[2016] **JMSC Civ 231**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012 HCV 03713

BETWEEN	**NAOMI HENLON**	**CLAIMANT**
AND	**PETER SHAND**	**1ST DEFENDANT/ ANCILLARY CLAIMANT**
	BUNTON MCINTOSH	**2ND DEFENDANT/ 1ST ANCILLARY DEFENDANT**
	VOLMAN CLARKE	**3RD DEFENDANT/ 2ND ANCILLARY DEFENDANT**
	NICKIESHA CLARKE	**4TH DEFENDANT/ 3RD ANCILLARY DEFENDANT**

Negligence – Motor vehicle collision – Potholes in road – Claimant a passenger – Cause of collision – personal injury – whiplash – damages – Observations on the Evidence Amendment Act and the duty of full disclosure.

Appearances: Chantall Campbell instructed by Kinghorn & Kinghorn for the Claimant

Pauline Brown-Rose for 1st Defendant

Althea Wilkins instructed by Dunbar & Co. for 2nd, 3rd and 4th Defendants.

HEARD: 28th and 29th November 2016 and 2nd December 2016.

CORAM: BATTS J.

[1] This judgment now reduced to print, was orally delivered on the 2nd day of December 2016.

[2] On the 31st day of January 2012 the Claimant was a passenger in a taxi owned by the 3rd and 4th Defendants but driven by the 2nd Defendant. At approximately 5:00 p.m. that day, and whilst the Claimant was seated in the rear of the taxi, a collision occurred with a motor vehicle owned and driven by the 1st Defendant.

[3] The Claimant alleges she was injured in the collision and claims damages against the Defendants or any or all of them. The 3rd & 4th Defendants filed an Ancillary Claim against the 1st Defendant (see Ancillary Claim Form filed 10th March 2016 and Particulars of Claim contained in a document erroneously entitled "Amended Defence" and Counter Claim of 3rd & 4th Defendants, filed on the 10th March 2016). The 1st Defendant had earlier filed an Ancillary Claim against the 2nd, 3rd and 4th Defendants (see Ancillary Claim filed on the 22nd October 2012).

[4] It does appear however, that permission was not obtained at the Pre-trial review, heard on the 7th October 2016, for the 2nd and 3rd Defendants to issue that Ancillary Claim (see order of Daye J. , 7th October 2016). This may explain why the 2nd, 3rd and 4th Defendants' pre-trial memorandum, filed on the 2nd June 2016, mentions no claim by these defendants against the 1st Defendant. It may also explain why the various written submissions filed by the parties do not mention a claim by the 2nd, 3rd and 4th Defendants against the 1st Defendant. For these reasons and more, and notwithstanding the evidence in the 2nd Defendant's witness statement as to damages, I will treat no further with that Ancillary Claim.

[5] The issues for my determination concern the claim to damages sustained by the Claimant and the claim to a contribution or indemnity for loss sustained by the 1st Defendant. In this regard I have been ably assisted by the written submissions filed by all parties prior to the trial as well as written submissions filed after all the evidence was lead. Counsel for the parties agreed to waive the right to make

oral submissions. The parties are to rest assumed I have read and in some cases reread these submissions.

[6] I have also carefully considered the evidence presented. I will not, in the interest of time, restate that evidence. I will only reference the evidence to the extent necessary to explain the reasons for my decision.

[7] It has been an unusual feature of this case that no one alleges that anyone was travelling at an excessive speed. The 2nd Defendant, the driver of the taxi, was emphatic that the 1st Defendant was not speeding. Similarly the 1st Defendant does not contend that the 2nd Defendant was driving too fast. The Clamant, a passenger, simply makes no such assertion. All parties agree that the Claimant was a passenger in the 1st Defendant's motor vehicle, at any rate, it is not denied she was a passenger. It is also common ground that the collision occurred in the vicinity of a bend in the roadway. It is also agreed that the area of damage to the 2nd, 3rd and 4th Defendants' vehicle (the taxi) was to the right rear door and fender. That damage it is argued was relatively minor. It is also common ground, or not contested, that it was the right hand section of the 1st Defendant's vehicle which was in contact with the right rear of the taxi. It is also agreed that there were potholes on the 2nd Defendant's side of the road in the vicinity of the bend. The vehicle driven by the 1st Defendant was travelling in the opposite direction to the vehicle driven by the 2nd Defendant.

[8] In the face of so much consensus the looming factual issue has to do with where in the road did the impact occur. The 1st Defendant's case is that the 2nd Defendant drove onto his side of the road, in order to avoid potholes, and this was where the impact occurred. The 2nd Defendant maintains he was always on his side of the road and it was the 1st Defendant who "drifted" over to the incorrect side. The Claimant, and we will consider the evidence more closely later on, puts the accident somewhere in the middle.

[9] Having considered the evidence and the demeanour of the respective witnesses, I am satisfied that the account given by the 2nd Defendant is to be preferred. I

find as a fact that on the day in question the 2nd Defendant was carefully negotiating a bend in the road. He remained on his side of the road and slowly attempted to go through and around potholes on his side of the road. The roadway was just over 20 feet wide and hence as he negotiated the potholes on his side he was able to do so without entering the other side of the roadway, which was for oncoming vehicles. It was the 1st Defendant who whilst negotiating the bend came over onto the 2nd Defendants side of the road and impacted the taxi being driven by the 2nd Defendant.

[10] My reasons for preferring the 2nd Defendant's evidence to that of the other witnesses are as followed:

a) In the first place I observed his demeanour and manner of giving evidence. He was forthright and candid. His account was rendered in calm and confident tones. He impressed me as a witness of truth. So that when, for example, the Claimant's counsel asked:

> "*Q. You agree Mr. Shand was going very fast?"*
>
> *he answered,*
>
> *"A. No, no."*

He was emphatic about that, and this is an example of the candid nature of his evidence.

b) Secondly, and in a contrasting manner, the 1st Defendant was rather unsure in his account of the events. His witness statement, which stood as his evidence in chief was, to say the least, rather vague as to where in the road the accident occurred. All it said at paragraph 2 was;

> *"On reaching a section of the road where there was a "S" shaped corner, whilst coming around a corner I saw a white Toyota Corolla station wagon car swing from a pothole and collided into my right hand fender causing damage to the fender."*

In paragraph 3 he says,

> *"After the collision I noted there was a cluster of potholes on the right side of the road that is the side of the road where he Toyota station wagon car should have been travelling. I realised that the collision occurred because the driver of the Toyota station Wagon came over onto my side of the road to avoid the potholes on his side of the road."*

I observe firstly that on this account it is only after the collision that the 1st Defendant realized that the 2nd Defendant was on his side of the road. One would have thought that that had he been paying attention, he would have been immediately aware that the other car was on his side of the road.

His uncertainty was also demonstrated in the course of giving oral evidence. Driving amplification the following exchange occurred:

"Q: *you heard evidence of Miss Henlon. Did you take the corner too wide?*

A: *I don't think it was wide. I think I was on my side of the road."*

And later:

"Q: *Did you look at position of vehicles after collision?*

A: *My vehicle was on the left side of the road.*

Q: *Where was the taxi after collision?*

A: *He was on his left side. My front tyre was in the middle of the road. I was in the centre but i was more to the right side than the left side.*

Q: Which was your side?

A: The left side. I was more to the right than to extreme left.

Q: Did you stop immediately after impact?

A: Yes."

When cross-examined by the claimant's attorney:

"Q: *Whilst coming around deep corner you drifted a little bit.*

A. I would not say drifted. I could have been more to the left."

The context of his evidence and the manner in which it was delivered, suggests to me that the 1st Defendant was either unsure or was less than candid about the position in the road of the respective vehicles at the point of impact.

c) The third reason for preferring the 2nd Defendant's account has to do with the evidence of physical damage. Although there was no expert or documentary evidence, the parties all agreed on the area of impact to the respective vehicles. It seems to me that if, as the 1st Defendant stated, the collision occurred because the 2nd Defendant swerved onto the incorrect side of the road, the right front of the 2nd Defendant's vehicle ought to have been impacted. For the right front of the Defendant's vehicle to be impacted, the 1st Defendant would have had to be positioned well into his own lane.

There being only 10 feet approximately on his side then, assuming a car's width of 4.5 feet, for his right front to impact the left rear of the 2nd Defendant's vehicle on his left side he would, it seems to me, have to be well in his own lane. As we have seen however, the 1st Defendant says his right front was closer to the middle of the road.

This suggests that the 2nd Defendant's vehicle did not swing "from a pothole and collide into" the 1st Defendant's vehicle as stated at paragraph 2 of the 1st Defendant's Witness Statement.

On a balance of probabilities and, given the position in the road that the 1st Defendant says his vehicle was located that is to be the right of his lane, it is more probable that the damage to the right rear of the taxi was caused because the 1st Defendant's vehicle had crossed to the wrong side of the road.

d) My fourth and final reason for accepting the 2nd Defendant's account in preference to the 1st Defendant's has to do with the conduct of the 1st Defendant after the collision. It is common ground that the 1st Defendant initially agreed to pay for the repair of the taxi. It is common ground that he also paid for his own repairs. He made no mention of this in his Witness Statement. When giving evidence orally, he admitted to the same.

In amplification:

"Q. *Did you tell the driver to have the vehicle repaired and give you the bills?*

A: *Yes*

Q: *Why*

A: *The reason being I came out of vehicle and I realize both could be at fault and as vehicle is not the driver's and miniscule accident I decide to fix it.*

Q: *Did you ever change your mind?*

A: *Yes*

Q: *Why?*

A: *Because when I went home I got a call saying a passenger said she is going to give me [claim] so I said let insurance deal with it."*

In fact, and as he admitted in cross examination, further to his statement at the scene he met with the 3rd Defendant four (4) days later. He persuaded the 4th Defendant to take the taxi to be repaired at his (the 1st Defendant's) repairer and affirmed he would pay for it. He changed his mind because personal injury claims were coming forward.

Whilst being cross-examined the following exchange occurred:

"Q: *In response to a question you said "yes" you were responsible.*

Objection: *Answer is clear*

Judge: *I will allow.*

A: *When I heard she say responsibility, it mean their repair bill not to say I cause accident. Reason why everyone know insurance excess. I knew I am not wrong. If he did not swerve and I was more over to the left. I estimate not more than twenty thousand dollars ($20,000.00). So I do it in good faith."*

The 1st Defendant is a Justice of the Peace and a businessman. I find on a balance of probabilities that he agreed to repair the damage to the other vehicle because he knew he had drifted to the wrong side of the road when negotiating the bend.

[11] It is to be noted that I have not in this regard mentioned the Claimant's evidence. This is because I found her generally unreliable. Her witness statement which stood as her evidence in chief, stated.

"3. The driver was driving over the bridge and approaching the corner there was a motor vehicle coming from the opposite direction. The driver took the corner too wide and collided into the vehicle I was travelling in."

At paragraph 15, she says:

"The vehicle that I was travelling in was avoiding a pothole in the road and also the other driver was avoiding the same pothole so both vehicles collided."

When allowed to amplify she said:

"When I said both vehicles avoiding the same pothole, Mr. Shand (1st Defendant) was not avoiding the pothole. The vehicle I was in is driver who was avoiding the pothole."

This is all well and good but it begs the question why in paragraph 3 she attributes the cause of the collision to the other driver taking the corner too wide. Her cross-examination furthered the conflicting nature of this evidence. So that having admitted the pothole was on the 2nd Defendant's side and that he left his side of the road to go around it, she denied that the 2nd Defendant failed to keep to his proper side of the road. She attempts to avoid the conundrum by saying:

"After Mr. McIntosh (2nd Defendant) go around he went back in line, he went back more to the left side."

She denied that after the collision the taxi was to the middle of the road. Added to this her estimate of distance and width were clearly bad and unreliable. For example, when pointing out the width of the road, she pointed out a distance measured at 6 feet. I suspect that the Claimant never really saw much of the impact and had no idea of the relative positions in the road of the motor vehicles. She was seated in the right rear passenger seat immediately behind the driver and in all likelihood only became aware of the collision on impact. On her own account she was in pain and crying after the accident and for that reason also

failed to note the position in the road of the vehicles. Her evidence was not of much assistance in my determination of liability.

[12] The consequence of my finding of fact as to the position in the road at the point of impact is that the 1st Defendant is entirely to blame for this accident, ***Street v Berry (1966) GLR 270*** is sufficient authority. The 2nd Defendant was on his proper side of the road and did nothing to cause or contribute to the collision.

[13] On the question of damages, the Claimant on the first day of trial applied for and was granted permission to amend her claim as follows:

(1) To add a plea of 1% permanent impairment.

(2) Delete $2,500.00 and insert $7,500.00 for Dr. Phillip Henry

(3) Delete $4,607.59 and insert $4695.93 for R & J Pharmacy

(4) Add $50,000.00 for Dr. Denton Barnes

(5) Delete $10,000.00 for transportation and insert $20,000.00

[14] The Claimant's injuries are recorded in three (3) medical reports admitted by consent as Exhibits 1A, B and C. Her complaints were of pain to the neck and upper back following the collision. Dr. Phillip Henry in his report of the 12 April 2012, diagnosed her as having a whiplash injury. In his report dated the 29th February 2016 Dr. Denton Barnes, an orthopaedic surgeon, gave an update on the Claimants condition. He found:

- Full range of movement of the neck
- Pain on flexion and extension with mild spasm of the paraspinal muscles in the neck.
- No bony tenderness in the neck with normal upper limb neurological examination.

- In her lumbar spine she had no spasm of the paraspinal muscles.
- Flexion was 60 degrees extension 10 degrees, lateral bending 30 degrees and painful, rotation was normal.
- No neurological deficit in the lower limbs.

She was assessed at having achieved maximal medical improvement. Her level of impairment was assessed as 1% whole person. This was attributed largely to the reported neck pains. The doctor stated that she had "symptoms, no clinical findings and no investigations."

[15] In considering damages for pain suffering and loss of amenities, I found the following authorities of assistance:

a) Consolidated claims ***2008 HCV 01162, 2008 HCV 02031, 2008 HCV 05308, Gretel Embden et al v Oswin Brooks*** unreported judgment of Daye J, delivered 2nd June 2016. The Claimant Gretel Embden sustained whiplash injuries with significant pain and discomfort. She had pain to neck, mild cervical spine tenderness, pain on moving head, mild muscle spasm, lower back tenderness, pain on rotation of hip. The award was seven hundred thousand dollars ($700,000.00).

b) ***Ava Gaye Smith v Henry's Transit Ltd. and Jerome Sims, 2012 HCV 01341*** upheld judgment of Tie J. (Actg) 28th June 2016. Upper back strain and strain to left shoulder. Her pain was "minimal". The award after citation of authorities was eight hundred thousand dollars ($800,000.00). I note that the judgment of Daye J. was delivered in 2016 however arguments in the case ended in 2010. The cases cited to him were of some vintage. Justice Tie considered more current award. The Claimant before me has more serious injuries than the claim before Tie J.

[16] I did not find the other authorities cited to be of much assistance. Certainly references to assessment orders with a medical respect appended but without

written judgments were of no great help. One cannot discern whether the court accepted all that was in the medical report and if that report played any part in the decision or if there was other evidence which impacted the award.

In all the circumstances I award one million dollars ($1,000,000.00) for Pain and Suffering and Loss of Amenities.

[17] In relation to special damages, these were agreed (See written submissions of 1st, 2nd, 3rd and 4th Defendants) at eighty two thousand, one hundred and ninety three thousand dollars ($82,195.93).

[18] In the result my decision is as follows:

(1) Judgment for the Claimant against the 1st Defendant as follows:

General Damages	($1,000,000.00)
Special Damages	($82,195.93)

(2) The 1st Defendant's Ancillary Claim against the 2nd Defendant is dismissed.

(3) Costs to the Claimant and the 2nd, 3rd and 4th Defendants against the 1st. Defendant such cost to be taxed or agreed.

(4) Interest will run on General Damages at 3% from the 18th September 2012 and on Special Damages from the 31st January 2012.

[19] In closing I wish to advert to two matters of practice which emerged in the course of this trial. In the first place the Claimant's counsel endeavoured to tender a medical report through her client. When I intervened, her response was to the effect that this had been her way of adding medical evidence. In fact the reports were later admitted by consent. It is important for practitioners to realise that Section 31E of the Evidence Amendment Act allows for the admissibility of documents in civil proceedings where a Notice has been served and there has been no objection, provided the document satisfies Sections 31E(1) and 31(F).

In this regard see my judgment in Paulette Robinson-Keize v Carlos Morant 2010 HCV 042015 unreported judgment of 5th October 2012.

[20] The second point of practice has to do with the attempt by the 1st Defendant's counsel to rely on a document which had been listed as privileged in her list of documents. I ruled that this did not amount to disclosure within the rules and refused permission for the document to be put to the witness. The duty of full disclosure in civil proceedings cannot be overstated. It is not disclosure to have a statement made by the opposing party but call it a report made in contemplation of litigation so as to claim privilege. The claim to privilege means necessarily that one is saying there is no duty to disclose. Parties need to be reminded that trial by ambush is not encouraged in this Supreme Court. Full disclosure of all relevant material is necessary if proceedings are to be efficiently conducted and time saved not only in their speedy conduct but also by possible settlements.

Parties cannot be allowed to claim a privilege in order to "hide" a damaging document and then waive that privilege to surprise another party to proceedings. This is not I think, what the overriding objective is all about.

David Batts
Puisne Judge