

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.S 122 OF 1984

BETWEEN CHERYL SIRJUE PLAINTIFF
(by next friend ADLIN SIRJUE)
AND ATTORNEY GENERAL FIRST DEFENDANT
AND DERRICK MASTERS SECOND DEFENDANT

Claim in negligence.

Raphael Codlin and Barbara Lee for the Plaintiff.

Glen Brown and David Callendar instructed by the Director of State Proceedings for the Defendants.

Hearing on 7th, 8th January, 1986
and 20th March, 1986

JUDGMENT

The Plaintiff Cheryl Sirjue, a school girl in this matter claims through her next friend and sister Adlin Sirjue in negligence damages for personal injuries the result of a collision on 10th June, 1983 occurring between the Plaintiff and a motorcar registered NF 8516 owned by the Commissioner of Police and driven by the second defendant Derrick Masters, a Police Officer, who was at the material time acting in the course of his employment. It is for this reason that the Attorney General is also sued by virtue of the Crown Proceedings Act and the fact^{of} the Agency of the second defendant is also not disputed.

The collision occurred while the second named defendant was driving the motor vehicle along Eastwood Park Road proceeding in a northerly direction up the said road and the plaintiff was in the act of crossing or attempting^{to cross} the road from the left side to the right side that is from West to East.

As a result of the collision the plaintiff suffered certain bodily injuries which caused her to be admitted into the University Hospital of the West Indies where she remained as a patient for two days and following her discharge she spent a period of some eleven weeks recuperating at home during which time she had to make several visits to the University Hospital and the clinic there for follow-up treatment. The details of the nature

- 2 -

and extent of her injuries and the period of her disability are more particularly described and set out in the Medical Report of Dr. Paul Wright which was admitted into evidence as Exhibit 2.

In the particulars of negligence in the Statement of Claim, it alleged inter alia that the second defendant was:-

- (i) "Driving at too fast a rate of speed in the circumstances.
- (ii) Failing to keep any or any proper look out for other road users, and pedestrians in particular.
- (iii) Failing to heed, observe or have any or any due regard for the presence or direction of the plaintiff.
- (iv) Failing to see the plaintiff in sufficient time to avoid the collision."

There is also the particulars of special damage set out and the claim ended with the various reliefs sought.

In the defence the fact of the collision occurring between the car driven by the second defendant and the plaintiff on the date and at the place alleged is admitted. Negligence on the part of the defendant is specifically denied and the defendants go further and contend that the collision was caused by the negligence or contributory negligence of the plaintiff.

In the particulars of negligence set out in the defence it is alleged inter alia that the plaintiff was:-

- (a) "Crossing or attempting to cross the road without first ascertaining whether it was safe to do so.
- (b) Failing to keep any or any proper look out or have any or any sufficient regard for her own safety when crossing the said road.
- (c) Stepping in the said road in the path of the second defendant without giving him any reasonable opportunity of avoiding the collision.
- (d) Walking from before a stationary bus on the nearside of the second defendant and going into the said motor vehicle."

- 3 -

Damages were also denied.

From the pleadings two main issues arose for determination:-

1. Was the plaintiff or the defendant negligent or both?
2. Dependent upon the outcome of the above issue the question of damages.

The plaintiff gave evidence and called two witnesses one of whom her sister and next friend's evidence was mainly confined to the area of proving the special damages claimed.

The second named defendant gave evidence for the defendants.

As the evidence emerged the Court was left to determine the issues of fact which arose from three versions given by the witnesses as to how the collision took place.

The first version or the plaintiff's version was that on the morning in question around 8:10 a.m. she was on her way to school at Saint Hugh's High School and had got a drive to as far as the intersection at the corner of Molyne's Road and Eastwood Park Road. She was desirous of obtaining a bus to take her to Cross Roads but she did not know from which place the bus travelled so she asked a lady who was by the bus terminus for 35 - 37 buses on Eastwood Park Road how she could get such a bus. After getting the required information she was attempting to cross Eastwood Park Road from the left or western side to the right (eastern side) by North Odeon Avenue. At this time there were two buses parked to the left of the road by the terminus - one in front of the other. As she was about to cross the road the bus to the front moved off up Eastwood Park Road. Before crossing she looked up Eastwood Park Road and then down towards the traffic lights by the intersection of Eastwood Park Road, Molyne's Road and South Odeon Avenue. At this stage, she saw vehicles at the lights but they were stationary. She saw no other vehicular traffic anywhere else.

It may be convenient at this stage to observe in passing that at this hour of the morning on a week day that would have been highly improbable as in that situation the lights would have been then favouring the traffic proceeding from Molyne's Road both towards South Odeon Avenue as well as traffic emerging from Molyne's Road

- 4 -

into Eastwood Park Road .

To continue the narrative in its proper sequence, however, the plaintiff, having according to her account, seeing the road clear of traffic, then proceeded to cross the road travelling to the front of the second bus which was still parked at the 35 bus terminus. When she got to about the middle of the road she again looked in the direction of the traffic lights and now observed that the vehicles on Eastwood Park Road, which included the black car driven by the second named defendant, had started to move up the road. The black car was travelling in the right lane and was then about a distance which was estimated by the witness to be one and half chains away from her. (One and a half times the length of the Court room). This car was according to the witness "coming down fast". The car hit her on her right side causing her to fall back unto the bonnet of the car and then unto the ground.

It is common ground that the road in question at the point of impact could accomodate about three lanes of traffic and that the parked bus would have been occupying one of these lanes. To be more specific the bus would have been occupying the left lane as one proceeds up Eastwood Park Road.

When the plaintiff was cross-examined, she estimated that the width of the road at the point of impact was about the width of the Court room and that she would have required about twelve to thirteen steps to reach the point of impact. A demonstration given by her in Court produced some nine steps to complete the crossing of the width of the Court room which measures twenty feet.

The plaintiff placed herself in the right lane when she was hit by the car.

Although the plaintiff testified that the car what was estimated to be about one and a half chains from when she first saw it, and coming down fast, it took about ten to eleven seconds before hitting her. The car was still able despite its fast rate of speed to pull up immediately upon the collision

- 5 -

taking place and this was so despite the fact that the plaintiff testified that she heard no screeching of tyres caused by the application of brakes.

The second version or the plaintiff's witness's version.

The plaintiff called a witness, one Desmond Campbell, an unemployed person who had defective vision, having lost the sight in one eye and whose vision from the other eye is also impaired. It is not without some significance that he was observed standing at the door of the Court room with his ear attuned listening in to the proceedings as the plaintiff was being examined by one of her Counsel. If there was anything wrong with his sight that no doubt could have been amply supplemented by what he may have heard from the plaintiff as she gave evidence.

On his evidence, he was standing by the 36 bus stop awaiting a bus which would have taken him to 37 Shortwood Road, his ultimate destination. He was in a crowd of persons by this bus stop. He remembered seeing the plaintiff as she approached the 35 bus stop terminus and saw her speak to a lady after which he saw her pause for a while before setting out across the road. He then saw the black radio car approach up Eastwood Park Road and hit down the plaintiff in the right lane, as she had her lead foot in the right lane and her other foot was still positioned in the middle lane. According to him, he was able to see this because of the fact that the road had three lanes all clearly marked out with white paint.

I pause once more to observe that it is almost a notorious fact that Eastwood Park Road is a one-way thoroughfare running from south to north and that there are no white lines running the length of that road and delineating the path of any traffic lanes. Mr. Campbell went to state further that he saw no bus parked out at the terminus while the plaintiff was there conversing with the lady, at the 35 bus stop ^{and} as she set out on her journey across the road.

It may be mentioned in passing also that as the 35 bus stop is situated above the 36 bus stop where the witness Campbell was, and as according to the witness there was a

- 6 -

crowd out there that morning, as it would have been expected at that hour of the day and for the witness to be able to see the plaintiff conversing with the woman and as she set out to cross the road he would have had of necessity to have a clear view of the plaintiff, a situation which a parked bus may not have made possible.

When Campbell was cross-examined it emerged from the evidence that he went to the scene following the accident and assisted the second named defendant in placing the plaintiff in the radio car and accompanied them to the University Hospital. He also gave a statement in writing at the Half Way Tree Police Station later on in the day. That statement was tendered in evidence as Exhibit 1 and it is sufficient to state that it varies most materially from the account now given by the witness Campbell at the trial.

In that statement, the witness, Cambbell, mentioned seeing the plaintiff on the morning in question on Eastwood Park Road between the 35 and 37 bus stops. She enquired from him as to where she could get a bus to go downtown and he told her. He then mentioned that a JCS bus stopped at the bus stop and as it moved off there was a police radio car coming up behind the bus and the plaintiff was not paying attention to the police car and continued walking. The police car hit her and she fell to the ground and he assisted in taking her up and accompanying the police and plaintiff to the hospital.

The second defendant's version

He told of driving the black police radio car up Eastwood Park Road on the morning in question. He was the first car in the left lane in a line of traffic at the intersection with Molyne's Road and South Odeon Avenue. When the lights changed to green he drove off heading in a northerly direction of Eastwood Park Road. He observed two parked buses. One moved off leaving the other. This bus was occupying the left lane. A girl (plaintiff) dashed from in front of the parked bus and into the path of the car. He immediately applied his brakes but could not avoid

206
the collisoon. He stopped but the girl was now^{to} the right of the car headlamp when she was hit. He puts his speed at the time of impact at about 15 - 20 miles per hour.

Conclusions and Findings of Fact

On the evidence as it emerged there were a number of common features that made the determination of the issues of fact not too difficult to resolve as:-

1. It is clear from the demeanour of the witness, Desmond Cambbell that his performance was of such a nature as to stamp him as an unreliable witness and one whose evidence was not worthy of belief.

He contradicted himself on the statement he gave to the police shortly after the accident which statement I accepted as one made by him.

He was further contradicted by the plaintiff herself and the second defendant on their evidence as to the presence of a parked bus being still stationary out at the terminus at the time of the collision and of the plaintiff attempting to cross the road from the front of that bus.

He can give no evidence of the circumstances leading up to the collision but his attention was drawn to the collision after it had already taken place. He stated that he first saw the black radio car when it collided into the plaintiff.

I therefore rejected his evidence in its entirety as I found that his credibility was shaken beyond redemption.

2. The facts as admitted by the plaintiff that she was attempting to cross the road from the front of the parked bus made her presence in the road unsighted to all moving vehicular traffic approaching up Eastwood Park Road until she had emerged into the road from the front of the bus. As the second defendant has testified that as he approached the second parked bus, which is the one which the

2. plaintiff stated she was crossing the road from the front of, he was now travelling in the middle lane totally unaware of her presence up to the moment in time when she had so emerged from in front of the bus.
3. The fact that the defendant driver was able ^{to} seeing the plaintiff/pull up and stop his vehicle upon hitting her, negatives any evidence of the car approaching at a fast rate of speed as the plaintiff has described.
4. The plaintiff's evidence of seeing vehicles stationary on Eastwood Park Road at the intersection by the traffic lights and not seeing any other vehicular traffic anywhere else at that moment in time, either crossing over into South Odeon Avenue or emerging from Molyne's Road unto Eastwood Park Road, is unsupported on a balance of probabilities and is evidence from which one can reasonably infer that she was not keeping any proper look out for traffic approaching from a southerly direction before setting out to cross the road.

I regard this finding as crucial to the plaintiff's case.

5. The account given by the defendant driver is more consistent with the truth as to how the collision occurred, when looked at as against that given by the plaintiff, as from the position that the plaintiff places herself on first seeing the defendant's car as it moved off from the traffic lights, had she been properly observing the traffic as the vehicles approached, and had she reacted in the manner that she stated she did, she would have completed crossing the road before the defendant's car reached her, as on her own account:-
- (i) The defendant's car was ^{was} ^{it} ~~she~~ estimated ~~to~~ be then about one and a half chains away from her.

- 9 -

- (ii) She had just about four to five steps left to complete crossing the road.
- (iii) She had about ten to eleven seconds in which to do so.

On the probabilities therefore the collision must have occurred while the plaintiff was in the middle of the road and bears out the defendant driver's contention that the plaintiff dashed suddenly into the road from the front of the parked bus and into the path of the car.

The plaintiff was therefore negligent in that:-

1. She stepped out onto a busy thoroughfare from in front of parked vehicle.
2. She was attempting to cross the road without first ascertaining that it was safe for her to do so.

For the defendant's part, having regard to my earlier observations and findings as to where in the road the collision took place and the fact that the defendant driver was not travelling at a fast rate of speed, I do not find that there was any evidence of negligence or contributory negligence on the defendant's part as based on the plaintiff's conduct on the morning in question the collision that occurred could not in my opinion on these facts have been avoided by any prudent motorist taking all reasonable precaution in the circumstances with which the defendant driver was presented.

The Law.

On the facts as I have found there is in my opinion no special duty of care owed to an infant plaintiff of whose presence the defendant driver was up to the time of collision totally unaware and therefore placed in a position where he could have had her in his contemplation at the material time, that is prior and up to the time that the collision took place. Such a special duty of care would only arise if the defendant driver had been afforded on the facts the opportunity of seeing the plaintiff before she set out on her journey to cross the road this fact would then have afforded him sufficient time and opportunity to pay due regard to the plaintiff's presence and her situation to have taken such reasonable steps to

- 10 -

guard against any abnormal behaviour such as that to which children of that age are accustomed such as dashing suddenly across roads without first looking out for oncoming traffic or playing on or near an highway as the decided cases have made reference to.

In all the circumstances therefore, on these facts as I have found, as much as one regrets the unfortunate suffering and injuries which has been the lot of the plaintiff in this matter, there is in my opinion no higher duty of care fixed on the second named defendant as to cast any finding of culpability on him and the end result is that there must be judgment for the defendants with costs to be taxed if not agreed.

D. O. BINGHAM
Fuisne Judge
March 20, 1986