



[2020] JMSC Civ. 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 01045

BETWEEN	MARVEL MORRISON	CLAIMANT
AND	ERVAL ADOLPHUS JACKSON	1ST DEFENDANT
AND	MICHAEL ANTHONY JACKSON	2ND DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 01046

BETWEEN	MICHELLE TUGMAN	CLAIMANT
AND	ERVAL ADOLPHUS JACKSON	1ST DEFENDANT
AND	MICHAEL ANTHONY JACKSON	2ND DEFENDANT
BETWEEN	ERVAL ADOLPHUS JACKSON	1ST ANCILLARY CLAIMANT
AND	MICHAEL ANTHONY JACKSON	2ND ANCILLARY CLAIMANT
AND	MARVIE MORRISON	ANCILLARY DEFENDANT

IN OPEN COURT

Mr. Courtney Rowe instructed by Bignall Law for the Claimants.

Mr. Stephen Johnson instructed by Samuda & Johnson for the Ancillary Claimants and Defendants.

Negligence-Motor vehicle collision-Contributory negligence- Personal injuries – Damages

Heard: 9th and 11th December, 2019 and 29th April, 2020

WILTSHIRE, J.

Background

- [1] The Claimants have brought an action in negligence against the Defendants for damages for personal injuries arising out of a motor vehicle accident which occurred on or about the 21st February, 2013 along First Street, Newport West, in the parish of Kingston. The Claimants allege that Mr. Michael Jackson negligently drove, managed and/or controlled motorcar registered 7633 FA causing it to collide into the side of motorcar 9273 FA driven by Marvie Morrison and in which Michelle Tugman was a passenger. The Claimants contend that they suffered injuries, loss and damage and incurred expenses as a result of the negligence of Mr. Michael Jackson.
- [2] The circumstances surrounding the accident are in dispute as the parties are blaming each other. To that end, the Defendants denied liability and filed an ancillary claim alleging that the collision was caused and/or contributed to by the negligence of Miss Morrison.

Claimant's Case

- [3] Miss Morrison testified that on the 21st February, 2013 she was driving motor vehicle registered 9273 FA along First Avenue, Newport West, in Kingston. She had two passengers, Michelle Tugman and her sister Tricia Tugman. She said a motor vehicle registered 7633 FA, which was travelling in front of her, proceeded to make a sudden U-turn without any indication or warning. She stated that before completing said U-turn, the driver of said vehicle lost control and collided into the left side of the vehicle she was driving. She further stated that she honked her horn and tried to swerve to avoid the collision but was unsuccessful. She said that if Mr.

Jackson was paying attention he would have noticed that she was trying to get out of his way.

- [4] Miss Morrison indicated that where the accident occurred was a blind corner, that is, as one went around the corner one could not really see what was around there. She said that Mr. Jackson was a car's length ahead of her and went around the corner first. When she went around, she encountered Mr. Jackson's vehicle that was on the corner in a stationary position. She explained under cross-examination that when she came upon the stationary vehicle, she tooted her horn and moved to her right in order to avoid a collision. When she moved to the right, Mr. Jackson made the U-turn and hit her vehicle.
- [5] Miss Morrison agreed with Mr. Johnson's suggestion that the accident occurred because she attempted to overtake Mr. Jackson after he had stopped. Under re-examination she explained that Mr. Jackson was at fault as he had made a stop around the blind corner and she had to go to her right or she would have collided in the rear of his vehicle. She swerved to her right to avoid a direct collision, noticed that he was making a U-turn so went even further right to avoid him and he hit the left section of her car.
- [6] Miss Morrison said that Mr. Michael Jackson told her that he had not heard her horn or seen her vehicle as he was on his phone while making the U-turn. She also said that he told her that he would pay to fix her vehicle.
- [7] Miss Tugman testified that when the accident occurred she was seated at the back left hand side of the vehicle driven by Miss Morrison. She was on her phone when she heard Miss Morrison toot her horn, and she observed the other vehicle turning. She said the person stopped and then just turn the van+. When challenged by counsel that she did not know how the accident happened because she was on her phone, she responded that she heard the horn, looked up and the man just turn. That's when we collided.+She indicated that after the accident both she and

her sister, Tricia Tugman, exited the vehicle and were to the left of same, while Miss Morrison and Mr. Jackson were talking.

Defendants'/Ancillary Claimants' Case

- [8] Mr. Michael Jackson testified that he was travelling along First Street when he decided to make a U-turn. He said that he slowed down, put on his right indicator light and checked his right rear view mirror to see whether or not it was safe to make the turn. Having determined that it was safe, he was in the process of making the U-turn, when Miss Morrison, driving at a fast rate, tried to overtake him and in doing so, collided in the right front section of his vehicle.
- [9] Mr. Jackson denied that the accident occurred around a blind corner and pointed out 12 feet as the distance from the corner to where his vehicle was positioned. He also denied speeding and losing control of his vehicle. He said that his vehicle was already turned crossway the roadway, going into the opposite lane, when Miss Morrison collided into his vehicle. He stated that he did not see her vehicle before the collision. Mr. Jackson also stated that he was not aware of Miss Michelle Tugman at the time of the accident, as he did not see her and she did not present herself as a passenger in Miss Morrison's vehicle.
- [10] Under cross-examination, Mr. Jackson stated that the distance of 12 feet was pretty much+one foot more than a car length. He indicated that after he passed the corner he realised that he was on the wrong street so he was making the U-turn. At the time of making the U-turn, he did not see any vehicle behind him. He saw Miss Morrison when she was about to hit him, and at that time his vehicle was stationary. He stated that when he turned, his vehicle was more in the right lane and Miss Morrison should have stopped. He said further that if she had stayed in the left lane then the collision would have been to the rear of the vehicle he was driving. He also agreed with Counsel that with his vehicle turned across, it covered all of the left lane and a part of the right lane. In response to Counsel's question

Mr. Jackson insisted that he did not see Miss Michelle Tugman at the scene of the accident, he only saw Miss Morrison and another fair complexion lady.

- [11] In the Amended Defence filed on the 17th September, 2018, the Defendants denied that Mr. Michael Jackson, at the time of the accident, was driving as the servant and/or agent of Mr. Erval Jackson. They averred that Mr. Michael Jackson was driving for his own purpose and was not under the control of Mr. Erval Jackson. However, neither Defendant gave evidence on this issue.

Visit to Locus

- [12] It was apparent to the court that the parties differed on whether the location of the accident was at a blind corner. At the close of the Defendants' case, the court indicated that since that issue was critical to the determination of liability, it would be best resolved by a visit to the locus.

Facts not in dispute

- [13] The parties agree that on the 21st day of February, 2013 there was a collision between vehicles registered 7633 FA and 9273 FA. It is also not disputed that Mr. Erval Jackson was the owner of motor vehicle registered 7633 FA, and Mr. Michael Jackson was the driver of said vehicle.

Issues

- [14] The court must therefore determine the following:
- (i) Whether the collision was caused by the negligence of either party.
 - (ii) Whether both parties contributed to the accident.
 - (iii) What is the nature and extent of the injuries suffered by the Claimants.
 - (iv) The quantum of damages to which the successful party is entitled.

Law

- [15] In the early case of **Blyth v The Company of Properties of the Birmingham Waterworks (1856) Exchequer Reports 781** negligence was defined as,

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

To succeed in a cause of action for negligence, the following three elements must be proved;

- (a) *A duty of care owed by the defendants to the claimants;*
- (b) *A breach of that duty by the defendants; and*
- (c) *The damage to the claimants resulted from the breach*

All users of the road owe a duty of care to other road users and section 57 (2) and (3) of the Road Traffic Act imposes a duty on a motorist to take such action as may be necessary to avoid an accident and drive or operate a vehicle with due regard to other vehicles and pedestrians and with due regard to the safety of any person or property.

Analysis of Evidence

- [16] The visit to the locus revealed that the accident did occur in a blind corner. I observed that after turning onto First Avenue the road proceeded around a deep left hand corner. As one enters the corner there is a property on the left hand side, which is secured by a large gate. The entrance to that property was less than a car length from the corner. The observations made at the locus gave credence to Miss Morrison's evidence that it was a blind corner and revealed that a car's length from the corner placed Mr. Jackson's vehicle in a blind spot. His vehicle could not be seen until one cleared the corner.

- [17] It has not been disputed that Miss Morrison was always behind Mr. Jackson at a distance of a car's length. I accept that Miss. Morrison came around that blind corner and encountered Mr. Jackson's vehicle in a stationary position. She said she tooted her horn and moved to the right because if she had not done so, she would have collided in the rear of his vehicle. Miss Tugman testified that it was the sound of Miss Morrison's horn that caused her to look up and see Mr. Jackson making the U-turn. Mr. Jackson on the other hand, claims that Miss Morrison failed to blow her horn.
- [18] Mr. Jackson opined that Miss Morrison came around the corner at 70km per hour. From my observations at the locus, Mr. Jackson's vehicle, based on his evidence, was too close to the corner. Being one car length behind, had Miss Morrison come around that corner at 70km per hour, she could not have swerved to avoid a collision in the rear of Mr. Jackson's vehicle. Mr. Jackson also said he did not see or hear Miss Morrison's vehicle before the impact. I therefore find his evidence about her speed to be incredible and I reject same.
- [19] In her evidence in chief, Miss Morrison stated that Mr. Jackson was the cause of the accident. Under cross-examination, she agreed with Mr. Johnson that after Mr. Jackson made the stop, she attempted to overtake him and that was why the accident occurred. Under re-examination she sought to clarify the inconsistency in her evidence by explaining that Mr. Jackson made a direct stop around a blind corner and in order not to hit him in the rear, she swerved to her right. She further explained that she noticed him make the U-turn and so she went further right to avoid him and he hit the left section of her car. She thereafter repeated that Mr. Jackson was the cause of the accident. I am satisfied that, from Miss Morrison's explanation, she continued to maintain that Mr. Jackson's actions caused the accident and she was not accepting liability.
- [20] Miss Morrison testified that she went around the corner and came upon Mr Jackson's stationary vehicle. Mr Jackson in his evidence in chief stated that he had slowed down and put on his right indicator light but under cross-examination,

he admitted that his vehicle was stationary. Miss Morrison's evidence was clearly that if she had not swerved to the right she would have collided into the rear of Mr Jackson's vehicle. Mr. Jackson testified that Miss Morrison should have stopped and that if she had stayed on the left, the collision would have been to the rear of his vehicle.

- [21] From that piece of Mr. Jackson's evidence, the court can only infer that Mr. Jackson was conceding that based on how and where his vehicle was positioned on that blind corner, there would have been a collision. Apparently, a collision to the rear would have been the lesser of two evils. I do not find that Mr. Jackson was a truthful and credible witness. I find that the Claimants were credible and their evidence reliable. Wherever Mr. Jackson's evidence was in conflict with Miss Morrison's, I preferred her evidence and I reject Mr. Jackson's.
- [22] Mr. Jackson stopped in a blind corner on his realisation that he had taken the wrong road. From that position, he decided to change directions, using a dangerous manoeuvre, a U-turn, when it was unsafe to do so. From the position of his vehicle, based on his evidence, he could not have seen that a vehicle was about to negotiate that corner. That is why he did not see Miss Morrison's car. Mr. Jackson owed a duty of care to Miss Morrison and he breached that duty when he stopped in a blind corner and then executed a change of direction from said corner. He was therefore negligent in his operation of motor vehicle registered 7633 FA.
- [23] Regarding the presence of Miss Tugman, the evidence of Miss Morrison and Miss Tugman on that point was not challenged by the defence and as I have already indicated, I do not find Mr. Jackson to be a witness of truth. I therefore accept that Miss. Tugman was a passenger, seated in the rear of Miss Morrison's vehicle.
- [24] Mr. Erval Jackson did not testify and Mr. Michael Jackson gave no evidence regarding the averment that he was driving for his own purpose and was not under the control of Mr. Erval Jackson. There is a presumption in law that if a motor vehicle is registered in your name then you have custody and control of said

vehicle and the driver of said vehicle was acting as your servant and/or agent. It is however rebuttable and if relied on by the registered owner, then the evidential burden shifts to said owner. The onus therefore shifted to Mr. Erval Jackson to show that custody and control had passed to Mr. Michael Jackson.

- [25] That onus of displacing the presumption was not discharged. The undisputed evidence that Mr. Erval Jackson was the registered owner of the vehicle driven by Mr. Michael Jackson therefore stands as *prima facie* proof that Mr. Michael Jackson was his servant and/or agent.

Contributory Negligence

- [26] Counsel for Mr. Jackson submitted that if the court did not find that Miss Morrison was fully liable, then a finding of contributory negligence should be made against her. The law in relation to contributory negligence is stated in section 3(1) of the Law Reform (Contributory Negligence) Act as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of another person or persons, a claim in respect of that damage shall not be defeated, but the damages recoverable in respect thereof shall be reduced to the extent as the court thinks just and equitable having regard to the Claimant's share in the responsibility of damage....."

- [27] Contributory negligence arises where there has been some act or omission on the Claimants part, which has materially contributed to the damage, caused and is such that it can be described as negligence. Under these circumstances, negligence is deemed to be more careless conduct. To establish a claim of contributory negligence what is required is proof that the injured party did not take reasonable care of himself and contributed to his own injury.
- [28] According to Lord Simon in **Nance v British Columbia Electric Railway** [1951] A.C. 610 at 611:

"When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove..... that the injured party did not in his own interest take reasonable care of himself and

contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the Plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

- [29] Mr. Johnson submitted that a prudent person would have stopped and made sure it was clear to pass the person making a U-turn. Counsel argued that Miss Morrison should have stopped, indicated and blown her horn. It was also submitted that from the visit to the locus it was seen that the road was broad enough for Mr. Jackson to make the U-turn safely and for Miss Morrison to go around.
- [30] The very act of stopping in a blind corner, in this court's view, was an act of negligence on Mr. Jackson's part. Miss Morrison could not have seen around that corner. I accept Miss Morrison's evidence that she did blow her horn when she came upon the vehicle in the corner. Mr. Jackson stopped in a blind corner and failed to ensure the way was clear before executing a change of direction. His negligent conduct created a situation which placed Miss Morrison between the proverbial rock and a hard place. Coming around that blind corner, Miss Morrison would have collided into the rear of Mr. Jackson's vehicle had she not swerved. Then, despite having attempted to avoid a rear end collision, Miss Morrison had to deal with Mr. Jackson's further negligent act of changing direction when it was not safe to do so.
- [31] The prudence of travelling one car length away from the vehicle ahead allows a driver enough space and time to take appropriate action should an emergency arise, for example, a sudden stop. The driver's ability to respond also depends on their paying attention to the actions of the other drivers. It has not been disputed that Miss Morrison was travelling a car length behind Mr Jackson, there is no evidence that she was not paying attention to the road and there is no evidence that she was speeding. It also goes without say, that Miss Morrison could not have seen around the blind corner. Miss Morrison was not careless as to her own safety and the safety of her passenger, and her conduct does not amount to contributory negligence.

Damages

- [32] Miss Morrison testified that she sustained injuries to her back, hip and shoulders and was in a lot of pain. She was examined by Dr. Francis Kpormego after the accident in 2013, and he prescribed pain and anti-inflammatory medication for her. Miss Morrison said that she experienced difficulty in doing a lot of things including sleeping after the accident. Two years later, she was examined by Dr. Pencle for the purposes of assessing her injuries post-accident. Under cross-examination, she stated that she was still having pain in her shoulders, lower back and hip.
- [33] Miss Morrison relied on medical reports, from both doctors, which were admitted into evidence. Dr. Kpormegos report revealed that Miss Morrison complained of severe pains to her shoulder, lower back and neck, which radiated to her upper limbs. He saw Miss Morrison twice and based on his examination he concluded that she had suffered a moderate whiplash injury and moderate to severe sprains/strains. He also found that she was suffering from anxiety syndrome. The doctor indicated that prognosis in this case was always bleak as muscle strains were %as eruptive as active volcanoes+, so total recovery was %untameable+.
- [34] Dr. Pencles report indicated that when Miss Morrison was seen in 2015, she complained of persistent neck pain, persistent numbness and pain in hands bilaterally and persistent lower back and hip pain. He gave a diagnosis of whiplash syndrome, numbness in hands, lower back pain and intermittent back pain. Her prognosis was expected to be that of continued general improvement with time for her neck and back pain. Dr. Pencle calculated Miss Morrisons disability as two percent (2%) whole person impairment with respect to her neck and lower back pain.
- [35] Mr. Rowe relied on the case of **Talisha Bryan v Simpson and Fletcher** [2014] JMSC Civ. 31 where the claimant there suffered a whiplash injury and lower back strain. Lindo J. awarded the sum of \$1,400,000.00 for those injuries. That sum, when updated, would be \$1,700,000.00 today. Counsel submitted that since Miss

Morrison did not undergo physiotherapy treatment the sum would be adjusted down and an appropriate figure would be \$1,500,000.00.

- [36] Mr. Jackson submitted that Miss Morrison's injuries were not serious or life threatening and relied on the case of **Peter Marshall v Carlton Cole & Alvin Thorpe** found in Volume 6 of Khan's Recent Personal Awards. The claimant in that case suffered moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain and spasm. McIntosh D. J awarded the sum of \$350,000.00 which when updated, would be \$926,553.10 today. Counsel submitted that Miss Morrison's injuries were not as serious as Mr. Marshall's and therefore an award of \$850,000.00 would be reasonable compensation. Mr. Jackson also submitted that as Miss Morrison saw Dr. Pencle two years after the accident, his report did not add any value.
- [37] Miss Morrison in her viva voce evidence, testified that she was still having pain in her shoulders, lower back and hip. Dr. Kpormego had indicated that the prognosis in the type of injury suffered by Miss Morrison was bleak and total recovery could not be given a time. Dr. Pencle indicated that in 2015 based on his examination of Miss Morrison she was still experiencing pain in her neck, lower back and hip. The evidence regarding her continued pain was not challenged and the findings of Dr. Pencle, made two years after the accident, were not discredited. I therefore must humbly disagree with counsel that Dr. Pencle's report adds no value to this assessment.
- [38] The cases cited by Counsel on both sides do provide some guidance as to the award to be made. I do agree that as Miss Morrison's injuries did not require physiotherapy, they were not as serious as those suffered by Miss Bryan. Miss Morrison spoke of a difficulty doing a lot of things but gave no details of those things save and except a difficulty sleeping after the accident. I am of the view that her injuries were more serious than Mr. Marshall's, as he was discharged without any residual pain and up to the time of this trial Miss Morrison was still experiencing pain. Taking into consideration, as well, Dr. Pencle's conclusion that Miss Morrison

has a two percent (2%) whole person impairment, an appropriate award for her pain and suffering is \$1,300,000.00.

- [39] Miss Tugman testified that she was in a lot of pain after the accident and struggled with sleep. She stated that she went to Dr. Kpormego and he prescribed pain and anti-inflammatory medication which helped but she was still in a lot of pain. She also said that most of her problems was with headaches and lack of sleep. At the time of the trial, she said she was having a bit of pain in her knees and lower back. Dr. Kpormego diagnosed her as suffering a moderate whiplash injury, moderate to severe sprains/strains and anxiety syndrome.
- [40] Dr. Pencle reported that Miss Tugman's whiplash injury had resolved and he continued her on analgesics as necessary. He indicated that with respect to her neck and knee pain, which did not seem to impact on her current lifestyle, she was expected to continue to improve with time. I find the **Peter Marshall** case to be more helpful in this instance and an appropriate award for her pain and suffering is \$1,000,000.00.
- [41] For special damages, two receipts each totalling \$25,000.00, being the cost of the medical reports from Dr. Pencle, were agreed by counsel for the parties and admitted into evidence.

Disposition

- [42] Based on my findings, in the consolidated matters of 2015 HCV 01045 and 01046, judgment for the Claimants Marvie Morrison and Michelle Tugman against 1st and 2nd Defendants Erval Jackson and Michael Jackson. On the ancillary claim, judgment for the Ancillary Defendant, Marvie Morrison against Ancillary Claimants Erval Jackson and Michael Jackson

[43] I assess damages against the 1st and 2nd Defendants as follows:

For Marvie Morrison:-

- a) Special Damages in the sum of \$25,000.00 with interest at 3% from the date of the accident to the date of judgment.
- b) General Damages in the sum of \$1,300,000.00 with interest at 3% from the date of service of the claim to the date of judgment.

For Michelle Tugman:-

- a) Special Damages in the sum of \$25,000.00 with interest at 3% from the date of the accident to the date of judgment.
- b) General Damages in the sum of \$1,000,000.00 with interest at 3% from the date of service of the claim to the date of judgment.
- c) Costs to Marvie Morrison on the claim to be taxed if not agreed.
- d) Costs to Michell Tugman on the claim to be taxed if not agreed.
- e) Costs to Marvie Morrison on the ancillary claim to be taxed if not agreed.