IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NOS. 2009HCV00236 and 2009HCV06427

CONSOLIDATED

BETWEEN	**DELWIN JACKSON**	**1ST CLAIMANT**
	ANN MARIE LAWRENCE	**2ND CLAIMANT**
AND	**SEYMOUR SMITH**	**1ST DEFENDANT/ ANCILLARY CLAIMANT**
	THE ATTORNEY GENERAL	**2ND DEFENDANT/2nd ANCILLARY CLAIMANT**
	BERRINGTON GORDON	**3RD DEFENDANT**

Negligence- Motor vehicle collision- 1st Defendant exiting premises – 2nd and 3rd Defendant overtaking a line of vehicles with flasher and siren on- Claimants passengers- Liability- Contributary Negligence – Damages.

Allia Leith-Palmer instructed by Kinghorn & Kinghorn for the 1st Claimant

Sharon Gordon-Townsend instructed by Gordon & Watson for the 2nd Claimant

Symone Mayhew for the 1st Defendant

Hazel Edwards instructed by the Director of State Proceedings for the 2nd and 3rd Defendants

Heard: 25th, 26th, 27th and 29th November 2013

COR: BATTS J.

[1] This Judgment was orally delivered on the 29th November 2013.

[2] I have taken the liberty to retitle this matter in the way indicated above so as to avoid obfuscation and to allow for coherence in the delivery of this judgment. It may be advisable whenever a matter is consolidated that it be retitled in the most convenient way.

[3] When this matter commenced, it promised to be very involved and protracted. With 4 counsel and 5 clients, Claims and Ancillary Claims this was only to be expected. However as the evidence unfolded it proved not to be so. It seems to me that on the evidence and on a balance of probabilities there has to be judgment for the 1st and 2nd Claimants against the 1st Defendant and judgment for the 2nd Defendant/Ancillary Claimant against the 1st Defendant on the Ancillary Claim. I will indicate the reason for my decision with reference to the evidence only so far as it is necessary to explain my decision.

[4] It has been common ground between the parties that this accident occurred along the Brunswick Avenue in Spanish Town, St. Catherine. The point of impact being in the vicinity of a petrol filling or service station located on the left hand as one proceeds in the direction of Linstead. It is also common ground that the road is a long straight road which is approximately 30 feet wide (15 feet in each lane). The parties agree that the 1st Defendant/Ancillary Claimant was in the process of or had exited the service station with the intention of going in the direction of Spanish Town. The parties agree also that the police service vehicle, the property of the 2nd Defendant/2ndAncillary Claimant, was proceeding towards Linstead from Spanish Town at the time of the collision. It was in the process of overtaking other vehicles. The 1st and 2nd Claimants were passengers in the police service vehicle.

[5] The parties differ as to the exact position in the road at which the accident occurred. The 1st Defendant/Ancillary Claimant alleges that it occurred in the left lane heading towards Spanish Town. He says he had completed his manoeuvre and had fully entered that left lane when he saw the police vehicle approaching. He was able he says to pull over to the left and his left front was as far left to that curb as he could go. The 1st and 2nd Claimants say the collision occurred whilst the 2nd Defendant/Ancillary Claimant's vehicle (in which they were passengers) was in the left lane as one heads

to Linstead. The 3rd Defendant (who was the driver of the police service vehicle and the servant or agent of the 2nd Defendant/Ancillary Claimant) states that the vehicle was in the middle of the road partially in both lanes. He states also that the 1st Defendant/Ancillary Claimant was diagonally across the road with the front of his vehicle in the right lane as one proceeds towards Linstead.

[6] On this issue I accept as true the account of the 3rd Defendant. I observed his demeanour in the witness box and was impressed by the clear and straightforward way in which he spoke. Furthermore his evidence is consistent with the area of damage to each vehicle as revealed in the assessors report and estimates of damage put in evidence. Furthermore as the police service vehicle was in the process of passing other vehicles when the collision occurred it is far more probable that it was in the middle of the road than in the left lane as one heads towards Linstead. In any event the driver and those in the front of a vehicle are in a far better position than rear seat passengers to determine the position in the road of the vehicle in which they are travelling. Both 1st and 2nd Claimants were rear seat passengers.

[7] There was a dispute as to whether or not the 3rd Defendant engaged the flashing lights and siren of the police service vehicle only moments before the collision. The 1st and 2nd Claimants assert it was turned on shortly after leaving the Spanish Town Police Station. The 1st Defendant/Ancillary Claimant says it was seconds before the collision although when cross-examined he admitted that from the first moment he saw the service vehicle its flashing lights and siren were already on. He says he never heard the siren or saw flashing lights prior to exiting the petrol filling station although his windows were down. Hence his assumption I suppose that it was only turned on seconds before the collision. The 3rd Defendant on the other hand says that having left the Spanish Town Police Station he did not engage the emergency signalling devices until after he entered Brunswick Avenue. He did so when he came upon a line of traffic that was very slow moving. He radioed control and received authorisation to engage the siren and flasher lights for the dual purpose of finding out the reason for the hold up of traffic and to speed up his return to Linstead. This latter because there was a prisoner being transported and the service vehicle was the only one available at the Linstead Police Station where it was required.

[8] On this issue I again accept the evidence of the 3rd Defendant. He was I should mention no longer a serving member of the police force at the time he gave evidence. He also was not a Claimant or an Ancillary Claimant in this action and swore on oath that he had no pending claim against the 1st Defendant/Ancillary Claimant. In a sense he was the only disinterested witness to give evidence. On a balance of probabilities I find that the siren and flasher lights were engaged in the vicinity of the Rajmaville Club that is shortly after entry onto Brunswick Avenue as the 3rd Defendant alleges. It would be odd indeed if a police service vehicle equipped with such accoutrements, were to overtake a line of 6 vehicles each with 10 feet between them and not engage the emergency warning apparatus. It would be even stranger, as the 3rd Defendant stated, for the driver of such a vehicle seconds before a collision, to have the composure and presence of mind to turn on siren and flasher lights whilst taking evasive action. On a balance of probabilities I reject the 1st Defendant's account in this regard.

[9] On the issue of the position in the road of the 1st Defendant's/Ancillary Claimant's vehicle I find that at the point of impact he was mostly in the left lane as one heads towards Spanish Town. His vehicle almost made it into the left lane but was still in the process of entering that lane. It was diagonally slanted as it was making a right turn towards Spanish Town.

[10] This conclusion follows almost inevitably from the description of the road. The road all parties agree is straight and wide. 30 feet was the 1st Defendant's/Ancillary Claimant's estimate. I accept that evidence because I am quite familiar with Brunswick Avenue in Spanish Town. It is a main thoroughfare and prior to construction of the Spanish Town Bypass was the main entrance into the town. There is 15 feet of space at least on the left hand side as one heads in the direction of Spanish Town. The vehicles, the evidence also reveals, were approximately 5 feet wide. The 1st Defendant says the front of his vehicle is 5 feet wide and the rear 5'8" wide. This means that had he fully entered his lane and pulled to the left as he describes there would be approximately 9 feet of roadway on that side to allow the police service vehicle to pass. The accident ought therefore not to have occurred.

[11] I find, on a balance of probabilities, that the 1st Defendant's vehicle had not yet fully entered the left lane heading to Spanish Town. He almost made it. The 3rd Defendant swerved left in an attempt to avoid impact. This finding is consistent also with the area of damage revealed in the coloured photographs put in evidence and the damage stated in the assessors report of the 1st Defendant/Ancillary Claimant's motor vehicle. That is to the right rear fender and wheel. The damage was to the front of the police service vehicle mostly to the front right.

[12] On these findings of fact therefore it is apparent that the 1st Defendant/Ancillary Claimant was making an entry onto the highway from premises adjoining. He had a duty to ensure it was safe to proceed before venturing further. It may be that the slowing of the traffic as vehicles made way for the police service vehicle induced him to think it was safe to proceed. It may be that because of his age (he was in his 70's when giving evidence) he did not hear the siren. Whatever the reason however he did not keep a proper lookout before attempting that manoeuvre.

[13] The next issue for the court therefore is whether contributory negligence arises. The 1st Defendant/Ancillary Claimant in the course of some very probing cross-examination admitted to being partly to blame but asserted that the other driver must bear contribution. His counsel has submitted that an overtaking vehicle has a duty to lookout for other vehicles that may be entering the roadway. Furthermore she pointed to the fact that both Claimants (passengers in the 3rd Defendant's vehicle) saw the 1st Defendant exit the service station. Therefore she says the 3rd Defendant ought also to have seen the 1st Defendant's vehicle at that stage. The 3rd Defendant says he never saw the 1st Defendant/Ancillary Claimant's vehicle until it emerged before his vehicle in the middle of the road. Counsel argues that this is evidence of the 3rd Defendant's failure to keep a proper lookout. She relied primarily on the authority of **Hamied v Eastwick(1st November 1994 Unreported)** a case annotated in Bingham and Berryman's Motor Claims Cases 11th Edition at para [9.53]. The head note reads in part,

> *"A prudent driver must bear in mind the real possibility that someone may emerge from the side road, even one which provides that the driver should stop and give way. By driving faster than he should have done in the circumstances the*

plaintiff deprived himself of the time and opportunity to take avoiding action by braking or swerving in front of the defendant's vehicle."

The court found that the party entering the main road was 80% to blame and the party on the main road 20%. It is clear from the report that the excessive speed, 5 to 10 miles per hour over the speed limit, was the important factor for that decision.

[14] In the matter at bar evidence of the speed of the 3rd Defendant's vehicle varies. The 1st Defendant/Ancillary Claimant did not estimate the speed of the 3rd Defendant in his witness statement but in the course of giving evidence said it was coming fast. The 2nd Claimant estimated the speed at 50 miles per hour (which would make it 20 miles above the speed limit in that area). The 3rd Defendant said he was going approximately 20kph. I have regard to the damage to the motor vehicles when considering the issue of speed. It is clear that the damage was moderate, not severe. Indeed the right rear fender can be described as scratched and slightly dented and the rear bumper slightly displaced in the photograph. The assessors report shows most damage to the right rear wheel and the chassis leg was affected. The chassis of the 1st Defendant/Ancillary Claimant's vehicle was not bent. The 2nd Defendant's vehicle had damage to the bonnet, front grill and radiator. Importantly there was no windscreen damage. Its chassis also was not bent. The injuries sustained were also relatively minor; no cuts or bruises or broken bones. I therefore find that the 3rd Defendant was proceeding at a higher than normal speed but not such as to be described as excessive in the circumstances. To the extent necessary and on a balance of probabilities I prefer the evidence of the 3rd Defendant on this matter of speed.

[15] When responding on the issue of contributory negligence counsel for the 2nd and 3rd Defendants relied upon the authorities of:

a) **Harding v Hinchcliffe,** decided 7th April 1964, Royal Courts of Justice, UK (1964) Times ,8th April.(annotated in Bingham and Berrymans' Motor Claim Cases 11th edition para. 9.51).
In that case the Plaintiff a 16 year old on a motor cycle was in the process of overtaking a bus which had slowed to turn. The Defendant was exiting the road into which the bus was turning

when he collided with the Plaintiff. The trial judge acquitted the Defendant of negligence. Neither driver had seen the other prior to the accident. The Court of Appeal allowed the appeal and found the driver who was entering the major road liable. Per Lord Denning MR,

"Nevertheless coming out, as he was, from this lane on to the main road, it seems to me what he ought to have done was to wait the extra second or two which would be necessary to enable the bus to get completely into Tendridge Lane so that he could see that everything was clear."

b) **Worsfield v Howe [1980] 1 AER 1028**

In that case the emerging vehicle collided with a motorcycle that was passing a tanker in a lane to his left. The court ultimately found the parties 50:50 to blame. In that case there were 2 lanes of traffic going in the same direction. Secondly the evidence in that case was that a driver on the main had signalled to the Defendant that he was stopping to allow him through. The Defendant moved out and the accident occurred when the nose of his car was a foot or 2 beyond the vehicle that had stopped to give him way. The Claimant on his motorcycle was passing the tanker in the other lane. The decision underscores that in these matters there is no absolute principle of law and the issues are primarily questions of fact.

[16] In this case, and bearing in mind the authorities so helpfully cited, I do not find that the 3rd Defendant was contributorily negligent. He breached no duty of care. This is because he, when passing the line of traffic (which had pulled to the left or stopped) engaged his siren and flashing lights. His attention while driving at a faster than normal speed would naturally be on the vehicles ahead. He would reasonably expect that anyone thinking of emerging from a side road or adjacent premises would hear his siren or see his flasher light. I do not find that he ought to be going at a snails pace and peeping around each vehicle before passing. To so hold would defeat the purpose for which flasher lights and sirens were intended.

[17] Finally, on this point, counsel for the 2nd and 3rd Defendants attempted to rely on provisions of the Road Traffic Act, the Road Code and Road Traffic (Prior Right of Passage) (Police) Regulations 1968. As regards the Road Code, these are not legislated and in the absence of the Code being admitted into evidence I decided not to have regard to it. As regards the regulations these are clearly in need of revision as they do not relate to the circumstances in which the 3rd Defendant decided to engage his siren and flasher lights.

[18] I therefore turn now to the matter of damages to be awarded to the 1st and 2nd Claimants and to the 2nd Defendant/Ancillary Claimant against the 1st Defendant/Ancillary Claimant.

Delwin Jackson: (1st Claimant)

[19] His injuries are detailed in a Medical Report dated 15th October 2008 **(Exhibit 1).** On the 15th May 2008 he presented to the doctor with an obvious antalgic gait because of the pain to his right leg. The pains were mild to moderate. He also had pain to neck, chest, shoulder and lower back. He was unable to turn his head because of neck pain and stiffness. The back pain was described as intense. The doctor said that he appeared to be suffering from mild cervical spine tenderness and muscle spasms. There also appeared to be injury to the lumbar vertebrae. Chest pains were the result of trauma to the chest. There were no neural deficits and reflexes were normal. Straight leg raise was normal but he complained of pain to upper 1/3 portion of his leg just below the knee with swelling. There was no muscle weakness. He was sent home on analgesics and muscle relaxant and advised to rest and avoid strenuous work. On review on 11th June 2008 he reported that the pain had gotten worse so much so he had to stop from work for 7 days. He reported that the pain on bending and turning had impacted his ability to perform his job. His overall progress was good. The complaints resulted from a whiplash injury of the cervical and lumbar regions of the spine. They are not permanent but the doctor describes them as chronic. Recovery was expected in 8 to 10 weeks.

[20] The 1st Claimant in his witness statement details the pain felt and the effect on him of the injury. His counsel submitted that these injuries merited an award of $1-2 million for

pain suffering and loss of amenities. Mrs. Mayhew for the 1st Defendant submitted that $750,000 was in accordance with the authorities.

[21] I have considered the cases cited before me,

Danielle Archer v JIO, Suit 2010 HCV 2388 (31 May 2013)

Marshall v Cole annotated in 6 Khan page 109
Wendell v Campbell, Suit HCV 01324/2006 (4 December 2009)

Campbell v Lawrence, C.L.C. 135/2002 (28 February 2003)

Darron Pinnock v Taylor, Claim No. 2011 HCV 00463 (16 April 2013)

[22] In my judgment and when regard is had to the authorities cited a fair award for pain suffering and loss of amenities is $1.4 million. He has made no claim for special damages.

Ann Marie Lawrence: (2nd Claimant)

[23] This Claimant was seen on the 14th May 2008 by Dr. Sandra Nesbeth whose medical report was admitted as **Exhibit 2A**. The injuries were described as: severe whiplash, severe pain in neck; severe pain in left shoulder, severe pain in lower back and spasm, her right leg was also painful and swollen with black and blue marks in front of the leg. The doctor had X-rays done, gave 2 weeks sick leave. Prescribed cataflam and norflex injections. The sick leave was extended by an additional 4 weeks and she had to be given additional pain injections. She resolved slowly and after 54 weeks had no residual pain or spasm.

[24] By report dated 10th April 2012 **(Exhibit 2b),** Dr. Rose saw her on the 21st July 2011. He had the benefit of a report from Dr. Nesbeth as well as a radiologist's report dated 19th May 2008. His physical examination revealed a healthy looking overweight female in no obvious painful distress. The cervical spine had restriction of left lateral rotation but all other ranges of motion of cervical spine were normal and pain free. Neurovascular status was intact in the upper extremities. There was a full range of motion of right thumb without pain. Pholens Test was negative. There was mild

tenderness along the midline of the lumbar spine. There was full active range of motion of the lumbar spine with "precipitation" of pains on lateral flexion. Straight leg raising was to 75% bilaterally with onset of hamstring tightness. The neurovascular status was intact in both lower limbs. Examination of the right ankle revealed no abnormalities. His diagnosis/impression:

1. Chronic whiplash injury
2. Chronic mechanical lower back pains
3. Possible ganglion dorsum left hand

The doctor expressed the opinion that the history of the incident is the "competent medical cause" of the injury. He rated her whole person impairment rating as 0%. He stated, "*Physical examination revealed no abnormal neurology and only mild restriction of movements in the cervical and lumbo-socral spine."*

[25] In her witness statement Ms. Lawrence paints a slightly different picture as she states,

> *"The pain is still there. My back is weak and I feel severe pain in my neck when I sit in one position too long and when I lay down without supporting my neck with a high pillow. My hand also hurts sometimes when I do strenuous work."*

[26] I am not convinced that this Claimant continues to have severe pain even though there probably is some intermittent discomfort. It is not such however as to materially affect her daily living. I prefer the evidence of Dr. Nesbeth that she had fully resolved after approximately 1 year and of Dr. Rose which to my mind corroborates Dr. Nesbeth's.

[27] Ms. Sharon Gordon for the 2nd Claimant submitted that the award should be $1.5 to $2 million. Ms. Mayhew submitted that for pain suffering and loss of amenities an award of $1.4 million was appropriate.

[28] I considered the following cases cited before me:

Stacey Ann Mitchell v Davis, Khan Vol. 5 p.146 (6.5.93)

Leslie v Panoe, Khan Vol. 5 p.150 (17.7.97)
Barrett v Brown, Khan Vol. 6 p. 104 (3 Nov 2006)
Wendell v Campbell (supra)
Danielle Archer v JIO (supra)

[29] In respect of pain suffering and loss of amenities I find that a fair award consistent with the authorities is $1.7 million for pain suffering and loss of amenities.

[30] There has been no challenge to the special damages claimed and I do believe counsel for the 1st Defendant acknowledged they were adequately supported by the evidence. Special damages of $81,322.79 will be awarded in that regard.

[31] The 2nd Defendant's ancillary claim against the 1st Defendant is in respect of the cost to repair their motor vehicle. This was pleaded at $317,288.00 and is supported by documentary evidence. 1st Defendant's counsel did not challenge the amount.

[32] In the result there is judgment against the 1st Defendant as follows:

1. For the 1st Claimant, $1.4 million general damages
2. For the 2nd Claimant, $1.7 million general damages and $81,322.79 special damages
3. For the 2nd Defendant, $317,288 special damages.

Interest at 3% will run on the general damages from the date of service of the claim (or ancillary claim as the case may be) and on special damages from the date of the accident. Costs against the 1st Defendant to be taxed if not agreed.

[33] It leaves me only to express my appreciation to all counsel for the professional manner in which this matter has been conducted. It made my task far easier and more pleasant.

David Batts
Puisne Judge