



[2016] JMSC Civ. 88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NI. 2008 HCV 01162

BETWEEN	GRETEL EMBDEN	CLAIMANT
A N D	OSWIN BROOKS	DEFENDANT
AND	OSWIN BROOKS	ANCILLARY/CLAIMANT
AND	WILTON SOMERS	ANCILLARY/DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2008 HCV 02031

BETWEEN	MURIEL BROWN	CLAIMANT
AND	OSWIN BROOKS	DEFENDANT
AND	OSWIN BROOKS	ANCILLARY CLAIMANT
AND	WILTON SOMERS	ANCILLARY DEFENDANT

AND WITH

CLAIM NO. 2008 HCV 05308

BETWEEN	BEVERLY BAILEY	CLAIMANT
AND	OSWIN BROOKS	DEFENDANT
AND	OSWIN BROOKS	ANCILLARY CLAIMANT
AND	WILTON SOMERS	ANCILLARY DEFENDANT

Sean Kinghorn instructed by Kinghorn and Kinghorn for 1st, 2nd, and 3rd Claimants.

Miss Stacia D. Pinnock and Miss N. Dummet for Defendant.

Mrs. T. Madurie and Miss Michelle Reid instructed by Nunes Scholefield Deleon & Company for Ancillary Defendant.

Heard: November 2, 3 & 4, 2010 and June 2, 2016

**Damages - Motor Vehicle Accident – Breach
Duty of Care – Standard of Care – Whiplash
Injury – Contributory Negligence**

Daye, J.

[1] Three (3) ladies each filed claims for damages for personal injuries and loss they sustained arising from a motor vehicle accident. They are Gretel Embden, a teacher, Muriel Brown, a cook and Beverly Bailey, also a cook. Each of these ladies were passengers in a 1990 Toyota motor car on the evening of the 31st August, 2007 driven by one Wilton Somers.

[2] The driver of this motor car was driving these three (3) ladies home along Riversdale Main Road from the direction of Bog Walk to Riversdale district in the parish of St. Catherine. The 1990 white Toyota Corolla motor car and the 2003 gray Toyota motor car collided at a community along the road known as Hog Hole District in the vicinity of Knolford Farm. The driver of the second Toyota Corolla motor vehicle involved in the accident was identified as Oswin Brooks. Each of these three (3) ladies filed their claims for damages for personal injuries against Oswin Brooks on the ground that he drove negligently and caused the accident and damage to the vehicle in which they were passengers. The ladies were all from the same Riversdale community. They knew each other for over ten (10) years. They knew also the driver of the white 1990 Toyota motor car in which they were passengers. The 1st claimant Gretel Embden was the common law spouse and mother of four (4) children for the driver of the car, Mr. Wilton Somers. She was seated in the front passenger seat of his motor vehicle. Muriel Brown was a passenger in the back seat behind the driver while Beverly Bailey was seated behind the front seat passenger to the left.

[3] Upon being sued as the only person responsible for this accident, Oswin Brooks then sued and filed a claim against the other driver Wilton Somers for damages for negligence. NEM the insurer for Wilton Somers' motor vehicle pursuant to subrogation rights filed a Defence and Counter Claim on his behalf denying any negligence of their driver. It is in these circumstances that Oswin Brooks is named as an Ancillary

Claimant and Wilton Somers an Ancillary Defendant. As a result of these pleadings all these claims were consolidated i.e. joined together to be tried at single trial.

PLEADINGS

[4] The allegation of negligence filed against Oswin Brooks by all three (3) ladies are similar. I will refer only to Gertel Embden Particulars of claim.

“PARTICULARS OF NEGLIGENCE OF DEFEDNDANT”

- (I) Driving too fast a rate of speed in all the circumstances.
- (II) Colliding with motor vehicle registration number 8226 DE
- (III) Failing to see the said motor vehicle registration 8226 DE within sufficient time.
- (IV) Failing to apply his brakes within sufficient time or at all.
- (V) Driving on the incorrect side of the road.
- (VI) Failing to keep to the left of the road.
- (VII) Driving at or into the claimant’s motor vehicle.
- (VIII) Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

[5] Mr. Wilton Somers alleged in his Defence and counter claim to Mr. Oswin Brook’s ancillary claim the following:

“5. This Defendant will say that the collision was caused solely and/or materially contributed by the negligent driving of the Ancillary Claimant Oswin Brooks.”

There he itemized the following breaches.

“PARTICULARS OF NEGLIGENCE OF OSMIN BROOKS”

- (a) Driving at an excessive and/or improper speed.
- (b) Failing to keep any or any proper lookout.
- (c) Failing to have any or adequate regard for other road users and in particular the Defendant.

- (d) Driving in a reckless and dangerous manner.
- (e) Driving on the incorrect side of the road.
- (f) Failing to see and/or observe the presence and/or approach of the Defendant's said motor vehicle.
- (g) Failing to stop, slow down, swerve so as to avoid the said collision.
- (h) Causing and/or allowing his motor vehicle to loss control and to veer unto the incorrect side of the roadway and colliding with the Defendant's motor vehicle.
- (i) Colliding with the Defendant's motor vehicle.

[6] Now Mr. Oswin Brooks' allegations are as follows:

"PARTICULARS OF THE ANCILLARY DEFENDANT'S NEGLIGENCE"

- (a) Failing to effect any or any proper or effective control of the motor vehicle registered 8226 DE.
- (b) Driving at an excessive speed and or improper rate of speed.
- (c) Failing to keep any/or proper lookout or to have any or any sufficient regard for other vehicles particularly oncoming traffic on the road.
- (d) Encroaching in the Defendant's correct side of the road thereby causing the said collision.
- (e) Driving without due care and consideration for other users of the road.
- (f) Failing to heed and/or observe the presence of the Defendant's motor vehicle registered 3825 EZ on the said road in sufficient time or at all.
- (g) Colliding with the Defendant's Toyota corolla which was correctly positioned in the correct lane.

[7] These particulars of negligence are similar to the particulars filed in Oswin Brooks' Defence to the claims of the ladies. In effect each driver is making the same allegation of negligence against the other:

- Speeding
- Failing to keep a lookout on the road
- Driving on the incorrect side of the road

- Failing to avoid the accident

ISSUES

[8] The disputes in the pleading give rise to the following issues:

- (1) Was either driver driving at an excessive speed in the circumstances?
- (2) Was either driver driving on his incorrect side of the road?
- (3) Was either driver driving in the middle of the road?
- (4) Where was the point of impact?
- (5) Did either driver fail reasonably to foresee that if he did not drive in a safe manner in his interest the damage would result to his vehicle and or passengers.

Burden of Proof

[9] I accept the claimants and ancillary claimant must prove breach of the alleged particulars of negligence on a balance of probability.

Standard of Proof

The defendant's action should be judged according to the standard of a reasonable driver and not the standard of an ideal driver (**Stewart v. Glaze** [2009] EWHL 704 cited by Counsel for the Defendant)

Duty of care of Motorist

[10] The duty of a driver on the public road towards other passengers on the road is to drive his motor vehicle with such reasonable care as will avoid injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care. (**Boughill v. Young** [1943] A.C. 92 at 98). The issue in this trial is already stated: whether either of these drivers breached the duty of care alleged.

Direction on the use of Independent Evidence

[11] I accept the guidance found in the reference by counsel for the Defendant to the dictum of Carey J.A. in **Calvin Grant v. David Paredon and Augustus Paredon** SCCA 91/87 that:

“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence as is nearly always usually the case, seeking to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks, location of damage to the respective vehicles or parties, and any permanent structure of the accident site... This physical evidence may well be of crucial importance in assisting the tribunal of fact in determining which side is speaking the truth”.

EVIDENCE SPEED

[12] In Gretel Embden’s, Muriel Brown’s and Beverly Bailey’s evidence-in-chief i.e. their witness statement each gave an estimate of the speed both drivers were driving at the time of the accident. So too each driver gave an estimate of the rate of speed they were travelling. Wilton Somers estimated he was driving at 30 MPH while Oswin Brooks was driving at 40 MPH. These rates of speed by themselves do not indicate that any of the drivers were driving at an excessive speed. The estimated speed of driving has to be looked at against the road conditions at the time of accident to determine if speeding was a factor that caused the accident.

What side of the Road

[13] All the witnesses in Mr. Wilton Somers’ car as well as himself say he was driving on his correct side of the road and the accident occurred on their side of the road. They go on in their evidence to say Mr. Oswin Brooks was first driving in the middle of the road and then on approaching their vehicle swerved to his left to avoid hitting their vehicle. Gretel Embden, Muriel Brown and Beverly Baileys’ evidence is, I agree, unreliable as to what caused the accident. They each say the collision was a head on collision but the impact or damage on each vehicle was to its right front. (Exhibits 22, 23 and 24). Their evidence is contradicted by this physical evidence. Also the same physical evidence would reduce the value of their evidence that Wilton Somers’ vehicle was on the banking of the road and was stationary when it was hit. So their evidence

leaves open on which side of the road the accident occurred, i.e. their correct side on the left. Mr. Oswin Brooks' mere assertion that he was in his correct side does not assist any better in relation to these issues.

Condition of Road

[14] All parties agree:

- (1) the road along Riversdale was wet
- (2) there was a slight bend in the road in the vicinity of the accident
- (3) there was no line in middle of road
- (4) police came on the scene about 20 minutes after the accident
- (5) the vehicles were not removed from their position after the accident until the police came.

The claimants say the police helped to ease Mr. Oswin Brooks' car away from Mr. Wilton Somers' car. He disagrees. Mr. Wilton Somers attached an extract of a police report dated November 27, 2007 to his Defence and Counterclaim. It disclosed that Constable D. Crawford investigated the accident. The report described the road condition as follows:

“ Darkness, fine, straight, wet asphalted road.”

Mr. Oswin Brooks in his witness statement says the evening was cloudy. There was no statement of measurements of the road by this officer.

Point of Impact

[15] Neither was there any indication that the officer help to more Mr. Oswin Brooks' vehicle out of the road. There is only a brief summary report that the driver of the vehicle registered 3825 EZ failed to keep left where there was a slight bend in the road and collided with vehicle registered 8226 DE. It was reported also that driver of motor vehicle registered 3825 EZ was charged for careless driving. The report did not account for who was responsible for these actions or observation. This aspect of the report is hearsay and is not admissible for the truth of its content.

[16] Other evidence of the measurements of the road emerge from the cross examination of Mr. Oswin Brooks who is an engineer. He gave the following measurements:

“The width of the road is about 13 feet. I was driving a Toyota corolla. My vehicle is 5ft 6ins wide. At the point of impact I was about 2-3ft from the left edge of the road. The point of impact was not on Mr. Somers’ side of the road. The point of impact is more in the middle of the road. I am an engineer. The road is 13ft wide. If the road is evenly divided each lane is 6-5ft wide. I don’t agree that I was occupying more than 6-5 ft of the road based on where I was from the edge of my side of the road.”

ANALYSIS

[17] In the absence of any other evidence of measurement of the road it means if both vehicles were driving on their correct side of the road there would be no collision. One or either or both of these vehicles were momentarily not driving on its correct side of the road. More assistance is required to answer the question which motor vehicle was not driving on its side of the road. Further the answer to this question is inter related to the issue whether the point of impact was in the middle of the road. The other evidence available to the court was documentary i.e. photographs taken by Mr. Oswin Brooks after the accident.

PHOTOGRAPHS/PHYSICAL DAMAGE OF MOTOR VEHICLES

[18] Mr. Oswin Brooks presented four (4) photographs that were attached to his supplemental witness statements. The photographs are stamped 31/8/2007 the day of the accident. They depict the physical damage to Mr. Wilton Somers’ motor car. The damage is to the right front fender of the vehicle and the right wheel. Thus the physical damage does not support a head on collision. It is more correct that the vehicle was swerving out of the path of another vehicle close to its right side.

There is another set of four (4) photographs contained in Exhibit15 which is the Assessors report dated September 7, 2007 of the damage to Mr. Wilton Somers’ vehicle. These photographs are close up photos of the damage to the right front fender,

right wheel, right bumper and inside of the bonnet of the vehicle. The Assessor's opinion of the damage to Mr. Wilton Somers' vehicle is this:

“As a result of a single impact to the unit's right front section we noted extensive structural mechanical and cosmetic damage thereto. Due to the force of the impact the right front axle was broken, the right front fender twisted and the front bumper torn, Direct contact was made with the right front wheel, pushing it in the body of the unit, damaging the right front tyre, right front strut right front control arm, right front flooring and right front hinge pillar. There was also damage to right locker panel, front filler panel, right front door, right side shield and chassis leg, front windshield glass, right front corner lamp and right head lamp”.

[19] This detailed description of the damage indicate that there was impact to the right front side of Mr. Wilton Somers' vehicle. It also suggests the impact was forceful. On the hypothesis that Mr. Oswin Brooks' motor vehicle was the only vehicle that collided with Mr. Somers' vehicle then the forceful impact would be due to his vehicle swerving away and driving with some degree of speed. The forceful impact could also be due to Mr. Wilton Somers' swerving away with some speed.

[20] Counsel for Mr. Oswin Brooks cross examined Mr. Wilton Somers intensely on the condition of his motor car. She suggested on his same Assessors report (Exhibit 15) his vehicle was not in a road worthy condition. The basis of this suggestion was the report showed his right front tyre was 40% worn, his left front tyre was 50% worn, his right rear tyre was smooth, his left rear tyre was 90% worn and his spare was smooth. Counsel suggested and submitted that Mr. Wilton Somers' could not take evasive action in time to avoid the accident because his bad tyre caused him to lose control of his vehicle. The substance of his submission would be that Mr. Wilton Somers materially contributed to the damage of his vehicle and the injury of his passengers. This is a factor for the court's consideration whether there was this breach.

[21] There is another set of photographs and this is contained in Exhibit 20. This is the Assessors report of the damage to Mr. Oswin Brooks' motor vehicle dated

September 13, 2007. Photos 1 and 2 depict damage to the right front fender, right wheel and right front door frame. This Assessor's opinion of the damage was:

"The unit was struck along the right front bumper corner, fender and door, penetrating the suspension, steering assembly, drive axle, engine and the front sub-frame. Further damage affected the right apron, wheel housing, A-pillar, rear engine mount, right section of the crawl panel (fire wall) and fender line."

[22] The repair estimate was \$393,773.26. The damage to this motor car is similar to Mr. Somers' Toyota Corolla car. It is more probable that both vehicles had a glancing impact though with some force. In my view the force of impact would be due to some speeding in all the circumstances. Mr. Oswin Brooks testified that he did not apply his brakes when he swerved away from Mr. Somers' vehicle. The reason he did not was because the road was wet. Counsel for the defendant in paragraph 33 of her written submission submits the photographs depicting the resting position of Mr. Somers car after the collision. She submits the picture is consistent with a swiping impact of the two vehicles.

FINDINGS

[23] Taking account of the physical independent evidence I find the following on a balance of probability:

- (1) Both drivers were driving towards the middle of the Riversdale Main Road as each drove towards a slight bend in that road.
- (2) Both drivers were partially over their respective incorrect side of the road;
- (3) Both drivers were travelling at a rate of speed in excess of what was required on a wet road and around a bend;
- (4) Both drivers took evasive action to swerve away from the oncoming vehicle;
- (5) The point of impact of the collision was in the middle of the road;

- (6) Both drivers were not keeping proper look-out based on the condition of the road;
- (7) The tyres of the 1990 Toyota corolla motor car was not in the best condition to permit the vehicle to respond sufficiently to avoid the collision.
- (8) The driver Mr. Oswin Brooks is liable for the damage to Mr. Wilton Somers' vehicle and injury to his passengers. However, I find that the driver of the 1990 Toyota car Mr. Somers was also careless in his manner of driving and the risky use of his motor vehicle.

CONTRIBUTORY NEGLIGENCE

[24] Under Section 3 (1) of the **Law Reform (Contributory Negligence) Act**, the claim of a person who suffered damage shall not be defeated because he or she is partly at fault. The Court has the discretion to reduce the damage having regard to the claimant's share of the responsibility for the damage. I therefore apportion the damage between the claimant and the defendant as well as the ancillary claimant and defendant at 50:50.

DAMAGES

[25] In accordance with Section (3) of the Act I assess total damages for each claimant:

Gretel Embden

The nature of impediment of Gretel Embden was –

- (i) pain to neck
- (ii) mild cervical spine tenderness and pain on moving her head
- (iii) mild muscle spasm
- (iv) mild lower back tenderness
- (v) pain on rotation flexion of her hip

Dr. K. D. Francis' final review of the claimant on January 16, 2008 said her progress was good. She had a whiplash injury of her cervical spine and muscle ligament sprain, She experienced significant pain and discomfort. Her disability was estimated at ten

(10) to twelve (12) weeks. She may have chronic pain in the future. She was treated with analgesics.

Counsel submitted that an award of \$400,000 to \$500,000 for general damages was a reasonable sum for pain and suffering and loss of amenities. She rest her submission on two main cases **Pamela Thompson v. Devon Brown et al C.L. 2001(T.14)** and **Peter Marshall v. Carlene Cole et al Khan 199**. As Counsel submitted these cases are not exactly on point but are closely comparable. An award of \$700,000.00 for general damages for pain and suffering and loss of amenities is a reasonable sum as far as money can do to put the claimant back to the position she would have been if the injury had not occurred

Special Damage was agreed at \$8,200.00 medical expenses plus \$5,000.00 transportation costs and total \$13,200.00.

AWARD

[26] General Damages - \$700,000.00, Interest on sum at 3% per annum from date of service to date of Judgment.

Special Damages - \$13,200.00 - Interest at 3% per annum from date of accident to date of Judgment.

Cost to the Claimant to be agreed or taxed.

Damages apportioned 50:50 Claimant and Defendant.

Muriel Brown

The nature of her injuries were:

- (i) whiplash injury to the cervical spine
- (ii) musclogligament of lumbar spine.

Dr. Francis reported the claimant complained of pain to her lower back and neck when she bends, lifts heavy objects or stands for an extended period. When she was examined on October 20, 2007 he found her progress to be good. The injury caused her significant pain and discomfort. Her disability would last ten (10) to twelve (12) weeks and she may have chronic pain in the future. A range of \$400,000.00 to \$500,000.00 was submitted as reasonable for general damages for pain and suffering

and loss of amenities. The court awards \$700,000.00 for general damages for pain and suffering and loss of amenities as is the case if Gretel Embden. Special Damages was agreed at \$14,000.00.

AWARD

General Damages \$700,000.00 for pain and suffering and loss of amenities. Interest on sum of 3% per annum from date of service to date of Judgment.

Special Damages \$14,000.00 – Interest on sum of 3% per annum from date of accident to date of Judgment.

Cost to Claimant to be agreed or taxed.

Damages apportioned 50:50 between Claimant and Defendant.

Beverly Bailey

[27] The nature of her injury were:

- (i) severe pain to her neck;
- (ii) pain to her lower back;
- (iii) neck pain and stiffness;
- (iv) mild cervical spine tenderness;
- (v) pain on moving head;
- (vi) neck muscle spasms;
- (vii) pain in rotation and flexion of hip;
- (viii) whiplash injury of cervical spine;
- (ix) musculo ligament of her lumbar spine as a result if the sudden flexion followed by hyper extension of her spine;
- (x) pain and discomfort.

Dr. Francis' received the patient on February 4, 2008 and found her progress was good. He found her disability would cost ten (10) to twelve (12) weeks and she may have chronic pain in the future. Analgesic was recommended.

The court awards \$700,000.00 – General Damages for pain and suffering and loss of amenities. Special Damages was agreed at \$13,200.00.

AWARD

General Damages \$700,000.00 – pain and suffering and loss of amenities. Interest at 3% per annum from date of service to date of Judgment.

Special Damages \$13,200.00 – Interest at 3% per annum from date of accident to date of Judgment.

Costs to be agreed or taxed.

Damages apportioned at 50:50 between Claimant and Defendant.

[28] Oswin Brooks Ancillary Claimant

AWARD

Special Damages

Repairs \$393,773.20

Assessor's fee \$ 8,819.05

Loss of use for 8 days
@ \$2,500 per day \$ 20,000.00

Total \$ 422,592.25

Interest on Special Damages at 3% per annum from date of accident to date of judgment.

Costs to Ancillary Claimant to be agreed or taxed.

Damage to be apportioned at 50:50 between Ancillary Claimant and Defendant.

[29] Wilton Somers Ancillary Defendant

The nature of injury for Wilton Somers were:

- (i) pain to right knee with good range of movement.
- (ii) soft tissue injury

Dr. Francis' examination on the 23rd January, 2008 showed he had whiplash injury of his cervical spine and muscular ligament sprain of his lumbar spine. His disability was to last ten (10) to twelve (12) weeks and may have chronic pain in the future.

AWARD

General Damages \$700,000.00 for pain and suffering and loss of amenities. Interest at 3% per annum on sum from date of service to date of Judgment.

Special Damages agreed at \$131,140.00.

Interest on Special Damages at 3% per annum from date of accident to date of Judgment.

Costs to Ancillary Defendant to be agreed or taxed.

Damages apportioned at 50:50 between Ancillary Defendant and Ancillary Claimant.