

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1637 of 2001

BETWEEN:

DENNIS PENNISTON

PLAINTIFF

AND

**TRANSPORT BOARD
JONATHAN BOYCE**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before Dr. the Hon. Madam Justice Sonia Richards, Judge of the High Court.

2009: June 12, 22

July 03

August 25, 26, 27

October 02, 14

December 22

2010: May 26

Mr. David Comissiong for the Plaintiff.

Mr. Leslie Haynes Q.C. and Ms. Laura Duncan for the Defendants.

REASONS FOR DECISION

The Factual Background

- [1] On 08 August, 1998, two buses owned by the Transport Board (the “First Defendant”) collided on Pegwell Main Road in Christ Church . The accident occurred around 7:30 a.m. on a rainy morning. BM400 was driven by Mr. Dennis Penniston (“the Plaintiff”), from Bridgetown towards the Airport via Oistins and Pegwell Main Road. BM500 was driven by Mr. Jonathan Boyce (the “Second Defendant”), from Sam Lord’s Castle towards Bridgetown via Pegwell Main Road.
- [2] The Plaintiff was injured and hospitalised as a result of the accident. He underwent a number of operations prior to his discharge from the Queen Elizabeth Hospital (“the hospital”), on 17 December, 1998. On 02 August, 2001, he filed a Writ claiming damages against the First and Second Defendants as a result of the collision. The Plaintiff alleged that the collision was caused wholly by the negligent driving of the Second Defendant. His particulars of negligence accused the Second Defendant of:
- (i) driving at a speed which was excessive in the circumstances;
 - (ii) failing to keep to his left and proper side;

- (iii) failing to keep any or any proper lookout or to have any or any sufficient regard for other motor vehicles particularly oncoming vehicles that were or might reasonably be expected to be on the said road;
- (iv) failing to see the said motor omnibus registration number BM400 in sufficient time so as to avoid colliding with that motor omnibus or at all;
- (v) failing to give any or any adequate warning of his approach;
- (vi) failing to heed the presence of the said motor omnibus registration number BM400 on the said road;
- (vii) failing to stop, slow down, to swerve or in any other way so as to manage or control the said motor omnibus registration number BM550 so as to avoid the said collision; and
- (viii) failing to exercise or maintain any or any proper or effective control over the said motor omnibus registration number BM550.

[3] The Defendants denied any negligent driving on the part of the Second Defendant. They alleged that the accident was caused or contributed to by the negligence of the Plaintiff by reason of his:

- (i) driving at excessive speed;

- (ii) driving on the wrong side of the road and there colliding with BM550;
- (iii) failing to keep any or any proper lookout or to have any or any sufficient regard for other traffic, particularly on coming traffic on the road;
- (iv) overtaking or attempting to overtake or pass a motor vehicle without first ascertaining or ensuring that it was safe so to do and when it was unsafe and dangerous so to do; and
- (v) failing to stop to slowdown to swerve or in any other way so to manage or control the motor omnibus as to avoid the collision.

[4] Ten witnesses gave evidence in the matter. These witnesses were the Plaintiff, the Second Defendant, one passenger from each bus, three individuals who lived along the roadway close to the scene of the accident, a police officer, a medical doctor, and the loss adjuster appointed by the insurance company. The evidence was taken over a period of four months, commencing on Friday 12 June, 2009 and concluding on Wednesday 14 October, 2009.

Disposition By The Court

[5] On Tuesday 22nd December, 2009, after receipt of the written submissions from the attorneys-at-law for the parties, and at the

conclusion of the oral submissions, the Court entered judgment for the Plaintiff on the basis that negligence was one hundred percent on the part of the Defendants and that there was no evidence of contributory negligence on the part of the Plaintiff. The computation of the quantum of damages was reserved to January 2010.

[6] On Wednesday 26 May, 2010, the Court further ordered that the Plaintiff was entitled to:-

1. special damages in the sum of \$12,370.00 with interest at the rate of 6% from the date of filing of the writ until judgment, and thereafter at the rate of 8% until payment.
2. general damages in the sum of \$120,000 with interest at the rate of 8% from the date of judgment until payment.
3. costs to be agreed or taxed.

The Evidence Presented

1. The Two Bus Drivers

[7] The Plaintiff's evidence is that he was the driver of BM400, a charter for airport workers. His route was from the fire station at Probyn Street around 7:15 a.m. to Oistins. It was a rainy morning, and he picked up passengers along the way. At Oistins, the heavy rain stopped leaving light drizzles. On leaving Oistins he stopped at the

junction of Pegwell Cross Road and took up two passengers. He took the left fork at that junction and drove up Pegwell Main Road and entered into an S bend.

[8] The Plaintiff said that he was driving on his left and proper side at a speed of 25 to 30 kilometers per hour. The road was wet, and a flow of water was still running down on the road. He came out of the S bend at the junction of Scarborough Road and Pegwell Main Road. Scarborough Road was on his left side, and he did not see anything on Scarborough Road.

[9] After passing the junction at Scarborough Road, the Plaintiff saw a gentleman driving a car on a driveway to a house on his left. The car was on the second property after passing Scarborough Road. While on the driveway, the car moved off and then stopped. The Plaintiff said he had passed the driver in the vehicle on the driveway when he observed another bus “coming down on the wet road with excess speed.”.

[10] The Plaintiff said that he continued driving on his left and proper side. Because the two buses would have arrived in the bend at the same time, he looked into his left side mirror to check whether the back of his bus had cleared the vehicle in the driveway. At the same time a

passenger sitting behind the Plaintiff, screamed out “Look how that man coming down the road like a madman!”.

[11] BM400 and BM550 were both on their left and proper sides at this time. According to the Plaintiff, the Second Defendant came down to the second bend with the same speed although the road was wet. BM 550 rushed over a flow of steady water that was on the road. As the front wheel of BM550 entered this water, the Plaintiff saw the Second Defendant pull the steering wheel of BM550 to the left. BM550 failed to go around the bend, and this bus crossed the road and its right front crashed into the right side of BM400. The Plaintiff lost consciousness after the impact.

[12] Prior to the collision, the Plaintiff said he managed to stop BM400 on its left and proper side. He estimated the speed of BM550 to be between 50 to 65 kilometers per hour. The Plaintiff was trapped in BM400 after the impact. He regained consciousness, and he was able to advise the Fire Service how to extricate him from the bus, by pulling BM550 off of BM400. After the buses were pulled apart, the Plaintiff was removed from BM400 with the assistance of the Jaws of Life, and taken to the hospital.

[13] On 17 August, 1998, while in hospital, the Plaintiff gave a written statement to the witness Martin Goddard, who was a loss adjuster at the time. The relevant portion of the statement reads as follows:-

“On Saturday August 8, 1998, I was assigned to drive the chartered bus to the airport. We departed Probyn Street at approximately 7:15 a.m. and travelled Highway 7 along the coast. As I approached Pegwell the road was damp. I was travelling at approximately 35-30 kilometers per hour up the hill. There were 16 to 17 passengers in the bus. As I approached the junction by Scarborough Road on my near side I saw the face of a white car onto the road. At that time I saw an approaching bus on the above straight coming down facing north. I had already started to pass the front of the said white car. I glimpsed into the left side mirror to check that the back of my bus had cleared the car. At the same time one of the passengers behind me screamed out. As I looked to the front I saw the other bus approach the corner. Seeing the driver pull the wheel to the left, instead of the bus going to its left it skidded across the road towards my vehicle. I attempted to bring the bus to a halt but the other bus collided with me at the same time. The front of my bus was on the left and proper side when the collision occurred.”.

[14] The Plaintiff stated that when he made the statement he was not too collected at the time. He also pointed out what he described as “slight errors” in the statement. The car was not a white car, and it was in a driveway and not on Scarborough Road.

[15] During cross-examination, the Plaintiff noted other errors in his written statement. There were 13 passengers in BM400 and not 16 to 17. In addition, he saw the face of the car in the driveway, and not on

the main road. Therefore, he emphasized that the Second Defendant could not have seen BM400 either overtaking a car parked on Pegwell Main Road, or overtaking a car with its front entering on to Pegwell Main Road.

[16] The Second Defendant was the driver of BM 550 at the time of the collision. Around 7 a.m. on the day of the accident, he was driving BM550 on the return journey from Sam Lord's Castle to Bridgetown. The rain was falling by Providence Church, and he noticed that his bus was washing or sliding when he pressed the brakes on the wet road. He explained that washing or sliding meant that BM550 was moving to the left or to the right when he pressed the brakes on the wet road.

[17] As a result of the sliding, the Second Defendant reduced his speed from between 30 to 35 kilometers per hour to 25 kilometers per hour. The speed limit for BM550 was 50 kilometers per hour. The Second Defendant informed the Court that BM550 was known for sliding, and that the speedometer was not working. This bus slid a number of times between Providence and Pegwell. It slid when on flat level road. Some of the slides also occurred when the bus was going straight and not going around a curve. However, BM550 did not slide

on a dry road. And when the Second Defendant reduced his speed BM550 did not slide.

[18] On reaching the junction of Pegwell Park and Pegwell Main Road, he saw a white car parked to his right on the opposite side of the road just above the junction of Pegwell Main Road and Scarborough Road. The Second Defendant said that he was driving about 20 kilometers per hour when he saw BM400 overtaking his car. He described the collision in this way:

“BM400 came up and overtake this same parked car and that is when I slammed home my brakes. I slammed brakes because the bus overtaking the car was over on my side. My bus started to slide to the right. It was at this point that I let go my brakes and hold them again. It was at this point that the two right corners of the buses collided together The position of the two buses at that point in time was at the centre of the road.”.

[19] The Second Defendant gave three statements about the collision. The first statement was an oral statement given to the police at the scene. The Plaintiff was still trapped in BM400 when the Second Defendant gave this statement. The Second Defendant’s version of what he told the police officer is as follows:

“I told him that I was coming down Pegwell by the Park. As I got to 3 to 4 bus spaces from a parked car BM400 overtake the parked car causing me to slam my brakes. That way the vehicle started to slide. I let go and hold again and the two buses collide.”.

[20] A written statement was submitted to the First Defendant by the Second Defendant on 10 August, 1998, two days after the collision. He was shown this statement, and he confirmed that it was true and correct when he gave it to the First Defendant. The relevant portions of this statement are that:-

“.... On reaching Providence, Christ Church I realised the road was wet from there on so I reduced my speed since the bus was sliding a little when I applied the brakes On reaching Pegwell, Christ Church at 07:40 hours, I was travelling at a moderate speed on my left and proper side when I rounded the first part of the “S” bend and saw the bus BM400 between two or three bus lengths away from me overtaking a parked white car. The oncoming bus BM400 was over on my side of the road so I had to slam home the brakes. My bus started to slide to the right. I released the brakes and applied them again but the bus kept on sliding until the right front corners of both buses collided Thirty-two passengers were on my bus at the time. ...”.

[21] The Second Defendant agreed that he made further statements to the loss adjuster. He was shown the following extract from Martin Goddard’s report.

“We contacted Mr. Boyce on August 18, 1998 and questioned him about the “parked white car” referred to in his statement. He informed us that he was not certain that the car was parked on the main road. And it was possible that the vehicle was actually exiting Scarborough Road. He advised, however, that the front of the vehicle was angled to turn left onto the main road.

Mr. Boyce also confirmed that the brakes of his bus were not faulty on the day of the accident. However, due to the

slippery condition of the road due to a light shower, the bus was “sliding slightly”.”.

The Second Defendant agreed that these additional statements were made by him to Mr. Goddard.

2. The Two Passengers

[22] Mrs. Catherine McClean was a passenger in BM400 when the accident occurred. She sat in the first or front seat on the left side of the bus. It was an elevated double seat, and she occupied the seat closest to the aisle. Someone else sat next to her on the left in the window seat. Over to her right and across the aisle was the first front seat on the right hand side of the bus. The Plaintiff sat in the drivers’ seat immediately ahead of the first front seat on the right side of BM400.

[23] Mrs. McClean was aware that the Plaintiff was new to that charter, and therefore unfamiliar with the airport employees who travelled on the charter. So she assisted him in identifying those employees who were not in uniform. Throughout the journey BM400 travelled fairly slowly from Bridgetown. The Plaintiff was also driving slowly coming around the corners to go to Thornbury Hill.

[24] BM400 passed Basix supermarket, which is on the right side of the road, and proceeded uphill towards the junction of Scarborough Road

and Pegwell Main Road. After passing this junction Mrs. McClean felt BM400 veer to the right. She looked up to see why the bus had veered, and she saw the front of a car coming out of a driveway on the left. The car was partially out in the road by its front bumper and front tyres. It appeared to this witness as if the driver of the car was preparing to turn right to go down the hill. Less than one quarter of the car was on Pegwell Main road; the car might have been a foot to a foot and a half out in the road "at the most". Mrs. McClean was not sure whether both front wheels of the car were on the main road or only one front wheel.

[25] According to Mrs. McClean, the Plaintiff pulled "a bit" to the right around the car. He went to the right side of the road, but not fully on the right side. She described it as a gentle manoeuvre. BM400 was not moving at any great speed; and Mrs. McClean knew "for sure" that when the Plaintiff made the manoeuvre, he did not go right over to the right side of the road. In fact, he was already around the car and pulling back to his left side.

[26] As the Plaintiff was returning to the left side of the road, Mrs. McClean looked up and saw BM550 coming down. She also heard the sing-song of its engine. She saw BM550 in the bend, and this bus

started to skid towards its right hand side of the road. The witness did not know why BM550 skidded. BM550 slammed into BM400, and struck BM400 on a part of BM400 that was already over on her left side of the road. Mrs. McClean was unable to say where in the road the back of BM400 was when the collision occurred.

[27] BM550 struck the right front corner of BM400, and BM400 moved back and ended up touching a hedge in the position shown in Exhibit SS1. The collision happened by a space after the hedge going up the hill. And the impact forced the left front of BM400 further left into the hedge. After the collision, the two buses were touching each other.

[28] When she gave her evidence, Mrs. McClean had been a licensed driver for eight years. She was not a licensed driver when the accident occurred. However, prior to the accident, she had travelled the same route on buses from the time she was eleven years of age. In her own words she “knew enough about buses travelling on Pegwell Main Road to make judgments about their speed.”. In her judgment BM550 was not being driven very slowly; BM550 was moving quickly. Mrs. McClean recalled screaming out an expletive, and

saying that perhaps the driver of BM550 was going to kill them because of the speed at which he was travelling.

[29] Mrs. McClean stated that the rain was falling when BM400 reached Welches by the supermarket. However, she did not recall seeing water on the road from a burst pipe. In addition, there was no car parked on Pegwell Main Road on the Plaintiff's side of the road.

[30] A passenger who travelled in BM550 also gave evidence. Verona Jones was sitting up front in the second aisle seat behind the driver of BM550. She could see the road ahead, and she confirmed that the road was wet that morning because of the rain. Ms. Jones was a regular passenger on the Sam Lord's Castle bus. She boarded BM550 at Long Bay, and eventually the bus was almost packed with every seat taken. However, no one was standing in BM550.

[31] Ms. Jones has a phobia for Thornbury Hill. She said that "most of the time I am jumpy about going around Thornbury Hill. ... I close my eyes and pray when I am going around that corner.". That morning she was scared because the Second Defendant was driving fast. She described herself as being "a little frightened" because "the bus was fast"; and she referred to Thornbury Hill as a "dangerous corner".

[32] Thornbury Hill is a steep winding descent that levels out and joins Pegwell Main Road on the way to Oistins from the Airport. Ms. Jones was preoccupied with the speed of BM550, and she believed that she closed her eyes when going around Thornbury Hill that morning. Her eyes were open on Pegwell Main Road because “Pegwell is not too bad”.

[33] Ms. Jones gave a vivid description of events as BM550 passed through Thornbury Hill and on to Pegwell Main Road:

“The bus was fast. I was wondering why it didn’t slow down because it’s dangerous. It was going downhill and there is another bend. The bus was fast and to me another bus was approaching us. I said within myself “This bus is going straight into that other bus” because it was fast. The bus I was in was heading towards the other bus, and the driver tried to stop the bus by slamming the brakes. It was heading straight to the right of the other bus. I know that vehicles are supposed to drive on the left side. The bus I was in was not on the left side, it was on the right side heading straight to the approaching bus.”.

[34] Under cross-examination Ms. Jones elucidated further:

“I just saw the bus heading straight towards the other bus. I cannot say exactly when it went over to the other side of the road. The driver was heading towards the other bus and slammed the brakes. I just saw the other bus in front of me. I am not sure of the lane. When the driver slammed the brakes he was over on the right hand side in front the other bus. When I first saw the other bus approaching us it was on the right hand side. I saw the front of the other bus. The bus I was in was almost in line with the other bus, it was on the right hand side.”.

3. The Three Residents

[35] Three individuals, who lived at adjoining premises along the route close to the collision, gave evidence in this matter. They were Davis Griffith, Jean Ward and Sonia Thompson-Solloway. Davis Griffith lived at the first house on the main road, after the junction of Scarborough Road and Pegwell Main Road, going towards Thornbury Hill. He lived on the same side that BM400 travelled along just before the collision. Around 7:30 a.m., Mr. Griffith said that he was sitting in a stationary car in his driveway, waiting to exit on to Pegwell Main Road. He was the driver of a grey Suzuki Swift Sedan, and he said that he was waiting about ten feet from the main road. The face of his car was not on the road.

[36] Because of the configuration of his driveway, Mr. Griffith's car was paralleled to Pegwell Main Road and facing east when he saw BM550 coming down. He slowed down to make a right turn in his driveway towards the exit. Mr. Griffith observed that BM550 "had a little speed", therefore he was prepared to wait for BM550 to pass before attempting to exit. At this point he heard and saw BM400 coming up the road, so he stopped in his driveway. BM400 was in line with Scarborough Road.

- [37] Mr. Griffith said that he stopped his car about ten feet from Pegwell Main Road. He noticed water running down the road. Although it had rained earlier, he didn't believe that it was rain water. He thought that this water was either coming from a burst pipe or from someone's property.
- [38] BM400 passed Mr. Griffith's driveway. He was still stationary in his car when he heard the impact. He did not witness the collision. After the impact BM400 was pushed back down the hill. BM400 came to a stop, partially blocking about one-third of Mr. Griffith's driveway, but leaving just enough space for him to ease out on to the main road and turn right. BM400 was on to the hedge of his next door neighbour Jean Ward.
- [39] Mr. Griffith told the Court that when BM400 passed his driveway it was on the dead left side of the road. BM400 did not go over to the other side of the road to overtake a car. He did not see BM400 making any other manoeuvre. This witness was certain that no car was exiting from a driveway on the left before the corner. He did not see a car in Scarborough road, or in his line of sight that morning. He saw no other stationary vehicle on Pegwell Main Road at the time of

the accident. And he denied that the face of his car was on Pegwell Main Road when BM400 passed.

[40] Jean Ward was Mr. Griffith's neighbour. Her property was between Mr. Griffith to the west and Ms. Thompson-Solloway to the east. Ms. Ward saw the collision between BM400 and BM550. Her verandah looks onto Pegwell Main Road, and she had been standing there from 7 a.m. for about half an hour observing traffic. It was not unusual for her to be out there on mornings looking around.

[41] Ms. Ward also confirmed that it was a rainy morning. Her evidence was that there was a burst pipe on the left side of the road, and that water was running across the road and down the hill towards Oistins. She saw BM400 coming from town, going towards the Airport, and driving at a normal speed. BM400 was on the left side of the road going up, and it passed her house and Ms. Solloway's house.

[42] Ms. Ward also observed BM550 driving down and around a corner on the other side of the road driving fast. BM550 was travelling so fast that she had to look at this bus. She stated that BM550 was travelling faster than BM400. In fact, it was unusual for her to see a bus coming down and going so fast. Very few buses passed her house coming down at the speed at which BM550 was travelling.

[43] Ms. Ward saw BM550 cross over to the other side of the road and collided with BM400, forcing BM400 back down the hill into her fence. The front of BM400 ended up by her fence and Ms. Solloway's gate. The back of BM400 ended up directly in front of Ms. Ward. After the collision BM400 and BM550 were "kissing one another, together.". Ms. Ward did not see another vehicle parked on Pegwell Main Road that morning.

[44] Ms. Solloway also lived on the main road above Ms. Ward, and two houses away from Mr. Griffith. She did not witness the collision, but around 7:40 a.m. she heard the impact from her bedroom that faced the main road. She rushed to her window and then went outside. She told the Court that she saw:

“... two Transport Board buses. One was coming down the hill, and the other was going up the hill. The bus coming down the hill was virtually on to the right across the road pinning the bus coming up over to the left side of the road towards the gutter and fencing of my neighbour Mrs. Ward The bus coming up was pushed over to the gutter and very close to the pillar of my front gate and my neighbour's fence The front of the bus was inches away from the pillar of my front gate The back of the bus was by the neighbour next to Mrs. Ward going to Oistins. The bus going uphill was in the left lane going from Oistins.”.

- [45] According to Ms. Solloway, the impact was in front of her house. She also observed some wetness on Pegwell Main Road that morning. Water was coming down the road in the bend by Pegwell Gardens. Ms. Solloway knew that there was a pipe in the area, but she could not say that the pipe had burst.
- [46] Ms. Solloway did not see any other vehicle in the road at the site of the accident. However, after the accident, a fire truck, a police vehicle and a CBC camera came to the scene. She saw the fire truck use a harness to pull BM550 from off of BM400. The Plaintiff was pinned to the steering wheel of BM400, and he was cut from the vehicle by the use of the Jaws of Life.

4. The Police Witness

- [47] Sergeant 743 Hendrick Spooner carried out investigations and took measurements at the scene. The measurements were recorded in his official police notebook. He arrived at the scene before the Fire Service, but he did not see the two buses touching each other. The distance between the buses was 2 feet 4 inches. Sergeant Spooner determined the point of impact from the broken glass in the roadway. Rain had recently fallen, and the road and the point of impact were wet. The width of the road at the point of impact was 23 feet 7 inches.

Measurements were also taken in relation to the positions of BM400 and BM550 from the two sides of the road. There were no brake marks on the road.

[48] Sergeant Spooner spoke to the Plaintiff when he was in the ambulance. The Plaintiff showed signs of discomfort, and told Sergeant Spooner that he could not remember what had happened. Sergeant Spooner also took a statement from the Second Defendant at the scene. The Second Defendant said:

“I was travelling along Pegwell Road when I approached an S bend. BM400 was travelling from the opposite direction overtaking a parked car. It was over on my right side of the road. I slammed home the brakes. The bus started to slide and the front corners of the buses collided.”.

[49] Sergeant Spooner recalled that there were about 40 passengers on BM550 and 20 on BM400. He interviewed and took statements from the majority of these passengers. He was the only police officer who investigated the accident; however a police report was completed by someone else. Sergeant Spooner did not see a steady flow of water across the road like water from a burst pipe. And he was not aware of any cause of water on the road other than rainfall.

5. The Medical Evidence

[50] The Plaintiff was under the care of Mr. Winston Seale during his stay at the hospital. Mr. Seale is a consultant orthopaedic surgeon and an expert witness in this case. He detailed the Plaintiff's injuries on his admission to the hospital. Counsel for the parties referred to his report in their closing submissions.

[51] Mr. Seale gave evidence from the Registrar's notes about two surgeries performed on the Plaintiff. After the first surgery, the Plaintiff complained of severe pain in both legs. In Mr. Seale's opinion, the degree of pain would have been more intense when the Plaintiff's fractures were fresh. In addition, while a fracture is immobile, movement at the fracture site could cause pain. There were no injuries to the Plaintiff that could have affected his memory.

6. The Loss Adjuster

[52] Mr. Martin Goddard was a loss adjuster with D.C. Craig & Associates Ltd. when the collision occurred. He investigated the accident, but he could not recall the details of the investigation. Mr. Goddard visited the scene of the accident a few days after it occurred. Based on his investigations, which included speaking to the investigating officer, he determined a point of impact on the Plaintiff's side of the road.

[53] Mr. Goddard took a statement from the Plaintiff, and he received statements from the Second Defendant. These statements were mentioned at paragraphs [13], [20] and [21] of this judgment. Mr. Goddard also interviewed passengers on the Plaintiff's bus. And he spoke to persons who lived near the scene of the accident, mainly to ascertain where the buses ended up.

Evaluation Of The Evidence And Findings Of Fact

[54] Having heard the evidence, the critical question to be answered by this Court is whether either the Plaintiff or the Second Defendant contributed, in whole or in part, to the collision between BM400 and BM550. In attempting to answer this question, the Court encountered a number of challenges.

[55] In assessing the evidence of the various witnesses, the Court was mindful of the fact that this evidence was taken approximately twelve years after the collision, and nine years after the Plaintiff filed his writ. There was, therefore, the very real possibility that memories had dimmed, and perceptions overshadowed by the passage of time. Little photographic evidence was provided to assist the Court. Photographs taken at the scene of the accident, soon after it occurred, were not produced. The Court was informed that the photographs could not be

found. The photographic evidence was limited to one photograph that appeared in a local newspaper.

[56] Sergeant Spooner's evidence was that although he arrived at the scene before the Fire Service, he did not see BM550 being pulled off of BM400. He said:

“I recall this scene clearly. I did not witness a movement of either of these vehicles. I would not have allowed them to be moved.”.

However, other witnesses saw the buses “kissing” each other, and also saw the Fire Service use a harness to separate the buses. The Court accepts that the buses were separated after the initial impact and contact. Therefore Sergeant Spooner's measurements were compromised to some extent, because they were taken after BM550 was pulled off of BM400.

[57] Several individuals were on board both buses. Most of these passengers were on board BM550. However, the Court heard from only two passengers. Statements were taken from a number of passengers at the Oistins Police Station and their names recorded in the Station Daily Diary. The Court was told that these statements no longer existed, and that the Station Daily Diary had been destroyed. The police witness could not recall the names of any of the persons

who gave statements. However, his notebook was preserved. Another curiosity is that neither the Plaintiff nor the witnesses who lived adjacent to the scene of the accident, were interviewed by the police following the accident.

[58] At the trial, the Plaintiff's account of the accident varied in part from the version of events given in his written statement. The Plaintiff said there were 13 passengers in his bus, and not 16 to 17 as recorded in his statement. The investigating police officer recalled about 20 passengers on BM400. Another error which the Plaintiff pointed out in his statement was the sentence stating that he saw a white car with its face on to the main road. He did not see the face of a car, but at the critical time, according to him, the car was stationary in a driveway just above the Scarborough Road junction. In addition, the colour of the car mentioned in his statement was inaccurate. The car was not a white car.

[59] The Plaintiff denied overtaking a car that was exiting a driveway to his left with its front wheels on the road. This evidence was confirmed by the driver of the car, Mr. Griffith. However, it is in conflict with the evidence of Catherine McClean, one of the passengers in the Plaintiff's bus. Her evidence was that she felt the

bus veer to the right, and that on looking up she saw the car coming out of the driveway. The car was a foot to a foot and a half on Pegwell Main Road. She was uncertain whether both front wheels were on the main road, but she was sure that the right front wheel was on the road. The Plaintiff also said that Mrs. McClean was sitting behind him at the right front of the bus. Her evidence was that she was seated in the left front aisle seat of the bus.

[60] During his examination in chief, the Plaintiff said that he had already passed the car in the driveway when he saw BM550 coming down. He continued on his left and proper side of the road. He stated further that:-

“Seeing the two buses would have arrived in the bend at the same time, I glimpsed into my left side mirror checking to see that the back of my bus had gone clear from the vehicle that was in the driveway.”.

The Plaintiff's evidence at this point was that having seen BM550 approaching, he checked to see whether the back of BM400 had cleared the vehicle in the driveway to his left.

[61] In cross examination, the Plaintiff confirmed that he saw BM550 before checking his left wing mirror. He told the Court that:

“When I observed the bus coming above the bend of the road I glimpsed into my mirror checking the back of my bus to

see if I had cleared the front of the car, and if the car had come out on to Pegwell Road.”.

[62] Later in his cross examination, the Plaintiff also stated that the purpose of looking into this mirror “was not to see whether BM400 had cleared the car.”. The reason given for checking was as follows:

“The rear wheel of my bus had touched the sidewalk. That caused me to look into my left wing mirror. Any driver would know when the wheel strikes a stone or rubs the sidewalk. I felt the rubbing of the wheel on the sidewalk and that caused me to look into my left wing mirror.”.

[63] Counsel for the Defendants suggested to the Plaintiff that the reasons he gave for looking into his left wing mirror could not both be true. The Plaintiff responded that both statements were true. He had looked into the left wing mirror to check the rubbing of the wheel, and also to see if BM400 had cleared the vehicle in the driveway. The Court accepts that the Plaintiff did check the left wing mirror of BM400 to see whether the back of BM400 had cleared the front of the vehicle in the driveway.

[64] The Court is also of the view that the Plaintiff’s reason for checking the left wing mirror is consistent with Mrs. McClean’s version of the events immediately prior to the collision. Why would the Plaintiff have felt the need to check on the position of the back of BM400 vis-

à-vis the vehicle in the driveway, if, according to him, this vehicle was stationary in the driveway, some 12 feet from the main road, and posed no danger? The Court is persuaded that the Plaintiff's checking of the left wing mirror was a part of the manoeuvre described by Mrs. McClean.

[65] The Plaintiff had veered to his right in order to go around the face of a vehicle that was protruding slightly on to the main road. And he consulted the left wing mirror to ensure that the back of BM400 had cleared the vehicle before returning BM400 to the left side of the road. This conclusion is also consistent with an unchallenged statement made by the Plaintiff. In cross examination he said that:

“A Transport Board bus is a long vehicle. BM550 was 34 feet long and BM400 was 30 feet long. If you are overtaking you go over to the right hand side and then back to the left hand side. If you are overtaking a long vehicle there would be a point when the front of the vehicle goes back to the left and the back of the vehicle is still on the right. If it is a short vehicle like a car being overtaken the entire bus will return to the left hand side at the same time.”.

[66] Having made his manoeuvre around the protruding vehicle, the Plaintiff was duty bound to ensure that the back of BM400 had cleared the vehicle before he returned to the left side of the road. Had he returned the front of BM400 to the left side of the road too soon, the back of BM400 could have collided with the vehicle. It was as if

the Plaintiff was overtaking a short vehicle, and the entire bus would have returned to his left side of the road at the same time. Therefore, it was necessary for him to consult his left wing mirror to ascertain the appropriate time to return to the left side of the road, and to ensure that he did not collide with the protruding vehicle.

[67] The Court finds as a fact that up to the point prior to his decision to go around the protruding vehicle, the Plaintiff had driven BM400 slowly and carefully. In executing the manoeuvre around the vehicle, was the Plaintiff negligent as a result of a lapse of judgment on his part? Mrs. McClean described the manoeuvre as gentle. There was no sense of danger or urgency on her part or on the part of the Plaintiff. The manoeuvre did not require the Plaintiff to go completely over to his right side of the road; he had veered “slightly” to the right.

[68] Mrs. McClean was not sure whether BM400 had completed the manoeuvre, but the front of BM400 had returned to the left side of the road when she saw BM550. In light of the Plaintiff’s unchallenged evidence referred to at paragraph [65] of this judgment, the Court finds that BM400 had returned to the left side of the road in its entirety. There is no evidence that the protruding vehicle was more than a foot to a foot and a half on to the main road. There is no

evidence that the Plaintiff saw BM550 or any other traffic coming through the bend towards him before he made the manoeuvre.

[69] The Second Defendant's account is that he was driving on Pegwell Main Road towards Oistins. When he reached the junction of Pegwell Park and Pegwell Main road he saw a white car parked on the opposite side of the road just above Scarborough Road. As he got to two or three bus lengths away from this parked car, BM400 came up and overtook the said parked car. BM400 was on the same side as BM550, so the Second Defendant slammed the brakes of BM550. At this point BM500 started to slide and the two buses collided.

[70] The Second Defendant was the only witness to see a car parked on Pegwell Main Road just above the Scarborough Road junction. Mrs. McClean's evidence was that there was no car parked on Pegwell Main Road on the Plaintiff's side. Mrs. Solloway did not see any other vehicle in the road at the site of the accident. And ten days after the collision, the Second Defendant was expressing his uncertainty to Martin Goddard as to whether a car was parked on the main road. He told Mr. Goddard that it was possible that the car was exiting Scarborough Road. The Second Defendant also admitted in cross-

examination that his statement to Mr. Goddard was informed by what he heard from other people about a car exiting Scarborough Road.

[71] The Court finds as a fact that, prior to the collision, there was no car parked on Pegwell Main Road, above Scarborough Road. Additionally, there was no vehicle exiting Scarborough Road.

[72] The Second Defendant realised that BM550 was sliding while driving by the Durants Golf Course. The speedometer was not working, so he estimated his speed to be about 30 to 35 kilometers per hour at that time. As a result of the sliding he slowed his speed to about 35 kilometers per hour. Having slowed down, BM550 was not sliding. When he saw BM400 overtaking the car, his speed was 20 kilometers per hour.

[73] Under cross examination, the Second Defendant considered that a moderate speed was about 25 to 30 kilometers per hour. He agreed that he was driving at what he considered “to be a moderate speed”. Also in his written statement, submitted to the First Defendant two days after the accident, the Second Defendant said that on reaching Pegwell at 07:40 hours, he was travelling at a moderate speed. (See paragraph [20] of this judgment.)

[74] Having agreed with Counsel for the Plaintiff that prior to the collision he was driving BM550 at a moderate speed of between 25 to 30 kilometers per hour, the Second Defendant immediately resiled from that position: "I could be wrong. I could have judged the speed wrong. The speedometer was not working. I would say that I was driving slowly.". During his re-examination, the Second Defendant made a further modification to his speed: "I considered myself to be driving very slowly on Pegwell Road."

[75] All the other witnesses who were involved in the collision, or who saw the collision, commented on the speed at which BM550 was travelling just before the collision. The Plaintiff described BM550 as "coming down on the wet road with excess speed.". A passenger behind the Plaintiff likened the manner in which BM550 was being driven to that of a madman. Mr. Davis observed that the bus coming down had a little speed. Ms. Ward was not a licensed driver, but she had observed buses travelling that route outside her residence on a regular basis. She found the speed at which BM550 was travelling to be unusual because very few buses coming down passed at that speed. She kept BM550 under observation because it was "travelling so fast.".

[76] Verona Jones said repeatedly that BM550 was fast. She told herself that BM550 was going straight into BM400 because BM550 was so fast. She had never driven a vehicle, but she travelled that route regularly by bus on her way to work. Mrs. McClean was not a licensed driver at the time of the accident. However, she had travelled that route on buses from the time she was eleven years of age. She stated that she:

‘knew enough about buses travelling on that road to make judgments about their speed. In my judgment [BM550] was driving quickly. I cannot remember exactly what I said, but I said something else to the effect that perhaps the [Second Defendant] was going to kill us. I said that because of the speed at which he was going?’.

[77] The evidence is overwhelming that just before the collision the Second Defendant was driving neither very slowly, neither slowly, nor at a moderate speed. BM550 was being driven at a rate that drove fear into the two passengers who gave evidence and caused Ms. Ward to comment on its unusual speed.

[78] The single fact on which all the witnesses are agreed, is that at the time of the collision the road was wet. The Plaintiff also spoke about a flow of water on the road. The witnesses who lived near to the accident suggested that there was a burst pipe in the area, or that the water was coming from someone’s property. However, no one gave

evidence about seeing the source of this water. There were other witnesses, like Mrs. McClean who did not recall seeing any water running on the road. The Court accepts the undisputed evidence that the road was wet; and the Court also finds that water was flowing on the road, although the source of this water is uncertain.

[79] On the morning of the collision, the Second Defendant drove BM550, a bus that according to him was known for sliding. The bus slid several times on the wet road before he reached Pegwell Main Road. The Second Defendant continued to drive BM550, and he did not think it necessary to inform the First Defendant by CB radio that he was experiencing any problem with the bus. He knew that BM550 could slide on the wet road if he exceeded 35 kilometers per hour. The Second Defendant was also aware, as stated in his own words, that “The majority of times that a vehicle slides it constitutes a danger.”.

[80] With this knowledge the Second Defendant proceeded to drive BM550 downhill, through the bends of a wet Pegwell Main Road, at a fast rate of speed. Water was also flowing on the road, and it was in these circumstances that BM550 slid across the road into the path of BM400. According to the witness Verona Jones, who was on board

BM550, the Second Defendant slammed the brakes when BM550 was heading straight towards BM400. The Court accepts this evidence, and finds as a fact that the Second Defendant did not slam the brakes of BM550 before this bus started to slide across the road in the direction of BM400. It was after BM550 was sliding towards BM400 that the Second Defendant tried to stop BM550 by slamming the brakes.

[81] The Second Defendant lost control of BM550, and was unable to stop its slide across the road, and the inevitable collision with BM400. He slammed into BM400 over on BM400's side of the road. BM400 was on its left and proper side of the road at the time of the collision. There was no evasive action that the Plaintiff could have taken in order to avoid the collision. It was the negligence of the Second Defendant that was wholly responsible for the accident. And there is no evidence of any negligence on the part of the Plaintiff.

Assessment of Damages

[82] The Plaintiff's special damages are not in dispute, and they were agreed in the sum of \$12,370.00 as follows:

(i)	Medical expenses	\$3,440.00
(ii)	Transport	530.00
(iii)	Housekeeping	5,400.00
(iv)	Future medical care	<u>3,000.00</u>
		<u>12,370.00</u>

[83] With respect to the general damages, the Plaintiff's injuries involved several fractures that were simplified by Mr. Seale as follows:

- (i) a fracture to the left knee cap;
- (ii) a fracture below the knee to the left leg;
- (iii) a fracture to the left side of the right ankle; and
- (iv) a fracture to the right side of the right ankle.

He endured excruciating pain immediately after the accident, and he was heard crying out in pain and begging personnel to stop his removal from the bus.

[84] The Plaintiff was taken to surgery on six occasions between 08 August 1998 and 14 February 1999. He remained in hospital for about four months, and on his discharge from the hospital he was unable to walk. He used a wheelchair and crutches for about a year after the accident. He was also unable to work for about a year.

[85] At the time of giving his evidence the Plaintiff complained of experiencing lots of pain in both feet from his toes to his ankles and

around his knees. He suffers with arthritis from his hips to his toes on both feet. The injuries also left marks on his body on the left and right ankles, and a long operating scar on the left leg. He experiences steady pain on a daily basis from his toes to his ankles. The Plaintiff is now unable to wear any enclosed shoes.

[86] The medical report, which was referred to by both counsel, states that the Plaintiff was left with a left leg that is mildly bowed by five degrees in comparison to his right leg. As a result his right leg is one centimetre shorter than his left leg. His overall disability is about twenty-five percent.

[87] The Plaintiff's injuries are within the category of "severe leg injuries", as designated by the guidelines of the United Kingdom Judicial Studies Board. In view of the nature of the Plaintiff's injuries, his several operations, the degree of pain endured and ongoing, the onset of arthritis, the cosmetic challenges to the areas of injury, and the degree of permanent disability, the Court consider that an award of \$120,000.00 is appropriate.

[88] Judgment is entered on behalf of the Plaintiff, and he is entitled to:

(i) Special damages in the sum of \$12,370.00 with interest at the rate of 6% from the date of filing of the writ until judgment, and thereafter at the rate of 8% until payment.

(ii) general damages in the sum of \$120,000.00 with interest at the rate of 7% from the date of judgment until payment.

(iii) costs to be agreed or taxed.

DR. SONIA RICHARDS
Judge of the High Court

Postscript: Upheld by the Court of Appeal in Transport Board et al v. Dennis Penniston (Civ. App. No.9 of 2010; 20 February 2012)