

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1838 of 2002

BETWEEN

DEXTER DAVID

Plaintiff

AND

(1) THE MINISTER OF NATIONAL SECURITY

**(2) THE ATTORNEY GENERAL OF TRINIDAD
AND TOBAGO**

(3) ARVIN KALLOO

(4) STACEY CREMONA-SIMMONS

Defendants

(as administratrix ad litem of the Estate of the Deceased

**Nigel Busby as appointed by the Honourable Mr. Justice Myers dated
31st July 2003)**

Before Hon. Justice A. Mendonca

Appearances

Mr. K. Sagar for the Plaintiff

Ms. Noel and Ms. Smith for the Second Defendant

Mr. Hosein and Mr. Sankar for the Third Defendant

Mr. Scoon for the Fourth Defendant

J U D G M E N T

In this action the Plaintiff claims against the Defendants damages for personal injuries which he suffered in a vehicular collision. The collision involved two motor vehicles and the Plaintiff was a passenger in one of them. The vehicle in which the Plaintiff was a

passenger was a police vehicle owned by the State and the other vehicle was owned by the Third Defendant and driven by Nigel Busby, now deceased. The Fourth Defendant is sued as the administratrix ad litem of the estate of the deceased, Nigel Busby. The First named Defendant, the Minister of National Security, was wrongly named as a defendant and the action was discontinued against that Defendant before the trial of the action.

The facts in this matter are essentially not in dispute. Unfortunately the drivers of both vehicles were killed as a consequence of the collision. As will appear below, the Plaintiff could give no useful evidence as to how the accident took place. The evidence of how the collision occurred came essentially from Corporal Vidale who was a passenger in the police vehicle at the time of the collision and Corporal Samuel who was detailed to the scene of the accident to conduct inquiries. The facts may be summarized as follows.

On June 3rd 2001 in the early hours of the morning the Plaintiff, a police officer, was a passenger in a marked police vehicle registration Number PBJ 2811. The vehicle at the time was being driven by Constable Layne. In the front passenger seat next to Constable Layne was Corporal Vidale. Behind him in the rear seat of the vehicle was the Plaintiff. The police officers were on enquiries and were proceeding in an easterly direction along the Priority Bus Route (the PBR) on their way to the St. Joseph Police Station in St. Joseph. They were in the vicinity of the Eric Williams Medical Sciences Complex when a collision occurred involving the police vehicle and another vehicle PBG 6542.

As I mentioned above the drivers of both vehicles were killed and the only circumstance of the collision which the Plaintiff could recall was seeing a bright light on the windscreen of the police vehicle. Corporal Vidale however was able to give evidence more helpful to the Court. According to him on arriving at the crest of an incline on the PBR he saw two bright lights heading in a westerly direction on his side of the road or the eastbound lane of the PBR at a very fast rate. The first time he saw the lights they were 30 to 40 feet in front of the police vehicle in which he was a passenger and which was travelling at what he described at a medium rate of speed. He stated that he called on Constable Layne to pull his vehicle to the left but there was a delay by the driver in so doing. When he proceeded to pull to the left, Corporal Vidale heard a loud crashing sound and felt an impact. According to Corporal Vidale after the collision he noticed that the police vehicle was on the extreme left or the eastbound portion of the roadway.

According to Corporal Vidale therefore the collision was a head on collision that occurred when the PBG vehicle which was travelling in a westerly direction collided with the police vehicle on the eastbound lane of the PBR. The clear conclusion to be drawn from this evidence is that the collision occurred as a result to the negligence of the driver of the PBG vehicle. He left the westbound or his correct lane and came into the eastbound lane travelling in a westerly direction and there collided with the police vehicle.

There was no evidence to contradict this. Indeed the only other evidence impacting on the circumstances surrounding the accident support that conclusion. This evidence came

from Corporal Samuel. Corporal Samuel who at the time was attached to the St. Joseph Police Station was detailed to the scene of the accident. When he arrived at the scene he saw the police vehicle with the entire front smashed in on the shoulder of the northern side of the PBR facing east. He also saw the PBG vehicle also on the northern side of the PBR which is the eastbound carriageway facing west. The front of that vehicle was also smashed.

Corporal Samuel then proceeded to take measurements at the scene of the accident. He stated that he recorded brake impressions left by the police vehicle measuring in length 14 feet 3 inches. These brake impressions started in a straight line in the eastbound carriageway and veered towards the shoulder on the northern side of the PBR or in other words the brake impressions started in the eastbound carriageway and veered towards the shoulder of the eastbound carriageway. He stated that there were no brake impressions left by the PBG vehicle.

Corporal Samuel further stated that the width of both the eastbound and westbound carriageways of the PBR was 25 feet 4 inches. This measurement does not include the shoulders on both sides of the road. Including the shoulders the width of the PBR is 37 feet 9 inches. According to Corporal Samuel he assumed the point of impact of the two vehicles to be where he saw most of debris. He also took into account the position of the vehicles. That point of impact to the center line dividing the eastbound and westbound carriageways was measured at 11 feet 7 inches on the northern side of the PBR. The point of impact according to the observations of Corporal Samuel was therefore to the

extreme left or north of the eastbound carriageway. Corporal Samuel did state that in arriving at the point of impact, he did so without the assistance of anyone involved in the collision. This is because the time when he arrived at the scene of the accident the driver of the police vehicle was already dead, the driver of the other vehicle was unconscious and the other passengers in the vehicles appeared to him to be severely injured. However as mentioned above he arrived at the point of impact from his observations of the position of the vehicles and where he saw most of the debris. While it is possible that his assumption as to the point of impact may not be correct, in the absence of any evidence to the contrary I think it is of probative value and what it does show is that the collision occurred well in the eastbound lane.

The evidence of Corporal Samuel therefore supports that of Corporal Vidale that the collision occurred in the eastbound carriageway.

I think it is clear in the circumstances that the accident occurred as a consequence of the negligence of the driver of the PBG vehicle. It is clear on the evidence that he drove in a westerly direction on the eastbound lane when it was dangerous so to do and there collided with the vehicle in which the Plaintiff was a passenger.

There was some suggestion by Counsel for the Plaintiff and for the Fourth Defendant that the driver of the police vehicle should be held to be contributorily negligent, although I may say in fairness to Counsel for the Plaintiff it is a submission that he appeared to resile from. The submission was made on two bases (a) that there was a delay before the

driver of the police vehicle pulled to the left and (b) he should have pulled to the right and not to the left. The submission based on delay in pulling to the left was informed by Corporal Vidale's evidence that after he told Constable Layne to pull to the left there was a lapse of 45 to 60 seconds before he reacted. When asked however to demonstrate the time lapse from when he said pull to the left and when Corporal Layne responded it was no where near that. There was a lapse of only a few seconds, not exceeding five.

I think it is clear that from the time Corporal Vidale stated that he emerged over the incline and saw the oncoming vehicle the collision must have occurred in no time at all. The demonstration of a few seconds in my judgment exaggerated the time delay. No doubt it may have appeared longer than it really was. It is indeed remarkable that Corporal Vidale could even have commented to Corporal Layne to pull to the left. It is however pertinent here to note that we are dealing with two vehicles. One vehicle was said to be travelling at a very fast rate of speed and the other at a medium rate. According to Corporal Vidale the first time he first saw the oncoming vehicle it was 30 to 40 feet away from the vehicle in which he was travelling. The view of the vehicle before that was obscured by an incline on the PBR and on the evidence the vehicle could not have been seen sooner. With one vehicle travelling at a very fast rate and the other at a medium rate they would have travelled the 30 to 40 feet in no time at all - a split second - yet in that time the police vehicle left a brake impression of over 14 feet. I think in those circumstances it is fair to say that the reaction of the driver of the police vehicle must have been instantaneous. The brake impressions went straight and then veered. This

supports Corporal Vidale's evidence that the driver did not immediately pull to the left but in all the circumstances he cannot be criticized for that.

In order to establish contributory negligence it must be proven that the person failed to take ordinary care for himself or in other words such care as a reasonable man would take for his own safety. It must also be established that the failure to take care was a contributing cause. From the evidence it is not open to argument that the police vehicle driver's reaction was instantaneously to apply his brakes. He cannot be criticized for not immediately pulling to the left or to the right. Indeed I think pulling to the left was a normal reaction by Corporal Layne faced as he was with a vehicle coming toward him and travelling in his lane. By immediately applying his brake and pulling to the left it cannot be said that Corporal Layne did not take such care as a reasonable man in the circumstance would take. He is to be credited with reasonable care not the reaction one might expect from some extraordinary being.

In my judgment there is no question on the evidence of a finding of contributory negligence and in my judgment the driver of the PBG vehicle was solely to blame.

The Plaintiff in his statement of claim pleaded that at the material time the driver of the PBG vehicle was driving the vehicle as the servant or agent of the Third Defendant. This is denied by the Third Defendant. The only evidence that may point to this is that the vehicle at the time of the collision was owned by the Third Defendant. Ownership of the vehicle may provide some evidence that it was being driven by the owner's, servant or

agent. It is said in *Rambarran v Gurrucharan* [1970] 1 All ER 749, 753 that a defendant can repel any inference based on the fact of ownership that the driver was his servant or agent in either of two ways. One by giving or calling evidence as to the driver's object in making the journey in question and establishing that it served no purpose of the defendant. Two by simply asserting that the vehicle was not being driven for any purpose of the owner and proving that assertion by means of such supporting evidence as is available to him.

In this case the Third Defendant stated that the vehicle was one of a fleet of vehicles which he and his father owned and which was rented by a business owned by them. In other words the vehicle was rented out in the course of the business of the Third Defendant and his father. According to the Third Defendant when the vehicles are hired out they are hired by persons for their own private purposes or at least not for any purpose of the Third Defendant. It is no different with the PBG vehicle in this case. According to the Third Defendant it was rented out for no purpose of the Third Defendant.

A written contract relating to the hire of the vehicle was received in evidence. According to the contract the vehicle was rented by Kalloo's Auto Rental Co. Ltd. to Nigel Busby, the driver of the PBG vehicle, for a period of three days at a daily rental of \$200.00. According to the Third Defendant this company is a car rental company which is run by him and his father and on the evidence hires out vehicles owned by the Third Defendant and his father and indeed rented the PBG vehicle to the driver of the said vehicle.

I accept the evidence of the Third Defendant that the vehicle on the day in question was rented to the Nigel Busby. It was rented to the driver of the vehicle to be used by him for his own purposes or at least to be used not for any purpose of the Third Defendant. In my judgment the Third Defendant has done sufficient to repel the inference from ownership of the vehicle and I hold that the driver of the PBG vehicle was not driving the vehicle as the servant or agent of the Third Defendant.

I turn now to the question of damages. It is not in dispute that as a consequence of the collision the Plaintiff suffered severe personal injuries. He has made no claim for special damages but has claimed general damages. With respect to general damages the general considerations which the Court has to bear in mind when making its assessment are as follows:

- (1) The nature and extent of the injuries sustained;
- (2) The nature and gravity of the resulting physical disability;
- (3) The pain and suffering which had to be endured;
- (4) The loss of amenities suffered;
- (5) The extent to which the Plaintiff's pecuniary prospects have been affected.

(See *Cornilliac v St. Louis* (1964) 7 WIR 464).

I will set out what I consider to be the relevant facts under each head.

The nature and extent of the injuries sustained.

It is not disputed that the Plaintiff sustained a fracture of the neck of the right femur and a comminuted fracture of the mid shaft of the right femur. In effect his right hip and the mid shaft of the right femur were fractured.

There also appears in a medical report of Mr. Araujo, an orthopaedic surgeon who attended to the Plaintiff on his admission to the Port of Spain General Hospital shortly after the accident, that the Plaintiff sustained a laceration to his left ear. There is however no other medical evidence of this and I assume that this healed uneventfully.

The nature and gravity of the resulting physical disability.

Although the fractures are now healed the injuries have left the Plaintiff with a one inch shortening of the right leg. His right knee is very stiff with a range of movement of ten to eighty degrees. This is against the normal range of movement of zero degrees to one hundred and thirty degrees. Because of his injuries the Plaintiff walks with a significant limp and has weakness in both the thigh and hip muscles. In Court he was of uncertain gait and walked with the assistance of a cane.

Dr. Hoford into whose care the Plaintiff came shortly after the accident indicated that he has recommended surgery to the Plaintiff to improve the movement of his knee. There is however no guarantee that this operation will help significantly. According to Dr. Hoford if it does help it will not restore normal movement to the knee but can improve it.

The cost of the operation which has been recommended by the Plaintiff's doctor is approximately \$15,000 to \$18,000.

The Plaintiff is a tall person with a shortened limb, and this according to Dr. Hoford, is a classical recipe for back pain in the future. There are two matters which Dr. Hoford referred to in the evidence which may impact on the Plaintiff's back pain but will not eliminate it. The two matters are: (1) Although the Plaintiff can and should wear built up shoes this will not prevent the onset of back pain but may delay it. (2) The Plaintiff is also on the heavy side and if he were to lose weight it will lessen the severity of the back pain.

Dr. Hoford also stated that there was a high probability that arthritis will set in; this notwithstanding any weight loss on the part of the Plaintiff.

Dr. Hoford explained that to repair the fracture to the hip he placed a steel pin and plate in the area of the fracture. There is no specific reason to remove this. However should the Plaintiff develop arthritis in the hip which the doctor feels is a high probability, it will become necessary to remove the pin and plate and replace the hip in order to treat the arthritis. The cost of this operation is \$50,000 to \$60,000.

According to the unchallenged evidence of Dr. Hoford the Plaintiff's movement is now restricted. He cannot return to a normal range of movement. The Plaintiff will not be properly able to run, squat or stoop.

Pain and suffering endured.

On the day of the accident the Plaintiff was admitted to the Port of Spain General Hospital. It seems that on being admitted to hospital the Plaintiff was unconscious but he later regained consciousness at the hospital on the same day of the accident. On regaining consciousness the Plaintiff noted there was swelling in his right leg and hip. The Plaintiff described the pain in those areas as severe. He also experienced severe pain in the ear and temple area presumably from the laceration to the ear. I have no reason to deny that the Plaintiff's pain was severe.

At the hospital traction was applied to the Plaintiff. He remained at the Port of Spain General Hospital from June 3^d to June 7^h 2001 when he was transferred to the St. Augustine Private Hospital and came under the care of Dr. Hoford. He was bed ridden during this period. While at St. Augustine Private Hospital he underwent two surgical procedures. The first procedure according to the Plaintiff lasted somewhere in the region of 9 to 11 hours and was performed on June 16th 2001 approximately two weeks after the accident. After the operation the Plaintiff experienced severe pain in the right side of his right leg and right knee and hip. He underwent further surgery on the right leg on about June 22nd 2001. The Plaintiff said that this was to add stability to the leg. He was discharged from the St. Augustine Private Hospital on June 25th because of the high cost of staying there. Since then he has undergone one further surgical procedure and this was to remove the nail in the femur placed there to repair it. It is fair to say that these surgical procedures would have occasioned trauma to the Plaintiff.

During his stay at the St. Augustine Hospital the Plaintiff was confined to bed. He remained bedridden until on or about April 21st 2002. During this time the Plaintiff said he experienced severe pain. Further there is the steel pin and plate in his hip and while he was bedridden this caused great discomfort to the Plaintiff. In his own words “there was a piece of thing like steel probing (his) buttock muscle”.

According to the evidence of the Plaintiff the severe pain he experienced continued for as much as a year and a half after the accident. The Plaintiff continues to experience what he describes as moderate pain and which he must continue to control by the use of analgesics.

As mentioned earlier, according to Dr. Hoford the Plaintiff has to undergo one further operation in the short term and one sometime in the future. The Plaintiff will no doubt experience pain and suffering as a consequence. According to the doctor, as noted earlier back pain also lies in the Plaintiff’s future as well as arthritis. Simple functions are also a source of pain and discomfort to the Plaintiff; he cannot stand or sit for too long.

The loss of amenities suffered:

Prior to the accident the Plaintiff played lawn tennis and basketball. He considered himself to be a good basketball player. He also loved to dance and went ball room dancing two or three times a month. The Plaintiff now cannot do any of this. He cannot run and according to Dr. Hoford he will not be able to run properly again. It seems that

the Plaintiff will never again be able to play lawn tennis and basketball. With respect to ballroom dancing the Plaintiff said he does not have the balance to dance and this from the evidence is not likely to improve.

The effect on pecuniary prospects.

At the time of the accident the Plaintiff was and is now a police constable. The Plaintiff was unsuccessful at a promotion examination which he took. He has been in the police service for the past 22 years. This will however change shortly. The Plaintiff has been retired from the Police Force on the ground of ill health, that is to say because of the injuries suffered in the collision. The resignation will take effect from the date following the expiration of all the vacation leave to which he is entitled. This is approximately six to seven months. The Plaintiff will therefore cease to be in the service from approximately the end of June 2004.

As a police officer he earns a basic salary of \$8,737.55. There are deductions therefrom for PAYE, N.I.S. and Health Surcharge bringing the Plaintiff's net income to \$6,540.83.

The retirement age as a police officer is 55. If the Plaintiff were able to retire at that age he would receive a gratuity and a reduced pension. These are subject to tax and according to the evidence at the age of 55 the Plaintiff would receive based on his present salary the sum of \$146,715.47 as a gratuity and \$35,211.21 per annum as a reduced pension. However because the Plaintiff will not retire at the normal retirement age he will receive a lesser gratuity and reduced pension. According to the evidence if the

Plaintiff retired as at December, 19th 2003, the Plaintiff would receive a reduced pension of \$22,438.02 per annum and a gratuity of \$93,491.72. There is no likely to be any significant change in these figures on the Plaintiff's retirement in June 2004.

The Plaintiff is a welder by profession. A welder in the normal course of his trade is required to stoop and squat. These are functions which the Plaintiff cannot now do and which according to the evidence he will not be able to do. According to Dr. Hoford the Plaintiff, if he had to work as a welder, may be able to put himself in a position from which he could weld. But given the Plaintiff's obvious limitations it is a matter of conjecture whether the Plaintiff would be in a position to earn a livelihood as a welder.

The Plaintiff indicated that he did not think he would be able to resume his welding profession and that he had an interest in furthering his studies. He said he wanted to pursue computer studies. However hereto there would be limitations. Dr. Hoford pointed out that as back pain is an issue with the Plaintiff that could adversely affect his ability to function in an office environment. Also, there is difficulty in the Plaintiff sitting for long periods of time which could also negatively affect his ability to function in an office environment.

The doctor was asked if the Plaintiff could function as a security guard. He indicated that this was possible but it would not be easy. Quite clearly the Plaintiff's restricted movement, his inability to sit or stand for too long and the prognosis of back pain will adversely affect the Plaintiff's ability to function as a security guard.

It seems clear that the Plaintiff is limited in what he may do but he is functional and may earn an income in the years ahead. I propose to take this into account in fixing the multiplier in relation to the Plaintiff's lost earnings to which I will come shortly in this judgment.

On the issue of non pecuniary loss I have considered the cases referred to me by the parties in particular H.C.A. T99 of 1998 and 1792 of 1998 *Bacchus v Jack and Others* , H.C.A. No. S1508 of 1987 *Ramlal v Mc Intyre*, H.C.A. No 2112 of 1984 *Baal v Stollmeyer Ltd.* and H.C.A. No 277 of 1981 *Gonsalves v Teeluckchan*. Taking into consideration the change in the value of money at the date of the awards in those cases, that the award I make is a once and for all award and taking also into account the considerations as enumerated in *Cornelia v St. Louis* supra I think a fair award in all the circumstances for non pecuniary is \$200,000.00.

With respect to the pecuniary loss as I mentioned the Plaintiff earns as a police officer the net monthly salary of \$6,540.83. That figure I will use as the multiplicand. The Plaintiff is now 42 years old. He was born on August 17th 1961. The normal retirement age for a police officer according to the evidence is 55. I mentioned earlier that the Plaintiff may earn an income in the years ahead. It is pure however conjecture as to what he can do to earn an income and what he would earn. I propose in all the circumstances to use a multiplier of 5. This gives a total of \$392,449.80. From this must be deducted the salary which the Plaintiff will earn as a police officer to June 2004. In respect of loss of earnings I therefore award the sum of \$353,204.02.

With respect to the pension and gratuity there is no dispute among the parties that the Plaintiff was entitled to the gratuity lost as a consequence of his forced retirement by reason of his injury. The difference between the gratuity the Plaintiff would receive on retirement in June and which he would receive on normal retirement is \$53,223.75. The pension, it was accepted by the parties, is to be assessed on the same basis as the loss of earnings. According to the evidence the difference in pension which the Plaintiff will receive now as opposed to normal retirement is \$12,773.69 per annum. I therefore award the sum of \$63,868.45 for loss of pension.

The Plaintiff is also entitled to the cost of the two future operations of which Dr. Hoford gave evidence. This amount to \$65,000.00.

There will therefore be judgment for the Plaintiff against the Fourth Defendant with damages assessed in the sum of \$735,297.02. Of this sum \$200,000.00 shall carry interest at the rate of 6% per annum from May 28th 2002 to the date hereof.

The Plaintiff's claim against the Second and Third Defendants is dismissed.

On the question of costs I think it was reasonable for the Plaintiff to sue the Second and Third Defendants as the owner of the vehicles involved in the collision. The Second Defendant has pleaded in its defence that the accident was caused by the Third Defendant while the Third Defendant pleaded that the collision was caused by the driver of the police vehicle. With respect to the Fourth Defendant, that Defendant was added late in the day because of an amendment to the defence of the Third Defendant. In the original defence of the Third Defendant it was not contended that the driver of his vehicle was not

his servant or agent. That plea was introduced by way of the amendment which was almost a year after the commencement of the action. In the amended defence it was contended that the driver was not the servant or agent of the Third Defendant as he rented the vehicle to the driver. The written contract however showed that the vehicle was rented not by the Third Defendant but by a company. It is only in the evidence of the Third Defendant at the trial that it came to light that the company was in essence run by the Third Defendant and his father. I think in all the circumstances it was reasonable for the Plaintiff not only to join the Fourth Defendant but to continue the action against the Second and Third Defendants. In all the circumstances I think the appropriate order would be a Sanderson order (see *Rudow v Great Britain Mutual Life Assurance Society* [1881] 17Ch. 600 and *Sanderson v Blyth Theatre Co.* (1903) 2 KB 533). I therefore order that the Fourth Defendant pay the Plaintiff's costs of the action to be taxed, such costs to include all costs incurred by reason of there being three defendants. The Fourth Defendant shall pay the costs of the Second and Third Defendants to be taxed.

Dated this 12th day of January, 2004.

A. Mendonca
Judge