

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. D207/95

BETWEEN	ROGER IAN DAYES	PLAINTIFF
AND	A. CHONG	1ST DEFENDANT
AND	ACHONG LIMITED	2ND DEFENDANT
AND	BASIL JAMES	3RD DEFENDANT
AND	B.J. CONSTRUCTION AND	4TH DEFENDANT
AND	BASIL JAMES CONSTRUCTION AND PLUMBING SERVICES LIMITED	5TH DEFENDANT
AND	NATIONAL WATER COMMISSION	6TH DEFENDANT

The fourth defendant is struck from the records.

Dr. R. B. Manderson-Jones for the plaintiff.

Dennis Goffe Q.C. and Minette-Palmer instructed by Myers Fletcher & Gordon for the first and second defendants.

Garth Lyttle instructed by Garth Lyttle & Co. for the third, fourth & fifth defendants.

Andre Earle and Jeffery Daley instructed by Rattray Patterson for the sixth defendants.

Heard: 25th & 26th November 1998, 11th, 12th, 13th, 14th,
21st, 22nd January 1999 and 8th October, 1999

PITTER J.

On the early morning of the 14th January, 1995, at approximately 1:00 o'clock, Roger Ian Dayes the plaintiff was driving his Suzuki Vitara motor vehicle along Musgrave Avenue in the parish of St. Andrew when he was involved in an accident which resulted in serious bodily injury to him and extensive damage to the vehicle. It is the plaintiff's case that at the intersection of Musgrave Avenue and Comlin Bank Road there was a large hole which

had been dug in the roadway with a high mound of earth alongside it and a trench cut across the road. That the said hole and mound of earth constituted a major obstruction of passage along the roadway, occupying most of the surface of the road and blocking all of the plaintiff's path on the left hand side of the road, causing the plaintiff to swerve and avoid entering the hole or hitting the mound of earth and forcing the plaintiff's car to hit the trench running across the road and from there to collide into a telephone pole on the bank of the right hand side of the road. In swerving to avoid the mound of earth and hitting the open trench, he was thrown from his seat and he lost control of the vehicle. He says that there were no lights in the area except those of his car and at the time he was travelling at approximately 30 miles per hour.

The plaintiff's claim is that the first defendant at all material times was an officer and servant or agent of the second defendant which was at the time a company of consulting engineers. The third defendant at all material times was the servant or agent of the first and or second defendant and or the fifth defendant and or the sixth defendant.

Alternatively, at all material times the fifth defendant was the servant and agent of the first and or second defendant and or the third defendant, and or the sixth defendant.

The sixth defendant is a Statutory Company.

It is the further claim of the plaintiff that the said hole, mound of earth and trench were part of pipe-laying and road works activity being carried out by and under the supervision of the first, second, third, fifth and sixth defendants and or their servants or agents the first, third, and fifth defendants (as the case may be) who they had employed to assist in providing manual labour for carrying out the works and laying the pipes or who did so under their supervision.

The first and second defendants deny the claim and deny that the third and fifth defendants were their servants and/or agents. They also deny that the pipe-laying and road works were being carried out by them or under their supervision and deny that they were responsible for the digging of the hole, the mound of earth and the trench. It is the case of the first and second defendants that at all material times the second defendant had been engaged as a consultant for the design and implementation of the sewerage system in a housing development at Musgrave Avenue and Comlin Road and that the second defendant applied to the sixth defendant for a sewer connection to the sixth defendant's sewer main for the said housing development and which was approved by the sixth defendant who agreed to undertake the responsibility of designing and constructing the sewer trench in question. They deny the claim for negligence and say that at all material times the work was being carried out by the third and or fifth

defendants who were themselves independent contractors subject to and under the supervisor of the sixth defendant. They also filed notice of indemnity against the other defendants.

The third, & fifth defendants also deny the plaintiff's claim. They deny that there was any mound or hole or trench left in the road or at all; that earlier in the day a trench was dug but it was later backfilled and levelled off leaving no obstruction in the road. They say that excavation work was done under the supervision of the first, and second defendants. It is their case that the injuries occasioned by the accident, loss and damage suffered by the plaintiff were solely caused or contributed to by the plaintiff's own negligence.

The sixth defendant denies that any of the third, or fifth defendants were its servants or agent. It also denies that the pipe - laying works and roads and works activities were carried out under their supervision; or done by any of its servants or agents but that this was carried out by the first, second and fifth defendants. The sixth defendant in its defence, claims that the first defendant, acting as the servant and/or agent of the second defendant, contracted the third defendant to connect a sewer main to the said location and that its actual role as regards the said connection was limited to the examination of the laying of the sewer mains and the building of the manholes to ensure that such works were undertaken to its specifications.

It is the further defence of the 6th defendant that the loss and damage suffered by the plaintiff was caused or contributed to by the negligence of the plaintiff, the first, second and third defendants or any one or more of them. The sixth defendant has also filed notice to the co-defendants claiming indemnity.

The Evidence

The plaintiff's evidence is that he owns two businesses in auto parts. One is located in Florida U.S.A. and the other, Daytona Sales Limited at 7D Marescaux Road, Kingston and that he is the majority shareholder to both businesses. He testified that on the 14th January, 1995 at about 1:00 a.m. he was driving his Suzuki Vitara motor vehicle along Musgrave Avenue in the parish of St. Andrew when he suddenly saw a mound of earth in the middle of the road, that he braked and swerved left, hit an open trench, was thrown out of his seat, he lost control of the car which went to the other side of the road and ended up in a lightpole some 100 feet from the mound. As a result he suffered serious bodily injury requiring hospitalisation, both here and in the U.S.A. The car was a total write off. He said he was travelling at 30 miles per hour, that there was no lighting on the roadway except for the lights coming from his motor car. There were no warning signs. The open trench which ran into the mound area is an unpaved area below the level of the road.

He was taken to the University of the West Indies Hospital where he spent a month in the Tony Thwaites Wing of the hospital. As a result of the accident, he suffered abrasions, to the right foot, cuts to the face and scalp and a broken hip. The femur was driven through the socket of the hip. He also suffered fractured ribs and the injuries were associated with severe pains. He underwent surgery to reinforce the broken socket, which was pinned and his right leg placed in traction. He left the hospital and went by air ambulance to St. Petersburg, Florida where he had further treatment. He again underwent surgery and received an artificial replacement hip - there he spent a further nine days in hospital and rehabs centres. He stayed at home recuperating approximately three - four months. In all he spent about six months between hospitals and home.

He incurred medical expenses. Most of it was met in the U.S.A. by Cigma Insurance Company amounting to U.S.\$23974. Cost of psychotherapy in Jamaica \$21,000 and in the US.A. over \$500. The plaintiff's medical prognosis is that he will require another hip replacement soon and he anticipates another three replacements during his lifetime costing an average of U.S.\$30,000 each. One replacement lasts ten - fifteen years. Medical expenses were supported by documentary evidence including bills and receipts. The cost of air ambulance service amounted to U.S.\$5,500 which was paid by the insurers. Cigma Health Insurance paid out a total of U.S.\$23,400.

The Vitara motor vehicle was damaged and had to be written off in the sum of \$475,000.00, its pre-accident value being \$700,000.00. A car was rented in its place costing \$23,114.36 which was used by his wife to visit him. Taxi service amounted to \$10,000.

It is his evidence that his future earnings would be seriously affected. He is unable to attend auto trade shows for any length of time because of the pains experienced. These shows allow him to be kept abreast of current events in the motor trade. He is also prevented from galvanizing customer relationship with social relationship as his working day is usually terminated because of pain. He currently does a full days work in his business but with much discomfort because it is difficult to sit for prolonged hours as his business is a warehouse and it is necessary to walk the premises. He thinks he has a substantial working life ahead of him be being 53 years of age. He estimates his loss of future earnings to be \$1.2M at a rate of \$100,000 per annum over a period of twelve years.

He further testified that the injuries caused pains which preoccupy his existence. Not a day goes by, and recently, an hour, that he does not feel pains. Such is the pain that it saps his energy and interest in life. He feels pains mostly in his hip, leg, calf and bottom. When he moves the pains are excruciating, and intermittent when he sits on hard surfaces, it is painful due to lack of muscle fat on his bottom because of atrophy associated with the accident. It is difficult and

uncomfortable to sit in cars with bucket seats and also in air plane seats. He walks with a limp as one leg is now a little shorter than the other, and has trouble walking as he does a lot of this particularly at trade shows.

The artificial hip has its restrictions, he should not cross his legs, should not bend at an angle of more than 90 degrees and as a result he has developed a phobia because of the care he has to exercise. He also has a fear of infections.

His injuries have prevented him from enjoying the recreation he is accustomed to including horseback riding, golf, boating, swimming, playing of cards, travelling and visiting museums. At best of times he is slow, cannot walk fast and this impinges on his enjoyment. He is unable to sit in his bed with his feet in the bed - they have to be off when sitting. He is restricted in having sexual intercourse because of the range of motion it is difficult in rotating his hips as he encounters pain in so doing. He also has difficulty in getting on the toilet as the point at which his legs touch the seat causes pain. His mental attitude is also affected as the injuries preoccupy his very existence, something he thinks about daily.

After his first illness, he had to use two crutches for about fifteen months. Thereafter he has had to use a walking stick up to the present. He currently wears support stockings to contain the swelling in the leg. He has a problem standing as one leg is

shorter and weaker than the other which makes standing on the good one leg tiresome.

Cross-examined by Mr. Goffe, he said that the accident took place at a T junction. The road is straight from Trafalgar Road to that junction and it is neither wide nor very narrow, though narrower than Trafalgar Road.

The trench was right in the junction. The mound of earth and dirt were blocking both lanes. There were no warning lights and the area was not illuminated. The site of the road repairs was dark and he does not remember whether street lights were on. Prior to the accident his lights were on dim, the range then being about 40 feet. He saw the mound when he was 20 feet away from it. He did not see the mound earlier as it was of the same colour as the road.

He denied travelling at a speed of more than 30 miles per hour. At 30 miles per hour his car could not stop within 20 feet - that it would take 70 feet to stop if he was driving at that speed. If he had seen the mound earlier he could not have stopped on time. He admitted being tired at the time of the accident but not to the point of falling asleep behind the wheel. He also admitted that his vehicle was equipped with seat-belts but he was not wearing one at the time. He said that at the time of the impact, he was thrown out of his seat albeit he knew that the purpose of the seat-belts was to reduce the chance of that

happening. The car travelled at least 100 feet from the mound to the electric pole - he was unable to press the brakes as he was thrown out of his seat.

He did not see the trench at the same time he saw the mound. The trench was below the level of the road so it was not obvious to him until he ran into it. The rest of the road was asphalted - black - and in good condition. The mound was about 2 feet high, the open trench about 8 inches deep. It did not take up the road completely. He did not know if he could have passed on either side of it - he had to make a decision instantly. He denied that he was not keeping a proper look-at and also that he was driving too fast in the circumstances. Prior to the accident he had no problems to his left leg or hip. He has had no hip injuries before.

Cross-examined by Mr. Lyttle, he said he was driving along Musgrave Avenue, a straight road which took him beyond the mound. He could have turned left up Comlin Bank Road where there would have been no obstruction. He was driving along Musgrave Avenue at 30 miles per hour and applied his brakes 20 feet from the mound and pulled left as he did not want to serve into the mound. It was after he applied his brakes that his vehicle went into the open trench. It was when the vehicle went into the open trench that he was thrown from his seat. He denied travelling at more than 30 miles per hour, from the trench to the light pole

where he collided is 100 feet. His vehicle travelled a distance of 100 feet from the left side of the road on Musgrave Avenue and collided with the pole on the right side of the road. He denied telling Dr. Vaughn that he had "washed" into a light pole. It was the open trench that caused him to lose control of his vehicle. He denied the suggestion that there were four cones placed in the middle of the road just before one gets to the trench. He said his vehicle did not mount the curb wall - he cannot say if there is a 9 inch curb wall just before the light post. He denied that after he went into the trench, he travelled over 100 feet and then the vehicle crashed and went across the road. Dr. Vaughn was his medical doctor in Jamaica and prescribed the crutches for him and instructed him about its use. He was able to amble along on the crutches before he did the hip surgery in Florida. During that time he went to work at Daytona. He denied suffering any injury to his hip, pelvic area or the affected leg prior to the accident.

Cross-examined by Mr. Daley, he said the trench was 30 inches wide by 8 inches deep. That when he hit the trench he was travelling at a speed less than 30 miles per hour. He applied his brakes immediately on seeing the mound. He was not in control of the vehicle after it hit the trench. He denied he was travelling at a speed far in excess of 30 miles per hour why he had no proper control over the vehicle and thereby causing the accident.

Re-examined he said there were no signs inviting him to take detour into Comlin Bank Road. It was one transaction from the hitting of

the trench to his ending up in the light pole. He got into the open trench because he was avoiding the mound which was in front of him and there was no other way.

Winston Gassop, a corporal of police said that about 1:45 a.m. January 14, 1995, as a result of a radio message he received, he went to Musgrave Avenue where he saw a Vitara motor vehicle which was extensively damaged. He noticed the driver of the vehicle, the plaintiff was bleeding severely all over his body and unable to walk. He also observed that there was a huge heap of dirt with little road space. There were no signs or reflecting lights to indicate that construction was in progress. He did not see any cones. There were no lights in the area - it was dark. This dangerous area he said could not be seen from a far distance. He had to use spot lights on the left of his service vehicle to assist him. The plaintiff was conscious and did not appear to be under the influence of alcohol.

Cross-examined by Mr. Goffe, he said he did not see any lights on Musgrave Avenue nor did he see any lights in the area.

Cross-examined by Mr. Lyttle, he denied that Musgrave Avenue is a dead straight road from the top of Trafalgar Road. He saw obstruction in the road i.e. a mound of earth and a hole in the middle of the road. That vehicles could not turn left into Camden Road. Vehicles going north had very little space to go.

through. Going south a very small vehicle could pass.

Cross-examined by Mr. Earle, he said he saw the obstruction in the road when he was $\frac{1}{2}$ chain from it. It was not possible for him to have seen it before. He did not see any cones surrounding the area - he did not see any cones at all. He disagreed that the damage to the Vitara was consistent with excessive speed. The light pole the vehicle ran into was standing straight.

At this stage Mr. Goffe applied for amendment to his defence to include contributory negligence and secondly to visit the locus in quo. Both applications were refused.

Dr. Kenneth Vaughn an orthopaedic surgeon treated the plaintiff for fracture of the hip joints. He said the plaintiff subsequently developed osteo-arthritis of the hip joint which necessitated him having a total hip replacement which was done in the U.S.A. in May 1996. Bone graft may have to be done and there is a likelihood of further hip revision. Remissions do not last as long as primary hips which last for approximately 10 years whilst revisions last approximately 5 years.

Cross-examined Mr. Goffe, he said the natural consequences of osteo-arthritis is a vascular neurosis.

Cross-examined by Mr. Lyttle, he said that the injuries to the plaintiff's head are consistent with someone sitting in front of a vehicle and crashing with a light pole. He said the plaintiff did tell him that he ran off the road and ran into a light pole.

Cross-examined by Mr. Earle, he said that (the) hip replacement is done in Jamaica at a cost of approximately \$300,000. That when he examined the plaintiff, there was no evidence of a previous leg or hip injury.

The third defendant Basil James, gave evidence saying he is the managing director of the fifth defendant, Basil James Construction and Plumbing Services Limited and has been involved in building construction for 23 years, 18 of which he was a superintendent in the waste-water division of the National Water Commission and that he is an employee of the fifth defendant.

He said that in January 1995, he was employed by the second defendant A. Chong Limited in the construction of a sewerage system in the area of Musgrave Avenue taking in Comlin Bank Road. The work involved the laying of 18 inches mains from Braemer Avenue into Musgrave Avenue to facilitate premises at an open lot. His company dug a trench across the road about 1 week prior to the accident. It was approximately 7 feet deep and 2 feet six inches wide and pipes were laid in it. Having dug the drain across the road, a 4 feet diameter man-hole was put in - this at the center of the intersection. He left workmen working in the man-hole about 9:00 p.m. that night. Two cones were placed to the northern side and two to the southern. It was a busy Friday and traffic passed on both sides.

When he left at 9:00 p.m. the trench was backfilled with marl to the level of the road. He denied the trench was 18 inches deep. He did not leave a mound of earth or filling from the trench in the road. Apart from the cones there was nothing left in the road to form a barrier or obstruction.

There was also light coming from a lightpole 104 feet from the intersection.

On the morning of the 14th he discovered one of the cones missing.

He denied that he or his company failed to provide adequate warning regarding the mound or the manhole. He said that there was no need to provide other protection as there were four self-illuminated cones around the manhole cover. There was no need to provide a warning for the open trench as there was none. Nor was there a need to re-route traffic that night as men were working in the area of the manhole inside it. Trafalgar Road to the top of Musgrave Road is straight no bend in it.

Cross-examined by Mr. Goffe, he said it was the second defendant who prepared the plans. The sixth defendant, The National Water Commission would be responsible for approving the design and sewer trunk. In this case the (N.W.C.) sixth defendant accepted responsibility of designing and constructing the sewer trunk. When the work was completed, the sixth defendant inspected it. This was on the 23rd January 1995 - he was present along with Garfield Haughton, manager of the Waste Water Department of the N.W.C. It was the

sixth defendant that accepted the responsibility of designing and constructing the sewer trunk.

Cross-examined by Mr. Earle, he said that no time did he leave the trench on Comlin Bank Road open - it was backfilled. He never saw a representative of the second defendant come there during construction. The first defendant came there before the work started on omore than one occasion. The first defendant showed him where the pipes were going and he would observe the work that he was doing. In carrying out the work laying the pipes, he was not representing the sixth defendant, he was doing the work for the first defendant; contact with the second defendant only for the payment. When he wrote exhibit 15 he was not representing the sixth defendant. He said he laid pipes along Comlin Bank Road connecting it on Braemer Avenue, he also installed 2'x3" diameter manholes - one in the center of Comlin Bank Road and the other at the intersection of Musgrave and Comlin Bank Roads. He also installed an 8" lateral to number 4 Musgrave Avenue, putting it back in its original condition. The total excavated area was completely reinstated. His company did the job for \$433,682.60 this after reducing the original figure by \$10,000 which the first defendant said was high.

The 6th defendant approved the design of the system - they do not do the design themselves.

At 2:00 p.m. on the 13/1/95 all the trenches were already backfilled the only work left to be done were inside the manhole on Musgrave Avenue. He left the site at 9:00 p.m., manhole

cover was in place - with wet cement around it and that is why he left self-illuminating cones around it. He returned to the site at 9:00 a.m. the following day when three of the four cones were still in place. He did not see any imprint in the cement as if vehicles had driven over it.

Cross-examined Mr. Manderson-Jones, he said the supervision charge he referred to in the estimate were for persons who supervised. All the labourers who worked on that site were employed by his company the fifth defendant. He did the supervision. He said that the road surface at Musgrave Avenue was reinstated when the job was completed.

The trench to the right of the manhole was dug on the 13th and was backfilled the same day. When he left it was not asphalted. There was no space left in the trench for asphaltting after backfilling. He said he was given specifications that would allow for the layer of asphalt to be reinstated - which is one inch - he did not comply. He did not have any of the following signs left on the premises when he finished working on the 13th eg. "detour", "road works ahead", "slow", "caution", "pass this side". He did not provide a light for the spot. He did not have plans to work on the road up to 9:00 p.m., but the work took them to that time. There were lights overhead directly over the manhole - that is the light used to work in the manhole. From the manhole he took out about 15 cm. yards of earth and from the trench a little less. The earth was stored in adjoining premises. He never had a drop of earth on Musgrave Avenue to fill the trench. He denied that

the earth removed from the manhole and the trench were left near the manhole on Musgrave Avenue.

He did not consider it necessary to install any warning in respect of the backfilled trench as there was no need for caution.

One could drive at 30 miles per hour on Musgrave Avenue when he left there on the 13th - above that would be unlawful.

The first defendant ALton Chong, testified that he is the Managing Director fo the second defendant Company which provides designs in water supply, plumbing and drainage etc. In March 1994, he said that at the request of Architects, McMorris, Sibbly Robinson, he prepared plans which were drawings that depict the internal sewer layout mainly including pipes and location of manholes within the proposed development by Mutual Life on ComlinBank Rd and Musgrave Avenue. Construction was done by fifth defendant and was paid for by Surrey Construction Limited. Whilst work was being done by the fifth defendant company he visited the site to ensure that the project had started. He had gone there between the 1st to the 13th January 1995 to see if the lateral to the development had been done, i.e. the manhole at the junction of Musgrave Avenue to his client's, Jamaica Mutual Life's property.

Cross-examined by Mr. Lyttle, he said he had gone to the site as he had expected a monument to be installed before the project was completed. He could not say whether or not the manhole was in place when he visited the site. He said that the sixth defendant must approve plans and the cutting of roads before they

