



[2014] JMSC CIV. 257

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

**CLAIM NO. 2008HCV05389**

<b>BETWEEN</b>	<b>DAMEAN WILSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CHRISTOPHER DUNN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>EVERTON FALCONER</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**Negligence – Pedestrian hit – One vehicle overtaking whilst another positioned to turn – whether breach of road code evidence of negligence.**

**Sundean Riley instructed by Kinghorn & Kinghorn for the Claimant.**

**Harrington McDermott instructed by Channer Ormsby for the 1<sup>st</sup> Defendant.**

**Tamara Dickens instructed by the Director of State Proceedings for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.**

**Heard: 29<sup>th</sup> September 2014 and 31<sup>st</sup> October, 2014**

**BATTS, J.**

[1] This judgment was delivered orally on the 31<sup>st</sup> October 2014. I now put it in permanent form. At the commencement of the trial, the Crown applied for a separate trial of damages and liability. The reason being that they wished to cross-examine the doctor. Having heard submissions I refused the application. There had been ample opportunity to make such an application at pre-trial stages. Furthermore the rules allow experts to be questioned prior to trial. I do not think the delay which such a separation of issues would cause, was fair to the Claimant, neither would the necessary additional costs.

- [2] The parties indicated that special damages were agreed at \$26,213.53.
- [3] **Exhibit 1** is a medical report of Dr. Chandra Thondapi dated 30<sup>th</sup> May, 2008 pursuant to paragraph 6 of an Order of the Honourable Mr. Justice Rattray dated 25<sup>th</sup> September, 2012.
- [4] The Claimant Damean Wilson was 12 years old on the date of the accident 12<sup>th</sup> June, 2007. His witness statement dated 25<sup>th</sup> August 2012 was allowed to stand as his evidence in chief. He was born on the 27<sup>th</sup> August 1994 and is now 20 years old.
- [5] He states that he was standing on the “banking” at a “T” junction of the McGrath Road and the Ewarton Main Road awaiting his sister. He saw a motor vehicle coming from the direction of Linstead and its right indicator was on. He formed the impression that it intended to turn onto McGrath Road. It had been his experience that vehicles sometimes make a U-turn on McGrath Road and so he moved further away from the road and into bushes on the banking.
- [6] He took his eyes off the car to see if his sister was coming when he heard a loud noise, he then saw the car he had seen turning, coming towards him. The car hit him down. The car came to a stop on his left foot and pinned him against a fence.
- [7] When the car was taken off him he saw an ambulance and its left side was crashed into the right side of the car. A taxi-man took him to the hospital. He described his pain as ‘terrible’. He described his treatment and recovery.
- [8] He was cross-examined by counsel for each of the Defendants. In answer to Mr. McDermott he said that immediately prior to the accident he had seen his sister but she had not crossed the road. In answer to Miss Dickens he said that he had not seen his sister prior to the accident. He said she was there after the accident. In answer to Mr. McDermott the Claimant says he saw the car positioned to the right side of its lane and that other vehicles passed to the car’s left. He said he saw the ambulance further back. He saw no flashing lights. In

answer to Miss Dickens he said the car was stationery when he saw it. He said it was a Toyota motor car. He admitted he only glanced at the car as he was really looking for his sister.

[9] In answer to the court the Claimant stated that he was sure no one from the ambulance assisted him because of certain things he heard being said while he was on the scene.

[10] The First Defendant's witness statement dated 27<sup>th</sup> September 2012 stood as his evidence in chief. He stated that he owned and drove a Toyota Corolla motor car on the 12<sup>th</sup> June, 2007. On that date at between 5.30 pm and 6.30 pm he was going along the Ewarton Road in the direction of Mount Rosser. On reaching the intersection with McGrath Road which was to his right, he switched on his right indicator and moved closer to the middle of the road. He started making the turn when he saw a lady crossing the road from his left to his right. He stopped to allow her to cross the road. He checked his rear-view mirror. Vehicles were passing to the left side of his vehicle. He started to turn right while the second vehicle was passing to his left. He felt a hard impact to the right side of his car. He stepped on his brake but was pushed by the ambulance towards the embankment on his right side. His car climbed the embankment and pinned a little boy's leg against a "peg". He could not exit the car through the right door as it was damaged by the ambulance. He exited through the passenger door and moved the car off the boy's leg. He said there were no flashing lights on the ambulance and that the ambulance driver refused to take the boy to hospital.

[11] The First Defendant was not cross-examined by the Claimant's counsel. Miss Dickens for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cross-examined him extensively. The 1<sup>st</sup> Defendant said he was going to McGrath road to visit someone there. He stated that when he checked his rear view mirror he had not seen the ambulance. He did this when he positioned to turn. The following exchange occurred:

**Q: Did you check rear view mirror again before you turn?**

**A: No, did not think I need to again because 2 cars were passing on the left.**

**Q: When you about to drive to turn right you did not see the ambulance?**

**A: No.**

**Q: The first time you saw the ambulance is after the collision?**

**A: Right.**

[12] This witness maintained that the crew of the ambulance provided no assistance to the little boy.

[13] The first witness for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was Mr. Andrew Bowen. His witness statement dated 25<sup>th</sup> September 2012 was allowed to stand as his evidence in chief. He was allowed to amplify as there was no objection. He said that the other road referred to in paragraph 5 is McGrath Road. He said the accident occurred in Ewarton. He was on his way from Kingston.

[14] His witness statement indicated he was a ward assistant. He was sitting on the left in the front passenger seat of the ambulance. He said the ambulance approached a Toyota Corolla motor car which had stopped on the left of the main road. The ambulance was about to pass when the Toyota Corolla suddenly and without warning moved off and started to turn to the right. The ambulance swung to the right and stopped. The Toyota did not stop and collided with the ambulance. It then proceeded towards the embankment on the right and collided into a little boy. He said the ambulance driver and others assisted the little boy. The boy was transported to the hospital by residents. His ambulance had a patient on board.

[15] The cross-examination by Claimant's counsel was inconsequential. The 1<sup>st</sup> Defendant's Counsel's was more substantial. The witness denied seeing any other vehicles between the ambulance and the car after he first saw it. The following interesting exchanged occurred:

**Q: Flashing light was on?**

**A: Yes, they were on but I am not sure if on at time when because you know bulbs can blow. They were turned on but don't know if working. Sometimes turn on but no light."**

He also was clear that he saw the car stopped on the road not the soft shoulder. He said also that the collision occurred in the right lane as one faces Mount Rosser.

[16] Everton Falconer the 3<sup>rd</sup> Defendant then gave evidence. His witness statement dated 25<sup>th</sup> September 2012 was allowed to stand as his evidence in chief. He was without objection allowed to correct his statement. In paragraphs 5, 7, 8, 16 and 18 the reference to McGrath Road should be Ewarton main road. The witness was instructed to make the corrections and initial them on the statement.

[17] His evidence in chief was that he commenced his return trip to St. James in the afternoon. At about 5:45pm he saw a Toyota Corolla ahead. The Corolla pulled off the main road and on to the left soft shoulder of the road. He said his flashing lights were on. As he approached to pass the Corolla it suddenly turned to the right as though it was intending to go on to the McGrath Road. He blew his horn, applied his brake and swung right. He stopped the ambulance but the Corolla did not stop and proceeded to turn right causing the collision. The Corolla ended up on the right embankment and collided with a little boy and pinned him to a fence. He said himself and others in the ambulance assisted the little boy.

[18] He was not cross-examined by the Claimants attorney. When cross-examined by the 1<sup>st</sup> Defendants attorney there were some interesting revelations. He explained his reason for having the flasher light on as being because he wanted the patient to reach Montego Bay as quickly as possible. He too denied the presence of any other vehicles when he first saw the Corolla. He admitted that there was no soft shoulder there and therefore Mr. Bowen was correct that the vehicle stopped on the side of the road. He said too that his entire vehicle was in the right lane as one goes to Mount Diablo when he swerved. The collision

occurred in the right lane. The front of the ambulance was facing McGrath Road when the car hit the ambulance. In answer to the court the following exchange took place:

**Q: Can you explain how your car stationery, Corolla hit your car but end up on embankment to the right?**

**A: Don't think the other driver was alert. Even after the collision when his vehicle ran on the embankment his foot was still on the accelerator.**

**J. How you know that?**

**A: Saw his foot still depressed the accelerator.**

**J: Where was the little boy?**

**A: Still pinned between the fence and the car.**

[19] Such was the evidence of note in the matter. The parties made submissions and I will not repeat them. I have reviewed my notes of the submissions. This is a matter which turns largely on the credibility of the witnesses. In assessing that, I rely not only on my impression of the witness, but on the evidence given and whether it is internally consistent or credible.

[20] In this case as we have seen the 3<sup>rd</sup> Defendant for the first time in the trial, after examination in chief and cross-examination and re-examination, stated that the 1<sup>st</sup> Defendant had depressed the accelerator – (instead of the brake) after the collision and continued doing so even while the Claimant was still pinned to the fence.

[21] Furthermore himself and his witness would have the court believe that the ambulance was stationery at the time of the collision. This I find highly improbable. The 3<sup>rd</sup> Defendant insists his flasher light was on, his witness is not so sure. He was honest enough to say that sometimes the lights don't work.

[22] The Claimant's evidence was itself flawed. It is clear that he did not really see much of what he asserts. As with the issue whether persons in the ambulance

assisted him, I am of the view that much of what he stated is the result of things told to him. He may honestly believe he did see them occur; the power of suggestion on a child could cause that. I accept that he was standing on the soft shoulder and that he saw the car positioned to turn. I do not think he truly recalls much else.

[23] The 1<sup>st</sup> Defendant gives an account that is very probable. He also gave evidence in a manner which was not evasive or hesitant. Unlike the 3<sup>rd</sup> Defendant who refused or failed to give any evidence of distance and very little as to time, the 1<sup>st</sup> Defendant was forthright. He said that he did not check his rear view immediately before turning. He may not have done so because vehicles as he said were passing to his left. I hold that it was reasonable for him to expect other vehicles would also pass to the left. This is so particularly because, as I find as a fact, he was positioned in the middle of the main road with his indicator on.

[24] The 3<sup>rd</sup> Defendant attempted to pass because he had turned on his flasher light and was driving an ambulance. He did not expect the 1<sup>st</sup> Defendant to turn and expected he would heed his flashing light. I find as a fact however, that no lights were flashing. The 3<sup>rd</sup> Defendant may have turned them on but they did not come on, hence the 1<sup>st</sup> Defendant saying he did not see flashing lights. This I accept as truthful.

[25] The issue which arises is whether there is a breach of duty of care by the 1<sup>st</sup> Defendant. I hold that he acted reasonably and as any reasonably prudent driver would. He satisfied himself no vehicle was oncoming. He had earlier satisfied himself no one was behind and that vehicles behind were passing to his left. It was reasonable to assume that any other vehicle would follow suit. The accident was in my view entirely caused by the negligence of the 3<sup>rd</sup> Defendant who failed to operate his vehicle in a safe manner. A vehicle ahead positioned as if to turn right with indicator on, ought to be passed on its left or not at all. It is an act of negligence to proceed in the reckless expectation that other vehicles will give way stop or move out of the way, merely because one has a light on. In fact and

as I have found there was no flasher light on the vehicle. Whether or not one was on makes no difference to my decision. This is because a flashing light would not have changed the cause of this accident. The 1<sup>st</sup> Defendant was positioned to turn right with his indicator on. The 3<sup>rd</sup> Defendant ought to have stopped or passed to the left of the 1<sup>st</sup> Defendant.

[26] Both parties agreed to admit the Island Traffic Authority Road Code (1987) (the Code) as **Exhibit 2**. Mr. McDermott for the 1<sup>st</sup> Defendant relied on paragraph 8 of the code. This says in part:

**“Do not overtake at or when approaching the following locations:**

**.....(c) Road junctions.”**

[27] Miss Dickens for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also relied on the Code. She points out that Part 2 Rule 6 states,

**“Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or “last minute” turn; it is very dangerous.”**

It was submitted that the admission by the 1<sup>st</sup> Defendant that he did not look in his rear view mirror immediately before turning constituted a breach of the Code. This breach it is submitted constitutes an act of negligence, see the Road Traffic Act Section 95 (1) and (3). See however section 51 (2).

**“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.”**

- [28] The Road Code is a guide to motorists. A breach is and can be regarded as evidence to support an allegation of negligence. Each case however turns on its peculiar facts. In this case as I have found, when regard is had to the position of the 1<sup>st</sup> Defendant's vehicle, his indication to turn right, the fact that vehicles were safely passing to his left and the fact he had earlier checked his rear view, I hold that it was not a breach of duty to turn without again checking his rear view mirror. I find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entirely to blame.
- [29] On the question of damages Claimant's counsel relied on ***Simpson v Baker*** Khan 5 d p. 86. The award when updated was \$2,038,000; ***Ebanks v McClymont*** Khan 6 d p 76. The award was updated to \$1.6 Million. An award for pain, suffering and loss of amenity of \$1.685 Million was sought.
- [30] Mr. McDermott submitted that the cases cited by the Claimant involved more serious injuries. He relied upon ***Martin v Uncle Sonny's Transport*** Khan 5 d page 68. When updated that amounts to \$1.3 Million. He submitted for an award of \$1.1 Million.
- [31] The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relied upon: ***Martin v Uncle Sonny's*** (referenced above) ***Lewis v Attorney General*** Suit C.L. 1986 L 240 unreported judgment of Edwards J delivered 19<sup>th</sup> April 1990 when updated the award was \$946,000. ***Finn v Nagimesi*** CL 1991 F 117 unreported judgment of James J, delivered 5<sup>th</sup> May, 1994. When updated the award is \$542,000. ***Thomas v Francis*** Suit CL 1995 T0906 unreported Judgment of Smith J delivered 28<sup>th</sup> September 1999, updated the award was \$1,886,000.
- [32] In the case at bar the medical report (**Exhibit 1**) stated that the Claimant suffered a degloving injury to the left leg and fracture of the distal one third of the left tibia. The report which is very short ends by saying the Claimant "improved well". There is no medical evidence of a permanent partial disability. In his witness statement the Claimant has given a little more insight into his pain suffering and loss of amenity. He said,

**“Para 6.- The car was hot. I started to scream and beg for anyone to help to take the car off my foot. It didn’t seem as if the car could move. Some people came and rocked the car off my foot. My foot seemed to me like it was just cut open in two. I couldn’t stand on it. I was in terrible pain. I was crying.**

**Paragraph 17 - When I walk for any significant distance my leg hurts. Before the accident I used to play cricket at my school. I no longer play cricket because I am afraid to cause hurt and pain to my leg. It pains me whenever I put any kind of pressure on it. I have been left with an ugly scar to my left leg. That scar is tender whenever I touch it. I always wear socks with my shoes. If I were not to do so the scar would be uncomfortable.”**

[33] I accept as truthful this aspect of the Claimant’s evidence. I agree that the Simpson and Ebanks cases are far more serious, involving as they did treatment by traction. Jonathan Johnson was applicable. It was a knee injury; however, the doctors expected a complete recovery. Thomas v Francis is also relevant and was a knee injury causing 15% disability of the limb. Finn was a fracture of the 5<sup>th</sup> metatarsal and is clearly less impactful. Lewis is more helpful, however he had no “degloving” or scarring and recovered fully. It too therefore is less serious. Martin’s case is helpful. Although also having traction his assessed final disability was 3% whole person.

[34] In the circumstances I award \$1.1 million to the Claimant for Pain Suffering and Loss of Amenities.

[35] There will therefore be judgment for the Claimant against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as follows:

Special Damages (agreed) \$26,213.53

General Damages for Pain, Suffering and Loss of Amenities \$1.1 Million

Costs to the Claimant to be taxed if not agreed.

Interest at 3% will run on general damages from the 12<sup>th</sup> June, 2007 payment and on Special Damages from the 18<sup>th</sup> November, 2008 until date of payment.

**David Batts**  
**Puisne Judge**