



[2017] JMSC. Civ. 118

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

**CLAIM NO. 2011HCV07801**

**BETWEEN                      BALVINE MOORE                      CLAIMANT**  
**AND                              MARLON D'AGUILAR                      1<sup>ST</sup> DEFENDANT**

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**AND                              KALONJI GAMEL D'AGUILAR                      2<sup>ND</sup> DEFENDANT**

**IN OPEN COURT**

Mr Lemar Neale instructed by Bignal Law for the Claimant

Mr Kwame Gordon instructed by Samuda and Johnson for the Defendant

*Negligence - Motor vehicle accident – Liability – Credibility of parties*

**Heard: May 10 and 22, 2017 and September 19, 2017**

**LINDO J:**

**The Claim**

[1] The claimant's action sounds in negligence. By claim form and particulars of claim filed on December 13, 2011, he alleges that on or about August 10, 2011, the second defendant, the servant and/or agent of the first defendant, negligently drove motor vehicle registered 7912EK thereby causing same to collide with his motor cycle and as a consequence thereof, he sustained serious injuries, suffered loss and incurred expenses.

- [2] The defendants by their joint defence filed on January 29, 2013, have denied negligence and have averred that the collision occurred solely as a result of, or was contributed to, by the negligence of the claimant. They have also denied that the 2<sup>nd</sup> defendant was the servant or agent of the 1<sup>st</sup> defendant.
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### **The Evidence**

- [3] The claimant on being affirmed, identified his witness statement filed on May 26, 2015 as his evidence in chief after paragraph 18 was struck out as being hearsay. His testimony is that he is a medical technician and on the 10<sup>th</sup> day of August 2011, he was riding his motor cycle from the direction of downtown, in the left lane along Lyndhurst Road in the direction of Maxfield Avenue and on reaching in the intersection of Lyndhurst Road and Beechwood Avenue he came to a complete stop at the white line at the front of a line of traffic heading in his direction. He states that when the light changed from red to green his motor cycle shut off and he turned the ignition, the engine turned over for about five times, which lasted about eight seconds, and then it started and he proceeded through the intersection "as the traffic light displaying in my direction was still on green".
- [4] He further states that he heard the sound of a motor car engine coming towards his left side, lifted up his legs and the motor car slammed into his motor cycle and he was thrown from the motor cycle and his right side collided with the traffic light pole. He also states that he was taken to the St Joseph's Hospital where he was treated and later transported to the Kingston Public Hospital. He states that at the Kingston Public Hospital he was seen by Dr Reid who gave him "head injury advice" and a prescription. He adds that he went home "began to feel pain to my neck, left wrist mid and lower back" and on August 20, 2011 he visited Dr Ravi Prakash Sangappa who examined him.
- [5] The following documents were agreed and tendered in evidence:  
Medical report of Dr C A Reid dated August 2, 2012.

Medical report of Dr Ravi Prakash Sangappa dated October 3, 2011

X-ray report from Nuttall Memorial Hospital dated August 31, 2011  
Receipt dated August 10, 2011 issued by Saint Joseph's Hospital in the sum of \$1,600.00

Receipt dated August 11, 2011 issued by Nelson's Drug Store in the sum of \$2,232.00

Receipt dated October 10, 2011 issued by Nuttall Memorial Hospital in the sum of \$7,000.00

2 Receipts issued by Oasis Health Care Limited dated February 13, 2015 in the sum of \$9,000.00 and \$25,000.00 respectively.

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- [6] Under cross-examination by Mr Gordon, the claimant agreed that Lyndhurst Road and Beechwood Avenue, were both about 25 feet wide, there is a "four way" and there is a painted white line on each road, except for Beechwood Avenue. He also agreed that each road along the four way has a stop light, and that on the Lyndhurst Road side, stop lights are on the left and right sides and the light on the left is about 15 feet from the actual intersection.
- [7] When asked if it was a busy thoroughfare he answered "depends on the time of day". He then indicated that it was closer to one o'clock than twelve and said that it was a 'week day'. He disagreed with the suggestion that on that specific day Lyndhurst Road was a busy thoroughfare. On being confronted with his witness statement, paragraph 5 where he had said "...I was about 30 feet away from the white line ... came to a complete stop at the white line...", he maintained that there was no white line. He stated that before the collision, he stopped in front of the stop light which was about 12 feet ahead of him and he was on the left hand side of the roadway, in the left lane, about 2-3 feet from the sidewalk, to the left.
- [8] He stated further that he was at the head of a line of traffic, three or four cars were behind him and no one was on the opposite side. When asked how long he was stationary at the intersection before the light changed to green, he indicated that he "cant give a time because I don't know how long the light take to change". He however stated that the motor cycle had shut off when the light turned to

green, he was in the same position, which is 12 feet from the light and he stayed there 2.5 to 3 seconds, turning over the engine before the bike started. He said about 5 seconds passed from the time the light turned to green, the bike shut off, and he got it started. He agreed that when the light changed, the cars behind him started to go through the intersection and two of the cars passed him and the collision occurred about "a second or two" after the bike started.

- [9] He also stated that he had not completed crossing the intersection when the collision occurred, and that of the two cars that had gone ahead up Lyndhurst Road, the last one was about 25 -30 feet. He said when the bike "shut off" he was about 27 to 30 feet from the intersection, and "anywhere between 4 seconds" passed since the last vehicle passed him, before the collision. He said when he got the bike to start, he checked the light before entering the intersection and it was still on green.
- [10] The claimant also said when the collision took place he was thrown up in the air "in a sense" and that he could not determine if the car that collided with his bike was coming fast, but that based on where the bike landed, it must have been coming fast. He said the car did not hit him.
- [11] He then said he was not thrown up in the air, but thrown up "like going to Beechwood Avenue" and he landed at the foot of the stop light, about 8-9 feet "from the tail of the car" and that the motor cycle ended up on Beechwood Avenue. He added that after the motor car hit the motor cycle, the motor cycle hit a drum and the motor car hit the motor cycle again, on the side of the road. He maintained that he had the green light when he went through the intersection and that the defendant came out of his vehicle "on his phone".
- [12] The 1<sup>st</sup> defendant did not attend the trial or give evidence in the matter.
- [13] The witness statement of the 2<sup>nd</sup> defendant, Kalonji D'Aguilar, filed on May 6, 2015, stood as his evidence in chief after he was sworn and it was identified by him. His evidence is that he borrowed his father's motor car and was driving it for

his own personal use. He states that when driving north on Beechwood Avenue, on reaching the traffic light which was showing green, and as he entered the intersection, "a bike man" rode out from Lyndhurst Road to his right and into his path and he "mashed [his] brakes to avoid a collision" but was unable to do so. He states that he was still in his lane at the time of the collision, no vehicles travelling in either direction along Lyndhurst Road had entered the traffic intersection immediately before the collision, the traffic was at a standstill before and even after the collision no vehicles entered the intersection until about 4 seconds later. He states further that the collision between the motor bike and the motor vehicle he was driving, happened because the bike rider "broke the red light, rode directly into my path".

- [14] When cross examined by Mr Neale, he denied that after the collision he came out of the car with a phone in his hand and agreed that traffic on Lyndhurst Road was at a standstill. He indicated that while driving along Beechwood Avenue he could not have seen the vehicles traversing Lyndhurst Road and that he saw the claimant on entering the centre of the intersection. He admitted that he "mashed his brakes" and indicated that he could not swerve. He disagreed that the claimant was thrown from the bike into a light post. He also disagreed that the claimant had the green light.
- [15] He stated further that he had no dialogue with the police when they came on the scene "other than taking particulars" and agreed that after the accident he made a statement in relation to insurance.
- [16] He stated that prior to entering the intersection of Beechwood Avenue, a vehicle was about 20 feet ahead of him and his vehicle would have been the last to pass over the stop light. He said he did not know if vehicles were behind him and that after the collision, no vehicle passed him on Beechwood Avenue because of the collision. When asked if he saw any vehicle behind him after he got out of his vehicle he said he "wasn't taking note". He agreed that the collision took place in

the intersection in the left lane of Beechwood Avenue and that he noticed vehicles heading in the opposite direction on Beechwood Avenue.

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[17] He indicated that Mr Moore was the cause of the accident, and that he broke the stop light as he, the defendant, had the green. He admitted that after the accident he asked him if he was 'ok' because he was concerned.

#### **The submissions**

[18] Mr Neale, Counsel for the claimant, submitted that the court should attach little weight to the evidence given by the claimant under cross examination, particularly as it relates to the evidence regarding measurements and distance of the road from various angles, as it is not relevant to determine the issues joined between the parties. He urged the court to assess the claimant as a truthful witness on the totality of the evidence given, and suggested that although the witness contradicted himself regarding the white line in the road, "this alone should not affect his credibility as a whole."

[19] Counsel also submitted that the claimant's testimony that the defendant came out of the vehicle with a phone at his ears, suggests that the 2<sup>nd</sup> defendant was distracted and this, combined with his failure to swerve, shows that he failed to have sufficient regard for other users of the road, including the claimant, and that he failed to keep a proper look-out.

[20] Counsel expressed the view that based on the claimant's evidence of the "impact of the collision...it seems that the 2<sup>nd</sup> defendant was going through the intersection at an excessive and improper speed and that he failed to apply his brakes in sufficient time or even stop or swerve." He also expressed the view that the 2<sup>nd</sup> defendant's testimony that no other vehicle was in the intersection coming from the opposite direction at the time of the collision, and his further evidence that vehicles were in the opposite direction, but not in the intersection, suggests that the defendant did not have the green light.

[21] On behalf of the 2<sup>nd</sup> defendant, Mr Gordon submitted that an examination of the claimant's responses to questions in cross examination revealed the improbability and inconsistencies associated with his version of the accident. He pointed out that the claimant in his evidence in chief, said, *inter alia*, that he came to a complete stop at the white line, but he was adamant in cross examination that there was no white line on the roadway and noted that he sought to explain that he meant the white line that exists now, as none was there at the time. Counsel also pointed out that the Claimant gave three different time lines as to how long it took him to restart his bike.

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[22] Counsel indicated that there is inconsistency between the claimant's version of the accident and the medical reports on which he relied, noting that the claimant contended that he collided with a traffic light pole, but the medical report of Dr Sangappa speaks to him being "thrown from his bike and fell on the ground hitting his head, then slid into a gutter...", while the medical report of Dr Reid states, "...Patient who was riding a motor bike when was hit off. He was thrown off, up to 6 feet in the air and landed on the left side of the face...". Counsel pointed out that the accounts in the medical reports are completely inconsistent with the version of events in the claimant's witness statement and that these are irreconcilable versions, which the claimant made no attempt to reconcile at the trial.

[23] He submitted that it is highly improbable that the vehicle which the claimant said was turning on Beechwood Avenue when the collision occurred, was not closer than 12 feet to the claimant, and pointed out that the claimant, in cross examination, said the collision occurred one second or two, after he got his bike started and there is no explanation as to how the bike was able to move and cover a distance of approximately 39 to 42 feet in that time, which he submitted was "physically improbable".

### **The issues**

[24] Two diametrically opposed versions of the accident have been given. The claimant on the one hand, is contending that this accident occurred because of the second Defendant's act of breaking the red light at the intersection of Beechwood Avenue and Lyndhurst Road. The second defendant, on the other hand, is saying that it is the claimant who broke the light and entered the intersection causing the collision.

[25] The main issue to be determined on the question of liability is whether the accident was caused by the Claimant or the Defendant. In this regard it also has to be determined whether the Claimant had the green light when he proceeded through the intersection or whether it was the Defendant who had the green light and also whether either party took any steps or could have taken any steps to avoid the collision.

#### **The Law**

[26] It is well settled that in a claim for negligence, in order for the claimant to succeed, he must provide evidence to satisfy the court on a balance of probabilities that the defendant owed him a duty of care at the material time, that there was a breach of that duty and it resulted in damage to him. It is also the law that a driver of a motor vehicle on a public road owes a duty of care to other road users to so manage and/or control his vehicle to prevent, hurt, harm or damage to each other. If he breaches this duty of care and an accident occurs he is responsible in law to the person who has been wronged.

[27] **Section 51(2) of the Road Traffic Act** imposes a duty on motorists to take such action as may be necessary to avoid an accident. It also provides that the breach by a driver of any motor vehicle of any of the provisions of the section shall not exonerate the driver of any other vehicle from the duty imposed by the subsection.

[28] All road users owe a duty of care to other road users (See **Esso Standard Oil SA Ltd & Anor v Ian Tulloch**, (1991) 28 JLR 553). The driver of a motor vehicle



must exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care is the care which an ordinary skilful driver would have exercised under all the circumstances and includes avoiding excessive speed, keeping a proper lookout and observing traffic rules and signals.(See **Bourhill v Young** [1943] AC 92)

- [29] In this case where there are diametrically opposed accounts of the accident, the court has a duty to analyse the available evidence and decide which of the accounts is more likely.
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- [30] Having considered the facts of this case and the submissions of both Counsel, I recognize that the issue of liability rests on the credibility of the parties and the plausibility of the accounts given by them. In arriving at my decision, I have therefore placed reliance on my assessment of the parties having examined their demeanour while giving evidence and during cross-examination.
- [31] I formed the impression that the claimant was not being truthful, especially in relation to the evidence which determine the cause of the accident and the point of impact as well as the injuries he sustained. The injuries sustained by him as set out in the medical reports tendered in evidence are not consistent with his contention that his right side struck the light pole. He was not convincing notwithstanding his effort to impress the court in relation to exact measurements and time. His evidence on cross examination has been riddled with inconsistencies and he has been discredited. I also find, and therefore must agree with Counsel for the 2<sup>nd</sup> defendant, that his case is "replete with improbabilities".
- [32] On the other hand, the 2<sup>nd</sup> defendant was forthright and even willing to concede on cross examination that he admitted after the accident that "insurance will handle it". He was calm and measured as he gave his evidence and was cross examined and has impressed me as an honest and truthful witness. He has been quite frank with the Court and I find his account of this accident more credible. I

cannot say the same regarding the claimant as I do not believe his story and I reject his account of how the accident happened and therefore reject his evidence in relation to the state of the traffic lights and also whether there was a white line at the intersection.

[33] I accept that the defendant had the green light and was proceeding through the intersection when the claimant went through when the light had changed to red. This points the court to a finding that the claimant is liable for the collision.

[34] I find that the claimant is the author of his own misfortune. I do not believe his story and I reject his account of how the accident happened. He gave answers in cross-examination which demonstrated that his version of how the accident happened could not be accepted or relied upon.

[35] There was no independent eyewitness and I accept the evidence as to the point of impact as stated by the defendant in cross examination as being more plausible. Whereas the claimant said he was thrown from his motorcycle and his right side collided with the traffic pole, the medical evidence points to injury which is confined mostly to the left.

[36] The claimant had a duty to prove his case on a balance of probabilities. In all the circumstances, I find that it more likely than not that the claimant failed to keep any or any proper look-out, failed to observe the 2<sup>nd</sup> defendant's vehicle in sufficient time and crossed over the intersection when he had the red light and it was manifestly unsafe to do so and his bike collided with the 2<sup>nd</sup> defendant's car. I find that the accident was caused, wholly, by the negligence of the claimant.

[37] There will therefore be judgment for the 2<sup>nd</sup> defendant with costs to be agreed or taxed.

*Quido*