IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 03655

BETWEEN	**RICHARD WILLIAMS**	**CLAIMANT/1ST ANCILLARY DEFENDANT**
AND	**NUBIAN CONSTRUCTION LTD.**	**DEFENDANT/ANCILLARY CLAIMANT**
AND	**O'NEIL JASON GREY**	**SECOND ANCILLARY DEFENDANT**

Sean Kinghorn instructed by
Messrs. Kinghorn & Kinghorn for the Claimant.

Kwame Gordon instructed by
Samuda & Johnson for the Defendant/Ancillary Claimant

Danielle Archer instructed by Danielle S. Archer & Associates for Second Ancillary Defendant.

Negligence – Motor Vehicle Collision – Whether Defendant entered major road from minor road – physical evidence – Whether appropriate to plead absence of Insurance in a claim for negligence.

Heard: 3rd & 4th December, 2012 & 18th January 2013

CORAM: JUSTICE DAVID BATTS

[1] This claim is brought in negligence and arises out of a motor vehicle collision which occurred along the Nelson Mandela Highway in the Central Village area of St. Catherine on the 14th December, 2008.

[2] The Claimant Richard Williams was the driver of a Toyota Starlet motor vehicle. The Defendant Nubian Construction Ltd. owned a van which at the material time

was under the control of their employee Mr. Glen Cole. The Defendant counterclaimed against the Claimant alleging that, he was at fault in the accident. The Defendant also joined O'Neil Jason Grey as an Ancillary Defendant claiming an indemnity on the basis that he had allowed the vehicle the Claimant was driving to be on the road without insurance. O'Neil Grey owned the vehicle which the Claimant was driving. O'Neil Grey, as the evidence revealed, was also a participant in the events as he was the owner and driver of a Honda Civic motor car which was damaged in the accident.

[3] The Claimant's witness statement which stood as his evidence in chief was to the effect that on the 14th December, 2008 sometime after 10:00 p.m. he was driving a motor vehicle owned by O'Neil Jason Grey along the Nelson Mandela Highway. O'Neil Jason Grey was driving another vehicle ahead and in the lane to the Claimant's right. The Claimant says he had a passenger with him in his vehicle. He stated he was going between 50 kph and 65 kph at the time. Visibility was good.

[4] The Claimant stated that as he approached Big Lane (which was a road to his left) he saw "a van come out from Big Lane go straight across my left lane and into the right lane." He said he was a car length to two car lengths behind O'Neil's vehicle before the van came from Big Lane. He saw the brake lights on O'Neil's vehicle light up and heard O'Neil blow his horn. He continued driving and then

> "Suddenly the van moved from over the right lane into my left lane. The movement of the van from the right lane into my lane was almost immediately after O'Neil blew his horn. I was so frightened that I ended up colliding into the rear of the van because of how suddenly the van man came over into my lane."

His witness statement is dated 22nd August 2012 and also details his injury treatment and losses.

[5] The Claimant was exhaustively cross examined. The result was that he admitted going 50 to 60 miles per hour and that he was unaware of the speed limit in that area. He gave estimates of various distances and relative positions. Essentially his evidence remained consistent as to how the accident occurred. He admits he flew through the windscreen and was wearing no seatbelt at the time. He was coming from the same place as O'Neil Jason Grey, a car show in Kingston. In answer to a question from the court he stated that at the time of the accident he was 22 years old.

[6] Save for the agreed exhibits that was the case for the Claimant. The agreed exhibits tendered and admitted were

Exhibit 1	Medical report South East Regional Health Authority 25th March, 2009
Exhibit 2	Medical Report Dr. Bullock 31st March 2009
Exhibit 3	a). receipt 29/4/09
	b). Precept 31/10/12
Exhibit 4	Receipt for Loss Adjusters Report 6th March, 2009 - $9,320.00
Exhibit 5	Loss Adjusters Report 2nd March 2009
Exhibit 6	Motor Accident Report for from JIIC Ltd. 7th January, 2009
Exhibit 7	Certificate of Insurance by ICWI re: O'Neil Gray

[7] The Defendant's witness was Mr. Glen Cole. He stated that he now lived abroad and was no longer employed to the Defendant. In December 2008 he was employed to Nubian Construction Ltd. (which I will hereafter refer to as the Defendant) as a driver. On the 14th December, 2008 he was using the Defendants pick up. While waiting for a friend 'beside' the Central Village main road, he was sitting in the vehicle which was in neutral while there,

> "I felt an impact to my stationery vehicle and realized that a vehicle seemed to have lost control and collided into my vehicle causing it to move forward."

He said his park lights had been on while the vehicle was parked as he waited for his friend.

[8] Mr. Glen Cole was cross examined by both counsel for the Claimant as well as Counsel for O'Neil Jason Grey. His account in cross examination remained consistent as he insisted that he had not driven out from a side road onto the highway. Indeed he volunteered that the Claimant had also made that allegation after the accident and he had got angry as he vehemently denied it then. He stated that after the collision his vehicle was pushed out into the highway and across it ending up in the median. He said the impact may have rendered him temporarily unconscious as he woke to see himself in the van going across the road and only then was he able to apply his brakes. He stated, that the vehicle that hit his van ended up off the main road to the left in some place built for flowers. This fact was later also deponed to by O'Neil Jason Grey. He said he saw another car after the accident and someone bending down beside its left rear wheel suggesting something was wrong with it. The witness however had not seen or heard a collision with any other vehicle. He was shown the motor accident report form which had been completed for his employer's insurers. [Exhibit 6] and certain suggestions were made. The witness explained the penciled as well as the handwriting in pen. The Defendant called no other witness.

[9] Mr. O'Neil Jason Grey the 2nd Ancillary Defendant who I will hereinafter refer to as the Ancillary Defendant then gave evidence. His witness statement was also allowed to stand as his evidence in chief. He stated that he was 32 years of age on the 3rd October, 2012 and he was a chef. On the 14th December 2008 he was driving a motor vehicle registration number 5855 FG along the Mandela Highway

heading towards Spanish Town. His friend the Claimant was driving a Toyota Starlet. That vehicle was owned by the Ancillary Defendant who further stated that on reaching the vicinity of Big Lane he was in the right lane and the Toyota starlet was in the left lane but behind him. He saw the van driven by the Claimant (which he describes as a truck) enter the main road from the lane called Big Lane. The truck did not stop before entering the main road but came straight across the left lane and over to his lane straight into his path. He applied his brake and "forcefully" sounded his horn for the vehicle to come out of his path. The truck then swung from the right lane into the left lane.

> "When he did this the Toyota Starlet was in the process of passing me and collided into the left side of the truck as it swung into the left lane. The Starlet then lost control and then collided into the side of the vehicle I was driving and then overturned."

[10] The Ancillary Defendant was also cross examined as to the relative positions of the two motor vehicles at the time of the collision. In this regard his position shifted slightly. He admitted that when the van swerved out of his lane after he blew his horn, his vehicle continued forward. The Starlet was therefore behind him. This bit of evidence is sufficiently important to repeat:

> "Q. Where was the van in relation to your car when the Starlet hit it.
>
> A. I could not really say but it was a little behind.
>
> Q. You did not see when Starlet hit the van.
>
> A. I see when the collision occurred but and I know say it hit the van.
>
> Q. Where did collision occur in relation to your vehicle
>
> A. To left
>
> Q. Where was the Starlet when it collided with van in relation to your vehicle.
>
> A. To the left of my vehicle.

Q. Had the Starlet passed your vehicle

A. No

Q. Was the Starlet in line with your vehicle

A. A little behind

Q. At point of collision

A. yes

Q. Had you passed the van when collision occurred

A. Yes sir"

[11] This effective bit of cross examination demonstrated that the Ancillary Defendant's evidence in chief as to the impact between the van and the starlet could not have been based on anything he had seen. Indeed, his statement that the Starlet hit the "side" of the van was not consistent with the assessor's report of damage to the van or the photographs attached to Exhibit 5. The Ancillary Defendant also stated in his cross examination that his speed at the time was about 65 – 70 m.p.h. He stated that his Toyota Starlet which was being driven by the Claimant was a Turbo. He said he did not know whether a Turbo Starlet was faster than the ordinary Starlet as he was not a mechanic. He had passengers in his car at the time of the accident one was his sister the other was a friend. The Ancillary Defendant called no other witness.

[12] In his closing submissions the Claimants counsel suggested that the evidence as to speed and position suggested that the Defendant and the Ancillary Defendant were racing. The fact that the Defendant "flew" through the windscreen is consistent with his colliding with a stationery object. He therefore urged the court to accept the Defendant's account of how the accident occurred. He abandoned his Ancillary claim against the Ancillary Defendant based as it was on the failure to insure the vehicle the Claimant was driving. On the question of damages for Pain, suffering and loss of amenities he submitted that 1 to 1.2 million dollars was appropriate. No award he said, should be made for lost earnings or

transportation costs, as these claims were unsupported by documentary evidence.

[13] Mr. Sean Kinghorn for the Claimant handed up speaking notes. He suggested that the Defendant in his defence had not stated he was on the soft shoulder and therefore his evidence to that effect was inconsistent with the pleading. He urged the court to accept the evidence that the Defendant's van moved across the two lanes of traffic as the physical damage and the final position of the vehicles [Defendant's vehicle in centre island and Claimants vehicle off the road to the left] was consistent with the Claimant's account. The party changing direction had a duty to ensure that the way was clear. Further the Defendant had made no alternative plea and had not pleaded that the Claimant was contributorily negligent. He urged the court to have regard to the report from the hospital that Claimant stated he "hit side of van" and that the Defendant's witness admitted that the Ancillary Defendant was on the scene and had asserted from that moment that he (the Defendant) had exited a side road. He submitted that damages for the Claimants pain suffering and loss of amenities ought to be $2 million and he relied the authorities of **Paulette Robinson Keize v. Carlos Morant HCV 4205/2010 and Clarke v Lewis CL C234/2001**.

[14] Counsel, for the Ancillary Defendant was content to submit for her client's costs of being joined, the Ancillary claim having been abandoned. She urged the court to summarily assess costs.

[15] In this matter I agree with Mr. Kinghorn's formulation of the central issue being,

> "on a balance of probabilities which version [of the events of that night] is the more probable of the two."

It is indeed a pure question of fact but in deciding that the court has to have regard to all the evidence.

[16] In this regard I observed carefully the demeanour of the witnesses. I formed the impression that Mr. Glen Cole was a witness of truth and was more forthright in giving evidence then either the Claimant or the Ancillary Defendant. The Claimant had a particularly glaring discrepancy as it related to his speed at the time of the accident, as between his witness statement and his evidence while being cross examined. The Ancillary Defendant it turns out did not see the collision between the Claimant and the Defendant.

[17] Mr. Glen Cole (the witness for the Defendant) volunteered that on the night in question the Ancillary Defendant alleged that he had driven from a side road and that he had denied it at the time. This candid disclosure emanated whilst counsel was suggesting that he had driven from a side road and the witness, indicated that it was not true today nor was it true when the Ancillary Defendant first stated it.

[18] In addition to the viva voce evidence I considered the physical evidence. The damage to the left rear of the Defendants' van is consistent with a vehicle hitting it while moving to the left. I find it significant that there was no damage to the "side" of the pickup contrary to the allegation in the Ancillary Defendant's witness statement and the Claimant's reported statement at the hospital [see Exhibit 1]. I also accept that a collision with a stationary object could propel a driver not wearing seatbelts, forward. The movement of the Defendant's van from its stationary position might have occurred if it were struck by a vehicle travelling at 65 miles per hour.

[19] This to my mind is a more probable scenario than that of the Claimant's. He would have the court accept that whilst he was travelling at that speed, on a road which all witnesses agreed was straight and wide, the Defendant exited the minor road. The question is why was the damage to the left rear of the Defendant's van? Why did the Defendant end up in the median to the right?

Had he swerved into the Claimant's lane just as the Claimant was about to pass the Ancillary Defendant the damage would be more likely to have occurred to the side of the Defendant's van. If he were safely in the left lane prior to the collision then damage would be to the centre rear of the van. Left rear damage would in such circumstances only occur if having entered the left lane the Claimant swerved further to his left. This would indicate that

(a) The Defendant's driver had fully entered the left hand lane

(b) The Claimant's speed and/or failure to slow down would have been the effective cause of the accident, since he was at all material times behind and to the left of the Ancillary Defendant's motor vehicle.

[20] The question arises also with respect to the physical evidence available, how on the Claimant's account, did the Ancillary Defendant's vehicle get damaged and why did the Defendant's vehicle enter the centre island. The Claimant explains the damage to the Ancillary Defendant's vehicle by asserting that after he collided with the Defendant's van he lost control collided with the Ancillary Defendants vehicle and then left the road to the left. The difficulty with this scenario is that at the time of his collision with the van the Ancillary Defendant had passed the van. Further the damage is to the left rear of the van and one can see from the photograph (Exhibit 5) that the blow tapers left. Contrary to the submission of counsel for the Claimant I find that this bit of physical evidence favours the probability that the accident occurred in the manner stated by Mr. Glen Cole. If the Defendant's van was hit in the left rear while in the process of switching from right to left lane one might have expected it would either straighten its trajectory or continue even further left. The probability that it would go back to the right and enter the median is to my mind less probable on this account than on the account given by the Defendant's driver.

[21] It is a matter of some regret that in a matter such as this no party sought to provide any expert opinion as to conclusions which might be drawn from the

physical damage. There is not even objective evidence with respect to the damage to all the motor vehicles. Similarly there were passengers in the two cars and yet none were called to assist in the search for truth.

[22] Be that as it may I find that the Defendant's witness was a witness of truth and he impressed me as such. I accept that on the night in question he had stopped his vehicle off the road on the verge and had put the vehicle in neutral. Thereafter the vehicle driven by the Claimant collided in the left rear of his stationary vehicle propelling it across the road diagonally to the right and that he was able to steer it onto the median. I accept that he is unable to account for the damage to the vehicle driven by the Ancillary Defendant as that may well have occurred prior to the collision involving his vehicle. Indeed it is not beyond the range of possibilities that the vehicle driven by the Claimant may have collided with the vehicle driven by the Ancillary Defendant whilst they were racing along at 65 – 75 miles per hour that night. That contact between those vehicles may well have caused the Claimant's vehicle to leave the road and collide with the Defendant's van. The Defendant's witness however saw none of that as his first indication that anything was amiss was the blow to the left rear of his vehicle by the Toyota starlet driven by the Claimant.

[23] It follows therefore that I am constrained to give judgment for the Defendant against the Claimant. Exhibits 4 and 5 are in support of the Defendants counterclaim against the Claimant. I therefore award $750,000.00 damages on a total loss basis and $10,000.00 for the cost of the assessor's fee.

[24] With respect to the Ancillary claim, the Defendant wisely if very late in the day indicated that that claim could not be maintained. I say wisely because the sole basis of the claim to an indemnity was that the Claimant was alleged to be an unauthorized driver for insurance purposes, of the Toyota Starlet. It was said

therefore that the Ancillary Defendant prevented the Defendant from recovering against the Claimant. With respect to counsel who settled that pleading the court fails to see how, whether or not a vehicle is insured or a driver authorized to drive, can impact the cause of an accident. The absence of insurance and its impact could only possibly arise if there has been a determination of liability and the liable person is unable from his own resources to pay the claim. Then one would need to establish a duty owed and a breach of that duty. In this case the duty would flow if, the person claiming the indemnity fell within the persons intended to be protected by the Motor Vehicle Insurance (Third Party Risks) Act. The claim would I suppose be one of breach of statutory duty. There seems to be no basis for an Ancillary claim of this nature where there has been no evidence to support impecuniosity, and where liability had not been determined.

[25] Finally on this point, the court deprecates the introduction in a claim of this nature of allegations and evidence with respect to whether or not parties have insurance. It is best if the court were not made aware one way or the other because such information has much prejudicial and little probative value. The deep pocket of an insurance company, or its absence, may induce sympathy one way or the other. It is best that such issues be resolved separately from the issue of liability for the accident.

[26] Finally and so as to save the costs and time of a retrial if this judgment were reversed on appeal, I will follow the practice of assessing damages for the Claimant. In this regard having reviewed the authorities cited and the injuries suffered by the Claimant, I would if needed have assessed damages as follows:

1.	Pain Suffering and Loss of Amenities	$1.5 million
2.	Loss of Earnings for one month as a part time Delivery man	$8,000.00
3.	Cost of medical report	$10,000.00

[27] In the event there will be judgment for the Defendant against the Claimant on the claim as the claim is dismissed with damages assessed at $760,000.00 against the Claimant on the counterclaim. Interest will run at 3% from the date of service of the defence and counterclaim to today's date. Costs will be awarded in favour of the Defendant against the Claimant.

[28] With regard to the ancillary claim costs are awarded to the Ancillary Defendant against the Defendant. Such costs to be taxed if not agreed.

…….
David Batts
Puisne Judge