

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C. L. 1976/M107

BETWEEN	CLIVE MALCOLM	PLAINTIFF
AND	REX KNIGHT	FIRST DEFENDANT
AND	HEZEKIAH WILLIAMS	SECOND DEFENDANT

HEARD: January 16, 17, 18, 1978
May 29, 30, 31, 1978
October 9, 10, 11, 1978
January 31, 1979

COR: THE HONOURABLE MRS. JUSTICE ALLEN

Mr. A. W. Campbell together with Mr. Crafton Miller and
Mrs. Earle-Brown appearing for the Plaintiff.
Mr. C. U. Hines and Mrs. E. Hines, instructed by Hines, Hines and
Company, appearing for the Defendants.

Allen, J. :

Judgment was awarded for the Defendants in this case
on the 31st day of January, 1979, when the court intimated orally
the findings relevant to such award, and promised to give the
reasons in writing shortly, and this I now do.

The Plaintiff suffered injuries in collision with First
Defendant's truck driven by the Second Defendant, Hezekiah
Williams, on the 28th June, 1973, along the Thompson Pen Road which
runs from Sligoville to McNeil Park in the parish of Saint
Catherine. These injuries resulted in serious brain damage and
physical disability. The Plaintiff contends that the collision
was caused by the negligence of the Defendant driver in hitting
the Plaintiff from behind. Plaintiff had been riding a pedal
bicycle travelling in the same direction towards McNeil Park,
ahead of the truck. As a result of the collision he was propelled
up in the air and fell on a concrete culvert which was on their left
side of the road.

There is a great conflict of facts: The Defendants allege that the collision was caused by the negligence of the Plaintiff, whom they say was riding a bicycle in the opposite direction, travelling on his incorrect hand, and collided with the left side of the front of the truck, ending up on the culvert.

Facts which either admitted, conceded or not contested were:

- (a) That there was a collision between the bicycle ridden by the Plaintiff and Fargo dumper truck driven by Defendant Hezekiah Williams, on 28th June, 1973.
- (b) The place where Plaintiff's body fell was a concrete culvert.
- (c) Location of culvert - on Sligoville side of a corner described as "Mother Flowers' corner".
- (d) Direction truck travelling: In direction from Sligoville towards McNeil Park.
- (e) Daytime: The hour was not material to the issues, and has been given by different witnesses as 11:30 a.m., 12 noon, 12:30 p.m.
- (f) No evidence of other than fair weather conditions.
- (g) No other traffic in vicinity of collision.

Also not contested were the injuries suffered by the Plaintiff:

- (1) Cominuted compound depressed fracture of skull to left of midline, the dura mater torn, the brain itself lacerated, blood clot in damaged area of the brain.
- (2) Fracture of the first, second and third metacarpals of the left hand.
- (3) Fracture of the first metacarpal of the right hand.
- (4) Fracture of the fourth rib on the left side.
- (5) Fracture of the left scapula.

- (6) Injury to the brachial plexus on the left side resulting in weakness of muscles of the left arm and forearm and complete paralysis of left hand. (The left hand presented a claw-like appearance.)
- (7) Trachea displaced to right side.
- (8) Plaintiff was unconscious for 18 days.
- (9) Epileptic fits developed, following on brain damage.
- (10) There was evidence of personality change.
- (11) In the opinion of Professor Cross, Plaintiff's mental function (at trial) was inferior to one of his age, his memory and calculating ability poor. Plaintiff was also treated by Dr. Chutkan.

Nor was any challenge made to the evidence of damage to the truck and pedal bicycle given by Corporal Britton:

Damage to the truck:

- (a) Left front blinker damaged, glass broken,
- (b) Left side front fender slightly damaged.
- (c) Left side front ~~fender~~ - sink-dented.

Defendant Williams made less of this damage. He stated that there "was no damage to the light - just the edge of the light get damaged."

Of the pedal cycle, Corporal Britton found slight damage to:

- (a) Front wheel.
- (b) Front fork.
- (c) Handle bent.
- (d) Frame slightly bent.
- (e) No damage to back wheel.
- (f) No damage to back fork.

Defendant Williams' evidence was that there was damage to the front fork and front wheel.

The only other evidence of the condition of the bicycle

came from Plaintiff's witness, Mr. George McFarlane, who said, "I believe the front part of it did bend."

Witness Mr. Aubrey Robinson, the former employer of Plaintiff, was called in support of the allegation of a change in personality, following Plaintiff's injuries, and his pre-accident skills. Mr. Robinson's business was auto repairs, manufacturer of ironing boards and mops, dish drainers, space savers, record rocks, jig work, requiring a lot of welding. Mr. Robinson first knew Plaintiff as a tenant of premises owned by him. Plaintiff was then about eighteen years old. Mr. Robinson employed Plaintiff as apprentice welder; found him a promising, trainable, industrious, intelligent, reliable and trustworthy. He was a good worker, and had good potential. Plaintiff was paid \$30.00 per week for five days, but with fringe benefits and overtime the job was worth \$50.00 per week. In his estimation, if Plaintiff had remained with him he might have earned what others now employed in the category were earning, an average of \$70.00 per week, possibly what the man he considers his foreman earns, \$95.00 per week. He could read a job sheet and follow instructions from it. Since the accident, Mr. Robinson found Plaintiff a different person altogether: His ability to work - his approach to people. He indulges in senseless laughter, asks silly questions - his intelligence had gone down. His personal hygiene, previously fairly clean - now he defecates anywhere.

Plaintiff, Clive Malcolm, gave evidence on his own behalf. His story is that while riding a bicycle from Sligoville direction towards McNeil Park, at a deep left hand curve before one reaches McNeil Park, he was hit from behind and knew nothing more.

Plaintiff impressed the Court as being shrewd and intelligent, although having no more than basic academic education. Although there were apparent gaps in his recollection, he showed a coherent grasp of his situation, displayed his understanding of

shades of meaning and was alert to where his own interest lies and where it does not. Were it not for the evidence of eminent neurosurgeon, Professor Cross of brain damage, and of his mother, Miss Violet Moore, as to his post-accident change of habits and of personality, it would be difficult to believe that anything was wrong with his brain, or that his intellect was affected by the damage to his brain. From the evidence of Miss Violet Moore - as incident to his personality change, Plaintiff demanded money not owed to him in truth, and speaks things not true. The Court did not believe him when he said that witness investigator to the Insurance Company of Jamaica, Mr. Samuel Oliver, held his father's hand to sign statement (Exhibit 1). In the opinion of the Court, it would be extremely unsafe to accept Plaintiff's evidence as to how the accident happened, and accordingly this evidence is rejected.

In support of his case as to how the accident happened, the Plaintiff called witnesses George McFarlane and Noel McLennon.

Mr. McFarlane's story is that he saw the driver of the truck

"went down on the cyclist and hit him backways. The dumper of the truck - left hand bumper - hit the cyclist and he go up like that and he fell - dropped into a little culvert on his face - on his head. Yes, I saw all that. He fell like from here to table (15 feet). He fell in culvert of the road on left hand side."

The impression I formed of this witness was not favourable. I doubted that he saw how the accident happened, and that he spoke to the driver of the truck as he alleged. I form the opinion that he was untruthful and unreliable and rejected his evidence of how the accident happened on those grounds.

Mr. McLennon, on the other hand, impressed me with his apparent sincerity. His story is that he was riding a bicycle on the road, travelling in the direction McNeil Park towards Sligoville. He saw the accident which took place at the corner called "Mother Flowers' corner". He saw the Plaintiff

"... coming down on a bicycle coming down towards me, face to me, and a dumper truck was behind him. Just as I bend the corner the dumper truck come and hit him from behind and he fell to my right at a culvert and the bicycle was almost in the middle of the road more to my left hand side."

In cross-examination he said:

" When I made the bend and saw the truck for the first time, it was fifteen to twenty yards from me. Truck was just going at an ordinary speed. Yes, truck stopped, passed where man fell a little. No Sir - When made Mother Flowers' corner accident already taken place. Just as I come down the grade and made the corner the accident happened before my eyes.....
There is some ruts in the road and saw the truck swerve from some of the ruts - before the crash. About from here to there (about thirty-five feet) between swerve and actual crash. After swerve it look to me as if it check its speed. When truck swerve/check from pot hole, distance between bicycle and truck about half distance (17½ feet). "

" Yes, collision took place in front of me. Yes, had good view of man as was hit. ouldn't say how he fall. He go up in the air about four feet and drop to his left on the culvert and the bicycle coming more to my left hand. "

This witness impressed me with the shock he felt as he made the bend and saw the accident happen right before his eyes, and I believe and accept that he did see the collision. However, in view of the position in the road where he must have been when he 'bent' the corner, the statement which he made as to the pre-accident movement and direction of the truck and of the Plaintiff is inconsistent with the immediacy of the earlier statement.

The Defendants' denial of liability arises out of the facts as alleged by Defendant/driver, Mr. Hezekiah Williams.

Mr. Williams' evidence is that he was driving dumper truck, licensed FB 818, a 10 ton truck, right hand drive, from Sligoville towards McNeil Park, Spanish Town, through the district of Thompson Pen. As he approached the corner known as Mother Flowers' corner, he was in the extreme left hand corner travelling at about twenty-five miles per hour - that he blew his horn and even cut down his speed - that immediately he saw a cyclist coming from the opposite direction and on his (Williams') side of the road. That he swerved to his right to avoid killing the cyclist but when he swerved, the cyclist had hit the truck already. He pulled to the right side of the road and came out immediately and

saw the cyclist lying on his back on the asphalt near to the edge of a manhole, his head in the manhole. The cyclist was bleeding, and not saying anything. A Mr. McBean, driving a van, came up shortly (1½ minutes) after, and with the assistance of Mr. McBean and men from his van, the cyclist was taken from where he was on the culvert and placed in van. He denied seeing witnesses Mr. McFarlane and Mr. McLennon on the scene. When he came out the truck, he saw only "one man around - a little boy about eighteen years of age". That no one gathered on the scene at the time the accident happened - not until after a little while.

The Defence called witness Mr. Samuel George Oliver, who said that on the 22nd August, 1973, when employed as investigator to the Insurance Company of Jamaica, he took a statement from the Plaintiff (Exhibit 1). This document was signed by the Plaintiff, and Plaintiff's father and sister as witnesses. Among other things, this document purports to be a written admission by the Plaintiff that "I remember that as I was riding on the main road at Thompson Pen, I ran into the front of a truck that was travelling towards me from the opposite direction".

The Court regards the circumstances under which the statement was taken from the Plaintiff to be unfair: the Plaintiff was apparently suffering disorientation from the effects of the accident, and as it turned out brain damage. Further, this statement was taken in the presence of witnesses, themselves illiterate. The Court accordingly rejects the evidence of a previous inconsistent statement contained in Exhibit 1, as being unreliable and having no weight, even if accepted as said by Plaintiff.

What remains for the Court to consider, therefore, after eliminating rejected evidence, is the evidence of Mr. McLennon, for the Plaintiff, against the evidence of Mr. Williams, for the defence. Whose version of the way the accident happened is more probable? The Court looks to the evidence of Professor Cross and

Dr. Chutkan to see how Plaintiff's injuries fit in with the two versions.

Professor Cross agrees in general terms that the injuries of Plaintiff were consistent with a fall on the head and hands. The injury to the brachial plexus, he stated, was seen in connection with head injuries - the head goes one way and the plexus is pulled from the spinal cord (the path of the plexus traced from vicinity of neck along shoulder to arm, indicated) and you get paralysis of the arm and also affects the legs.

Dr. Chutkan, in turn, speaking of injury to the brachial plexus that a severe degree of force would produce the stretching to cause injury.

Doctor Chutkan's attention was directed by the defence to the fracture of the metacarpals. His opinion was that he would expect moderate to severe degree of force to cause fracture to the metacarpals, and agreed that ^{the} fracture to the metacarpals is consistent with a cyclist with (both) hands on handle-bars coming into collision with a truck face to face. He also agreed that a fall in these circumstances was likely to cause fracture to the skull and injury to the brachial plexus. He elaborated that a fracture of the skull on the left side (indicating above the eye at hairline) in addition to injury to the brachial plexus would indicate a stretch which was more likely caused by more (greater) force from moving objects. This, he said, can be caused by a fall on a hard surface, but more likely by a moving object.

To Mr. Crafton Miller, Counsel for the Plaintiff, postulating a truck travelling at twenty to twenty-five miles per hour, coming into contact with a man riding a bicycle (from behind) so that that man went up in the air and landed in a concrete manhole, Dr. Chutkan agreed that the injuries were consistent with patient falling on a hard surface - that this was not related to being hit from behind and one would have to postulate that the patient got hit to the head on the manhole, and the shoulder pushed in the other direction and the metacarpals

injured at that time. Dr. Chutkan agreed that if the body fell in a manner - head in open culvert and body out - that any injuries could be caused in those circumstances. As to the metacarpals, Dr. Chutkan gave his opinion that on a fall on palms outstretched, fracture of the metacarpals was less likely but possible. He would expect a fracture of the lower forearm in such a case.

The upshot of all this medical evidence on the issue of causation is that the injuries suffered by Plaintiff could be caused on both versions, whether Plaintiff rode into the truck and fell, or whether he was hit from behind and fell.

Speed:

Speed has not been an issue in the case. Mr. McLennon stated that the truck was going at an ordinary speed and stopped a little past where Plaintiff fell.

Point of Collision:

What is very material is the point of collision or impact.

Was the cyclist hit from behind at some point before the truck reached the culvert, and thrown forward of the truck to fall on the culvert? Or, was the cyclist hit from behind and propelled behind the truck? If Mr. McLennon saw both cyclist and truck travelling - one ahead of the other - the distance between himself and the truck at that point was in excess of thirty-five feet - approximately twenty-five feet on the Sligoville side of the culvert.

The whole purpose in fixing the point of collision and in **consequently** ascertaining how far Plaintiff's body was carried/flung, is to test whether it was possible for witness McLennon to see the direction the Plaintiff was travelling before the actual collision, in view of the evidence given by him that as he 'bend' the corner, the accident happened before his eyes.

Defendant Williams' evidence is that Plaintiff hit the truck after the truck had passed the manhole. In re-examination he said "I swerved to right immediately so he get a clearance to 'chip' between truck and the manhole." Defendant Williams puts

the point of collision to be "in the dead centre of the apex", and the manhole/culvert to be about fifteen to twenty feet from the apex of the curve on the Sligoville side of the curve. On defendants' version, the Plaintiff collided with the truck and continued on his path for fifteen to twenty feet to the culvert. There is no evidence as to how he reached there, whether in one fling, somersault or carried on the bicycle.

Eight photographic prints (marked 1 to 8) of the area, and in particular the side of the culvert in relation to Mother Flowers' corner were admitted in evidence as Exhibit A2.

Defendant Williams' evidence is that he saw Counsel, Mr. Hines, take photographs of the area and the culvert where the accident occurred, and that from the date of the accident to the date when the photographs were taken on 22nd December, 1977, there were no physical changes in the location itself. Witness identified the photographic prints marked 1 to 8 as photographs of the area and of the culvert, and showing the corner which is called Mother Flowers' corner.

Exhibit A1 was put to witness Corporal Britton who identified the photograph to be of the area where he saw the bicycle.

The Court is not unfamiliar with the location, having travelled by the road and passed that corner many times before, and twice during the hearing of the case. These photoprints (Exhibit A2) bring to instant vision the evidence of the location of the accident given by the witnesses McLennon, Williams and Britton.

Defendant Williams' evidence is that "You cannot see around the corner as I was driving". The witnesses speak of a fence - Mother Flowers' fence - and a zinc fence is shown (in Exhibit A1) around premises in the corner which effectively blocks the view around the corner. If the accident happened "right before my eyes" as witness McLennon bent the corner, then this witness could not see the movement of vehicles approaching

him and travelling on their correct hand. He could only see approaching traffic as they broke his line of vision diagonally at a tangent to the corner.

I therefore find that witness McLennon lied when he said that he saw Plaintiff coming down the road towards him, the truck behind Plaintiff, and when he said he saw the truck swerve, apparently to avoid ruts.

There being no credible evidence offered by Plaintiff of the direction in which Plaintiff/cyclist was travelling before the collision, the Court considered the inanimate evidence presented to see how it fits in with the two versions of the parties. With respect to the evidence presented the Court finds:

- (1) That damage to the bicycle was to the front wheel and front fork and handles.
- (2) That there was no damage to the rear wheel and rear fork.
- (3) That there was fracture of the metacarpals of both the left and right hands of Plaintiff, and that this evidence points with telling effect in support of Defendant Williams' version.
- (4) That Mr. Aubrey Robinson, the employer of Plaintiff and a person having an interest in Plaintiff, made efforts to find, but never found a witness who said he saw the accident.
- (5) That Mr. Aubrey Robinson is well acquainted with witness McLennon and that both men had spoken with each other and discussed the accident.

On the balance of probabilities I find that the Plaintiff has failed to prove that the Defendant Williams drove negligently as alleged, or that his negligence caused this accident. I find that the accident was due to Plaintiff's own negligence, and that it is most unfortunate that he sustained such serious injuries.