



[2018] JMSC Civ 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 00867

BETWEEN	KEMOY BLAKE	CLAIMANT
AND	HUGH LEVY	1ST DEFENDANT
AND	CATHERINE LEVY	2ND DEFENDANT

IN CHAMBERS

Mr. Lamar Neil instructed by Bignal Law for the Claimant.

Ms. Suzette Radlyn for the 2nd Defendant.

Heard: 4th – 5th and 9th April, 2018.

Negligence – Liability – Credibility.

Shelly Williams J

Background

[1] On the 9th of November 2013 there was a collision between the Claimant and the Second Defendant on Dulwich Drive in the parish of St Andrew. The Claimant at the time of the collision was riding a Zangshend 150 motor cycle and the Second Defendant was driving a Nissan X-Trail motor vehicle registered 4481 FS. The First Defendant is deceased.

[2] The Claimant sustained injuries as a result of the collision and was taken to the University Hospital where he was admitted. On the 26th of January 2017 the Claimant filed a claim for personal injuries against the First and Second Defendant. Only the Second Defendant was served.

[3] The negligence being claimed by the Claimant included that the Second Defendant:

- a) Drove at an excessive and/or improper speed;
- b) Failed to keep any or any proper lookout;
- c) Drove without any or any sufficient consideration for other users of the road;
- d) Failed to maintain sufficient control over the said motor vehicle;
- e) Failed to apply brakes within sufficient time or at all so as to prevent the collision from occurring;
- f) Failed to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to avoid the said collision;
- g) Failed to keep any or any proper and effective control of Nissan Xtrail motor car numbered and lettered 4481 FS, she was driving;
- h) Failed to take reasonable steps to avoid a collision;
- i) Encroaching on the Claimant's lane of travel;
- j) Failed to keep the Nissan X-trail motor car numbered and lettered 4481 F, in the correct lane along the roadway. Being that said Nissan X-trail motor car numbered and lettered 4481 FS, driven by the Second Defendant, along Dulwich Drive, Kingston in the parish of Saint Andrew, drove in a careless manner, swerved from its designated lane and collided into Zangsheng 150 motor cycle, aboard which the Claimant was the driver at all material times, that was travelling the opposite direction when the collision occurred causing the Claimant to suffer injury, loss and damage and incur expense.

[4] The Claimant also relied on the doctrine of *res ipsa loquitur*.

[5] The Second Defendant filed a defence claiming that the collision was a result of the negligence of the Claimant and denied that she was responsible for any injuries, loss and damage that occurred as result of the accident.

[6] Facts in dispute

1. Where the collision took place
2. Who was responsible for the collision?
3. Whether the Claimant was contributorily negligent.

[7] The issues in the case

- a) Whether the collision was as a result of the negligence of the second defendant?
- b) Whether the Claimant was contributorily negligent?
- c) What were the injuries that were sustained by the Claimant?
- d) If the Claimant's injuries resulted in whole person impairment?
- e) The quantum of damages if any?

Claimant's case

[8] The Claimant's case was that on the 9th of November 2013 he was travelling from Half Way Tree heading to his home which is located at 13 Grants Pen Avenue, Kingston 8. He was riding his Zengsheng 150 bike at about 30 kmph. He then turned on Dulwich Drive which is a two lane roadway measuring about 23 feet wide. His evidence is this roadway can accommodate two lanes of traffic. Whilst on Dulwich Avenue, on approaching a blind corner, he reduced his speed. On entering the corner on his left lane he saw a SUV coming towards him on his side of the road. The SUV was travelling at such a fast pace that he did not have time to evade the SUV and it slammed into his bike.

[9] As a result of the collision he was thrown from his bike unto the ground still in his lane. The SUV did not stop and dragged his bike for about 15 meters before it

eventually stopped. He remained in the roadway as his foot was broken, until he was eventually taken to the University Hospital.

[10] The Claimant then proceeded to outline his injuries, the treatment he received for the injuries and his expenses as a result of the collision.

[11] The Claimant pleaded injuries which were supported by medical evidence as follows:-

1. Post-surgical reduction of the right femoral fracture;
2. Mechanical lower back pain;
3. Multiple abrasions to both elbows;
4. Right knee injury;
5. Paraspinal muscle strain of the lumbar region;
6. Fracture of right femur; and
7. Healed right femoral shaft fracture

[12] The Claimant is claiming the sum of \$459,795.00 as special damages and asked the court to award the sum of three million dollars as general damages.

Defendant's case

[13] The Second Defendant's case is that on the 9th of November 2013 she was driving her Nissan X-Trail motor vehicle from Barbican Road onto East Dulwich Drive. Her evidence is that she was travelling on her left side of the road at about 35-40 km per hour. She observed a motor cycle travelling in the opposite direction at a high speed.

[14] She further stated that she saw the Claimant's motor cycle travelling on her side of the road and she moved to her left to avoid him. He, however, collided in the right front fender of her motor vehicle. The Claimant fell off the bike and she

stopped her vehicle about 10 to 12 feet from the point of impact. Whilst she was travelling the 10 to 12 feet the bike was under her vehicle and as such it was dragged for that distance.

[15] After the collision she called a friend for an ambulance and for them to contact the police. She denied encroaching on the Claimant's lane and being the cause of the collision.

THE LAW

[16] In order to succeed the Claimant must establish on the balance of probabilities that the Second Defendant was negligent at the material time.

Viscount Simmonds in the Privy Council case of **Nance v British Columbia Electric Railway** [1951] 2 All ER 448 stated that:-

“Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.”

[17] In Clerk and Lindsell on Torts, 19th edn 2006, p. 383 stated that To prove negligence there are certain requirements that have to be proved namely:

- 1. The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.*
- 2. Breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;*
- 3. A casual connection between the defendant's careless conduct and the damage.*

4. *That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*

When these four requirements are satisfied, the defendant is liable in negligence.”

Liability - Analysis

Credibility

[18] The case rests on the credibility of the parties and is to be decided on which version of the incident that I believe. The evidence of the parties are totally opposed as to which side of the road the collision took place and even where exactly it took place.

[19] In deciding the issue of credibility I took into consideration the demeanor of the witnesses, whether there were inconsistencies in the evidence of the witnesses and if so are they material. I also took into consideration a number of pictures that were taken by the Second Defendant after the incident which were exhibited to the court.

[20] The evidence of the Claimant had a number of inconsistencies that I took into consideration. These included:-

- a. In his witness statement the Claimant gave evidence that when he came around the corner, the Second Defendant's motor vehicle came at him so fast that he did not have time to brake, or swerve or to do anything. In cross examination his pleadings were put to him which stated that the Second Defendant swerved into his lane. He then changed his position indicating that she did swerve into his lane.
- b. In his witness statement he indicated that the second Defendant dragged his bike for 15 meters and in cross examination he gave evidence that it was 15 feet.
- c. The Claimant in cross examination at first stated that his gas tank had been flung from his bike and started to leak where it fell. He gave this evidence before being shown the pictures

that had been admitted into evidence. After he was shown the pictures and shown where the gas tank was positioned in the road he then said the gas tank had rolled.

- [21]** Some of these inconsistencies do not go to the heart of the Claimant's case as it could clearly have been an error. I considered this in relation to the distance the bike was dragged under the motor vehicle. However, the inconsistency as to the gas tank is important as it affects the location of the point of impact which could decide if the Second Defendant was negligent. I did find that there were some grave inconsistencies that affected the credibility of the claimant.
- [22]** I took into consideration the photographs presented by the Second Defendant in the case. Both parties agreed that at the point of impact of the motor vehicle and the bike there would be some form of debris. Counsel for the Claimant tried valiantly to show that there was some debris to left side of the road that the Claimant stated he had been riding. However, on close inspection of the photographs the only debris concerning the accident appeared to be on the left side that the Second Defendant stated she had been driving on.
- [23]** I observed the demeanor of the Claimant and the Defendant when giving evidence. The Defendant under cross examination seemed to be truthful and honest in giving her answers. When she was asked about the position of her vehicle, the distance she was from the Claimant when she first saw him on the bike and the actions she took when she saw the Claimant, she seemed quite forthright in her answers.
- [24]** The Claimant on the other hand seemed very hesitant under cross examination and especially when confronted with his pleadings about the Second Defendant swerving towards him. He hesitated at first and eventually stated that although everything happened quickly he was still able to see the Second Defendant swerve towards him.

[25] After considering all the evidence in this matter I find that the Claimant has not made out its case on a balance of probability. The Second Defendant's case based on her evidence, the photograph and her demeanour is more probable than the Claimant's.

[26] I therefore do not find that the 2nd Defendant was:

- a. Travelling at an excessive or improper speed.
- b. That she failed to keep any or any proper lookout;
- c. That she drove without any or any sufficient consideration for other users of the road;
- d. That she failed to maintain sufficient control over the said motor vehicle;
- e. That she failed to apply brakes within sufficient time or at all so to prevent the collision from occurring;
- f. Failed to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to avoid the said collision;
- g. Failed to keep any or any proper and effective control of Nissan X-trail motor car numbered and lettered 4481 FS, she was driving;
- h. Failed to take reasonable steps to avoid a collision;
- i. Encroaching on the Claimant's lane of travel;
- j. Failed to keep the Nissan X-trail motor car numbered and lettered 4481 JFS, in the correct lane along the roadway. Being that said Nissan X-trail motor car numbered and lettered 4481 JFS, driven by the Second Defendant, along Dulwich Drive, Kingston in the parish of Saint Andrew, drove in a careless manner, swerved from its designated lane and collided into Zangsheng 150 motor cycle, aboard which the Claimant was the driver at all material times, that was travelling the opposite direction when the collision occurred causing the Claimant to suffer injury, loss and damage and incur expense.

k. I do not find *res ipsa loquitur* applies.

Order

1. Judgment for the Defendant.
2. Cost to be agreed or taxed.