



[2019] JMSC Civ. 264

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 04180**

<b>BETWEEN</b>	<b>TAMAR ELLIOT</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JOSEPH MURRAY</b>	<b>DEFENDANT</b>

**CONSOLIDATED WITH:**

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 04153**

<b>BETWEEN</b>	<b>RONIQUE SIMPSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JOSEPH MURRAY</b>	<b>DEFENDANT</b>

**CONSOLIDATED WITH:**

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 04050**

<b>BETWEEN</b>	<b>KINGSLEY SIMPSON (Administrator of the estate of Dwayne Simpson)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JOSEPH MURRAY</b>	<b>DEFENDANT</b>

Mr. Paul Edwards instructed by Bignall Law for the Claimants

Mrs. Pauline M. Brown Rose for the Defendant

**Civil practice and procedure – Negligence – Motor vehicle collision – Negligence–  
Inevitable accident defence**

**Heard: February 6 and 7 and June 28, 2019**

**IN OPEN COURT**

**ORAL JUDGMENT**

**PALMER HAMILTON, J**

- [1] On the 28<sup>th</sup> day of June 2019 I made oral judgment in this matter. I had promised to put my reasons in writing. I do so now.

**BACKGROUND**

- [2] This consolidated matter arose from a motor vehicle accident which occurred on the 27<sup>th</sup> day of April 2013 along the Rockfort main road in the parish of Saint Andrew. The Claimants are seeking damages for negligence arising out of this accident. They alleged that the Defendant was negligent when he failed to keep his Toyota Hilux Vigo motor truck licensed 2059 EJ (hereinafter “the motor truck”) at a safe distance behind the Nissan Sunny motor car licensed 2549 FX (hereinafter “the motor car”) being driven by Dwayne Simpson (now deceased) (hereinafter “the deceased”) and failed to take reasonable steps to avoid the rear end collision between the aforesaid motor vehicles. The Claimants Tamar Elliot and Ronicque Simpson were occupants of the Nissan Sunny motor car.
- [3] The Defendant filed a Defence stating that the collision arose from an inevitable accident and notwithstanding the exercise of reasonable care and skill on his part, the Defendant was unable to avoid the said collision.

- [4] The undisputed and agreed facts are that on the 27<sup>th</sup> day of April 2013 there was a herd of cows crossing the road at the time of collision and that the collision occurred in the right lane of the dual carriage way. It is also undisputed that both vehicles were travelling in the same direction and that a rear end collision occurred between the motor truck and the motor car.

### **THE CLAIMANT'S CASE**

- [5] The witness statement of Tamar Elliot and Ronicque Simpson were admitted into evidence and allowed to stand as their evidence in chief. They were extensively cross examined. The Claimants contended that while travelling along the Rockfort main road in the parish of Saint Andrew they saw a number of cows in the process of crossing the road. The driver of the motor car in which they were passengers, that is, the deceased came to a gradual stop in the right lane of the dual carriageway waiting for the cows to pass. Both witnesses alleged that there was another motor vehicle beside their motor car also waiting for the cows to cross.
- [6] The Claimants further contended that after a few moments and while the cows were still in the process of crossing, they heard an engine racing and they felt a heavy impact to the rear of the motor car. They indicated that they were both thrown forward on impact. The witnesses spoke to the fact that the Defendant at the material time seemed to be intoxicated.
- [7] Both witnesses maintained under cross examination that the motor car in which they were passengers was stationary for a while before the impact.

### **THE DEFENDANT'S CASE**

- [8] The Defendant proffered that the collision occurred when the motor car driven by the deceased overtook him on the left and was in the process of overtaking the car ahead of his motor truck that was in the left lane. The motor car then moved into the right lane in front of the Defendant and then suddenly braked. The Defendant

indicated that he applied his brake in response but was not able to stop and the mid front section of his motor truck collided with the right rear of the motor car.

- [9] The Defendant relies on the defence of inevitable accident in that he was unable to avoid the accident despite him exercising reasonable skill and care. he alleged that the deceased had admitted that he was forced to brake suddenly because of the cows on the road. The Defendant indicated that he saw the cows after the collision.

## **ISSUES**

- [10] In my view, the issues to be determined by me are as follows: -

1. Was there any negligence on behalf of the Defendant?
2. Whether the negligence of the Defendant caused injury to the Claimants?
3. Whether the Defence of 'inevitable accident' is applicable in the circumstances?
4. What quantum of damages should be awarded, if any?

## **SUBMISSIONS ON LIABILITY AND QUANTUM**

### **Submissions on behalf of the Claimants**

- [11] In summary, it was submitted on behalf of the Claimants that: -

1. The Defendant had collided into the rear of the Claimants' motor vehicle that was properly stationed in its lane of travel, which raises a *prima facie* case of negligence which requires the Defendant to discharge his evidentiary burden consistent with no negligence on his part.

2. The Defendant's explanation of inevitable accident falls short of the required standard in law. The cases of **McBride v Stitt** (1944) NI 7, CA and **The Merchant Prince** [1892] P 179 were cited in support of this submission.
3. The Defendant has failed to show cause of the accident, as he has proffered multiple versions of how the accident was caused, that is, he blamed the herd of cows for causing a sudden stop and he has blamed the sudden switch of lanes and a sudden stop without the involvement of cows.
4. The Defendant has failed to give a consistent account of the version of events that led to the accident occurring. On one hand the motor car was in the process of overtaking/ passing a vehicle three (3) car lengths of at least forty-two (42) feet away and on the other hand, the motor car did not even make it into the right lane completely before the impact occurred.
5. The Defendant has failed to explain clearly or at all how or why he is not negligent in colliding to the rear of the Claimants' motor car.
6. The Defendant is therefore liable for the injuries sustained by the Claimants' in the motor vehicle accident which occurred on the 27<sup>th</sup> day of April 2013.

[12] In regards to the quantum of damages that should be awarded, Learned Counsel for the Claimants particularised the proposed award for each Claimant as follows:-

**Tamar Elliot**

[13] The Claimant was seen by doctor George W. Lawson and Doctor Phillip Waite who diagnosed the Claimant as suffering from the following injuries: -

1. Cervical strain;
2. Right shoulder strain;
3. Mechanical back pain;
4. Mild chronic discogenic neck pain;
5. Mild chronic lower back pain with mild subjective right lumbar;
6. 3% whole person impairment.

[14] The cases of **St. Helen Gordon and Ors. Andianne Gordon (bnf St. Helen Gordon), Nina Francis (bnf St. Helen Gordon) v Royland McKenzie** (unreported), Supreme Court, Jamaica, Suit No. C.L. 1997/G025, judgment delivered on the 10<sup>th</sup> day of July 1998 and **Dalton Barrett v Poncianna Brown and Another**, (unreported) Supreme Court, Jamaica, Claim No. HCV 01358, judgment delivered on the 3<sup>rd</sup> day of November 2006 were submitted for the Court's consideration. Learned Counsel proffered that based on the **St. Helen Gordon and Ors. Andianne Gordon (bnf St. Helen Gordon), Nina Francis (bnf St. Helen Gordon) v Royland McKenzie** (supra) case, the award of Two Million One Hundred Thousand Dollars (\$2,100,000.00) should be made for general damages. He submitted that the sum of Ninety-Eight Thousand Five Hundred Dollars (\$98,500.00) should be awarded for special damages.

**Ronicque Simpson**

[15] The Claimant was seen by Dr. George W. Lawson and doctor Andrew Ameerally who diagnosed the Claimant as suffering from: -

1. Cervical strain;
2. Mechanical back pain;
3. Subconcussice blunt head injury;

4. Paraspinal muscle strain of the cervical region;
5. Paraspinal muscle strain of the lumbar region;
6. 1% whole person impairment.

[16] Learned Counsel for the Claimant submitted the authorities of **Talisha Bryan v Anthony Simpson & Andre Fletcher** [2014] JMSC Civ.31 and **Anna Gayle Anderson v Andrew O,Meally** (unreported) Supreme Court, Jamaica, Claim No. 2005 HCV 01255 judgment delivered on the 9<sup>th</sup> day of April 2008 for the Court's consideration. He proffered that based on the **Talisha Bryan v Anthony Simpson & Andre Fletcher** (supra) case an award of One Million Seven Hundred Thousand Dollars (\$1,700,000.00) should be made for general damages and an award of One Hundred and Twelve Thousand Five Hundred Dollars (\$112,500.00) be made for special damages.

#### **Dwayne Simpson**

[17] The Claimant was seen by Dr. George W. Lawson who diagnosed him as suffering from cervical strain/whiplash injury and mechanical back pain. The authorities of **Talisha Bryan v Anthony Simpson & Andre Fletcher** (supra) and **Anna Gayle Anderson v Andrew O,Meally** (supra) for the Court's consideration. Learned Counsel submitted that based on the **Talisha Bryan v Anthony Simpson & Andre Fletcher** (supra) case an award of One Million Seven Hundred Thousand Dollars (\$1,400,000.00) should be made for general damages and an award of Twenty-eight Thousand Dollars (\$28,000.00) to be made for special damages.

#### **Submissions on behalf of the Defendant**

[18] The submissions for the Defendant might be summarised as such: -

1. A significant feature of the case was omitted from the statement of case of all three Claimants. Learned Counsel indicated that the Claimants all gave evidence that the motor car was stationary in

the roadway awaiting cows that were crossing the road. Mrs. Rose Green submitted that this issue of coming to a complete stop to wait the cows is an important detail and its absence from the Particulars of Claim goes to the very core of the case of the Claimants. She further submitted that the case advanced by the respective Claimants in their Statement of Case was substantially different from the evidence given in their witness statements and their evidence in Court.

2. The Court is required to assess the evidence and conclude on a balance of probabilities which of the two versions presented is more probable or plausible. Learned Counsel submitted that the Claimants' embellished their case whilst they were in the witness box. Based on the Claimant's account, the deceased drove perfectly and did everything that was expected of the prudent driver, accordingly there should have been no collision on that night.
3. Learned Counsel asked the Court to reject the Claimants' account for the following reasons: the engagement of hazard lights and that the motor car had come to full stop to await the cows crossing the road way are all recent concoctions and the Court should put no weight on those evidence. Mrs Rose Green further indicated that the account of the Claimants is highly unlikely and improbable.
4. It was submitted that the accident would be more likely to have happened on the account given by the Defendant. The Defendant remained consistent throughout his case and was unshaken under cross examination.

5. Accordingly, the Court is asked to accept that there is no negligence on the part of the Defendant and the accident was inevitable.

- [19] In regards to the submission on quantum, Learned Counsel for the Defendant submitted that for the Claimant Tamar Elliot an award of One Million One Hundred and Twelve Thousand Seven Hundred and Twelve Dollars and Ninety-Seven Cents (\$1,112,712.97) for general damages should be made. The case of **Cordella Watson v Keith James & Errol Ragbeen** (unreported) Supreme Court, Jamaica, Suit No. C.L. 1994 W 236 judgment delivered on the 26<sup>th</sup> & 28<sup>th</sup> days of November 1997 for the Court's consideration. She further submitted that an award of Eighty-Nine Thousand Five Hundred Dollars (\$89,500.00) be awarded for special damages.
- [20] With regards to the Claimant Ronicque Simpson the case of **Gretel Embden v Oswin Brooks and others** [consolidated claims] [2016] JMSC Civ. 88 was submitted for the Court's guidance. It was submitted that an award of Seven Hundred and Seventy-One Thousand Eight Hundred and Eighteen Dollars and Eighteen Cents (\$771,818.18) should be made for general damages and Eighty-Seven Thousand Five Hundred Dollars (\$87,500.00) for special damages.
- [21] As it relates to the Claimant Dwayne Simpson, it was submitted that an award between the sum of Six Hundred Thousand (\$600,000.00) to Six Hundred and Thirty Thousand (\$630,000.00) be made for general damages. The case of **Pamela Thompson and others v Devon Burrows and others** (unreported) Supreme Court, Jamaica, Suit No. C.L. 2001/T143, judgment delivered on the 22<sup>nd</sup> day of December 2006 was cited for the Court's consideration. Learned Counsel submitted the sum of Twenty-Three Thousand Dollars (\$23,000.00) be awarded for special damages.

## LAW AND ANALYSIS

- [22] From the evidence presented it is apparent that the resolution of this matter is grounded on the credibility of the witnesses. Both versions of events are diametrically opposed, with each side contending that the other side is not credible.
- [23] Negligence is defined in the seminal case of **Blythe v Birmingham Waterworks Co.** (1856) 11 EX 781; [843-607] All ER 478 as: -

*“...the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.”*

- [24] In ascertaining whether to attach liability to either or both parties, section 51(2) of the Road Traffic Act is instructive: -

*“Notwithstanding anything contained in this section it shall be to the duty of a driver of motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this section.”*

- [25] I find that the Privy Council decision of **Nance v. British Columbia Electric Railway Co. Ltd.** [1951] 2 All ER 448 also provides some guidance as to how to approach this matter. At page 450 Viscount Simon pronounced: -

*“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”.*

- [26] The law as it relates to the establishment of negligence is settled in that it must be proved that the Defendant in the instant case owed a duty to exercise due care to the Claimants, that the Defendant failed to exercise due care and that the Defendant's failure to do so was the cause of the Claimants' injuries.
- [27] As noted by Lord Uthwatt in **London Passenger Transport Board v Upson** (1949) AC 155: -

*“A driver is not bound to foresee every extremity of folly which occurs on the road. Equally, he is certainly not entitled to drive upon the footing that other users of the*

*road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of road users teaches that people do, albeit negligently.”*

- [28] The authorities have established that in order to connect the links in the chain of causation it is not necessary that the particular details leading up to the accident should reasonably have been foreseen by a careful driver. It is sufficient if the accident which occurred is of a nature which should have been foreseeable.
- [29] I have assessed all the evidence before the Court and have considered all the submissions in great detail. The Claimants have an evidential and a legal burden to adduce sufficient evidence to prove that the accident occurred in the way they alleged.
- [30] It is clear that both the deceased and the Defendant owed a duty of care to operate their vehicles in a manner so as not to cause harm to each other. After a review of the evidence, in terms of physical evidence, evidence of damage to the respective vehicles was sparse and not independently confirmed. There was no evidence put forward to assist the Court in this regard.
- [31] I find that there are areas on the Defendant’s evidence that raise some concern as to his credibility. In cross examination, he could not tell how far he could see down the road. He also indicated on the one hand that he saw the cows on the left extreme side of the soft shoulder to his right. On the other hand, he indicated that the accident was an inevitable one caused by stray cows on the thoroughfare. Although not a significant issue, there is some variation in this regard. In my view, if I were to find that the cows were on the soft shoulder to his right, then it would discredit his explanation for the deceased driver braking suddenly before him, that is, because of the cows.
- [32] In my view, the most determining piece of evidence is the fact that the Defendant indicated that the deceased was in the process of overtaking the car that was to the left of him which was about two (2) or three (3) car lengths ahead of him. This would have therefore placed the motor car at a reasonable distance. This would

therefore mean that the Defendant would have ample time and distance to brake and avoid the collision.

- [33] I also find that the fact that the Defendant indicated that the deceased was overtaking him to his left, would have meant that he would have anticipated the deceased actions of moving into his path and returning to the right lane in front of him.
- [34] If I accept his version of events, it would mean that the Defendant remained unchecked and did not apply his brake to avoid the possibility of a collision. It would suggest that the Defendant, although he was operating correctly by proceeding in his lane in which he had been safely travelling, was negligent in not braking, especially in light of the fact that on his evidence, it suggests that he had sufficient time and distance within which to do so from the point at which he first saw the motor car overtaking his motor truck. I reject his evidence that he had applied his brakes.
- [35] The case of **Foskett v Mistry** [1984] R.T.R. 1 establishes that a driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent. He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends. It would therefore mean that if I accept his version of events there would still be a finding of negligence on his part.
- [36] On the totality of the evidence, I accept the narrative of the Claimants as to the occurrence of the accident. On a balance of probabilities, I find the evidence of the Claimants more credible and more reliable and that the Defendant had failed to take reasonable care for the safety of other road users, in particular the Claimants. He had failed to see the stationary motor car in sufficient time because he had failed to keep a proper lookout.
- [37] The Defendant pleaded the defence of inevitable accident. The case of **The Merchant Prince** (supra) submitted by Learned Counsel provides useful guidance

as to what must be established in order for the defence to succeed. Fry LJ indicated that: -

*"The burden rests on the defendants to show inevitable accident. To sustain that, the defendants must do one of two things. They must either show what was the cause of the accident, and show that the result of that cause of accident was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided."*

- [38] I will say that the Defendant has failed to sustain this defence in that the result of the collision could have been avoided had he taken evasive action. In my judgment, it is clear, that he was guilty of a high degree of negligence and that this negligence was the cause of the accident and by extension, the cause of the injuries suffered by the Claimants.

## ASSESSMENT OF DAMAGES

- [39] I will now address the issue of quantum to be awarded to each Claimant. For the Claimant Tamar Elliot, I find the authorities of **St Helen Gordon and Anors v Royland McKenzie** (supra) and **Cordella Watson v Keith James & Errol Ragbeen** (supra) to be most useful. In **St Helen Gordon and Anors v Royland McKenzie** (supra) the claimant suffered whiplash injury associated with pain centred around the neck and shoulder. The claimant was assessed with a 3% whole person impairment. An award of Four Hundred Thousand Dollars (\$400,000.00) in July 1988 was made. This award would be updated to Two Million One Hundred and Sixty Thousand and Sixteen Dollars and Fifty-Four Cents (\$2,160,016.54) using CPI 261.2 for July 2019.
- [40] The Claimant in the case of **Cordella Watson v Keith James & Errol Ragbeen** (supra) sustained severe lower back pain, chronic mechanical back pain and difficulty turning the lumbar region. The claimant was assessed with a 3% whole person impairment. An award of Two Hundred Thousand Dollars (\$200,000.00) was made in November 1997. This figure updates to One Million One Hundred

and Forty-One Thousand One Hundred and Nine Dollars and Sixty-Five Cents (\$1,141,109.65).

- [41] I note that the injuries of the instant Claimant are slightly more severe than the claimant in the latter case. In the circumstances I find that an award of Two Million Dollars (\$2,000,000.00) is appropriate for general damages.
- [42] In relation to special damages, receipts were tendered in the amount of Eighty-Eight Thousand Five Hundred Dollars (\$88,500.00). The Claimants herein did not provide any proof of transportation. I take judicial notice that it is not customary for taxi operators to provide receipts. I am prepared to award the sum of Five Thousand Dollars (5000.00) for transportation. The total award for special damages is therefore Ninety-Three Thousand Five Hundred Dollars (\$93,500.00) for special damages.
- [43] As it relates to the Claimant Ronicque Simpson, I found the authority of **Talisha Bryan v Anthonuy Simpson & Andre Fletcher** (*supra*) most useful. In this case the claimant suffered whiplash injury to the neck and lower back strain. An award of One Million Four Hundred Thousand Dollars (\$1,400,000.00) was made in March 2014. This figure updates to One Million Seven Hundred and Seven Thousand One Hundred and Eighty-Nine Dollars and Fifty-Four Cents (\$1,707,189.54). The injuries of the instant Claimant are analogous and I find that an award of One Million Seven Hundred Thousand Dollars (\$1,700,000.00) is appropriate for general damages.
- [44] In relation to special damages receipts were tendered in the amount of One Hundred and Two Thousand Five Hundred Dollars (\$102,500.00). I am prepared to award the sum of Five Thousand Dollars (\$5000.00) for transportation. The total award for special damages is therefore One Hundred and Seven Thousand Five Hundred Dollars (\$107,500.00) for special damages.
- [45] Pertaining to the Claimant Dwayne Simpson, I found that the cases of **Talisha Bryan v Anthonuy Simpson & Andre Fletcher** (*supra*) and **Pamela Thompson**

v **Devon Burrows** (supra) provided the most guidance. In the latter case, the claimant sustained mild whiplash injury to the neck and complained of pains to the neck, lower back and shoulder. An award of Two Hundred and Fifty Thousand Dollars (\$250,000.00) was awarded in December 2006. This updates to Six Hundred and Fifty-Three Thousand Dollars (\$653,000.00). Given the circumstances, I find an award of One Million Dollars (\$1,000,000.00) is appropriate.

- [46] In relation to special damages receipts were tendered in the amount of Twenty-Three Thousand Dollars (\$23,000.00). I am prepared to award the sum of Five Thousand Dollars (\$5000.00) for transportation. The total award for special damages is therefore Twenty-Eight Thousand Dollars (\$28,000.00).

## **ORDERS AND DISPOSITION**

- [47] In light of the foregoing, I make the following orders: -

1. Judgment for the Claimant Tamar Elliot against the Defendant as follows:
  - i. For special damages, the sum of Ninety-Three Thousand Five Hundred Dollars (\$93,500.00) with interest at a rate of 3% per annum from the 27<sup>th</sup> day of April, 2013 to the 28<sup>th</sup> day of June 2019;
  - ii. For general damages, the sum of Two Million Dollars (\$2,000,000.00) with interest at a rate of 3% per annum from the 28<sup>th</sup> day of July, 2013 to the 28<sup>th</sup> day of June 2019;
  - iii. Costs to the Claimant to be taxed if not agreed.

2. Judgment for the Claimant Ronicque Simpson against the Defendant as follows:
  - i. For special damages, the sum of One Hundred and Seven Thousand Five Hundred Dollars (\$107,500.00) with interest at a rate of 3% per annum from the 27<sup>th</sup> day of April, 2013 to the 28<sup>th</sup> day of June 2019;
  - ii. For general damages, the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00) with interest at a rate of 3% per annum from the 20<sup>th</sup> day of July, 2013 to the 28<sup>th</sup> day of June 2019;
  - iii. Costs to the Claimant to be taxed if not agreed.
3. Judgment for the Claimant Dwayne Simpson against the Defendant as follows:
  - i. For special damages, the sum of Twenty-Eight Thousand Dollars (\$28,000.00) with interest at a rate of 3% per annum from the 27<sup>th</sup> day of April, 2013 to the 28<sup>th</sup> day of June 2019;
  - ii. For general damages, the sum of One Million Dollars (\$1,000,000.00) with interest at a rate of 3% per annum from the 20<sup>th</sup> day of July, 2013 to the 28<sup>th</sup> day of June 2019;
  - iii. Costs to the Claimant to be taxed if not agreed.