

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV 03409

BETWEEN	SHANTAE PALMER (a minor, suing by Roxanne Marsh her mother and Next Friend)	CLAIMANT
AND	STEVEN TAYLOR	1 ST DEFENDANT
AND	THE ATTORNEY GENERAL	2 ND DEFENDANT

Mr. A. Williams for the Claimant instructed by Usim, Williams & Company.

Miss T. Dickens instructed by the D.S.P. for the Defendants.

**Negligence - Road Traffic Accident – Child Crossing the Road - Duty of Motorist
Overtaking a Parked Vehicle.**

Heard: 7th and 8th December 2010 and 5th May 2011

Brown G, J.

1. The claimant on the 19th day of November 2007 was walking along Brunswick Avenue in the parish of St. Catherine on her way home from school when she attempted to cross the road in front of a stationary truck and collided with the defendants' motor car. At the time she was six (6) years old; she is now nine (9) years old. She sustained injuries and was hospitalized first at the Spanish Town Hospital and subsequently the Bustamente Children's Hospital. She alleged negligence on the part of the 1st defendant who was the driver of the vehicle.

2. The Particulars of Negligence as set out in the Particulars of Claim reads:

The 1st defendant was negligent in that he:

(a) Failed to have sufficient regard for pedestrians crossing or attempting to cross the roadway.

(b) Overtook or attempting to overtake a truck which had come to a full stop along the roadway in order to allow the claimant to cross, without regard for the obvious danger of colliding with a pedestrian then attempting to cross the roadway in front of the truck

(c) Failed to keep a proper look out for pedestrians along the said roadway.

(d) Failed to heed the signal given by the truck driver not to overtake the said truck.

(e) Failed to have special regard for minors using the said roadway.

(f) Failure to stop, slow down, swerve so to manage and/or control the said police vehicle so as to avoid a collision.

3. The defendants denied the allegation of negligence and blamed the claimant.

The Particulars of Negligence of the Claimant reads:

The claimant was negligent in that she:

(a) Suddenly ran into the road from in front of a large parked truck;

(b) Failed to ensure that the roadway was clear and safe for her to enter the road and;

(c) Endangered her life and those of other users of the road.

4. The claimant was a student at Crescent Primary School and was on her way home from school. She was walking alone on the right hand side of the road in a Southerly direction. She said a group of students were ahead of her. She stopped at a stall to buy sweets. She lived with her parents in Lakemore Gardens which is situated on the other side of the road. She decided to cross the road and a truck travelling in a northerly direction stopped in front of her. She then observed the truck driver beckoned to her with his hand to cross the road. She walked to the middle of the road and looked up and down when an unmarked police car overtook the stationary vehicles and collided with her. As a result she fell to the ground unconscious and injured.

5. The claimant called two eye witnesses to corroborate her account, Clifton Palmer and Kevin Anderson. Miss Roxanne Marsh her mother, who was not present at the time of the accident, was also called as a witness to show that the 1st defendant had admitted his negligence. Mr. Clifton Palmer in his witness statement indicated that at about 3:00 pm he was standing at a stall on the left hand side of the Brunswick Avenue, going towards Angels, Spanish Town in the parish of Saint Catherine. He saw when a truck came to a stop along the roadway and a line of traffic came to a halt behind the truck. He saw the claimant standing in front of the truck to the left. He said he saw her hold out her hand fanning down the truck. The truck stopped, and she started to cross. He then saw a car travelling at very fast speed overtake the truck and about five or six cars causing the left hand side mirror to hit her. The car did not stop immediately because of the speed. The driver then travelled about half mile before he turned and returned to scene of the accident.

6. Mr. Kevin Anderson was the other eye witness. He said in his witness statement that he was standing by a fence right beside a truck that had stopped to allow the claimant to cross the road. He noticed a car overtaking a line of cars behind the truck and collided with her just as she passed in front of the truck. He described this vehicle as a Toyota Corolla which had Government plates, so he came to the conclusion that it was a police vehicle.

7. Miss Roxanne Marsh said that "she went to the Spanish Town Hospital where she met the 1st defendant who told her that he tried to swing from the child but his vehicle was soft". She then asked him why he overtook the line of traffic. He responded by saying that he had authority to overtake when he was in a line of traffic, because someone could come up and shoot him.

8. The 1st defendant denied the allegations on the claimant's case. He said that he was driving an unmarked Toyota Corolla service vehicle at about 35km/h behind a large truck. It then suddenly pulled over to the left side of the road without indicating that it would stop and came to a complete stop and then parked. He overtook the truck and as he approached the front he noticed the claimant who darted into his path. He swerved to avoid hitting her but she collided with the side mirror. He stopped and assisted by taking her to the hospital. He also denied making the statements to Miss Marsh.

9. There was no dispute that at the time of the collision the claimant was attempting to cross the main road when she collided with the defendants' motor car. The issues to be determined are whether the 1st defendant

- (a) improperly overtook the stationary truck
- (b) failed to keep a proper look out
- (c) failed to heed the truck driver's signal.

10. It is settled law that a motorist owes a duty of care to other road users and is not automatically liable in negligence because he collided with a child. In Allen and Suddeal v Watt (1990) 27 J.L.R. 134 at p.141 Rowe P. said:

"This case is illustrative of the fact that a motorist is not an insurer for infant plaintiffs and is therefore, required to pay compensatory damages whenever an infant is injured in a motor vehicle accident on the road. The age of the infant did not matter in the case cited above but rather what was material was whether the driver had been negligent in the performance of his duty of care towards that child. The Court of Appeal held that he had behaved in a reasonable manner, he had not failed to keep a proper look-out in the circumstances and consequently he was not guilty of negligence."

11. The burden of proof was on the claimant to establish on a balance of probability that the defendant was negligent. In Sirjue v A.G. and another (1986) unreported SCJ the plaintiff, a young child, attempted to cross Eastwood Park Road. She ran from in front of a bus into the path of a police vehicle. The defendants were not liable. Bingham J said:

"In my opinion there is no special duty of care owed to an infant plaintiff of whose presence was up to the time of the collision totally unaware and therefore placed in a position where he could have had her in his contemplation at the material time, that is prior and up to the time that the collision took place. Such a special duty of care would only arise if on the facts, the opportunity of seeing the plaintiff before she set out on her journey across the road. This fact would then have afforded him sufficient time and opportunity to pay due regards to the plaintiff's presence and her situation to have taken such reasonable steps to guard against any abnormal behaviour such as that to which children of that age are accustomed such as dashing suddenly across roads without first looking out for oncoming traffic or playing on or near highway as the decided cases have made reference to."

12. In the present case written submissions were filed by the parties. Counsel for the claimant submitted that despite the inconsistencies and discrepancies in the testimony of the witnesses called on behalf of the claimant the account of the accident given by those witnesses is to be preferred to the account given by the 1st defendant. Counsel for the defendants on the other hand submitted that the evidence of the 1st defendant is to be preferred to those of Kevin Anderson and Clifton Palmer who have demonstrated themselves not to be credible witnesses.

13. The gist of the claimant's case was that she wanted to cross the road and she waved her hand to an approaching truck. The driver stopped to allow her to cross the road and indicated to the traffic behind him not to overtake him. He then indicated to the claimant to cross the road. She did not dash but walked slowly to the centre and was looking toward the oncoming traffic

behind the truck when the 1st defendant overtook the line of traffic and was too close to truck causing the side mirror to strike her in the face.

14. The claimant who is now nine (9) years old told the court that she remembers the accident very well. She was able to repeat her story without any difficulty notwithstanding the unfortunate trauma she had suffered three years ago. Her memory appeared to be excellent for a young child as she was able to give a clear and vivid account of the accident. The Court was therefore not surprised when she admitted that her evidence was based on what she had been told. It was clear from the manner in which she gave her evidence that she had been coached. I find that she did not know what had happened to her that afternoon. Thus, her evidence was compromised, useless and not to be relied on. She was clearly discredited.

15. The claimant was also relying on the testimonies of the two eye witnesses to establish the defendant's negligence as they saw her crossing the road and the defendant overtaking five or six vehicles before colliding with her. Clifton Palmer knew the claimant and her mother prior to the accident. He was at a stall by the road side speaking to the vendor. He did not see the claimant stop by the stall to buy sweets. He first saw her when she stopped to cross the road. He was able to see the claimant waving her hand and the truck came to a halt about three feet from the stall. At the same time he observed the number of cars including the defendants' travelling behind the truck and their make. He also saw the 1st defendant driving very fast and overtaking the line of stationary traffic and as the claimant reached the middle of the road the side mirror of the police car struck her in the face. He never said he saw her looking to see if it was safe to cross. She fell forward about 10 feet on the road surface. The car then travelled about half of a mile before turning around and stopped to assist the claimant.

16. It was in his cross examination that the witness mentioned for the first time that the claimant was walking and not running as suggested by Counsel for the defendant. He also mentioned for the first time that she was looking to her right when the collision took place. The truck was described as a big goods truck. It had stopped about 3 feet from him with its right front wheel over the white line. He did not disclose the distance the truck was from the claimant when she waved her hand. He did not remember the colour of the car and could only say that it had on the yellow government plate. He denied that she fell 10 feet forward contradicting his witness statement. When he made that statement he meant that the car turned around 10 feet after hitting her and not half a mile down the road.

17. Kevin Anderson was the other eye witness called to support the claimant's case. He knew the claimant and her mother prior to the accident. He said that he saw the entire accident. He said in his witness statement that the truck stopped to allow her to cross the road. He saw a long line of vehicles behind the truck. He then noticed a car overtaking the line of traffic, about five or six cars, and collided with Shantae just as she passed in front of the truck, in her attempt to cross the road. He came to the conclusion that the car was a police vehicle as it had on government plates. However in cross examination he said when he saw her first she was at the white line going across. She was in the middle of the road and the car was 23 feet away. He said he saw her stepped out and looked. All her body had not passed the truck. He saw the claimant first and then the car. Interestingly, he did not see the truck stop to allow her to cross the road or the claimant as she stood on the pavement waiting to cross the road but knew that it had stopped to allow her to cross the road. He also saw the driver put on his four way flasher. The witness was now able to describe the defendants' car as a marked police vehicle with a number and blue line for

the first time, thereby contradicting his previous statement that the vehicle was an unmarked police car. This has certainly affected his credibility as an eye witness.

18. The 1st defendant denied that he overtook a line of stationary vehicles, thereby colliding with the claimant as she stood in the middle of the road looking to see if it was safe for her to cross. He maintained that he was driving an unmarked police car at about 35 km/h. He observed a large truck that was travelling directly in front of him pulled over to the left side of the road and stopped. He proceeded to overtake this truck when the claimant suddenly ran from in front of the parked truck into the path of the service vehicle. He swerved to avoid hitting her but she collided with the left side mirror. He stopped and took her to the hospital. He later spoke to her mother. He visited the claimant in the various hospitals from time to time. Her mother, he said, consistently demanded money from him each time she visited the hospital and he would give her \$1000.00 towards her transportation. She later sought to obtain compensation from him.
19. Counsel for the defendants maintained that the claimant had failed to establish negligence on the part of the 1st defendant. It was also her contention that the claimant and her witnesses were seriously discredited and their evidence cannot be relied on. On the other hand, she contended that the 1st defendant's account was more plausible, realistic and truthful and clearly supported the defendants' case that they were not in breach of any duty and were therefore not negligent.
20. Counsel for the claimant submitted that the account given by the 1st defendant was incapable of belief and ought not to be accepted. He further submitted that it is more than probable that Sgt. Taylor was driving pretty close to the right hand side of the truck and the act of negligence was driving too close to enable a pedestrian to ascertain whether or

not it was safe to cross the road. He was of the opinion that the court should reject the 1st defendant's evidence that

- (a) he was about three feet from the truck when he was passing it.
- (b) He was parallel to the truck when she ran out into his path.
- (c) He swerved to his right to avoid hitting her.

He argued that despite the inconsistencies and discrepancies in the testimonies of the witnesses called on behalf of the claimant, the account of the accident given by those witnesses is to be preferred to the account given by the 1st defendant.

21. It was clear from the evidence that the truck would have obstructed Sgt. Taylor's view and the claimant would not have been visible to him until she emerged from the front of the truck. He had not seen Shantae before the collision or knew of her presence and therefore could not have anticipated her action in attempting to cross the road. He would not be in breach of any duty of care to take reasonable precautions to protect the child against acts expected of children of that age.

22. The defendant had a duty to keep a proper lookout and to take such actions to avoid the collision. The truck driver would have known of her presence in the road if it was true that he had stopped and indicated to her to cross. Sgt. Taylor would be negligent if he had ignored or failed to observe the truck driver's signal not to overtake the truck. This was also the claimant's case that it was the 1st defendant's failure to heed the signal given by the truck driver not to overtake the truck. This signal was never disclosed in any of the witness statements. It was in cross examination that Kevin Anderson alleged that the truck had put on its four way flasher. There was no evidence that the truck driver had

indicated to the vehicles behind by extending his hand in the prescribed manner not to overtake. In any event it appeared that counsel for the claimant had abandoned this item. I am of the opinion that this evidence was a late invention by the witness.

23. The claimant's two eye witnesses, in their testimonies, asserted that at the time of the collision the 1st defendant was driving very fast and overtook six or seven stationary motor cars. He denied the allegations and stated that he was driving at about 35 km/h and within the designated speed limit for the area. The claimants did not allege excessive speed in the particulars of negligence and the witnesses were not able to give an estimation of the speed. There was no credible evidence to support the claimant's assertion that the defendant was speeding.
24. The witness credibility is critical in order to determine whether (a) the 1st defendant drove too close to the truck thereby causing the side mirror to hit the claimant in the face as she was peering to her right to see that it was safe to proceed any further or (b) that the claimant ran into his path. The claimant's evidence I have already determined was discredited. Mr. Williams in his written submissions averted to the inconsistencies and discrepancies in the testimonies of her witnesses which in my opinion are material and adversely affects the claimant's case. I was not impressed with them and came to the conclusion that neither of them actually saw the accident and are merely witnesses of convenience.
25. On the other hand, I find the 1st defendant to be an honest witness who spoke the truth when he stated that Shantae Palmer ran from in front of the truck thereby causing the side mirror to hit her in the face as he swerved to avoid the collision. I accepts his evidence in

its entirety and rejects the claimant's case that the truck driver had stopped to allow her to cross the road and that she was standing in front of the truck looking to see if it was safe to cross the road when the mirror hit her in the face. I therefore conclude that the claimant is solely to be blamed for the accident.

There will therefore be Judgment for the defendants with costs to be agreed or taxed.