

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-423 OF 1992

BETWEEN	MERLE McCALLA	PLAINTIFF
A N D	LENNOX AQUART	1 <sup>ST</sup> DEFENDANT
A N D	NORMAN SMITH	2 <sup>ND</sup> DEFENDANT

Mr. Authur Williams instructed by Arthur Williams & Co. for the Plaintiff.

Mr. Garth McBean instructed by Messrs. Dunn, Cox, Orrett & Ashenheim for  
Defendants.

**Heard: 28<sup>th</sup>, 29<sup>th</sup> 30<sup>th</sup> March 2000, & 30<sup>TH</sup> June 2000**

**Marsh, J.**

By Writ of Summons dated November 30, 1992, and by accompanying Statement of Claim similarly dated, the Plaintiff Merle McCalla claimed damages of Negligence against the Defendants Lennox Aquart and Norman Smith.

The Plaintiff alleges that on or about March 12, 1991, she was driving her motor car along Washington Boulevard, in the parish of St. Andrew when she was involved in an accident. This accident occurred when a vehicle owned by the first Defendant and driven by the second Defendant collided with her motor car. She further alleged that this accident was

caused solely by and or materially contributed to by the negligence of the second Defendant.

The particulars of Negligence of the second Defendant are as follows:

- (a) He drove on or onto the incorrect side of the road and there collided with the Plaintiff.
- (b) He failed to keep a proper look out.
- (c) He was gazing
- (d) He drove at a rate and speed which was excessive in the circumstances.
- (e) He pulled out to overtake at a time when it was manifestly unsafe so to do.
- (f) He failed to stop, slow down or swerve or in any way so to drive, manage and or control his said motor vehicle as to avoid the said collision.
- (g) Res ipsa loquitur

As a result the Plaintiff further alleged that she suffered loss and sustained personal injuries.

The defendants denied that the accident was caused by or materially contributed to the negligent driving of the second Defendant. The accident was caused solely by or alternatively, substantially contributed to by the Plaintiff's negligent driving. The details of the Plaintiff's negligence are listed and all liability denied.

EVIDENCE as to liability:

Plaintiff testified that on the day in question, she was driving her Toyota Corolla motor car along Washington Boulevard coming from Constant Spring in the direction of Three Miles. She was headed towards her home, located "off the Washington Boulevard". At a point about ¼ mile from an island in the road, as she approached it, the accident occurred.

A truck driven by the second by the second Defendant, approaching from the opposite direction, tried to overtake a car ahead of it.

It was heading towards Plaintiff's car so she tried to go as far left as she could. However, although she got as far left as to soft shoulder the truck kept coming towards her. She could go no further left and the truck hit her car.

She was travelling at about 25 miles per hour when she saw the truck approaching.

She became unconscious after the impact and only regained consciousness when she was being taken to the Andrew's Hospital. From there she was transferred to St. Joseph's Hospital after "about 10 days or a week". From here she was transferred to the University Hospital where she spent sometime, the duration is not recalled.

Her injuries were extensive and the consequences, as indicated in agreed Medical Reports tendered as exhibits were quite grave.

Both Defendants testified but I shall deal first with the evidence of Lennox Aquart, the first Defendant, whose evidence in sequence came after the second Defendant's.

The first Defendant admitted ownership of the “tractor head” (called by Plaintiff “a truck”) driven by second Defendant at the time of the accident.

He testified that he had gone to the scene of accident on the evening of said accident, that the second Defendant had pointed out certain wheel marks and drag marks to him.

It was too dark to take pictures that would show up the marks. However, next morning he returned to the scene and took photographs of the scene. Photograph was also taken of the tractor head some seven days after the tractor head was returned to him.

These photographs were developed and were tendered exhibits in the case.

(Exhibits 7(A) – 7D)

He was not cross examined by Mr. Williams for the Defence.

Norman Smith the second Defendant gave evidence to the effect that he was the driver of a tractor head that day which was involved in an accident along Washington Boulevard in St. Andrew. He was at the time an employee of first Defendant and the said tractor head belonged to the Defendant. He was driving towards Dunrobin Avenue when the accident occurred. He was travelling at about 20-25 miles per hour. There was no vehicle ahead of them in his lane, but in the lane opposite him there were about 7 – 8 vehicles approaching from the opposite direction. A car changed lanes. It was a car with 2 or 3 others in front of it that changed from the left lane and came over onto his side. It appeared to be overtaking. Immediately he applied his brakes as there was nothing else he could do. The car was than over on his side having gone over the unbroken white line.

Car collided with the front wheel and fender of the tractor head – the latter merged or swerved to the right of the road and ended up some 40 feet from where the two vehicles had collided. The spring clamp and control arm and main spring blade were broken off. The other vehicle, the car, was also about 40 feet away – having gone back onto its right side that is the left side of the road coming down the Boulevard.

The tractor trailer made drag marks on the roadway – on the left side of the road towards Dunrobin Avenue. These drag marks were caused “because the spring blade break and the control arm twisted – both wheels go in different directions and draw across the road”.

#### **SUBMISSIONS:-**

Mr. Williams submitted inter alia,

- (1) Court should accept testimony of the plaintiff and to prefer the version of the accident as outlined by her.
- (2) Second Defendant account of accident, had it so occurred , there would be a more frontal collision.
- (3) Second Defendant deliberately lied when he told Court that the car go over the unbroken white line. In cross examination, when pressed he said it was an error.
- (4) Plaintiff’s evidence is that she was proceeding in the correct lane and it was the ‘tractor head’ that came over to her side of the road. She pulled as far left as she could, two (2) of her left wheels were on the soft shoulder.

This account is consistent with where both vehicles ended up and the damage to both cars and “tractor head”.

Mr. McBean for the Defendant countered:

- (1) Court should bear in mind that there was no challenge by way of suggestion from the Plaintiff that the photographs of the drag mark or drag marks ~~we~~<sup>were</sup> concocted to suit Defendants' case.
- (2) Plaintiff's evidence as to her driving experience was significant. Her answers suggested she was not candid in her in her answers re driving.
- (3) Plaintiff's vehicle ended up on its correct side of the road, which is consistent with Defendants' case. Inference to be drawn, bearing in mind the relevant sizes of the vehicles, that if the car collided with the tractor head, the car would rebound off the nearer vehicle, the tractor head. The damage to vehicles cannot be relied upon as being consistent with any one side's case.
- (4) Conceded there were discrepancies on both sides. Overall when the evidence is considered, it is more probable that accident happened as described by the second Defendant. The photographs provide independent evidence as opposed to the words of the parties

## **CONCLUSION:**

The evidence in this case, relating to the 'fact' is as between Plaintiff and Defendant's diametrically opposite.

Each alleges that the accident occurred on his correct side of the road. It is evidence coming from the Plaintiff only and the second Defendant only.

It is patently clear that both accounts of how the accident happened could not both be true. Both witnesses were quite definite that the accident was caused by the negligent driving of the other. Having examined the evidence of the Plaintiff, I found that the Plaintiff not all together a convincing witness. She was less than frank with the Court when she was cross examined as to her driving experience. I have recorded her in cross examination to have answered. " I was a licensed driver for about two years up to March 1991. I did not own a car during those two years. Prior to March 1991, I owned the Toyota motor car for about two years. When she was reminded of her evidence on the Point, she said " I think I had Corolla for one year and one or two months thereabout". Prior to this, Plaintiff had stated that up to 12/3/91 she had been driving for about six years – that she had got the car from about a year before; that she was not a licensed driver for six years up to March 1991. I find it difficult to believe and do not accept that near 5 p.m on the Washington Boulevard on a week day, that traffic was light. However, this is the Plaintiff's evidence, she stated that at the time there was no vehicles to overtake. I preferred, as being more realistic and much more likely, second Defendant's account that there were about 7 – 8 vehicles approaching on the opposite side and that Plaintiff's car, had about two or three cars ahead of it in a line of 7 or 8 vehicles.

I found that Plaintiff was not a good Judge of distance. She estimates that width of her car to be "about three feet wide" said the asphalted surface of the roadway to be

about ten feet wide. Yet when she was asked to point out, if possible, the width of road, by reference to the parameters of the Courtroom, she pointed out a width of about 20 – 22 feet.

The evidence of the Plaintiff stands by itself. However, the second Defendant has produced photographs of the locus of the accident, as exhibits. Admitted by agreement, Exhibit 7C was shown to Plaintiff and she indicated, in cross-examination that it appeared to be “photograph of general area of accident”.

The other photographic exhibits Exhibit 7A, B, D were admitted by an agreement in evidence during testimony of first Defendant Lennox Aquart. Not a single word was asked of him by the Plaintiff’s Attorney – he was not cross-examined.

Defendant Norman Smith identified Exhibits 7A – C as being photographs of the area where the accident occurred and pointed out “drag marks” specially on Exhibits 7B and 7A. He accounted for how they came to be made. Quite surprisingly, Mr. Williams for Plaintiff, never asked a single question about these drag marks.

The evidence relating to the drag marks remains unchallenged. Exhibit 7B shows obvious drag marks on the left side of the road heading towards Dunrobin Avenue. These drag marks show lines running parallel to the broken white lines dividing the road. These, second Defendant stated, occurred when he suddenly applied brakes on seeing Plaintiff’s manoeuvre. Exhibit 7A shows marks crossing the roadway across the broken dividing line. This second Defendant identified as drag mark of the tractor head, after the brake

was applied. The tractor head as seen in Exhibit 7D, is a considerably larger vehicle than the Plaintiff's motor car. If the accident had occurred as plaintiff alleged, I would expect to have seen the drag marks, not on the second Defendant's side of the roadway but on the Plaintiff's side.

I am therefore obliged to find that the presence of the drag marks where the exhibited photographs indicated lends great weight to the second Defendant's testimony that it was plaintiff who left the lane she was driving in and crossed the road and collided with second Defendant. The second Defendant was not negligent.

I am sorry that the plaintiff received the injuries which the exhibited medical reports indicate. However, in the light of my conclusions above, I find on a balance of probabilities for the Defendants.

Judgment is therefore entered for the Defendants. Cost to be Defendants' to be agreed or if no to be taxed.