IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008/HCV 04025

BETWEEN **DWIGHT JOHNSON** **CLAIMANT**

A N D **GRACE DIXON** **DEFENDANT**

Mr. Dale Staple instructed by Kinghorn and Kinghorn for Claimant

Ms. Stacia B. Pinnock-Wright for Defendant

HEARD ON: April 15 and October 3, 2013

Negligence - Motor Vehicle accident – Liability - Therefore whether drivers contributorily negligent - Damages

CORAM: Morrison, J

[1] The facts from which the cause of this accident is to be ascertained emanate from two witnesses on the Claimant's side and one on the Defendant's side.

[2] This action arose out of a two-vehicle motor vehicle collision which occurred on February 2002 along the dual carriageway in the vicinity of Ackee Village, Saint Catherine. The collision involved a motor vehicle registered PD 2452 that was being driven by the Claimant herein and a motor truck registered CG 1993 being driven by the Defendant's servant and/or agent, Mr. Rory Alvaranga.

[3] The Claimant had been travelling with two passengers in his vehicle: his brother, one Gaynor Johnson, who was sitting on the back seat and one Leon Drummond who was sitting in the front left passenger seat.

[4] During the Claimant's traverse of the said roadway his motor vehicle became involved in an accident with the other named vehicle that was going in the opposite direction towards Spanish Town, Saint Catherine.

[5] The Claimant has alleged that the cause of the accident is entirely the fault of Mr. Rory Alvaranga whereas the Defendant has sought to attribute blameworthiness for the accident on the Claimant, if not entirely, then contributorily.

[6] As such, the Claimant's claim is for damages for negligence with interest thereon, costs and such other relief as the Court deems just. The Defendant in refuting the allegation of negligence counter claimed and has asked to be compensated for the loss suffered, damages and expenses incurred.

THE CLAIMANT'S CASE

[7] The Claimant who is a taxi operator testified that he was travelling in the direction of Bog Walk via Flat Bridge Road. He approached a left hand corner at approximately thirty miles per hour. As he was negotiating the said corner, he saw the offending truck on his side of the road which was travelling at a fast rate of speed. He states that when he saw the truck it was already close to his vehicle. He says that he was already close as possible to the left side of the road and could go no further left as to do so he would have collided with the hills.

[8] Further, that he "shadowed" and then applied his brakes but despite this the right side of the truck collided with the right side of his vehicle. He states that his vehicle could not be driven after the collision as his tyre had blown out and something under it seemed to have broken off.

[9] The Claimant's witness Leon Forbes confirms the Claimant's statement that the truck had encroached on the car's lane and was travelling at a speed". The truck collided with the car and pushed it backwards into the hillside. The truck did not stop. The car could not move as it was pinned against the hillside.

His door could not be opened it being so pressed against the hillside that he had to climb through the driver's door, itself so damaged, in order to get out of it.

THE DEFENDANT'S CASE

[10] The Defendant states that her account of the accident is based on what her driver related to her.

a) The evidence of defendant's driver is that he was driving and international motor truck and was its sole occupant. He was heading to Kingston. He said that he was traveling in the fourth gear. While negotiating a corner, he saw "a flash of headlights at a high rate of speed to the right of the truck". He states that there was a collision with the front right wheel followed by a second collision with the right rear wheels.

b) He avers that he stopped the truck 150 meters away from the point of impact. He did so as he had heard threats and as a result hid himself in the bushes until the police arrived.

c) It is his statement that the damaged car was partially across the solid white line and therefore partially in the lane in which he was travelling.

d) The Defendant's driver states that on his inspection of the car with the police, he observed opened beer bottles. Further, the Claimant and the police traced long tyre marks from where the car rested to the initial point of impact.

e) At the point of impact he saw broken glass and debris on the solid white line.

f) The Defendant's driver stated that the truck was rendered immobile due to a broken rear axle which caused the drive shaft to disengage from the rear end of the truck.

THE ISSUES

[11] Liability is in issue. The central question for determination is whether the collision was cause solely by the Defendant's negligence or was caused wholly or was contributed to by the Claimant's negligence.
Whether one of both parties were contributorily negligent and if so, to what extent?

THE LAW

[12] Both under statute and at common law a duty of care is imposed on all road users to avoid actions which will cause injury to other persons or properties. Section 51(2) of the Road Traffic provides that the motorist must do all he can to avoid a collision. Section 51(3) provides that a motor vehicle obstructs other traffic if it causes risk of accidents thereby.

[13] The Rules of the road also provide that motorists must drive on the left hand side of the road and is only permitted to drive on the right solely for the purpose of overtaking.

[14] The rules of driving require the adherence to the speed limit. They also provide that the motorist should decelerate on approaching a corner and then to accelerate after negotiating it.

[15] The case of **Bourhill v Young (1943) AC 92** is instructive. It provides that "the duty of the motor cyclist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury (including injury by shock although no direct impact occurred) to such persons as he could reasonably foresee might be injured by his failure to exercise that care". This cited authority is supported by the case **Randall v Tarrant [1955] 1 All E.R. 650** in which the court held that a user of the road must take *"all the steps which a reasonable man would take in the circumstances, that is, all possible care to avoid a collision".*

EVALUATION OF EVIDENCE

[16] I begin by saying that where there are conflicts on the evidence I accept the evidence of the Claimant and his witness over and above that of the evidence of the Defendant's driver. Mr. Alvaranga was neither forthright nor forthcoming. Cogency was not a feature of his evidence.

[17] It is not disputed that there was a collision and that the right side of the Claimant's vehicle was damaged. The site of the collision is also not disputed neither the fact that visibility was poor without the use of headlamps. Both parties indicated that they were negotiating the same corner.

[18] The fact that the collision occurred is indicative that at least one of the drivers had failed to keep to his respective left, that is, to his proper side of the road. What is clear is that both drivers were travelling against each other on a winding section of the roadway and at a time when visibility was poor.

[19] While the position of the vehicles prior to the accident is disputed, the Claimant stated that upon collision, his vehicle could not be driven after the collision due to a blown out tyre.

[20] On the other hand, the Defendant's driver stated that he was travelling in fourth gear and that a broken rear axle and disengaged drive shaft had subsequently rendered the truck immobile.

[21] Had the truck been traveling at a moderate speed I find that its driver would have been able to halt it much closer to the point of impact than he actually did. It is difficult to accept that the force of the impact had caused the truck to be propelled to that a distance of 150-200 metres away from the initial point of impact. More is in the mortar than the pestle. Careless speeding was a factor of the accident.

[22] Further, there is no evidence that the Defendant's driver gave any warning to other road users as he approached the corner, or for that matter, of his reducing his rate of speed.

[23] The Claimant stated that on approaching the corner, he could not see around it but suddenly saw the truck on his side of the road as he entered the corner. On the other hand, the Defendant's driver stated that he saw a flash of headlights as he entered the corner. However, evidence is that the truck is at a higher elevation than that of the car. As such, it is fair to assume that Mr. Alvaranga having seen the flash of oncoming light ought to have done something to alert other road users of the presence of the truck on the other side of the road. His failure so to do bespeak someone who did not keep a proper look out and one who drove without due care and attention.

[24] It is also the contention of the claimant that at all times he maintained occupation of his left lane of the road. Further, that on seeing the defendant's truck he "shadowed" his brake and then braked. The Claimant stated that he was as far left as possible in his lane and could go no further left as to do so would result in a collision with the hillside. The Claimant's witness indicated in his evidence-in-chief that the Claimant did indeed swerve in an attempt to avoid a collision. Added to this is the unchallenged evidence of Mr. Leon Dobbs that the car was so close to the edge of the left lane at impact that in order for him to have exited the car he had to climb through the damaged right front door of the car. Having regard to all of the above, it seems to me that on the evidence that Mr. Johnson did all he could have done to avoid the collision. The allusion by Mr. Alvaranga to the presence of beer bottles being in the car is at base a diversion any tactic intended to obfuscate the facts.

[25] Furthermore, it is curious that the defendant's driver stated that he traced long drag marks made by the claimant's car, yet in evidence he stated that there were no drag marks that were on his side of the road. I feel myself obliged to say that being the case that there would be no need for the claimant to apply his

brakes had there not been an encroachment on his driving side of the road. Moreover, a lack of drag marks on the Defendant's side indicate that the defendant did not do all that was reasonable to avoid a collision.

[26] Concerning the type of damage sustained by the car, the Claimant stated that the front and right side of his vehicle was damaged. This is consistent with the Defendants statement that he heard a collision at his right front wheel followed by a second collision with the right rear wheels. Clearly, this was not a head-on collision but instead a side swipe impact. All in all, I find that the Defendant's driver was solely to blame for the accident. It follows that the issue of whether there was contributory negligence on the part of the Claimant has not been made out.

THE LAW

[27] The measure of damages is to put the Claimant, as far as money can do, back in the position as if the tort had not occurred.

[28] The Claimant claims damages for personal injury received as a result of the collision. The medical report indicated that he Claimant suffered laceration to the upper lip, mild tenderness along neck with pains through the range of motion associated with stiffness and cervical strain with muscle spasms. The Claimant was given three weeks sick leave, analgesics, antibiotics and muscle relaxants and was referred to physiotherapy.

[29] In assessing damages for pain and suffering, the Claimant's counsel cited **Trevor Benjamin v Henry Ford et al Claim No. 2005 HCV 02876** in support of his claim. The Claimant claimed general damages for pain and suffering and loss of amenities in the sum of $750,000.00. In **Trevor Benjamin** the Claimant suffered muscle spasms in the neck, soft tissue injuries to the anterior and posterior chest wall, tenderness over his lower back pain and painful swelling with abrasion to his foot and right leg. In the instant case injuries to the Claimant are fairly analogous to the injury suffered by the in the **Trevor Benjamin** case.

[30] The Defendant's counsel, however, proposed and award of $680,000.00 as being more in keeping with analogous awards in comparable cases. To substantiate that position Counsel cited **Hazel Carty v Deward Singh and Others, reported at page 213 of Harrison's Assessment of Damages 1st edition** in which an award made in March 1992 in the sum of $25,000.00 now updates to $329,391.87. In **Peter Marshall v Carlton Cole and Alvin Thorpe reported at Khan's volume 6 page 109**, the Claimant sustained moderate whiplash, sprain, swollen and tender left wrist and left hand, as well as, moderated lower back pain and spasm. In that case an award amounting to $350,000.00 was given which now updates to $638,662.00. Unlike Mr. Marshall, the Claimant in the instant case did not suffer multiple injuries of swollen and tender left wrist and left hand nor did he receive 16 weeks of medical care, having been placed on three weeks sick leave.

[31] However, it is trite law that a Claimant has the duty to take all reasonable steps to mitigate his loss**: Selvanayagam v University of the West Indies (1983) 1 W.L.R. 585).** Accordingly, damages will not be awarded for loss flowing from a failure by the claimant to prevent further losses.

[32] In the instant case the Claimant stated that because he operated a taxi he was not able to earn for three weeks as driving during that time proved to be difficult. He also stated that he had undergone a course of physiotherapy with Dr. Thompson. His evidence-in-chief does not allude to the fact that these sessions were done. Further, there is a lack of receipts to show that these sessions were indeed conducted by Dr. Thompson. In the circumstances I find that the claimant did not pursue the recommended course of physiotherapy and has therefore failed to mitigate his loss.

[33] Nevertheless, I am to say I find that the claimant is entitled to be awarded the sum of $750,000.00 for pain and suffering and loss of amenities.

SPECIAL DAMAGES

[34] Concerning special damages the following losses have been pleaded and proved.

Medical expenses	$12,375.00
Transportation costs	$ 2,000.00
Loss of earnings ($10,000.00 per week for 3 weeks)	$30,000.00
Total	$44,375.00.

COUNTERCLAIM FOR PROPERTY DAMAGE

[35] The Defendant counterclaimed for damages estimated the sum of $72,620.28. As I have already found that the collision was due to the negligent driving of the Defendant's driver the counterclaim of the defendant fails.

[36] In the upshot judgment is entered for the Claimant as follow:

a. General Damages in the sum of $750,000.000 with interest thereon at 3% from 4th October 2008 to the 3rd October 2013.

b. Special Damages in the sum of $44,375.00 with interest thereon at 3% from the 16th February 2008 to the 3rd October 2013

Costs to the Claimant in the sum of $40,000.00