[2025] JMSC Civ.87

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV01409

BETWEEN	**SHANAGAYE SAMUELS-BENNETT**	**CLAIMANT**
A N D	**MAURENE ADAMS**	**DEFENDANT**

Mr. Richard Reitzin instructed by Reitzin & Hernandez for the Claimant

Ms. Shanique Scott with Mr. Vincent Roberts instructed by Northeastern Legal Aid Society for the Defendant

HEARD: June 13 and 27, 2025

Tort – Negligence – Motor Vehicle Collision – Liability for Collision – Whether or not the Defendant Was Negligent in her Operation of the Motor Vehicle and was Fully Liable for Colliding with the Claimant – Whether or not the Claimant Contributed to the Collision and the Extent of her Contribution.

Assessment of Damages – Quantum of General and Special Damages – Fracture to Tibia with Permanent Partial Impairment – Loss of Earning Capacity.

D. STAPLE J.

[1] Grand Market Night in Jamaica is usually a time of festivity, merriment and joy unbridled. The Grand Market itself is also a place that is heavily trafficked by pedestrians, vendors and motorists alike with all fighting along narrow streets for space to freely move.

[2] It was on such a Grand Market night that there was a collision between the Claimant and the Defendant's motor vehicle. This particular Grand Market night was on the 24th December 2018.

[3] The Claimant's claim is that she was walking along Annotto Bay main road in the parish of St. Mary. She claims that due to the presence of vendors along the sidewalk, she was forced to walk in the gutter.

[4] She said as she was passing a pharmacy, she felt an impact to the rear of her right leg. This impact threw her into the water in the gutter.

[5] According to her, she realised that she was hit by a vehicle which, she later discovered, was owned and driven by the Defendant.

[6] The Defendant, of course, tells a different tale. The Defendant's case is that the Claimant was walking along the same road, seemingly distracted, stepped out into the path of her vehicle as it was driving along and was, unfortunately, hit.

[7] It is these two different versions of the same event that I am now called upon to resolve.

The Law

[8] I remind myself that it is the Claimant who must satisfy me that it was more likely than not that this collision was the consequence of the Defendant's negligence in her driving of the car. More specifically, that the Defendant did not properly keep to the driving lane and did carelessly come into collision with the Claimant who was walking in the gutter.

[9] As the Defendant has pleaded contributory negligence properly, it is for them to satisfy me, on the balance of probabilities, that the Claimant contributed to the collision by improperly walking along the road; walking into the path of the car and failing to take care for herself whilst walking along the road.

[10] Lord Griffiths in the case of ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat et al***[1] reminds us of the burden and standard of proof in a negligence matter. He stated at pages 3 and 4 of his judgment that:

> *"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 must 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."*

[11] Negligence is proven by establishing that the Defendant owed the Claimant a duty of care; that the Defendant breached that duty; and that the breach led to loss, injury or damage to the Claimant that was foreseeable[2].

[12] In establishing this duty of care, the damage to the Claimant caused by the Defendant's negligent act must have been foreseeable and there must exist a sufficient proximate relationship between the Claimant and the Defendant to make it just to impose this duty of care on the Defendant to the Claimant.

[13] In Jamaica, the legislation governing driving on the road at the time of this collision was the **Road Traffic Act (1938)**. Specifically, section 51. Section 51(2) provided essentially that all drivers have a duty to take such action as is necessary to avoid an accident.

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[1] [1988] UK PC 7

[2] See the case of *Glenford Anderson v George Welch* [2012] JMCA Civ 43 at para 26.

[14] However, it is not only the motorist that has a duty of care on the roads. Pedestrians also owe a duty to take care for their own safety on the roads. The decision of the Supreme Court in ***Walters-Aikerman v Hibbert***[3]. Makes the point beautifully at paragraph 65 where Thomas J said as follows:

> *"Therefore, on a review of the cases, there does appear to be a general principle, that as it relates to negligence involving motor vehicles accidents between motorists and pedestrians, the court imposes a high burden on the motorist. However, this is not to say that the pedestrian owes no duty of care to other road users. Additionally, this does not absolve a pedestrian from paying due regard for his or her own safety."*

[15] In the case of ***Clifford v Drymond***[4], the pedestrian failed to look to her right before stepping out into the road. Had she done so, she would have seen a vehicle about 75ft away travelling at approximately 30mph. Negligence was apportioned at 20% against the Claimant. Lord Justice Bridge stated as follows: "a pedestrian who leaves the pavement and set foot on the carriage way, there is a duty on the pedestrian to keep that car under observation and to see whether the car is going to stop."

[16] There is also the decision in the case of ***Robert Franklin v. Everton Walters & Anor***[5]***.*** In this case, the Claimant was hit from behind by a motor vehicle being operated by the servant and or agent of the 2nd Defendant. This case outlined a number of factors that should be considered when determining liability. This case outlined the standard of care expected from both motorists and pedestrians. They are as follows:

> *" [27] Case law and the Road Code offer a guide as to the standard of care expected of a driver, and this includes:*
> *1. Driving with due care, attention and concentration;*

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[3] [2024] JMSC Civ 36
[4] [1976] RTR 134
[5] [2021] JMSC Civ 36

2. Driving within speed limits and adjusting the speed of the vehicle depending on the road conditions and vehicular and pedestrian traffic;
3. Being alert and keeping a proper look out for other road users, including pedestrians emerging suddenly into the road;
4. Driving slowly where pedestrians are seen, such as in crowded streets;
5. Honking the horn to alert others, including pedestrians, to the presence or the approach of the vehicle; and
6. Taking evasive action where necessary.
…

[29] Pedestrians must take reasonable care of themselves and the amount of care reasonably required of them depends on the usual and actual state of the traffic on the road. This means that if the pedestrian is aware that the road is a busy one, he should exercise greater care and alertness so as to not expose himself or other road users to danger. The Road Code offers a guide in respect of the standard of care expected of a pedestrian, and this includes:

1. Taking reasonable care for his own safety when on the road;
***2. Avoiding walking on the roadway with one's back to the traffic**;*
3. Using sidewalks or footpaths when there is one, and when there is none, walking on the right hand side of the road, facing oncoming vehicle; (emphasis mine)
4. Avoiding walking into the roadway from in front, behind or in between stationary vehicles; and
5. Ensuring that one can see vehicles and can be seen by vehicles before walking into the roadway." **(Emphasis mine)**

[17] It was also stated that the test which must be applied is that of what a "reasonable man" would have done in the position of the operator to a motor vehicle and that regard must be had to whether or not the claimant took reasonable care for his own safety.

[18] I do take the Claimant's counsel's submissions that this case will turn on credibility and all of the authorities cited by him relating to credibility have been read and the principles understood.

[19] The fundamental underpinnings of this case depend strongly upon whose versions of the events I accept.

ISSUES AND ANALYSIS

Did the Defendant Owe the Claimant a Duty of Care?

[20] There was no dispute that the Defendant owed the Claimant a duty of care. The Claimant was a pedestrian using the same road as the Defendant. The Defendant was driving along the said road. The Defendant owed the Claimant a duty of care to drive the car with such skill and care as a reasonable and prudent driver would in order to avoid colliding with the Claimant.

Did the Claimant Owe Herself a Duty of Care?

[21] It is my finding that contributory negligence was properly raised in the Defence. As such, I find that the Claimant also owed a duty of care to herself to take reasonable steps whilst walking along the road for her own safety. Particularly, as set out in the ***Robert Franklin*** case above, she would owe a duty to, among other things:

> ***Avoid walking on the roadway with her back to the traffic****; and*
> ***Use sidewalks or footpaths when there is one, and when there is none, walk on the right hand side of the road, facing oncoming vehicle;***

DID THE DEFENDANT BREACH HER DUTY OF CARE?

[22] I find on a balance of probabilities that the Defendant breached her duty of care to the Claimant by failing to give her any or any adequate warning of the approach of the vehicle before colliding with her; she failed to apply her brake within time to avoid the collision; and she failed to take any evasive or adequate evasive manoeuvres to avoid colliding with the Claimant.

[23] The Claimant's evidence is that she was walking along a gutter on the side of the roadway along the Annotto Bay main road in the parish of St. Mary. She said, and I accept and find, that it was Grand Market night and the sidewalks were packed,

so she was forced from the sidewalk. According to her evidence, she chose to walk in the gutter off the asphalted surface rather than in the road.

[24] However, it is my finding that at the time of the collision, the Claimant was not likely walking in the guttering. It is my finding that she was more than likely walking on the asphalted surface of the road. In cross-examination, when asked by the Court as to the position of the car after the impact, the Claimant's evidence was that the car was on the asphalted surface of the road and none of it was in the gutter where she claims she was.

[25] Bearing in mind that the Claimant's evidence is that she got hit by the car in the back of her right leg, one can infer that the only way this could have happened, without the car leaving the asphalted surface, is if the Claimant was herself walking along the asphalted surface of the road.

[26] The Defendant submitted that it was the Claimant who stepped out into the road into the path of the Defendant's slow-moving vehicle and thereby caused the collision. However, I reject that submission.

[27] I did not find the Defendant's evidence to be credible and reliable. The Defendant, in her own evidence, under cross-examination, repeatedly and vehemently denied that she even collided with the Claimant. Therefore, it seems rather inconsistent that her counsel would submit that there was even a collision, let alone that it was a collision caused by the Claimant suddenly stepping into the road.

[28] Secondly, the circumstances of the collision, as far as the Defendant's version is concerned, remains unclear. The Defendant's sister, Ms. Ireland, in her evidence in chief, said that she had seen the claimant standing along the road as the vehicle being driven by her sister approached the Claimant. She testified that the Claimant suddenly stepped into the road and caused the collision.

[29] The Defendant, in her earlier testimony, denied that such a thing happened and gave a completely different account of how the collision occurred (this was before

denying the collision in cross-examination). She said that the Claimant was walking along the roadway when she stepped into the road.

[30] This discrepancy in how the collision occurred was not resolved on the Defendant's case at the point it was closed. All told, I did not believe the account of Ms. Ireland. It was the account that was most incongruent with those of the Claimant and the Defendant which were consistent with each other. Whilst I do believe she was present on the scene of the incident, I simply find that her memory of the incident was incurably faulty.

[31] I further find that there was absolutely no evidence from the Defendant or Ms. Ireland as to what they did before the collision to avoid same. I do not accept the evidence that the Claimant suddenly stepped into the road. I find that the Claimant was always present along the roadway.

[32] It is true that the roadway was packed with vehicular and pedestrian traffic. It is also true that the area was somewhat congested and the traffic was moving slowly. But it is my finding that the Defendant did not blow her horn to alert the Claimant to the presence of the car as they approached the Claimant. The evidence, which I accept, is that the Defendant did see the Claimant walking along the road before the collision. There is therefore no evidence that the Claimant appeared out of nowhere, making it that the Defendant could not have taken steps to alert the Claimant of the presence of the car prior to the collision.

[33] I also find that the Defendant drove as she did in order to avoid the collision with a vehicle coming from the opposite direction, but she went much too close to the Claimant and collided with her in the process. The Defendant did not give any evidence that she applied her brakes in time or did any other manoeuvre to avoid colliding with the Claimant in the circumstances.

DID THE CLAIMANT CONTRIBUTE TO THE COLLISION BY BREACHING HER DUTY OF CARE FOR HERSELF?

[34] The Claimant did not take proper care for her own safety on the road. It is my finding that the Claimant was walking along the road surface and not in the gutter. I accept that she could not walk along the sidewalk due to the presence of the vendors on the sidewalk.

[35] But in walking along the road surface, she would have been exposed to the vehicular traffic coming along the road. In that regard, she had a duty to exercise care for her own safety.

[36] Her evidence, which I accept, is that she was walking along the road with her back to the traffic. She was therefore on the side of the road where vehicles could come from behind her without being aware as to their approach. She would also have been walking along the incorrect side of the road as she should have walked along the side of the road facing the oncoming traffic. As explained above, pedestrians walking along the road have a duty to walk on the side of the road facing the oncoming traffic. This is just a common-sense approach to using the road. A pedestrian can clearly see traffic coming toward them and take necessary evasive steps to avoid being hit.

[37] In those circumstances, I find that the Claimant did contribute to the collision with herself by failing to take sufficient care for her own safety whilst walking along the road.

APPORTIONMENT

[38] In my view, the greater duty was owed by the motorist to the pedestrian in the circumstances of this case. The Defendant was driving the vehicle, saw the Claimant in advance of the collision and so could have done more to avoid the collision. Therefore, I find the Defendant 80% liable for the collision.

ASSESSMENT OF DAMAGES

General Damages

[39] ***Adolph Clarke v Wayne Howell***[6] - This was an appeal. The Respondent suffered a grade 1 open fracture of the right distal tibia with multiple soft tissue injury. He had to undergo surgery to fix the fracture and the surgical wound became infected. He was assessed as having a 7% total whole person impairment as a consequence. He also could not walk for some 7 months after the incident. He was awarded $3,000,000.00 for pain and suffering and loss of amenities on the 19th June 2015. The Court of Appeal upheld this award. That sum updates to $4,911,935.11 after indexation.

[40] The Claimant and the Defendant both looked at the case of ***Nathan Watson v AG of Jamaica***[7]. In that case, the Claimant suffered an open fracture of his right tibia and fibula. He had to undergo surgery as well. He eventually walked with a limp and was left with a varus deformity of the left leg measuring 10 degrees. He was left with a permanent impairment of 20% of the whole person. He was awarded about $2.7m which updates to around $4.5m after indexation.

[41] The Claimant in this case did not have to undergo surgery. She was simply put in a plaster of paris cast and she had an uneventful recovery. She was sent home the same day of her visit to the hospital at the time of the accident. During her period of recovery, the medical report showed very little evidence of any serious pain or discomfort reported. The Claimant's only reported concern was the deformity and she was advised that it was so slight that the risk of surgical correction was not beneficial.

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[6] [2020] JMCA Civ 3
[7] [2015] JMSC Civ 5

[42] The Claimant pleaded an extensive list of post injury complaints. However, none of them are supported by the medical evidence provided by the expert witness. In other words, the expert's evidence did not suggest that she should be having these difficulties. In fact, her complaints about persistent stiffness and pain in her leg after sitting down nearly 6 years after the accident is at variance with the finding of her expert that she did not develop significant stiffness in the lower limb. There was no medical evidence that she could not stand for long periods of time; there was no medical evidence that she could not perform her tasks as a Practical Nurse; or that she could not lift weights or even her four year old child.

[43] Her impairment is largely attributable to her varus deformity. It is therefore my finding that most of the Claimant's complaints were, in fact, exaggerated. I also found it rather odd that with all her complaints about standing for long periods, pain and stiffness, that the Claimant would take employment as a gas station attendant at the time of writing her witness statement.

[44] When I observed the Claimant, she did not appear to walk with any noticeable limp or impairment. She was able to stand for her entire cross-examination without any sort of complaint or discomfort expressed.

[45] I am of the view that her injuries were not as severe as those suffered by the Claimants in the ***Nathan Watson*** or ***Adolph Clarke*** matters. Those Claimants actually underwent surgery and they had much more significant periods of impairment before full recovery and they also suffered during their recovery period with the Claimant in ***Adolph Clarke*** even developing an infection during his recovery. So though the final impairment ratings were similar, I find that the actual effect of the injury on their pain and suffering and loss of amenities was greater than that of the instant Claimant. As such, I find that the award for General Damages should be reduced to the sum of $2,800,000.00.

HANDICAP ON THE LABOUR MARKET

[46] It was the Defendant's submissions that the Claimant should receive no award for handicap on the labour market as she has not adequately proved what her earnings were at the time of the collision nor since.

[47] I have closely examined the Claimant's claim that she was at a disadvantage in the labour market as a consequence of her injuries. There is no medical evidence to support this claim. There is no evidence from the doctor that she would not be able to use her upper body effectively to lift things, move things or otherwise do activities that would be required by a caregiver.

[48] Further, the Claimant said she was able to gain employment as a gas station attendant after she left her employment as a practical nurse. This activity requires prolonged standing for periods as you dispense fuel.

[49] She testified during the trial that she was no longer employed. There was no evidence as to why this was the case. Nor was there any objective evidence from her employer (when she was a practical nurse) as to why she stopped working in that position.

[50] I did not accept her evidence that she was unable to lift her child, or carry out her duties as a practical nurse as a consequence of the injury to her leg.

[51] In my view, it is not enough for a person to just say they are at a disadvantage in the workplace as a result of the injury they suffered. There must be medical evidence to support this claim. The mere fact that there is an impairment rating attributed to a part of the body, does not automatically mean a disadvantage in the workplace.

[52] The basis of an award for loss of earning capacity (or handicap on the labour market) are well known. They were recently reviewed in the case of ***O'Connor v Hyman***[8] by McDonald-Bishop P.

[53] The learned President reaffirmed the law as established in the well-known case of ***Moeliker v A Reyrolle Ltd*** **('Moeliker')**[9]. This case was followed by the Court of Appeal in ***The Attorney General of Jamaica v Ann Davis***[10]. The operating principles from Moeliker, which were distilled by our Court of Appeal in ***AG v Davis***, at para. 15, are these:

a) Is there a 'substantial' or 'real' risk that the claimant will lose her present job at some time before the estimated end of her working life?

b) If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the claimant will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the claimant's chances of getting a job at all, or an equally well-paid job.

[54] I, too, am bound and guided by these principles. It is my finding that there was no risk of the Claimant being unable to gain similar employment as a consequence of the injuries suffered or any impairment occasioned by those injuries.

[55] In the ***O'Connor*** decision itself, McDonald-Bishop P found expressly that there was a medical basis for the learned trial judge's finding that the Claimant's injuries posed a real risk of her being thrown on the labour market in a disadvantageous position[11].

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[8] [2025] JMCA Civ 14
[9] [1977] 1 WLR 132
[10] (Unreported), Court of Appeal, Jamaica, Civil Appeal No 114/2004, judgment delivered on 9 November 2007
[11] n. 8 at para 57

[56] In the case at bar, there is no medical opinion from Dr. Barnes that says that her impairment, as he found it, prevented her from doing work as a practical nurse.

[57] In those circumstances, I reject her claim to handicap on the labour market and make no award for same.

SPECIAL DAMAGES

[58] The parties agreed, prior to the start of the taking of the evidence, that special damages would be agreed at $80,000.00.

DISPOSITION

1 Judgment for the Claimant against the Defendant with liability apportioned 80% to 20% in favour of the Claimant.

2 Damages to the Claimant assessed as follows:
   a. General Damages for pain and suffering and loss of amenities in the sum of TWO MILLION EIGHT HUNDRED THOUSAND DOLLARS ($2,800,000.00) with interest thereon at 3% from the 7th November 2023 to the 27th June 2025 (of which the Claimant is to recover 80%); and
   b. Special Damages agreed at EIGHTY-THOUSAND DOLLARS ($80,000.00) with interest thereon at 3% from the 24th December 2018 to the 27th June 2025 (of which the Claimant is to recover 80%).

3 Costs to the Claimant to be taxed if not agreed of which the Claimant is to recover 80%.

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Dale Staple
Puisne Judge