was approaching at normal speed. She increased her walking speed - She had covered at least 28 feet in the crossing when she was hit. This case is clearly distinguished from the reference case.

I find that the defendant is wholly to be blamed for this accident. The plaintiff crossing the road did not place the defendant in any dilemna. He had ample time to see her and he failed to do so through his own negligence.

On the question of special damages the following were agreed

Hospital expenses	$ 809.00
Professor Golding's fee	$ 340.00
Loss of Spectacles	$ 600.00
Travelling expenses	$ 685.00
Rental of Walker	$ 400.00

Although the claims for loss of salary and loss of lunch money have not been supported by documentary evidence I am prepared to allow them - they are not unreasonable -

Loss of salary for 78 weeks @ $250 per week	$19,500.00
Lunch money for 78 weeks @ $10 per day (5 days per week).	$ 3,900.00
Total	$26,234.00

Medical report admitted into evidence from Professor Golding dated January 19, 1988 showed that the plaintiff suffered the following injuries:- Fractures of the distal third of both femurs; a fracture of the upper and left

tiba and fibula. A fracture of the left and right superior rami of the pelvis.

In his last report dated October 10, 1991, Professor Golding said that the plaintiff "reached maximum medical improvement in April 1988 having a permanent impairment of 30 percent of the right lower extremity due to the marked bowing of the right lower femur, instability of the knee and subsequent traumatic arthritis. This takes into account the 1 inch shortening of the right lower extremity compared with the left. There is a 5 degree hyperextension of the left knee with a loss of full flexion. I would assess that the impairment of the left lower extremity is still 20 percent, giving her a whole person impairment of 19 percent."

The case of **Harold Ellis v. Edward Miller - Vol 1 page 39** was referred to by both Counsel. Mrs. Benka-Coker claims it is more serious than the instant case. Mr. Wilkins says otherwise. In that case the plaintiff suffered fracture of the left and right femur and dislocation of right hip. The permanent partial disabilities were 20 percent on the right lower limb - 5 percent on the left lower limb and 5 percent right hand. The court awarded **$16,000.00 for pain and suffering.**

I think this case is a fair base to work from. It is the nearest I could find from the cases referred to. In view of the other fractures and disabilities suffered by the plaintiff in the case on trial, I find that the injuries in the instant case more serious. If the instant case was heard in 1979 when the case under reference was heard I think an award of $25,000.00 would have been made. When this sum is converted due to inflation it would be equivalent to $404,814 using the Consumer Prices Index for May 1993 of 437.2.

The plaintiff is now 73 years of age. That sum should be scaled down due to her age. I think an award of $300,000.00 would be reasonable.

Accordingly, there shall be judgment for the plaintiff with damages assessed as follows:-

Special Damages ---------- $26,234.00 with interest at 3% per annum from 31st July, 1987 to date of judgment.

General Damages -- Pain and Suffering and Loss of amenities ------ $300,000.00 with interest at 3% per annum from the date of the service of the writ to the date of judgment.

There shall be costs to the plaintiff to be taxed if not agreed.

Counsel's fees (on back)