**[2019] JMSC Civ 220**

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

**IN CIVIL DIVISION**

**CLAIM NO. 2011 HCV 00934**

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| **BETWEEN** | **GAUNTLETT POWELL** | **ANCILLARY CLAIMANT** |
| **AND** | **BULK LIQUID CARRIERS PETROLEUM TRANSPORT LIMITED** | **ANCILLARY DEFENDANT** |

**IN OPEN COURT**

**Miss Allison T. Lawrence for the Ancillary Claimant**

**Mr Stuart L. Stimpson and Miss Tashauna A.K. Grannum instructed by Messrs. Hart Muirhead Fatta for the Ancillary Defendant**

**Heard: June 10, 11, 12, 13, 14 and November 21, 2019**

**Negligence – Motor vehicle collision – Whether the ancillary defendant is liable – Expert evidence – Weight – Parties instructing different forensic experts in accident reconstruction – Expert evidence directly conflicting with ancillary claimant's evidence – Conflicting expert witness testimony – Quantum of damages**

**A. NEMBHARD, J**

**INTRODUCTION**

**[1]** The afternoon of 18 April 2010 was a fateful one. At approximately 3:30 p.m. that afternoon, the Ancillary Claimant, Mr Gauntlett Powell, was driving a Toyota

Hiace owned by him and registered PP 073W, ("the Toyota Hiace"). He was driving along the Flamingo Main Road, in the parish of Trelawny.

**[2]** Mr Donald Atkinson, now deceased, was also driving along the Flamingo Main Road on that fateful afternoon. He was driving a 1998 Kenworth motor truck ("the truck"), registered CF 0783. The truck's tanker was laden with fuel. The truck was, at all material times, owned by the Ancillary Defendant, Bulk Liquid Carriers Petroleum Transport Limited ("Bulk Liquid Carriers").

**[3]** Both vehicles were travelling in opposite directions. Mr Powell avers that Mr Atkinson attempted to overtake and that that action placed the truck directly in the path of the Toyota Hiace.

**[4]** In an effort to avoid a head on collision, Mr Powell asserts that he pulled over onto the left soft shoulder of the roadway. That notwithstanding, the truck collided with the right rear side of the wheel arch of the Toyota Hiace, causing the latter to spin and to run across the roadway onto the right side. As a consequence, the truck overturned.

**[5]** Finally, Mr Powell asserts that, as a consequence of this collision, he suffered loss and damage and incurred expenses.

**[6]** Conversely, Bulk Liquid Carriers contends that it is Mr Powell's negligence, in his manoeuvring or handling of the Toyota Hiace, that caused it to collide into the region of the front right wheel of the truck, as a result of which the latter overturned. As a consequence of Mr Powell's negligence, it is further contended that Bulk Liquid Carriers suffered damages and loss.

**The pleadings**

**The case for the Ancillary Claimant**

**[7]** By way of an Amended Ancillary Claim Form, filed on 13 September 2012, Mr Powell claims against Bulk Liquid Carriers for loss, damage and expenses

incurred, on the grounds that its authorized driver, Mr Atkinson, so negligently drove and/or manoeuvred the truck that he caused the collision.

**[8]** The particulars of negligence relied on by Mr Powell are particularized as being:

(a) driving on the wrong side of the road;

(b) overtaking when it was manifestly unsafe to do so;

(c) driving at an unsafe and excessive speed in the circumstances;

(d) failing to effect any or any proper or effective control of the motor vehicle bearing registration number CF 0783 (the truck);

(e) failing to stop, slow down, swerve or in any other way to manage or control the said motor vehicle (the truck) as to avoid the collision;

(f) driving without due care and consideration for other users of the road and in particular Mr Powell;

(g) colliding into the right rear section of the motor vehicle bearing registration number PP 073W (the Toyota Hiace).

**[9]** Further, and/or in the alternative, Mr Powell claims that Mr Atkinson contributed significantly to the collision.

**The case for the Ancillary Defendant**

**[10]** By way of the Ancillary Defendant's Defence and Counterclaim, filed on 7 September 2011, Bulk Liquid Carriers denies that the collision was caused by its servant, Mr Atkinson's handling or manoeuvring of the truck as alleged, or, at all. It is being contended that the collision was caused by Mr Powell's negligent manoeuvring or handling of the Toyota Hiace.

**[11]** Bulk Liquid Carriers asserts that the injuries, loss and damage claimed by Mr Powell were neither caused nor contributed to, by the manner in which Mr

Atkinson manoeuvred or handled the tanker trailer. It contends that Mr Powell's negligence caused the Toyota Hiace to collide into the front right wheel of the truck, as a result of which it overturned. Finally, it is being contended that Mr Powell failed to exercise due care, in all the circumstances, and that he is not entitled to the relief he has sought, or any relief at all.

**[12]** The particulars of negligence relied on by Bulk Liquid Carriers were particularized as being:

(a) driving at an excessive and/or improper speed;

(b) failing to keep any or any proper lookout;

(c) driving without due care and attention;

(d) failing to heed or act upon the position and path of the trailer (the truck) in all the circumstances;

(e) failing to swerve or manoeuvre the motor bus (the Toyota Hiace) to avoid the collision;

(f) failing to keep any or any proper and effective control of the motor bus (the Toyota Hiace);

(g) overtaking a line of traffic when it was evidently unsafe to do so; and

(h) failing to keep the motor bus (the Toyota Hiace) along a safe path as he [Mr Powell] overtook the line of traffic.

**[13]** Bulk Liquid Carriers counterclaimed for damages and loss incurred, in the sum of Six Million Seven Hundred and Eighty-One Thousand One Hundred and Fifty-Five Dollars and Fifty-Six cents ($6,781,155.56) and interest.

## THE ISSUES

### Factual issues to be determined

**[14]** The following factual issues arise for the Court's determination: -

(1) Was the truck speeding prior to the collision?

(2) Was either motor vehicle overtaking prior to impact?

(3) Did the driver of either motor vehicle encroach on the path of the other?

(4) Where was the point of impact?

(5) What caused the collision?

### Legal issues to be determined

**[15]** The following legal issues arise for the Court's determination: -

(1) Was the collision caused by the negligence of Mr Atkinson?

(2) Was Mr Powell contributorily negligent and, if so, in what proportion?

(3) Is Mr Powell liable to Bulk Liquid Carriers on the Counterclaim?

## THE LAW

### The claim in negligence

**[16]** It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty.

**The burden and standard of proof**

**[17]** It is also well settled that where a claimant alleges that he/she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his or her case on a balance of probabilities.

**[18]** The general state of the law as to the proof of negligence was eminently enunciated by Lord Griffiths in **Ng Chun Pi and Ng Wang King v Lee Chuen Tat and Another**, Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988, when he stated at pages 3 and 4: -

> *"The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant might have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…*
>
> *…it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."*

**The duty of care**

**[19]** In establishing a duty of care there must be foreseeable damage consequent upon the defendant's negligent act. There must also be in existence, sufficient proximate relationship between the parties, making it fair and reasonable to assign liability to the defendant.

**[20]** Lord Bridge, in **Caparo Industries plc v Dickham** [1990] 1 All ER 568 at 572, spoke to the test in the duty of care, sufficient to ascribe negligence, in this way: -

> *"In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships, there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, also falling within the ambit of the test of negligence."*

**[21]** At pages 573 and 574 Lord Bridge went on to say: -

> *"What emerges, is that, in addition to the foreseeability of damage, [the] necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."*

**[22]** There is a reciprocated duty of care that each driver on the road owes to others. This duty of care is to manage and control his motor vehicle in such a way as to prevent harm or damage to other users of the road. (See – **Stephen Pryce v Joslyn Pryce and Daviot Pryce**, Claim No. 2004 HCV 2899, judgment delivered on 24 April 2009, **Esso Standard Oil SA Limited and Another v Ian Tulloch** [1991] 28 JLR 553, **Hay or Bourhill v Young** [1942] 2 All ER 396, **Elizabeth Brown v Daphne Clarke & Others** [2015] JMSC Civ 234, **Pluckwell v Wilson, Bart** (1832) CAR. & P. 376.)

**[23]** This duty of care is enshrined in statute. Section 51 of the Road Traffic Act ("the Act") is entitled "Driving Rules". Section 51(1)(c) and (g) of the Act reads as follows: -

> *"51.-(1)The driver of a motor vehicle shall observe the following rules - a motor vehicle*

*(c) shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;*

*(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;"*

**[24]** Section 51(2) of the Act imposes a duty on drivers to take such precautionary action to prevent an accident. It reads as follows: -

*"Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."*

**ANALYSIS**

**Was the collision caused by the negligence of Mr Atkinson?**

**[25]** The question now arising, is, whether, on the evidence, negligence can be ascribed to either party?

**[26]** The issue of liability is to be determined on the facts of each case, as each case has its own nuances. This principle was enunciated by Lord Greene M.R. in **Morris v Luton Corporation** [1946] 1 K.B. 114.

**[27]** Lord Greene M.R. stated as follows: -

*"There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps slips unconsciously…but it is much to be deprecated,*

*because these are questions of fact dependent on the circumstances of each case."*

**[28]** To determine the issue of liability in the instant case, the Court must evaluate the three divergent accounts of how the collision occurred. These accounts are that of Mr Powell, Corporal Phillip Williams and Mr Ian Blackwood.

**[29]** The parties are agreed on the following facts: -

(a) The collision that is the subject of these proceedings took place on 18 April 2010 along the Flamingo Main Road in the parish of Trelawny;

(b) Mr Powell was the owner and driver of the Toyota Hiace;

(c) Mr Atkinson was the authorized driver/servant of Bulk Liquid Carriers and was the driver of the truck on the day of the collision; and

(d) Both vehicles were travelling in opposite directions.

**[30]** The agreed facts in relation to the scene of the collision, as outlined in the Accident Reconstruction Report of Corporal Phillip Williams and that of Mr Ian Blackwood, the expert witnesses, are that:

(a) The roadway runs from east to west and accommodates vehicular traffic in both directions;

(b) The roadway is straight;

(c) The roadway is divided into two (2) lanes which are separated by a central broken white line;

(d) The surface of the roadway is paved and is in good condition with soft shoulders on both sides that are paved with asphalt; and

(e) The roadway is designated an eighty kilometres/hour (80kph) speed zone.

**[31]** The parties are diametrically opposed in their respective accounts of how the collision took place. There is no consensus in relation to the point of impact. The expert witnesses agree however, that Mr Powell's account of where the collision took place is not supported by the evidence.

**[32]** Regrettably, the Court is unable to accept Mr Powell's account that the collision occurred whilst the Toyota Hiace was stationary on the left soft shoulder of the roadway. The Court had the opportunity to observe Mr Powell's demeanour as he testified from the witness box and found that he did not inspire confidence in this regard. Furthermore, Mr Powell's evidence cannot be supported by the forensic and documentary evidence.

**[33]** Nor does Mr Blackwood, the expert witness called on behalf of Bulk Liquid Carriers, agree with Corporal Williams, the expert witness called on Mr Powell's behalf, as it relates generally to the circumstances in which the collision occurred and specifically in relation to the point of impact. In order to resolve this conflict, the Court was invited to adopt the approach of the Privy Council in the authority of **Grace Shipping Inc and Another v C F Sharp & Co (Malaya) Pte Ltd** [1987] LRC (Comm) 550 and that adopted in the authority of **Armstrong and Another v First York Ltd** [2005] 1 WLR 2751.

**[34]** In **Armstrong**, Brooke, LJ referred to the judgment of Lightman, J in **Coopers Payen Ltd v Southampton Container Terminal Ltd** [2004] 1 Lloyd's Rep 331. At paragraph 67 Lightman, J had this to say: -

> *"67. Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situation is somewhat different. If*

> *the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact. The judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept. The circumstances may be such as to require the judge to reach only one conclusion."*

**Was the truck speeding prior to the collision?**

**[35]** Mr Powell contends that the truck was speeding prior to the collision. Mr Chester Chung, former principal of Bulk Liquid Carriers, stated in his evidence that the truck was retrofitted with a governor that restricts the truck from travelling above 80 km/hr, without load, and which restricts it from travelling above 50 km/hr, whilst laden. The unchallenged evidence before the Court is that, at the time of the collision, the truck was laden with fuel.

**[36]** Corporal Williams has stated that the truck was travelling at 84.2 km/hr and substantiates this conclusion by his use of the coefficient friction formula. In cross-examination, however, he agreed that that formula only measures the distance between where a vehicle begins to brake and where it stops. He agreed that the formula cannot accurately confirm a vehicle's speed prior to impact and that the momentum formula would be a more accurate determination of its pre-impact speed.

**[37]** Corporal Williams testified that the collision between the Toyota Hiace and the truck was a 'side swipe' and that it would not have generated sufficient energy between the two vehicles to warrant the use of the momentum analysis.

**[38]** Mr Blackwood's evidence on this issue was that there are two types of momentum analyses. The first is an in-line analysis, where the full force passes through both vehicles at the centre of mass. The second is an angular momentum, where the vehicles collide at an angle, including the angle at which both vehicles collided in the instant case. Mr Blackwood testified further that the data required to analyze the speed from the angular momentum, are (i) the weight of the vehicles; (ii) the approach angles of impact of both vehicles; (iii) the departure angles from impact of both vehicles and (iv) the post-impact speed of both vehicles.

**[39]** It is his evidence that, save for the weight of the vehicles, this information could be obtained from the scene of the collision. The weight of the vehicles and that of the fuel being hauled by the truck, could be obtained from other sources. Mr Blackwood avers that this analysis would determine the pre-impact or impact speed and the post-impact speed of both vehicles and that the formula used by Corporal Williams is a 'slide to stop' formula that should only be used where neither vehicle makes contact with another or with an object, prior to coming to rest.

**[40]** Having regard to the principles enunciated by Lightman, J in **Coopers Payen Ltd v Southampton Container Terminal Ltd** (supra), the Court accepts the evidence of Mr Blackwood over that of Corporal Williams and finds that there is no basis on which it can find that the truck was speeding prior to the collision.

**Was either motor vehicle overtaking prior to impact?**

**Did the driver of either motor vehicle encroach on the path of the other?**

**[41]** Mr Powell's evidence is that the truck was overtaking a line of traffic prior to the collision. Regrettably, that evidence is not supported by that of Corporal Williams. In fact, Corporal Williams' evidence is that the driver of the truck perceived a hazard and deviated into the correct lane of the Toyota Hiace, thereby causing the collision.

**[42]** In this regard, the Court accepts the evidence of Mr Blackwood that the driver of the Toyota Hiace, whilst overtaking, failed to return to his proper lane, thereby causing the right rear side of the Toyota Hiace to collide into the right front wheel of the truck.

**Where was the point of impact?**

**[43]** In this regard, the Court accepts the evidence of Mr Blackwood. Referring to the photograph which comprises exhibit 14[4] Mr Blackwood had this to say: -

> *"The point of impact would be right at this point. This would be the right front wheel of the truck and it is digging into the asphalt. … This mark clearly shows the truck was straight at the point of impact in its lane. The initial braking would be somewhere at the cone [bottom left corner] this is evidenced by the faint tyre mark that is moving along, which is the shadow. When we look at the width of this area, the distance between made by the mark of the right front wheel and the left front wheel of the truck is consistent with the track width of the truck, which is the distance between the centre of one tyre in relation to the other. Going back to Newton's first law of motion, the path of the truck was redirected to the right which is consistent with the impact with the right front wheel of the truck. It was noticeable that after this mark at the point of impact, there was no deep mark made from the right front tyre, it was almost absent from the road."*

**[44]** Mr Blackwood explained further that the right front tyre is no longer present on the roadway as the impact affected the braking system of the truck, as a result of which, that tyre was no longer holding. This evidence is corroborated by the parallel skid marks that are visible in the photographs that comprise exhibits 12[a], 12[b] and 12[c]. Both expert witnesses agree that these marks were created by the left wheels of the truck.

**What caused the collision?**

**[45]** The Court finds that the collision was caused solely by the negligence of Mr Powell.

**[46]** The Court is unable to accept Mr Powell's account of the circumstances in which the collision occurred. Mr Powell contends that Mr Atkinson attempted to overtake, an action that placed the truck directly in the path of the Toyota Hiace. In an effort to avoid a head on collision, he [Mr Powell] pulled over onto the left soft shoulder of the roadway where the truck collided with the right rear side of the wheel arch of the Toyota Hiace. This account has been discredited by the evidence of both Corporal Williams and Mr Blackwood.

**[47]** Corporal Williams and Mr Blackwood both agree that, prior to the collision, the truck was travelling in its correct lane, until something caused it to deviate from its path. Mr Blackwood contends that this was as a result of the impact between the right rear side of the Toyota Hiace and the right front wheel of the truck. This in turn, Mr Blackwood contends, caused the truck to deviate to the right lane.

**[48]** Corporal Williams, on the other hand, asserts that the driver of the truck perceived a hazard and manoeuvred to avoid it. He does not indicate what this perceived hazard could have been but remains adamant that it could not have been, as Mr Blackwood contends, as a result of the impact between the right rear side of the Toyota Hiace and the right front wheel of the truck.

**[49]** In this regard, the Court accepts the evidence of Mr Blackwood. The Court finds that Mr Blackwood is better qualified and more experienced in the field of Accident Investigation and Reconstruction than Corporal Williams. In fact, Corporal Williams testified that he is more experienced now [at the time of his testifying] than he was in 2010.

**[50]** Furthermore, the Court finds that the evidence of Corporal Williams was discredited on important aspects. For example, in relation to the correct formula

to be used to calculate the pre-impact and post-impact speed of the Toyota Hiace and the truck; the point of impact; and the cause of the collision.

**[51]** The Court accepts Mr Blackwood as being a credible and reliable witness and accepts his evidence as being credible and reliable. The Court finds, on a balance of probabilities, that, the collision occurred in circumstances where Mr Powell was overtaking and failed to complete that manoeuvre in time. As a consequence, the right rear side of the Toyota Hiace collided into the right front wheel of the truck.

**Was Mr Powell contributorily negligent and, if so, in what proportion?**

**[52]** This Court is of the view that contributory negligence does not arise in the instant case.

**Is Mr Powell liable to Bulk Liquid Carriers on the Counterclaim?**

**[53]** The Court finds further, that, Mr Powell is liable to Bulk Liquid Carriers for the damage and loss that it has suffered, as a result of the collision.

**DISPOSITION**

**[54]** It is hereby ordered that: -

(1) Judgment for the Ancillary Defendant against the Ancillary Claimant on the Amended Ancillary Claim Form, filed on 13 September 2012;

(2) Judgment for the Ancillary Defendant against the Ancillary Claimant on the Counterclaim, filed on 7 September 2011, in the sum of Six Million Seven Hundred and Eighty-One Thousand One Hundred and Fifty-Five Dollars and Fifty-Six cents ($6,781,155.56), with interest thereon at the rate of three percent (3%) per annum, from 18 April 2010 to 21 November 2019;

(3) Costs are awarded to the Ancillary Defendant against the Ancillary Claimant to be taxed if not sooner agreed;

(4) The Ancillary Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.