IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 1996 / W. - 240

BETWEEN	**LLOYD WISDOM**	**PLAINTIFF**
AND	**JANET JOHNSON**	**DEFENDANT**

Heard on June 3, 4,5, 7, 10 and 11, 2002

Mr. M. Frankson instructed by Gaynair & Fraser for Plaintiff; R Braham, Esq., and Mrs. S. Risden-Foster, instructed by Livingstone Alexander & Levy for Defendant.

ANDERSON, J.

In this case, perhaps most unusually, most of the critical facts are agreed as between the Plaintiff and the Defendant. There was a collision between the Plaintiff's Mazda minibus, and the Defendant's Honda Acura left-hand drive motor car, on the Liberty Valley Main Road in the Parish of St. Ann, near to the Dover raceway. It seems to be common ground that the accident occurred, and I so find, on the Plaintiff's side of the road, even though the Defendant would seem to say: "On that side of the road, but towards the middle". Notwithstanding that finding, however, it is trite law that the plaintiff must prove his case on a balance of probabilities. He must adduce evidence of the breach on the part of the defendant of her duty of care to him as a user of the public roadway on which they were both travelling on that fateful November day in 1994.

The Plaintiff in the "Particulars of Negligence" in his Statement of Claim, avers that the defendant was negligent in that, the defendant was:

> "driving in a dangerous manner; driving at too fast a rate of speed having regard to all the circumstances; driving without due care and attention and without due consideration for other users of the roadway;...failing to keep a straight and/or safe course; driving at or unto the incorrect side of the roadway and thereby colliding with the plaintiff's motor vehicle which was traveling in the opposite direction; failing to apply brakes in sufficient time or at all; failing to stop, slow down, turn aside or in any other way so to manage or manoeuvre the said motor vehicle so as to avoid the collision."

The defendant, in her amended defence, says that she was not negligent and she suggests that the blame for the accident should be ascribed to the plaintiff's own negligence, or at the very least that he contributed to the accident by his own negligence. In this regard, her pleadings of the facts which would seek to ground a finding of negligence on the part of the plaintiff alleges that the Plaintiff was guilty of negligence in the following ways:

> "failing to keep to his proper side of the road; driving onto the Defendant's proper side of the road; driving at a speed which was excessive in the circumstances. Failing to stop, slow down or otherwise control his said motor vehicle so as to avoid a collision".

The court had the benefit of the evidence of the plaintiff, the defendant, a passenger in the minibus and the policeman who visited the scene of the accident at some time after it had occurred. I have deliberately avoided saying that he "investigated the accident" for it would be charitable to describe what the policeman said he did as amounting to investigating.

The court, in assessing the witnesses and the testimony that they gave, found the plaintiff to be a witness of truth, firm and consistent in his recollection of the events which took place on November 1, 1994. His evidence in relation to the particulars of negligence pleaded in his Statement of Claim, is credible and in fact, is supported by the defendant in material particulars; for example as to the side of the road on which the accident took place, and the fact that the defendant's vehicle was swerving from side to side. It is my view that these allegations are credible and raise an inference of negligence on the part of the defendant.

Further, I agree with counsel for the plaintiff, that the evidence which was given by the defendant does not in any way support the allegations made in her particulars of negligence in her Defence. There is no evidence to support any of the purportedly factual allegations about the driving of the plaintiff or his contribution to the cause of the accident. In fact, I have to say that the evidence of the defendant was inconsistent, and confused. It may very well be that this was partly due to nervousness, but the court has to take the witness as she appears in the box, and her appearance was not conducive to

credibility. I had particular difficulty with her assessment of the speed at which she was traveling, on her evidence about 5 miles per hour; the distance she travelled from the left hand corner to where she said she picked up the skid, and the distance she was from the minibus when she first saw it. In this regard, in giving her evidence, she indicated a distance of some 80 to 100 yards to a building across King Street. In any event, the clear evidence of the defendant is that once she started skidding, she panicked and closed her eyes. Nor, according to her, was she able to make any estimate of the speed or the quality of the driving of the minibus.

In light of what I have said above, it goes without saying that I accept that the plaintiff has raised a prima facie case of negligence, a breach of the duty of care owed by the defendant to the plaintiff. Without more, this would lead to a finding of liability on the part of the defendant. The defendant pleads in the alternative, that owing to "the presence of oil on that section of the road and/or the slippery condition of the said road, the defendant's vehicle skidded out of control and collided with the Plaintiff's vehicle. The defendant says that the said collision was caused by inevitable accident and/or that the action she took in the emergency which confronted her was reasonable".

The simple issue which the court has to decide is whether the defendant may avail herself of the defence referred to by her counsel in his submissions, as "Inevitable Accident". I have already stated my view of the quality of the evidence given by the defendant. It affects the weight of the evidence which is to be given with respect to the issue of oil on the road. The passenger in the minibus who gave evidence said he saw no oil on the road after the accident. The police officer, Sergeant Grant, says he say "a lot of oil" although he did say in his evidence that he saw it when it was pointed out to him by bystanders who were advising him to avoid it. In my view, it is difficult to understand why if there was such a lot of oil why it had to be pointed out to an experienced motor cycle policeman on the scene of the accident.

I also agree with Mr. Frankson, that the policeman and the defendant place the oil at different points of the road; he at the entrance to the corner, and she eight feet out if the

corner entering the straight. What I find particularly troubling is the evidence of the defendant. She did not say that oil caused her skid. She said she realized something was wrong when she started skidding across the road, I find it difficult o understand how in the circumstances, she would not have gone back to try to ascertain whether it was in fact the oil that that had caused the skid. This reservation is heightened by the fact that she admits that she did not tell her insurers about any oil when she reported the accident, and indeed, her defence was amended quite late in the proceedings to assert the presence of oil on the road. I accordingly find that on a balance of probabilities, there was no oil on the road, and if there was, it did not cause the accident.

If however, I am wrong in that finding, I consider the defence on the basis that oil was in fact on the road. The question is whether the defence has made the case that this was "inevitable accident?

Mr. Braham referred the court to Charlesworth & Percy on Negligence, Ninth Edition by R.A. Percy and C.T. Walton, and page 252 of that text. The relevant passage starts with the proposition that:-

> "Where the facts proved by the Plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts negativing his liability, and one way in which he can do this is by proving inevitable accident".

The passage continues:

> "Inevitable accident is where a person does an act, which he may lawfully do, but causes damage, despite there having been neither negligence nor intention on his part. In maritime cases, it has been described as follows: 'An inevitable accident in point of law is this: viz., that which the party charged with the offence could not possibly prevent by exercise of ordinary care caution and maritime skill.' "

I find myself in agreement with the words of Lord Greene quoted by the authors from **BROWNE v DE LUXE CAR SERVICES, [1941] K.B. 549 at 552** :

> "I do not feel myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?"

I adopt the following section from the text under consideration:-

> "Accordingly, the true view is that the loss must lie where it falls, unless it can be shown that it was caused by a breach on the part of some other person of a duty to take care, or of some duty making it wrongful for him to have inflicted the loss upon the person who suffered it".

In any event, if the defence is to succeed, two things must be shown according to Charlesworth.

1) There can be no inevitable accident unless the defendant can prove that something happened over which he had no control; and
2) The effect of which could not have been avoided by the exercise of care and skill. (See *The Albano* [1892] P. 419, per Lord Esher, M.R. referred to by Mr. Braham)

Even if one accepts the evidence of the policeman that there was oil on the road, it has to be seen in the context that he said previously that he saw oil coming from the defendant's car. Could this have been the oil that caused the skid? Even if there was oil, there was no evidence from Sergeant Grant that the oil he saw was the same as the oil on the tyre of the vehicle, nor that the tyre tracks which he claimed he saw in the oil, were or could have been made by the tyres on the defendant's vehicle. In my view, it would be quite improper, and require a quantum leap of faith for a court presented with these limited "facts", to draw the inferences necessary to the defence of inevitable accident, and to suggest that a third party had deposited the oil, in breach of a duty not to do so, and that it was this that had caused the accident and the plaintiff's consequent injuries and loss.

Even though Mr. Braham submitted that the court ought not to second guess the defendant who has a split second to make a decision, which may thereafter turn out to be wrong, I believe that one must still, consistent with the passage from Charlesworth quoted above, look at the defendant's action. I am emboldened in this view by the evidence of the defendant herself. She said that when she went into a skid, she just

"closed her eyes and held on to the steering". She also said that she did not at that time know anything about how to correct for a skid. The court, in my view, may take judicial notice of the fact that in preparing for the test for a driver's licence, there is in the study of the road code, references to just such an eventuality. Her action therefore, in any event, takes her outside of the criteria of the defence she seeks to raise. I also find myself in agreement with the submission made by Mr. Frankson and supported by **RICHLEY v FAULL (RICHLEY third party) [1965 3 A.E.R. 109** that he cited, that " a sudden violent and unexplained skid is itself evidence of negligence". And where that skid leads to the vehicle going out of control as it appears happened here, then a fortiori, there is evidence of negligence.

It will therefore not come as a surprise that I find the defendant liable for the collision and the loss and damage which flowed therefrom. I can find no evidence of any contributory negligence on the part of the plaintiff and I so hold.

With respect to the special damages, these have been agreed and pursuant to an amendment sought to be made to the Statement of Claim and not opposed by the defendant's counsel, this figure is now set at $1,154,904.00. This sum will bear interest of 3% from November 1, 1994 to July 14, 1999, and at 6%, from July 15, 1999 to June 11, 2002. I also accept the submission of counsel for the defendant, and not opposed by plaintiff's counsel, that with respect to loss of earning capacity, given the plaintiff's present age of fifty-two (52) years, a multiplier of five (5) years would not be unreasonable and given a salary at the time of the accident of $3,000.00 per week, this gives rise to a sum of $780,000.00.

I also agree that this is not a proper case for any award for handicap on the labour market, as it seems from Moeliker and the Gravesandy cases that this is only a proper consideration where the plaintiff is working and could lose his job and be put back on the labour market. This is not the case here.

In the out-turn, I must now consider the question of general damages. The fact that counsel on both sides rely substantially on the same cases, namely Nugent v Berry; Thorpe v Jasper Smith and Errington Campbell and John Campbell v Art & Fabrics is of great assistance to the Court. The injuries suffered by this plaintiff are considerable, resulting in a 36% PPD of the whole person, and to assist with the determination of similar actions in the future, these are set out below.

(i) 4cm Laceration to right Mandibular region
(ii) Dislocated right hip
(iii) Fracture of left and right mandible
(iv) Dislocated right hip with acetabulum fracture
(v) Fracture of right tibia and fibula comminuted
(vi) Fracture of left medial malleous
(vii) Septicemia
(viii) Extensive soft tissue infection
(ix) Below knee amputation
(x) Out of place right hip with formation of false acetabulum
(xi) Permanent disability

He is now unable to stand for any period of half an hour or more, and is hampered in doing his church work which he used to do, as well as taking part in games such as cricket. To allow him to walk without the aid of crutches, may require further surgery to his amputated leg, because of the deformity at the knee which is now permanently bent at an angle. By way of comparison, it was submitted that the damages in Nugent would, according to the current CPI, be now worth $2.6 million. There is no figure given for permanent partial disability in that case. In Thorpe, the figure awarded would now be worth $2.385 million. However, Mr. Braham suggests that the injuries of the Plaintiff in that case were more extensive. In the John Campbell case, the injuries received by the plaintiff resulted in a 30% PPD, less than that of the plaintiff in the instant case, and he was awarded a sum that would today be worth $1.7 million. Mr. Braham suggested that a fair figure, in these circumstances, would be between $2.0 million and $2.5 million.

Mr. Frankson for the Plaintiff, using the same cases, argues for a sum of not less than $2.6 million.

I am of the view that a figure of $2.5 million is appropriate to compensate the plaintiff for his damages, pain and suffering and loss of amenities, and I award that sum with interest at 3% from the 10th October 1996, the date of the first Entry of Appearance by Mr. George Soutar, to July 14, 1999 and at 6% from July 15, 1999 to June 11, 2002. The plaintiff shall also be awarded his costs of this action to be agreed and if not agreed, taxed.

On application by counsel for the defendant, execution stayed for six weeks.