IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: 200HCV02758 OF 2009

BETWEEN	**DONALD BLAKE**	**CLAIMANT**
AND	**EDWARD BARNABY**	**1st DEFENDANT**
AND	**NORTHERN CASH AND CARRY LIMITED.**	**2nd DEFENDANT**

Heard: January 14, 15 and February 4, 2010

Mr. Carlton Williams and Ms. Cavelle Johnston instructed by Williams McKoy and Palmer for Claimant; Mr. David Johnson instructed by Samuda and Johnson for both defendants

Motor vehicle collision; claimant must establish case on a balance of probabilities; whether claimant has done so; common sense approach to different versions of how accident occurred; need for strict proof of special damages; what court may accept in proof of special damages.

CORAM: ANDERSON J.

At about 5:00 a.m. on December 10, 2004, Donald Blake, ("the Claimant") a business man and farmer, now 65 years old, was driving his Isuzu Motor Truck, licence No: 0765 CC when he was involved in an accident. Edward Barnaby (the "First Defendant"), the servant and/or agent of the Second Defendant, was the driver of the other vehicle (Isuzu Motor Truck Licence No: 6855 CC) involved in the accident in which the Claimant suffered injuries. The Claimant asserts that the accident was caused by the negligence of the First Defendant and that as a result thereof he suffered loss and damage. The First Defendant for his part denies that he was negligent and avers that the accident was caused by the Claimant coming out of a minor road onto a major road without stopping. The Second Defendant claims against the Claimant by way of an ancillary claim for damages to the vehicle owned by that Defendant, which vehicle was written off as a "total loss" as a result of the accident.

This, like all accident/personal injury cases, gives rise to unfortunate consequences including the injuries of which the Claimant now complains. It is not, however, for this

court to consider the misfortune which has arisen and to show sympathy for any party. Rather, the court must assess the evidence taking account of the demeanour of the witnesses and determine whether, and if so to what extent the Claimant has proven his case. This he must do on a balance of probabilities.

It is not in dispute that the accident took place at around 5 o'clock on the morning of December 10, 2004. The averments of the main protagonists in this case as to how the accident occurred, are in stark contrast to each other. The Claimant says that he came along a minor road, Nugent Road, to where it connects at a right angle to the major road running from Kingston to the North coast of the Island in the vicinity of the town of Ewarton, creating a T-junction. Having got to the end of the minor road he stopped and then proceeded cautiously to edge of the main road where he waited for four vehicles, proceeding towards Kingston to pass him. Then, having ascertained that it was safe to do so, he proceeded to make a right turn onto the main road where he was hit by the motor truck driven by the First Defendant. He alleges that although it was still dark and, as he added during cross examination also foggy, the First Defendant's vehicle did not have its lights on. As a result of the accident, the Claimant has suffered the following injuries as set out in the medical reports which have been accepted, and remained in hospital for four (4) days:-

1. Cerebral concussion and loss of consciousness; retrograde amnesia
2. Fractured ninth rib
3. Blunt trauma injury to the chest
4. Chronic dislocation of the sterno-clavicular joint which continued to worsen after the accident
5. Multiple abrasions to the face and upper and lower limbs
6. Sutured laceration on the face
7. Wound to left leg which required antibiotics and dressing

The First Defendant, on the other hand, in his witness statement avers that as he approached the point in the main road where Nugent Road connects to the main road, his

view of the entrance from that road to the main road was partially obscured by a shop at the near corner of Nugent Road which was to his left. However, he said that the vehicle driven by the Claimant came out of the side road across the main road without any warning and was the cause of the accident. The Second defendant raises an ancillary claim against the Claimant in respect of the total loss of the second defendant's truck and also loss of use.

As counsel for the defendants noted, with the passage of time memories fade and perceptions of witnesses change over time and these sometimes give rise to differences in the accounts given by litigants. This does not mean that witnesses are lying when these gaps or differences appear in their recollection of what had happened. Nevertheless, based upon the available evidence, the court must come to some determination for or against the Claimant who must establish his case on a balance of probabilities.

The Issue of Liability

The Claimant under cross examination was at pains to point out that he did stop and waited until four vehicles had passed before making his way onto the main road and making a turn to his right. He said that the truck that hit his vehicle did not have any lights on. At the same time, he also says that he "never saw the truck" that hit him. He certainly could not say, in answer to a question posed by Counsel for the Defendants as to whether the truck was white. This would seem to raise the question of whether he could say that the vehicle "did not have lights" when it came along the road.

On the other hand, according to the First Defendant, when he saw the Claimant's vehicle come out of Nugent Road, it did so without stopping. Given the configuration of the intersection as revealed in the evidence and shown in the photographs, it seems to me that if the view of the mouth of the road is obscured by a building as the First Defendant says it was, he would not have been able to see whether the Claimant's vehicle had stopped or not. In that regard, the evidence of the Claimant and the First Defendant would both appear to be questionable. The court must, therefore, look to other factors to assist it in arriving at proper conclusions.

In that regard, I found it very instructive that the First Defendant indicated that the collision took place in the middle of the road and that the vehicles stopped on the right side of the road. In fact, in answer to the court, the First Defendant stated that his vehicle stopped so close to a drop off on the right side of the road that, although his left hand door could not be opened, he could not come through the right door as he would be down over the edge of a ravine. In those circumstances it was necessary to climb through the window on the left hand side of the truck. Further, his evidence was that the main damage as a result of the collision was to the left front of the First Defendant's truck and the right front of the Claimant's vehicle. I find it difficult to understand how damage of that description would result if the accident took place in the manner and at the point in the road, suggested by the First Defendant.

If the First Defendant first saw the Claimant's vehicle as it shot across the road from the minor road, (my words), it is difficult to understand why the First Defendant would not have swerved to the left to avoid this vehicle going across him. In those circumstances it could be expected to damage the right front of the First Defendant's vehicle and the middle right to back right side of the Claimant's vehicle. This is especially since, as I understand the evidence of the First Defendant, the collision took place in the middle of the road. If the main damage from that impact was to the left front of the defendants' vehicle, and that impact was in the middle of the road, then more of the First Defendant's vehicle must have been over the right side of the road, the Claimant's proper side of the road.

It seems to me that such a scenario would be inconsistent with the First Defendant's version of the accident and I have formed the view that liability for the accident must be ascribed to the First Defendant. The description given by the First Defendant of the way the collision occurred, is in my view more consistent with the First Defendant not being aware of the other vehicle until that vehicle was in the middle of the road and then, in trying to avoid the collision, swerving to the right rather than to the left. How else can one explain where the impact took place, the middle of the road; the main areas of

damage being the right front of the Claimant's vehicle and the left front of the First Defendant's vehicle and the vehicles ending up on the extreme right side of the road. I find that the First Defendant failed to keep a proper lookout and therefore failed to see the Claimant's vehicle as it turned unto the road way and collided into it as it was completing that turn. Notwithstanding the hour of day, the area where the collision occurred is a built up area and the First Defendant ought to have anticipated that other road users might alight from adjoining roads. *A prudent driver must bear in mind that someone may emerge from the side of the road* – **Hamied v. Eastwick**, UK Court of Appeal decision (unreported), November 1, 1994[1].

I accordingly find that the joint and several liability of the defendants has been established.

Damages

With regard to the special damages claimed by the Claimant he has "thrown some figures at the head of the court" but provides little if any, support for them. It is trite law that special damages must be specifically pleaded and proved. In particular, there is no evidential support for the loss of use of $720,000.00. The fact that the Claimant had to pay some outstanding sums owed by his son on the vehicle which he used is not a basis for awarding the Claimant the sum claimed. With respect to the claim for the cost of repairs, while there is some attraction to Mr. Johnson's submission that in the absence of evidence there is no way of knowing whether the vehicle should be treated as a total loss, there is no rule that the victim of a tort would be obliged to accept as his damages the total loss value of his vehicle. The duty is to mitigate but not necessarily to minimize. This is especially so where the vehicle is insured, not comprehensively but for third party risks only. I am prepared to hold that the estimate of the repairs presented in support of the cost of the repairs is valid evidence and ought to be allowed.

On the other hand, I do not feel that the amount claimed for loss of earnings has been established and I am not prepared to allow it.

---

[1] Paragraph 9.53 Bingham's and Benjamin's Motor Vehicle Claims (11th edition).

The defendants do not take issue with the figures for clothing, doctor's visits and medication. The amount to be allowed for special damages is therefore **$717,000.00** and it will bear interest at the rate of 6% from December 10, 2004 to June 21, 2006 and 3% thereafter to the date of judgment.

With respect to the submissions on general damages for loss of amenities and pain and suffering I believe that some guidance may be gained from the authorities cited. I should, however, first observe in passing that in making an assessment for pain and suffering and loss of amenities it is not appropriate to allocate damages to each item of injury and then add them up. Rather, one must look at the overall picture holistically, and make a determination as to what is an appropriate amount.

Cases cited by Claimant:

Donald Henry v Robinson Car Rentals Ltd. Suit No C.L. 1989/H 017: Harrison & Harrison, p. 57

Injuries sustained: Cerebral concussion; fracture of frontal bone; head pains bouts of amnesia. On 29/1/91 the Claimant was awarded $25,000.00, a figure now worth $531,071 using the CPI for November 2009.

Daphne Moodie v Berris Wray Suit No C.L. 1991/M342; Harrison & Harrison, p. 59

Injuries sutained: Blow to head; pains in head back and chest. On 25/6/92 the Claimant was awarded $70,000.00, a figure now worth $ 641,738.59 (CPI for November 2009).

Barrington Walford v National Water Commission CL 1996/W 073 Khan's Vol. 5 p. 98

Injuries sustained: Dislocation of shoulder; trauma to back with abrasions and pain
On 12/4/99. By Consent the Claimant was awarded $325,000.00 now worth $ 984,266.80 (CPI for Nov 09)

The Claimant's attorneys suggested that a figure of $1, 570,671.59 would be an appropriate award.

Authorities submitted by Defendants

Shaniece Jackson (by next friend Melva Lindsay) and Hope Brown v Glen Gooden Livingston Smith and Roy McGill, Khan's Vol. 5 Page 281.

Injuries sustained: Loss of consciousness; head injury; trauma to right hand and right shoulder; fracture of tip of right clavicle; severe and recurrent headaches. On October 31st 2001, the Claimant was awarded $350,000.00 now worth in November, 2009 $861,814.00

Turkhiemer Moore v Elite Enterprises Ltd and Sherwin Brown Suit No. CL1995/M168, Khan's Vol. 5, p.96

Loss of consciousness; bruises to head and possible concussion; multiple bruises to upper limb; fracture of right clavicle

On February 29th 2000 awarded $275,000.00 now worth in November 2009 $772,139.35

Jotham Treasure v Thomas Bonnick, Tyrone Edwards, Donovan Edwards and Andrew Chambers Suit No. CL2001/T026 Khan's Volume 6, p. 89

Injuries sustained: Brief loss of consciousness; fracture of right clavicle; pain in shoulder for 8 months. On March 28th, 2008 awarded $650,000.00 now worth in November 2009 $786,452.40

Counsel for the defendants suggested that a figure of $800,000.00 would be appropriate for general damages.

The injuries in the more up to date cases submitted on by the Defendants' counsel are in my view not as serious as those suffered by the Claimant herein. On the other hand, as noted above, it is not the correct approach to isolate each item of injury and add them up.

Taking all the authorities into account, I am of the view that a figure of $1,250,000.00 is an appropriate award for general damages for pain and suffering and loss of amenities. I also award interest on the general damages at the rate of 3% from the 18/7/07 to the date of judgment, against the defendants.

In relation to the Ancillary Claim, I also give judgment for the Claimant/Ancillary Defendant, Donald Blake against the Ancillary Claimant.

The Claimant is to have his costs against both defendants, to be taxed if not agreed.

JUSTICE ROY K. ANDERSON
February 4, 2010