



[2020] JMSC Civ 96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 05213

BETWEEN	ROSALIE ELLISON DOCKERY	CLAIMANT
AND	CARLTON LYNCH	DEFENDANT
AND	CARLTON LYNCH	ANCILLARY/CLAIMANT
AND	CHRISTOPHER SHAW	ANCILLARY/DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 05201

BETWEEN	NOVLETTE SHAW	CLAIMANT
AND	CARLTON LYNCH	DEFENDANT
AND	CARLTON LYNCH	ANCILLARY/CLAIMANT
AND	CHRISOPHER SHAW	ANCILLARY/DEFENDANT

IN OPEN COURT

Ms. Monique Thomas instructed by Bignall law for the Claimant.

Mr. Jeffery Mordecai of Counsel for the Defendant/Ancillary Claimant.

Ms. Racquel Dunbar instructed by Dunbar and Co for the Ancillary Defendant.

Motor Vehicle Accident - Negligence - Breach of Duty of Care.

HEARD: 27th -29th of January 2020; 27th of March 2020.

THOMAS, J.

INTRODUCTION

[1] These are two (2) consolidated claims brought in negligence by Ms. Rosalle Ellison Dockery and Ms. Novelette Shaw against Mr. Carlton Lynch for injuries sustained in a motor vehicle accident. Both Claimants indicate that on the 10th of November 2010 they were passengers travelling in the same motor vehicle on the Burnt Ground Main Road in St. Elizabeth when the Defendant Mr. Lynch who was driving a motor van from the opposite direction, left his side of the road and came on the side of the road they were travelling on and thereby collided in the motor vehicle in which they were travelling. They allege that they sustained injuries as a result of this collision. The Defendant Mr. Lynch has filed an Ancillary Claim against Mr. Christopher Shaw the driver of the motor vehicle in which the Claimants were travelling.

[2] In his defence the Defendant/Ancillary Claimant, Mr Lynch denies any negligence on his part. He avers that the collision was caused by the negligence of Mr. Christopher Shaw. In the Ancillary Claim he claims damages for loss and damage to his motor vehicle. His ancillary claim alleges inter alia that Mr. Shaw, suddenly and without warning drove onto the incorrect side of the road into the path of his motor vehicle, thereby colliding with his motor vehicle, causing his motor vehicle to lose control and to collide in another vehicle.

[3] Mr. Shaw in his defence to the ancillary claim contends that:

It was the Ancillary Claimant Mr. Lynch who caused the accident as he drove on the Ancillary Defendant's, Mr. Shaw's side of the road and collided with the right rear door of his vehicle.

[4] He avers that he tried to avoid the collision by driving on the left embankment but Mr. Lynch continued to encroach on his lawful side of the road and impacted with the right rear section of his vehicle.

[5] The parties have agreed the quantum of damages being claimed by the Claimant and Ancillary Claimant, subject to the determination of liability by the Court.

THE EVIDENCE

The Claim

[6] In her witness statement, Claimant Ms. Dockery states that:

On the 10th of November 2010, she was seated in the back, on the right side, behind the driver's seat of the vehicle being driven by Mr. Shaw on the Burnt Ground Main Road towards Santa Cruz in St. Elizabeth. After she had been in the vehicle for some time, she noticed Miss Novelette Shaw standing along the roadside. Mr. Shaw stopped and Ms. Shaw entered the vehicle and sat in the front passenger seat.

[7] Mrs. Dockery further states that:

The road on which they were travelling, had two lanes of traffic; one heading to and the other coming from Santa Cruz. The road was wide and asphalted. As she travelled, she was looking out of the window when she heard Mr. Shaw shouted. When she looked to see what was happening, she noticed that a van was coming towards Mr. Shaw's car on the left side of the road, which is the same on which Mr. Shaw's car was travelling. Mr. Shaw moved the car further to the left of the roadway and rode the banking in an effort to avoid the collision.

[8] She testifies that:

Although Mr. Shaw's car was on the banking, the driver of the van slammed into the right rear door where she sat, all the way to the extreme rear of the vehicle, then collided with a motor vehicle that was travelling behind Mr.

Shaw's car. Upon impact, her body was tossed over to the left hand side of the vehicle, causing her to be located behind Miss Shaw, who was in the front passenger seat.

[9] On amplification of her witness statement she gave the following clarification:

Two vehicles travelling in the opposite direction could pass comfortably on that road. The banking she referred to is the road side. When she noticed the van coming towards them, it was a distance of approximately 19 to 20 feet.

[10] On cross examination Mrs. Dockery maintains that the vehicle she was travelling in was on its correct side of the road at all times and it was the Defendant's van that came over to its incorrect side of the road, colliding with Mr. Shaw's motor vehicle. She states that when she first saw the Defendant's motor vehicle, it was on the right side of the roadway and the van moved from its correct side to its incorrect side of the road in a distance of 19-20 feet, which is how far away she said the van was when she first saw it.

[11] She denies the suggestion that prior to the impact the Defendant swung his motor vehicle away from Mr. Shaw's motor vehicle She also states that at the time the collision occurred, Mr. Shaw's motor vehicle was stationary because he climbed the banking. As to whether the van lost its right front wheel, she stated that she did not see

[12] She further responded that:

She is familiar with the road where the accident took place. It not true that vehicles travelling on her side would have a left-hand curve and then a straight away; there was a straight away, no corner. Three (3) vehicles could not pass on that road at the same time. The road was not hilly nor was it curvy. The driver was seated directly in front of her. He did not block her vision looking forward. She was looking through the window to the right-hand passenger window. When she heard the shout she turned

her head and looked to her right. When she saw the van, it was to her right. When she first saw the van, it was on the right side coming down. When the collision took place, Mr. Shaw tried to point the car to the banking; on the left side. When the collision took place, the vehicle she was in was off the road because Mr Shaw was trying to climb the bank.

[13] Her evidence on cross examination continues as follows:

She did not look to see whether there was another vehicle behind her. The van appeared to be out of control. It was coming down and then it swung off its side of the road and straight in the car. When the van was coming down to the car Mr. Shaw take the car out of the road and bank it. The van moved from its correct side to the incorrect side. Mr. Shaw's vehicle stopped before the collision. The stopping happened before the van could travel 19-20 feet. She did not see the van lost its right front wheel because when she got hit she could not see anything. She was looking out of the right of the vehicle and not ahead.

[14] The 2nd Claimant Ms. Novelette Shaw, states in her evidence in chief that:

On the particular day she was seated in the front passenger's seat of the motor vehicle being driven by Mr. Shaw heading towards Santa Cruz along the Burnt Ground Main Road. They were travelling on the left of the road. Suddenly and without warning she saw the pickup coming from the opposite side of the road way to the same side of the road she was on. Mr. Shaw shouted out and climbed the banking. That is when she felt the impact of the pickup truck slammed into the right of her vehicle.

[15] On cross examination, Ms. Shaw maintained that the collision took place on the left side of the road, the side that the vehicle she was in was travelling on. She further states that:

The Defendant did not swing his van to the left to avoid the collision. She knew Mr. Shaw before the accident. She did not know Mr. Noble before the

accident. She knew Mr. Lynch a little while before the accident. She is familiar with the part of the road where the accident took place. There was a corner but that's not where the accident happened. It happened on the straight. The corner is to the left going down. They had to finish the corner to see the straight. Two vehicles could pass; one down one up. To get from Santa Cruz to Burnt Ground, you have to go uphill. The vehicle she was travelling in was going downhill. The van was coming uphill. When she first saw the van, it was coming up on the right side of the road. That was the van's correct side of the road. She was looking straight.

- [16] She denied that she was talking to Mr. Shaw at the time of the accident, but later admitted that she was, when confronted with her witness statement. She further testifies that:

When the car got hit she is not sure if it was moving or it was stationary. When the collision took place the car was pointing down left. When the collision took place the car was on the banking. Only a part of the vehicle could stay on the banking. The other part was on the road. It was only after the accident that she realized that there was another vehicle behind the car. When she first saw the van it was on the straight. The car was not going fast. She felt the brake of the car applied before the collision. The car was going around a corner but she could still see the straight. The corner is not that deep. At the beginning of the corner, she could not see the whole of the straight. She does not know if after the collision, Mr. Lynch's vehicle lost its front wheel. She knows that it collided with a second vehicle but she does not know how it happen.

The Evidence of the Defendant/Ancillary Claimant

- [17] The Defendant/Ancillary Claimant, Mr. Lynch, says that on November 10, 2010, he was travelling in his Nissan Frontier motor truck along the Burnt Ground Main Road when upon reaching a section of the road he saw a black Toyota Corolla

motor car with registration number 7288 EW which was travelling in the opposite direction, driving over into his left lane.

- [18]** He states, that upon realizing that the other motor vehicle was coming into the path of his motor vehicle, he swung to the extreme left of his lane in an attempt to avoid the collision, but the driver of the Toyota Corolla failed to stop and instead swung left causing the right front section of his motor vehicle to collide with the right side of the Toyota Corolla, to the rear. This collision the Defendant states, caused his right front tyre to fall off, causing him to lose control of the motor vehicle, which resulted in him colliding with another Toyota Corolla motor vehicle which was travelling in the same direction as the first.
- [19]** It is the Defendant's contention that there was nothing he could have done to avoid either collisions, as he was on his correct side of the road prior to the collision with the first Toyota Corolla motor vehicle and it was the damage caused by the first collision, caused his vehicle to lose control and collide with the second Toyota Corolla on his right hand side of the road.
- [20]** In a supplemental witness statement filed on the 23rd of September 2019, the Defendant restates his contention that he was travelling on his correct left-hand side of the road. He states further that at the time, he noticed that both Toyota Corolla motor vehicles were speeding down the hill and seemed to be racing with each other.
- [21]** He states that he noticed the black Toyota Corolla, while trying to negotiate the slight left-hand corner along the roadway, drove from its correct lane into his left lane. Additionally, in that supplemental statement he states that his contention in his first witness statement that the first collision caused his right front tyre to fall off was erroneous and that it was his right front wheel which fell off, after being struck by the right rear of the black Toyota Corolla.
- [22]** On cross examination, the Defendant states that he was about 20-25 feet from the black Corolla when he first saw it and he noticed that it was in his lane. He says,

he was travelling at a speed of 25 miles per hour prior to the collisions. In answer to the question whether he applied his brakes, he stated that he could not use the brakes at the time because he swung to the left. He subsequently agrees that if it is true that he swung left, then the front part of his vehicle would have been to the left, meaning that it was the middle to the back of his vehicle that would have been exposed to the other vehicle.

[23] At this juncture, I find it necessary to quote the evidence of Mr. Lynch verbatim as this aspect of his evidence will factor significantly in my discussion of the issues. His evidence is:

“I said I saw Mr. Shaw come around a slight corner. I saw him immediately as he came around the corner. When I first saw Mr. Shaw he was about 20-25 feet away. The accident happened about 15 feet away from the corner. No, it did not take place on the straight road. I don't remember if I could have seen him before he first approached the corner. If they come wide, you could see them. I did not see Mr. Shaw.”

[24] He further states:

“I am saying that the collision happened on the corner, not on a straight. The accident happened as Mr. Shaw approach the corner not as he finished the corner. I was entering the corner when the accident happened. I can't say what the distance was between Mr. Shaw and Mr. Noble's vehicles when I first saw them. It is my evidence that I cannot see around the corner. It was before the accident that I saw the two vehicles racing. I couldn't say for how many seconds or minutes I saw these vehicles racing; I never check. At the time when I saw them racing, Mr. Shaw was not on his correct side of the road. He was on my side when I saw him. The first time I saw Mr. Shaw's vehicle was when he was coming around the corner. I did say it was about 15 feet from the corner that the accident occurred”.

The Ancillary Defence

[25] In his defence to the ancillary claim, Mr. Shaw denies the allegations of negligence of the Ancillary Claimant, and denies that the Ancillary Claimant is entitled to the relief claimed. Mr. Shaw further avers that it was the negligence of the Ancillary Claimant that caused or at least significantly contributed to the accident, in that:

- (a) The Ancillary Claimant drove on to the Ancillary Defendant's lawful side of the road and there collided with the right rear section of the Ancillary Defendant's vehicle.
- (b) The Ancillary Defendant tried to avoid the collision by driving on the left embankment but the Ancillary Claimant continued to encroach onto the Ancillary Defendant's lawful side of the road and thereby collided with his vehicle.
- (c) The impact to the right rear section of the Ancillary Defendant's vehicle pushed it further into the embankment thereby causing damage to the left side of the Ancillary Defendant's vehicle.

[26] On cross examination, Mr. Shaw states:

The accident took place in a bend, possibly a 5-degree bend. The 5-degree bend enables someone to see 4 or 5 chains down the road. If he were 4 or 5 chains away from the bend someone could see 2½ or 3 chains around the bend. When the collision occurred it was just as he come out of the bend. All of the vehicles cleared the bend.

[27] He further states that:

The first time he saw Mr. Lynch's vehicle it was about 2½ - 3½ chains away. Mr Lynch was on the straight, he was in the bend going on to the straight. When he first saw Mr. Lynch he was on the right-hand side, his correct side. His vehicle was not on Mr. Lynch's side of the road.

[28] His evidence also is that at some point after he first saw Mr. Lynch's vehicle, he perceived that there would be a head on collision as Mr. Lynch was on his (Mr. Shaw's) side of the road. As such, he put his vehicle to the left. He denies the suggestion by Counsel that he went to the left because he was on the right-hand side. He maintains that Mr. Lynch did not swing left away from his vehicle.

[29] Mr. Shaw admits, on suggestions by Counsel Mr. Mordecai that of the two points of impact, (i.e., the impact with Mr. Shaw's vehicle and the impact with Mr. Noble's vehicle) the point nearest to the middle of the road was the accident with Mr. Noble and Mr. Lynch and as such, agrees that the natural inference to be drawn is that for the accident with Mr. Lynch and Mr. Noble to have occurred, Mr. Lynch's vehicle would have had to drift further to Mr. Lynch's left. He however maintained that Mr. Lynch encroached onto his side of the road way and denies that he was on Mr. Lynch's side.

[30] Mr. Anderson Noble was called as a witness on the Ancillary Defendant's case. In his evidence in chief he states that:

On the relevant date he was travelling behind Mr. Shaw along the Burnt Ground Main Road. He was traveling at about 50 km per hour. He travelled behind Mr. Shaw for a little less than two minutes. He was about 2-3 chains away when he saw Mr. Shaw's vehicle brake up in front of him. On seeing this he applied his brakes as he saw that Mr. Shaw was coming to a stop. He looked up and saw a truck, a brown Nissan Frontier licensed 2261 ET. When he saw the Frontier it was coming in the opposite direction but it was moving from its correct side of the road on the right to the left hand side of the road in which both himself and Mr. Shaw were traveling.

[31] He further states that:

He saw Mr. Shaw's vehicle brake up and tried to swerve away further left to avoid the Nissan Frontier. He realized that the vehicle brakes up as he saw the brake lights on Mr. Shaw's vehicle and saw when his vehicle went further left. The Nissan Frontier still continued to travel on Mr. Shaw's side

of the road and then he saw the him (the driver of the Nissan Frontier) try to swing away from him (Mr. Shaw) but it was too late as he ended up colliding into the right rear door or Mr. Shaw's vehicle. Mr. Shaw's vehicle was stationary when the collision occurred between Mr. Shaw's vehicle and the Nissan Frontier. After the collision between the Nissan Frontier and Mr. Shaw's vehicle it appeared that the driver of the Nissan Frontier lost control of his vehicle and he ended up colliding head on into his (Mr. Noble's) vehicle which was on the left hand side of the road. He had to force his door open in order to get out. When he came out, he recognized the driver of the Nissan Frontier whom he knows as Carlton Lynch as they basically grew up in the same area. There was extensive damage to his vehicle. There was damage to the front of the Nissan Frontier as well. There was nothing else Mr. Shaw could have done to avoid the accident.

[32] On cross examination he states that:

He has known Ms. Dockery and Ms. Shaw for some time before the accident. The accident happened on a straight road. There it just a little bend but one can see around it. Before the bend one can see about 2-3 chains down. He entered the main road from a minor road about ¼ mile before the collision. He was travelling behind Mr. Shaw for more than 1 minute. He was approximately 2 chains behind him. He did not lose sight of Mr. Shaw's vehicle during the time.

[33] He further states that:

When he was going around the bend his vehicle was on his left side. He couldn't see Mr. Lynch's vehicle because he was behind Mr. Shaw. Only when Mr. Shaw brake up after the collision took place, he saw Mr. Lynch's vehicle. He saw Mr. Lynch's vehicle same time as the collision. The collision did not take place on Mr. Shaw's incorrect side of the road. He could see Mr. Shaw's vehicle at all times but he could not see Mr. Lynch's vehicle until at the time of the collision. He was behind Mr. Shaw all along.

[34] He further asserts that:

When he saw Mr. Shaw's vehicle it was not coming from the right and going left, he was going left practically in the banking. When he saw the collision take place, it was in the bend. He stopped about a chain from Mr. Shaw. He never reached the bend as yet. Mr. Shaw was not yet on the straight, but on the bend. After the collision happened, it seems that Mr. Lynch just lost control of his vehicle and came head on into his vehicle behind Mr. Shaw's vehicle. Mr. Lynch's vehicle did not travel in a straight line when it lost control. After it hit Mr. Shaw's vehicle, Mr Lynch's vehicle swung to his (Mr. Noble's left) that would be his right and come into his vehicle.

[35] He agrees that:

His statement says that the first time he saw Mr. Lynch's vehicle it was on its correct side of the road. The way Mr. Lynch moved from there to where the collision occurred was by moving to the right.

[36] He further states that:

From what he saw the accident occurred when Mr. Lynch was swinging to his right and Mr. Shaw was swinging to his left. His vehicle was a little more to the right of Mr. Shaw's vehicle. Mr. Shaw vehicle is a little wider than his. He saw damage to the right rear of Mr. Shaw's vehicle. He and Mr. Shaw's vehicle were coming down a hill so Mr. Shaw was not driving too fast, he had his foot on the brake. After the collision he saw Mr. Shaw's vehicle. It is not true that it was 50ft away from the collision, it was parked right where the collision happened. The road was wide enough so only 2 vehicles could pass in opposite directions.

[37] He states that:

The collision took place right in the bend. In the collision with Mr. Shaw's vehicle Mr. Lynch's vehicle did not lose control because it had damage to

the right front wheel. The front tyre was not blown out. The right side of Mr. Lynch's vehicle hit his vehicle. The right front of Mr. Lynch's vehicle collided with the back door to the right of Mr. Shaw's vehicle; from the back door to the rear fender. The accident did not take place on Mr. Lynch's correct side. It was on Mr. Shaw's correct side. After the collision with Mr Shaw's vehicle Mr. Lynch's vehicle lost control and collided his vehicle. When Mr Lynch collided with Mr. Shaw, both vehicles were not moving. Mr. Shaw stopped.

The Expert Evidence

[38] The expert witness Mr. Norris Campbell, a motor vehicle assessor, assessed Mr. Lynch's motor vehicle after the accident in 2010 and prepared a report in that regard. His expert opinion of the damage to the Defendant's vehicle is that the right front wheel was severely out of line. The tyre was attached to the rim but the tyre was deflated. The wheel, he stated, was on the vehicle but it was out of line. He explained that by "out of line" he meant that the left front wheel was straightly [sic] positioned and the right front wheel was turning towards the right.

[39] On cross examination, He notes that in vehicles with no damage, the wheel would have been straight and as such the Defendant's front wheel being turned to the right meant that it was forcibly pushed to the right. When asked whether the damage to Mr. Lynch's vehicle could have happened if both vehicles involved in the collision had turned to their respective left, he was clear that if that were the case, he would not expect to see that damage to the Defendant's front tyre, as it would mean that the back of the vehicle would have been exposed instead of the front. He explained that "for the wheel to be in that position it would have to mean that prior to the accident the wheel would have to be locked to the right."

The Issues and Applicable Law

[40] This is a claim in negligence. Therefore, the general principles relating to the law of Negligence would apply. The authorities are clear in relation to the what a

Claimant is required to prove in order to succeed in a claim grounded in negligence.

[41] The Claimants and Ancillary Claimant must establish that:

- There existed a duty of care on the part of the, Defendant and or the Ancillary Defendant towards them as Claimants.
- The Defendant and or Ancillary Defendant breached that duty of care.
- Damages were occasioned to them as Claimants arising from that breach

That the damage caused to them as Claimants was foreseeable by the Defendant and or the Ancillary Defendant. (See the case of **Ann v Merton** 1997 2 ALL ER 492 and **J.P.S. Co. Ltd v Pamela Rance** Civ. App. No 11/92).

[42] In the case of **Donoghue v Stevenson** - [1932] A.C. 562 Lord Atkin stated that:

“One must take reasonable care to avoid acts or omissions which can be reasonably foreseen would be likely to injure your neighbour. One’s neighbour in law, he said, is a person who is “so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

[43] The Court’s pronounced in **Esso Standard Oil S.A. Ltd. & Anor. vs Ivan Tulloch** [1991] 28 J.L.R. 553 that “all users of a road have a duty of care to other road users”.

[44] In **Nance v. British Columbia Electric Railway Co. Ltd.** [1951] 2 All ER 448, Viscount Simon said at page 250:

“Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other

a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.”

Whether the Defendant/Ancillary Defendant owed a duty of care to the

Claimant/Ancillary Claimant

[45] There is no dispute on the case that the parties in both the Claim and the Ancillary Claim were road users. Consequently, there is no dispute that a duty of care is owed by the Defendant to the Claimants and the Ancillary Defendant to the Ancillary Claimant. Therefore, the issue which lies to be determine is which driver breached his duty of care by driving on his incorrect side of the road without due regard for the other road users.

Whether It was the Defendant/Ancillary Claimant or the Ancillary Defendant Who Breached His Duty of Care

[46] In assessing the evidence, I bear in mind that the Claimants and the Ancillary Claimants bear the responsibly of proving on a balance of probability that the defendant in the case of the Claimant and the Ancillary Defendant in the case of the Ancillary Claimant drove without due care and attention giving rise to the accident and the consequential damage to them. The main issue in the determination of this case is one of credibility.

Submissions

[47] Counsel for the Claimants submits that:

“In assessing credibility, demeanour ought to be considered.” She relies on the case of *Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman Suit No. CL H035/1999 delivered September 16, 2005* in which McDonald J noted that:

“It is the Claimant who must satisfy the Court on a balance of probabilities that he has proven the allegation of negligence against the Defendant. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses”.

[48] In this regard, she submits that:

“All the witnesses except Mr. Lynch gave their evidence calmly, composed and maintained eye contact with the Court at all times. They were not argumentative or sarcastic in responding to Counsel for Defendant when tested. Unlike these witnesses Mr. Lynch did not maintain eye contact with the Court and smirked when questions or suggestions were made to him that he was the cause of the accident. He seemed to be on edge and confused as to his version of events and instructions that he possibly may have given his Attorney-at-Law.”

[49] Counsel for the Ancillary Defendant submits that in assessing the Defendant’s version of events the Court ought to consider the fact that:

“The Claimants could have sued either Carlton Lynch or Christopher Shaw or both. They chose to sue only Carlton Lynch. Anderson Noble is not even a party to the claim. He gave evidence solely as a witness and not as a party. He therefore had no personal interest in the case or its outcome. They have no reason to lie about how the accident occurred. Only Carlton Lynch and Christopher Shaw would be motivated to do that. Yet no one else has supported Carlton Lynch’s version of the events”

[50] Mr. Modecai on behalf of the Defendant/Ancillary Claimant submits that there is a contradiction between Mr. Shaw’s account and Mr. Noble’s account as to how the accident occurred. He points specifically to Mr. Noble’s evidence in chief in which he states that the Nissan Frontier continued to travel on Mr. Shaw’s side of

the road, then he saw him try to swing away but it was too late and he ended up colliding in Mr. Shaw's rear door. Whereas, Mr. Shaw indicates that Mr. Lynch did not swing left away from his vehicle and that at no stage did he see Mr. Lynch's vehicle moving to the left.

Discussion

- [51] Having considered the evidence in light of the submissions of Counsel and the burden of the Claimants and the Ancillary Claimant, I find that the evidence of the Claimants on the Claim are for the most part consistent. Additionally, they support the version given by the Ancillary Defendant and Mr. Noble that the accident occurred on Mr. Shaw's correct side of the road.
- [52] I am cognizant of the fact that each of the Claimants, describes the actual scene of the accident in a slightly different way. Ms. Shaw states that the car was going around a corner but you could still see a the straight. The corner is not that deep. At the beginning of the corner, you can't see the whole of the straight. However her evidence is that the accident took place on the straight.
- [53] Ms. Dockery states there was a straight away, no corner. She does not remember a corner. It was on a straight. Mr. Shaw describes the area as having a 5-degree bend. He however states that where the collision occurred his vehicle had just come out of the bend. Mr. Noble describes a bend. That is "It is straight road, as it is just have a little bend but you can see around it. Before you take the bend, you can see about 2-3 chains down" He however states that the accident happened in the bend.
- [54] However, in accordance with common sense and reality, it is evident that different persons will describe the same things in different ways depending on their perception and it does not necessarily mean they are lying. I also notice that the person who said there was no corner, that is Ms. Dockery, also says she does not remember if there was a corner.

- [55]** Incidentally, The Defendant/Ancillary Claimant Mr. Lynch describes it in his evidence in chief as a slight left hand corner. In light of all the evidence, I find that the important and relevant factor to the consideration of the issues that I am required to determine is that all parties had to negotiate a bend or corner prior to the impact.
- [56]** Despite the contradictions identified, I find that the Claimants and the Ancillary Defendant and his witness Mr. Noble are more consistent than contradictory in the material aspects of the case. That is all have said without any contradiction on their evidence, or being discredited that the collision occurred on Mr. Shaw's correct side of the road.
- [57]** Mr Shaw's evidence is that the first time he saw Mr. Lynch's vehicle it was about 2 ½ - 3 ½ chains away, on the right-hand side, his correct not fully on his correct side of the road. There was no time that day that he saw Mr. Lynch entirely on his correct side of the road.
- [58]** Mr. Shaw also agrees that in relation to accident with Mr. Noble and Mr. Lynch. the natural inference to be drawn is that for the accident with Mr. Lynch and Mr. Noble to have occurred Mr. Lynch's vehicle would have had to drift further to Mr. Lynch's left.
- [59]** I find that this evidence is not inconsistent with the evidence that the collision occurring on Mr. Shaw's correct side of the road. That is Mr. Shaw's left side. On this version of the evidence, in swinging away after the impact from Mr. Shaw's vehicle, which was off the road to Mr Shaw's extreme left, Mr. Lynch would have been on his extreme right swinging towards his left. That is, his manoeuvre at that juncture, despite swinging towards his left would not necessarily place him on his correct side of the road. In fact, this would inevitably mean that Mr. Lynch would be swinging towards the oncoming vehicle properly positioned on the left.
- [60]** Admittedly there appears to be some confusion on Mr Noble's evidence as to the manoeuvring of Mr. Lynch's vehicle after he collided in Mr. Shaw's vehicle. That

is where he states that” after him hit Mr. Shaw vehicle, the vehicle swings to my left that would be his right and come into my vehicle. The time when Mr. Lynch vehicle collided into me, it was swinging to its right”. However this does not affect the consistency of his evidence, with that of Mr. Shaw and the Claimants that the collision with Mr. Shaw’s vehicle occurred on Mr Shaw’s correct side of the road while Mr Shaw’s vehicle was positioned on the left banking.

[61] Additionally, the evidence of the assessor Mr. Noris Campbell supports the version of the Claimants, the Ancillary Defendant and the witness Mr. Noble on the material aspects of this case. Mr. Campbell who though called by Mr Lynch was accepted as an expert witness of the court. Therefore, I agree with the position as posited by Mr. Mordecai that he should be treated as independent witness. Additionally, I am aware of, and has applied the law that his evidence should not be automatically accepted simply because he is an expert but should be examined in light of all the other evidence before the court. (See the case the case of **Fuller v Strum** [2001] WTLR677.) In light of the foregoing I have treated with Mr Campbell’s evidence accordingly.

[62] I find that when I examine the evidence of Mr. Campbell, it lends more credence to the versions of the Claimants and the Ancillary Defendant and contradicts the version of Mr. Lynch .The fact that he states that the right wheel was on the vehicle but out of line, turning towards the right, contradicts the version of Mr. Lynch that the right wheel of his vehicle was hit off and that it was the hitting of the right wheel that cause his vehicle to end up on his right side of the road thereby colliding in Mr. Noble’s vehicle.

[63] I take note of the fact that in his report Mr. Campbell did conclude that the accident could have occurred as reported by Mr. Lynch. However it is of great significance that on cross examination he did indicate that at the time of preparing his report he did not have any information from the report of Mr Lynch that both vehicles had turn to their respective left at the time of collision.

[64] Therefore where the opinion of the expert is premised on his own observation in addition to information provided, it is my view that he is entitled to revisit his conclusion, where he is provided with relevant information of which he was previously bereft.

[65] Of particular note is the aspect of Mr Campbell's evidence, where he states that:

If both vehicles are turned to their respective left, this damage he observed to the wheel could not have happened. He would not expect to see that damage to the front tyre. The back of the vehicle would be out instead of the front. In that position the impact with Mr. Shaw's vehicle could not have caused his vehicle to swing right. For the wheel to be in that position it would have to mean that prior to the accident the wheel would have to be locked to the right.

[66] Mr. Mordecai has submitted that this line of questioning should be posed to an Accident Reconstruction Expert. However, I do not share this view. The fact is, Mr. Campbell was questioned on the damages he observed on the motor vehicle in light of the evidence that has been given by Mr. Lynch as to the position of the vehicles at the time of the collision.

[67] Bearing in mind that Mr. Lynch's evidence is that he had swung to his left just before the impact with Mr. Shaw's vehicle, this evidence of Mr. Campbell is consistent with the evidence of the Claimants and Mr. Shaw that the accident occurred as a result of Mr. Lynch swerving to the right on their side of the road.

[68] Additionally, it is not totally inconsistent with the evidence of Mr. Noble who did also indicate that Mr. Lynch did serve right onto Mr Shaw correct side of the road. His evidence that Mr Lynch tried to swing away from Mr. Shaw's vehicle but it was too late, indicates to me that the impact had already occurred before he was able to swerve from Mr. Shaw's vehicle.

[69] Additionally, Mr. Noble states that he could see Mr. Shaw's vehicle at all times but he could not see Mr. Lynch's vehicle until at the time of the collision. Mr. Shaw and the Claimant's being at a better vantage point than Mr Noble, he being behind Mr. Shaw's vehicle, I am more prepared to accept their version as to the manoeuvre of Mr. Lynch's vehicle immediately prior to the impact.

[70] However of fundamental importance is the consistency of all these witnesses that the impact with Mr. Shaw's vehicle occurred on Mr. Shaw's correct side of the road. Having observe the demeanour of the witnesses I accept this as truth. Therefore I accept the evidence that Mr Lynch's was already to his right prior to the impact. That is, the impact with Mr. Shaw's vehicle occurred on Mr. Shaw's correct side of the road and not on Mr. Lynch's correct side of the road.

[71] On my examination of the evidence of My Lynch to include his demeanour I find him to be the least convincing of all the witnesses. I find that his evidence is fraught with grave unresolved inconsistencies. Mr Lynch states that "he was driving in his correct left lane when he noticed Black Toyota Corolla driven by Mr. Shaw and a White Toyota Corolla driven by Anderson speeding down hill and seem to be racing. Mr Shaw who was trying to negotiate a slight left hand corner, drove from his correct lane into his lane and he swung to the extreme left in an attempt to avoid the collision. He angled the front of his vehicle to the left and the right of that vehicle towards the rear collided with the right front section of his vehicle. His right front wheel fell off after being struck by the right rear of the other vehicle and he subsequently loss control of his vehicle and ended up on the incorrect side of the road where he collided with vehicle driven by Noble Anderson". However I take note of the fact that the evidence with regards to the racing and speeding was lacking from his earlier statement, but was included in his later statement.

[72] I find that this would have been such a significant factor to the cause of the accident that it would have been fresh in his mind to be included in his earliest statement. Mr Mordechai has submitted that the fact that Mr Nobles' evidence in chief is that he was travelling at 50kmph behind Mr. Shaw is an indication that Mr. Shaw was

speeding around the bend and that at that excessive speed he was more likely to encroach on Mr Lynch's side of the road.

[73] However it is my view that 50 kmph is not considered to be excessive speed in Jamaica. In fact, this is the speed limit in built up areas in Jamaica. I also balance this against the unchallenged evidence of Mr Noble that he and Mr Shaw were going downhill and Mr. Lynch was coming up hill. In light of this evidence I find that in those circumstances his evidence that Mr. Shaw was not driving too fast, he had his foot on the brake is more plausible.

[74] Mr Lynch agrees that when he swung to the left, the front part of his vehicle would have been to the left when he swerved. That would mean that the middle to the back of the vehicle would have been exposed to the other vehicle. Based on his demonstration the front of his vehicle was to the left and the back slant towards the right. Therefore based on his description of the accident, that both vehicle swung to their respective left prior to the collision, both being in a slant position I would expect that it would have been the middle to the rear of his vehicle that would come in contact with Mr. Shaw's /the Ancillary Defendant's vehicle.

[75] Further Mr. Lynch states that he said he saw Mr. Shaw immediately as he came around the corner the slight corner. When he first saw Mr. Shaw he was about 20-25 feet away. However I find his evidence conflicting for the following reasons:

1. He states that the accident happened as Mr. Shaw approached the corner not as he finished the corner.
2. Mr. Shaw was entering the corner when the accident happened. Yet he further states that the accident happened about 15 feet away from the corner. Yet again he states that the corner is long.

[76] Further, he states that he does not remember if he could have seen Mr. Shaw's car before he first approached the corner; "if he come wide", he could have seen them. (Speaking of both Mr. Shaw's and Mr. Noble's car) Then he said, "I did not

see Mr. Shaw". The fact that he states that he did not see Mr Shaw before he reached the corner and that he could see them if they" came wide" is suggesting to me that he is admitting that Mr. Shaw did not, "come wide" before he reached the corner. Mr Shaw having not," come wide" would essentially place Mr. Shaw on his correct side of the road.

[77] Additionally, Mr. Lynch having admitted that the corner was a right-hand corner; and that he would have to turn his wheel to the right and that the accident happened as he was entering the corner, I find that it is far more likely that on entering the corner, with his wheel turning right, that he would veer to his right rather than Mr Shaw veering to his right. This is against the background that he admitted that going around the corner/bend Mr Shaw would turn his wheel to the left. [

[78] Additionally, he has pointed to no obstruction on Mr Shaw's' side that would cause him to veer away from his left side. However if Mr Lynch not did not negotiate the right bend properly it is more likely that he would veer right to Mr. Shaw's correct side of the road.

[79] Mr. Lynch's evidence is that he could see around the corner. Additionally, he spoke of seeing Mr. Shaw's vehicle for the first time just as it came around the corner and that Mr. Nobles vehicle was right behind Mr. Shaw's. I also note his evidence that it was as they reached in the corner he saw them and that it was before the accident that he saw the two vehicles racing.

[80] In putting the following pieces of Mr. Lynch's evidence together that:

- (a) The vehicles had to come wide before they enter the corner for him to see them.
- (b) The first time he saw Mr. Shaw's vehicle was when he entered the corner; the accident happened as Mr. Shaw approached the corner.
- (c) He could not have seen the vehicles before they entered the corner.

I find that there can be no truth to his evidence that he saw both vehicles speeding and appear to be racing prior to the collision.

[81] I also bear in mind that Mr. Lynch's evidence with regards to the speeding was missing from his first statement signed on the 7th of September 2018. In fact, the supplemental statement which contains this bit of evidence was signed on the 20th of September 2019 and filed on the 23rd of September 2019. That is over a year after signing his original statement and a little over two months after the statements of Mr. Shaw and Mr. Noble were filed. Their statements were filed on the 15th of July 2019.

[82] Mr. Shaw and Mr. Noble have denied this allegation. They impress me as witnesses of truth, on the material issues. I find it reasonable on the evidence for me to conclude and I so conclude that this a recent concoction on the part of Mr. Lynch in an attempt to strengthen his case in order to pin liability of the accident on Mr. Shaw.

[83] Furthermore Mr. Lynch states that when he first saw the vehicles Mr. Nobles' vehicle was right behind Mr Shaw's. He states that Mr. Noble's vehicle was always on its correct side of the road. Therefore this contradicts his evidence that when he first saw Mr. Shaw's vehicle it was on his side of the road. If that were so then Mr. Noble's vehicle when he first saw it could not have been right behind Mr. Shaw's Vehicle. If Mr. Noble was always on his correct side of the road it would lend to the logical inference that for Mr Noble's vehicle to be right behind Mr. Shaw's vehicle Mr. Shaw' vehicle would also have had to be on his (Mr. Shaw's) left.

[84] Essentially, I reject the evidence of Mr. Lynch that that It was the impact with Mr. Shaw's vehicle that caused his vehicle to be on the wrong side of the road. I find that Mr. Lynch's vehicle was already on Mr. Shaw's correct side of the road when the impact occurred. Mr Mordecai submits that the case of **Cooper v Floor Cleaning Machines Limited**, CA 20th of October, 2003, is also instructive. There the Court of Appeal in England held that, the duty of a trial judge in light of

diametrically different accounts of the accident was to analyse such evidence as there was and to conclude which of the two was more likely. On adopting this approach, the Court found in favour of the Defendant. I accept the view that the principle laid down in that case is applicable to the case at bar. However contrary to counsel's view having analysed all the evidence carefully I find that the version of the Claimants and the Ancillary Defendant is more likely

[85] I share the view of Ms. Thomas, put forward in her submissions, that if the court were to take the entire evidence of the Claimants, the Ancillary Defendant and Mr. Noble, the court will find that occurrence of the damages to both vehicles would have been more plausible and more consistent with the version of Claimant, the Ancillary Defendant and Mr. Noble's version as to how the accident occurred.

[86] Despite the presence of the inconsistencies that I have already highlighted, among the evidence of the Claimants the Ancillary Defendant and Mr. Noble, which I do not consider to be major, I find that their evidence taken together with that of the assessor provide a more plausible explanation of how the accident occurred. Ms. Thomas has submitted that the inconsistencies on Mr. Lynch's version of the accident are substantial. For reasons previously outline I am inclined to agree with her.

[87] I find that the evidence of Mr. Lynch to include his demeanour has been discredited to the point that I cannot accept his version as the more probable cause of the accident. I reject his evidence that Mr. Shaw was on his side of the road when the impact with Mr. Shaw's vehicle occurred.

Whether The Ancillary Defendant/the Driver of the Claimants vehicle is Contributory Negligent

[88] Mr Mordecai has relied on the case of ***Baker v Market Harborough industrial Co-Operative Society Ltd., Wallace v Richards (Leicester) Ltd*** (1953) WLR 1470, in suggesting that I should apportion blame equally to both drivers in the event that I am unsure as to how the accident occurred. It is noticeable that in

the afore-mentioned case, the accident occurred in the centre or close to the centre of the road where it was difficult for the court to apportion the blame. In those circumstances both parties can be found to be 50% negligent.

[89] However, I find the case at bar distinguishable from the afore-mentioned case. In the instant case the evidence which I have accepted is that the collision occurred not in the middle of the road but on Mr. Shaw's side of the road. That is Mr. Shaw's car was to the extreme left on the banking. Essentially this was not a slight encroachment or drifting. The clear evidence is that Mr. Lynch drove over on to Mr. Shaw's side of the road at collided at a point where Mr Shaw's vehicle was away from the middle of the road on the left banking. The evidence of the Claimants, Mr. Shaw and Mr. Noble which I accept is that in an attempt to avoid the accident, Mr. Shaw swung to the left bank and stopped. Consequently, I find that he did all he could to avoid the accident. Despite denying that the collision with Mr. Shaw's vehicle took place on Mr. Shaw's side of the road, Mr. Lynch admits that Mr. Shaw moved further left. I find that this moving left was in an attempt to avoid the collision. Consequently, I find that there is no basis for me to apportion any blame to him.

[90] Therefore, on the totality of the evidence I find that the accident occurred as a result of Mr. Lynch driving from his correct side of the road on Mr. Shaw's correct side of the road into the path of the vehicle being driven by Mr. Shaw in which the Claimants were passengers. I find that on the Claim, the Claimants have successfully discharged their burden on a balance of probability that the Defendant Mr. Lynch breached his duty of care to them. I find that My Lynch is 100% negligent in causing the accident and that there is no basis for me to apportion liability between Mr. Lynch and Mr. Shaw.

Consequently, I find Mr Lynch 100% liable in damages to the Claimants.

[91] I find that on the Ancillary Claim, the Ancillary Claimant Mr Lynch has failed to discharged the burden on a balance of probability that Mr. Shaw has breached his

duty of care to him. Therefore, on the Ancillary Claim I enter judgment for the Ancillary Defendant.

ORDERS

On the Claim

(1) In terms of liability Judgment is entered for the Claimants.

Damages

(2) I make the following award in terms of damages agreed between the parties.

(a) Mrs. Dockery- \$2M Global to include interest and Costs

(b) Ms. Shaw- \$1M to include interest and Costs.

On the Ancillary Claim

(3) Judgment for the Ancillary Defendant

(4) Cost to the Ancillary Defendant to be agreed or Taxed.