[2016] JMSC Civ. 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 07493

BETWEEN	**CLIFFORD MCFARLANE**	**CLAIMANT**
AND	**TECHNOLOGY PLUS COMPANY LIMITED**	**1ST DEFENDANT**
AND	**ENOS FERGUSON**	**2ND DEFENDANT**

TRIAL IN OPEN COURT

John Clarke instructed by Bignall Law for the claimant.

Andre Earle and Nickeisha Young Shand instructed by Earle and Wilson for the defendants.

Heard: 29th & 30th June 2016 & 16th September, 2016.

Negligence – Motor Vehicle Collision - Liability of parties - Contributory negligence – Assessment of Damage

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] This claim arises from a motor vehicle accident which occurred along the Bendon Main Road in St. Catherine. The claimant Mr. Clifford McFarlane asserts that he was driving a car along the main road when a bus being driven by the 2nd defendant Mr. Enos Ferguson emerged from a minor road into his path. Despite swerving, he was unable to avoid the collision. He asserts that the collision was due solely to the negligence of Mr. Ferguson, the servant and/or agent of the 1st

defendant Technology Plus Company Limited, the owners of the bus. As consequence of the collision he suffered injury loss and damage for which he is now claiming against both defendants.

[2] The 2nd defendant contends that the collision was due solely to the actions of the claimant who rounded a corner at an excessive rate of speed. He said the claimant swerved violently in the vicinity of the minor road from which he had emerged and collided with his vehicle which was then on the opposite side of the road, and turned in the opposite direction from the claimant's vehicle. As a result of the collision he too sustained injury, loss and damage for which he claims against the claimant.

[3] Both drivers were negligent and contributed to the accident. The greater culpability is accorded to the 2nd defendant who emerged from the minor road when it was unsafe to do so.

PRELIMINARY ISSUES

[4] An application to visit the locus was made by the claimant. The defendants objected on the basis that there were changes to the environment since the date of the accident. A ruling on the application was deferred until the close of evidence. It was indicated to Counsel that such a visit would only take place if evidence given needed to be clarified and the court was satisfied that there were no changes to the locality.

[5] At the end of the evidence I took the view that it was not clear that the area had remained unchanged. As such, the application to visit the locus was refused.

[6] The claimant also made an application to call a witness to produce photographs of the location taken in 2016. This witness had not given a witness statement. The defendants also objected to this application. The application was refused on the basis that the prejudicial effect of introducing photographs taken in 2016 of a scene in 2011 would outweigh any probative value.

THE LAW - NEGLIGENCE

[7] The definition of negligence is now trite law. The classic statement of negligence and the duty of care was made by Alderson B. in Blythe v The Birmingham Waterworks Company 11 Exch. 781 where he said

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."*

In Blythe the defendants had installed water mains along the street with hydrants located at various points. One of the hydrants across from plaintiff's house developed a leak as a result of exceedingly cold temperatures and caused water damage to the house. The plaintiff sued for negligence.

[8] In Glenford Anderson v George Welch [2012] JMCA Civ.43 Harris JA said of the tort of negligence at paragraph 26:

> *"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ..."*

As to the burden and standard of proof she went on to say:

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities"*

[9] In Bingham & Berrymans' Motor Claims Cases 11th Edition it is stated at paragraph 4.1 that:

> *"There is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected."*

[10] As such, a collision between two vehicles raises an inference of negligence with the burden of proof being on the defendant (Bingham & Berryman's paragraph 5.11). The Defendants having filed an ancillary claim, the burden of proof is on each party to prove his case on a balance of probabilities.

LIABILITY

[11] Based on the accounts of the accident given by the two drivers these facts are uncontested.

(1) The claimant was driving on the Bendon main road

(2) The 2nd defendant was moving from a minor road Henriques Boulevard to Bendon main road

(3) The minor road was to the left of the claimant

(4) There is a s-corner on the claimant's side of the road

(5) The 2nd defendant stopped at the intersection of Henriques Boulevard and Bendon main road

(6) The collision occurred on the right side of the road going in the direction the claimant was travelling

(7) The damage to the 2nd defendant's vehicle was to the right front door going towards the back. The impact was on the panel behind the right front wheel

At issue is the

(1) Speed at which the car was travelling

(2) The distance from the 'curve' to the intersection

(3) The visibility from the ‘curve’ to the intersection

(4) The point of impact/ damage to the claimant’s vehicle

(5) The position of the vehicles at the point of the impact and after the accident.

[12] **In these answers lie the answer to the central issue, what was the cause of the collision.** Both the claimant and Defendant stuck to their account in cross-examination and both appeared to be less than candid in some of their answers. The reliability of their evidence had to be approached from the position of internal inconsistencies and logic.

(i) __**Speed**__

[13] The claimant claimed to be travelling at 50 kilometres per hour (**km**/h). At that speed he would cover 100 feet in and 2 ½ seconds. The 2nd defendant claims that the claimant was travelling at approximately 70 to 80 **km**/h. At 70 **km**/h he would cover 100 feet in just less than 2 seconds. At a distance of 100 feet travelling at 70 **km/**h therefore the claimant would take just under 2 seconds to reach the intersection from the curve.

[14] In his first witness statement the claimant wrote that the 2nd defendant said to him that he did not know he was coming so **fast**. In his further witness statement and in cross-examination he said the 2nd defendant said he did not know he was so **close** to him. These different accounts in the claimant’s witness statement have not being satisfactory explained, his explanation being that he did not say what was in his first witness statement. I find this was likely a deliberate attempt to cover up the speed at which he was travelling. In the circumstances I believe that the 2nd defendant’s estimate of speed is more likely to be accurate and so accept that he was driving at approximately 70 to 80 **km/**h.

(ii) **Distance**

[15] There was a dispute as to whether there was a deep or slight corner approaching the intersection of Bendon Main Road and Henriques Boulevard. It was described as “a slight little curve”, “a blind corner”, a slight curve”. The claimant mentions that he had already passed the “deep corner and a come up” when he first saw the bus. The 2nd defendant said it is the “same corner taper out into the curve”. It is clear that the curve mentioned by both drivers is the end of the s-corner.

[16] The distance of the curve from Henriques Boulevard was put at 80 -100 feet by the 2nd defendant. The claimant gives an indication of 300 feet between the deep corner and Henriques Boulevard. It was the only distance he gave unhesitatingly. Given that the claimant’s estimate was from the deep corner and not the curve at the end of the s-corner I again believe that the 2nd defendant’s estimate is more likely and find that it is more probable that the distance of the corner from the intersection is approximately 80 - 100 feet.

(iii) **Visibility**

[17] There was a contention that the visibility around the corner would have been obscured by banking about four feet high and brush about one and a half feet high. However from 80 to100 feet, both drivers would have been able to see the other.

(iv) **Point of impact**

[18] The claimant says the centre front of his vehicle was damaged. Despite the collision being some time ago, I find it incredible that the claimant does not recall whether the right front side of the vehicle was extensively damaged, recalling only that the radiator burst and that the windscreen was broken by his head. I find that it is more likely as said by the 2nd defendant that the damage to the claimant’s vehicle was to the right front and that the point of impact to the

claimant's vehicle was to the right front. It was uncontroverted that the damage to the 2nd defendant's vehicle was to the right front door going towards the back.

(v) **Position of vehicles**

[19] On the claimant's account after this accident, the bus was in the other lane and that the collision occurred in the right lane. This was because he "drifted" right in a bid to avoid the collision. The damage to the vehicles tells the tale of the position of the vehicles. Had the bus been travelling straight, that is, made no turn after leaving the side road, then the damage to the claimant's vehicle would be to the left hand side when he drifted to the right. For the right hand side of the vehicle to be more impacted the bus must have turned on to the right hand side of the road, even if not completely straightened on the right hand side. The assertion of the claimant that at the point of collision the majority of the bus from the middle of the right driver front door to the back of the vehicle was on the left hand side of the road could not therefore is correct. Indeed given it is uncontested the collision was on the claimant's right hand side, the damaged back of the bus had to be on that side of the road and the back of the car remaining on the left hand side.

(vi) **Causation**

[20] Was the 2nd defendant in anyway negligent? That depends on whether he could have completed his manoeuvre had the claimant not swerved right. The defendants contend he would have.

[21] This is no evidence from the claimant or the 2nd defendant as to the width of the road or the speed of the 2nd defendant's vehicle. The 2nd defendant's evidence is that he had travelled some 15 feet at point of collision. Based on the point of the impact to the vehicles and location of the collision on the roadway, the 2nd defendant had to have driven some distance from the intersection. Even at 30 **km**/h (no speed is given) he would travel that distance in under a second which means he drove out after the claimant came around the corner. The claimant

would therefore have less than the 80 to100 feet to travel before reaching the 2nd defendant's vehicle.

[22] Section 51 of the Road Traffic Act provides as follows:

> *51.-(1) The driver of a motor vehicle shall observe the following rules—a motor vehicle*
>
> > *(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic*
> >
> > *(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road*

[23] It was said by Dunbar- Green J. and affirmed by Phillips JA in Dalton McLean v Steve Cespedes [2016] JMCA App 11 that

> *"All road users have a duty to manoeuvre their vehicle in a manner which does not endanger other users of the road. In circumstances where crossing the path of another vehicle is being executed, the driver carrying out the manoeuvre must do so in a manner which does not endanger anyone and only when it can be done safely. This includes having a clear view of the roadway ahead, checking the speed of the vehicle which is being crossed and ensuring that after crossing any other manoeuvre can be completed safely."*

[24] Since the width of the road is unknown, I am unable to say that the defendant would have completed his manoeuvre without there being a collision with the claimant's vehicle and must therefore find him at least partly responsible.

[25] Was the speed of the car is a causative factor in the collision? At 50 **km**/h the stopping distance is approximately at 75 feet. At 80 **km**/h the stopping distance is 175 feet. The claimant would therefore not have been able to stop upon seeing the bus move out into the main road if he came around the curve at that speed. By the same token I find that it is most unlikely that the claimant "drifted" to the right implying a benign movement, and that more probably the manoeuvre would be more accurately described as a violent swerve.

[26] A violent swerve is prima facie evidence of negligence. (O'Hara V Central Scottish Motor Traction Co. Ltd. 1941 SC.363) In circumstances where the claimant admitted to seeing the defendant at the intersection he ought to have adjusted his speed so as to be able to stop if necessary. Indeed had he been driving at the speed he said he was, then he should have been able to stop before the collision.

[27] S.51 (2) of the Road Traffic Act under the caption "Driving Rules" places a positive duty on a driver to avoid a collision. It provides in part as follows:

> *s.51(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as many be necessary to avoid an accident,..."*

[28] He had sufficient time to avoid the collision if he had kept a proper look out. Further as a prudent driver he ought to have rounded the corner more cautiously. In this regard he was negligent. It is not the case as in **Watson v Everald and Tebbet** (Bingham and Berrymans' Motor Claims Cases 11th Edition p.384) that the 2nd defendant drove out of the side road directly in the path of the van. In **Ruel Ellis v Tristan Wiggan and others** Claim No. 2007 HCV 04918 heavily relied on by the claimant the situation was somewhat different. The driver on the main road was not travelling at an excessive speed nor was he coming around a corner. I adopt from the defendants submission the quotation of Her Ladyship Dean-Armour in Samuel v Surajh TT 2002 HC 68 citing the unreported decision of Rowlatt J. in Page v Richard as follows

> *"It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of his seeing, as for example, a fog, he must go slower in consequence."*

(vii) **Apportionment**

[29] Both drivers are therefore responsible for the collision. S.51(2) of the Road Traffic Act provides that

> *... breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.*

This indicates that the duty and responsibility placed on each driver is independent of the other.

[30] As to apportionment is there a greater responsibility on the driver moving on to the main road? Having regard to the nature of the statutory obligation on both drivers, I find that the 2nd defendant should bear the greater responsibility. As noted in Bingham and Berryman's Motor Claim Cases 10th Edition page 22 quoting from Brown v Thompson [1968] 2 ALL ER 708 ".... regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness." It has been said that those emerging from side roads have a great responsibility in relation to main road traffic. (Watkins v Moffatt (1967) 111 Sol Jo 719 CA.)

[31] In the circumstances I find a fair apportionment of liability is 30% to the claimant and 70% to the defendants jointly and/or severally.

ASSESSMENT OF DAMAGES

Claimant

General Damages

[32] The medical report of Dr. Ravi Prakash Sangappa showed the claimant sustained injuries to his neck, lower back and both knees. He found the claimant had mild tenderness over the paraspinal muscles of the neck, with normal range of movement. He also had paraspinal muscle tenderness over both sides of the lower back with painful range of movement and had tenderness over both knees

with painful range of movement. He assessed him as having mild whiplash injury to the neck, lower back strain and bilateral knee sprain. He was advised to take analgesics, muscle relaxant and referred him for physiotherapy of the neck, lower back and both knees.

[33] Reviewed some six to seven weeks later, the pain to the neck, lower back and both knees had completely subsided but reported occasional episodes of pain to these areas. On examination he was non-tender in these areas. It was the Doctor's opinion then that he was likely to experience occasional pain for the next three months.

[34] In his further witness statement the claimant recited a litany of complaints for which he sought no further medical attention. He complained of his feet becoming numb and cramped while driving resulting in regular stops to stretch his feet. He was unable to sit for long periods without back support, unable to drive long distances without stopping to stretch, had difficulty sleeping due to pain and was unable to have sexual intercourse as frequently due to pain and medication. There is no indication he took any medication beyond the initial period.

[35] There is no period of incapacity given for the claimant beyond stating that he would have occasional pain for the next three months. Not having sought any further treatment, it is more likely that his injuries were resolved within the five months. This was sooner that the claimant in Dalton Barrett v Poincianna Brown and Another Claim No. 2003 HCV 01358 who was incapacitated for almost one year. Mr Barrett had mechanical lower back pains and soft tissue injury to the left shoulder. His injuries however are more serious than the claimant Trevor Benjamin v Henry Ford and others Claim No. HCV 02876 of 2005. This claimant has soft tissue injuries with some residual pain and recovered in three weeks. Peter Marshall v Carlton Cole and Another Claim No. 2006 HCV 01006 is relied on by the defendant. The claimant in that instance suffered moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain

and back spasm. He was given two weeks sick leave. He was discharged after sixteen medical care weeks with no residual pain or suffering. These injuries were more akin to this claimant but falls on the lower end of awards for similar injury. As used to be said of sexual offences, sexual dysfunction is a claim easily made. However unlike an allegation of a sexual offence it can be diagnosed from medical tests and may be treatable. No such evidence is before the court.

[36] In all the circumstances I believe a reasonable award for general damage is $1,200,000.00. In keeping with my findings on the issue of liability the general damages will be reduced by 30%.

Special Damages

[37] The following expenses have been proven

Receipt from Dr. Waul	$15000
Police report	$1000
Physiotherapy report and visits	$38000
Medical Expenses Oasis Health Care	$25000
	$9500
	$26000
Nuttall Hospital	$11500

[38] There is no evidence in support of the claim for transportation expenses. This claim is disallowed. With respect to loss of income, there is no indication from the medical report that the claimant was unable to carry out his normal occupation due to the effects of his injuries. However he had substantial discomfort for at least one week which led him to seek further medical attention. It is reasonable to suppose that he was unable to carry out his occupation of driving for at least 2 weeks. Despite the absence of any documentary evidence, it is notorious that

this is mostly a casual job in Jamaica. The sum of $20,000.00 is allowed for loss of income.

[39] Total special damages is therefore $120,000.00. This amount is similarly reduced by 30%.

2nd Defendant/Ancillary Claimant

General Damages

[40] Mr. Ferguson presented with injuries to the right thigh and knee, right hip and pain to his neck and lower back. He was found to have tenderness to the lateral and superior aspect of the right thigh and had pain to his right lower limb. He had mild swelling to his right knee and a superficial abrasion. He had pain on extension of his right knee and mild pain on rotation of his neck and back. He was assessed as having moderate whiplash injury, muscular strain, soft tissue injury and ligament to right knee. He was started on analgesic and muscular relaxants and advised to rest for seven days. He was later given an additional twelve days.

[41] In February 2012 after continuing visits to his doctor, he was still complaining of pain to the right knee especially on long standing and exertion. He was also complaining of numbness with pain radiation down the right lower limbs. He was referred for physiotherapy and continued on intermittent analgesic for pain. He did physiotherapy sporadically over a period of two years. In 2014, some three years later, he was still receiving treatment and expected to recover fully within the next eighteen months. At the time of giving evidence he claimed to be still suffering the effects of the injuries, feeling pain from the neck to right foot when driving long distance, climbing ladders and stair cases and when stooping down. However he has not visited the doctor recently.

[42] It is clear that the 2nd defendant suffered the more severe injury being advised to rest for approximately nineteen days and suffering the effect and his injuries for five years. It is possible that the effects of his injury may have resolved sooner if

he was more regular with his attendance at physiotherapy but there is no evidence his failure mitigate his injuries by having the necessary physiotherapy sessions prolonged his symptoms. The submissions on behalf of the 2nd defendant on quantum are apropos in the circumstances and adopted. The sum of $1,500,000.00 for general damages is reasonable. This amount is reduced by 70 % in accord with my findings on liability.

Special Damages

[43] The following special damages were proved

Doctors visits	$10500.00
Physiotherapy	$3500.00
X-ray	$540.000

[44] Total special damages is $14,540.00. This amount is similarly reduced by 70%.

ORDER

[45] Judgment for the claimant on the claim in the sum of $84,000.00 for special damages and $840,000.00 for general damages and loss of amenities

[46] The Court awards interest on special damages at the rate of 3% from the 31st August 2011 to the 16th September, 2106 and on general damages at the rate of 3% from the 29th November, 2011 to the 16th September, 2016.

[47] Judgement for the ancillary claimant on the ancillary claim in the sum of $4362.00 for special damages and $450,000.00 for general damages.

[48] The Court awards interest on special damages at the rate of 3% from the 31st August 2011 to the 16th September, 2106 and on general Damages at the rate of 3% from the 31st January, 2012 to the 16th September, 2016.

[49] The claimant to have 70% of his costs on the claim to be taxed if not agreed.