[2014] JMSC Civ. 221

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV 05682

BETWEEN	**RANDY HITCHINS**	**CLAIMANT**
AND	**GAVEL WHITTER**	**1ST DEFENDANT**
AND	**PATRICK GREEN**	**2ND DEFENDANT**

Negligence – Motor vehicle collision – One vehicle on the wrong side of dual carriageway – Whether lawfully there due to road conditions – Whether contributory negligence due to speed – Damages – Spinal injury 30% permanent partial disability.

Roderick Gordon, Kereene Smith instructed by Gordon McGrath for Claimant.
Leroy Equiano instructed by the Kingston Legal Aid Clinic for the 1st & 2nd Defendants.

Heard: 29th October 2014, 6th November 2014 and 19th December 2014.

Batts J.

[1] I delivered this judgment orally on the 19th December 2014 and now reduce it to writing.

The claim concerns a motor vehicle collision which occurred on the 3rd October 2007, in Westgate Hills Montego Bay in the Parish of St. James. It is common ground between the parties that the collision occurred along a dual carriageway. It is also common ground that the Defendants' vehicle was proceeding along the wrong side of the said dual carriageway at the time of collision.

[2] The issues for my determination, insofar as liability is concerned, were fairly narrow. These were: whether there was a lawful reason for the Defendants' vehicle to be on the incorrect side of the dual carriageway; and, did the Defendants' driver take reasonable care prior to and whilst on the incorrect side of the dual carriageway; thirdly, was the presence of the Defendants' vehicle on the incorrect side of the dual carriageway, the sole cause of the collision that is, did the Claimant cause and / or contribute to the cause of the collision.

[3] It must be a rare case indeed in which a Defendant who finds himself on the incorrect side of the road at the point of collision contests liability. Indeed the words of the Jamaican Court of Appeal in **Street v Berry** (1966) Gleaner Report 270 bears repeating per Eccleston JA at page 281.

> *"Now in his findings in no.3 it would be quite irrelevant to theorize as to what had occurred just prior to the accident because if the learned Resident Magistrate accepts that the accident happened on the plaintiffs side of this white line, then it would be quite irrelevant if the plaintiff had been driving across that line before so long as he had got to his correct side of the road, before there was an accident."*

[4] Mr. Equiano in this case has mounted a spirited Defence so much so that, at the close of submissions I decided to reserve my decision. Having done so however and having considered the evidence presented as well as the matters of law stated, I am of the view that the 2nd Defendant is entirely to be blamed for this accident. The 1st Defendant his employer is vicariously liable. I will refer to the evidence only to the extent necessary to explain the reasons for my decision.

[5] The Claimant was the first to give evidence. His witness statement of the 28th November 2011 stood as his evidence in chief. When cross examined he admitted that the accident occurred on a private road and that rain had been falling prior to the collision. The dual carriageway was such that one side took

traffic into the community and the other side took traffic out. The side heading into the community was, at the point of the collision, lower than the side heading out. Each side of the dual carriageway had two lanes for traffic. He was very familiar with the road and denied that the lower road of the dual carriageway is flooded whenever it rained. He admitted there were potholes on it but denied that sections became difficult to travel on when it rained. He stated it was the first time he had seen a vehicle drive on the top road and denied that it was not unusual for vehicles to do so when it rained.

[6] The Claimant admitted he was 20 years old at the time of the accident. The vehicle he was driving was a Honda Integra 2006. He had his drivers licence for 3 years. He denied travelling at a fast speed prior to the accident.

[7] He denied doing anything when he saw the Defendants' bus approach because the bus was 15 feet away when he saw it and, "nothing could be done, it crash right away." However, he was directed to paragraph 4 of his witness statement and admitted he had pulled to the left and braked. Paragraph 4 of his witness statement reads thus,

> *"I was just approaching the beginning of the dual carriage road, towards the bottom of the hill, when I first notice a big bus. The bus did not have lights on. It was in the middle of the road, coming towards me. He was approaching fast. I tried to get out of his way, so I braked and pulled to my extreme left to go on the soft shoulder. The bus continued further on to my side and collided with my vehicle."*

[8] This inconsistency was followed by an affirmation that he did pull over and brake. The Claimant had also to be reminded by reference to his witness statement that he waited for the rain to stop before going to buy Fabrese. Curiously he denied it had been raining heavily. He explained that his niece was in his car and that was the reason he had to wait for the rain to stop. She could not exit the car to go into her house. He thereafter went alone to the shopping centre. Also for the first

time in cross examination the Claimant stated that the roadway was unable to accommodate 2 vehicles at the point of collision because there were vehicles parked along the roadway "and a compressor". When stating his speed the witness said "45" but could not recall if it was miles per hour or kilometers per hour.

[9] Very importantly the Claimant having looked at a document (Peter Blake rule), stated that it was the left side of his vehicle which collided with the Defendants' vehicle. The following exchange occurred,

"Q: You pulled left so left side closer to soft shoulder?

A: Yes

Q: It was this left side bus hit?

A: Yes

Q: Despite presence of other cars on the road?

A: Yes"

[10] It was later suggested to the Claimant that he was travelling too fast, this he denied. It was then suggested that when he pressed the brake his vehicle skidded. The Claimant hesitated before answering and said,

"Aam, collision happened. No did not skid"

There followed the following,

"Q: What side of the bus hit your car?

A: No, don't remember

Q: Suggest your left side ran into right?

J: That is double question

Q: You hit right side of the bus?

A: Yes, I am not sure what side of his vehicle I hit

Q: Look at this. Having seen that, can you say what side of bus you hit ?

A: Yes his right side

Q: Had it not been for your speeding?

A: I was not speeding

Q: You were unable to control your vehicle?

A: It would not happen if he was not on my side."

[11] The Claimant was asked to demonstrate how the collision occurred. It was not surprising that he had some difficulty impacting his left front with the right front of the bus, whilst he was pulling to the left side of the road. My note of the demonstration is:

"*Witness illustrates but his right hand impacts."*

I was, to say the least, not particularly impressed by the Claimant's account of the accident.

[12] The 2nd Defendant's evidence was at the end of the day more credible. His witness statement was allowed to stand as his evidence in chief. In that statement given on the 19th September 2014, he describes himself as a 50 year old tour bus driver. He was on his way to return his employer's bus at the end of his duty. He said the weather condition was good but road conditions were deplorable. It had he said, rained throughout the week and water flooded the numerous potholes on the roadway. He describes the accident thus,

7. "As I proceeded on my correct side of the road, he (sic) road conditions worsened. The potholes were numerous, bigger and deeper and much of that side of the road was flooded. I was driving so slowly I had actually put on my hazard lights even before entering the Westgates Hills area. It became clear to me that it was not safe for me to continue on that side of the dual carriageway, even though I was approaching the end.

8. I carefully made my way to the right side of the dual carriageway. I was travelling at approximately 10 kilometers per hour. I still had my hazard lights on, and just in case of any oncoming vehicle I was also flashing my headlights.

9. Soon after I had entered the right hand side of the dual carriage way, a car came towards my vehicle and passed me. There was adequate space for both vehicles to pass on the roadway.

10. It was just before dark. My headlights were on.

11. Within 10 seconds of the first car passing me I notice the approach of another motor car. It had bright lights coming towards my vehicle at a high speed. Due to the high speed of that vehicle I came to a dead stop.

12. I flashed my lights to the oncoming car but there was no response. I constantly flashed my headlights, blowing the horn of the bus. I still had on the hazard lights.

13. The oncoming car swung from his left to the right. In approximately 5 seconds there was a collision of the car and the bus.

14. The car collided with the right side of my bus. The car was being driven by the Claimant, Randy Hitchins, it bore registration number 7007EZ. It was a Honda Integra.

15. There was extensive damage to the front right hand side of my bus. The impact of the collision pushed the front left wheel of my bus over the edge of the wall, that operates as a median between the two sides of the dual carriage way.

16. The Claimant's vehicle was damaged on its left side.

17. The median that separates the roadway is a stone that runs down the middle of that section of the dual carriage way.

18. One side of the carriage way is higher than the other. The height varies along the length of the carriageway. On my correct side of the dual carriage way, where the flooding existed, that was the lower part.

19. When I crossed over the other side of the carriageway (my incorrect side of the road) I moved onto the higher section of the road.

20. As I progressed along the incorrect side of the carriageway I stayed on my left side that was closer to the median wall. The Claimant's vehicle and the other vehicle that passed me before him had sufficient room to remain on the right side (my right side). Had the Claimant stayed to his left (which is towards the bush on the side of the road) the collision would not have occurred.

[13] Importantly however, the witness did not there say that the left side of the dual carriageway was impassible. He described it as “unsafe” presumably because potholes were filled with water. This seems to indicate that his concern was about damage to the bus he was driving. He for that reason and on his own admission entered the side of the dual carriageway designed for vehicles coming in the opposite direction. It does not seem to have occurred to the 2nd Defendant, that in doing so he created an equally or greater unsafe situation.

[14] When cross-examined, the 2nd Defendant admitted he was on the side of the road he should not have been. He also admitted that it was 6:30 pm just before dark, he had his head lights on and the roadway was damp. The following exchange occurred,

> *“Q: What you normally do when driving on a flooded road in Montego Bay.*
> *A: Most of the time if traffic you have to wait if not turn back and use a different road.”*

Then later on,

> Q: What was your concern why you chance to drive on wrong side of road?
> A: The road was impassible so I venture on the right side of road.

[15] It was suggested to the witness that on the evening in question he decided to “take a chance” because he did not think there was traffic coming, his answer, “yes”.

The witness denied he was travelling fast. He said he proceeded cautiously.

[16] Importantly the 2nd Defendant indicated that he crossed over prior to reaching the part of the road he says was flooded.

> “Q: When you decided to go from your lane to other lane was that before flooded part or when come to water?
> A: Before
> Q: So you decided that is what you would do?

A: Not necessarily

Q: Why do that?

A: No specific reason. I realize there was a puddle of water because you can see at a distance so I decided to go on the other side."

And later,

"Q: The day before it rained and that is reason you decided to take top road?

A: Not necessarily."

[17] Most importantly the following exchange occurred,

"Q: What was unsafe to proceed on your side of the road?

A: Basically the vehicle has an air filter. If water gets into it water would suck up and damage the engine. Depends how navigable is the water.

Q: You did not trust yourself to navigate the water?

A: In that sense no.

Q: You put operating condition of bus at higher standard then safety of road users?

A: I was not thinking that far."

[18] In effect the 2nd Defendant admitted that he had committed an error of judgment. It apparently did not occurr to him that in driving on the wrong side of the dual carriageway, in wet conditions, where his vehicle was most unexpected, he was creating a situation of danger. The more so because there was no way for him to return to his correct side of the road. This because the other side of the dual carriageway was on another level and there was a stone wall separating the dual carriageway. The speed at which the Claimant was driving even if above the legal limit, was safe in the circumstances reasonably to be expected; that is on a damp road which is straight and which has two lanes for traffic going in the same direction. I find as a fact that when he saw the Defendant's oncoming vehicle with headlights on in the half light the Claimant panicked and slammed on his brakes and skided. His front left therefore impacts the right front of the bus. Had the Claimant pulled to his left and gradually reduced speed the accident might not

have occurred. However, a person faced with a dilemma cannot be judged to the same standard as one who has time to reflect before taking a decision. I hold that the instinctive reaction of the Claimant was not such as to make him blame worthy. It is only an unexplained violent skid which leads to a presumption of negligence. Here the reason for the skid is fully explained.

[19] This is even more so because the 2nd Defendant on his own admission had no very good reason to change lanes. It is not that he attempted to pass the section of the road covered by water. He had not even reached up to it. He cannot truthfully say that on the day and at the time it was impassible, because he does not know. He perhaps expected it to be given the earlier rainfall. However, his concern was not for his safety or that of other road users, but the possible damage to the bus. His decision, even if the roadway was impassible, ought reasonably to have been to take another lawful route or wait until the water recedes. Instead he put himself and other road users in danger by adopting the reckless course of going onto the incorrect side of the dual carriageway from which he could not retreat or exit for some distance. The decision is more the negligent because it is done at half light on a wet or damp roadway. His headlights and flashing hazard lights although well intentioned and prudent perhaps only added to the panic of the young Claimant who saw it coming towards him at a time and place which was unexpected. He therefore slams hard on his bakes skids and loses control.

[20] I am fortified in my decisions by the following authorities. **Street v Berry** (1966) Gleaner Law Reports 270 and **Knightly v Johns** (1982) 1AER 851. In the latter case the Defendant's negligence caused a collision in a tunnel. As a result of that collision the Claimant a police officer was injured while following instructions to proceed the wrong way along a tunnel in order to close the entrance to the tunnel. That instruction was held to be negligent. In deciding that the Defendant was not to blame for the Claimant's injuries the court said, at page 865 (g).

> "*The question to be asked is accordingly whether that whole sequence of events is a natural and probable consequence of [the Defendant's] negligence and a reasonably foreseeable result of it. In answering the question it is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions or failures to act, which acts and omissions were innocent mistakes or miscalculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction. Mistakes and mischances are to be expected when human beings, however well trained, have to cope with a crisis; what exactly they will be cannot be predicted, but if these which occur are natural the wrongdoer cannot, I think, escape responsibility for them and their consequence simply by calling them improbable or unforeseeable. He must accept the risk of some unexpected mischances."*

[21] I remind myself that exceeding the speed limit does not without more amount to negligence. One must have regard to the conditions of the road. I have found that the Claimant was not negligent when driving in excess of the speed limit. He was on a dual carriageway and the roadway was straight and had two lanes going in the direction in which he was travelling. He had never seen oncoming vehicles on that side of the dual carriageway. Further the 2nd Defendant had never himself performed such a maneuvre before. I do not accept that it was the norm for vehicles to traverse the incorrect side of the dual carriageway when it rained. The 2nd Defendant's vehicle therefore surprised and frightened the Claimant as it approached in the half light with lights on. The Claimant's instinctive act of pressing his brakes, thereby creating a skid on the wet road, was a reasonable foreseeable consequence of the 2nd Defendant's deliberate entry to the wrong side of the dual carriageway. I do not accept that the Claimant was 50% or at all

to blame for this accident. The 2nd Defendant was entirely to blame. The 1st Defendant is vicariously liable for his negligence.

[22] On the matter of damages Mr. Gordon for the Claimant submitted as follows:

General:	Pain and suffering and loss of amenity $20 million	
	Loss of future earnings	$3,600,000
	Handicap on labour market	$1,000,000
Special:	Medical Expense	$837,300.00
	Loss of Income	$2,520,000.00

Mr. Equiano submitted that the authorities do not support the amount claimed for pain and suffering. He commended the case of **Hunter v Brown Khan 6d page** 56. He submitted further that the doctor's estimate of a 30% permanent partial disability should be rejected. He advanced no suggested award but felt the court should do so. He submitted that the Claimant had failed to prove any loss of income or lost future earnings.

[23] What then is the evidence on damages? This is to be found in Exhibit 2 (the Claimant's Bundle of Documents). Doctor Ian Neil is a Consultant Orthopaedic and Spinal Surgeon. He gave 3 reports. The first dated 5th October 2007 diagnosed a displaced type 2 odontoid fracture, a displaced fracture of the right medial epicondyle of the humerus and a ruptured quadriceps tendon. He described the proposed surgery and gave an estimate of its cost.

[24] His second report is dated the 24th October 2007 and repeats the content of the earlier one save that it acknowledges payment of some part of the estimated cost of surgery.

[25] His third and final report is dated 22nd April 2009. He begins by pointing to the fact that the Claimant was known to have sickle cell disease. He recites the history of the accident as told to him and states that the Claimant was taken to

the Cornwall Regional Hospital before being transferred to the St. Joseph Hospital the following day. The report does not say when it is he was first seen by Doctor Neil. The treatment administered was described. The doctor concludes, “the cervical spine was splinted with traction applied through Garden-Wells tongs affixed to the skull. Operative treatment was considered necessary and he was prepared for surgery. On October 6, 2007, under general anaesthesia, closed reduction and anterior screw fixation of the odontoid fracture was effected. Open reduction and internal screw fixation of the other fractures was also done. Early post operatively screw break-out was observed in the neck. Under a second general anaesthesia (October 7, 2007) an attempt at correction was made but this was unsuccessful and posterior spinal fusion was therefore necessary. On October 13, Lateral mass C1/C2 instrumented fusion was done under a third general anaesthesia. Post operatively the neck was immobilized in a halo-thoracic vest for about six (6) weeks. On October 15, 2007 he was discharged from hospital and followed as an outpatient. He was seen many times as an outpatient. He developed superficial surgical wound infection of the posterior neck which required dressing culture directed antibiotics. On November 19, 2007 the halo-thoracic vest was removed and a hard cervical collar applied. He was also sent for a programme of physiotherapy rehabilitation of the spine, elbow and knee. On December 10, 2007 a glass foreign body fragment was removed from the left forearm. The cervical collar was removed on December 31, 2007.

He was last seen on February 2, 2009. All wounds were healed and there was clinical and radiological evidence of healing of all fractures. There was about 20% reduction in neck flexion and extension and about 50% loss of rotation but there was no associated pain. There was elbow extension lag of about 20^0 but there was full pronation and supination. There was full range of right knee movements with no significant muscle wasting.” The doctor concludes:

> “Mr. Hitchins is known to have a serious genetic disease but was relatively well until he was involved in a road traffic accident in which he sustained multiple serious injuries. He required hospitalization, complicated

operative treatment and prolonged outpatient care. He has made good recovery and has returned to most of his usual activities. He has DRE cervicothoracic category IV injury to the spine which has healed with marked reduction in neck range of motion but with neurological compromise. There is also some compromise in right elbow function. He is assessed as having an estimated 30% whole person permanent disability based on the American Medical Association's Guide to the Evaluation of Permanent Impairment."

[26] There has been no cross examination of the doctor. Nor has there been other medical evidence adduced. The Claimant's witness statement complements the doctor's report. He says his neck still hurts. He cannot lift things with his hands well. Walking up and down stairs causes his legs to hurt. He can no longer play football a game he used to play once per week. Nor can he swim or go out with friends anymore. After 3 or 4 hours of sleep he wakes with pain in his ankles. He sometimes takes pain killers to ease the symptoms.

In these circumstances it is not open to me to reject the medical expert's opinion.

[27] The following authorities were instructive:

a) Janet Williams v Yue Singh (1986) W 455 annotated in Khan 6d p 10. The injuries were contaminated compound fracture of right and left tibae and fibula dislocation of torso-metatarsal of joint and dislocation of interphalangeal left big toe. Under general anesthesia both legs were debrided and dislocation in each reduced and fixed with pins. Almost one year later there was bone grafting done. She ended up with a 2.5 inch leg length discrepancy. She was also left with ugly scarring. Dr. Rose estimates her permanent partial whole person disability at 30% she had severe pain in legs and back. The award in April 2002 was 6 million dollars which when updated using the Consumer Price Index amounts to approximately 22 million dollars.

b) Nugent v Attorney General CE 1991B2010 Khan 5d page 7. This motorcyclist suffered multiple compound fractures to both legs - lateral left humerus – He was disabled for 2 years after the collision – He spent 11 months in various hospitals for treatment – His whole person permanent impairment was assessed at 40%. He had difficulty climbing stairs and could not run, jump or lift heavy weights. In January 2000 the award for pain and suffering was 3 million. When updated this approximates to $12.8 million.

c) Hunter v Brown 2001H010 Khan 6d page 56. The Claimant then in her 80's, was hit down by a motor vehicle. She received a laceration to the back of her head, fractured lateral tibial plateau and marked bruising over left knee. An above knee plaster cast was applied and later surgery done to left knee. She ended up with left thigh deficit of 3cm, left calf deficit of 1 cm, limitation of flexion of left knee, patella femoral crepitus in left knee, osteoarthritis. She had to use a cane full time. Her prognosis was not good and deterioration was expected. Her whole person disability was assessed at 24%. The award in July 2002 was $850,000 for the pain and suffering and loss of amenities. When updated this is approximately $3,000,000 today.

[28] It appears to this court that the award in Hunter v Brown is somewhat out of sync with the others and indeed with the trend of awards today. It may be the court had in mind the Claimant's age, although in the absence of evidence that she was already suffering from debilitation, due for example to arthritis, that could hardly be relevant. On the other hand the Claimants in the other cases cited suffered graver injuries than did Mr. Randy Hitchins even if, at the end of the day their permanent impairments were similar. When regard is had to the authorities, and the circumstances of Mr. Hitchins, I award $8 million for pain and suffering and loss of amenities.

[29] As regards loss of earnings, the Claimant's evidence is that at the time of the accident he worked at Patmar's Car Rental earning $7,500.00 per week. He is now unable to work due to his injuries. When cross examined he stated that he earned $7,500.00 every 2 weeks. He had no pay slip to produce nor was there a letter from his employers. I will therefore assume weekly earnings of $3000 or $12,000.00 per month for the period October 2007 to December 2014 (86 months). This amounts to $1,032,000.00 for loss of earnings (2007 to 2014) Reduced by 1/3 to take account of taxes; past loss of earnings total: $722,400.00.

[30] As regards loss of future earnings no issue was taken with the suggested multiplier of 10. Using the multiplicand ($144,000.00) the lost future earnings come to $1,008,000.00 ($1,440,000 less 1/3 = ($1,008,000.00) after reducing by 1/3 for taxes. I will not make an award for lost earning capacity (popularly called handicap on the labour market) as the evidence is that the Claimant is unemployed. He stated that due to the injury he is unable to find employment.

[31] As regards special damages for medical and other expenses these are vouched for in Exhibit 1. The claim as pleaded is $1,329,069.40. In his document entitled proposal on award of damages the Claimant's counsel submits for $837,300.00. The Defendants counsel made no submission on special damages. I therefore award $837,300.00

[32] Finally, among the documents in Exhibit 1 is a partial release executed by the Claimant proving receipt of $1,500,00 from the Defendants insurer's. The award to the Claimant has therefore to be reduced by that amount.

[33] There is therefore judgment for the Claimant against the First and Second Defendants as follows:

Medical Expenses:	$837,300.00
Lost Earnings Past:	$722,400.00
	$1559,700.00 less (1.5 million)
Total Special:	$59,700.00
Pain suffering and loss of amenities:	$8,000,000.00
Future loss of earnings:	$1,008,000.00
Total General	$9,008,000.00

Costs to Claimant to be taxed or agreed.

Interest will run on special damages at 3% per annum from the 3.10.07 to 19.12.14 and on general damages at 3% from the 5.1.10 to 19.12.14.

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David Batts
Pusine Judge