IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV04547

BETWEEN	ALBOURNE MATTHEWS	1ST CLAIMANT
AND	WINSTON MORRISON	2ND CLAIMANT
AND	THE ATTORNEY GENERAL	1ST DEFENDANT
AND	GREGG GARDNER	2ND DEFENDANT

Miss C. Hudson instructed by K.C. Neita & Company for the 1st and 2nd Claimants
Miss L. White instructed by the Director of State Proceedings for the 1st and 2nd Defendants

Motor vehicle collision – Pleadings – Evidence – Credibility – Assessment of damages

Written submissions filed and received 15th November,2010

Heard on 22nd June, 2010 and 1st July, 2011

CORAM: MORRISON, J

> "*The rule of the road is a paradox quite for riding or driving along;*
> *If you go to the left you are sure to go right, if you go to the right you go wrong.*"

[1] The adjudicative material before me, in the case at bar, is largely comprised of the subjective vistas of the Claimants and the second Defendant, and one *ex post facto* objective witness – the then Certifying Officer of the Island

Traffic Authority, Morant Bay, St. Thomas, Mr. Marlon Monteith. Inexplicably, though the St. Thomas police arrived on the scene of the accident shortly after it had occurred, their input, apart from regulating the ensuing chaotic traffic congestion was, by way of evidentiary support, lacking in assistance in the quest to determine the cause of the accident. Thus, there is no corroborative independent from-the- scene evidence coming from them.

[2] It is with this background in mind that the issue of causation is to be viewed. Accordingly, the matter of the credibility of the dramatis personae is writ large.

[3] Preliminarily, though the parties are wont to describe the accident as occurring head-on, the damage to both vehicles as testified to by Mr. Monteith, and taken with the assessor's report of Mendez, Livingston Incorporated, reveal a right side bias impact to both vehicles. Both vehicles showed extensive damage chiefly to their right sides by dint of which the accident bespeaks unskillfulness and carelessness on the part of at least one of the driver's involved. That, I daresay, was on an unremarkable day and on an asphalted road surface. From all accounts, it was, for the most part, an ordinary roadway that was ordinarily traversed by ordinary motorists that has some how contrived to produce an extraordinary accident.

<u>The Pleadings</u>

[4] It will be observed that the Claim Form and Particulars of Claim were first filed on November 9, 2007. Thereafter, two further amendments to the

Particulars of Claim were filed. One on the 27th May 2009 and the other on the 18th March 2010.

[5] Further, from the Claim form as filed on 9th November, 2009 there were two additions to the 27th May 2009 version, the materiality of which was as to the addition of the second Claimant and the role he played in the accident. The gravamen of the complaint is as couched in the Further Amended Particulars of Claim filed on 11th March 2010: "That on or about the 20th day of March 2007, the first Claimant was travelling as a passenger in motor vehicle registered 7453 EJ driven by the second Claimant, Winston Morrison, along Sun Valley main road, in the parish of St. Thomas when on reaching the brow of a hill along the said road, the Second Defendant travelling in the opposite direction negligently drove and/or managed motor vehicle registered 0769 EV so that he lost control of the said motor vehicle and collided head-on in the Claimant's aforesaid motor vehicle."

[6] It will be observed that there is a departure from the endorsement that is repeated in the Amended Claim Form filed on May 27, 2009 to wit: "The first Claimant Albourne Matthews … and the second Claimant Winston Morrison …. claim against the first Defendant and the second Defendant … to recover damages for negligence in that … on reaching the brow of a hill … the second Defendant travelling in the opposite direction negligently drove and/or managed motor vehicle registered 0769EV by overtaking (sic) and/or attempted to overtake in line of traffic, collided in the rear of motor vehicle registration unknown whereupon he lost control of the said motor vehicle and collided head-on in the

<u>Claimants' aforesaid motor vehicle</u> (in) consequence of which the Claimant sustained injuries suffered loss and incurred expenses."

[7] The Particulars of Negligence ascribed by the Claimants' in respect of the second Defendant's driving are:

a) driving at an excessive speed;

b) driving onto the wrong side of the road and there colliding with the motor vehicle registered 7453EJ;

c) driving in a dangerous and reckless manner;

d) losing control of motor vehicle registered 0760EV so that it collided head-on into motor vehicle registered 7453EJ;

e) failing to keep any or proper look-out or to have any or any sufficient regard for other traffic, particularly on-coming traffic on the road;

f) failing to give any adequate warning of his approach;

g) placing the Claimant in a dilemma by failing to keep to his correct driving side of the said road; and

h) failing to stop, slow down, to swerve or in any other way to manage or control the motor car as to avoid the collision.

[8] The particulars of the negligent driving were in most respects identical to those as is outlined by the Claimants, except that the second Defendant particularized that the driver of the Claimants' car had failed to keep any proper control of the vehicle he was driving; that he had suddenly and without warning driven onto the incorrect side of the road and there collided with the motor car

being driven by him; failed to heed or observe the motor vehicle being driven by him; proceeded unto the incorrect side of the road at a time when and in a manner which it was dangerous so to do.

[9] The first Defendant was sued in its capacity by virtue of the Crown Proceedings Act. The Defendants counter claimed and in so doing repeated their particulars of claim. In reply, *inter alia*, to the counter claim, the Claimants *ipsiss ima verba,* had this to say at paragraph (4) of their Amended Reply and Amended Defence filed on July 23, 2009:

> "… that on approaching the brow of a hill the 2nd Defendant/2nd Ancillary Claimant travelling in the opposite direction attempted to overtake a line of traffic thereby colliding in the right rear section of a motor vehicle, registration unknown, and which motor vehicle was travelling in the Claimants'/Ancillary Defendant's direction, whereupon the 2nd Defendant/2nd Ancillary Claimant lost control of motor vehicle 0769EV and collided head-on with motor vehicle 7453(EJ)".

The Submisions

[10] The Claimants have urged the court to say that they should be believed as the second Defendant's demeanour bespeaks blameworthiness. This they say has come about because of the non-committal answers of the second Defendant which was characterized by the "I don't re-call" incantations.

[11] Also, they proclaim, that the snippet of evidence in respect of the first Claimant "that it was the second Claimant who braked suddenly causing the

motor car to slide to the right of the road," is to be dismissed in view of the fact that it was unaverred by the Defence as filed.

[12] Another plinth of this attack was directed at the fact that the second Defendant himself had failed in his testimony to give evidence to the unaverred pleading. Further, they contend that it was the second Defendant's inattention at the wheel that contrived to produce the accident that is complained of.

[13] The Defendants for their part have sought to attack the amendment of the pleadings by the Claimants, as a matter of law, for the reason that, ostensibly, former aspect of the Claimants pleadings had not been maintained. The Defendants placed great store on the physical lay-out of the accident vicinity to bolster the fact that the Sun Valley road could only accommodate single lane two-way traffic, thereby foreclosing to the Claimants' their assertion that 'the car that was in front of theirs had suddenly reared to the left, off the road because of the negligent driving of the second Defendant."

[14] Again, great store was placed on the fact that there was a skid of 12 feet after the Claimants' car had braked, so as to implicate the liability of the Claimants for negligence. For this proposition reliance was placed on the authority of **Richley (Henderson) v Faull (Richley, Third Party)** [1965] 3 All E.R. 109 and the Road Traffic Act.

[15] Finally, this court is asked to say that it was the first Claimant who was the driver of the offending motor car, and that Marlon Monteith's evidence in respect of Exhibit 13 "showed that the Toyota Corolla swung to the right," having encroached onto the lane in which the second Defendant was travelling.

Analysis Of Evidence

[16] Prefatorily, the criticisms made of the second Defendant's lack of averment as to the skid generated by the second Claimants' driving arises on the Claimants' own evidence and not on his testimony and as such does not foul the law of pleadings.

[17] Secondly, the substratum of the Defendants' submission that it was the first Claimant who was driving at the time of the accident is built upon evidentiary exclusionary rules as much as it suffers from a lack of evidentiary validation. It was a leap in the dark born out of an excited imagination.

[18] Be that as it may, I begin by observing that both vehicles were extensively damaged. From this I infer that the percussive force of impact must have been great. It follows that the relative speeds of both vehicles must have had a bearing on the impact. In this scenario one would expect to find a debris site. This, I think, would have lent itself in determining the point of impact. The evidence of this was inconclusive. I make no finding as to whether there was a lay-by in the vicinity of the accident scene to the left as one proceeds towards the direction of Morant Bay.

[19] I reject the unsupported submission by the defendants that it was the first Claimant, and not the second Claimant, who was the driver of the Claimant's car. That bold and bald submission failed to resonate. Nevertheless, I prefer and accept the evidence of the second Defendant as being far more reliable than that of the Claimants who were less than forthright. The fact is that the Claimant's vehicle was travelling behind the first car at a distance of about 14 feet and at a

rate of speed of 15 miles per house. If, as the Claimants say this first vehicle made a sudden turn to the left, which caused the second Claimant to brake in order to avoid colliding into this first vehicle, it suggests to me, at any rate, that the second Claimant was either travelling too fast or was travelling too close behind the first vehicle. Further, absolutely no reason is offered, on the evidence, assuming that what the Claimants say is true, for the second Defendant's vehicle transgressing onto the Claimants' proper driving side of the road which, I find, that it did not.

[20] If one bears in mind the Claimants answers in cross-examination that they did not see the second Defendant overtake or attempting to overtake a line of traffic, then the urgent question is, what caused the second Defendant to have done so? In such a scenario, one would expect, if there was indeed a lay-by as suggested the Claimants, some manouvre on the part of the second Claimant to avoid being imperiled by the second Defendant's driving. I should think that prudence would dictate a manouvre to his left, by the second Claimant, away from the path of the errant second Defendant's vehicle. But this was not established on the evidence. What the evidence discloses is that the second Claimant applied his brakes and, on the evidence of the first Claimant, which is preferred to that of the second Claimant, when he did so their vehicle did not come to an immediate stop but in fact had slid for an estimated distance of 12 feet. Having so found, the clear answer of the Claimants that there was enough space for their vehicle to have passed the first vehicle, it follows, ineluctably, that

the manouvre by the second Claimant was less than that expected from a skillful and prudent driver.

[21] In any event, the reply to the Defendants' defence and counterclaim is at variance with the Claimants' evidence. Whereas the Claimants admit that the second Defendant did not overtake or attempt to overtake a line of traffic, their pleadings say that the second Defendant, was attempting to overtake. This, the impugned manouvre of the second Defendant was the *causa causans* of the accident. Or, taken from the amended particulars of the Claimants' claim, the second Defendant's negligent driving precipitated the accident. Plainly, the Claimants cannot, simultaneously approbate and reprobate. The inconsistency on the pleadings and on their evidence is irreconcilable. Through cross-examination the Claimants maintained the averment that there was an overtaking or an attempt at overtaking by the second Defendant, that stance was unsupportable. The die had already been cast. There could be no retreat from their averment.

[22] Finally, I accepted that the demonstrated positions of the vehicles, after the collision, was as depicted by the second Defendant. The latter had so positioned his vehicle in trying to avoid the collision, as to be plainly on his correct side of the roadway.

The Law

[23] It is trite law that negligence arises were there is a breach of a legal duty to take care the breach of which results in damage to a person to whom the duty is owed.

[24] Thus, all road users are entitled to the exercise of reasonable care on the part of persons operating motor vehicles on the road. In this regard a driver's duty is to observe and obey the rules of the use of the road. The rules of the road are codified under the Road Traffic Act. Under this Act it is promulgated by Section 95 that "The Island Traffic Authority shall prepare a code (in this Act referred to as the "Road Code") comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit. Section 95(3) in part says that any failure on the part of any person to observe any provision of the Road Code may be "relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings,' be they criminal or civil.

[25] Selected relevant features of the Road Code include, according to Part 2 of the Road Code (1987), not exceeding the speed limit; keeping as near to the left as is practicable; always being able to stop one's vehicle well within the distance for which one can see the road to be clear; not travelling too close, to the vehicle that is in front of one's vehicle. Importantly, with respect to the last mentioned rule is the following: "Always leave enough space between you and

the vehicle in front so that you can pull up safely if it slows down or stops. A good rule of thumb in good conditions is to allow at least one vehicle length for each 10 miles per hour you are travelling …"

[26] From the found facts, it is pellucid that the second Claimant was travelling too close, behind the first car. From the admitted rate of speed by the second Claimant of 25 miles per hour, and applying the 'rule of thumb' as used in the Road Code, the second Claimant ought to have been travelling at a distance of about 24 feet from the first car. His own evidence is that he was doing so at a distance of 14 feet at that rate of speed. Plainly, the rationale of the rule of thumb though directed at safety outcomes is advised by the correlates of speed and distance on the reaction time available to a driver with respect to the movement of a vehicle that is ahead of his.

[27] In this there was a functional failure on the part of the second Claimant to do as is required by a driver possessed of ordinary skill and care. He is palpably to blame for the accident. As to the skid I am only to say that there is evidence that the Claimant's car skidded and that in that process the collision occurred. The authority of **Richley (Henderson) v. Faull (Richley, Third Party)** [1963] 3 All.E.R. 109, is helpful.

[28] The relevant facts which are taken from the head-note of the report are as follows:

> *A collision occurred between a car that was being driven by the defendant and a car being driven in the opposite direction by the third party in which the plaintiff was a passenger. The plaintiff had sustained injuries as a*

result of the collision. Both cars were being driven on their near side of the road. The road was wet. Near to a bend in the road the defendant's car skidded across the road into the path of the third party's car and was struck in its rear end by the third party's car. From those facts, it was held by the Court of Queens Bench Division, that the fact of the defendant's car having moved to the wrong side of the road into the path of the third party's car created a prima facie case of negligent driving by the defendant which was misplaced by merely proving that the defendant's car had skidded. That fact was only proof that the skid had occurred without the defendant having failed to prove that the skid occurred through no fault of his or that the third party had contributed to the collision by negligent driving, he alone was liable.

[29] In the instant case the *causus vera* for the skid by the Claimants' car, on the first Claimant's account, was the act of the swerving off the road by the first car. The *caus causans* was the transgression onto the Claimant's proper side of the road by the Defendant's car. But, apart from the skid not being averred to on the Claimant's pleadings, it is incongruent with the accident dynamic. From the distance between the first car and that of the Claimants car, coupled with the latter's rate of speed, the reaction time of the second Claimant was compromised. That being so, the second Claimant had to apply his brakes, but this was not in an attempt to swerve from off the road to his near side.

[30] In any case, consistent with my earlier findings, I reject the view that it was the movement of the Defendant's car that had created the accident scenario. In

order to avoid colliding with the first car by applying his brakes, the second Claimant's unskillful driving not only caused his vehicle to skid for a distance of 12 feet but in that process he transgressed onto the Defendant's correct side of the road thereby causing the Defendant to take evasive direction.

[31] On the principle of the **Richley** case the second Claimant has failed to prove that the skid occurred through no fault of his or that the Defendant had contributed to the collision by his negligent driving. He alone is liable for the accident

Quantum of Damages

[32] From the admitted exhibit the Defendant's Toyota Forerunner motor vehicle suffered extensive damage in the region of $2,600,000.00. From the report of Mendez, Livingston Incorporated, Collision/Appraisal Consultants, "the damage sustained is restorable, however, the nature of the damage, repair cost and age of the vehicle warrants consideration of total loss figures …"

[33] The Defendants submit as their special damage claim the sum of $2,600,000.00, a figure with which the Claimants are consilient, the issue of liability having been determined in favour of the Defendants.

[34] In the upshot on a balance of probabilities, judgment is hereby entered for the Defendants in the sum of $2,600,000.00 with interest thereon at 3% from March 20, 2007 to today. Costs are to go to the Defendants and are to be agreed, failing which they are to be taxed.

[35] Special Damages in the sum of $5,500.00 is awarded to the 2nd Defendant with interest thereon at 3% per annum from 20th March 2007 to the 1st July, 2011.