



[2013] JMSC Civ 170

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2008 HCV 05886

BETWEEN	JODIAN BARKER	CLAIMANT
AND	DAMIEN ANDREW GALLIMORE	1 ST DEFENDANT
AND	JUDITH COLLEEN GALLIMORE	2 ND DEFENDANT
AND	E & R HARDWARE LIMITED	3 RD DEFENDANT

CONSOLIDATED WITH
CLAIM NO. 2008 HCV 03471

BETWEEN	IRIS BARKER	CLAIMANT
AND	DAMIEN ANDREW GALLIMORE	1 ST DEFENDANT
AND	JUDITH COLEEN GALLIMORE	2 ND DEFENDANT
AND	E & R HARDWARE LIMITED	3 RD DEFENDANT

Ms. Allia Leith-Palmer and Ms. Oraina Lawrence
Instructed by Kinghorn & Kinghorn for the Claimant

Ms. Carla Brydson
Instructed by Archer Cummings & Co. for the 1st and 2nd Defendants

Mr. Kwame Gordon
Instructed by Samuda & Johnson for the 3rd Defendant

Heard: February 2, 3, 2012 and November 8, 2013

*Negligence - Motor Vehicle Accident -
Overtaking line of traffic - Whether
vehicle being overtaken was negligent,
or contributed to accident*

Campbell QC, J

Background

[1] Faiths Pen is a popular refreshment stop for persons journeying between Kingston and the North Coast. The road crosses the mountainous spine of the island; it is for the most part narrow and meanders along the contours of the mountain. Except in a few places, such as in the area of Faiths Pen, traffic must adhere to a line, and there is little scope for overtaking.

[2] It is in such a line that the claimants, mother and daughter travelled on the 4th April 2008. The mother, Iris Barker was the driver of the Honda Fit registered 5732 EZ, her daughter Jodian, was in the left front passenger seat. They were immediately behind a, "10 wheeler," large trailer, about 22 feet in length 6 feet wide that was lumbering along at about 10 miles per hour. They had been behind the trailer "for more than half an hour," on the account of Jodian. Their vehicle was followed by the 3rd defendant's truck, after which there was, "a line of more than ten cars." In effect, the trailer because of its size, the speed at which it was moving and frequent turns in the road was in control of the speed at which all the following vehicles could proceed, until they managed to pass.

[3] In the area of Faiths Pen, the road's width was estimated at 40 feet. The surface was dry, asphalted and had a broken white line running down its centre. Suddenly, cars somewhere in the line of traffic, following the truck, started to overtake the three leading vehicles. There is no challenge that the claimants' Honda Fit remained in the line, as did

the trailer. However, the third defendant's Subaru motor vehicle, registered CB 4795, collided into the rear of the claimants' motorcar.

Claimant's case

[4] Jodian said that she is unable to say what happened before the Subaru hit the vehicle she was travelling in, "the first time I saw the vehicle was the same time it hit my vehicle." She said before the collision, more than two cars had overtaken her vehicle and the trailer. According to Jodian, the overtaking cars had passed in close proximity to each other and had been travelling very quickly. Iris Barker said when she felt the impact of the collision was the first time she was seeing the Subaru. She said she didn't know how the accident happened, "she only know it hit in the back of her car."

First and Second Defendants' case

[5] Mr. Andrew Gallimore, a 36 year old Information Technology Manager, gave evidence on behalf of the 1st and 2nd defendants. He admitted that his vehicle collided in the rear of the Iris Barker's car. He said that there were two vehicles ahead of him behind the truck. Both of those vehicles overtook the truck. Mr. Gallimore estimated the combined length of the three vehicles ahead of him to be about 75 feet. He was in third gear travelling at about 40 – 50 miles per hour in the process of overtaking when the truck drifted to its right and hit his left rear wheel. As a result, the car went into a skid and the truck and the Subaru collided a further two times.

[6] The second collision, he said caused him to spin in front of the truck, "at which point, he collided in the rear of Mrs. Barker's car. The third impact with the truck was when the truck's left front tyre took off his front bumper. Mr. Gallimore was questioned about his motorcar, which he said was a turbo-charged, 2000cc, engine. He said that the fact it was turbo-charged, made it much faster than the ordinary vehicle. He said that the truck would have drifted a foot over the centreline of the roadway. It was suggested to him that in the process of overtaking there was a vehicle coming from the opposite direction and he tried to "squeeze in" the left lane between the truck and the Honda Fit, and collided with the front of the truck which propelled him into the Honda

Fit. He denied that he was driving at a speed which made it unsafe to do so in all the circumstances.

[7] The driver of the truck, the 3rd defendant, had been a licensed driver for 35 years, was familiar with the route and had been driving that truck for the last five years. He was transporting goods and had no scheduled time for arriving in Montego Bay. He first became aware of the Subaru when it attempted to overtake his truck. He said he was not looking for anybody to overtake at that point. His vehicle is a left hand drive and he had never overtaken on Mount Rosser, because "he couldn't take the chance to overtake." He denied that he turned into the right lane. He states that the cab of his vehicle is on the same level as the top of the car, affording him good visibility. He said that after the two cars overtook him, the Subaru, could not make it as there was an oncoming vehicle. The Subaru tried to fit in the space between his truck and the Honda Fit, but couldn't make it and collided with the front of the truck and spun around and collided with the rear of the Honda Fit.

Analysis

[8] There is no evidence that the Honda Fit left its place in the line of traffic. There is no suggestion that Iris Barker, as driver of the Honda Fit was liable or contributed to the collision in any way. I accept the evidence that the truck did not overtake or swerved into the path of the overtaking Subaru. The evidence is that the width of the road is about 40 feet, in the area of the collision. According to the evidence of Mr. Gallimore, the trailer invaded the right lane, by about a foot that would have left a space of 19 feet for the Subaru to pass. Mr. Gallimore described the area as an incline, the truck was laden with goods, and travelling at a speed, which Mr. Gallimore's evidence characterized as "creeping." The evidence of Jodian is that the truck was behind the car she was in, at the time of the collision.

[9] I find that the three overtaking cars, of which the Subaru was last, were travelling rapidly and in close proximity to each other. I find that the Subaru manoeuvre could not be completed because of an approaching vehicle. The further from the front of the line, the overtaking vehicle commences the manoeuvre to overtake the more fraught with

danger is the situation. This is so, not only because the overtaking vehicle has a greater distance to travel, but there is greater opportunity for the circumstances that facilitated a safe completion of the procedure to change. In this case, the change was the oncoming motor vehicle. I prefer the evidence of Mr. Knight, driver of the truck, to that of Mr. Gallimore, I accept Mr. Knight's testimony, that he never overtakes on Mount Rosser. I find that the Subaru collision with the claimants' car and Mr. Knight's truck was totally due to Mr. Gallimore's failed attempt at overtaking due to an oncoming motor vehicle.

General Damages – Jodian Barker

[10] Jodian Barker's injuries were particularized as follows:

- (i) Headaches, (ii) Moderate pain to her neck, (iii) Moderate pain to her back, (iv) Pain at the mandibular joint, (v) Stiffness to the mandibular joint, (vi) Muscle spasm, (vii) Whiplash injury, (viii) Muscle spasm to the back, (ix) Ligament spasm to the back.

She was referred to a physiotherapist and a bone specialist, by Dr. Francis.

Counsel for Jodian Barker had submitted for an award of \$1.7 million for general damages, and relied on **Calston Campbell v Omar Lawrence** Claim No. 2002CLC00135 delivered on 28th February 2003. Mr. Campbell had suffered:

- (i) Laceration to the chin – 2" x 1/6." (ii) Trauma to chest resulting in chest pain and, difficulty breathing and minor obsession to chest wall. (iii) Trauma to back resulting in severe pain and swelling and difficulty in walking properly for three weeks. (iv) Whiplash injury to neck resulting in pain and restriction of movements, collar recommended. He wore a bandage under his chin for a period, had difficulty in breathing, severe chest pains, difficulty in walking. He was unable to walk for too long without feeling pain. He was visited by Dr. Mossop with what the court found and he a "10% disability of function," although not permanent.

The injuries in **Calston Campbell** case were more severe than those suffered by Ms. Barker.

[11] The defendants relied on **Peter Marshall v Carlton Cole and Alvin Thorpe**, 2006HCV1006. The claimant suffered moderate whiplash, sprain, swollen and tender wrist and left hand, moderate lower back pain and spasm. The court awarded \$350,000.00 updated that amount to \$624,762.00.

The matter of **Lascelles Allen v Ameco Caribbean Incorporated and Peter Perry**, **Mr. Allen** had suffered injuries to his side and neck and back. He was diagnosed with whiplash injury and is expected to have complete resolution of the injury, though relatively trivial trauma can cause a recurrence of his symptoms. Within four months of the accident, by June 2009, he seemed to have recovered fully. He had had sessions of physical therapy and was awarded \$600,000.00 and updated to \$637,000.00. Counsel submitted that an award of \$850,000.00 was justifiable in the circumstances.

[12] Mr. Gordon for the 3rd defendant submitted that there was a lack of evidence put forward by the claimants in support of the claim for general damages. There was no evidence from Jodian's school to support her claim.

Ms. Jodian Barker injuries are not as severe as those of **Calston Campbell**, who Dr. Mossop had made an initial assessment of 10% disability of function. He had difficulty breathing, severe pain, unlike Jodian whose pains are described as moderate. **Mr. Campbell** could not properly walk for three weeks. However, her injuries are more severe than those in the authorities presented before me by the defendants' counsel. I will make an award of \$1.1 million for general damages.

Special Damages

Medical Expenses	\$25,000.00
Transportation expenses	<u>\$ 2,000.00</u>
	\$27,000.00

Iris Barker

[13] Iris Barker particularized her injuries as follows:

- Considerable pain
- Two months of physiotherapy
- Hire help for 10 -12 weeks
- Whiplash injury
- Unable to work for six days

[14] There was no evidence of displacement. Mr. Gordon for the 3rd defendant submitted that there was a lack of evidence put forwarded by the claimants in support of the claim for special damages. No basis on which to make an award for loss of earnings. She could have produced receipts. He adopted the submissions of Counsel in relation to general damages.

Counsel for the claimants relied on the authorities of:

- (a) **Marian Llandell v Judah Campbell** Claim No. 2006HCV01324, delivered on 4th December 2009. Thompson-James, J (Ag) made an award of \$950,000.00 for general damages, updated that amount to \$1,025,598.40.

The plaintiff had been found by Dr. Nesbeth to have the following injuries:

- (1) Soft tissue swelling on the forehead with severe headache and dizziness. (2) Moderate lower back pain and spasm. (3) Left knee tender and painful with swelling in the left knee. (4) Mild thromboplebitis in the left leg (inflammation in the left leg).

Ms. Llandell testified that after she was discharged from Dr. Nesbeth, she attended one Dr. Rose as she was still feeling pain in the back and neck.

Dr. Rose diagnosed (1) acute cervical strain (2) acute lower back pains. His prognosis was that **Ms. Llandell** had made a significant recovery from her injuries and both the subjective and objective findings indicate that she is fully functional.

- (b) **Claston Campbell v Omar Lawrence** Claim No. 2002CLC00135, delivered on 28th February 2003; \$600,050.00 updated to \$1,794,602.48. Counsel for the claimant submitted that the court should make an award of \$1.3 million.

The injuries in the instant case are much less severe, than that which **Ms. Llandell** suffered which included dizziness, and thromboplebitis in the left knee. I will make an award of \$800,000.00 for general damages and \$23,000.00 for special damages.

No award is made for loss of earnings.

Costs to the claimant to be in the sum of \$300,000.00 in the consolidated matters.