



[2023] JMSC Civ. 200

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

**CIVIL DIVISION**

**CLAIM NO. SU 2021 CV 00423**

<b>BETWEEN</b>	<b>DEON CARTER</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ALFORD ALEXANDER JUNOR</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Mr. Mark Wallen, Attorney-at-law for the Claimant

Ms. Sherica Taylor instructed by Bertram Anderson, Attorney-at-Law for the Defendant

September 28, 2023 and October 2, 2023

***Trial – The Road Code - Motor vehicle accident – Turning from major road on to minor road – Duty of care of drivers and pedestrians - Contributory negligence – Apportionment of liability – Fracture to both arms – Quantum of damages***

**MOTT TULLOCH-REID, J**

**BACKGROUND**

[1] Ms Carter was injured on April 13, 2016, when she was hit by the Defendant's motor vehicle as he turned from Lyssons Main Road in the parish of St Thomas on to Nutts River Road, the road on which Ms Carter was walking.

**EVIDENCE**

[2] Ms Carter's evidence is that she was walking along Nutts River Road on the left-hand side. She was intending to cross from Nutts River Road on to Lyssons Main Road as she was on her way to Morant Bay. A truck passed her as she walked

on Nutts River Road and came to a stop some 4ft from the intersection of Nutts River Road and Lyssons Main Road. It had positioned itself to turn left on to Retreat Road. The motor truck having stopped, Ms Carter walked from behind it and stood by the right window near to the front of the truck facing Lyssons Main Road. Her left shoulder was pointing towards the truck's window and her right shoulder was pointing towards the other side of Nutts River Road. As she stood by the truck waiting, the Defendant drove his vehicle on to Nutts River Road and hit Ms Carter on her left side. Ms Carter was flung to the other side of the roadway. She fell on the roadway and was injured. The truck was not damaged.

- [3] Ms Carter confirmed in cross-examination that there were no sidewalks on the roadway and that she could not have continued on the left side of the truck as it was in the corner. She said it was safer for her to go on the right side of the truck and was in the middle of Nutts River Road. By doing so, she would have been able to see Lysson's Main Road to her right. She could not see to her left as the truck was blocking her.
- [4] Mr Junor's account is different. He says he was travelling on Lyssons Main Road coming from the direction of Retreat. He stopped at the intersection of Lyssons Main Road and Nutts River Road, put on his right indicator, waited for the way to be clear and when it was, proceeded on to Nutts River Road. As he drove on to Nutts River Road, the Claimant suddenly appeared from behind a motor truck which had stopped at a stop sign, positioned to turn left on to Lyssons Main Road. Because Ms Carter came suddenly from behind the truck, he was not able to stop his motor vehicle in time and it collided into her left side. Ms Carter fell to the ground just where she was struck by the motor vehicle. Mr Junor's evidence is that Ms Carter was on his side of the road when she was struck and that she was not facing Lyssons Main Road, but rather was facing the other side of Nutts River as she emerged from behind the stationary truck.

## **ANALYSIS**

- [5] Ms Carter was certain in her evidence that she was struck on her left side. She was standing close to the truck on the left side of the roadway. Based on Ms Carter's account, she could not have been struck on her left side if the accident occurred as she has indicated. If she was facing Lyssons Main Road, she would have had to be struck from the front or at least on her right side. Mr Junor's version of how the accident occurred is more agreeable to me. In order to be struck on her left side, Ms Carter could only be facing the other side of Nutts River Road and that would be possible if she were coming from behind the stationary truck.
- [6] That is not to say that Mr Junor's version is 100% believable. His evidence is that the road is at first wide so that it can accommodate three vehicles easily and then narrows so that it can accommodate two vehicles comfortably. He says he was in his lane and denied breaching the lane in which the truck was. He said the front right side of his bus hit Ms Carter. If the road is wide enough to accommodate two vehicles comfortably and he was properly positioned in his lane, it is not likely that if the Claimant suddenly emerged from behind a stationary truck that he would have struck her on her left side. I am of the view that Mr Junor cut the corner when he entered Nutts River Road from Lyssons Main Road, and in doing so hit Ms Carter as she emerged from behind the stationary motor vehicle.

### **Conclusion on the issue of liability**

- [7] Both parties are liable for the accident. The question is to what extent is each blameworthy. Both the motorist and the pedestrian have a duty of care to use the roadway safely so as to prevent harm to themselves or others.
- [8] Ms Carter, as a pedestrian is required to take care to use sidewalks when they are provided. Ms Taylor submits that MS Carter should have been walking on the road facing the traffic. I agree with Ms Taylor. If the Claimant had done so, she would have been seen by the Defendant as she would have been on the right side of the

road. Instead, she was walking on the left side and puts herself in the middle of the road as that was, in her words, safer. I cannot see how walking in the middle of the road or on the roadway is safer than keeping to the left.

- [9] In my opinion, the Claimant ought to have stayed on the left in the corner until the truck had passed and then continued on her way or better yet, she should have been walking on the right side of the roadway as that side of the road would have also taken her to the point at which she could cross on to Lyssons Main Road. By standing by the truck's window, she would also have put herself in danger of being injured by the truck itself. Another thing to note is that in instances such as that, if there was no alternative but to go on the outside of the truck, the best thing to have done was to go around as quickly as possible and get back on the left side of the road. The Claimant did not do that. Instead, she went around the truck and stood at the truck's window, waiting to cross. I do not believe that the Claimant was as careful as she could have been in the situation and find that she is also to be blamed for her misfortune.

## THE LAW

- [10] Mr Wallen relies on the case of **Melvin McCurdy v George Campbell and anor [2014] JMSC Civ 5**. In that case the claimant had to go around a motor truck which was parked partially on the roadway. While in the process of doing so, he was struck from behind by the defendant who was driving a motor car. The Court held at paragraph 17 of the judgment that:

*“In the instant case, the first Defendant ought to have been cautious in passing the parked truck as it had encroached upon the highway. He ought to have borne in mind the probability of pedestrians being inconvenienced by the truck and accordingly to have paid due regard and attention to that probability by slowing down or honking his horn or swerving to avoid hitting such a pedestrian.”*

[11] I will say at the outset that the circumstances are somewhat different. In the **McCurdy case** the claimant was struck from behind, so the defendant had a duty to notify the claimant of his approach on the roadway. In the case before me, the truck was not parked, it was stationary for the purpose of exiting on to Nutts River Road to turn left towards Retreat Road. That is the evidence. In my opinion, a greater duty is owed when vehicles are parked on the roadway thus forcing pedestrians to go around them, as against a vehicle stationary for a short moment to make a turn. There would be a greater duty of care to expect pedestrians to go around a parked vehicle than one that is only stationary for a short time. There would be a lesser expectation for someone to appear suddenly from behind a temporarily stationary vehicle than from behind a parked one.

[12] Ms Taylor relied on the case of **Robert Franklin v Everton Walters and anor [2021] JMSC Civ 36**. This is a decision of Hart-Hines J (Ag) as she then was which was useful in setting out the law governing the use of the roadway by motorists and pedestrians. Section 32(1) of the Road Traffic Act makes it an offence for a motorist to drive a motor vehicle without taking care and being attentive on the roadway and without reasonably considering other road users. Section 51(2) of the Act provides that a motorist must take any action which is necessary to avoid an accident. Pursuant to S95 of the Act, the Island Traffic Authority is permitted to give directions as to how motorists and pedestrians alike are to use the roadway. The Road Code is one such directive.

[13] Paragraph 27 of the decision of Justice Hart-Hines sets out the standard of care which is expected of drivers on the roadways. These include:

- a. driving with due care, attention and concentration;
- b. keeping a proper lookout for other road users, including pedestrians emerging suddenly into the roadway;
- c. driving slowly where pedestrians are on the roadway;
- d. driving within the speed limits and then adjusting speed depending on vehicular and pedestrian traffic;

- e. taking evasive action; and
- f. and sounding horn to alert other road users of approach on the roadway.

**[14]** Pedestrians also have certain responsibilities. These are set out in Part 1 Rules 1, 2 and 4 of the Island Traffic Authority Road Code (1987) and include:

- a. they must take reasonable care of themselves while using the roadway;
- b. they must face the oncoming traffic and not walk with their backs to the traffic;
- c. use a sidewalk or footpaths when they are available avoid walking into the road from in front behind or between stationary vehicles;
- d. ensure that they can see vehicles and can be seen by vehicles before walking into the roadway.

**[15]** The question is whether Mr Junor and Ms Carter abided by these reasonable standards. Mr Junor's evidence is that because the Claimant came suddenly from behind the truck, he could not take any evasive action. This might be true, but as I have already said it is my view that he had in fact cut the corner when turning on to Nutts River Road. I am of the view that had he not done so, he would not have trespassed on the right side of the road on which Ms Carter was emerging from behind the truck and would therefore not have hit her. In this regard, he is not blameless and was not driving with due care and concentration.

**[16]** Ms Carter on the other hand, was walking with her back to traffic. She was walking on the left side of the road when she should have been walking on the right side of the road because of the absence of sidewalks or footpaths. She says she was hidden behind the truck and was not able to see down Retreat Road nor could she be seen from Retreat Road because of her position beside the truck. She therefore did not ensure that she could see vehicles or be seen by vehicles before walking into the roadway, standing by the front window of the truck, and waiting. She walked into the roadway from behind the truck and according to her stood by the

front window waiting to cross. She puts herself into the roadway. In my opinion, she does not by her actions, satisfy the standard of care expected of the reasonable pedestrian.

[17] Denning LJ in **Jones v Livox Quarries Ltd [1992] 2 QB 608, 615** said:

*“A person is guilty of contributory negligence if he ought reasonably to have or seen 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.”*

[18] I am satisfied on the evidence that the Claimant was contributory negligent and agree with Ms Taylor that she should bear the greater responsibility for the collision as there were many ways in which she failed to act as a reasonable pedestrian should. I accept the proportion offered by Ms Taylor as being fair in the circumstances and apportion 70% of the liability to the Claimant. The remaining 30% is to be borne by the Defendant.

## **Assessment of Damages**

### **General Damages**

[19] The medical reports prepared by the Princess Margaret Hospital, Kingston Public Hospital and Dr William Brown, as well as the physiotherapist's report prepared by Andrea Robinson have all been agreed. The injuries sustained by Ms Carter are noted as follows:

- a. Fracture of distal 1/3 of right and left hand
- b. Complete and displaced fracture of radial bones
- c. Both wrists swollen and tender
- d. Pain in both forearms
- e. Cramps, numbness and tingling sensation in the left fingers
- f. Thoracic spine tenderness

- [20] The Claimant was treated with below elbow plaster of paris cast, was given 5 weeks' sick leave and painkillers. She says in her evidence that she did not inform Princess Margaret of back pain at the time she was treated there initially but that she informed KPH. No such notation appears in the medical report and only Dr Brown speaks to the back pain, which is confirmed on x-ray. She was referred to physiotherapy by Dr Brown and she attended the sessions. Physiotherapy addressed both back and hand issues. The Claimant attended on Dr Brown 2 weeks' post-accident and so although there is no evidence of back pain in either of the two public hospital's medical reports, I find on a balance of probabilities that she did in fact experience some back pain because of being hit by the Defendant's motor vehicle and falling to the road.
- [21] In addition to the injuries she sustained, Ms Carter's evidence is that she was affected in that she had to sit a year out of nursing school, and she could not attend to her 8-year-old child. She was not able to attend to domestic chores and she has pain even up to today. She says her left wrist is slightly deformed and is always swollen.
- [22] The last medical report I have is dated June 10, 2016. In it, Dr Brown promised an updated report once physiotherapy was completed. No updated medical report has been presented to this Court. Additionally, none of the reports speak to the Claimant having a "slightly deformed wrist" and no PPD is given. It would have been helpful to the Claimant's case if that information was contained in something prepared by an objective third party, rather than to be said, unsupported, by the Claimant herself. The physiotherapist says there was swelling but that was in 2017. I do not know what her current medical condition is. I do take note however of the fact that the physiotherapist says that there was weakness in both wrists and that physiotherapy sessions were meant to treat with that handicap.
- [23] Mr Wallen relies on the cases of **Leroy Robinson v James Bonfield reported at Khan's Vol 4 page 99, Jermaine Newman v Marva Chambers and anor [2014] JMSC Civ 32** and **Annette Christie v Nutrition Products Ltds and anor Suit CL**



**1990/C429 decided on March 30, 2001**, the decision of Harrison J in support of his claim for an award of General Damages in the amount of \$3.5M. In the case of **Leroy Robinson**, the plaintiff had a fractured right wrist with swelling and tenderness to the left elbow. After six weeks the fracture had healed satisfactorily. His total period of incapacitation was 8 weeks. The sum of \$269,438 was awarded in his favour and this updates to \$2,230,537.37.

**[24]** In **Jermaine Newman case** the claimant had swelling and tenderness to right wrist. He had an undisplaced fracture of the distal radius of right wrist. The fracture had healed with good range of motion. He was awarded \$1.2M which updates to \$1.9M. In **Annette Christie**, the claimant had a classical dinner fork deformity of the left wrist with marked restriction in the range of motion. X-rays indicated that she had a misaligned fracture of the distal 1/4 of the left radius with backward angulation. The joint between the radius and wrist was dislocated surgery was recommended. She had swelling of her left hand, did three sessions of physiotherapy, and had improved during the time she was being seen by the orthopedic surgeon. Over time she developed carpal tunnel syndrome and had a disability rating of 12% of the whole person. Had she done the surgery her disability would have been reduced to 4% of the whole person. Ms Christie was awarded the sum of \$450,000 for her pain and suffering and loss of amenities which updates to \$2.7M approximately.

**[25]** It is immediately clear that the **Annette Christie** case is significantly more serious than Ms Carter's case because there is a disability rating and because Ms Christie needed surgery whereas Ms Carter did not. However, only one of Christie's wrists was broken and so despite the differences, the case is useful in determining damages payable. Ms Carter's case is also more serious than the **Leroy Robinson** and **Jermaine Newman cases**. Newman had an undisplaced fracture. Ms Carter had displaced fracture. Only one wrist was broken in the Newman and Robinson cases, but both of Ms Carter's wrists were broken which would leave her incapacitated to a greater extent. Ms Carter had 5 weeks' sick leave and I accept

her evidence that both casts were removed no later than June 2016, which was 8 weeks post the accident.

[26] I accept Ms Carter's evidence that she experienced back pain given that Dr Brown reported that x-ray results showed muscle spasms. I am not of the view that the scoliosis was because of the accident. No connection was given by doctor between the two, but since there was spasming from an objective test, I accept on a balance of probabilities that there was back pain resulting from the accident.

[27] Ms Taylor offered no cases of her own but said that it was the **Jermaine Newman case** put forward by the Claimant's attorney which was most on point. I believe that all the cases put forward by Mr. Wallen are helpful. Ms Taylor is of the view that damages should be assessed in the sum of \$2M with the 70:30 apportionments in favour of the Defendant.

[28] When I consider the injuries, pain and suffering, and the loss of amenities (inability to take care of her 8-year-old son, the impact the injuries had on her ability to pursue her studies, inability to perform domestic chores), I am of the view that the sum of \$3.1M is a reasonable award in the circumstances.

## **SPECIAL DAMAGES**

[29] The sum of \$87,500 was agreed. The cost of the medical report from KPH will be allowed. A medical report from KPH was presented and agreed. It is Exhibit 2 and the evidence that the Claimant paid \$1,000 for it is accepted. Cost of pharmaceuticals, as evidenced in receipts Exhibits 13A and 13B in the amount of \$22,396.11 is allowed. Receipt for radiograph in the amount of \$7,500 (exhibit 14) is also allowed. In 2016, the minimum wage for a domestic worker was \$6,200. Ms Carter's evidence is that she paid someone to help her at \$6,000 per week for 6 months. The accident happened in April 2016 and both casts came off by June 2, 2016. That would be approximately 2 months. I am not certain why the helper would be needed for so long after the casts were removed and there was no evidence to provide that explanation. I suspect though that although the casts

were removed approximately 2 months after the accident, that Ms. Carter would still have had some issues, and I am prepared to give an additional month for household assistance at \$6,000 per week for a total of \$72,000. As it relates to transportation costs incurred, at paragraph 39 of her Witness Statement Ms. Carter says she incurred travelling expense of \$60,000 in furtherance of her medical treatment. Miss Carter has however not indicated how that travelling expense was incurred. Without any detail, the Court's hands are tied. In her oral evidence, however, Ms Carter presented 2 receipts, one in the amount of \$7,000 admitted into evidence as Exhibit 15A, the other in the amount of \$6,000 admitted into Evidence as exhibit 15B. I accept both sums, as the evidence is that because of her injuries, Ms. Carter had to charter a taxi to take her from her home in St Thomas to Kingston to attend school and the KPH. The total Special Damages is therefore \$203,396.11.

**[30]** My orders are as follows:

- a. Damages are assessed in favour of the Claimant against the Defendant with liability apportioned 70% against the Claimant and 30% against the Defendant.
- b. The Defendant is to pay the Claimant General Damages (Pain and Suffering and Loss of Amenities) in the sum of \$930,000 plus interest at 3% per annum from February 2, 2021 to October 2, 2023, Special Damages in the amount of \$61,018.83 plus interest at 3% per annum from April 13, 2016 to October 2, 2023 and costs in the claim which are to taxed according to the same apportionment of liability, if not agreed.
- c. The Claimant's Attorney-at-law is to file and serve the Judgment.

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**T. Mott Tulloch-Reid**  
**Puisne Judge**