[2014] JMSC Civ 243

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV03312

BETWEEN	**SHEVAUGHN MURPHY**	**CLAIMANT**
AND	**CARLTON MENZIE**	**1ST DEFENDANT**
AND	**CHERYL HOPE CAMPBELL**	**2ND DEFENDANT**
AND	**MICHAEL SPENCE**	**3RD DEFENDANT**
AND	**PETER HARRIS**	**4TH DEFENDANT**
AND	**PAULA LITTLE JOHN**	**5TH DEFENDANT**

Alia Leath-Palmer for Claimant instructed by Kinghorn & Kinghorn

Glenroy Mellish instructed by Gifford Thompson and Bright for 1st Defendant.

Negligence – Motor vehicle collision –Whether claim to be dismissed because 3rd Defendant's driver pled guilty in the traffic court- 1st Defendant turning –Duty of turning driver- Duty of overtaking driver- Damages – Fractures, whiplash ,3% PPD.

Heard: 7th, 8th, and 16th May 2014.

BATTS J.

[1] This judgment was delivered orally on the 16th May 2014. Due to resource constraints it is only now (some 4 years later) being reproduced in a permanent form.

[2] Prior to the commencement of trial I enquired of Claimant's counsel about the position with regard to the other Defendants, as only the 1st Defendant appeared. Counsel indicated that she had applied for, but not yet obtained, a Default Judgment against the 4th and 5th Defendants. The 2nd Defendant had filed an acknowledgement of service and the 3rd Defendant had never been served. I indicated to counsel that there would only be one trial and hence one assessment of damages. If she proceeded against the 1st Defendant only at this trial the claim against the others will have been effectively abandoned.

[3] Counsel asked for and obtained time to consult her client and thereafter informed the court of her client's election to proceed against the 1st Defendant only. Mr. Mellish for the 1st Defendant then indicated a wish to take a preliminary point. Mr. Mellish submitted that the claim against his client ought to be dismissed for the following reasons:

a. There is before the court affidavit evidence of a guilty plea by the 3rd Defendant. This amounts to an admission.
b. On the pleadings the cause of action against the 1st Defendant is very weak. Furthermore, the Claimant's evidence is that the 3rd Defendant was overtaking.

[4] Having heard submissions I dismissed the application. In the first place an admission by the 3rd Defendant does not negate the possibility of contribution by the 1st Defendant. Further the pleadings of the Claimant allege negligence against either or both of them. The Claimant was a passenger and, it is in the interest of justice that all the evidence be heard.

[5] The Claimant gave evidence and her witness statement was allowed to stand as her evidence in chief. She says the accident occurred on the 18th February 2008. The Claimant was then 17 or 18 years of age. She was a passenger in a minibus on her way to school. She was sitting immediately behind the driver. She states,

> *"5. On reaching the vicinity of Angels Plaza the bus I was travelling in overtook a motor vehicle. I cannot now recall whether it was one vehicle or several vehicles. As he was overtaking I saw a green motor car which was travelling in the same lane ahead of the bus proceeding to make a right turn into the Unipet Gas Station. The vehicle that was turning turned into the Unipet Gas Station did so suddenly and turned into the path of the bus that was overtaking. The bus collided into the side of the car that was turning. It was a massive collision because none of the vehicles slowed down or braked up prior to the collision."*

Her witness statement also details her pain suffering, injuries and treatment.

[6] When cross-examined the Claimant did not change this account. Whereas she recalled that there was a line of vehicles in the vicinity of Angels Plaza she could not say how many were in front of the bus in which she was travelling. There were more than two vehicles however. The witness indicated that it was approximately 8:00 am in the morning and the weather was good and so was visibility. She denied the bus was going fast.

[7] Exhibits 1 to 5 were admitted by consent being medical reports and various receipts. The Claimant's case was closed.

[8] The 1st Defendant then gave evidence. His witness statement dated 5th May 2014 stood as his evidence in chief. By consent amplification was allowed to treat with one aspect of his witness summary which had not been inserted in his witness statement. That is he gave evidence that the car he was driving was not his own but he had the owner's permission to drive it.

[9] In his witness statement the 1st Defendant stated that he resides in London, England. He was on a visit to Jamaica in February 2008 when the accident occurred. He said,

> *"3. I had decided to buy some petrol at the Uni-Pet gas station in the Plaza and this meant I would have to make a right turn into the Plaza. There was an unbroken white line at the section of the road in front of Angels Plaza. There was no traffic heading towards Spanish Town so I slowed down to about 20 miles per hour put my right indicator on, looked in my rear view mirror, glanced over my right shoulder to see if any vehicle was passing*

me and then started to turn into the Unipet Gas Station. When I had crossed the right lane and was actually entering the gateway of the station I felt an impact when the motor vehicle which the 3rd Defendant was driving slammed into the car I was driving."

[10] The 1st Defendant also stated,

"I lost consciousness. The collision damaged the right front and back doors as well as caused significant damage to the front area of the car. The minibus also crashed into the columns which were at the entrance of the gas station. I was assisted to the hospital by persons who had to cut parts of the vehicle to release me."

His statement goes on to detail the injuries he suffered as well as the fact that the 3rd Defendant pled guilty to careless driving in the traffic court.

[11] When cross-examined the 1st Defendant maintained that he had completely crossed the lane and that the bus hit his vehicle whilst he was in the entranceway to the gas station. He stated that there was enough space for the bus to safely pass behind his vehicle. The 1st Defendant explained that he was born in Jamaica but left for England when he was 16 years of age. He returned to Jamaica regularly. In 2007 when he came he stayed 6 weeks. In 2008 he came to see about his mother's funeral. The collision occurred about a week after he arrived in Jamaica. He was familiar with the Walks Road as he drove along it every time he came to Jamaica. Interestingly however, he did not recall the existence of the Angels Housing Scheme. The witness stated that he checked his rear view mirror after the roundabout in the vicinity of the KFC, again in the vicinity of the offices of Kinghorn & Kinghorn and also, prior to turning into the gas station. He says that at no time did he see the minibus. He admitted, when asked that,

Q: the van appeared out of thin air
A: yes.

Q: suggest van did not appear out of thin air.

A: I said yes. If you did not see something and then something impact on you it is like it just sudden out of

[12] The First Defendant's Counsel endeavoured to adduce a police report in reliance on Part 29 of the Civil Procedure Rules 2002. I ruled that it was too late to do so and, in any event, the police report contained only what was told to the police officer. It was therefore hearsay and inadmissible.

[13] The matter adjourned to the 8th May, 2014 when each Counsel made oral submissions. Claimant's counsel urged this court to find that the 1st Defendant had either not looked or had not looked carefully enough. She cited ***Patel v Edwards 1970 RTR 425*** *(*as annotated in Bingham and Berryman's Motor Claims cases 11th Edition (2000)); as well as ***McNally v Mahabir 2008HCV03943*** unreported decision of Campbell J, 1st March 2012. She submitted that the 1st Defendant was 80% to blame.

[14] 1st Defendants Counsel, Mr. Mellish, submitted that the uncontradicted evidence was that the bus driver overtook along an unbroken white line. He relied on written submissions, and cited ***Thompson v Brady*** (Consolidated claim 2002 T053) unreported judgment of the Honourable Mr. Justice Glen Brown, dated 29 July, 2011.

[15] I am grateful to Counsel for the submissions made. Insofar as the duty of the overtaking driver is concerned, it is a duty to take reasonable care in the circumstances existing. In this regard each case will turn on its peculiar facts. Whether a duty of care has been breached is a question of mixed law and fact. The authorities are a guide only. So that in ***Patel v Edwards (1970) ,***the full report of which is found at 1970 RTR 425, a pedal cyclist wished to turn onto a minor road from a major road. He looked behind him and saw a car slowing for a left turn. He moved to the centre of the road to make his right turn when the Defendant on a motor cycle came around the car and collided with the pedal

cyclist. The English Court of Appeal overturned the trial judge's findings of 50:50 contribution and apportioned 2/3 blame to the plaintiff pedal cyclist. They decided that the plaintiff could have stopped more quickly and, because he was moving from in front of a car which was slowly turning across a main road, special care needed to be taken so that he did not get in the path of other traffic. In the case of ***Thompson v Brady***, claim 2002 CL T053 (cited above) the evidence before the court was that the 2nd Defendant was in the process of overtaking the vehicle ahead of him. He looked in his side mirrors, put on his indicator and indicated with his right hand. He, at a point where there was a broken white line, commenced overtaking. While parallel with the car he was overtaking the 1st Defendant's motor vehicle collided with the right rear of his vehicle. The 1st Defendant was found entirely to blame for that accident.

[16] In the matter of ***McNally v Mahabir (cited above)*** Campbell J, on facts not dissimilar to those before this court, found the driver who was overtaking 60% to blame and the driver who was turning 40% to blame. In that case there was an unbroken white line. The court found as a fact that the turning vehicle turned suddenly and without indicating its intent to turn. ***Patel v Edwards*** was applied uncritically.

[17] The evidence before me was bereft of objective evidence such as, assessors reports as to the damage to either vehicle, or evidence from an accident reconstructionist, or of measurements taken or debris observed at the scene of the collision. There was however no great conflict between the evidence of the Claimant and the 1st Defendant. I find both the Claimant and the 1st Defendant were honest witnesses trying to be truthful. However, the passage of time as well as the trauma of their experience may have affected their ability to accurately recall details. I make the following findings of fact-

a) On the 18th February 2008 at approximately 8:00 am both the Claimant (a passenger in a minibus) and the 1st

Defendant (in a motor car) where travelling in the same direction.

b) The minibus was some distance behind the 1st Defendant's vehicle and there were other vehicles between them.

c) Upon approaching the entrance to a petrol filling station the 1st Defendant slowed down looked in his rear and wing mirrors and indicated his intention to turn right into the filling station using his indicator light.

d) At that section of the roadway there was an unbroken white line which is an indication that there should be no overtaking.

e) The vehicles immediately behind the 1st Defendant's vehicle came to a very slow speed.

f) There being no oncoming traffic the 1st Defendant commenced his right turn into the service station.

g) The minibus, upon realising the traffic in front had slowed, accelerated and commenced overtaking the vehicles ahead.

h) The minibus was travelling too fast in the circumstances.

i) Upon seeing the 1st Defendant commence his turn the driver of the minibus swerved to his right and collided with the right side of the 1st Defendants vehicle. He went on to collide with the gateway to the service station.

j) The collision occurred when the 1st Defendant had almost completed his turn hence the damage to the right side front and rear door of his motor vehicle.

[18] These being my findings of fact I find that the driver of the minibus was entirely to blame for the accident. The 1st Defendant in the context of an unbroken white line and no oncoming traffic acted as any ordinary and prudent driver would. He ought not to be expected to again check his rear view against the possibility of someone overtaking in such a reckless manner. This is because he checked his rear and wing mirror prior to indicating his intent to turn. There was then no overtaking traffic and the vehicle immediately behind him was then in its proper lane. He signalled his intent to turn right and positioned himself to turn. It is only natural that his focus now would be on oncoming traffic and the entranceway to the service station. Furthermore, in the context of an unbroken white line he had no reason to expect anyone to be overtaking the line of traffic.

[19] The minibus however did just that, by attempting to pass not just the 1st Defendant but the vehicle or vehicles behind the 1st Defendant as well. It is this manoeuvre which was the sole cause of the accident. The driver of the minibus ought not to be overtaking at an unbroken white line. He ought to have been alert as to the possible reason for the slowdown in traffic. Had he been keeping a proper lookout he would have seen the 1st Defendant's indicator lights. As it was, when the 1st Defendant turned across the lane, he swerved rather than continue straight or braking. This explains a collision to the side of the 1st Defendant's vehicle rather than to the right rear or rear. The minibus drove at an excessive speed, overtook a line of vehicles and overtook at a point along the road when overtaking was prohibited. The Claimant said the minibus was not driving fast. She is not a licensed driver. "Fast" to her may relate to the fast speeds at which she was accustomed to seeing such buses drive. I doubt very much whether it related to the road code and the maximum speed allowed.

[20] Judgment will therefore be given for the 1st Defendant against the Claimant. Costs will be awarded to the 1st Defendant against the Claimant to be taxed if not agreed.

[21] Notwithstanding my finding on liability I will indicate the damages I would otherwise have awarded so that in the event an appeal is successful there will be no need for a retrial. The Claimant's injuries were as detailed in Exhibits 1 and 2. In essence the Claimant suffered a fractured left tibia and fibula as well as a cervical strain due to whiplash injury and trauma to the back. Dr. Douglas Massup estimated her Permanent Partial Disability as 3%, he does not say whether it is of the whole person or of the limb. Dr. Ravi Prakash Sergappa diagnosed back strain and a healed fracture of the left leg. On the 24th June 2011 the date of his last examination he expected that lower back pain would continue for a further 3 months. He described her recovery as fair. The Claimant in her witness statement says that she had occasional pain. She feels pain when she attempts to wear heels. She cannot play netball anymore.

[22] Mrs. Leith Palmer, for the Claimant, submitted that $2.8 million in damages was appropriate for Pain Suffering and Loss of Amenities. She relied upon ***Fairweather v Campbell*** (1999) Khan 5d p. 66 and ***McKenzie v Fletcher*** (1998) Khan 5d p. 72. Mr. Mellish for the Defendant submitted that an appropriate award is $1.7 million. He relied on ***Brown v Grey*** (2007) Khan 6d page 8.

[23] I found the decision in ***Brown v Gray*** most instructive. That Claimant however had no whiplash injury and no permanent impairment. No loss of amenity was reported. The award is therefore to be increased. In my view an award for pain suffering and loss of amenities of $2.2. Million is appropriate. Special Damages were agreed at $35,000.

[24] In the result however the Claim is dismissed and there is judgment for the 1st Defendant against the Claimant. Cost to be taxed if not agreed.

David Batts

Puisne Judge