



[2019] JMSC Civ 87

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2012HCV05832**

<b>BETWEEN</b>	<b>PAUL JACKSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DELROY BURKE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ALICE FLYNN</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

Ms Kristeina Beckford instructed by Kinghorn & Kinghorn for the Claimant

Ms Racquel Dunbar instructed by Dunbar & Co for the Defendants

Heard: November 22, 2018, February 12 and April 24, 2019

**Negligence – Motor vehicle accident – motor vehicle and pedal cyclist –  
Credibility of parties – Whether Claimant contributorily negligent - Damages –  
Assessment – Personal injury**

**LINDO, J.**

**The Claim**

[1] On October 30, 2012, the Claimant Paul Jackson filed the instant claim to recover damages for negligence against the 1<sup>st</sup> Defendant who was the driver of a motor vehicle owned by the 2<sup>nd</sup> Defendant. He alleges that on February 18, 2012 he was riding his bicycle along the “intersection of Hampton Drive and St

John's Road, Spanish Town in the parish of St Catherine when the 1<sup>st</sup> Defendant, the servant and/or agent of the 2<sup>nd</sup> Defendant, so negligently drove...motor vehicle registration number 8038 EU, that he caused and/or permitted the said motor vehicle to come violently in collision with [him]". He also claims that he sustained serious personal injury and has suffered loss and damage.

### **The Defence**

[2] Both Defendants acknowledged service of the Claim and on January 29, 2013, the 2<sup>nd</sup> Defendant filed a Defence in which she admitted the accident took place on the date and at the place alleged, and stated that the cyclist and the vehicle were travelling in opposite directions at all material times and there was a pothole in the vicinity of the accident. She denied that the 1<sup>st</sup> Defendant was acting as her servant or agent, denied the claimant's stated occupation and age, as well as his stated particulars of injuries, loss and damage.

[3] On February 4, 2013 the 1<sup>st</sup> Defendant filed a Defence in which he too admitted that there was a collision between the cyclist and the 2<sup>nd</sup> Defendant's vehicle on the date and at the place alleged. He stated that the cyclist and the 2<sup>nd</sup> Defendant's vehicle were traveling in opposite directions at all material times and he denied that he was the servant and/or agent of the 2<sup>nd</sup> Defendant.

### **The Trial**

[4] At the trial, the witness statements of the Claimant and the 1<sup>st</sup> Defendant stood as their evidence in chief and they were cross examined. They called no witnesses in support of their respective case.

[5] The following documents were agreed and tendered and admitted in evidence:

- (1) Medical report from the Spanish Town Hospital over the signature of Dr Churchill Igbokwe dated June 19, 2012
- (2) Medical report of Dr Ijah Thompson dated dated March 2, 2012

- (3) Receipt from Essential Medical services dated March 2, 2012 in the sum of \$50,000.00
- (4) Receipt from Essential Medical Services dated February 25, 2012 in the sum of \$3,000.00
- (5) Medical report of Dr Ijah Thompson dated March 2, 2014

**[6]** At the end of the hearing Counsel were asked to reduce their closing submissions in writing and to file same on or before December 20, 2018. On February 12, 2019 submissions were filed on behalf of the 1<sup>st</sup> Defendant. The court has not had the benefit of closing submissions from Counsel for the Claimant.

### **The Claimant's Case**

**[7]** The Claimant's evidence is that at about 7pm on February 18, 2012, he was riding his bicycle along St John's Road, on the left hand side, heading to Spanish Town and on reaching the intersection of Hampton Drive, he noticed a vehicle coming from the direction of Spanish Town, "on...the same side I was riding". He states further that there is a huge pothole on the road "on the right side coming from Spanish Town" and when he saw the car coming towards him "on the wrong side of the road", he tried to turn on to Hampton Drive and the car hit his bicycle causing him to fall onto the bonnet of the car before he fell on the ground.

**[8]** He adds that at this point he was unable to see, he felt when he was lifted up, felt like he was in a vehicle and the next thing he knew was that he was in the hospital in a wheel chair. He states further that he was examined by a doctor and sent home to return the following morning, which he did, and he was given an injection. He also states that he was feeling pain in his right side and a few days after the accident he was unable to lift any weight with his right hand and the pain was severe in his right hip and shoulder so he sought further medical help at Amadeo Medical Services in Spanish Town and there he was examined by Dr

Ijah Thompson given prescription for medication and referred to get physiotherapy. He states that he did two sessions.

- [9] When cross examined by Ms Dunbar, he insisted that the accident happened on St John's Road "almost on Hampton Drive" which is not the same as Hampton Green Avenue and that Hampton Drive which is a "T" would be to his left, indicating that you have to turn from St John's Road to go to Hampton Drive
- [10] He agreed that the car was heading from the Spanish Town direction at the time, disagreed that the road has a lot of pot holes and is a bad stretch of road and also disagreed that cars have to travel slowly because of potholes. He stated that there was a good side and a side with a huge pot hole and there were "minor patches, you get a rough drive". He admitted that he was riding closer to Hampton Drive, on the same side as Hampton Drive.
- [11] He stated that when the impact occurred the front wheel of the bicycle did not collide with the car and it was the right front of the car that was impacted. He disagreed that car was in its proper lane from Spanish Town direction but agreed that the road is straight and flat and that he could see "for a little stretch" along that road. He said he could not recall if headlights were on the car at the time, but stated that the road had street lights which were lit at the time and he could see well.
- [12] He insisted that from the first time he the saw the car to when they collided, it was on the incorrect side and that it was at a distance, as pointed out, and agreed to be 35 feet. He stated that the pot hole was "very huge" and covered one side of the road, pointing a distance of about 20 feet. When asked how wide was the road, he said it was a regular road for two side traffic and again pointed out a distance of about 20 feet. He then said the pot hole was twenty feet wide and ten feet long, on the bad side of the road and that the rest of the road is good.

- [13] In further response to Counsel, he said he was riding on his side and that he was not saying it was all good, as it was a bumpy road. He agreed to knowing measurements and agreed that the car he had the collision with would be about 5 feet wide, and that he, on his bicycle, would take up about two feet of space, or less. He also agreed that he tried going into the Hampton Green scheme and had all the length of Hampton Drive to turn on, but disagreed that he had a wider space to turn.
- [14] Mr Jackson also said he saw the car straight in line with him, so he couldn't say it swerved, but it was travelling fast. He disagreed that he was "dilly dallying" or that he swerved from a pot hole and hit into the left side bumper of the car. He admitted that the first place he went was the Spanish Town Hospital and that he went the same night. He indicated that he was told that he went to the hospital in the Defendant's car.

### **Defendant's Evidence**

- [15] Delroy Burke's Witness statement filed July 27, 2018 was admitted as his examination in chief after paragraphs 3 and 8 were corrected to read "me" in place of "him". In amplification, he stated that when he said "up the road", he meant his, "driver's left". He said there was no huge "20ft by 10ft" pot hole, but there were plenty pot holes on the road from top to bottom, and, in relation to whether there was a large pothole, said, "that pot hole never so wide".
- [16] His evidence is that he was coming from Spanish Town driving along Hampton Green Road, a straight road which leads back to St John's Road and that there were streetlights that were lit and his headlights were on. He states further that he had to drive slowly because of the potholes and as he was driving along he saw a bicycle coming from up the road, "swinging like dilly-dallying" not too far from him. He adds that he was on his correct side and the bicycle "skate" and he heard "'boom' in the car front". He adds that when he saw the bicycle coming, he

stepped on his brakes and “I think the car stop same time the bicycle hit into it but everything happened so fast”

- [17] He states further that when he got out of the car he saw that it stopped about two feet from the left side of the road and that nothing was wrong with the car and he did not look at the bicycle.
- [18] When cross examined by Ms Beckford, he said the big pot hole was about 3 feet wide and 2 feet long. He indicated that he was familiar with the area where the accident happened and that coming from Spanish Town, he was on the left side.
- [19] He also agreed that coming from Spanish Town, there is a train line across the road, before you cross it, that street is William Street, and as you cross the train line you would be on Hampton Drive. He also said that coming from Spanish Town, Hampton Drive is on the left, and as you cross, you would be on Hampton Green Drive which “intersects with Hampton Drive road”.
- [20] He disagreed that Hampton Green Drive is also called St John’s Road, insisted that he was driving on “Hampton Green” and not on St John’s Road and that Hampton Drive is on the left, the same side as a ‘vet clinic’. He also disagreed that Mr Jackson was coming from the Spanish Town bypass direction, but agreed that he (Mr Jackson) was coming from the opposite direction from where he (Mr Burke) was travelling. He maintained that Mr Jackson was “on the left hand side”.
- [21] He admitted that there was one pot hole which was significantly bigger than the others and that the accident occurred where that pot hole is located. He said there are two lanes of road, one lane is about 17 feet wide as “two vehicles can pass”, his vehicle would be about 5 feet wide, and the pot hole would be more to the left. He agreed that it would be in his lane “on my left” and that to the right of the significantly bigger pot hole there is grass, dirt and a sign “Hampton Green”

- [22] In describing the road, he said between his side with the significantly big pot hole, and the right side with much smaller pot holes “nutten don’t better, all of it bad”. He disagreed that in order to avoid the large pothole he drove on the right side, again insisting that he was on the left side. When it was suggested to him that he did not see Mr Jackson on his left side, he said “Yes, I see him on the left side”. He admitted that he said it was a straight flat road and agreed that the left side, his lane, was “roughy, roughy”
- [23] He disagreed with the suggestions that coming from Spanish Town, the right lane is better to drive on and that of the two lanes, it would be easier for him to drive on the right and not the left because it is ‘roughy’. He also disagreed that the right side is smoother saying “going and coming all of it rough”
- [24] He denied driving fast and also denied driving close to Hampton Drive, or on the same side Mr Jackson was riding, while repeating that he was driving on the left. He also denied hitting Mr Jackson, stating that “him dallying and come lick the front of my vehicle”
- [25] He stated that the collision occurred to the left front of the vehicle, admitted taking Mr Jackson to the hospital but denied having a conversation with him. He also admitted that he did nothing to move away when he saw Mr Jackson but that he stopped on the left side of the road. He denied that Mr Jackson fell on the bonnet of the car and stated that he got up and went into the back seat of the vehicle where there were two other persons.

### **Submissions on liability**

- [26] I am grateful to Counsel for the Defendant for providing written submissions, though belatedly. I note that they have adumbrated the disputed and undisputed facts as well as the applicable law. I will not restate any of these submissions save and except where I find it necessary to explain my reason for the decision arrived at. Counsel can be assured however, that I have given them due consideration.

[27] I note that up to the time of writing no submissions were received from Counsel for the claimant.

### **The Issues**

[28] There is no dispute that there was a collision involving the claimant's pedal cycle and the motor vehicle owned by the 2<sup>nd</sup> Defendant and driven by the 1<sup>st</sup> Defendant. The dispute is in relation to exactly where it happened, the manner in which the collision occurred and who is to be blamed, as the Claimant and 1<sup>st</sup> Defendant have advanced different versions of events leading up to the accident and there is no independent eyewitness.

[29] The issue of vicarious liability raised on the claimant's case appears to be put at rest as both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have averred that at the time of the accident "the 1<sup>st</sup> Defendant was carrying out his personal business when the collision occurred".

[30] The court therefore has to determine, on a balance of probabilities, whether the claimant has made out a case of negligence against the 1<sup>st</sup> Defendant, and as the 1<sup>st</sup> Defendant has raised the issue of contributory negligence, the court also has to consider whether he has shown that the damage alleged to have been suffered by the Claimant was as a result of his own fault.

### **The Law and Application**

[31] Negligence is defined in the case of **Blythe v Birmingham Waterworks Co.** [1856] 11 Ex 701 as:

*"...the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."*

[32] It is well established that in a claim for negligence, in order for the claimant to succeed he must provide evidence to satisfy the court on a balance of probabilities that the defendant owed him a duty of care at the material time, that

there was a breach of that duty and it resulted in damage to him. It is also established that all users of the road owe a duty of care to other road users (see **Esso Standard Oil SA Ltd. & Anor. v Ian Tulloch** [1991] 28 JLR 553).

[33] Section 51(2) of **the Road Traffic Act** and the case of **Nance v British Columbia Electric Railway Company Ltd.** [1951] AC 601 show that there is a statutory as well as a common law duty for drivers of motor vehicles to exercise reasonable care while operating their vehicles on the road and to take all necessary steps to avoid an accident.

[34] Reasonable care is said to be the care which an ordinary, skilful driver would have exercised under all the circumstances and this includes avoiding excessive speed and keeping a proper lookout (See **Bourhill v Young** [1943] AC 92).

[35] Their Lordships of the Judicial Committee of the Privy Council, in the case of **Nance, supra**, speaking through Viscount Simon said:

*“Generally speaking when two parties are so moving in relation to one another so as to involve the risk of a 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.”*

[36] There can be no dispute that the Claimant and the 1<sup>st</sup> Defendant owed each other a duty to move with care while travelling on the road and therefore I recognize that the issue of liability rests on the credibility of the parties and the plausibility of the accounts given by them. I have therefore placed reliance on my assessment of their demeanour while they gave evidence and were cross examined.

[37] I find that both parties were aware of each other’s presence on the roadway that night, both having admitted to seeing each other prior to the collision. The defendant stated that he saw the claimant ‘dilly dallying’, four feet away, while the claimant stated that the defendant was driving on the incorrect side of the roadway.

- [38]** The Claimant's account of the accident was not significantly shaken in cross examination, notwithstanding his effort to describe the condition of the road. I also find that his failure to give a good or realistic estimate of the distance he was from the motor vehicle when he first saw it, are not so material as to cause me to doubt his version of how the accident happened.
- [39]** I prefer and accept his version of what occurred over that of the Defendant. I bear in mind that the estimates of distances given by both parties may well be inaccurate, but I find as a fact that the Claimant was riding on his correct side of the road in the opposite direction of the Defendant who was driving on his incorrect side.
- [40]** I formed the view that the Defendant was not speaking the truth especially in relation to the point of impact. He was not convincing. He sought to ensure that every answer he gave, would be an indication that he was driving on the left. I therefore reject his evidence as being unreliable
- [41]** As I understand the evidence, and find as a fact, Hampton Drive forms a "T" with St John's Road and is on the right, travelling from the direction of Spanish Town. I also find that the collision took place in this vicinity.
- [42]** In making this finding, I note that although the defendant in his defence admitted the date, time and place of the accident, his evidence in chief and his evidence on cross examination show that he is saying the accident took place at a different location than as set out in the statements of case.
- [43]** Both parties however, gave evidence in cross examination which lead to a finding as stated in paragraph [41] above. They also gave evidence as to the condition of the road surface and I find that there was a significantly large pot hole on the side on which the defendant should have been driving, and that the rest of the road had a number of minor pot holes and that the road was not smooth. I also find that due to the existence of the large pot hole on the defendant's driving

side, he drove on the other lane which, although having minor potholes, was a better side to drive on.

**[44]** It is my view that for the impact to have occurred in the manner I find it did, it must mean that the defendant was not keeping a proper lookout. Had he been keeping a proper lookout, from the distance at which he claims to have seen the bicycle, he would have recognized that an impact was imminent and would have taken or would have been able to take some evasive action. The Claimant as well, having seen the car on the incorrect side of the road coming in his direction, also had a duty to act to avoid the accident. I however accept his evidence that he tried to turn his bicycle on to Hampton Drive and I believe the injuries he sustained, to his right shoulder and hip, though minor, are consistent with his version of what unfolded and the fact that he tried to turn.

**[45]** Additionally, had the Defendant been driving on his correct side of the road, that is, the left side from the direction of Spanish Town, the accident would not have happened and the fact that a bicycle does not need as much space to travel, as would a car, cannot justify the car being driven on the incorrect side of the road, as I find happened, even to avoid potholes.

**[46]** I find that due to the condition of the road, the Defendant drove without due care and attention to the other road users, and in particular, the Claimant, at the material time, as he drove on the side the Claimant was riding in an effort to avoid the significantly large pot hole. He also failed to take any necessary action to avoid colliding with the Claimant. The Defendant did not exhibit the necessary care and skill in the circumstances and is therefore negligent and liable for the injuries and loss sustained by the Claimant.

**[47]** Bearing in mind the submission of Counsel for the Defendants that in determining liability the court should have regard to physical evidence, I note that the court did not have the benefit of an assessor's report on the condition of the motor car or the bicycle, immediately after the collision, which could provide more

conclusive evidence on the point of impact and the court does not accept the evidence of the Defendant that the impact was to the left side of his vehicle.

- [48] The absence of damage to the motor car as stated by the Defendant combined with the fact that the injury sustained by the Claimant was mainly to his right side, support a finding that the accident took place largely as indicated by the Claimant, save and except that the injury sustained by the Claimant is indicative that the Defendant could not have been driving at a very fast rate of speed.
- [49] The injuries sustained by the Claimant as set out in the medical report of Dr Igbokwe who examined him at the Spanish Town Hospital are, also, in my view, consistent with his contention that he tried to turn on to Hampton Drive when he was hit by the car. The doctor's examination revealed "mild tenderness to right hip and right shoulder"
- [50] I therefore find that the injuries to the Claimant were caused by the negligence of the Defendant. The Defendant drove onto the side the Claimant was riding, failed to keep a proper lookout as a reasonable prudent driver of ordinary skill would have done in the circumstances, failed to take the necessary action to avoid the collision and is therefore negligent.

### **Contributory Negligence**

- [51] The Defendant is required to specifically plead contributory negligence and has a duty to provide evidence from which the court can find, on a balance of probabilities that the injury of which the Claimant complains resulted from the particular risk to which the Claimant exposed himself by virtue of his own negligence.
- [52] The Defendant in disputing the Claimant's claim raised the issue of contributory negligence, indicating that "it was his own negligence that caused or substantially contributed to the collision..."

[53] In **Nance**, *supra*, the court, with regard to the defence of contributory negligence, had this to say:

*“all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury.”*

[54] Applying that principle to the facts of this case, I find that the 1<sup>st</sup> Defendant has not shown on a balance of probabilities that the claimant failed to take reasonable care of himself and contributed to his own injury. Having weighed all the circumstances of the case as to causation and blameworthiness, I am led to the conclusion that the 1<sup>st</sup> defendant is wholly to blame for the accident. I find that it is his act of driving on the incorrect side of the road which was the cause of the accident. I also do not believe his story that he saw the Claimant “dilly dallying”. His was the faster moving vehicle coming towards the Claimant and he had a duty to stop or take some action to prevent the collision. The fact that he saw the Claimant, stepped on his brake and the collision still occurred is in my view another indication that he failed to keep a proper lookout and to exercise reasonable care on the roadway.

[55] There will therefore be judgment for the Claimant.

[56] I will now assess the damages to which the Claimant is entitled.

### **Assessment of Damages**

[57] Counsel for the Defendant referred to the following cases:

- (a) **Roger McCarthy v Peter Calloo** [2018] JMCA Civ 7, in which the injuries sustained by the claimant Peter Calloo included contusion to the left side of his face, acute back strain, post traumatic vertigo with headache and acute whiplash injury with grade 2 whiplash associated disorder. The Court of Appeal on February 16, 2018, reduced the award of general damages from \$800,000.00 to \$500,000.00

(b) ***Derrick Munroe v Gordon Robertson*** [2015] JMCA Civ 38 where the Court of Appeal on June 26, 2015, confirmed the award of \$300,000.00 made in the Supreme Court on June 18, 2009, where the claimant had pain in the sternal region of the chest, lower back pain, tenderness in the region of the left costochondrial joints with increased tenderness during respiration and all chest movements and tenderness in the lumbar region in all ranges of motion as a result of a motor vehicle accident and the doctor reported that he was fully recovered.

[58] I find that the cases referred to are not closely aligned with the instant case based on the medical evidence presented. I therefore considered the case of **Hermina Harvey v Amy Rigabie**, Suit No CL2001/H049, unreported, delivered December 2, 2003, which I find to be more comparable. In that case, the Claimant sustained injuries described as tenderness to the right side of her body, tenderness to right shoulder, diffused swelling and tenderness with superficial abrasion to the posterior aspect of the right forearm and mild swelling and tenderness to the right knee and was awarded \$240,000.00 (CPI 73.95) I note however, that unlike the case of Harvey, the Claimant in the case at bar suffered no contusions or abrasions and therefore any award to him would have to be discounted.

[59] When the award to Ms Harvey is updated to account for inflation (CPI 254.3), it yields \$825,314.40. I therefore find that an award of \$800,000.00 would be adequate compensation for Mr Jackson for general damages for pain and suffering.

[60] The Claimant has claimed special damages in the sum of \$53,000.00 for medical expenses and \$10,000.00 for transportation. "and continuing". The Claimant has only provided evidence of expenditure in the sum of \$53,000.00.

[61] In keeping with the applicable principles, an award of \$53,000.00 will be made in respect of his special damages claim.

**Disposition**

Judgment for the Claimant with damages assessed and awarded as follows:

General damages for pain and suffering awarded in the sum of \$800,000.00 with interest at 3% from the date of service of the claim form to date of judgment.

Special damages awarded in the sum of \$53,000.00 with interest at 3% per annum from February 18, 2012 to date of judgment

Costs to the Claimant to be agreed or taxed.