



[2019] JMSC Civ 123

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV01201

BETWEEN	EILEEN THOMPSON	CLAIMANT
AND	GEORGIA MYERS	1ST DEFENDANT
	EDWARD BARRETT	2ND DEFENDANT

IN OPEN COURT

Mr. Paul Edwards instructed by Bignall Law for the Claimant

Mr. Kwame Gordon instructed by Samuda & Johnson for the Defendants

Heard: February 11 and 20, March 1 and June 21, 2019

Negligence – Motor vehicle accident at road intersection – Claim for personal injuries – Counterclaim for repairs to motor vehicle – Credibility of parties – Contributory negligence – Damages – Assessment

A LINDO, J

The Parties

[1] The Claimant, Eileen Thompson (Mrs Thompson) was the driver of Nissan Sunny motorcar numbered and lettered 3378 GM. The 1st Defendant, (Ms Myers) is the owner, and the 2nd Defendant, (Mr Barrett) the driver, of Honda Civic motorcar numbered and lettered 4464 GL. Both motor vehicles were travelling in the same direction along the Molynes Road in the parish of Saint Andrew on November 11,

2013 when there was a collision between them. This collision is said to have taken place in the vicinity of the intersection of Woodglen Drive and Molynes Road.

The Claim

- [2] On February 16, 2015, Mrs Thompson filed a Claim Form and Particulars of Claim in which she alleges that Mr Barrett “so negligently managed or controlled “the Honda Civic motor car that it caused a collision with the Nissan Sunny motor car, “causing the Claimant to suffer injury, loss, damage and incur expense”
- [3] In her Particulars of Negligence, she alleges, *inter alia*, that Mr Barrett drove at an excessive speed, failed to keep any, or any proper look out, failed to maintain sufficient control over the vehicle, failed to stop, slow down, swerve, turn aside or otherwise operate the motor vehicle so as to avoid the collision. She adds that he drove in a careless manner and caused the collision with the Nissan Sunny motor car that was travelling in the same direction. She states that she is relying on the doctrine of *res ipsa loquitur*.

The Defence and Counterclaim

- [4] On April 30, 2015, the Defendants filed a Defence and Counterclaim in which they admit that Mr Barrett was the authorized driver of the Honda Civic motor car, admit the date and place of the collision and aver that the collision was caused by the reckless and dangerous manner in which Mrs Thompson operated her vehicle. They denied the Particulars of Negligence, denied that the doctrine of *res ipsa loquitur* applies to the circumstances of the claim and claimed that Ms Myers has suffered loss and damage and has been put to expense by reason of Mrs Thompson’s negligence.
- [5] In the Particulars of special damages, they claimed a total of \$77,550.00 in respect of repairs, assessor’s fees and loss of use of the motor vehicle.

The Trial

[6] The matter came on for trial on February 11, 2019 and the parties gave evidence on their own behalf without calling any independent eyewitness.

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

1. Medical Report of Dr Ravi Prakash Sangappa dated January 20, 2015.....Exhibit 1
2. Physiotherapy Report of Durga Prasad Gogineni dated September 17, 2018.....Exhibit 2
3. Receipt from Nuttall Memorial Hospital dated December 12, 2013 in the sum of \$8,500.00.....Exhibit 3
4. Four Receipts dated September 12, 2018 showing payments for medical report, physiotherapy report, doctor's visits and physiotherapist's visit (totalling \$69,750.00)Exhibits 4 (a) to (d)

[8] The following documents were also tendered and admitted in evidence by the Defendants:

- i) Assessors report dated November 13, 2013.....Exhibit 5
- ii) Receipt dated November 13, 2013Exhibit 6
- iii) 'Loss of use' document dated November 20, 2013 ...Exhibit 7

The Claimant's Case

[9] Mrs Thompson's witness statement filed on September 21, 2018 stood as her evidence in chief. She gave evidence that she was heading to a garage "in the evening hours. The roadway was lit... there were two lanes of traffic going in opposite directions". She states further that as she proceeded along Molyne's Road, she stopped, turned on her right indicator and was awaiting a filter light and a motorist behind her, to her right, flashed his headlights. She adds that all the vehicles behind him were stationary and she moved off a little, when she saw

it was clear she started to turn, and as she got closer to the gate of the garage into which she was turning “the Honda Civic 4464 GL swing out at me at high speed and hit me suddenly slamming me into the wall of the side of the road...”

[10] She states further that the car went and parked further along the sidewalk by the garage and the driver came out “hurling expletives...”. She adds that her car was “damaged to the front severely, everything except the left lamp” and it had to be removed by a wrecker.

[11] Her evidence further is that when she got home that night she was “feeling stiff”, and the following day she went to her lawyer and went to see a doctor. She says she was given prescription for pain medication and muscle relaxants and she did a total of seven sessions of physiotherapy and when she had these sessions she took taxis which cost on average \$600.00 initially, and \$4,000.00 round trip, after she had moved.

[12] When cross examined by Mr Gordon, she said she was “partially” in the left lane heading towards Half Way Tree (HWT) and when she first saw the Defendants’ vehicle it was two cars behind her car, partially in the right lane and there was bumper to bumper traffic at the stop light. She agreed that in the vicinity where the accident took place there were two lanes heading to HWT and one lane heading away from HWT and that of the two lanes heading towards HWT, the left continues towards HWT and the other one was a filter, and that at the intersection, there is a traffic light. She stated that on approaching the stop light, she put on her right indicator and most of her car was in the left lane towards HWT.

[13] When asked how long after seeing the Defendant’s car the collision occurred she said by the time she saw it “it came at me with such speed, I tried to brake up and the impact sent me next door to the premises I was about to enter”

[14] She said damage was to the front and right side of her vehicle and she ‘believes’ the left side of the Defendants’ vehicle hit her vehicle “because he was trying to

swerve from me”. She disagreed that she switched lanes without first making sure the way was clear and although she admitted that she drove out because of the assurance she got from the driver who flashed his lights, she said, “but I didn’t just drive out”.

The Defendants’ Case

[15] Ms Myers’ evidence in chief is contained in her witness statement filed on November 13, 2018. She states that she is the owner of the 2000 Honda civic motor vehicle and her spouse Edward Barrett “is the regular driver” and that on November 11, 2013 she was a passenger in the vehicle when the accident occurred.

[16] Her evidence further is that the Nissan Sunny motor vehicle was travelling in the same direction as the Honda and the “driver made right turn...My spouse stepped on the brakes and swerved but the Nissan motor car collided with the left rear side of my vehicle. The left door, left quarter panel and rear bumper of my vehicle was damaged...”

[17] On cross-examination by Mr Edwards, she said she was sleeping at the time of the accident and “it is the impact why I jump up”. She admitted that she did not see “what take place”, did not observe the position of the two vehicles and when confronted with her evidence in chief, admitted that what she was saying in court was accurate. She stated that after the impact the 2nd Defendant “turn and come park on the sidewalk...” She agreed that she heard Edward Barrett shouting expletives in the direction of Mrs Thompson and heard him complain about a previous accident.

[18] Ms Myers stated that her vehicle was able to be driven and they drove to the HWT police station. She indicated that repairs were done to the vehicle about two weeks after the accident and that the repairs took a “couple days’ but that the vehicle did not spend any time at a garage. When asked who did the repairs to the vehicle she said “him have his own car people, mechanic”

- [19] Mr Barrett's witness statement filed on November 13, 2018 was admitted as his evidence in chief after he was sworn and it was identified by him. His evidence is that he was heading towards Woodglen Avenue so he was positioned in the filter lane. He states that the Nissan Sunny travelling in the left lane, heading in the same direction began to make a right turn in his direction and he "slammed on [his] brakes and swerved to [his] right to avoid colliding with this vehicle." He adds that the Nissan Sunny collided with the left rear of his vehicle and the left rear door, left quarter panel and the rear bumper were damaged. He states that there was nothing he could do to prevent the collision "when she suddenly made that turn directly in the path of the Honda Civic while I was travelling in my proper lane at all times"
- [20] Under cross examination, he said both lights were showing green and he did not see the Nissan before the impact. When confronted with his evidence in chief, he said he saw it and swerved from it and then said the first time he realized it was on the road was when it hit his vehicle and it hit the left back of his vehicle, "going down to the bumper".
- [21] He admitted to passing cars, which were moving, in the left lane, before the collision and that the collision took place in the middle lane. He said he went through the light, turned into Woodglen and parked on the sidewalk. When pressed he said he did not see the Nissan lose control, and he agreed that motor vehicles were ahead of him heading to HWT before the accident occurred but denied that he moved from behind any vehicle to go into the filter lane. He admitted to using expletives to the Claimant and denied that he was speeding at the time of the accident.

Submissions on liability and damages

- [22] After hearing the evidence, Counsel for the parties were directed to file closing submissions which they both did on February 20 and March 1, respectively. I have considered these submissions and will not, for the sake of brevity, restate

them. I will make reference to them where necessary, to show reasons for decisions I have arrived at.

The Issues

[23] The court has to determine whether the collision was caused by the negligence of the Defendant or whether the Claimant was the author of her own injuries or whether she contributed thereto, and consider the nature and extent of the injuries suffered by the Claimant, the nature and extent of the loss suffered by the 1st Defendant and the quantum of damages, if any, to be awarded to the parties.

The Law

[24] It is well settled that all users of the road owe a duty of care to other road users and that drivers of motor vehicles have a statutory duty to take the necessary action to avoid an accident and to exercise reasonable care to avoid causing injury to persons or damage to property. (**Esso Standard Oil SA Ltd. & Anor. v Ian Tulloch** (1991) 28 JLR 553) (**Section 51 (2) of the RTA**)

[25] Reasonable care is the care which the ordinary, skilful driver would exercise under all the circumstances and includes avoiding excessive speed and keeping a proper lookout. (**Bourhill v Young** [1943] AC 92).

[26] In this case, both the Claimant and the 2nd Defendant owed a duty of care to each other as they were traversing the roadway, both travelling in the same direction and driving motor vehicles. (**Nance v British Columbia Electric Railway Co .Ltd.** [1951] AC 601).

[27] Of relevance in this case also, is the provision of Section 51(1) of the **Road Traffic Act** (RTA) which provides, *inter alia*, that a driver of a motor vehicle shall observe the following rules; a motor vehicle:

(a).....

(d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead.

[28] The Road Code established under section 95 of the RTA, sets out other rules governing overtaking, turning or approaching a road junction. It states, *inter alia*, that a motorist shall not overtake when approaching a road junction; when overtaking a motorist should ensure he will not have to cross a continuous white line in the centre of the roadway; a motorist should approach all intersections with caution, proceed through cautiously, be prepared to stop, and be in control of the vehicle at all times.

Undisputed Facts

[29] It is not in dispute that Mrs Thompson and Mr Barrett were driving motor vehicles in the same direction along Molyne Road at some time in the evening on November 11, 2013. It is also not disputed that in the vicinity where the accident took place, the intersection of Woodglen Drive and Molyne Road is controlled by traffic lights and that at that section of the road there are two lanes heading towards HWT and one lane in the opposite direction, and Mrs Thompson was in the act of executing a right turn when the collision occurred.

The issue of liability

[30] Having considered the evidence put forward by the parties and the submissions of Counsel, I recognize that the issue of liability rests on the credibility of the parties and the plausibility of the accounts given by them. In arriving at my decision, I have placed reliance on my assessment of the parties, having examined their demeanour while they were giving evidence during cross-examination.

[31] I found the Claimant to be forthright, and she was calm and measured as she gave her evidence and was cross-examined. The evidence of the 1st Defendant

in relation to how the accident took place was totally unreliable as it is clear from the answers she gave in cross examination that she did not see how the accident happened. The 2nd Defendant I found to be quite evasive and he gave conflicting answers as to when he first saw the Claimant's vehicle and whether he had passed vehicles to his left immediately prior to the collision. Where there are conflicts in the evidence as it relates to issues of fact, I prefer and accept the evidence of the Claimant as being true.

[32] I agree that the section of the road where the collision occurred is of significance in analysing the facts. I am also of the view that the physical damage to the vehicles provide independent evidence on how the accident took place.

[33] I find as a fact that the Claimant was driving ahead of the 2nd Defendant and came to a stop at the traffic lights. I find also that her right front tyre was over the white line of the other lane, so she was straddling the left lane and right lanes heading to HWT but was more in the left lane than in the filter lane (right lane) from which she would make a right turn.

[34] It is also my view that the 2nd Defendant had to pass vehicles to his left in proceeding to make a right turn on Woodglen, as he in fact admitted. If the 2nd Defendant was keeping a proper lookout, having passed vehicles which were moving, to his left, he would have seen the Claimant, who I find as a fact, had indicated to turn right and was waiting on the opportune time.

[35] Based on her admission that she drove out because of the assurance she got from another driver, it seems to me that she was not exercising sufficient care and in view of Mr Barrett's evidence that he did not see Mrs Thompson, although he admitted to passing moving vehicles to his left, immediately before the collision, I find that he failed to keep a proper lookout and must have been speeding whilst approaching the intersection.

[36] I therefore find on a balance of probabilities that the collision occurred because Mr Barrett was driving at an excessive speed towards the intersection and was

incapable of controlling his motor vehicle because of the speed and his act of swerving to his right proved ineffective with the result that the collision occurred.

[37] Based on the physical damage done to the vehicles, it is clear that it is the right front section of the Claimant's vehicle and the left rear section of the 1st Defendant's vehicle that were impacted. The Assessor's Report on the 1st Defendant's vehicle, (Exhibit 5) confirms the damage to the 1st Defendant's vehicle.

[38] On the evidence I find that both the Claimant and the 1st Defendant were negligent. However, I am of the view that it is the 2nd Defendant's act of speeding towards the intersection which is the real cause of the accident.

Contributory Negligence

[39] "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless" (**Jones v Livox Quarries Ltd.** [1992] 2 Q.B 608 at 615).

[40] The authorities show that negligence must be proved before the issue of contribution can be considered. (**Froom v Butcher** [1975] 3 All ER 520).

[41] The learned authors of **Charlesworth and Percy on Negligence**, 11th Ed. state, *inter alia*, that:

*"...there had to be a judgment, either for the Claimant or for the Defendant, and there was no provision for apportioning the loss between them. When one of the parties alone was negligent, judgment had to be given for that party against the other. On the other hand, when both were negligent, the Defendant could only be made liable if his negligence was the cause – what has vicariously been described as the 'real cause', 'effective cause', 'direct cause', 'decisive cause', 'proximate cause', and 'immediate cause' of the accident...Liability was a question of fact and the question was: 'whose negligence was the real or substantial cause of the accident?' See: **Swadling v Cooper** – [1913] A.C. 1, where the direction of **Humphries J.**, 'whose negligence was it that substantially cause the injury?' was approved."*

[42] The Defendants have pleaded and asserted inter alia that “the collision was as a result of the reckless and dangerous manner in which the Claimant operated the said vehicle...” and that “by reason of the Claimant’s negligence ...the 1st Defendant has suffered loss and damage ...” On the 2nd Defendant’s evidence he has indicated that the Claimant “switched” from the right onto the left of the road.

[43] In **Nance**, supra, the court, in relation to the defence of contributory negligence said:

“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”

[44] Applying that principle to the facts of this case, I find that although the Claimant said she had stopped and then was in the act of making the right turn when the collision took place, and she has admitted that the Defendants’ vehicle tried to swerve, it seems to me that the Claimant did not ensure that it was reasonably safe to make the turn at the time she did and failed to proceed cautiously. She was not properly positioned to make the turn that she intended to and did in fact make. Notwithstanding the fact that I accept that she did put on her right indicator, when the point of impact is examined, it is clear to me that by not exercising due care in the circumstances, the Claimant was contributorily negligent

Res ipsa loquitur

[45] The elements of the doctrine , as stated by Morrison JA in **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ. 20, are that (a) the occurrence was such that it would not normally have happened without negligence; (b) the thing that inflicted the damage was under the sole management and control of the Defendant; and (c) there must be no evidence as to why or how the accident took place.

[46] I find this doctrine to be inapplicable to the case at bar. The Claimant has the onus of proving either a specific cause of the negligence on the Defendant's part or that the accident occurred in circumstances in which, prima facie, it could not have occurred without such negligence. The evidence, which I accept as true, is that the 2nd Defendant was speeding towards the intersection when the accident took place. This to my mind shows negligence on his part.

[47] In my judgment, the conclusion that the accident was caused by the 2nd Defendant's negligence, is therefore inescapable. The 2nd Defendant in overtaking traffic while approaching the intersection was clearly in breach of the Road Code. For the accident to occur in the manner it did, also confirms the court's view that the 2nd Defendant must have been speeding.

[48] There will therefore be judgment for the Claimant against the Defendant with liability apportioned equally.

Damages – Assessment

General damages

[49] On examination of the medical report of Dr Sangappa, I note that Mrs Thompson sustained injury to her left knee and mid and lower back as well as her abdomen. She was diagnosed with soft tissue injury to left knee and mid back and lower back strain.

[50] Counsel for the Claimant submitted the following cases as useful guides in arriving at a reasonable compensation:

1. **Anna Gayle v Andrew O'Meally** 2005HCV01255, unreported, delivered April 2008 in which the Claimant had lower back pain and some pain in the neck and had significant pain at the time she was seen. She was assessed as having soft tissue injury to the back and was referred to physiotherapist but did not return for reassessment. She was awarded \$600,000.00 which updates to \$1,234,615.38 - April CPI

2. **Kavin Pryce v Raphael Binns and Michael Jackson** [2015] JMSC Civ 96, unreported, delivered May 22 2015. This Claimant suffered cervical strain, lower back strain and soft tissue injuries and was awarded \$1,500,000.00.

[51] Counsel for the Claimant submitted that an award of \$1,700,000.00 would be appropriate citing the case of Kavin Pryce as being similar in relation to the injuries sustained, to the case at bar.

[52] Counsel for the Defendants submitted the following cases as offering guidance in making an award for general damages:

1. **Anderson v Clipper Transport Ltd.** Khans, Vol. 4, page 170. This Claimant suffered severe lumbar muscular spasm and was left with total loss of lordotic curve and recurrent intermittent pain. She was awarded \$95,000.00 on June 27, 1997 (CPI 43.42) This updates to \$561,860.89.
2. **Deon Thomas v Osbourne Nembhard**, 2011HCV 07865,in which an award of \$500,000.00 was made for general damages in June 2015 (CPI 225.3) The 2nd Claimant's injuries were muscle spasm and tenderness on the left side of the neck, tenderness over the anterior chest; tenderness over the lower back on both sides and tenderness over the inner part aspect of the right ankle with normal range of motion. (This updates to \$569,906.79 - April CPI 256.80)
3. **Derrick Munroe v Gordon Robertson**, [2015] JMCA Civ. 38, unreported, delivered June 26, 2015 in which the Court of Appeal dismissed an appeal in a case where the Supreme Court in June 2009 awarded \$300,000.00 ,(CPI 142.00) to the Claimant who suffered pain in the sternal region of the chest and lower back pain as a result of a motor vehicle accident. The sum awarded then updates to \$542,535.21

[53] Counsel for the Defendants expressed the view that the injuries described in the authorities cited are far more serious than the injuries suffered by the Claimant and submitted that an appropriate award for general damages would be "between a range of \$300,000.00 to \$500,000.00

[54] Having examined the cases cited, I am of the view that the case of Kavin Pryce is a reasonable guide. I note however that in addition to soft tissue injuries, he also

suffered cervical strain and lower back strain. When the sum of \$1,500,000.00 which was awarded in May 2015 (CPI 224.2) is updated, (using the CPI for April 2019 of 256.80) it amounts to \$1,718,108.83. I am of the view that the award to this Claimant should be discounted to account for the fact that her injuries appear to be less serious than that of Kavin Pryce, but I also bear in mind her evidence of “feeling stiff” and “bleeding” on the night immediately after the accident. I am therefore of the view that a reasonable award to compensate Mrs Thompson would be \$1,000,000.00.

Special damages

- [55] Special damages must be specifically pleaded and proved. (See **Lawford Murphy v Luther Mills** (1976) 14 JLR 119) The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (**Julius Roy v Audrey Jolly** [2012] JMCA Civ 53)
- [56] In her particulars of special damage, Mrs Thompson pleaded \$107,000.00 for medical report and visit, x-ray, transportation and extra help. Of the pleaded amount, she has substantiated the sum of \$47,500.00. She has not provided sufficient evidence in relation to her claim for extra help and as such the claim under that head will not be allowed.
- [57] In relation to her claim for transportation, she has shown on her evidence that she incurred expenses of approximately \$7,600.00 in travelling for physiotherapy sessions. Although she has provided no documentary proof of this expense, I find that in the circumstances the said sum appears reasonable and as such the award will be made.
- [58] The court notes that the documents agreed and admitted in evidence include receipts totalling \$78,250.00. Mrs Thompson has not made a claim for expenses noted in some of the agreed documents and no application was made for the pleadings to be amended. In keeping with the relevant principles that judgment

cannot be entered for an amount greater than the sum claimed, no award will be made in respect of the expenses claimed in relation to Exhibits 4 (a) to (d). In view of all the circumstances, the court will make an award of \$55,100.00 for special damages.

[59] In respect of the counter claim, the Defendants claimed the sum of \$77,550.00 against the Claimant as special damages. Receipt showing payment of \$7,000.00 in respect of assessor's fees and a document prepared by Ms Myers claiming the sum of \$6,000.00 for loss of use were admitted in evidence. Ms Myers gave evidence that her vehicle did not spend any time at a garage but that it was repaired. I believe it is reasonable to find that she would have suffered loss of use for the period during which the repairs were taking place and I accept the Assessor's estimate of a period of three days for repairs to be done as well as the cost of \$64,550.00 as being reasonable.

Disposition

[60] Judgment for the Claimant against the Defendants on the Claim and Counterclaim, with damages assessed and awarded as follows:

Special damages awarded to the Claimant in the sum of \$55,100.00 with interest at 3% p.a. from November 11, 2013 to the date of judgment

General damages for pain and suffering in the sum of \$1,000,000.00 with interest at 3% p.a. from March 18, 2015 to the date of judgment

Costs to the Claimant to be taxed if not agreed.

On the counterclaim, special damages awarded in the sum claimed of \$77,550.00 with interest at 3% p.a. from November 11, 2013 to the date of judgment.

Liability in respect of the above apportioned 50% to the Defendants and 50% to the Claimant.