ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 538 OF 1999

BETWEEN:

IVAN O'NEAL

Claimant

and

CABLE & WIRELESS (WI) LTD
and
BERNARD MASCOLL

Defendants

Appearances:

Stanley John, Linton Lewis with him, for the Claimant
Samuel Commissiong for the 1st Defendant
Arthur Williams for the 2nd Defendant

- -
2001: December 12
2002: January 14, 16, 17, February 4
- -

JUDGMENT

[1] **MITCHELL, J**: This was a running down action involving a collision between a Cable & Wireless vehicle in Kingstown, St Vincent, and a person who was at the time sitting in a roadway conducting a demonstration against Cable & Wireless' allegedly high telephone rates.

[2] The action began with the issue on 29 October 1999 of a specially endorsed writ of summons out of the High Court in Kingstown in St Vincent and the Grenadines. By the statement of claim endorsed on the writ and as subsequently amended, the Claimant claimed that on 1st July 1997 he was engaged in a lawful and peaceful protest in front of the premises of the 1st Defendant (hereinafter "Cable &

Wireless") on a public pathway; that the 2nd Defendant (hereinafter "Mascoll") was employed by Cable & Wireless as its chief security officer and/or a motor vehicle driver; that Mascoll acting in the course of his employment drove a vehicle owned by Cable & Wireless past the Claimant who was seated with a placard between his legs; that Mascoll stopped the vehicle and alighted from it and spoke to the Claimant and got back into the vehicle and reversed it and wrongfully and intentionally assaulted and wounded the Claimant by driving the vehicle over his feet causing him distress, anxiety and personal injury and loss and damage. In particular, and among other things, he claimed that his left ankle joint was broken and had to be encased in plaster of paris for about 10 weeks, and he had been injured in his head and had lost consciousness and had suffered a neck injury. The Claimant claimed alternatively that his injuries had been caused by the negligence of Cable & Wireless and its servant and agent Mascoll. The particulars of the negligence were given among other things as driving at an unreasonably fast speed, driving with no reasonable regard for the Claimant's presence and safety, failing to keep any proper lookout and to heed the Claimant's presence, and failing to control the vehicle so as to avoid hitting the Claimant. The Claimant pleaded that on 30 September 1997 Mascoll had been found guilty at the Magistrate's court of the offence of unlawfully and maliciously inflicting grievous bodily harm on the Claimant by way of the vehicle, and, Mascoll having been convicted in the Magistrate's Court, the Claimant relied on section 28 of the **Evidence Act, Cap 158** of the Laws of Saint Vincent and the Grenadines.

[3] On 5 January 2000 the defence of the driver, Mascoll, was filed. He pleaded that the Claimant frequently protested the telephone rates, practices and services of Cable & Wireless; that at 8.15 am on the day in question the Claimant had deliberately placed himself in an 8 foot private driveway leading to the parking lot to the rear of Cable & Wireless; that this driveway was the only means of getting to the rear of the building and was frequently used by employees and vehicles of Cable & Wireless; that the Claimant would be aware of the busy traffic because of his frequent demonstrations; that on the day in question the Claimant was a

trespasser on the premises which was used only by the servants and agents of Cable & Wireless; that on the day in question the Claimant was sitting with a piece of plywood in front of him and was looking for a confrontation with Cable & Wireless and its servants and agents; that Mascoll was driving T5166 owned by Cable & Wireless and as he left the main highway on Halifax Street to enter the driveway leading to the rear of the Cable & Wireless building he noticed the Claimant sitting in the 8 foot wide driveway; that he got out of the vehicle and pleaded with the Claimant to remove himself so that he could pass but the Claimant did not move; that he reversed the vehicle to get enough room to get around the Claimant safely and he did so with due care and attention; that as he edged the vehicle slowly around the Claimant the front wheel of the vehicle cleared him slowly and safely and as the left rear wheel was about to pass him the Claimant pushed his left foot a little closer to the path of the vehicle causing the wheel to come into contact with his left ankle; that Mascoll relied on the principle of *volenti non fit injuria*; and, that the Claimant even after he was injured further demonstrated his desire for confrontation by refusing to remove out of the way and though Mascoll begged the Claimant to allow him to take him to the Kingstown General Hospital the Claimant shouted that he did not want to travel in any vehicle owned by Cable & Wireless; that the Claimant had contributed to the accident that had resulted in his injuries; in particular, the Claimant had been demonstrating in a private driveway at a time when he knew that the servants and agents of Cable & Wireless had to use the driveway to get to and from the parking lot at the rear of the building; that the Claimant had refused to get out of the path of the vehicle after it had stopped and Mascoll had invited him to move or shift his position so that the vehicle could have been driven safely past him; that the Claimant had invited confrontation with Cable & Wireless by permitting his left foot to come into the path of the left rear wheel of the moving vehicle after the left front wheel had successfully got past him; and, that the Claimant had failed to heed the passage of the vehicle as it inched its way through the busy driveway. On the matter of the conviction, Mascoll admitted it in his pleading but claimed that it was the subject of a pending appeal in the Court of Appeal.

[4] On 10 January 2000, Cable & Wireless filed its defence. Insofar as the matters pleaded relate to the issue of liability for the injury to the ankle of the Claimant, the defence was almost identical to that of Mascoll. In particular, it was claimed that on the morning in question at about 8.15 am the Claimant deliberately placed himself in the 8 foot wide private driveway leading to and from the parking lot at the rear of Cable & Wireless' main office in Kingstown; that the Claimant was a trespasser on its premises and had no claim of right to be sitting at the main entrance to its parking lot at that hour of day; that Mascoll had noticed the Claimant in the driveway and had stopped the vehicle immediately and come out of it and pleaded with the Claimant to move so that he could pass; that the Claimant did not move; that Mascoll had reversed the vehicle to get enough room to get around the Claimant safely and did so slowly and with care and attention; that the Claimant had pushed his left foot covered with the plywood a little closer to the path of the vehicle thereby causing the left rear wheel to come into contact with the plywood; that Cable & Wireless would rely on the principle of *volenti non fit injuria* because of the wilful conduct of the Claimant. The defence repeated the allegation of contributory negligence raised by Mascoll in his earlier defence.

[5] On 14 June 2000 a joinder of issue was filed. On 24 November 2000 the Claimant filed particulars of his claim as requested by the Defendants and as ordered on 17 November 2000 on the hearing of the summons for directions by Adams J. On 20 April 2001 the request for hearing was filed and the case has been ready for hearing ever since. On 29 May 2001 the matter came before Master Pemberton for case management. The Claimant was given leave to amend the statement of claim by deleting all references to himself as an economist. On 12 July 2001 at a further case management conference Master Pemberton ordered that the defendants file and serve amended defences on or before 31 July 2001; any reply if necessary to be filed and served by 13 August 2001; supplemental lists of documents to be filed and served by 31 July 2001; interrogatories if any to be filed and served by 27 August 2001; answers to be filed and served by 10 September

2001; the Claimant to be limited to 4 witnesses, the Defendants to 5; witness statements to be filed and served by 26 September 2001; pre-trial review to be on 16 October 2001; and, trial dates to be 30 and 31 October 2001. As a result, the Claimant filed an amended list to include a sketch plan of the *locus in quo*, and the transcript of the notes of evidence at the criminal trial on 29 September 1997. No amended defence was filed to the amended statement of claim. A number of witness statements were filed relating to the issue of liability. These were from Mascoll, and Leonard May on behalf of the Defendants; and on behalf of the Claimant from the Claimant himself, from Noel John, Carlitha Wright, and Sgt Calvin Glasgow. There were other witness statements and lists of exhibits filed, but they related to the issue of quantum which, it was agreed, would be brought up if necessary at a later stage on an application for assessment of damages.

[6] The trial commenced on 12 December 2001. By agreement the witnesses, who had all filed witness statements, relied for their examination in chief mainly on their witness statements and offered themselves for cross-examination. The first witness at the trial was the Claimant Ivan O'Neal. Noel John, a retired sergeant of police, and Carlita Wright, a market vendor of Mesopotamia, supported him. Sergeant Glasgow was not available to testify or to be cross-examined. In any event, from his witness statement it did not appear that his evidence would have been of much use to any of the parties. The 2nd Defendant gave evidence on his own behalf. Cable & Wireless called no witnesses.

[7] The facts as I find them are as follows. Cable & Wireless is the sole provider of telecommunications services in St Vincent and the Grenadines. It operates a monopoly for the provision of telephone and other telecommunications services. The Claimant has been demonstrating for many years against the telephone rates, practices and services offered to the public in St Vincent and the Grenadines by Cable & Wireless. The Claimant was at the time of the incident a retired Royal Air Force Officer and a national of St Vincent. He was also an economist and banana farmer. He has since been unsuccessful in the general elections to the House of

Assembly held in this State in the year 2001. Mascoll had at the time of the incident been employed by Cable & Wireless as a Security Adviser for the previous several months. He had been permitted as part of his employment to drive the vehicle that he was driving. After the incident, his contract with Cable & Wireless was not renewed and he is presently employed by a construction company.

[8] The main Cable & Wireless office in Kingstown is situate on Halifax Street, which is a one-way street running northwest to southeast through the city of Kingstown. It is one of the main arteries out of the city. As one drives along Halifax Street heading southeast, one comes on the left-hand side to the Cable & Wireless building. Just before the Cable & Wireless building, there is the Marcole Plaza building separated from the main street by the usual cement pavement several feet wide and a deep drain. Immediately after the Marcole Plaza building is a driveway. The Cable & Wireless building is separated from the Marcole Plaza building by this 8-foot wide driveway that leads to the private car park at the rear of the Cable & Wireless building. The sidewalk in front of the Marcole Plaza building is overhung by the 1st floor. There are columns and other obstructing walls of the Marcole Plaza building that restrict the view of the Cable & Wireless driveway as you approach it. Immediately in front of the Cable & Wireless building the pavement, which I take notice of is the usual 8-10 foot wide Kingstown city street sidewalk, is replaced by a 14 foot wide concrete sloping ramp that runs from Halifax Street up to a series of 21 feet deep, 6 feet 8 inches wide, parking lots in front of the Cable & Wireless building. The result is that the Cable & Wireless building is recessed some 35 feet from Halifax Street. The 14 feet ramped sidewalk is some 4-6 feet wider than the normal width, 8-10 feet wide, sidewalk in front of the Marcole Plaza building at the near end of the Cable & Wireless premises, so that there is a space of some 4-6 feet on the concrete ramp that might be sidewalk or it might be private property of Cable & Wireless.

[9] The Claimant was sitting in the Cable & Wireless driveway, in the location where the driveway merges into the ramped sidewalk. He was according to his own measurement sitting some 3 feet 4 inches away from the Marcole Plaza building wall, and into the driveway, which was 8 feet wide. The Claimant's and his witnesses' evidence, supported by his plan, is that he was sitting on the public sidewalk or pavement, which he and his witnesses characterised quaintly if not idiosyncratically as a "public footpath," which phrase conjured up visions of a rural track rather than described what it really was. The "public footpath" repeatedly referred to by the Claimant and his witnesses in their testimony was nothing more than the city street cement pavement or sidewalk. According to the Claimant he was sitting on this sidewalk one foot from where the driveway began but 3 feet 4 inches out into the pavement and so almost half way across and blocking the entrance to the driveway. The case for Cable & Wireless was that he was a trespasser sitting in the Cable & Wireless driveway, on their lands and not on the sidewalk. No party produced a survey plan or other accurate and exact evidence as to whether or not the spot on which the Claimant was sitting was either the public pavement or the private land of Cable & Wireless. Either way, if it was the Cable & Wireless driveway, as the Defendants contend, the Claimant was a trespasser; and, if it was the city pavement, as the Claimant contends, he was committing a public nuisance and obstructing the public sidewalk which is intended only for passing and re-passing by the public, not for sitting down for any reason whether by a demonstrator or any other person.

[10] On the morning in question, the Claimant was sitting in the driveway at the edge of the pavement holding a protest notice of some sort between his legs and facing at right angles to the street. He was unlikely to have been sitting obstructing pedestrian traffic along the pavement. He was more probably sitting at the unmarked edge of the Cable & Wireless driveway where he would not have obstructed pedestrians passing on the sidewalk. I accept that he was sitting alongside the low wall of the Marcole Plaza building which wall brings the 8-10 feet wide sidewalk in front of the Marcole Plaza to an end and causes the sidewalk to

debouch onto the concrete ramp which slopes up to the Cable & Wireless parking lots, and which ramp the Claimant has measured as being 14 feet wide. So, he was probably sitting off the pavement proper and some 3-4 feet into the Cable & Wireless driveway, recessed some 3-4 feet from the line of the pavement in front of the Marcole Plaza building. The location of the incident has to be deduced from the evidence as no exact measurement was given by any of the parties, or by the police. The Claimant was not entirely blocking the driveway. A little more than half of it was available to a driver using it. Additionally, according to the undisputed evidence of the witnesses, the first of the 6 feet 8 inches wide Cable & Wireless parking lots adjacent to the driveway had been left vacant by Cable & Wireless security precisely to ensure that there was enough room for Cable & Wireless employees to drive around the Claimant and to access the car park at the rear of the Cable & Wireless building. The space thus available for Mascoll, as he turned the corner the morning in question, to use to access the car park was the sum of the 6 feet 8 inches parking lot and the remaining nearly 5 feet of the driveway, some 11 feet in all. On the morning in question, sitting hidden by the Marcole Plaza building wall which was obstructing the pavement and the view of the driveway, was the Claimant; his position would ensure that someone, such as Mascoll, driving down Halifax Street and turning into the Cable & Wireless driveway would not see him until after the turn had been committed.

[11] At about 8.20 am Mascoll turned to the left off Halifax Street and drove up the concrete ramp that I have previously described replaced the pavement in front of the Cable & Wireless building. As he turned the corner he saw the Claimant sitting in front of him in the left centre of the driveway as previously described. He brought his vehicle to a stop before it had completely passed the Claimant. He came out of the vehicle and remonstrated loudly with the Claimant. Several witnesses describe his words as quite heated. I do not believe him to the extent that he suggested in his evidence that he got out of the vehicle out of concern and friendship for the Claimant and to plead with the Claimant to allow his vehicle to get past him to permit him to get to work. I believe that he yelled at the Claimant

to get out of the way, that he was blocking access to the Cable & Wireless car park. The Claimant not complying with his demands that he move, Mascoll then got back into his vehicle and reversed it onto the main street. What did he do that for? The evidence is confused. According to the witnesses for the Claimant at one point, Mascoll could have easily passed the Claimant on his first approach. At another point, the witnesses for the Claimant suggest that the Claimant was blocking the driveway, and Mascoll could not have passed him safely. Their interpretation of what Mascoll next did was that he got back into his vehicle, reversed it into the main road to give himself more room to drive it forward, and that as he did so, he veered the vehicle more to the left so that he could run it directly at the Claimant. Mascoll, on the other hand, says that what he did was to reverse the vehicle to give himself more room to make a wider swing to the right around the Claimant so as to miss him completely. What is the court to believe? The Magistrate appears to have rejected the version of Mascoll and to have accepted the evidence of the witnesses for the Claimant before him. However, they did not impress me for the following reasons. First, they were on the opposite side of Halifax Street from the incident, and, so, some distance from the scene of the accident. Secondly, one of them, Carlita Wright, who did not actually witness the vehicle running over the Claimant's ankle, admitted that she cannot drive a vehicle and I find would be unfamiliar with the demands of starting up a low powered vehicle and driving it up a ramp. She said that Mascoll raced it towards the Claimant. Mr Noel was of the view that the vehicle was doing 35 mph as it ran over the Claimant. I do not believe that Mascoll revved the vehicle and ran it at speed towards the Claimant. I do not believe that the vehicle could reverse a few feet and then drive forward at speed to the extent described by the witnesses. I believe the evidence of Mascoll that the vehicle had to drive up a ramp and that it made a loud noise as it was powered up to do so. I believe that sound was innocently misinterpreted by the witnesses as the sound of the vehicle speeding up. I believe that Mascoll revved the vehicle, as he says, to allow him to drive up the ramp. Critically, I also believe him that he did attempt to swing further around the Claimant than his original turn had allowed. The Claimant had been sitting in

the driveway, according to the evidence, with several persons clustered around him and reading his placard. None of these eyewitnesses came forward to support the Claimant's story of Mascoll's vehicle racing towards him, or of his having been obliged to throw himself out of the way of the wheels. However, I do not believe Mascoll when he says that he drove forward slowly and carefully. I believe that he was irritated and upset by the Claimant's conduct in demonstrating in front of his employer's premises and that he firmly pressed his foot on the accelerator and attempted to swerve his vehicle around the Claimant to enter the car park at the rear of the building. I do not believe that he took any particular care to look and to ensure that he was successfully avoiding the stretched out feet of the Claimant. I believe that he was careless as to whether he was successful in avoiding the Claimant. I believe that he was careless as to whether or not his vehicle ran over the foot of the Claimant. I do not believe the evidence of the Claimant that he threw himself to the right against the Marcole Plaza wall to save himself. I believe from the evidence of Mascoll and the other circumstances that he sat stolidly in his position and did not move his left foot from the path of the approaching vehicle. He was himself so annoyed with Mascoll's treatment of him, and so intent on ignoring Mascoll's vehicle, that he was careless as to whether or not he moved his foot out of the way of the approaching left rear wheel of Mascoll's vehicle as Mascoll attempted to get around his sitting figure.

[12] The submissions of Mascoll's counsel at the conclusion of the case were:

(1) That the only explanation for the injury received by the Claimant was that when the front wheel of Mascoll's vehicle had passed the Claimant, he pushed his left foot closer to the path of the oncoming vehicle causing the left rear wheel of the vehicle to come into contact with his left ankle. There is no evidence to support this conclusion, nor other reason to suspect that that is what happened, other than that it is a theory advanced by the Defendants. I do not find that there is any credible evidence that the injury was caused in this way.

(2) That because of the action of the Claimant in sitting as a trespasser, and sticking his foot out, the defence of *volenti non fit injuria* applies.

(3) That the Claimant was contributorily negligent in the matter of the injury caused by the vehicle running over his ankle; that the Claimant failed to use reasonable care for the safety of himself so that he became at least partially the author of his own wrong. Counsel relied on the case of **Nance v British Columbia Electric Railway [1951] AC 601**, and the cases referred to in that judgment, and quoted the judgment of Viscount Simon at page 611 where he said:

> . . . [W]hen contributory negligence is set up as a defence its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove . . . that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the Plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

Counsel also relied on dicta of Lord Denning in **Jones v Livox Quarries Ltd [1952] 2 QB 608**, at 615:

> Although contributory negligence does not depend on a duty of care, it does depend on forseeability. Just as actionable negligence requires the forseeability of harm to others, so contributory negligence requires the forseeability of harm to oneself. A person is guilty of contributory negligence if he ought

> reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[13] The submissions of counsel for Cable & Wireless were as follows:

(1) The evidence shows that the Claimant was demonstrating not only on the property of Cable & Wireless but also almost in the middle of its busy driveway; that this demonstration was without the permission of Cable & Wireless; and, that as such he was a trespasser. For the rights of a trespasser at common law, counsel (at para 7.6 of his skeleton argument) referred the court to the case of **R Addie & Sons (Collieries) Ltd v Dumbreck [1929] All ER Rep 1**. He quoted from the judgment of Lord Hailsham to the following effect at page 10, letter H:

> But if the person is a trespasser, then the only duty a proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head – injury either malicious or an act so reckless as to be tantamount to malicious acting.

(2) Counsel submitted (para 7.7) that the above dicta suggested that the occupier of land has no duty towards a trespasser to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes onto the premises at his own risk. The occupier is only liable to the trespasser if he inflicts some wilful harm or by some act with reckless disregard for the presence of the trespasser. Counsel also relied on

Commissioner for Railways v Quinlan [1964] 1 All ER 897
Videan and another v British Transport Commission [1963] 2 All ER 860
Titchener v British Railways Board [1983] 3 All ER 772

These were three other occupier's liability cases. These cases can shortly be dealt with by observing that this case is not a matter of occupier's liability, of considering the duty of an occupier to a trespasser. The Claimant does not claim against Cable & Wireless as occupier of the land on which he was injured. The Claimant claims against Cable & Wireless as the employer of Mascoll who, he claims, either deliberately or negligently injured him while performing duties for his employer. It is the principles governing the duty of care owed by a driver of a motor vehicle to a person sitting in the roadway and the principles of vicarious liability and also of contributory negligence that concern us in this case, not occupier's liability.

(3) The third submission (at para 8.2) was that the evidence did not support a finding that Mascoll had wilfully driven at the Claimant. I accept this submission, coming as it does from the counsel for Cable & Wireless, as putting an end to the issue of whether the court is bound by the decision in the Magistrate's Court that Mascoll had unlawfully and maliciously and deliberately driven the vehicle directly at the Claimant.

(4) The fourth submission (paras 9 and 10) is that the Claimant is guilty of the voluntary assumption of risk that he or any reasonable person should have anticipated once he had declined to move to permit the vehicle to pass; that the Claimant had voluntarily placed himself in the entrance to the driveway where to his knowledge motor vehicles pass between 8:00 – 9:00 am; that, alternatively, the Claimant must have appreciated the

danger of sitting in the driveway and persistently agreed to accept whatever danger came with his being there; that he was there looking for confrontation with Cable & Wireless; and, that the principles of *volenti non fit injuria* apply. Counsel submitted that the three elements required to ground the defence are: 1) Did the Claimant implicitly agree to absolve Cable & Wireless its servants and agents from any legal responsibility for his negligence or act of trespass on its land? 2) Did the Claimant voluntarily and freely select a spot on Cable & Wireless' land to protest its high telephone rates? 3) Did the Claimant have the complete knowledge of the risk involved in locating himself on Cable & Wireless' land to protest the high telephone rates? Counsel relied on the House of Lords case of **Imperial Chemical Industries v Shatwell [1964] 2 All ER 999** as authority for the view that the element of consent to be looked for in the Claimant when the defence was raised might be implicit or express and need be no more than a lack of reasonable care for the harm that his location and conduct may produce by sitting in a driveway. This was a case where the defence of *volenti non fit injuria* was raised as a defence to vicarious liability of the employer for the negligence of the employee.

(5) The fifth submission (at para 11) was that the Claimant was, alternatively, guilty of contributory negligence. This was a real issue in this case and is dealt with below.

(6) The sixth submission (at para 12) was that the Defendants were not estopped by the conviction in the Magistrate's court from stating that they were not liable for the injuries to the Claimant. Counsel submitted that, Mascoll having appealed his conviction and the appeal being still pending, the conviction was, notwithstanding section 26 of the **Evidence Act, Cap 158**, neither conclusive nor binding; that until the appeal had been successfully concluded against Mascoll the Claimant could not rely on it as being conclusive; that Mascoll was entitled to prove that he was not

liable for wilful assault for the conviction is deemed merely to be prima facie evidence and not binding. The appeal was not proved at the trial. There was, on the other hand, no attempt to suggest that the appeal, which had been pleaded from the beginning of the filing of the defence, had not in fact been filed. I was satisfied that there was an appeal pending against the conviction in the Magistrate's court. Although the conviction is still a 'subsisting one,' to use the words of the **Evidence Act**, the fair thing appeared to be to determine from the evidence produced to the court what the facts were. No reliance is placed in this judgment on the conviction in the Magistrate's Court.

(7) The seventh submission of counsel related to the alleged failure of the Defendants to file an amended defence to the amended statement of claim. He submitted that the issue was a red herring, as the Claimant's original contention had been that the Defendants had been negligent, and no new issue had been raised by the amended statement of claim; that the amended pleadings did not take the Claimant's claim one step further; that even if there were new matters in the amended statement of claim, and the Defendants had not amended their defences, the final paragraphs of the defences, which were the usual all-embracing denial of allegations made in the claim, would have adequately protected the Defendants. The main new matters pleaded in the amended statement of claim, however, was that Mascoll had at all times been employed "as a motor vehicle driver" and that he had been at the time in question "acting in the course of his employment as aforesaid." The Defendants had not in their pleading or in any amended pleading, or for that matter, in their witness statements or in their or cross-examination of the Claimant or his witnesses, attempted to deny that Mascoll had at the time been so employed. The Master had specifically given the Defendants extended time to file their amended defence if they wished to contest the matters raised in the amended statement of claim; and, they had failed to take

advantage of the extension. The point is this, if Mascoll had deliberately and maliciously used the Cable & Wireless vehicle to illegally assault and wound the Claimant, as claimed by the Claimant and as found by the Magistrate in convicting Mascoll of just this offence, then it was open to Cable & Wireless in their defence to dispute their liability to the Claimant for the injury caused to him by Mascoll, and to leave Mascoll to bear the full brunt of the claim by the Claimant. Whether Cable & Wireless was liable for the injury caused to the Claimant by a criminal assault on the Claimant would have been an issue for this court to try. I deal with the consequence of this failure below.

[14] The Claimant in his turn submitted as follows:

(1) That (at para 1.1.3 of the skeleton argument) the Defendants did not deny that Mascoll had been employed as a motor vehicle driver; hence they could not attempt to prove any allegation to the contrary; therefore, Cable & Wireless was vicariously liable for the negligence of Mascoll. Counsel referred the court to the textbook **Salmond on the Law of Torts**, 16th Edition, 1973, at paras 174-178. He relied on the cases of

> **Dyer and Wife v Munday and Another [1895] QB 742**; and
> **Poland v John Parr and Sons [1927] 1KB 236**; and
> **Ormrod and Another v Crosville Motor Services and Another [1953] 1 WLR 1120**

I am satisfied that by not filing an amended defence as directed by the Master, the Defendants must be taken to admit the claim in the amended statement of claim to the effect that the injury had been committed by Mascoll in the course of his employment. The finding of the court is, therefore, that Mascoll was at the time in question admittedly employed as a motor vehicle driver and that he was acting in the course of his

employment. Counsel for Cable & Wireless, as a consequence, had quite properly accepted in his submissions (para 17) that insofar as the claim in negligence was concerned, if Mascoll was found to have been negligent, the result was that Cable & Wireless must be liable as well on the principles of vicarious liability.

(2) In a related submission, counsel for the Claimant submitted (para 1.1.6) that the Defendants had admitted the conviction of Mascoll in the Magistrate's Court on a charge of unlawfully and maliciously inflicting grievous bodily harm on the Claimant by way of a vehicle; that the Claimant had pleaded that he would at the trial rely on the provisions of section 26 of the **Evidence Act, Cap 158**; and that the Defendants were precluded from denying that Mascoll was acting in the course of his employment; and that Mascoll had wrongfully and intentionally assaulted and wounded the Claimant by driving the motor vehicle over his left ankle. Counsel prayed in aid dicta in the decision of Goulding J in the case of **Re Raphael (deceased) Raphael v d'Antin and Another [1973] 3 All ER 19**. I have previously explained that I am satisfied that Mascoll in driving as he did on the morning in question acted in breach of the duty of care that he owed to the Claimant; and, that I am satisfied that the evidence produced before me did not support a finding that he intentionally assaulted and wounded the Claimant. I have previously explained that I accept the submission that the Defendants are precluded from denying, and are taken to admit, that Mascoll was acting in the course of his employment. Nothing new arises on this submission.

1) Counsel submitted (at para 6.2) that the occupier of premises owes a trespasser a duty to act humanely and is liable for injuries to the trespasser where the injury was due to some wilful or reckless act involving something more than the absence of reasonable care; further,

when a trespasser was known to be present the occupier must abstain from doing any acts which were intended to injure him. Counsel relied on

> **Halsburys Laws of England, 3rd Edition, Vol 28**, page 54, para 49
> **British Railways Board v Herrington [1972] AC 877**
> **Southern Portland Cement Ltd v Rodney John Cooper [1974] AC 623**.

I have previously explained that no occupier's liability issue arises on either the pleadings or the evidence in this case, and nothing further need be said on the point.

2) Counsel for the Claimant submitted (at para 6.3 and 7.1) that there was no evidence to show that the Claimant did anything which amounted to a voluntary agreement on his part to absolve the Defendant from the legal consequences of the risk having regard to the full knowledge about the nature and extent of the risk so as to give rise to the defence of *volenti non fit injuria*. In refuting the applicability of the defence of volenti, counsel prayed in aid dicta in the cases of

> **Clayard v Dethick (1848) 12 QB 439**
> **Nettleship v Western [1971] 2 QB 691**
> **Lynch v Ministry of Defence [1983] NI 216**
> **Woodridge v Summer [1963] 2 QB 69**
> **Osborne v London & North Western Railway Co (1888) 21 QB 220**
> **Harris v Birkenhead Corporation and another [1975] 1 All ER 1001**.

For the reasons I have given above, particularly the finding that Mascoll stopped the vehicle in good time to avoid colliding with the Claimant and then, annoyed by the Claimant's refusal to move himself out of the driveway when Mascoll demanded it, got back into the vehicle and deliberately drove it without any proper care to avoid running over the foot of the Claimant that he had good reason to believe was exposed having seen it and stopped for it, I do not consider that the defence of *volenti* applies in this case. If the facts were different and, for example, Mascoll had not seen the Claimant until it was too late, and had run over his ankle because the Claimant had knowingly placed himself in the busy driveway, there would have been cause to consider the defence of *volenti*. That was not what happened here. The fact that the Claimant was sitting in the private driveway-cum-sidewalk, even assuming that it was Cable & Wireless' land, did not reduce the duty of a driver on the driveway to bring his vehicle to a standstill if he saw that someone was obstructing the passage. It is not open to a motorist on that driveway in the circumstances postulated by the Defendants to drive forward in the face of a trespasser visibly sitting in the driveway and so to cause injury to the trespasser and then to claim the defence of *volenti non fit injuria*. My finding is that there is no legal basis for the defence of *volenti non fit injuria*.

3) Counsel for the Claimant submitted that there was no contributory negligence on the part of the Claimant. Section 3 of the **Contributory Negligence Act, Cap 84** of the Laws of St Vincent and the Grenadines provides that

> 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 extend as the court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage: . . .
>
> Counsel submitted that the Constitution of St Vincent and the Grenadines accords to the citizens of the country the right to carry out peaceful protests; that to allow others to intentionally and/or negligently cause harm to anyone carrying out such a peaceful protest just because that person is not in agreement with the protestor is an infringement of the fundamental rights of persons in a democratic country; that to find contributory negligence in the circumstances in this case may gravely constrain the freedoms provided under the Constitution and encourage those who disagree to cause harm to protestors in the knowledge that any award of damages will be apportioned.

[15] Applying the above facts to the applicable law, the finding of the court is that the Defendants are liable to the Claimant for the negligent driving of Mascoll in the course of performing his duties for Cable & Wireless; and that the Claimant is also contributorily negligent for his own injuries. The question that must now tax the court is what is the percentage of liability that should be ascribed to the Claimant and what percentage to the Defendants? No argument was produced to the court on this issue, and the court must use its commonsense in coming to some finding in accordance with the evidence. If the Claimant had not been sitting in the busy Cable & Wireless driveway where in the first place he had no right to position himself; if he had instead been sitting in the driveway a little closer to the Marcole Plaza building wall and not nearly half-way out into the driveway as he himself admits to; if he had not been sitting with his feet stretched out into the driveway where the Cable & Wireless vehicles attempting to access the company's car park had to pass; and more to the point, if he had looked out for his own safety and kept his eyes on the wheels of Mascoll's vehicle as Mascoll attempted to manoeuvre around him to get into the car park; if he had then pulled his ankle out

of the way of the tyre as it was about to run over his ankle; if he had not been so single-minded about protesting against Cable & Wireless' excessive charges that he could not see what was happening around him in the driveway; then he could have avoided any injury to himself at all. Given the findings as to the circumstances in which the accident occurred set out above, it seems to the court that the only proper finding is that the Claimant was one-half to blame for the injury that he suffered. There will accordingly be judgment for the Claimant against the Defendants for one half of his loss and damage and for one half of his assessed costs.

[16] As I conclude, I must express my gratitude to all counsel for the care and research that went into the preparation and presentation of the detailed written submissions and photocopies of the various judgments and texts that were relied on. These greatly assisted the court in being aware of the applicable authorities relied on by counsel, and much reduced the time that would otherwise have been spent on oral argument and the taking in long hand of dictation by the court.

I D MITCHELL, QC
High Court Judge