CIRCULATE civil may 5, 05


**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. 890 of 2002**

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| **BETWEEN:** | **ALEXANDER BODDEN** | **PLAINTIFF** |
| **AND:** | **SHANE SOLOMON** | **DEFENDANT** |

Appearances:
Mr. Kyle Broadhurst and Peter Broadhurst of Broadhurst Barristers for the Plaintiff
Mr. Ramon Alberga Q.C. instructed by Mr. Shaun McCann of Campbells for the Defendant

Before: Mr. Justice Sanderson

Hearing Date: 25th and 26th April 2005


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**REASONS FOR JUDGMENT**

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1. In the early morning on Sunday December 16th 2001, Alexander Bodden was walking on the edge of the Crewe Road Bypass. He was hit from behind by a motor vehicle driven by the defendant Shane Solomon. He sues Mr. Solomon in negligence. Mr. Solomon defends on the basis:

i) that the collision was an inevitable accident caused by a dragon fly entering his vehicle, flying around hitting him in the face and thereby creating an involuntary distraction; alternatively,

ii) that Alexander Bodden was contributorily negligent by walking on the roadway.

2. The defendant was convicted of careless driving in Summary Court by Magistrate Hall. That conviction was set aside by Levers J in this court on the basis of inevitable accident. This trial is limited to a determination of civil liability.

3. The accident occurred at approximately 7:00 am. The morning was clear, bright and dry. Visibility was unlimited. That portion of the Crewe Road bypass is straight and wide. The paved road has one lane going in each direction and is twenty-four feet wide in total, twelve feet for each lane. The shoulder on each side of the road is approximately twenty-four feet wide, is level, clear and well packed.

5. The plaintiff was walking approximately one foot on to the paved surface. He was with his brother David who was beside him walking on the shoulder. They were going to work.

5. The defendant was eighteen years old and was alone, driving a 2001 Mitsubishi Mirage which is approximately five feet wide. He had obtained his drivers licence a few months

earlier. He was travelling at approximately 40 mph, which is the maximum posted speed. He said he first observed the plaintiff and his brother from approximately four hundred feet away, although he later admitted in cross-examination that:

i) "I didn't see them before that because I wasn't looking that far ahead". Then he said;

ii) "I probably saw them before four hundred feet but didn't take notice of them". Then he said;

iii) "I probably saw them from more that four hundred feet away".

6. The defendant knew that he was going to have to move his car to the right in order to drive around the plaintiff. That is, he agreed he was on a collision course with the plaintiff. At a speed of 40 mph, he was travelling at a rate of 58.6 feet per second. At that speed it would take 6.8 seconds to travel 400 feet. Since the plaintiff was only one foot on to the roadway the defendant was, therefore, driving on the left-hand side of the twelve-foot lane. The defendant could have passed the plaintiff within his twelve-foot lane without having to enter in to the on coming lane. Further, there was no evidence of traffic coming from the opposite direction such as to prevent the defendant from moving in to the on coming lane if it was necessary to do so, in order to pass the plaintiff.

7. The defendant never changed his course or applied the breaks from the time he first saw the plaintiff until after he hit him. In his evidence in chief the defendant testified that he was approximately 40 to 50 feet from the plaintiff and was just about to steer his car around the plaintiff when a dragonfly flew in to car. He said he panicked and did not

notice the plaintiff after that. The distance between the plaintiff and the defendant, at the moment when the dragonfly flew into the car, is important in determining the out come of this case.

8. The defendant said that the dragonfly flew in and hit the inside of the windshield in front of him. He said the dragonfly stopped on the windshield and he had time to identify it as a dragonfly. The defendant then said he tried three times to shew it away with his right hand while holding on to the steering wheel with his left. He said he missed the dragonfly on those three occasions, that the dragonfly then flew up and around his face and head and that he tried once more to hit it away with his right hand but missed. He said the dragonfly hit then him in the face. It was immediately after that, that he felt the thump as he struck the plaintiff. The defendant said that from the time the dragonfly flew in the car until he hit the plaintiff with his vehicle, only took a split second. Finally he testified that he did not see or know that he had hit the plaintiff, until he stopped about a hundred and twenty feet away from the point of impact. The plaintiff had also been carried or knocked that distance and was lying beside the car. He was seriously injured.

9. I do not accept that the defendant was only 40 to 50 feet away from the plaintiff when the dragonfly flew into his car, or that only a split second elapsed, from the time the dragonfly entered the car, until the moment of impact.

10. In his written statement to the police on the day of the accident the defendant said:

> "As I approached the end of the bypass I observed two people walking, one person on the gravel shoulder and the other on the paved road. The person on the road was about one foot to the right of the shoulder. As I approached these people from two pole lengths away, a bug flew into my car. It was a dragon fly."

11. At trial (and also when he was on trial in summary court), he confirmed that that this statement was accurate and true. I read the statement to mean that the dragonfly flew into his car when he was about two pole lengths away from the pedestrians. The poles are approximately 200 feet apart so according to his written statement, he would have been about 400 feet from the pedestrians when the dragonfly flew into the car. His statement to the police was consistence with the oral evidence that he gave on cross-examination. He testified, "it is probably accurate that a fly flew in the car from 2 pole lengths away". This is contrary to the evidence that he gave in chief.

12. The defendant further agreed in cross-examination that at least 3 seconds elapsed between the time the dragonfly entered the vehicle and when he hit the plaintiff. (He also gave similar evidence in the Summary Court). The defendant said that 3 seconds would be the minimum time the dragonfly was in his car before it hit him in the face. At a speed of 40 mph the defendant would have travelled approximately 175 feet in 3 seconds. Therefore, if 3 seconds is the minimum time that the dragonfly was in the car, he was at least 175 feet away from the plaintiff when the dragonfly flew in the window and he was not 40 or 50 feet as claimed in his evidence in chief. Further, the time from the entry of the

dragonfly until the accident was much more than "split second" he claimed in his evidence in chief.

13. Finally, the defendant testified that the fly entered the car and hit the inside of the front windshield. The dragonfly stopped and he had time to identify it as such. He tried to hit it with his right hand three times missing each time. The dragonfly then alighted and flew around his head and face. The defendant again attempted to hit the dragonfly away but missed. The dragonfly then hit him in the face and the defendant collided with the plaintiff. (Again this was similar to the evidence he gave before the magistrate). These events do not take a split second but would have taken considerably longer. They cannot occur in time it takes to travel 40 to 50 feet at a speed of 58.6 feet per second.

14. I make the following findings of fact:

i) The defendant saw the plaintiff from more than 400 feet away;

ii) At a speed of 40 mph the defendant had at least 7 seconds to move his car and safely drive around the plaintiff;

iii) A distance of approximately 400 feet from the plaintiff, a dragonfly entered the defendant's vehicle;

iv) For approximately the next 6 to 7 seconds the defendant was distracted by the dragonfly, trying to swat it away and did not look at the pedestrians again;

v) At no time prior to the accident did the defendant apply the brakes or attempt to drive around the plaintiff. (This was admitted by the defendant);

vi) The defendant knew he was on a collision course with the plaintiff and would have to move the direction of his car or hit the plaintiff, (again this was conceded by the defendant);

vii) At the time of the collision the defendant did not have control of his vehicle, (again admitted by the defendant).

viii) If the defendant had applied the breaks when he was 3 seconds away from the plaintiff (or further) he could have stopped and avoided the accident, (again conceded by the defendant.)

ix) The approximate stopping distance of a vehicle travelling at 40 mph, including reaction time, is a hundred and twenty feet. The stopping distance in this case, according to the police evidence was approximately one hundred and eighteen feet.

**INEVITABLE ACCIDENT**

15. In these circumstances can a defendant maintain a defence of inevitable accident. *In The owners of the ship "Marpesia" and the owners of the Barque or vessel "America" and her cargo [1872]* [L.R.] PC the Privy Council held at page 220:

> Again in the case of *The Virgil* (1), the same learned Judge gives the definition of inevitable accident. "In my apprehension, an inevitable accident in point of law is this, viz, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.....
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> Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime shill, in the circumstances, either would not have done or would not have left undone, as the case may be.

16. In *Dowsing v Goodwin (Supreme Court of NSW)Australia (Mason P, Handley JA, Powell JA)* November 10th 1997, Mason J held at page 4:

> "Negligence law in Australia remains wedded to the fault principle and the requirement that the plaintiff bears the onus of proof. A plea of inevitable accident is simply a denial of negligence. [1] A sudden and unheralded incapacitating event, such as a bee sting or a stroke, may preclude a finding of negligence where the driver had insufficient time to avert the ensuing accident. [2] Since the duty is to take reasonable care, it follows that (in Lord Blackburn's words) *"when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much." "Not too much"* because the reasonable driver is aware of the potential risk of the activity and may be expected to drive *"defensively"* in the sense of making some allowance for dangerous situations not flowing directly from his or her own neglect".

17. *In S v Lumbard 1964 (4) SA 346; Sinclainr et al v Nyehold 29 DLR (3rd ) 614, and Wong v Gonzalez (2000) BCJ No. 1965,* the courts dealt with the situation where a bee had entered the defendant's automobile and a collision resulted. In each case the court

concluded that it was not an inevitable accident. In *Sinclair* (Supra) Tyso J said at page 617:

> "He went no further that to submit that this was a sudden and unexpected event creating' a situation with which a reasonably skilful and careful driver could not be expected to deal. I agree there was no emergency in the sense in which that word is known in the law of negligence. As to the submission made by counsel, in my view it overlooks the duty that rests upon a driver so to conduct himself as not to expose other users of the highway to unnecessary risk of harm by default in the management of his car "in respect of reasonable care, reasonable skill or reasonable self-possession, whether in emergencies or in ordinary circumstances", to use the words of Duff J., as he then was, in Carter v Van Camp et al., supra. I am forced to the view that at the time in question the respondent inexcusably displayed a lack of "competent self-command". Had he exercised reasonable skill and care a collision with the appellants' car would have been avoided. He would either have stopped his vehicle or so directed its course that it remained on its proper side of the highway. His failure to do so was the cause of this unfortunate accident.

18. In Wong (Supra) Myers J quoted from Maszlar v Wiens, [1994] B.C.J. No. 744 as follows:

> "In that particular case Mr. Justice Edwards, going over the law related to the doctrine of "agony of collision," quotes "from Fosters Motor Vehicle Law and says:
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> > "In a number of cases, concerning what is commonly called "agony of collision", it has been pointed out that a driver acting in an emergency created by another vehicle or some extraneous fact cannot be expected to exercise nice judgement and prompt decision, and mere errors of judgment is such circumstances may often be excusable."

Mr. Justice Edwards then quotes from the case of Manhas v Froese where Mr. Justice Gould said:

> "Where an emergency arises it is not necessary for a driver to possess extraordinary skill, presence of mind, poise or self-control, and his failure to act as an ordinary person in an emergency is not held to be negligence. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending upon the circumstances, to exercise his judgment as to what steps could be taken to avoid a collision.....:

Myers J. concluded at paragraph 20;

> "We turn then to the question of whether or not the plaintiff has proved on the balance of probability, negligence being the proximate cause of the accident. I hold, that in the circumstances where the bee entered the car, she had an opportunity to deal with the bee in a way that wouldn't impair or wouldn't potentially harm the safety of others, but she didn't take advantage of that opportunity. She is negligent in not dealing with the bee before there was a sting. Certainly she could have gotten out of the car, or put on the park or emergency brake or directed one of the other passengers to swing at the bee or do something or other. Instead she decided to focus all her attention on the bee at the unfortunate and foreseeable risk to other people using the road. I find therefore that prior to the bee bite, there was negligence. I find that, following Sinclair v Nyehold, there was negligence on the defendant's part in not considering at all how her actions might impact on other people or other cars in the area.

19. In the present case the defendant saw the plaintiff in ample time to avoid him and in ample time to stop. He did not commence to turn his vehicle such as to pass by the plaintiff. When the dragonfly entered his car, he was completely distracted by it. He did

not stop or even slow down. Again, he had ample opportunity to do both. The dragonfly posed no immediate treat. The defendant was not stung or injured or out of control because of this interfering act. The defendant made conscious decisions to try to get the dragonfly out of his car and paid no further attention to the pedestrians that he was on a collision course with. In submissions defendant's counsel, Mr. Alberga QC, agreed that if I found that the dragonfly entered the defendant's vehicle when he was one hundred and seventy-five feet (or three seconds) or more, away from the plaintiff, then the defence of inevitable accident could not be sustained. In my view Mr. Alberga is correct. If the defendant had exercised ordinary skill and caution, the accident would have been avoided. The defendant was under a duty to exercise reasonable skill or reasonable self possession whether in an emergency or in ordinary circumstances, although the particular conduct in each of those contrasting situations may very significantly. It is plain on the facts of this case that the defendant was negligent in the operation of his motor vehicle after the dragonfly flew in and the defence of inevitable accident cannot succeed.

**CONTRIBUTORY NEGLIGENCE**

20. The defendant argues that the plaintiff was contributoraly negligent and the defendant should only be liable for between 60 to 75 percent of the damages. In *Nance v British Columbia Electric Railway Company LD [1951] AC 601* the Privy Council held;

> "contributory negligence is wide enough cover a contention that he was careless of his own safety, even though he did not owe a duty of care to the respondent company."

21. In paragraph 3-12 and 3-21 of Charlesworth and Percy on Negligence, 9th edition, 1997 the author state:

> Further, it was explained by du Parcq L.J.:
>
> > "In order to establish the defence of contributory negligence, the defendant must prove first, that the plaintiff failed to take 'ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident."
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> The amount of care which a plaintiff may reasonable be expected to take necessarily varies with the circumstances and with the condition actually prevailing at the material time.
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> **3-21**
> **Cause of accident**. In considering what is the *cause* of an accident:
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> > "Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it.
> >
> > "One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being to remote and those which must not. Sometimes it is proper to discard all but one and to regard that as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.

**3-22**
What were the causes of an accident is a question of fact and, as the passage just cited shows, no test has yet been formulated to enable this question to be decided.

22. Section 8 (1) of the Cayman Islands Torts (Reform) Law (1996) Revision states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

23. In Charlesworth (Supra) at paragraph 3-25 and 3-26 it states:

> **Appointment of damages.** Section 1 (1) of the Act provides that when both parties are at fault the plaintiff's damages are to be reduced "having regard to the claimant's share in the responsibility for the damage." The use of the word "responsibility" is intended to exclude the more remote causes of the damage and to concentrate on the responsible causes. To quote Lord Wright in a case decided before the 1945 Act:
>
> > "The decision.....must turn not simply on causation but on responsibility; the plaintiff's negligence may be what is often called *causa sine qua non*, yet as regards responsibility it becomes merely evidential or matter of narrative if the defendant acting reasonably could and ought to have avoided the collision."
>
> For example, if a man lying drunk in the highway is run over in daylight by a motorist there are two causes of the accident, one on each side, but the parties would not be held to be equally responsible for the accident.

> A clear illustration appears in *Brown v Thompson*, where there were two causes of the accident, in which the plaintiffs were injured whilst travelling at night in their car. As it was being driven along, using dipped headlights, it crashed into the back of a stationary lorry, which had been parked without any rear red lights on and without even red reflectors fitted. The Court of Appeal stressed that, in apportioning liability under the Act, the emphasis is on fault and not solely on the causative potency of the acts or omissions of either vehicle's driver and declined to interfere with the trial judge's apportionment.

24. The defendant argues that the plaintiff should not have been walking on the road and that if he had been on the shoulder, like his brother he would not have been hit and injured. The plaintiff points out that under the Traffic Law he was entitled to walk on the edge of the road, and therefore, in doing so he was not acting negligently. In the Cayman Islands walking on the edge of the roadway is common practice. Often there are no sidewalks or there are small shoulders and pedestrians are often walking on the paved road itself. Cyclist on the roadway are also common. It is, therefore, known to motorist that they may expect to encounter both pedestrians and cyclists from time to time at the side of the road.

25. In *Harvey v Road Haulage Executive [1952] KB CA* a lorry driver had stopped without pulling to the side of the road. His lorry was stopped at an angle which blocked approximately one half of the roadway. It was foggy with visibility of eleven or twelve yards. A motorcyclist driving at 18 to 20 mph, ran into the back of the defendant's lorry and was injured. At page 126 to 127 Denning L. J. states:

> No valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it. The only valid distinction is these cases is between conduct which is purposeful or reckless, and conduct which is merely negligent. If a motorist sees an obstruction in the road and purposely or recklessly runs into it, he can, of course, recover nothing, because it is wholly his own fault. But if he is merely negligent in not taking proper steps to avoid it, then the damage is the result, partly of his own fault in not avoiding the obstruction, but also partly of the fault of the other person who left the obstruction in the road.
>
> The position can be tested quite simply in the present case. The plaintiff was riding his motor-cycle approximately along the white line bounding the near side lane. If the lorry driver had pulled the lorry into his near side, as he should have done, there would have been no accident, because the plaintiff could easily have passed clear. But it is very different with the lorry athwart the road as it was. The plaintiff could not swerve to his off because of oncoming traffic on the other half of the road. He had to swerve to his near side and this brought him into collision with the lorry. He was no doubt at fault. He may have been going too fast and, after seeing the lorry, he did not put on his brakes soon enough. But the accident cannot, with any sense of justice, be said to be wholly his own fault. It was the result, at least in part, of the fault of the lorry driver. If the question is asked in the words of the Law Reform (Contributory Negligence) Act, 1945: Did the plaintiff suffer "damage as the result partly "of his own fault and partly of the fault of any other person?" the answer is plainly: "Yes, he did."
>
> In my opinion, therefore, this is a case for contribution. I think it should be held that both were equally to blame.

26. In *Jones v Livox Quarries Ltd. [1952] 2 Q.B. 608* a work man jumped on to the back of a large piece of industrial equipment travelling at two and a half miles per hour. Another piece of industrial equipment came around the bend and rear ended the slower moving

vehicle in front of it and thereby injuring the plaintiff. As Singleton L.J. stated at page 614;

> "He had put himself in a dangerous position which, in fact, exposed him to the particular danger which came upon him. He ought not to have been there. The fact that he was in that particular position ment he exposed himself, or some part of his body to another risk, the risk that some driver following might not be able to pull up in time – it may be because that driver was certainly at fault. That is the view that the trial judge took of this case, and I do not see that that is a wrong view. It is not so much a question of was the plaintiff's conduct the cause of the accident? As did it contribute to the accident? On the assumption that it was something of a kind which a reasonably, careful man so placed would not have done. If he unreasonably, or improperly, exposed himself to his particular risk, I do not think that he ought to be allowed to say that it was not a cause operating to produce the damage, even though one may think that the prohibition against riding on the vehicle was not made with that particular risk in mind.....I do not see that it can be said that the judge was wrong in finding that the plaintiff, who deliberately put himself into a position which exposed him to this danger, was to some extent responsible for that which happened.

27. Denning L.J. in the same case at page 615 stated:

> Although contributory negligence is not depend on a duty of care, it does depend on forcibility. Just as actionable negligence requires the forcibility of harm to others, so contributory negligence requires the forcibility of harm to one self. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably, prudent man, he might be hurt himself; and in his reckoning he must take into account the possibility of others being careless.
>
> Once negligence is proved then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility

> for the consequences. The consequences do not depend on forcibility, but on causation. The question in every case is; what faults were that which caused the damage? Was his fault one of them? The necessity of causation is shown by the word "result" in section 1 (1) of the Act of 1945 and it was accepted by this court in Davis v Swan Motor Co (Swansea) L.D. [FN7] [1949] 2KB 291.....
>
> It all comes to this; if a man carelessly rides on a vehicle on a dangerous position, and subsequently there is a collision in which his injuries are made worst by reason of his position then they otherwise would have been, then his damages are partly the result of his own fault, and the damages recovered by him fall to be reduced accordingly.

28 In Eagle v Chambers (1) CA (Civil Division) (Court of Appeal) (Civil Division) July 24th 2003, the plaintiff was walking down the dividing line of a two way highway. She was walking backwards facing traffic. The trial court found her 60% contributoraly negligent. The Court of Appeal reduced her contribution to 40% and held the defendant driver 60% liable. At paragraph 16 Hale L.J. stated:

> " the court has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon.
> In our view of the drivers conduct was very much more causatively potent that that of the claimant:
>
> i) This was a wide, near-straight, well-lit road: the visibility was as good as it could be at night.
> ii) There was not much traffic, and on any view of the judge's findings, nothing to obstruct the driver's view.
> iii) This was not an unrestricted dual carriageway in the country, but a restricted road in a built up area. More that that, it was a sea front road in a seaside resort in early summer, with attractions for visitors on both sides of the road and cars parked in the middle.

iv) Car drivers have to be on the look out for pedestrians in the road. While a driver might not expect someone to behave as the claimant had been behaving, it was certainly to be expected that there might be pedestrians in that particular road at that time. The event at the Winter Gardens had just finished. People like Mr. Bowgen might be going for their cars on the central reservation. They might even be walking along the offside edge of the carriageway looking for their cars. These people could not be criticized.

v) The longer a person is in the road, the easier it should be to see them, especially if they are wearing light coloured clothing and remain in roughly the same place in relation to traffic approaching from behind.

vi) Although there was evidence that the claimant had been wandering or unsteady, there was no evidence that the claimant had staggered or changed direction suddenly.

vii) There was nothing to prevent the defendant taking avoiding action, as others had done before him.

viii) On the judge's findings, the defendant would have failed to avoid any **pedestrian**, including one whose own conduct could not be critized.

ix) 'But for' causation is not sufficient to hold a person **contributoryily negligent**; if it were, blameworthiness would be the only criterion in assessing the degree of **contributory negligence**.

However, we accept that the claimant's carelessness for her own safety was sufficiently blameworthy to justify a finding of **contributory negligence**, albeit that the defendant was also at least as if not more blameworthy that her.

i) She put herself needlessly at risk by walking along the middle and then the offside lane of the carriageway without keeping a proper lookout for vehicles coming from behind.

ii) She had been doing so for some time.

iii) She had ignored at least two warnings from sensible people who had made effort to persuade her to stop.

iv) She was young, upset and emotional, but rejected attempts to help her in terms which suggest that she

was not totally unaware of the danger she was putting herself in.

v) The car driver was a mature man. He was driving needlessly in the offside lane or straddling the white line.

vi) He was driving at or a little above the maximum permitted speed on a road he knew, the sort of road where particular care should be taken to look out for and avoid pedestrians.

vii) He knew that he had had enough to drink to affect his driving abilities.

viii) For whatever reason, he failed to see the claimant until the very last moment and took no action at all to avoid her.

29. The defendant in the present case was negligent. He saw the plaintiff from at least 400 feet away and probably more. If he did not see him before 400 feet then it was because he was not paying proper attention. The road was straight and wide. He knew he was on a collision course with the plaintiff. He did not slow down. A dragonfly entered his car when he was approximately 400 feet from the plaintiff. He had almost seven seconds to stop or drive around the plaintiff. He did neither. Instead he became preoccupied chasing the dragonfly out of the car and ignored or forgot about the plaintiff. As a result he drove straight into him.

30. The plaintiff was walking on the edge of the paved road. His back was to the approaching traffic so he could not see oncoming traffic bearing down on him. If he had been walking on the shoulder he would not have been hit. There was ample room to walk on the shoulder and no good reason not to do so. He was entitled to be on the road and there is no statutory requirement that he walk facing the traffic.

31. Did the plaintiff do something that a reasonably careful person would not have done. Put another way, did the plaintiff fail to take reasonable care for himself and thereby contribute, by his want of care, to his own injury. He did. A reasonably careful person would not walk on the road with his back to approaching traffic, when it would be obviously safer to walk facing the traffic on the shoulder, off of the traveled portion of the road. It is common sense, that it is safer to walk on the shoulder facing traffic when it is reasonable to do so, rather than the edge of the road with your back to the traffic. There will be cases when it may not be reasonable to take the more cautious approach, for example if the shoulder was not readily passable. The law only requires that a person, not be careless for their own safety and to take such care of themselves as a reasonable person would take in such circumstances. One need only ask the question, would a reasonable person having proper regard for their own safety chose to walk on the road or the shoulder of the road, when there was no impediment or disadvantage in choosing the shoulder.

32. Finally, the plaintiff in conducting himself, must take into account the possibility of others being reckless and he failed to do so.

33. I conclude that the defendant's negligence was far more significant that the plaintiffs. That is, the defendant was significantly more to blame for this accident than the plaintiff

was. I have already stated why. I apportion 80% liability to the defendant and 20% liability to the plaintiff.

Dated: May 5/05

D G Sanderson J

Dale Sanderson
Judge of the Grand Court

GRAND COURT
CAYMAN ISLANDS