

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 1996/M43

BETWEEN	GLENTON MORRISON	CLAIMANT
AND	STEADMAN HENRY	1 ST DEFENDANT
AND	NIGEL FAIRCLOUGH	2 ND DEFENDANT

Jermaine Spence and Laurence Jones instructed by DunnCox for the Claimant.

Donald Gittens for the 1st and 2nd Defendants.

CLAIM NO. CL 1996/S161 (Consolidated)

BETWEEN	EVELINDO SMITH	CLAIMANT
AND	STEADMAN HENRY	1 ST DEFENDANT
AND	GLENTON MORRISON	2 ND DEFENDANT

Ms. Dorothy Lightbourne for the Claimant.

Donald Gittens for 1st Defendant.

Jermaine Spence instructed by DunnCox for the 2nd Defendant.

CLAIM NO. CL 1996/P203 (Consolidated)

BETWEEN	MILTON PORTEOUS	CLAIMANT
AND	GLENTON MORISON	1 ST DEFENDANT
AND	NIGEL FAIRCLOUGH	2 ND DEFENDANT
AND	STEADMAN HENRY	3 RD DEFENDANT

Michael Brown, instructed by Michael B. P. Erskine & Co. for the Claimant

Donald Gittens for the 1st Defendant.

Jermaine Spence and Laurence Jones for the 2nd Defendant.

Heard 6th, 7th, 8th and 13th June 2007

Campbell J.

(1) It was a Sunday afternoon, 2nd December 1994, Glenton Morrison, was driving his Toyota Corolla easterly from Santa Cruz to his home in Mandeville. He was travelling alone. The road was asphalted, and there was a slight gradient in the direction he travelled. There were no vehicles travelling easterly ahead of him. He asserts that he had unimpeded vision for a distance of approximately forty yards, at which point the road made a right turn.

(2) Travelling westerly was a line of vehicles, headed by a Ford Transit van, driven by Nigel Fairclough, this was followed by a Ford Cortina motorcar and finally Milton Porteous driving a Mazda mini-van.

(3) The road surface, according to the evidence, was approximately fourteen to sixteen feet wide in that area and was divided by a white line down its centre. To the left of the Toyota Corolla, as it approached the vicinity of Braes Road there was a low embankment, according to Porteous, however, Morrison testified that there was steep hill rising to about five feet in that area. The road was dry and the sun shining. On the other side of the roadway there was no embankment, but a gully.

(4) There were collisions between the Corolla firstly and the leading vehicle in the approaching traffic, the Transit van, thereafter with the Ford Cortina and finally the Mazda mini-van. These consolidated cases are at the instance of the owners/drivers of the Toyota Corolla, and the Mazda mini-van.

(5) Mr. Morrison, the driver of the Corolla, has sued the owners and driver of the Ford Transit that was in collision with him. His was the first claim filed, on the 7th February 1996. His writ was endorsed as follows;

The Plaintiff's claims against the Defendant is to recover damages in negligence for that on the 2nd day of December, 1994 the Defendant do negligently drove, managed or controlled his Ford Transit motor car registered 0164 AN, owned by the 1st Defendant along the Wilton Main Road in the Parish of St. Elizabeth that it collided with a motorcar registered 1866 BB driven by the Plaintiff, causing damage.

- (6) The negligence was particularised, inter alia;
- (II) Driving causing or allowing the said motor van to go on or onto the wrong side of the roadway and there collide with the said motor car which was lawfully on the said roadway.
 - (vi) Overtaking or attempting to overtake at a time when it was manifestly unsafe to do so.

(7) Milton Porteous, the driver of the Mazda mini-van which was owned by Evelindo Smith, on the 5th December 1996, filed a Writ of Summons against the owners and drivers of the Corolla and the Ford Transit van that were involved in the initial collision. The writ was endorsed as follows;

The Plaintiff's claims against the Defendants to recover damages for negligence for that on the 2nd day of December 1994, the Plaintiff was lawfully driving a motorbus from Savanna-La-Mar in the parish of Westmoreland to when the First and Second Defendants so negligently drove motor vehicles registered 1866 BB and 0164 AN as to cause an accident whereby and by reason whereof the Plaintiff sustained personal injury and incurred losses and expenses.

- (8) The particulars of negligence of 1st Defendant noted thus:
- (ii) Failing to control motor vehicle so as to avoid colliding into bus being driven by Plaintiff.
 - (iv) Driving onto the wrong side of the road.

The particulars of the 2nd Defendant, inter alia:

(vi) Driving on the wrong side of the road.

(v) Overtaking when it was manifestly unsafe to do so.

(9) Nigel Fairclough in his defence blamed the driver of the Corolla, Morrison, for the accident and alleged in the Particulars of Negligence:

(d) Failing to pay due care and attention to other traffic on the roadway, and instead using a cellular telephone or other device or object when driving.

(10) The question is, who is liable for the collision between the Corolla driven by Glenton Morrison and the Ford Transit van, driven by Nigel Fairclough.

(11) Both drivers have claimed that the accident happened on their correct sides of the road. Both accuse the other of excessive speeding. Both vehicles came to a stop on their extreme right side of the roadway for their respective directions, i.e., the incorrect side of the road. Both drivers refer to the presence of a motorcyclist, travelling ahead of the Ford Transit van. However, Glenton Morrison testifies that the approaching Ford Transit van, whilst in the process of overtaking, the motorcycle came onto his side of the road and collided with him. Nigel Fairclough contradicts that account and asserts that he had completed the act of overtaking the motorcyclist and returned to his correct side of the road when the collision took place.

(12) The roadway is straight, Morrison claims to have had unobstructed vision ahead of him for about 40 yards. He however states that when he first observed the Transit van it was about 36 feet away. That begs the question why, if he was keeping a proper lookout as he was obliged to do, did he not see the van before it reached that distance of 36 feet from him.

(13) Milton Porteous, who may be regarded as an independent witness on the point of liability, has said he observed Mr. Morrison speaking on a cell phone at the time of the collision with his vehicle and that Morrison continued speaking after the collision. That would have been difficult to comprehend, when one takes into consideration that the collision with the Transit van would have already occurred, and the airbag in the Corolla

would have inflated. How could Morrison have kept speaking on the cell phone during all those occurrences?

(14) Porteous' statement was contained in his second witness statement. The first witness statement states that after the accident the driver came out of the car and spoke on his cell phone. A clear contradiction. However, in cross-examination he says that after exiting the car Morrison threw the phone back in the car. In effect, he has given these different versions of Morrison's cell phone use.

(15) Little weight can be placed on Porteous' evidence on this point. He does not claim to have seen how the collision between the Corolla and the Transit van occurred. However, his evidence is uncontradicted as to the position he was in when his vehicle was struck; he had come to a complete stop and had pulled over to his extreme left.

(16) The driver of the Transit van, Fairclough, in his witness statement said he 'was not sure who was driving the vehicle because it was going so fast. He therefore does not support Porteous evidence in relation to cell phone being used by Morrison. Curiously, the defence pleaded on his behalf, particularise as an item of negligence, that Morrison was using a cellular telephone or other device whilst driving. He states that he observed the Corolla dallying as if out of control as it sped towards him at over 75 miles per hour. Morrison says he was travelling at 30-35 m.p.h. Morrison said the driver of the mini-van attempted to overtake the motorcyclist by manoeuvring his vehicle into his lane of traffic and directly into the path of his motorcar. He said he applied his brake and the Transit van collided with his vehicle. He said he could never imagine someone attempting to overtake in such close proximity to an oncoming vehicle. The impact propelled him to the right of the road and he impacted with a Ford Cortina which was pushed into a gully on the extreme right of the road, and would perhaps have ended there himself, if his vehicle had not come to a stop because it collided thereafter with the Mazda.

(17) Fairclough says he was driving about 35 to 45 miles per hour. He says that the motorcyclist was travelling about 15 to 20 m.p.h. He said Corolla swerved or dallied away from him as it neared him and he thought it would pass him. He said after the collision he stepped on the brake but his vehicle still went across the road. He testified that he went no further than

two feet over the centre line in overtaking the motorcyclist, and had returned to his side at the time of the accident.

(18) The cross-examination of Porteous reveals that he saw the transit van about three car lengths ahead of him. He did not see a motorcycle. It is clear that if the Transit van had overtaken the motorcycle as Fairclough testifies, then Porteous would have been able to see the bike. Both vehicles were driving too fast for the built up nature of the area and the circumstances that existed there. The second and third vehicles following the transit were hit. If the motorcycle was following would it also be hit, considering that the evidence of Fairclough would suggest that it was operating in the middle of that side of the road.

(19) Both drivers refer to an overtaking, although Fairclough says the manoeuvre was completed. There is nothing on the evidence why the Corolla should start "dallying" I accept that the transit attempted to overtake the motorcycle and whilst so involved encroached on the side of the oncoming car. I find that the Corolla was operating too fast and was therefore unable to take the necessary evasive action. I find the fact of overtaking was the substantial cause of the accident, I find that Fairclough was sixty per cent responsible for the accident and Morrison 40% liable.

Damages

(20) **Glenton Morrison**

Special Damages

See exhibit 2, (assessors report Engineer report)

Total Loss	\$730,000.00
Less Salvage	<u>\$50,000.00</u>
	\$680,000.00
Assessors Fee	<u>2,887.00</u>
Total	\$682,887.00

Interest on Special Damages at 6% from 2nd December 1994 to 22nd June 2006 and at 3% from 23rd June 2006 to 13th June 2007. Cost to the claimant to be agreed or taxed.

21) **Milton Porteous**

50 years old, was trapped after the collision, for approximately one hour. He was admitted to the Kingston Public Hospital, after being transferred from Mandeville Hospital, where he had remained for a day. X-rays showed a comminuted fracture of the right femur, displaced fracture of the right tibia and compound displaced fracture of the left tibia and fibula. He developed respiratory distress. A fasciotomy was done. He was discharged on 7th June 1995. The femoral fracture became angulated. There was non union of the right tibia with persistent infection. On May 27th, 1996 removal of the plate was done. On the 18th June, the wound settled and he was discharged on 11th July 1996. There was marked stiffness of the right ankle, inability to extend the right ankle. In his report Dr. Dixon described the leg as equivalent to a prosthesis. His permanent disability has been assessed at twenty-five percent of the whole person. Dr. Fray in his report assessed him at twenty-six percent of the whole person.

General Damages

(22) The Court was referred to the case of **Linda Harris v Baron McKenley**, Harrison's page 197, 36 year old, mini-bus driver injured in motor vehicle accident on October 6th 1976 - swelling of middle and lower third of both thighs, puncture wounds, to left tibia, fracture of both femur, shortening of both legs. Hospitalised for 48 days. 20% - 25% permanent partial disability. An award of \$280,000.00 was made for pain and suffering, updated \$6,162,000.00. The instant Plaintiff's case is more aggravated, longer period of hospital stay. His leg function being reduced to a mere prosthesis. An award of \$7,500,000 is made for pain and suffering.

Handicap on Labour Market \$200,000. There is unchallenged evidence that he is unable to drive a motor vehicle.

Interest at 12% from 7th February 1996 to the 22nd June 2006 and at 3% from 23rd June 2006 to 13th June 2007. Cost to the Claimant to be agreed or taxed.

Special Damages:

Loss of Earning

(23) Mr. Porteous has not worked a day since the accident and has claimed loss of earnings for the period of 12 years that he has not worked. The Claimant must mitigate his losses. He says that his activities are watching television and reading. He has failed to demonstrate that he has discharged the duty placed on him to mitigate his loss. Neither of the doctors has opined that the Claimant is unable to work. There are numerous activities and skills that Mr. Porteous could have acquired during that period to make himself employable. He has made no effort at all. He is still ambulatory. He is able to sit for long hours without noticeable distress. He was a young man and could have acquired a marketable skill that suited his circumstance. He will be allowed a period of two years. It is unchallenged that he received \$1000.00 per day or \$6,000.00 per week. Award for a period of 104 weeks.

Loss of Earnings	\$624,000.00
	<u>32,000.00</u>
	\$656,000.00

(Cost to the Claimant to be agreed or taxed)

Interest at 6% from 2nd December 1994 to 22nd June 2006 then at 3% to the 13th June 2007.

(24) Evelindo Smith

Special Damages

Pre Accident value	\$320,000.00
Less Salvage	<u>\$60,000.00</u>
Total Loss	\$260,000.00
Assessors fee	\$3,520.00
Wreckers fee	<u>\$8,000.00</u>
(See Assessors Report (ex. 4), 5, 6)	\$271,520.00

Evelindo Smith, the owner of the Mazda van driven by Porteous, gave evidence that this licensed vehicle operates from Savanna-La-Mar to Mandeville. The trip cost each passenger more than \$60, his bus seated 12 passengers, and the owner would expect to earn \$4,000.00 each week, from his he was expected to pay for the maintenance of the vehicle. This

particular vehicle appeared to be quite roadworthy and only had a down time of two weeks over the years it was operated. The road licence cost \$2,500 per annum. The period claimed, 8 months, was totally unnecessary for a case of this type for the insurance to settle when it was clear on the facts that the operation of this vehicle could not have been saddled with liability in this case. A period of 4 months would have been sufficient for the insurers to advise themselves bearing in mind the number of vehicles involved. An amount of \$4,000.00 is accepted as the daily earning over a period of six days, for a total of \$96,000.00 per month for a total of \$384,000.00. Expenses for maintaining, insuring, licensing it would be deducted. That is assessed at the then annual rates of \$24,000.00, for the period of four months, \$8,000.00 is deductible. Total \$384,000.00.

Interest on special damages at 6% from 2nd December 1994 to 22nd June 2006, then 3% to 13th June 2007.

Cost to the Claimant to be agreed or taxed.