[2012] JMSC Civ 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 03943

BETWEEN	CHRISTINE McNALLY	CLAIMANT
AND	KENNETH MAHABIER	1ST DEFENDANT/1ST ANCILLARY DEFENDANT
AND	BRIAN CAMPBELL	2ND DEFENDANT/2ND ANCILLARY DEFENDANT
AND	COLLIN IRVING	3RD DEFENDANT/ANCILLARY CLAIMANT

Mr. Oraine Nelson and Mr. Kahie Watson instructed by K. Churchill Neita & Co. for the claimant.

Ms. Suzette Campbell instructed by Campbell & Campbell for the 1st and 2nd defendants.

Ms. Stacia Pinnock for the 3rd defendant.

Heard: 30 and 31st January and 1st March 2012

Negligence – Motor Vehicle Collision – Turning across Path of On-coming Vehicle – Point of Impact – Apportionment – Handicap on the Labour Market

Campbell, J.

[1] This matter arose out of a collision between two public passenger vehicles on the plains of Westmoreland. The vehicles were coming from opposite directions, a Toyota Hiace motorbus proceeding, from the parish capital, Sav-La-Mar and the other a Toyota Corolla taxi, from Grange Hill. The accident occurred along the Three Mile River main road, which lies roughly equi-distant between the two towns.

[2] It was the 1st October 2007, and the claimant was seated in the left front passenger seat of the, taxi owned by the 1st defendant and being driven by the 2nd defendant. She resided in Kingston, and was returning from a visit to her boyfriend. She was the only passenger in the taxi. The 2nd defendant testified that he has plied that route for about eight years.

[3] The other vehicle, the Toyota Hiace motorbus, was being driven by the owner, the 3rd defendant. The only passenger in the motorbus was the brother of the 3rd defendant who was seated in the left front passenger seat. The driver of the Toyota Hiace bus resided in that area and testified that he has been traversing those roads for some thirty years.

[4] It was sometime between 12:30 – 1:00pm; the road was dry, asphalted, and had an unbroken white line down its middle. Both drivers testified to the speed limit being fifty kilometers per hour in that area. The road width was estimated at twenty feet, and its surface was level. Both drivers had unrestricted visibility from both directions. From the direction of the Toyota Hiace, there was clear vision for 500 feet before the road made a right turn.

[5] All three witnesses who testified at the trial said that there was a line of traffic proceeding from Sav-La-Mar. The driver of the motorbus gave as the reason, that there was a large trailer ahead of this line. The claimant testified that there were vehicles ahead of the taxi she was travelling in, but it was not “bumper to bumper.” She said in cross-examination, “From he drove out of Grange Hill, the vehicle was overtaking.“ The driver of the taxi has denied that he was overtaking throughout the journey to Sav-La-Mar.

[6] At the point of the collision, the evidence is there is a road on the right for traffic travelling in the direction of the Hiace motorbus. This road, Cherry Tree Lane, was a central issue in the case. There was a deep drain, longer than thirty feet in length on the Cherry Lane side of the road. The taxi driver said that directly

across from Cherry Tree Lane was a light post on that embankment, and houses beside each other. The issue identified for resolution in all Pre-trial Memoranda filed by the parties, was to the effect, whether the 3rd defendant turned suddenly in the path of the 2nd defendant.

[7] Both the claimant and the 1st and 2nd defendants contended, inter alia;

The 3rd defendant, "Suddenly and without warning drove into the path of motor vehicle registered PC 2210 (taxi).
The 3rd defendant, for it part identified, inter alia, the following;

The 2nd defendant,

> Failed to see the Toyota Hiace waiting to turn right from Georges Plain in sufficient time to avoid the collision or at all.
>
> Overtaking a line of traffic when it was unsafe to do so thereby colliding with the 3rd defendant's motor vehicle.

[8] Did the Toyota Hiace bus turn in order to enter Cherry Tree Lane? In her testimony, the claimant said, there were no vehicles ahead of the Toyota bus, there were vehicles ahead of the car she was in. She was unable to say if the motorbus had on any right indicator. She said when the vehicle was overtaking it, the bus was on its correct side of the road. She was unable to say if the vehicle in which she travelled regained its side of the road before the collision. She said she did not "exactly see the collision. "

[9] The driver of the taxi testified that, "It happened so sudden." He said the vehicle came from SAV, and turned into Cherry Lane, the bus driver was frightened when he saw the taxi. The bus, according to the taxi driver, started its turn when he was about a half of a car length from it. It did not complete the turn. He further claimed that the car ahead of him swung to its left to avoid a collision with the turning bus. The taxi driver said he collided in the left front of the bus, and not

the front. He denied that he was overtaking at the time of the collision or that he had overtaken several vehicles in the course of his journey from Sav-La-Mar.

[10] The driver of the Hiace said he stopped to turn onto Cherry Lane, there were vehicles waiting behind him. He said there were no vehicles ahead of his bus. He maintained that his bus was not at an angle. According to the bus driver, he was positioned to his extreme left. He estimated the width of the lane he was in as being about ten feet, and the width of his bus, six feet. He said there was a distance of four feet between himself and the unbroken white line in the centre of the road. The bus driver said the taxi overtook the line of traffic; it was then travelling on his side of the road. He denied that he had started to turn. He said, when the taxi started to overtake it was about four car lengths ahead of him. He said the only thing the taxi could do was to brake and slam into his front. He said his bus was 10 – 12 feet long and six feet wide and was touching the embankment on the left. He had been stationary minutes before the accident. His standard drive vehicle was in neutral. According to the bus driver, the taxi continued straight and crashed into him head-on.

[11] The bus driver was questioned about the damage to his vehicle and admitted that a total of twelve items were listed for replacement on the left of the damaged bus. He gave evidence that his brother had to exit the vehicle through the door on the right. He admitted that the road code direction for making a right turn was to position close to the centre-line, with the indicator on. He said he did not do that in his effort to turn into Cherry Tree Lane, as his personal practice was to remain straight as he had done that day. He admitted that the Assessor's Report identified the point of impact as being the left front of the bus. He said the bus was rolled back into the embankment after the accident.

[12] The claimant's testimony that the taxi was overtaking at the time of the accident and before, was attacked. Mrs. Campbell further submitted, in any event, overtaking by itself provides no evidence of negligence. The claimant had

indicated that she had not seen the actual impact although she places the Corolla on its incorrect side of the road just prior to the accident.

[13] The evidence of the taxi driver stands in stark contrast to the evidence of his passenger, the claimant. The taxi driver denies overtaking all along the journey to Sav-La-Mar and insists that the Hiace had turned suddenly into his path.

[14] The evidence in respect of the damage to the bus is important in determining the positions of the vehicles at the point of impact. The damages noted by the assessor's report are more consistent with the testimony given by the taxi driver than the bus driver's evidence. If there was a head-on crash, as the bus driver is contending, one would expect that the damage would be more spread across the front of the bus. The point of impact being the left front of the bus is more consistent with the vehicle turning to access Cherry Tree Lane than being struck head-on by the taxi. On the bus driver's testimony, the point of impact would be turned to the embankment on his left. That is, the force that caused the impact would have come from the embankment. The bus driver had an unrestricted view of the approaching vehicle, yet took no steps to minimize injury to himself, his passenger or the bus. The position he assumed in order to make the turn would have meant that the taxi would have four feet of space on that side of the road. Why was no attempt made by the taxi to pass the vehicle in that space instead of hitting the larger bus head-on? Of crucial importance is the evidence of the claimant that she at no time felt that an accident was imminent from the overtaking of the driver of the taxi. She was unable to say whether there was a white line in the road, which would have some bearing on her ability to definitely say if there had been an encroachment by either vehicle.

[15] I find that the damages on the Hiace was more consistent with the taxi driver's case that the Hiace bus was turning into Cherry Tree Lane. I accept that the turn the Hiace bus made was sudden and was not indicated to the other users of the road. Anyone making such a move must naturally take special care to see that

he does not get in the path of other traffic. See **Patel v Edwards** (1970) RTR 425, CA. I.

[16] I accept the testimony of the claimant that just prior to the accident the taxi had overtaken vehicles in his lane. I find that the taxi was engaged in overtaking at the time of the collision, in so doing the driver was not exercising the care and caution, which would be very high, in an area where there was an unbroken white line.

[17] Judgment for the claimant, on the claim. I would apportion 60 per cent of the liability for the accident to the 3rd defendant and forty per cent to the 2nd defendant.

[18] On the ancillary claim, judgment for the ancillary defendant with liability apportioned forty percent for the ancillary defendant and sixty percent for the ancillary claimant.

Quantum

General Damages

[19] The claimant suffered a loss of consciousness, migraine headaches, chest pains, bruising of the chest, lower respiratory tract infection and a fracture of the 8th rib. When seen by Dr. Douglas on the 2nd February 2009, it was noted there tenderness to sternum, rib cage and back of the chest. She was diagnosed with contusion of the rib cage, fractured 8th rib, a strain dorsal spine and frontal headache. There were serious contusions to chest wall, dorsal spine, and to the forehead, these contributed to the chronic pain and physical impairment that the claimant experienced. She had converted to a symptomatic degenerative disease of the spine. The lung infection was seen as an indirect consequence of the injury. She was assessed with an impairment of 8% of the whole person.

[20] I considered the case of **Iris Edwards v Samuel Owen Mc Donnough** Khan Vol.5. Claimant suffered cerebral concussion, fracture of the 7th rib, contusion and soft tissue injuries to the face, left shoulder and left knee. There was no permanent disability. The sum of $1,300,000.00 awarded March 1999, updated to $2,447,543.58. Of note is that the claimant in **Iris Edwards** has no permanent disability; the prognosis was to recover within 4 – 6 weeks.

[21] **Olive Henry v Robert Evans & Greg Evans**, Khans Vol. 5, claimant suffered sustained pain and stiffness of the neck pain in the back interscapular areas and soreness over the rena lareas. Diagnosed with whiplash injuries with sequelae and x-rays reveal cervical spondylosis. Assessed at 10% of the whole person. Dr. Cheeks opined that the whiplash injury had converted to a symptomatic spondylosis. The claimant was assigned 11% whole person disability. Cheeks opined that the injury accounted for 50% of the disability or 5.5% of the whole person. An award of $750,000.00 was made for pain and suffering, updated this is $2,729,221.97. Counsel for the claimant highlighted that all of the instant claimant's injury is attractable to the accident.

[22] I am of the view that Ms. McNally case is more serious than both these cases the severe contusions of the chest wall, dorsal spine, has according to Dr. Douglas contributed to her chronic pain and physical impairment. The expert opinion is, she will continue to find strenuous work challenging, her symptoms can't be eliminated. In **Olive Henry** the pre-exiting condition was equally responsible for the claimant's condition. I would make an award of $2,500,000.00.

Special Damages

[23] Future care, although pleaded, there was no evidence led or documentary support for an application of this head. Nothing to say that she will need future medical care.

Handicap on the Labour Market

[24] The claimant had worked five days per week, at Fifth Element Studio, situated at Lyndhurst Crescent, as a domestic helper. After her injury, she went back to work but was unable to continue due to the pains she was experiencing. The claimant has been placed at a disadvantage on the labour market by her injuries. Dr. Douglas, in his report of 4th April 2011 noted that she will continue to find strenuous work challenging. She will not be able to lift heavy objects. She will be able to perform very light duties and a desk work. Her condition is likely to be chronic maybe lasting years. In her particulars of claim, she described herself as a domestic helper, her inability to do the chores of a domestic helper as placed her at a disadvantage as compared with her competitors in the labour market. The evidence is she is out of her job, she will find it more difficult than her able-bodied competitors to find employment.

[25] Whether the claimant will lose her job is not an imponderable that this court is faced with, she has lost her job due to the pain. She must be placed in a position, as if the injury had not taken place. The principle of restitutio in integrum applies. She presently engages herself in baby-sitting a neighbor's child. However, there is no evidence that she has made any effort to gain other employment. Neither is there any explanation why no such attempt was made. She has a duty to mitigate her loss. The learned authors of Ogus – The Law of Damages, 1973 states,

> "Whether the plaintiff has acted reasonably or not is a question of fact for the trial judge, taking into account all the circumstances of the particular case. The onus is on the defendant to show what the plaintiff did or failed to do was unreasonable. The court should not be over-eager to discharge the defendant's burden."

[26] Dr. Douglas did opine that desk work may be a reasonable alternative. She had left Spaulding Secondary School, at grade 9, had attempted evening classes but was forced to stop when her mother became ill. Neither Mrs. Campbell nor Ms. Pinnock suggested that the claimant's conduct was unreasonable; this may very well be a result of the findings of Dr. Douglas.

[27] The main contention against its application or an award under this head was that there was no documentary support for the wages that the claimant asserts she earned at her employment. I accept her explanation that when she returned to collect proof of her employment, the business had closed. It is not usual for domestic helpers to be given pay slips. Her evidence remains unchallenged that she was employed as a domestic/office helper. An award of $1,000,000.00 is made.

[28] Loss of earnings, there is no evidence to support the period or the amount claimed. Similarly in respect of future physiotherapy and future assistance, there is no evidence to support the application.

[29] It is hereby ordered that:

1. Liability apportioned 60:40 between the 3rd defendant and the 2nd defendant respectively.
2. General Damages in the sum of $2,500,000.00 awarded to the claimant.
3. Special Damages in the sum of $57,405.00 awarded to the claimant;
4. Handicap on the Labour Market in the sum of $1,000,000.00 awarded to the claimant.
5. Interest awarded on General Damages at the rate of 3% per annum from the 27th January, 2009 to the 1st March 2012 in respect of the 2nd defendant; and 3% per annum from the 6th April 2009 to the 1st March 2012 in respect of the 3rd defendant.
6. Interest awarded on Special Damages at the rate of 3% per annum from the 1st October 2007 to the 1st March 2012.
7. Costs to the claimant to be taxed, if not agreed.