



[2017] JMSC Civ. 26

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

**CIVIL DIVISION**

**CLAIM NO. 2011HCV05843**

<b>BETWEEN</b>	<b>TANIESHA CAMPBELL</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ATLAS ARMOURED SERVICE LTD.</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>GOYAN JOHNSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**CONSOLIDATED WITH**

**CLAIM NO. 2012HCV02096**

<b>BETWEEN</b>	<b>DALTON ANDERSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ATLAS ARMOURED SERVICE LTD.</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>GOYAN JOHNSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mr. Michael Brown instructed by Michael B P Erskine & Co. for the Claimants

Mrs. Stacia Pinnock Wright for the Defendants

**Heard: October 31, 2016 and February 24, 2017**

Negligence - Motor vehicle accident – Credibility of witness - Liability of parties

Damages – Assessment

**LINDO J**

**[1]** The claims in this matter which sound in negligence arose out of a motor vehicle accident which took place on or about October 22, 2010 in the vicinity of the

Shell gas station located along the Negril to Savanna-la-mar main road, in the parish of Westmoreland. It involves motor truck registered CH3268 owned by the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant and motor bike driven by Dalton Anderson and on which Taniesha Campbell was a pillion rider.

- [2] The claimants in their respective claims and particulars of claim aver that the 2<sup>nd</sup> defendant, servant and or agent of the 1<sup>st</sup> defendant so negligently drove Toyota corolla motor car registered CH3268, (incorrectly stated as 9702EW in the Claim forms) causing same to collide into the motor bike on which they were travelling whereby they suffered personal injury, loss and damage.
- [3] The defendants in their defence filed on February 15, 2012 have admitted that the 1<sup>st</sup> defendant is owner of motor vehicle registered CH3268 and that the 2<sup>nd</sup> defendant was its servant or agent but dispute the claim on the grounds that the accident was solely caused or alternatively contributed to by the claimants.
- [4] The two claims were consolidated by order of the court made on April 25, 2014.
- [5] The court has the task to decide how the accident happened based on the evidence placed before it, and to determine whether there was negligence on the part of any of the parties. The task is made difficult because the litigants and witnesses have provided opposing versions of how the accident happened.
- [6] It has been said that the court decides this question as a properly directed and reasonable jury would. Support for this proposition is to be found in **Stapley v Gypsum Mines Ltd** [1953] 2 All ER 478 at 485G-486A where Lord Reid said:

*"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly and reasonably... jury would decide it ..... The question must be determined by applying common sense to the facts of each particular case. One may find that, as a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not*

*mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those two faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident.....".*

- [7] It is well settled 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.

## The Evidence

### The Claimants' case

- [8] Taniesha Campbell's evidence in chief is contained in her witness statement dated April 6, 2016. She states that she was seated on the stationary motor bike, with Dalton Anderson on the premises of the gas station, parallel to the Negril to Savanna la mar main road, facing Negril, when she noticed a white Atlas motor truck coming from the direction of Negril. She states further that as it reached near the entrance to the service station, it turned off the road and collided in her right leg fracturing same. She indicates that she lost consciousness, was taken to the Savanna la mar hospital where she was admitted and spent about one month and that her leg was operated on by Dr Gilbert at the Falmouth hospital.
- [9] She adds that as a result of the accident she was unable to work for eight months and was not paid during the period. She also states that she was earning \$25,935.00 per fortnight and indicates that she spent \$331,000.00 for medical attention and \$68,500.00 on transportation.
- [10] When cross examined, she indicated that she resumed working in about June 2011. She said that they entered the gas station at the point which she called the second entrance and it had a sign marked 'exit' and that the section she called

the first entrance had a sign marked 'entrance'. She also said she first saw the vehicle that hit her at the gas station and that before the collision when Dalton Anderson drove off from the gas pump, he turned right. When asked what was the length of the motor bike she said "may be about two feet". She agreed that she said the motorbike was parallel to the main road, indicated that they sat there waiting about 10 -15 minutes and that there was a lot of traffic, "a constant flow from Savanna-la-mar to Negril".

- [11] She also indicated that when she saw the truck it was travelling very fast and she was looking to her right and to her left, and she saw it turn off the road when it hit the bike. She disagreed that the collision took place while the bike was in motion and indicated that the right front part of the fender of the truck collided with the bike, denied that Anderson rode into the left side of the truck and insisted that they were both wearing helmets and that there were signs relating to "entrance" and "exit". When pressed, she stated that when she first saw the truck it was travelling on the road and she insisted she sat on the bike for 10 -15 minutes.
- [12] In relation to her claim for special damages, she indicated that the taxi operators gave her receipts and indicated that before the accident she did not always ask for receipts. She also indicated that she did not remember the sums she paid.
- [13] Dalton Anderson's witness statement dated April 6, 2016 stood as his evidence in chief. His evidence is that he is a mechanic and that he rode the motor bike to the service station for petrol and was still on the service station premises. He states that he positioned the motor bike facing Negril, with the bike being parallel to the Negril to Savanna la mar main road and he saw the Atlas Security motor truck driven at a fast speed and it turned as if to enter the service station without stopping or slowing down, heading straight towards where he was sitting on the bike and it collided into the right side of the bike hitting Taniesha on her right leg and the motor bike fell and they both fell to the ground

- [14] He states further that after the collision the motor truck reversed and drove out of the service station unto the main road heading to Savanna-la-mar and some bikers who were on the road used their bikes to block the road. He adds that he sustained injuries to his shoulder, cuts to his left leg and to his head and he was taken to the hospital where he was given an injection and prescription. He indicates that he was not admitted to the hospital but was unable to work for four weeks and that he earned approximately \$20,000.00 per day.
- [15] Under cross examination he indicated that he did not own the motor bike, which was a scooter, and that it was about 4 feet long. He indicated that the width of the entrance where he sat and waited was about 6 ½ to 7 feet (as pointed out ) and that he was wearing a helmet. He also stated that after purchasing the petrol, he came to the end and stopped. He admitted to making a turn after he rode from the gas pump but insisted that the collision did not take place at that time.
- [16] He said that the length of the roadway where he sat on the bike is about 35 – 40 feet and that the collision took place at the end of the roadway and that he did not consider the roadway where it leads to the main road, the premises of the gas station. He also said that he waited about 10 minutes because a lot of traffic was coming from Savanna-la-mar to Negril.

### **The Defendants' Case**

- [17] Messrs Goyan Johnson, Leon Campbell and Junior Grant gave evidence on behalf of the defendant.
- [18] Mr Johnson's evidence is that he was a driver employed to Atlas Armoured Services Ltd at the time of the accident and that Mr Grant was seated beside him and Mr Campbell was in the back of the truck. He states that as he entered the gas station he saw a scooter bike coming from an easterly direction towards the truck at a fast speed, Mr Grant said "watch it" and he stopped promptly and the bike hit into the left of the truck. He states further that "the female... seemed to be

hurt" and they got assistance from other bike men and persons on the scene to put her in a car and the police came on the scene. He further indicates that the rider of the bike pushed the bike to the Negril police station and he travelled in the truck to the station.

- [19] Mr Johnson also gave evidence that there was no sign showing "entrance "and "exit" at the gas station and that the claimants were not wearing helmets.
- [20] When cross examined, Mr Johnson said he did not stop when he turned, as a car had given him clearance. He also said he did not stop to look to see if anyone was at the entrance and that before he turned onto the premises he did not see the motor bike. He insisted that he stopped when he saw the bike and that it was about 12 feet from him and he did not attempt to swerve from the bike. He admitted that he did not come out of the vehicle immediately but remained for about 2 -3 minutes because a crowd had gathered. He maintained that he did not reverse and drive off and indicated that he actually got onto the gas station premises when the collision occurred.
- [21] Mr Grant states that at the time of the accident they drove on the Nonpariel Road towards Savanna la mar in traffic that flowed moderately and on reaching the top entrance to the Shell gas station, Mr Johnson stopped in the left lane, put on his right indicator, the oncoming traffic from Savanna la mar stopped, with the vehicle at the head of the line flashing his light, Mr Johnson proceeded to turn into the gas station, slowly, and "when we were almost fully on the gas station compound, this bike came from nowhere travelling at a very fast pace towards us, coming from the left front of us"
- [22] He states further that he said "watch that eeditat yah" to Mr Johnson, the rider and the pillion collided into the left of the vehicle and Mr Johnson stopped immediately. He adds that a crowd gathered and became boisterous and they stayed in the vehicle until the police came. He also states that there is no entrance or exit sign planted in the ground, that Mr Johnson did not reverse onto

the main road and drive up the road after the collision and that it is not true that persons on bikes stopped him.

- [23] In cross examination, he indicated that the vehicle came to a complete stop and stopped for “4 or 5 minutes or so” and vehicles would have passed while he stopped. He stated that “all of the vehicle” was on the gas station compound, almost where they were going to stop which was at the building, about 30 feet from the entrance. He insisted that the bike was travelling very fast “maybe 50 or a little bit lower” and that it was not parked at the time of the collision.
- [24] Mr Leon Campbell’s evidence is that he was seated at the back of the truck driven by Mr Johnson and was unable to see or hear anything. He indicates that he felt the truck come to a stop and he was the last person to come out of the truck which was at the opening where it had entered the premises. He states that he saw a scooter bike “was thrown down” at the right side of the air pump which was to the right side of the truck and a gentleman and a female were sitting on the ground and the gentleman was holding his leg. His evidence further is that there was no “entrance” or “exit” sign and that he did not see any helmet on the bike rider nor the female and that he did not see any damage to the bike.
- [25] In cross examination, he indicated that when he came out of the truck he saw the “air pump” close to the entrance of the gas station. He said that he did not see any “entrance” or “exit” sign at the gas station, denied that the driver reversed the vehicle onto the main road after the impact and when asked if he felt any impact, he stated that he felt when the driver stepped on his brakes and stopped.

### **The submissions**

- [26] I have given due consideration to the written submissions and authorities provided by both counsel in relation to the issue of liability and will not restate them in this judgment.

## **Findings**

- [27] The credibility of the witnesses is an important factor in determining liability as two diametrically opposed versions of the accident have been given.
- [28] Having carefully reviewed the evidence, assessed the credibility of the witnesses, applied the statutory and common law principles relating to motorists and considered the submissions of Counsel, I find the claimant Campbell to be a very simple person who was candid. Although she gave inconsistent accounts of when she first saw the truck, I find her account of the accident to be credible. Dalton Anderson also gave inconsistent statements about when he first saw the truck but on the whole he was frank and he remained unshaken during cross examination.
- [29] The defendant Johnson on the other hand, I did not find to be credible. He gave contradictory responses in cross examination, for example, he said he did not see the motor bike before he turned onto the gas station premises but said he saw the motor bike when it was about 12 feet away and when he saw the bike he stopped. He also contradicted himself as to whether the motor bike was stationary when he collided in it and as to what stage he exited the truck. I was therefore not impressed with his testimony and reject his account.
- [30] The two witnesses who gave evidence in support of the 2<sup>nd</sup> defendant were not very helpful. Mr. Grant who said he was in the front of truck gave details of seeing Mr Johnson stop, put on his right indicator and vehicle flashing light “giving us the go ahead to turn into the gas station” and Mr Johnson turning slowly, yet he stated that the bike “came from nowhere...coming from the left of us” although his evidence earlier is that he got an opportunity to observe what was happening. The details noted by Mr Grant were noticeably absent from the evidence of Mr Johnson and were in part, also contrary to Mr Johnson’s evidence.

- [31] I reject the evidence of Mr Grant as unreliable. His demeanour was also not convincing. I am of the view that he was eager to assist the 2<sup>nd</sup> defendant and that at best he was embellishing the evidence in favour of Mr Johnson.
- [32] Mr. Campbell, who said he was travelling in the back of the truck was unable to state how the accident happened. He however stated that he saw the scooter bike “thrown down at the right side of the air pump which was to the right side of the Atlas...truck” which I find to be in total contrast with the evidence of Mr. Johnson and Mr. Grant whose evidence is that the motor bike collided in the left of the truck. He however remained consistent when cross examined. I prefer and accept his evidence in relation to the positions of the vehicles after the accident.
- [33] I find that the accident took place near to one of the points of entry or exit to the gas station located along the main road leading from Negril to Savanna la mar. I also find that it is more likely than not that the claimants were stationary on the motorbike near to the air pump which is close to the entrance to the gas station and that it is probable that they were wearing helmets.
- [34] While it is difficult to believe that the claimants were stationary for as long as 10 to 15 minutes, I find that as it relates to the time, the two claimants and even the witnesses for the defendant may have been mistaken.
- [35] I do not agree that the fact that the motor bike was said to be parallel to the main road meant that the claimants had no opportunity to see the flow of traffic from Negril to Savanna la mar. I find that if the bike had been in motion and collided into the truck, the driver Dalton Anderson, would be more likely to have sustained more serious injuries than the pillion, Tanesha Campbell,
- [36] The injuries sustained by the claimant Campbell were to her right thigh, which in my view, are more consistent with the claimants’ version that the truck hit the motor bike to the right side and consistent with the evidence of Mr Campbell who said when he exited the vehicle the motor bike was to the right of the air pump and to the right of the truck.

- [37] There was no report to show whether there was damage done to either of the vehicles. However, I find on a balance of probabilities that the point of impact would be more to the right front section of the truck driven by Mr Johnson and the right back section of the motor bike, which in my view would account for the type of injury sustained by the claimant Campbell and would be consistent with the evidence which I find as a fact, that the vehicle driven by the 2<sup>nd</sup> defendant turned right, off the main road onto the gas station compound, travelling from the direction of Negril.
- [38] In relation to the inconsistencies in the evidence of the claimants, for example whether there was a sign marked “entrance” and “exit”, and the point at which they saw the truck, I find that these inconsistencies are not so material as to affect the court’s determination on the issue of liability as the court finds that the motor bike was stationary and there was nothing that either claimant could do in the circumstances to avoid the accident.
- [39] I do not believe that the 2<sup>nd</sup> defendant had stopped at the entrance to the gas station when the accident occurred. I believe the 2<sup>nd</sup> defendant intended to turn his truck right into the gas station, and was in the process of doing so when the collision occurred. I am satisfied, on a balance of probabilities, that the 2<sup>nd</sup> defendant failed to discharge his duty to exercise reasonable care when driving onto the gas station compound to prevent injury to the claimants. It is his act of turning into the gas station without due care that caused the collision involving the motor bike, which I find was stationary, and leading to the injuries sustained by the claimants.
- [40] I find that he was not keeping a proper lookout and had to be alerted by Mr Grant and that it was after Mr Grant said “watch it”, the collision occurred and he stopped.

- [41] Had Mr Johnson been keeping a proper lookout he would have observed the motor bike and he would have had sufficient time to stop and or swerve to avoid colliding in it.
- [42] The defendants have alleged that the accident was solely caused or alternatively contributed to by the negligence of the claimants. In order to establish contributory negligence, it must be shown that the claimant in riding the motor bike “was careless of his own safety.” “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 being careless”: (see ***Nance v. British Columbia Electric Railway Co. Ltd. [1951] AC 601, at page 613;***)
- [43] The burden of proving contributory negligence is on the defendants. There is nothing on the evidence from which I can find that the claimants did not in their own interest take reasonable care of themselves and contributed by this want of care to their injuries as I do not accept the defendant’s version of how the accident happened. I find that there was nothing that the bike rider could have done in the circumstances to avoid the accident. I therefore do not find that the claimants were contributorily negligent
- [44] There was no independent eyewitness. I accept the evidence as to the point of impact as stated by Ms Campbell as being more plausible as in my view that would be more probable to result in the type of injuries sustained by her. I therefore prefer and accept the evidence of the claimants as being more reliable than that of the defendants’ witnesses and find that in all the circumstances the claimants’ version is more probable and therefore find that the accident was caused, wholly, by the negligence of the 2<sup>nd</sup> defendant.

### **Submission on damages**

- [45] Mr Brown, on behalf of the claimants, submitted that no challenge was made to the evidence of both claimants as it related to their employment, level of earnings

or the period for which they were unable to earn. He suggested that Ms Campbell should be awarded \$414,880.00 for loss of earnings, being 8 months at \$25,930.00 per fortnight. In respect of Anderson, Counsel submitted that he should be awarded \$400,000.00 being for four weeks at \$20,000.00 per day.

- [46] For general damages, Mr Brown submitted that in respect of Campbell, she is claiming the sum of \$3m. He referred to the case of **Barrington McKenzie v Christopher Fletcher & Joseph Taylor**, Khan, Vol.5, page 72, where an award of \$420,000.00 was made which converts to \$2,109,000.00. He noted that the figure is adjusted upwards significantly as the claimant in the case at bar sustained fracture of both tibia and fibula and had to undergo at least 4 failed attempts at manipulation before successful surgery was performed while the plaintiff in the case referred to was not expected to have any impairment. He also pointed out that Dr Gilbert opined that Ms Campbell, who had limitation in range of motion in the ankle, may not regain full pre-injury range of motion.
- [47] In relation to Mr Anderson, Counsel claimed a sum of \$300,000.00 for pain and suffering. He relied on the case of **Reginald Stephens v James Bonfield and Conrad Young**, Khan, Vol. 4 page 212 where the sum of \$40,000.00 was awarded to the plaintiff in September 1996. He indicated that this sum converts to \$224,000.00 and that this sum was adjusted upwards as he was of the opinion that Anderson's injuries were more serious than those sustained by the plaintiff in that case.
- [48] Mrs Pinnock Wright on behalf of the defendants, submitted the following as authorities to be considered in arriving at the general damages to be awarded to Ms Campbell:
  1. **Leroy Robinson v James Bonfield & Conrad Young**, Khan, Vol. 4 page 99 where the claimant sustained fracture of the right foot, abrasions etc and was awarded \$900,000.00 which updates to \$994,714.49

2. **Pamella Thompson et al v Devon Barrows**, Claim No CL2001/T143, where the claimant Junior Robinson suffered fracture to the right foot, wounds to the left side of his body, injury to his head, face and eye, with loss of consciousness, permanent loss of upper piece of his right ear and deep abrasions and laceration to right thigh and in December 2006 was awarded \$400,000.00 which updates to \$939,200.00.

[49] Counsel submitted that the award made to Leroy Robinson would have to be markedly reduced as only the fracture of the right foot is similar to the injury sustained by the claimant and that Junior Robinson sustained injuries which she submitted are more serious than the claimant in the case at bar. She therefore submitted that the claimant should receive between \$700,000.00 and \$900,000.00

[50] In relation to the claim for special damages, Counsel submitted that the sum proved for medical expenses are agreed at \$50,250.00. The sums claimed for transportation she noted are challenged.

[51] On her claim for loss of earnings, Counsel submitted that the sum of \$389,016.20 could be allowed, it being arrived at by using a per diem rate of \$153.72 for 252 days, October 22, 2010 to June 30, 2011.

[52] With regard to general damages to be awarded to Mr Anderson, Counsel for the defendants referred to the following cases:

1. **Donovan Champagnie v The Attorney General for Jamaica & Lyndon Wright**, Suit No CL1997/C442, unreported, delivered February 2001 where an award of \$35,000.00 was made to the claimant who sustained cuts and bruises as well as swelling of the limb and scarring in a case where the claimant's leg was trapped in the vehicle after impact. This award updates to \$145,528.59.

2. **Pamela Thompson et al v Henry Kennedy et al**, Suit No 2001/T143 where the injuries sustained by Muret Forrester included trauma to chest, lower leg and right arm and in December 2006 that claimant was awarded \$170,000.00 which when updated amounts to \$398,140.00.
- [53] Counsel submitted that the award made in the two cases referred to should be reduced as Mr Anderson did not suffer cuts or had scarring as the claimant Champagnie and neither did he suffer trauma to his chest or arm, as the claimant Forrester.
- Awards:**
- [54] Having examined the medical reports in respect of Ms Campbell, and considered the cases provided for comparison, I find that a reasonable compensation for pain and suffering and loss of amenities to her would be \$1,200,000.00.
- [55] I have taken into account the injury sustained and the subsequent surgical interventions outlined in the medical report of Dr Gilbert. I have also considered the similarities and distinguishing features of the cases provided for comparison, and have used the case of **Junior Robinson** as the preferred guide, and taken into consideration the fact that although there is no indication that Ms Campbell had any abrasions or lacerations, she had limited range of motion of ankle, had resultant surgical scar and was unable to work for about eight months. I note also that the doctor was of opinion that she may not regain full pre-injury range of motion in the ankle.
- [56] The court is therefore of the view that the injury sustained by Ms Campbell should attract a slightly higher award than that made to Junior Robinson to compensate for her injury as well as incapacitation.
- [57] The claimant has shown on her evidence that she is entitled to compensation for loss of earnings during the period October 22, 2010 to June 30, 2011. She specifically pleaded loss for 28 weeks at \$25,935.0 per week. She has proved on

her evidence that she earned the sum of \$25,935.00 per fortnight and that she was unable to work for about eight months. The sum awarded under this head will therefore be \$363,090.00.

- [58] Ms Campbell has provided evidence to substantiate her claim for medical expenses in the sum of \$50,520.00 which has been agreed.
- [59] In relation to her claim for transportation expenses, she gave evidence that she had to take taxis and that she obtained receipts when she travelled. She could not recall the sums she paid and admitted that she paid \$2,500.00 and \$2,000.00 on separate occasions to travel the same distance by the same taxi and did not ask any questions about the difference.
- [60] I am satisfied that it was necessary for her to travel by taxi during the period of her incapacitation and that as such she incurred some costs. She has not specifically proved the sum pleaded but in view of the circumstances I am inclined to allow the sum of \$20,000.00 which I believe is reasonable.

### **Dalton Anderson**

#### **General damages**

- [61] The medical report of Dr Chisholm shows that Mr Anderson suffered “tender (+) bruises over his left shin and knee” and there was no restriction of movement. With reference to the cases cited, I am of the view that the sum of \$150,000.00 would be adequate compensation for his pain and suffering.

#### **Special damages**

- [62] In respect of the items of special damages pleaded, Mr Anderson has not shown that he had in fact incurred expense of \$10,000.00 that he has claimed and neither has he strictly proved any loss of earnings as a mechanic. The medical evidence provided does not show that he would have been likely to be absent

from work due to the accident. This I find is a classic case of figures being “thrown at the head of the court”. The sums claimed are therefore disallowed.

**Disposition:**

[63] Judgment for the claimants against the defendants.

**Damages assessed and awarded as follows:**

1. **Taneisha Campbell:** General damages for pain and suffering and lack of amenities in the sum of \$1,200,000.00 with interest at 3% from the date of service of the claim form to date of judgment
2. Special damages in the sum of \$70,520.00 with interest at 3% from October 22, 2010 to the date of judgment
3. Loss of earnings awarded in the sum of \$363,090.00.
4. **Dalton Anderson:** General damages for pain and suffering in the sum of \$150,000.00 with interest at 3% from the date of service of the claim form to the date of judgment
5. The claimants are entitled to costs, which are to be taxed, if not agreed.

