

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. CL 2002 T 053

BETWEEN	NORMA THOMPSON	CLAIMANT
AND	MAURICE BRADY	1 ST DEFENDANT
AND	PETER SUDLOW	2 ND DEFENDANT
AND BETWEEN	PETER SUDLOW	ANCILLARY CLAIMANT
AND	MAURICE BRADY	ANCILLARY DEFENDANT

As Consolidated with

CLAIM NO. CL 2002 T 053

BETWEEN	GLENVILLE GABBIDON	CLAIMANT
AND	MAURICE BRADY	1 ST DEFENDANT
AND	PETER SUDLOW	2 ND DEFENDANT

Mr. L. Campbell instructed by Campbell and Campbell Attorneys at Law for Claimants

Miss C. Minto instructed by Nunes, Scholefield, DeLeon and Company for the 1st Defendant

Mr. S. Codner instructed by Lightbourne and Hamilton for the 2nd Defendant

**Negligence – Road Traffic accident – injury to passengers – driver overtaking vehicle –
collided with vehicle - summary of statement filed – driver failing to give evidence –
ancillary claim – duty of care of driver been overtaken.**

Heard: 22nd September 2010 and 29th July 2011

G. Brown, J.

1. The claimants brought an action in negligence seeking to recover damages as a result of injuries suffered in a motor vehicle accident along the Rose Hall main road in the parish of St.

James.

2. The claimants alleged that on the 17th day of March, 2002 at about 6:00 p.m. they were passengers in the 1st defendant's motor car travelling towards Montego Bay when the latter commenced overtaking the 2nd defendant's motor bus in the vicinity of the Half Moon Hotel. As the car reached half way of the bus the 2nd defendant suddenly swerved to his right and collided with the car. They blame both drivers for causing the accident.

3. The 1st defendant filed a defence denying that the collision was caused by his negligence and blamed the 2nd defendant. He did not file a witness statement and was not called as a witness. A summary of his statement was filed in the proceedings on his behalf from a statement that was in his Counsel's possession. It states:

"While I was driving along the Rose Hall Main Road heading in the direction of Montego Bay, I was travelling behind a Toyota Coaster bus. I decided to overtake this bus, and I was about to do so when this bus suddenly pulled out in front of me. In order to avoid hitting into the back bus, I swerved further to my right, but had to return to my left. When I attempted to return to my left side of the road, the left hand side of my car touched the right side of the coaster bus. That impact pushed my car to the extreme right, where my car ran off the right side of the road and slammed head on into a palm tree at the Colony Gate of the Half Moon Hotel."

4. The summary formed the gravamen of the 1st defendant's defence which was in serious conflict with the claimants' evidence. It was their testimony that at the time of the collision the car was overtaking the bus and was parallel with it. On reaching about half way the bus suddenly swung to his right and collided with the car causing it to go onto the soft shoulder of the road. The driver (1st defendant) then got the car back onto the road and the bus hit the car a second time causing it to collide with a tree on the right hand side of the road.

5. However the 1st defendant's case as set out in his summary clearly showed that he had not commenced overtaking the bus but was about to do so. He was behind the bus when it suddenly

swerved to the right in order to overtake another vehicle. In addition the car collided only once with the bus and not twice as the claimants sought to allege. The 1st defendant's absence at the trial placed Miss Minto in a predicament as she was unable to challenge the testimonies of the witnesses.

6. The 2nd defendant denied that he was negligent and blamed the 1st defendant for the collision. He also filed an ancillary claim against the 1st defendant for the damage to his coaster bus. He stated in his witness statement (examination in chief) as follows:

“That on the 17th of March, 2002 at about 6:00 pm I was driving along the Rose Hall Main Road... ..There were two vehicles ahead of me going in the same direction I was going. My speed was about 30 mph. I was travelling this slow because the vehicle ahead of me was travelling very slowly I think about 25 mph. I decided to overtake this vehicle ahead of me. I looked into my side mirrors, my rear view mirrors, put on my indicator to indicate that I was about to overtake the motor car in front of me and also indicated intention with my hand. The road was clear and I was about 20 feet behind the motor car in front of me. As I was clear to undertake this manoeuvre I waited until I had entered a section of the roadway that had a broken white line and proceeded to pull alongside the car in front of me. While being parallel with the car in front of me a car appeared from nowhere. I felt an impact to the right rear side of my vehicle. I glanced to my right side and saw a Toyota Corolla speeding like crazy. I then realized that the car I had seen hit my bus and lost control and went head on into a palm tree on the extreme right side of the road.”

7. The 2nd defendant was only cross examined by Counsel for the 1st defendant and there was no suggestion put to him that his account was incorrect. The accuracy of his evidence was unchallenged by either Counsel. I therefore accepted his account of the accident and rejected the claimants' version. This was not detrimental to the claimants' claim against the defendants as the accident could not have occurred without the negligence of either driver or both.

8. Mr. Campbell submitted on behalf of the claimants that each driver was negligent and liability should be proportioned equally. Miss Minto on behalf of the 1st defendant submitted that the claimants had not proved that the first defendant was negligent in the operation of his vehicle. If however the Court is minded to conclude that the 1st defendant somehow contributed to the accident the 1st defendant's liability should not exceed 30%. It was her contention that the authorities establish that a driver who pulls out or changes course while being overtaken without having any knowledge of the over taker's presence on the road until a collision has occurred, should bear most of the blame. She relied on Holdack v Bullock Brothers (Vol. 108 part 2. . . . SJ861) and Vincent Fearon v Isolda Wright (Court of Appeal) RMCA 40/90. She further argued that the 1st defendant could not be faulted for the steps he took while in the agony of the moment. It was her view that the 2nd defendant was not utilizing his rear view that day as he maintained that he did not see the 1st defendant's motor car prior to it hitting the bus.

9. Mr. Codner submitted that the 2nd defendant ought not to be held liable as he had acted within the provisions of the Road Traffic Act. Section 57 stipulates the appropriate signal to be given by the driver of a motor vehicle to the traffic behind him before he changed direction to his right. He said that he satisfied himself that he had a clear and unobstructed view of the road ahead. He then gave the appropriate signals to the traffic behind him of his intention to overtake the vehicle ahead of him. He checked his rear view mirrors and did not see the 1st defendant's motor car behind him. He then commenced to overtake the vehicle ahead of him. There was no credible evidence before the court to dispute the 2nd defendant's account. Likewise there was no evidence to support Miss Minto's suggestion that he did not utilize the rear view mirrors that day. Thus with the 1st defendant's absence from the trial there was no evidence to support any of the particulars of negligence against the 2nd defendant as alleged in the defence.

10. I therefore agreed with Mr. Codner's submission that the 1st defendant was wholly to be blamed for the collision and the injuries suffered by the claimant as he was attempting to overtake the 2nd defendant's vehicle when it was not safe. His client had indicated his intention to overtake the vehicle ahead of him and the 1st defendant failed to keep any control over his vehicle so as to avoid the collision.

DAMAGES

Norma Thompson

In her claim for damages, she tendered medical evidence that she sustained injuries as follows:

1. Fracture right humerus
2. Fracture right ulna with dislocation of radial head
3. Fracture left femur

She had lost consciousness as a result of the collision and was hospitalized at the Cornwall Regional Hospital for nine (9) days. She was treated at the outpatient clinic on the 9th April, 23rd August, and 28th December 2002. Dr. Don Gilbert saw her on the 4th November 2009 for the purposes of assessment of her injuries. His report dated 6th November 2009 reads:

Physical examination

On examination of the right upper limb there was a surgical scar on the subcutaneous border of the right ulna with moderate tenderness in the distal end of the scar. There was full pronation and supination of the forearm along with full extension of the elbow. Flexion of the elbow was limited 130 degrees. There was a good grip in the hand but it was weaker than the contralateral side. There was full range of motion in the shoulder except in abduction which was 120 degrees. On examination of the left lower limb there was a surgical scar over the lateral aspect of the distal thigh which was tender and another scar over the left buttock. There was full range of movement in the hip but flexion of the knee was limited to 130 degrees because of pain. Ms. Thompson was noted to walk with a limp and there was a 2cm limb length discrepancy (right 90 cm and the left 88cm).

Investigations

Plain radiographs of the left femur showed a heal fracture at the junction of the middle and distal 1/3 of the bone with a K-nail insitu protruding above the greater trochanter. Plain radiographs of the right ulna showed a healed fracture of the bone at the junction of the middle and proximal third with a rush rod insitu.

Diagnosis

Ms. Thompson has a healed fracture of the left femur with a limb length discrepancy that caused her to walk with a limp. She also has discomfort in the buttock because of a proud K-nail which she will need to have removed. Ms. Thompson also has a healed fracture of the right ulna and radius but has some limitation in range of motion in the shoulder as a result of the injury to right arm.

Prognosis

Ms. Thompson will need a heel lift to compensate for limb length discrepancy without which the alteration in gait will lead to lower back pain and left knee pain because of osteoarthritis. She will also need to restart physiotherapy treatment the range of motion in her right shoulder.

Impairment

The healed fracture of the femur with the limb length discrepancy placed Ms. Thompson in the class 1 of the Knee Regional Grid-Lower extremity Impairments which is assigned 7% lower extremity impairment according to page 510 of the 6th edition of the Guides to the Evaluation of Permanent Impairment published by the American Medical Association. 7% lower impairment is equal to 3% whole person according to page 530 of the above reference. Ms. Thompson will need to be reassessed after completing her physiotherapy regime to determine if she has any impairment in the right upper limb.

The claimant told the court that due to lack of funds she have failed to restart the physiotherapy program as recommended by Dr. Gilbert.

Special Damages

(i) Loss of Earnings

The claimant said that at the time of the accident she was employed to Johnny Gourzong, earning a weekly salary of \$4,500.00 and was claiming loss of earnings for 12 weeks in her particulars of loss/damages. The claimant said in her witness statement that she could not work for one year

and was now seeking loss of earnings for 52 weeks at \$3000 per week. The claimant made no application to amend the particulars in light of the discrepancy with her evidence and also did not provide any evidence to verify her income. I therefore agree with the defendants' that the claimant is not entitled to an award for loss of income.

(ii) Household Assistance

The claimant pleaded that she employed a household assistance for 10 weeks at \$1,500 per week. The defendants submitted that the claim was not proved. I accept the claimant's evidence that she employed a helper to assist her and the sum claimed is reasonable.

(iii) Transportation Expense

A sum of \$5000.00 was claimed for transportation from the Cornwall Regional Hospital to her home on five occasions. The claimant said she visited the hospital's out-patient clinic for treatment and also for physiotherapy. I also find this sum reasonable.

(iv) Medical Expenses

The sum of \$30,000 was agreed.

General Damage

It was the claimant's contention that an award of \$2,500,000 should be awarded for pain and suffering. He relied on the case of Annmarie Ewan and Tiffany Campbell v Devon Reid and Kameka Ryann Carlos (Khan's vol. 6 p. 25).

The 1st defendant on the other hand submitted that the decision of Charles Dixon v Sportmax Ltd. & Bryan Ellis (Khan's vol. 6 p. 23) provided a helpful guide in determining a suitable award for pain and suffering. He suggested the sum of \$1,100,000.00 as appropriate.

The 2nd defendant also made submissions and suggest that an award of \$860,000.00 was appropriate. He relied on the case of Cecil Martin v Uncle Sonny's Transport Co. Ltd (C.L. 1995 M035) and Devon Brown v Orville Earle (C.L. 1992/B 0350).

It is my view that the cases referred to by the defendants are not comparable and therefore award the sum of \$2,000,000 for pain and suffering and loss of amenities.

Glenville Gabbidon

The claimant sustained a comminuted fracture of the left humerus and also a 5cm laceration to his forehead. He had lost consciousness as a result and was hospitalized at the Cornwall Regional Hospital for one week. The laceration was sutured and the fracture was treated with a cast. After he was discharged from the hospital he attended the outpatient clinic for further treatment. The cast was removed on the 7th May 2007.

Special Damages

(i) Loss of Income

Mr. Gabbidon said in his witness statement that at the time of the accident was employed by Johnny Gurzong and earned \$3,000.00 weekly. He was unable to work for ten weeks purportedly exhibited a copy of his pay slip. This was never done and the defendants complain of his failure to present any documentary proof to verify or support his claim. I therefore make no award for loss of earnings.

(ii) Transportation

The claimant lives in Trelawny and had to travel by taxi to the clinic at the Cornwall Regional Hospital. He said he spent \$2,500.00 on transportation but did not get any receipt from the taxi drivers. I accept his explanation and find that the sum claim is reasonable.

(iii) He said that he paid \$4,500.00 as fees to the clinic. I find that the sum is reasonable.

General Damages

Counsel for the claimant submitted that the court should make an award of \$1,300,000.00 for pain and suffering and loss of amenities. He relied on the case of Leroy Swaby v Steve McIntosh (Khan 6th ed. P. 91).

The defendants on the other and submitted that a sum in the region of \$400,000.00 would be more than a fair figure to be awarded in light of the previous awards.

It is my view that the cases referred to by the parties are not comparable and I therefore award him \$900,000.00 as general damages.

Peter Sudlow

The 2nd defendant alleged that the cost to repair his vehicle was in the sum of \$56,925.00 and claims an additional sum of \$50,000.00 for loss of income. His counsel did not address this issue in his written submission.

Counsel for the 1st defendant/ancillary claimant submitted that \$38,000.00 should only be awarded as there was no nexus between the seats and the upholstery and the repairs to the damaged panels. One must appreciate that the former items must be removed in order to work on the side panels. There was no evidence challenging the sum claimed as been unreasonable and therefore the sum is allowed.

With regards to the claim for loss of income there is no evidence to support the item and I must agree that he has not proved his loss.

Judgment for the claimants against the 1st defendant and Judgment for the 2nd defendant against the claimants and the 1st defendant as follows:

1st claimant - Special damages \$50,000 with interest at 3% from 17th March 2000.

General damages \$2,000,000 with interest at 3% from 15th August 2002 with cost to be agreed or taxed.

2nd claimant - Special damages \$7,000 with interest at 3% from the 17th March 2000.

General damages \$900,000 with interest 3% from the 15th August 2002.

Costs to be borne by the 1st defendant.

Judgment for the ancillary defendant/2nd defendant against the ancillary claimant/1st defendant in the sum of \$56,925.00 with interest at 3% from the 15th August 2002 until today, with cost to be agreed or taxed.