

**REASONS FOR JUDGMENT**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

SUIT NO. 2000/N-039

<b>BETWEEN</b>	<b>ANNETTE NELSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>LLOYD BROWN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>SILICA MINING &amp; ENGINEERING LTD.</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Ms. K. McFarlane for Claimant.

Miss T. Dunn instructed by Nunes Scholefield DeLeon & Company for the Defendants.

**Heard: 17<sup>th</sup> December 2007, February 13 and 14, 2008**

**Mangatal J:**

This claim involves a motor vehicle accident which took place on the 24<sup>th</sup> of June 1998 along the Winston Jones Highway in the parish of Manchester.

One witness as to fact was called on behalf of the Claimant Ms. Nelson. The driver of Ms. Nelson's vehicle on the date in question was Mr. Errol Lemonius. Mr. Lemonius' witness statement filed November 29, 2007 was ordered to stand as examination in chief. Mr. Lemonius gave evidence that at about 9:45 p.m he was driving Ms. Nelson's left hand drive pickup from St. Elizabeth going towards Kingston. On negotiating the bottom of the Winston Jones Highway, he was travelling on his correct side of the road when he saw a light coming towards him. He says he realized that it was a truck which was drifting onto his side of the road. On seeing the truck drifting towards his side of the road, Mr. Lemonius tried to swerve further left but because of an

embankment he had limited space to manoeuvre. Mr. Lemonius then heard a bang and felt an impact to the front right side section of his vehicle. The pickup he was in rolled about 2 chains before it stopped. Mr. Lemonius says that when his pickup stopped he came out and observed a Mack truck pinned into the embankment with another truck, both on his side of the road.

Mr. Lemonius, stated that at no time did he overtake any vehicle in the vicinity of the accident and at all material times he was on his correct side of the road.

Mr. Lemonius indicated that where the accident occurred, the road was about 25 feet wide, in the vicinity there was a slight right hand bend, long bend and one can see to a point. Accident happened a little before you reach the bend. The other vehicle which the Mack truck collided with was a freightliner which Mr. Lemonius had passed at the middle of the Spur Tree, some 4-5 miles before the accident. Mr. Lemonius stated that he was driving very slowly as he had 1,000lbs of watermelon and 800lbs of pineapple on his vehicle.

On behalf of the Defense, the driver of the 2<sup>nd</sup> Defendant's Mack truck, Lloyd Brown, gave evidence. In addition the Defendants called 4 other witnesses as to the circumstances of the accident: that is, Delroy Spence driver of Freightliner trailer also involved in accident, Anthony Abbott, Norris Johnson and Anthony Dawkins.

Lloyd Brown gave evidence and his witness statement filed January 8, 2007 was ordered to stand as examination in chief.

Lloyd Brown's evidence was that on the night in question he was driving the 2<sup>nd</sup> Defendant's Mack truck heading along Winston Jones Highway in the direction of St. Elizabeth with a load of river sand.

He was travelling slowly down the hill and was coming towards the corner before taking the grade to enter Mandeville. There were vehicles coming in the opposite direction. Mr. Brown says about three vehicles passed him and he saw them apply their brake lights so he started to apply his brakes.

On reaching the corner before climbing the steep hill he saw a sudden burst of light coming towards him out of the line of traffic traveling in the

opposite direction. As the vehicle approached Mr. Brown heard a sound like an explosion and the truck he was driving "dipped", swung and drifted to the other side of the road. Mr. Brown states that the explosion which he heard was caused by the sudden impact of something colliding with the wheel of the truck.

In re-examination Mr. Brown said that he did not notice any vehicle traveling before the freightliner trailer proceeding in the opposite direction.

Mr. Spence in his witness statement filed November 8, 2007, stated that he was travelling along the Winston Jones Highway heading towards Kingston. He was driving a freightliner trailer an 18 wheeler, about 30-40 feet long and about 8ft wide.

The road ahead of him was clear and there were no vehicles travelling before him. He said that he saw a line of vehicles travelling in the opposite direction towards Mandeville, there were three other vehicles before a Mack truck. Mr. Spence said that all of a sudden he saw the Mack truck heading out of his line and coming towards him. He tried to move further left but there was no space to go so the Mack truck hit into the right side of the trailer by the right hand door.

Mr. Anthony Abbott stated that on the night in question he was seated in right hand passenger seat of a left hand drive truck which was travelling slowly because of a differential problem. The truck he was in was travelling in the direction of Westmoreland. There was a trailer head going in the direction of Williamsfield, that is, in the opposite direction to him. A van came from behind the trailer and overtook it.

There was his boss' van directly behind him and a car and a truck travelling behind the truck in which Mr. Abbott was travelling.

He saw when the van overtook the trailer and it could not get back in line and hit the truck travelling behind Mr. Abbott. It hit the truck by its right front wheel. The truck then went across to the other side and hit the trailer that was coming in the opposite direction. Mr. Abbott said that the pickup started to

overtake the trailer at a wider section of the road but that the road started to narrow.

NORRIS JOHNSON, whose witness statement dated December 11, 2007 was ordered to stand as his examination-in-chief, stated that he and several other persons, including Clive Abbott, Clive and Anthony Dawkins went to Winston Jones Highway to repair a broken down truck. He was heading back to Westmoreland traveling in a pickup behind the truck that had just been repaired. Johnson was standing in the back of the pickup holding on to the back of the cab. There were other persons in the van including Anthony Dawkins. There was a car travelling behind the pickup he was in and then another truck behind that car. Mr. Johnson said that there was a trailer travelling in the opposite direction and there were no vehicles travelling ahead of the trailer. He then noticed a Ford Ranger overtaking the trailer; it was overtaking beside the pickup that Mr. Johnson was traveling in. This took place at a wide section of the road but then the road started to get narrow in the opposite direction.

When Mr. Johnson saw this happen he looked around to watch the Ford Ranger pickup hit into the front wheel of the truck that was travelling behind him and he heard a loud explosion.

Mr. Johnson says the Ford Ranger overturned and the truck went across the road and hit the trailer in the right side.

Mr. Anthony Dawkins also gave evidence with his amended witness statement dated December 17, 2007 standing as his examination in chief. He stated that he was travelling in a pickup along the Winston Jones Highway heading towards Westmoreland. He was sitting on a keg in the back of the pickup and so was higher than the cab and was looking around.

Mr. Dawkins says that he observed a car travelling behind the pickup he was in and a Mack Truck was behind the car. He noticed a trailer coming down the hill from the direction of Mandeville. He did not see any vehicles before the trailer. He then saw a pickup overtaking the trailer. He says he continued to look because he knew that the pickup could not make it as the

road began to narrow and the pickup could not pass between the trailer and the Mack truck.

The pickup passed the pickup Mr. Dawkins was travelling in and the car behind him and then hit the Mack truck in the right front wheel. The Mack truck's front wheel blew out and the pickup van turned over.

When the pickup hit the Mack Truck, the Mack truck went across the road and hit the trailer on the passenger door.

It is clear that the claimant's driver Mr. Lemonius and the 1<sup>st</sup> Defendant are both giving completely different versions of how the accident happened and both versions of the accident plainly cannot be true. I will therefore have to examine the evidence closely to see whether there is any evidence which assists me in determining the manner in which the accident occurred on a balance of probabilities. The issue of credibility will be very important in the case and so too will be the question of the physical evidence and in determining which of these two reconcilable versions of the collision are true.

***See Ennette Cope v Donald Williams Civil Appeal No. 60/91***

In her closing submissions Miss McFarlane on behalf of the claimant asked me to say that the fact that the front of the pickup was not damaged, and the photographs show that the head lights were intact, is inconsistent with the pickup overtaking trailer and hitting into Defendants Mack Truck right front wheel. She characterized the damage to the pickup as essentially running damage.

She also said that although the photographs showed damage to right front wheel of truck this was not conclusive that it was damaged by the Claimant's pickup as there was also evidence of extensive damage caused to the Mack Truck from the collision with the trailer as well.

In his evidence Mr. Lemonius did not say which part of the Mack Truck collided with his pickup. It seems to me however that the type of damage to the claimant's pickup could be consistent with either version of the accident because if pickup had been overtaking and manoeuvred to avoid head on collision, the front would pass the front of Mack Truck and that would explain

how impact could be with side of pickup. In addition the fact that the pickup rolled and travelled about two chains before it stopped, suggests that the pickup was travelling fairly quickly such as would be consistent with an overtaking manoeuvre, particularly since claimant's driver says it was only a grazing blow, running damage to side of vehicle as opposed to travelling very slowly and swerving further left.

Also, the driver of trailer head Mr. Spence says Mack truck hit trailer at right front door and this suggests an impact which is not a head on collision. It seems to me that how the vehicles are said to have ended up with the trailer essentially pinned by Mack truck at an angle is more consistent with the Defendant's version of how the accident happened. For the accident to have happened as Mr. Lemonius described the point of impact would have had to have been to the far left side of Mr. Lemonius' side of the road and for the Mack truck to have then collided, not with the front of the freightliner, but with the right door of the freightliner, the 2<sup>nd</sup> Defendant's truck would have had to have drifted over to Mr. Lemonius' side of the road, collided with him, and then return towards the middle of the road, get over to the right side of the trailer, and collide with the trailer. Not a very credible manoeuvre. Mr. Spence had said he had no room or space to pull to his left.

Importantly too, there were four witnesses called by the Defendants who could really be classified as independent witnesses. It was not suggested they had any interest to serve and these parties do not appear to have any connection to the Defendants. They were also in my view not shaken in cross examination.

Even if there are any discrepancies in the evidence by these witnesses or any aspects which are not credible, same do not go to the root of the Defendant's case. The fundamental point is that all say that just prior to the accident there was no vehicle traveling in front of the freightliner trailer and this includes the driver of the trailer head Mr. Spence. It is difficult to see how all of these witnesses would not have seen Mr. Lemonius' pickup travelling in

front of the trailer head if Mr. Lemonius had in fact been travelling in front of the trailer head and if he had overtaken trailer head 4-5 miles before.

Mr. Abbott, Mr. Johnson and Mr. Dawkins all support the Defendant's case that it was Mr. Lemonius pickup that was overtaking the trailer head prior to the impact with the Mack truck and that it was the pickup which was on its wrong side of the road at the time of the impact.

I find that when I look at the preponderance of evidence that it was the pickup that was overtaking the trailer head, that the pickup hit into the right front wheel of the Mack truck on the Mack truck's correct side of the road and the evidence as to where and their position in relation to each other, that the Mack truck and trailer head ended up, I find that it is only logical to find on a balance probabilities that the accident happened in the manner described by the Defendants.

I find that the accident happened when the driver of the claimant's motor vehicle was overtaking at a time when it was dangerous to do so and the accident impact occurred on claimant's driver's incorrect side of the road. I find that the right side of the claimant's motor vehicle collided with right front wheel of Mack truck which caused the Mack truck to dip, swing and drift to the right, to other side of the road, causing the Mack truck to collide with right side of the trailer head vehicle at an angle almost right angle or close thereto. I find that the pickup came over into 1<sup>st</sup> Defendant's path at a time when the Mack truck was heavily laden. It would be difficult to stop a heavily laden truck or to swerve suddenly in the seconds between when the 1<sup>st</sup> Defendant first saw the burst of light about 60ft away and the time of impact. I therefore find that the first Defendant did not contribute to the accident in any way.

The Defendants are entitled to judgment on the claim. There is a Counter claim for \$1.3million, which must really be a claim for the 2<sup>nd</sup> Defendant owner of the Mack truck, on the basis of total loss of motor vehicle. However, the Assessor's report by Advanced Insurance Adjuster's dated April 12, 2000 p11 - 12 of the agreed bundle of documents states the pre accident

value of the Mack truck to be \$1.3 M with a salvage value of \$200,000.00. The proper assessment on a total loss basis is therefore \$1.1 million dollars.

There will therefore be judgment for the Defendants against the Claimant on the Claim and judgment for the 2nd Defendant against the claimant on the Counter claim, with damages assessed in the sum of \$1.1 million, with interest thereon at the rate of 3% per annum from June 24, 1998 to July 14, 1999, at the rate of 6% per annum from July 15, 1999 to 22<sup>nd</sup> June 2006, and at 3% per annum from 23 June 2006 to February 21, 2008.

Costs to the Defendants to be taxed if not agreed.