



[2019] JMSC Civ 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV00090

BETWEEN	RITIKA KIRPALANI	CLAIMANT
AND	ROWAN MORRIS	DEFENDANT

IN OPEN COURT

Mr Obiko Gordon instructed by Frater, Ennis & Gordon for the Claimant

Mrs Rachael Medley for the Defendant

Heard: May 13, (21 and 28) and June 21, 2019

Negligence – motor vehicle accident – claim for personal injury – counterclaim for repairs to motor vehicle - credibility of parties – Damages - Assessment

A LINDO, J.

The Claim

- [1] The Claimant Ritika Kirpalani, brings this action against the Defendant Rowan Morris in negligence. She seeks to recover damages for personal injuries she claims to have sustained in a motor vehicle accident on or about January 26, 2013. The accident involved motor vehicle registered 5053 EK owned by her and driven by her husband, Mukesh Kirpalani, and minibus registered PF 6387 owned and driven by the Defendant.
- [2] By her Claim Form and Particulars of Claim filed on January 10, 2014, she alleges that “the Defendant negligently drove, managed and controlled his motor

vehicle...as a consequence of which his said motor vehicle collided with the Claimant's motor vehicle causing extensive damage to same and serious injuries to the claimant...".

- [3] In her particulars of negligence she alleges, among other things, that the Defendant was "driving at a speed that was excessive; failing to keep a proper look out; dangerously attempting to overtake a motor vehicle which was making a right turn off the road; overtaking when it was not safe to do so; crashing his said vehicle into the rear of the Claimant's motor vehicle; failing to yield to the Claimant who was lawfully turning right off the main road; failing to stop, to slow down, to swerve, to turn aside or to in any other way so managed (sic) and or controlled (sic) the said vehicle so as to avoid the said collision"

The Defence

- [4] The Defendant acknowledged service of the claim on November 25, 2014, and filed a Defence and Counterclaim disputing the claim and alleging that the accident was "caused by the Claimant's sudden and unexpected right turn, failure to use or check her rear and side view mirrors, failure to use her indicator before turning right, which resulted in the Defendant having to swerve his motor vehicle to the left to avoid the accident..."
- [5] In his particulars of special damages, he claims the sum of \$557,304.00 for, "estimated cost of repairing motor vehicle, wrecking services, loss of use..."

The Evidence

- [6] At the trial, the Claimant gave evidence and called her husband, the driver of her motor vehicle at the material time, as a witness. Her witness statement and that of Mukesh Kirpalani both filed on March 13, 2017 stood as their evidence in chief.
- [7] The Claimant's evidence is that she was travelling in the front passenger seat of her motor vehicle and on reaching in close proximity to the Shaaz Petroleum

station her husband pulled to the right of the lane, came to a stop and vehicles going in the same direction passed to their left. She says while waiting to turn right, she felt a heavy impact in the rear of the motor vehicle which pushed the vehicle into the middle of the road so that part of it was “over the right hand side”. She states further that as a result of the impact she was jerked suddenly and suffered injuries and was taken to the Saint Ann’s Bay Hospital for medical attention. She adds that she could not work for three days and that she did x-rays, attended two physical therapy sessions and purchased medication and a cervical collar. She also states that the motor vehicle was assessed as ‘not economic to repair’ and she sold the wreckage for \$220,000.00 and had to pay \$5,000.00 per day for alternative transportation.

- [8]** Two questions were put to her in cross-examination. She was asked whether she had a valid insurance policy at the date of the accident, to which she said “no”, and when asked whether that meant that her husband was not insured to drive the motor vehicle, she also replied “no”.
- [9]** Mukesh Kirpalani’s evidence, in part, is that “intending to turn into Shaaz Petroleum Station, I pulled to the right of my lane and came to a stop awaiting the way to be cleared of oncoming vehicles before I made the right turn...my right indicator was on...I was there waiting to turn for about half minute when I felt a loud and heavy impact in the rear of my said motor vehicle. That the impact pushed my motor vehicle into the middle of the road ...”
- [10]** Under cross-examination he said when the Police came on the scene he was asked to produce his insurance and fitness certificate and motor vehicle registration. He said he was not given a ticket for driving without insurance.
- [11]** The Defendant gave evidence on his own behalf and called no witness in support of his position. He states that he was driving his vehicle going towards Runaway Bay, was carrying “about 14 or 15 passengers” and was travelling approximately one chain behind a Mitsubishi Pajero motor vehicle. He states further that he

arrived at a point in close proximity to the Shaaz Petroleum Station, which was on the right side of the road, the white line in the middle of the road was “a broken white line allowing overtaking”, and the road was clear and safe of oncoming vehicles. He says “intending to overtake the Mitsubishi...I put on my right indicator and proceeded to merge into the right lane...just as I proceeded to enter the right lane and overtake the Mitsubishi Pajero, the driver of the said vehicle suddenly put on his right indicator and made a sudden right turn causing me to swerve towards the left of the road. That both vehicles impacted on each other causing severe damage to the right front end of my mini bus. That the Mitsubishi Pajero went towards the gas station, hitting the wall of the gas station”

- [12]** Under cross-examination, he said before the accident it was just his vehicle and the Claimant’s vehicle on the road, and that at no point did the Claimant’s vehicle slow down but it was driving slowly, while he was driving at about “40-30kmph”. He said that he “go faster” when he was getting ready to pass him and blew his horn and put on his indicator.
- [13]** When asked how far he was from the Claimant’s vehicle when he entered the right lane to overtake, he said “I was on the tailgate at that time”. He then denied tailgating him and said he was close to the vehicle and that he began to accelerate about ten seconds before the accident happened.
- [14]** When confronted with his witness statement (paragraph 10 and 12) he denied saying both vehicles impacted and that he only realized what caused the impact after he came out of his vehicle. He also denied that his vehicle collided with the Claimant’s vehicle and denied that the point of impact was the rear of the Claimant’s vehicle and the front of his vehicle. He denied being in a hurry and then admitted that the Claimant was slowing down and he was on the tailgate when he was about to pass him.

The Submissions

- [15] After hearing the evidence, Counsel for the parties were ordered to file written closing submissions treating with the issue of liability and quantum of damages.
- [16] Mr Gordon, Counsel for the Claimant outlined the facts and the evidence and suggested that the Defendant, by discrediting his own Witness Statement under oath, has impugned the credibility of his entire case and has thereby presented himself as an untrustworthy and unreliable witness. He concluded that the Claimant and her witness have presented a believable and consistent version of the events while the Defendant's case is riddled with inconsistencies, impracticalities and self-contradictions.
- [17] Counsel for the Defendant, Mrs Medley, submitted that "the burden is therefore on the court to assess the character and demeanour of the witnesses and decide on a balance of probabilities who is more credible..."
- [18] She highlighted the fact that the Claimant hesitated before answering whether her vehicle was insured, and suggested that "her demeanour and hesitation spoke volumes as to honesty" and noted that Mr Kirpalani was "more candid".
- [19] She expressed the view that the Defendant's demeanour "was synonymous with a witness who has never given evidence in a courtroom and therefore was nervous and confused" noting that this was evident in his answers relating to speed, the use of the word "undertaking" instead of "overtaking" and his answer as to where on his bus had the greatest impact. Counsel also suggested that the Defendant "candidly made admissions which had the potential of weakening his case..."

The Issues

- [20] The dispute in this case has to do with the precise manner in which the collision occurred and who is to be blamed. In my view therefore, the main issues to be

resolved are who was the proximate cause of the accident and the quantum of damages to be awarded against the party found to be liable.

The Law and application

- [21] It is well settled that all users of the road owe a common law duty of care to other road users and that drivers of motor vehicles have a statutory duty to take the necessary action to avoid an accident and to exercise reasonable care to avoid causing injury to persons or damage to property. (**Esso Standard Oil SA Ltd. & Anor. v Ian Tulloch** [1991] 28 JLR 553) (**Section 51 (2) of the RTA**)
- [22] Reasonable care is the care which the ordinary, skilful driver would exercise under all the circumstances and includes avoiding excessive speed and keeping a proper lookout. (**Bourhill v Young** [1943] AC 92).
- [23] In this case, both the driver of the Claimant's vehicle and the Defendant owed a duty of care to each other as they were traversing the roadway, both travelling in the same direction and driving motor vehicles. (**Nance v British Columbia Electric Railway Co. Ltd.** [1951] AC 601).
- [24] It is not in dispute that Mr Kirpalani and Mr Morris were driving motor vehicles in the same direction along the Richmond Road in the parish of Saint Ann and that Mr Morris was travelling behind Mr Kirpalani prior to the accident. It is also not disputed that the accident took place in the vicinity of the Shaaz Petrol Station which is on the right hand side of the road, and that the accident took place in the night, between the hours of 8:30p.m. and 9:00p.m.
- [25] I find the Claimant and her witness to be honest and credible, as in the absence of any documentary evidence in relation to the lack of insurance coverage, they albeit with some hesitation on the part of the Claimant, admitted that this was so.
- [26] The Defendant on the other hand was not a convincing witness. Although he appeared to be nervous, he was also evasive. There were discrepancies in his evidence in chief and his evidence on cross-examination as it related to how

close he was to the Claimant's vehicle and when he realized what caused the impact. Additionally, even in cross-examination, there were inconsistencies in the evidence he was giving as at one stage he said the Claimant's vehicle did not slow down, he admitted to being close to the vehicle "on the tailgate" and then he said the Claimant was slowing down when he was about to pass.

[27] I agree with Counsel for the Claimant that by discrediting his own witness statement, under oath," the Defendant has impugned the credibility of his entire case and has thereby presented himself as an untrustworthy and unreliable witness"

[28] When the Defendant's evidence is examined against the report of the Assessors, his evidence is also not consistent with the information contained in it. In answer to a question put to him by the court as to what section of his motor vehicle was hit, he said "little part of the left side of the front". This is in direct contrast with the report as well as with the statement he gave to his insurers.

[29] In her closing submissions, Counsel for the Defendant placed much emphasis on the Assessor's Report in respect of the Claimant's vehicle. She suggested that the information contained in it, including information that the vehicle had spun "two and a half times" shows that at the time of the accident there were no oncoming vehicles and that "the damage being more to the front right of the bus heavily suggests that due to the movement of the Claimant's vehicle the Defendant had to take evasive direction". I find however that there is nothing in the report from which such inference can be drawn.

[30] Counsel for the Defendant did not put any questions in challenge to the Claimant's or her witness' version of the accident. She was content to elicit from them whether or not the motor vehicle was insured at the time of the accident or whether the driver at the time was insured to drive the said vehicle and I must point out that I fail to see how the lack of insurance of the vehicle or the driver has any bearing on the fact of the accident.

- [31]** Even on the Defendant's account, admitted in cross-examination, it is clear that the Claimant's vehicle had been travelling slowly and he was on the tailgate of the vehicle, began to overtake, accelerated to 50kmph and travelled for ten seconds before the accident occurred.
- [32]** I accept as true the evidence of the driver of the Claimant's vehicle that he had stopped because he intended to turn right into the petrol station. I bear in mind that whether or not there were oncoming vehicles at the time, he had a duty to ensure that the way was clear and it was safe to make the turn.
- [33]** In addition to the evidence in chief and viva voce evidence, I gave due consideration to the physical evidence presented as well. The Assessors' reports show that the damage to the Claimant's vehicle was to the rear, while it was the front section of the Defendant's vehicle, including the bonnet, front bumper, right and left headlamps that were damaged.
- [34]** To my mind, the front of the Defendant's vehicle, and the entire back of the Claimant's vehicle being damaged, provide cogent physical evidence that the Defendant's vehicle collided into the back of the Claimant's vehicle and it is more likely than not that at the time of the collision, the Claimant's vehicle was stationary. It is hardly likely that the Claimant could have already made the turn when the impact occurred as in such a case one would expect the damage to be more to the side of the vehicle. The exhibits therefore give support to the Claimant's account that the vehicle was hit from behind while it was in a stationary position.
- [35]** On the totality of the evidence, I find as a fact that the Defendant was speeding at the time and was not keeping a proper lookout and find on a balance of probabilities that it was his error of judgment and the fact of his speeding which caused the accident. He is therefore entirely to blame for the accident.
- [36]** There will therefore be judgment for the Claimant and I will now proceed to assess the damages to which she is entitled.

Damages – Assessment

[37] The medical report of Dr Derrick McDowell admitted in evidence, indicates that the Claimant suffered injuries to her cervical spine, left shoulder, left thumb/forearm, right thigh and right cheek and was diagnosed as having a sprain/strain type injury to the cervical spine (whiplash injury) and multiple soft tissue injuries which affected the left thumb, forearm and thigh.

[38] In his Skeleton submissions filed on March 14, 2018, on which reliance was placed, Counsel for the Claimant referred to the following cases as guides to determine the quantum of damages to be awarded for general damages:

1. **Kavin Pryce v Raphael Binns and Michael Jackson** [2015]
JMSC Civ. 96, unreported, delivered March 2015.
2. **Talisha Bryan v Anthony Simpson & Andre Fletcher** [2014]
JMSC Civ 31, unreported, delivered March...2014
3. **Trevor Benjamin v Henry Ford**, 2005HCV02876, unreported,
delivered March 23, 2010

[39] In the case of Kavin Pryce, the Claimant, like the Claimant in this case, was in the front passenger seat of the vehicle. He suffered cervical strain, lower back strain, soft tissue injuries to left thigh and left knee sprain when a motor truck collided in its rear. The Claimants in the cases of Talisha Bryan and Trevor Benjamin were back seat passengers. Talisha Bryan was diagnosed with whiplash injury to the neck and lower back strain, while Trevor Benjamin suffered soft tissue injuries. These Claimants were awarded damages ranging from \$700,000.00 to \$1,500,000.00. When the award to Kavin Pryce is updated, using the current CPI of 256.80, it yields \$1,717,955.57.

[40] The injuries sustained by the Claimant in the case at bar are more comparable to those of Kavin Pryce, but I bear in mind that this Claimant had no lower back

strain but had multiple soft tissue injuries. I am therefore of the view that a reasonable award would be \$1,400,000.00.

- [41] In relation to her claim for special damages, the Claimant has pleaded a total of JD\$1,716,652.57 and US\$1,140.00. She has provided documentary evidence in relation to her medical expenses and the loss of the value of the motor vehicle by way of receipts and the report of the Loss Adjuster, which were admitted in evidence. I have considered these for the purpose of assessing the financial loss suffered by her and find that these amount to \$421,548.50.
- [42] With regard to her claim for loss of income, she pleaded the sum of US\$1,140.00 and her evidence is that, as a Sales Manager she earned US\$330.00 per day, plus a commission of US\$50.00. Her evidence also is that she is employed as a Sales Executive at the Bahia Principe Hotel, Runaway Bay, Saint Ann.
- [43] Especially in the case of employed persons, it has been consistently held that some documentary evidence ought to be presented to support the amount being claimed for loss of earnings. The Claimant has not provided any documentary evidence. Additionally, she has failed to provide evidence as to how the commission is arrived at. Based on the nature of her job, I am of the view that she should be able to provide documentary evidence of her earnings. The evidence she has given in my view is insufficient to satisfy the requirement of specific proof in relation to her loss of earnings. Her evidence in my view is “so bald as to amount to throwing up figures at the head of the court”.
- [44] I am guided by the decision in **Desmond Walters v Carlene Mitchell** [1992] 29 JLR 173 in which Wolfe J.A (Ag.) (as he then was) upheld the approach of the trial judge who took cognisance of evidence from the respondent concerning his loss of earnings without supporting documentary proof. At page 176 of the judgment he opined:

“There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages, 12th Edition the learned author states:

“However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen LJ laid this down in the leading case of Radcliffe v Evans [1892] 2 Q.B. 524 (C.A.). In relation to special damage, he said:

“The character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old intelligible principles. To insist on more would be the vainest pedantry.”

[45] I find this Claimant’s case to be distinguishable from the Claimant in Desmond Walters, as she is employed, and even if not with the same company as at the time of the accident, the court would have reasonably expected her to present some form of documentary evidence to substantiate her income. She has failed to do so and as such, no award will be made in respect of her claim for loss of earnings.

[46] As part of her claim for special damages, the Claimant also claimed the sum of \$200,000.00 for loss of use of the motor vehicle for forty days at a rate of \$5,000.00 per day. The Claimant has provided no evidence whatsoever for the court to make a determination if such an award can be made. There is no evidence as to why the claim is for that number of days or how the sum of \$5,000.00 was arrived at. Having failed to substantiate this claim, there will be no award made for loss of use.

Disposition

[47] Judgment for the Claimant against the Defendant on the claim and counterclaim. Damages assessed and awarded as follows:

Special damages awarded in the sum of \$421,548.50 with interest at 3% from January 26, 2013 to date of judgment

General damages awarded in the sum of \$1,400,000.00 with interest at 3% from October 16, 2014 to the date of judgment

Costs to the Claimant to be taxed if not agreed.