[2017] **JMSC Civ 90**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV04893

BETWEEN	**RICHARD ROWE**	**CLAIMANT**
AND	**JOSEPH LLOYD THOMPSON**	**DEFENDANT**

Steven Jackson instructed by Bignall Law for the Claimant

Kalima Bobb-Semple for the Defendant

June 5, 6 and 16, 2017

Negligence – duty of care – breach of duty – foreseeability of loss – duty to take action to avoid accident–duty to observe ordinary care and skill – reasonable care to avoid injury to person and damage to property – keeping a proper look out and observance of traffic light – contributory negligence – liability – damages

D. Fraser J

Background

[1] On March 31, 2013 between 8:30 – 9 p.m. the claimant Richard Rowe was driving his Nissan Sunny motor car registered 0163CD along Oxford Road coming from the direction of Half Way Tree Road towards the intersection with Knutsford Boulevard. The defendant Joseph Thompson was at the same time driving his Volkswagen Golf GTI registered 4513EV in the opposite direction along Oxford Road, coming from the direction of Old Hope Road towards the said intersection with Knutsford Boulevard.

[2] Whilst the claimant was proceeding straight through the intersection and the defendant was in the process of turning onto Knutsford Boulevard, they collided in the intersection. The Claimant maintained that he proceeded through the intersection on a green light while the defendant indicated he proceeded to turn on a green filter light.

[3] The claimant sustained the following injuries as detailed in the medical report of Dr. George Lawson received in evidence as exhibit 2b:

i) Chronic Mechanical Lower Back Pain

ii) Chronic Cervical Strain/Whiplash Injury with Muscle Spasm;

iii) Chronic Left Knee Sprain & Abrasion;

iv) Sub-concussive Blunt Head Injury with Abrasion to Forehead & Post-trauma Headache;

v) Musculoskeletal Chest Pain.

[4] He was not expected to suffer any permanent impairment.

The Claim

[5] On November 12, 2015 the claimant filed an Amended Claim Form dated the 17th day of July, 2013 claiming damages and interest against the defendant alleging that the accident resulted from the negligence of the defendant, thereby causing the claimant to suffer injury, loss and damage and to incur expense.

Issues

[6] The main issue to be determined on the question of liability is, was the accident caused by the negligence of the claimant or of the defendant, or did both of them negligently contribute to the cause of the accident?

[7] I accept as sub-issues, with minor adjustments, the following specific questions for resolution by the court, outlined by counsel for the claimant in his submissions:

i) Whether the claimant had a green light whilst proceeding through the intersection or whether he had a red light?

ii) Whether the defendant had the green filter light whilst making his way through the intersection or was he trying to "beat" the claimant on the solid green light?

iii) Whether any of the parties did or could have taken steps to avoid the accident?

The Law

[8] The submissions in law made by the claimant are based on well known principles and are summarised as follows:

i) The claimant in a civil trial has the burden of proving the claim of negligence on a balance of probabilities (See ***Alvan Hutchinson v Imperial Optical Limited and Hugh Foreman*** [2003] EWCA1648 at para. 19).

ii) 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. The section also provides that 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.

iii) There are three elements necessary to establish a cause of action for negligence: a duty to the person injured; a breach of that duty and foreseeability of loss. There is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the road whom he could reasonably foresee as likely to be affected by his action or inaction. Whether or not a duty of care exists depends on the particular circumstances of each individual case. See **Bingham & Berrymans' Personal Injury and Motor Claims Cases** 12th Edition by Michael Pether and Others at para 4.1.

iv) All users of the road owe a duty of care to other road users (See ***Esso Standard Oil SA Ltd & Another 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 an avoidance of excessive speed, keeping a proper look out and observing traffic rules and signals (See ***Bourhill v Young*** [1943] AC 92).

v) Where there are diametrically different accounts of an accident, the duty of the trial judge is to analyse the available evidence and to conclude which of the two accounts was more likely (See ***Cooper v Floor Cleaning Machines Limited*** [2004] R.T.R 17). It was however acknowledged in ***Cooper*** at paragraph 18 that there are exceptional cases, even in respect of motor vehicle accidents where, citing Sedley LJ in ***Morris v London Iron and Steel Co Ltd*** [1988] Q.B. 493***,*** *"the common path to the resolution of the ultimate issue, namely who is telling the truth is blocked by an intractable evidential tangle. In such a case it may not only be legitimate but inevitable that the judge will hold that the Plaintiff has failed to show a preponderance of evidential probability in favour of his case."*

The Evidence

The Claimant's Account

[9] The claimant in his witness statement said at paragraph 3 that he was coming from Half Way Tree Road and, *"...made a turn onto Oxford Road, when I was approaching the junction at Knutsford Boulevard and Oxford the light was green. I was about to proceed through the light, when suddenly a Volkswagen Golf GTI motor vehicle registered 4513 EV coming from the Oxford Road direction trying to make a right turn onto Knutsford Boulevard, without any indication or warning, collided into the front right section of my vehicle. I tried swerving away to avoid the hitting (sic) vehicle but the collision was unavoidable."* At paragraph 4 he stated, *"After the collision happened my car ended up on the sidewalk against*

the fence of the Jamaica Pegasus Hotel. The other vehicle ended up in the middle of the road."

[10] In cross-examination he said he was travelling at about 40 – 45 miles per hour and was about five (5) car lengths from the street light when he noticed it was green. He also stated that *"When me see him, him deh right a de light fi turn fi go Knutsford Boulevard. He was in the lane closest to me."* He continued that, *"When me a go through the light me see him a turn and come over. That's when me just really see him."* He later stated that, *"Mi see de light me never know seh it a turn. That a right pon de light. When me see it a when me a get lick. Mi nuh know which lane him inna. Mi a drive. A when him a turn inna my car mi realise him."*

[11] He said that never touched his horn but that he applied his brakes when he got hit, when the defendant turned into his car. He said he couldn't swerve before he got hit. When he was going through the light he got hit and then he swerved back into the Pegasus fence.

[12] He denied that he was speeding, not keeping a proper lookout, that he went through the intersection when his light was not on green, that he first noticed the other driver when that driver was already turning, that he did not apply his brakes while the other driver was turning through the intersection and that he was the cause of the accident.

The Defendant's Account

[13] In his witness statement at paragraph 3 the defendant stated that, *"Whilst proceeding along Oxford Road, I could see clearly and my headlights were dipped. Upon reaching the intersection of Oxford Road and Knutsford Boulevard I slowed down and moved into the far right lane. I applied my right indicator as it was my intention to turn right onto Knutsford Boulevard. Having entered the right lane I observed that the filter light was on green so I proceeded to make the turn. Whilst making the turn I glimpsed a motor car coming towards me on Oxford*

Road from the opposite direction. I assumed this car would stop as the filter light facing me was green and based on my knowledge of the lights the other driver would have a red light. As the motor car got closer to me I noticed it was not stopping and it collided into the front of my motor car."

[14] In cross-examination the defendant said that had been driving for about 35 years prior to the accident. He stated that he used that route almost every day, though he did not indicate over what time period. His evidence was that from about 25 – 30 feet, he could tell what colour the stop light was. It was on green just before he approached it.

[15] He also stated that he was very familiar with the lighting system at that particular junction. Anything coming from the opposite direction should have red if he had the green filter light. They would have to come to a complete stop to allow him to make the right turn onto Knutsford Boulevard.

[16] He said he was on the left hand side of the road and prior to the accident he couldn't say for sure if any vehicle passed him going in the opposite direction on his right. He testified that he did not at any time prior to the accident see Mr. Rowe's vehicle. He also maintained that up until the point he started turning it was clear, but while making the turn he glimpsed a pair of headlights coming at him from about 15 feet away. He estimated that at that distance, it would take about 2 seconds for the vehicle to hit him, if the vehicle was coming at 45mph. He said there was no time for him to do anything like blow his horn or apply his brake. There was no time to swerve. The best he could do would probably be to just brace for the impact.

[17] He was asked if when the filter green goes off there was still a green light facing him? His answer was, *"To be honest I have never really noticed. If I am going to turn I am focused on the light that is directing me not the light on the other side."*

[18] He was also asked if he had ever been in a situation where the light facing him was green only and there was traffic flowing in the other direction? His answer, *"I*

pay attention to what is in front of me and where I am going. While negotiating the turn to cross the intersection I am now looking in front of the vehicle to make the turn."

[19] In answer to questions posed by the court he indicated that he came into the lane, saw the green filter on, positioned himself to turn, put on his indicator and that is when the collision occurred.

[20] He further indicated that he did not come to a complete stop before he turned. The light was on green, he came in the extreme right lane, naturally he slowed down, positioned his car to make the turn and then turned.

[21] He denied that he never had a green filter light but only a regular green light at the point at which he made the turn; that he failed to ensure it was safe to do so before proceeding through the light, that he failed to keep a proper lookout whilst proceeding through the junction; and that the accident occurred as he tried to beat Mr. Rowe's vehicle through the light.

Discussion and Analysis

[22] The critical matter which has to be determined is who had the right of way by virtue of the green light in their direction of travel. Did the claimant have a green light or did the defendant have a green filter light permitting him to turn?

[23] Everyone is clear that if the defendant had a green filter light the claimant's light would be on red. What was not definitively established from the evidence, is whether if the defendant's green filter light went off, there would still have been a solid green light facing the defendant that permitted persons travelling from his direction to proceed straight ahead but not to turn, while the claimant would still have had a green light to proceed straight in the opposite direction. The claimant did not give evidence of that. He only spoke to the fact that he had a green light.

[24] That combination of lights — in particular that when the green filter light went off there would still be a green light permitting travel straight ahead — was however

specifically put to the defendant and was clearly the theory of the claimant's case, to help to explain what caused the accident. It is significant I find that despite the fact that the defendant said that he travelled that route almost every day, he had never noticed if that was the sequence of how the lights operated and could neither say yea nor nay to that suggestion.

[25] My analysis of the evidence is supported by the view I have taken of the demeanour of both the claimant and the defendant which I carefully observed and considered throughout the trial. The impression I formed was that the claimant was plain speaking and recounted the events as they occurred. The defendant on the other had I found to be less forthcoming and somewhat evasive especially on the determinative aspects of the evidence.

[26] In that event I find that I accept the account of the claimant as more likely than not to be true (see ***Cooper***) and reject that of the defendant concerning the state of the lights at the time they both entered the intersection. I accept that the claimant had a green light which he saw from about 5 car lengths from the light and that he proceeded through the light while it remained on green. I do not find that he broke a red light as the situation would have to have been, if the defendant had a green filter light. Whether or not there was a green light facing the defendant that permitted persons travelling from his direction to proceed straight ahead does not need to be decided. My finding that the claimant had a green light necessarily requires a finding that the defendant did not have a green filter light which is sufficient for the determination of the question of liability.

[27] I gave consideration to whether or not the claimant was in any way contributorily negligent. The defendant claimed that he had on his indicator to turn while the claimant said he saw no such signal. The claimant also stated that *"When me a go through the light me see him a turn and come over. That's when me just really see him."* He later stated that, *"Mi see de light me never know seh it a turn. That a right pon de light.*

[28] Whether or not the defendant had on his indicator, the fact is as the claimant had a green light which I have found he did, he would not reasonably have expected that the defendant's vehicle would have been turning at the point at which the claimant was proceeding through his green light. In those circumstances I also do not find that the time at which the claimant saw the defendant's vehicle and noticed it was turning means that the claimant was not keeping a proper look out. Neither the claimant nor the defendant was able to take evasive action prior to the impact. However the claimant said he swerved and applied his brakes after impact. I have therefore concluded that in all the circumstances there is no basis for the apportionment of liability and the defendant is wholly responsible for the accident. His counterclaim would therefore naturally also fail.

Quantum of Damages

Special Damages

[29] The claimant has claimed special damages under a number of heads. In respect of the Medical reports from and visits to Dr. George Lawson the claim was for $78,600. One Interim Medical Report *(exhibit 2)* dated 16th August 2013 and one Medical Report *(exhibit 2b)* dated 25th November 2014 were received in evidence and costs for those of **$12,500** *(receipt dd 19.08.13 – exhibit 3c)* and **$40,000** *(receipt dd 27.11.14 – exhibit 3)* respectively, will be allowed. Additionally, costs of **$13,600** *(receipt dd 27.11.14 – exhibit 3d)* for Consultation and Medication will also be allowed. The sum allowed under this head will therefore be that of **$66,100** as submitted by counsel for the defendant.

[30] There is agreement that the sums of **$17,500** *(receipts dd 27.11.14 – exhibits 5a and 5b)* for the Physiotherapy report (exhibit 1) and visits *(Durga Prasad Gogineni, B.P.T.)* and **$9,000** *(receipt dd 21.06.13 – exhibit 4)* for an X-ray *(Nuttall Memorial Hospital),* should be allowed.

[31] The claimant also sought for $20,000 for transportation costs. However there has been no evidence, documentary or viva voce concerning the number of trips or

expenditure on such trips to support that claim. Therefore not even the allowance made in the case of ***Desmond Walters v Carlene Mitchell*** (1992) 29 JLR 173 and other cases which have held that, *viva voce* evidence of expenses unsupported by documentary proof would be sufficient in appropriate cases, can assist the claimant in these circumstances.

[32] The claimant also sought compensation for the cost of Extra Help for 10 weeks at $4,000 per week. The claim under this head suffered a similar evidential insufficiency as that which afflicted the claim for transportation costs. There was an absence of supportive *viva voce* or documentary evidence. Additionally while the medical report spoke to effects which caused the claimant to be temporarily unable to work there was no indication that his temporary impairment was such that extra help would have been required to carry out domestic chores. The claim under this head therefore also fails.

[33] The claim for Property Damage/Loss of **$330,000** in relation to the cost of repairs of the claimant's vehicle and the sum of for the Police Report, both of which were conceded by the defendant, will also be allowed.

[34] The total amount allowed for special damages is therefore **$423,600.**

General Damages

[35] Based on the injuries suffered by the claimant counsel for the claimant relied on the following authorities:

i) ***Dalton Barrett v Poncianna Brown & Anor*** Claim No. 2003 HCV 01358 cited at Khan Vol. 6 pages 104 to 105 - the claimant suffered whiplash injury & lower back strain, was awarded $750,000.00 in November 2006 (CPI-99.6). The updated value using Consumer Price Index of (239.3) for April 2017 is approximately $1,801,957.83.

ii) ***Talisha Bryan v Anthony Simpson & Andre Fletcher*** Claim No. 2011 HCV 05780 (unreported) **-** the claimant's injuries were whiplash injury to neck and lower back strain. An award of $1,400,000.00 was made on March 13, 2014 (CPI-214.6). This

figure updates to approximately $1,561,137 using the Consumer Price Index of (239.3) for April 2017.

iii) ***Wilfred Williams v Nedzin Gill & Anor*** Suit No. C. L. 1999 W 169 Khan Vol. 5 page 148 - the claimant suffered whiplash injury and was awarded $350,000.00 in November 2000 (CPI-56.2). The updated value using Consumer Price Index of (239.3) for April 2017 is approximately $1,490,302.49.

[36] Based on those cases and the injuries of the claimant, it was submitted that an award of $1,600,000.00 would be a reasonable sum to compensate the claimant.

[37] Counsel for the defendant on the other hand relied on the following cases:

i) ***Peter Marshall v Carlton Cole and Alvin Thorpe*** Khan, Vol. 6, page 109. The Plaintiff suffered from moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain and spasm. The Plaintiff was given 2 weeks sick leave and given analgesics and cataflam injections. He continued to attend for treatment and was discharged after 16 weeks of care with no residual pain or suffering. The Plaintiff was awarded $350,000.00 in October 2006 (CPI 99.83). Using the CPI of April 2017 of 239.3, this award updates to $838,976.25.

ii) ***Yanique Hunter v Conrad George Clarke and Kirk Beckford*** [2014] JMSC Civ. 83. The claimant sustained soft tissue injuries to her back and was diagnosed with chronic sprain or strain to the lower back with non-specific lower back pains ad soft tissue injury/spasm to the middle back. She was assessed as having a 2% whole person impairment. The Claimant was required to undergo a course of physiotherapy. She endured pain and suffering for approximately two years post-accident. She was awarded $1,200,000.00 in May 2014 (CPI 215.7). Using the April 2017, this award updates to $1,331,293.46.

iii) ***Anthony Gordon v Chris Meikle & Esrick Nathan*** Khan Vol. 5, page 142. The Claimant sustained injuries which resulted in pains to his lower back, left knee and left side of chest. He was diagnosed with cervical strain, lumbo sacral strain and contusion to the left knee and assessed as having a 5% whole person impairment. He was awarded $220,000 in July 1998 (CPI 48.37). Using the CPI of April 2017, this award updates to $1,088,401.90.

[38] Counsel submitted that given the nature of the claimant's injuries, they are more in line with the case of ***Peter Marshall*** as in the cases of ***Yanique Hunter*** and ***Anthony Gordon*** the claimant's sustained similar injuries with a longer period of suffering. Counsel therefore submitted that the claimant should receive an award of $850,000.00 for general damages.

Analysis

[39] Having reviewed all the authorities cited, given the injuries suffered by the claimant, his period of rehabilitation and his lack of any whole person impairment or lasting disability, I find that the authority of ***Peter Marshall v Carlton Cole and Alvin Thorpe*** is most useful for comparison. I consider the instant case slightly more serious that the ***Peter Marshall*** case and accordingly I find the appropriate general damages award to be **$925,000.**

Order

[40] Based on the foregoing the court makes the following order:

i) Judgment for the claimant on the claim and the counterclaim.

ii) Special Damages are awarded) in the sum of **$423,600** with interest thereon at the rate of 3% per annum from the 31st day of March 2013 to the 16th day of June 2017.

iii) General Damages are awarded in the sum of **$925,000** with interest thereon at the rate of 3% per annum from the 26th day of September 2013 to the 16th day of June 2017.

iv) Costs to the claimant to be agreed or taxed.