



[2015] JMSC Civ 162

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2010HCV02108**

BETWEEN	LASHAN DANIQUE BROWN (A minor who sues by her Sister and next Friend, SHANEEFE NEMBARD)	CLAIMANT
A N D	LESTER PEART	1ST DEFENDANT
A N D	JAMAICA DEFENCE FORCE	2ND DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2010HCV01462

BETWEEN	RONALD AUGUSTUS BROWN	CLAIMANT
A N D	LESTER PEART	1ST DEFENDANT
A N D	JAMAICA DEFENCE FORCE	2ND DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2010HCV01487

BETWEEN	ALPHANSO EDWARDS	CLAIMANT
A N D	LESTER PEART	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2010HCV01398

BETWEEN	CARMETA WEDDERBURN	CLAIMANT
A N D	LESTER PEART	1ST DEFENDANT
A N D	JAMAICA DEFENCE FORCE	2ND DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT

Ms. Oraina Lawrence instructed by Kinghorn, Kinghorn for the Claimants

Ms. Marlene Chisholm instructed by the Director of State Proceedings for the 1st, 2nd and 3rd Defendants

Heard: 11 and 12th May and 31st July, 2015

Negligence – Motor vehicle accident – Motor car pulling into the path of an overtaking vehicle – Incidence of liability – Whether each driver solely or jointly negligent.

Evan Brown, J

Introduction

[1] This claim arose out of a motor vehicle accident which occurred along the Spanish Town Bypass in the early morning of February 15, 2009, in the vicinity of the Jose Marti Technical High School, involving three motor vehicles. Mr. Ronald Brown and the other claimants were travelling in a motor car, being driven by him, towards the roundabout. The 1st defendant was driving a Jamaica Defence Force (JDF) Land Cruiser in the opposite direction as part of a joint police-0 military convoy.

[2] Travelling ahead of the Land Cruiser was a motor vehicle being driven by a civilian. This civilian-driven motor vehicle was not a part of the convoy. As the 1st defendant was in the act of passing the civilian-driven motor vehicle, the Land Cruiser

collided with its rear. That collision caused the Land Cruiser to veer across the road and hit the right side of the motor car in which the claimants were travelling.

Case for the claimants

[3] According to Mr. Ronald Brown, it was about 6 am. The sun was not yet up and his vehicle lights were on. Traffic, which was not heavy, was flowing smoothly. There were vehicles proceeding in the opposite direction. Also travelling in the opposite direction were some military vehicles. He commenced pulling to his left to allow the military vehicles to pass freely. It was then that he noticed a military vehicle starting to overtake the line of traffic.

[4] The military vehicle overtook a white car that was ahead of it, lost control and ran into the right side of his motor car. That caused his motor car to spin around. The military vehicle then hit a Honda-CRV and ended up in a ditch. After seeing the defence filed, Mr. Ronald Brown said he did not remember seeing a collision between the military vehicle and the white car. What he knew was that the JDF vehicle came out into the road and collided with his car.

[5] When he was cross-examined, Mr. Ronald Brown recalled seeing flashing lights approaching him as he drove along the roadway. When he first saw the flashing lights he was about seventy six feet away. Notwithstanding the flashing lights, it was an army vehicle that was at the head of the convoy, followed by a Jamaica Constabulary Force (JCF) radio car. While he could not recall how many vehicles were in the convoy, he insisted the convoy consisted of more than eight vehicles, having regard to its length.

[6] There were no civilian vehicles ahead of the convoy. However, there were civilian vehicles at the end of the convoy. At the very end was a civilian vehicle that was shaped like a Honda-CRV. Mr. Ronald Brown said he did not observe any civilian vehicles pulling to their left to allow the convoy passage. He denied that about four such vehicles pulled to their left on the approach of the convoy.

[7] None of the vehicles in the convoy had passed him before the collision. What Mr. Ronald Brown saw was the convoy, the civilian vehicle, then the army vehicle which collided with his vehicle. He insisted that the army vehicle was overtaking a white car at the time and denied that the army vehicle involved in the accident was fourth in the convoy.

[8] It was suggested to Mr. Ronald Brown that a grey Honda motor car pulled out in front of the army vehicle at the time it was passing. His answer was "No the civilian vehicle did not pull out as there were no other civilian vehicles. He was overtaking this vehicle when he bumped into it." He maintained that the army vehicle that collided with his vehicle also collided with a Honda-CRV.

[9] Mr. Ronald Brown's description of the accident was supported by Miss Carmeta Wedderburn, the passenger in the front of his car. She too said the army vehicle overtook the white car and she added that the army vehicle hit the white car, then went across the road and collided with their vehicle. The white car had been travelling between the army vehicles. She, however, said nothing about a collision between the army vehicle and a Honda-CRV. Miss Wedderburn further said an army vehicle with flashing lights was leading the convoy.

[10] Under cross-examination, Miss Wedderburn said the morning was not extra dark. She was not in conversation with Mr. Ronald Brown at the time. She was looking at the road, although sometimes she would glance elsewhere. She saw no civilian vehicles at the head of the convoy. They were at its end. When the accident occurred the majority of the vehicles in the convoy had passed Mr. Ronald Brown. However, she saw no vehicles behind the army vehicle that was involved in the accident. It was the white car that was at the back of the convoy but in front of the army vehicle that was involved in the accident.

[11] Miss Wedderburn denied the presence of four civilian vehicles which had pulled to their left on the approach of the convoy. She also disagreed that the fourth of the civilian vehicles pulled out into the path of the army vehicle. She disagreed that the

vehicle was a grey car. Neither was it a grey car that was involved in the collision with the army vehicle before hitting the one in which she travelling.

[12] Mr. Alphanso Edwards who sat behind Mr. Ronald Brown did not see how the accident occurred. He, however, spoke to seeing the approach of the convoy and a white car being between the soldier vehicles. He remembered feeling an impact, then he realized that the army vehicle had collided with Mr. Brown's car.

[13] Miss Lashan Brown was seated immediately behind Miss Wedderburn. She was on the phone at the time of the accident. In her witness statement, Miss Lashan Brown said it was about 6 am. There was a flow of traffic which she described as not really heavy. The sun was not yet up and the lights on the car were on. As they proceeded, traffic was approaching from the opposite direction.

[14] Miss Lashan Brown looked up from the phone and saw military vehicles approaching from the opposite direction. A military vehicle began to overtake the line of traffic. At the same time the military vehicle pulled out from the line of traffic, a white car travelling ahead of it also pulled out of the line of traffic. Almost right after that, the military vehicle bounced into the right side of Mr. Ronald Brown's car, then bounced into another car and ended in the bushes on her side of the road.

[15] When Miss Lashan Brown was cross-examined, she could not recall where, the white car was in the line of vehicles. In answer to the court, she said the second vehicle was hit after the collision with Mr. Brown's car. However, she saw no collision between the white car and the military vehicle. She could recall no other detail about the white car. Neither could she remember any details about the other vehicle involved in the accident.

[16] Miss Lashan Brown also said she did not notice the line of military and police vehicles. Another thing she did not see was vehicles pulling to the side to allow passage to the military and police vehicles. The final thing she said was that when the military vehicle began to overtake it was on its correct side of the road. When it pushed out to overtake it was in the middle of the road with a part of it on her side of the road.

Case for the defence

[17] The defence called two witnesses. The first of them was Lance Corporal Lester Peart, the driver of the JDF vehicle involved in the accident. Lance Corporal Peart said his was the fourth vehicle in the convoy of eight, transporting JDF personnel to an operation in Linstead, St. Catherine. The convoy was being led by a JCF vehicle with flashing lights on. As the convoy travelled along the Spanish Town Bypass, it came upon four civilian vehicles travelling ahead of it. All these vehicles pulled to the side as if to allow the convoy free passage.

[18] As he was about to pass the fourth civilian vehicle, a grey Honda Civic, suddenly and without warning, it came onto the road and into his path. That action of the grey Honda Civic caused a collision between both vehicles and caused the JDF unit to veer across the road into the path of the vehicle being driven by Mr. Ronald Brown. After the second collision, the JDF unit skidded, then careened onto its left side spilling its human cargo.

[19] When Lance Corporal Peart was cross-examined, he said they were travelling closely behind each other at a distance of approximately three or four vehicle lengths apart. He estimated a vehicle length to be between six to eight feet. The reason for that spacing was to prevent intervention by civilian vehicles. That is, to avoid civilian vehicles joining the convoy. That, he said, would cause the convoy to split.

[20] While Lance Corporal Peart could not remember the speed at which he was travelling, he estimated it was about 60 kph. His position in the convoy did not change from the time he left Up Park Camp to the time of the accident. He did not see the vehicle being driven by Mr. Ronald Brown before the accident as it was just before daybreak. Although all the vehicles had their headlights on, he could not see the road that clearly.

[21] When he drove past the third civilian vehicle he was in the left lane. The civilian vehicles were on the left side. In saying that the civilian vehicles pulled to their left, he

meant they went onto the shoulder. When he said he was passing them, he did not mean he was overtaking them. He denied that he was driving too fast in the circumstances and that he overtook the civilian vehicle.

[22] The Lance Corporal disagreed that he took no evasive action to avoid the accident. He honked the horn and applied the brakes. However, he never said in his witness statement that he had honked the horn. To the court, he said he was about seven feet away from the Honda Civic when it re-entered the road.

[23] The description of the accident provided by the second defence witness, then Lance Corporal Ewan Price, did not depart from that of Lance Corporal Peart. Lance Corporal Price was a passenger in the vehicle being driven by Lance Corporal Peart. According to Lance Corporal Price, the order in which the convoy travelled was two JCF vehicles followed by four JDF vehicles, then another two JCF vehicles.

[24] Asked in cross-examination how civilians were made aware of the convoy, he said there were flashing lights on one of the police vehicles. He, however, could not remember whether that police vehicle was at the front or at the back of the convoy. In addition, all other vehicles had their hazard lights on, including the one in which he was travelling.

[25] He later used the horn as a means of awareness. According to Lance Corporal Price, all the vehicles in the convoy were tooting their horns, including the one in which he travelled. The horns were being used as they passed the civilian vehicles. He did not think he had said so in his witness statement. He disagreed that the reason for that omission was because Lance Corporal Peart did not blow his horn as they passed the civilian vehicles.

Issue for determination

[26] The primary issue for my determination is who was the cause of the collisions which took place that morning? In other words, were the accidents caused by the

negligence of the 1st defendant or the driver of the Honda Civic motor car, or were they both negligent?

Brief statement of the applicable law

[27] The definition of negligence which has stood the test of time is to be found in ***Blyth v. Birmingham Waterworks Co.*** (1856), 11 Ex. 781;) [843-607] ALL ER 478:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

There is, therefore, a duty on the driver of a motor vehicle to use proper care and skill in the management of his motor vehicle, so as not to cause injury to other users of the road, whom he could reasonably foresee as being likely to be affected by the manner of his driving. The requirement of reasonable foresight makes it plain that the obligation to take care is not owed to all and sundry who may happen to be on the highway.

[28] The duty owed by drivers of motor vehicle owes to other road users is circumscribed by “the neighbour principle” laid in ***Donoghue v. Stevenson*** [1932] A.C. 562. Relying “on the neighbour principle” in ***Donoghue v. Stevenson***, Lord Jamieson in ***Hay or Bourhill v. James Young*** (John Young’s Executor-dative) 1941 S.C. 395, 429 explained the duty as follows:

“No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.”

[29] That statement of principle was approved by the House of Lords. In giving the statement of principle his imprimatur, Lord Macmillan elaborated on ‘proper care’ in ***Hay or Bourhill v Young*** [1943] A.C. 92, 104, “proper care connotes avoidance of excessive speed, keeping a proper look-out, observing traffic rules and signals and so on.” It seems, then, that proper care will be determined by the prevailing circumstances.

[30] The rules which a driver is required to observe in his demonstration that he took proper care in an overtaking scenario are laid down in section 51 (1) of the **Road Traffic Act**. The relevant portions of the section are extracted below:

“51.—(1) The driver of a motor vehicle shall observe the following

rules---a motor vehicle

(a) meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic:

Provided that an animal being led or driven, may be passed or overtaken on whichever side is the safer.

(b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass;

(c) shall not be driven alongside of , or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;

(g) shall not be driven so as to overtake other traffic unless the driver has a clear unobstructed view of the road ahead.”

Findings and analysis

[31] At the very outset, I am compelled to say I did not find any of the claimants to be reliable witnesses. They did not impress me as credible witnesses. Undoubtedly, their observation of the events was affected by their lack of a vantage point. They were in a motor vehicle on the opposite side of the road and travelling in conditions of reduced visibility. Therein, perhaps, lies the source of the confusion in their description of the events. Accordingly, I place only minimal weight on their evidence.

[32] This is what I accept as the chain of events which resulted in the claimants sustaining injuries that morning. There was a joint police-military convoy travelling along the Spanish Town Bypass, from the direction of the Jose Marti Technical High School. This convoy was being piloted by a JCF vehicle which had on flashing lights. The other vehicles in the convoy had their hazard lights on.

[33] The 1st defendant was driving the fourth vehicle in the convoy. There was a space of between three to four cars lengths separating each vehicle in the convoy. Travelling in the same direction as the convoy, were four civilian motor vehicles. At the back of this line of civilian vehicles was a grey Honda Civic motor car.

[34] On the approach of the convoy, the civilian driven vehicles, including the grey Honda Civic motor car, were steered to their left, onto the shoulder, but continued moving. The vehicle in which the claimants were travelling also moved to its left on the convoy's approach. However, the latter vehicle appears not to have left its lane. Therefore, the convoy was travelling in its proper lane as the convoy came within proximity of the claimants' vehicle.

[35] Three of the vehicles in the convoy passed the civilian-driven vehicles as the claimants' vehicle approached on the other side of the road. When the vehicle driven by the 1st defendant reached about seven feet away from the grey Honda Civic motor car, it was driven out into the path of the JDF Land Cruiser. The driver of the JDF vehicle applied the brakes, but the collision between the two was not averted. That collision caused the JDF Land Cruiser to veer across the road, colliding with the claimants' vehicle. There was no collision subsequent to the collision involving the vehicle in which the claimants travelled.

[36] From those findings, it is apparent that the four civilian-driven vehicles on the 1st defendant's side of the road acted in obedience to the rules of the road, on the approach of the convoy. Similarly, while the 1st defendant was overtaking the civilian-driven vehicles, the JDF vehicle was kept to the right or off-side of those vehicles. I note that the 1st defendant was adamant that he was not overtaking, opting to describe his manoeuvre as 'passing'. In my opinion, that is purely semantic as "overtaking" includes "passing" any other vehicle proceeding in the same direction: **Road Traffic Act**, section 51(3) (c).

[37] So, the joint police-military convoy was in fact overtaking the vehicles that had pulled to the shoulder. A duty was imposed on the driver of each of those vehicles to

drive the vehicle in a manner to allow the joint police-military convoy free passage, that is, to pass. Therefore, the driver of the grey Honda Civic motor was in breach of the rules of the road when he drove from the shoulder and onto the roadway before the convoy was safely out of the way.

[38] Even though the 1st defendant was travelling in a convoy, he was still under a duty to act within the rules of the road. I, therefore, must ask, did the 1st defendant have a clear and unobstructed view of the road ahead when he commenced overtaking? It is true that the 1st defendant said he could not see the road clearly on account of the time of day. However, from his description of the incident, it seems visibility was good enough to allow him to observe the civilian-driven vehicles moving to their left and the last one coming into his path.

[39] This is what I understand to be the mischief of the provision; overtaking must not be attempted unless it can be done without endangering life, limb or property. So, before overtaking, a driver is required by the **Road Code** to make sure he has sufficient time to pass and return to his left before meeting any oncoming traffic. The only way to make the assessment that there is a sufficiency of time within which to execute the manoeuvre, is to have a clear view of the road ahead.

[40] That is what obtains in a classic case of overtaking. In the case at bar, however, the accepted evidence is that the 1st defendant did not leave his lane in order to pass the civilian-driven vehicles, since they had been steered to the shoulder of the road. This finding is supported by the evidence of Lashan Brown who put the overtaking military vehicle on its correct side of the road, save for the instant it commenced overtaking. The 1st defendant, therefore, had no need to ensure that he had a clear view of the road ahead before attempting to pass the grey Honda Civic motor car.

[41] It is apparent, on the evidence from both sides, that as the convoy passed the civilian-driven vehicles, they did not pose an obstruction to oncoming traffic. Accepting as I have that the vehicles ahead of the 1st defendant in the convoy had passed Mr. Brown's vehicle before the initial collision, Mr. Brown obviously had an unobstructed path. It is therefore concluded that the 1st defendant was not overtaking in a manner

which caused an obstruction to traffic proceeding in the opposite direction. Indeed, but for the collision with the grey Honda Civic motor car, the 1st defendant would have passed Mr. Brown's vehicle without incident.

[42] Insofar as obedience to the rules of the road is concerned, in relation to overtaking, the 1st defendant cannot be faulted. The next question is, was the 1st defendant driving at an excessive speed? The only evidence of speed came from the 1st defendant himself. None of the claimants sought to say he was driving at an excessive speed. Additionally, there was no evidence of the prescribed speed limit along that roadway. Even if it was a 50kph zone, I do not find an approximate speed of 60kph excessive, in the conditions which obtained. In any event, speed by itself is not evidence of negligence.

[43] Although the 1st defendant was obeying the rules of the road and driving at an acceptable speed, was he keeping a proper lookout? The accepted evidence is that the grey Honda Civic motor car impeded the JDF vehicle suddenly and from a distance of about seven feet. In my view, that gave very little time to take any evasive action. Accepting as I have that the 1st defendant braked in an attempt to avoid the accident, he was obviously keeping a proper lookout.

[44] Consequently, the particulars of negligence which allege that the 1st defendant failed to see the offending motor vehicle in sufficient time, and to apply his brakes promptly, do not resonate with me. Seven feet was a perilously close distance to have come out in front of a moving vehicle. I know nothing of the speed at which that was done. So, to argue that there was sufficient time for the 1st defendant to do more than he did, relying on the distance only, is to invite speculation about the speed of the grey Honda Civic motor car.

[45] In my view, there was no want of care on the part of the 1st defendant that morning. The driver whose conduct was negligent was the one driving the grey Honda Civic motor car. It may be that having initially steered onto the shoulder to allow the convoy passage, the driver was lulled into thinking the convoy had ended because of

the space between the vehicles in the convoy. The reduced visibility may also have contributed to that misapprehension.

[46] However it came about that the driver decided to move back onto the roadway, he clearly did so when it was manifestly unsafe so to do. He could not have been keeping a proper lookout when he decided to return to the roadway at the time he did. Since he wished to return to the roadway, prudence demanded that he exercised proper care in doing so. At the very least, he was required to signal his intention to do so to vehicles approaching from the rear.

[47] By returning to the roadway in the manner that he did, the driver of the grey Honda Civic motor car was unmindful of the other users of the road who ought reasonably to have been within his contemplation. His duty to take care extended to all users of the road in proximity to his motor car when he decided to return to the roadway. That included the 1st defendant and the claimants. In his omission to take care, he exposed the claimants, the 1st defendant and the other road users to the unnecessary risk of injury. I conclude, therefore, that the conduct of the driver of the grey Honda Civic motor car fell below that expected of the reasonable and prudent driver.

[48] Not only was the driver of the grey Honda Civic motor car negligent, his negligence was the sole cause of the collisions which took place that morning. At all material times, the 1st defendant took proper care in driving the JDF Land Cruiser. In this vein, I am constrained to disagree with learned counsel for the claimants that the 1st defendant was the sole cause of the accident. On any rational analysis of what took place that morning, the most that could be urged is joint negligence on the part of the 1st defendant, which I do not accept.

[49] The theory which learned counsel for the claimants advanced as to how the accident occurred is unsupported by the evidence. In her submissions, learned counsel said the 1st defendant was travelling some distance behind the convoy when, in an effort to catch up with them, he overtook a line of cars and collided with the motor vehicle being driven by Mr. Brown. The case for the claimants was that the accident occurred

when the 1st defendant pulled out to overtake, not that he was overtaking a line of cars. Secondly, that summary makes no mention of the vehicle which, on her case also, drove out into the path of the 1st defendant's vehicle. Thirdly, none of the claimants could speak to the other vehicles in the convoy having left the 1st defendant behind. So, what counsel was left with were negative answers to the questions posed.

[50] In similar fashion, it was submitted that all the particulars of negligence averred in respect of the 1st defendant have been made out. Number five of the particulars of negligence charged that the 1st defendant drove into the path of motor vehicle registered 8586 EX (presumably the grey Honda Civic, or the white car according to the claimants). To so assert clearly does not take into account the evidence of Lashan Brown. She said the vehicle pulled out into the path of the army vehicle as it began to overtake. In sum, I do not find any of the particulars of negligence proved.

[51] Accordingly, I give judgment for the 1st, 2nd and 3rd defendants. Costs are awarded to the 1st, 2nd and 3rd defendants, to be taxed or agreed.