[2017] JMSC Civ. 74

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV06463

BETWEEN	**NORMAN MCBEAN**	**CLAIMANT**
AND	**RAINFORD WADE**	**1ST DEFENDANT**
AND	**RUPERT CAMPBELL**	**2ND DEFENDANT**

OPEN COURT

Mr Lemar Neale instructed by Bignall Law, attorneys-at-law for the Claimant

Mr David Johnson instructed by Samuda & Johnson, attorneys-at-law for the 1st Defendant

Heard: March 16 and May 16, 2017

Negligence – motor vehicle accident – liability – driver of 1st defendant's vehicle not served - vicarious liability – Damages - Assessment

LINDO J:

[1] This is a claim for damages arising from a motor vehicle accident which took place on April 26, 2011 along the Chalky Hill main road in the parish of Saint Ann. The claimant was driver of Toyota corolla motor car registered 2234EG,

the 1st defendant was the owner and the 2nd defendant the driver of Mitsubishi Lancer motor car registered 3165EJ.

[2] In his amended claim form filed on September 30, 2015, the claimant claims to recover damages for personal injuries as a result of the accident in which he claims that the 2nd defendant as servant and/or agent of the 1st defendant so negligently drove, managed or controlled the motor car owned by the 1st defendant that it collided into the rear of the car driven him, causing him to suffer injury, loss and damage and to incur expense. In his "Further Amended Particulars of Claim" the claimant notes that he is relying on the doctrine of *Res ipsa Loquitur.* He also claims that there is a risk that he will lose his employment and may then be at a disadvantage in getting another or an "equally paid" job.

[3] The 1st defendant in his Amended defence filed on October 15, 2015 admits that the collision occurred, avers that at no material time was the 2nd defendant his servant and or agent but states that the 2nd defendant was "merely an authorised driver of the 1st defendant's said motor vehicle...and was operating the said vehicle for his personal use". He denies that the collision was caused by the negligence of the 2nd defendant and states that the collision was caused and/or contributed to by the claimant's negligence.

[4] He indicates in his defence that the collision took place in the following manner:

a. *"the 2nd defendant who was proceeding from St Ann to Kingston on the Stewart Town Main Road came to a stop at its junction with the Chalky Hill Main Road.*

a. The claimant who was driving motor vehicle registered 2234EG entered Chalky Hill Road from the Stewart Town Road and stopped in the junction to permit a green Toyota Station wagon to make a U turn on the Chalky Hill road in the vicinity of the junction.

b While the driver of the green Toyota station wagon was in the process of making the manouver,(sic) a motor truck proceeding from the Chalky Hill road came upon the Station wagon prevented it from making its U-turn.

c. The Claimant in an effort to clear the truck driver's lane reversed the said motor vehicle without due care and attention and collided with the front of defendant's said motor vehicle which was then stationary on the Stewart Town road at the said junction."

[5] At the trial, the claimant's witness statement filed on January 23, 2017 was accepted as his evidence-in-chief. He states that on April 26, 2011 at about 5:30pm he was driving his car from his work place at Dunns River to his home in Chalky Hill and came to a stop at the intersection, known as a "T" junction, where there is a stop sign. He states further that a vehicle was ahead of him and whilst at the stop sign, a Mitsubishi Lancer motor car numbered and lettered 3165EG collided into the back of his car and pushed it into the back of the car that was in front of him. He adds that on impact, he was thrust forward and backwards and he came out of his vehicle, discussed with the other drivers how the accident occurred and they all went to the Saint Ann's Bay Police station where he gave a statement.

[6] His evidence further is that later in the night he felt severe lower back pain and the next morning he visited Dr Philip Henry who prescribed pain killers but he continued to feel pain even while taking the pain medication and about three months after the accident he was still feeling pain and sought further medical attention at Oasis Health Care and was diagnosed with whiplash injury to the neck and lower back. He states that he was treated with analgesics, muscle relaxant and referred for physiotherapy which was done at Oasis Health Care Centre.

[7] His testimony also is that despite the medication and physiotherapy he still continued to experience pain and discomfort and had further medical consultation with Dr Grantel Dundas who recommended an MRI which was

done on January 14, 2014. He indicates that Dr Dundas assigned him a whole person impairment of 19%.

[8] Mr McBean also states that he incurred about $60,000.00 in transportation costs and that he is still unable to do his usual household chores or take care of his garden and has to wear a back brace, as prescribed by Dr Ravi Prakash Sangappa.

[9] In cross examination by Mr Johnson, Mr McBean stated that he reported all complaints he had in relation to his injuries to the doctors and the physiotherapists that he saw.

[10] The following documents were agreed and tendered in evidence as Exhibits 1 - 20 : Medical report of Dr K Vaughn dated July 6, 2015; medical report of Dr Sangappa dated September 6, 2013; medical reports of Dr Grantel Dundas dated December 15, 2013, January 26, 2014, and June 9, 2014; medical report of Dr Marian Allison-Vaughn dated January 14, 2014; medical report of Dr Gogineni dated November 25, 2013; medical report of Dr Phillip Henry dated January 19, 2017; receipts showing payments totalling $237,090.00, which have been admitted as the expenses incurred by the claimant.

[11] The witness statement of Mr Wade, the 1st defendant, filed on June 22, 2016 stood as his evidence-in-chief. His evidence is that in April 2011 his cousin, Calvin, came to visit and he agreed to lend his car to his cousin and the 2nd defendant who was his friend, and that he gave the keys to the 2nd defendant. He indicates that he did not ask them to do anything for him while they were on the road and they did not offer to do anything for him. He adds that he did not tell Rupert or Calvin where or how to drive the car because they were going about Calvin's business.

[12] Under cross examination by Mr Neale, he maintained that Rupert was his friend and that the question of payment did not arise as he had no intention of hiring

the car to him. He also indicated that he did not travel in the car that morning because he had to work.

[13] It is not in dispute that a collision took place on the date and time stated and that it involved the motor vehicles owned and driven by the claimant and that owned by the 1st defendant and driven by the 2nd defendant, who was the authorised driver of the 1st defendant. The 2nd defendant is not a party to the proceedings, not having been served with the claim.

[14] The 1st defendant has admitted that he owns the Mitsubishi Lancer that was driven by the 2nd defendant and that the 2nd defendant was authorised to drive his vehicle.

[15] The court therefore has to determine whether the 2nd defendant is liable for the collision and whether he was the servant and/or agent of the 1st defendant. The question of service or agency has to be determined by considering the totality of the evidence presented and the onus is on the 1st defendant to rebut the presumption. The issue of contributory negligence has also been raised on the defence of the 1st defendant.

[16] The evidence as to how the accident happened came from the claimant only. The 1st defendant was not present but in his pleadings he has attributed the collision to the claimant or that it was contributed to by the claimant. He, however, has not provided any evidence in support of such assertion in his witness statement and neither was any evidence in relation to the accident elicited when he gave oral evidence or was cross examined.

[17] Mr Neale, Counsel for the Claimant, in his written submissions filed on March 20, 2017, set out the facts and issues to be determined and examined the applicable law. He noted that if the claimant pleaded facts which, if proved, give rise to a prima facie case of negligence, he can pray in aid the doctrine of *res ipsa loquitur* which then shifts the burden to the 1st defendant. He also submitted that on the evidence of the claimant, a *prima facie* case has been established as

"vehicles do not ordinarily collide into the rear of a stationed vehicle". He noted that the defendant offered no evidence to rebut this *prima facie* case of negligence, so the court should find that the collision was caused by the negligence of the 2nd defendant, Rupert Campbell.

[18] Counsel also submitted that, as regards agency, the presumption operates in this case as the 1st defendant pleaded that he authorised the 2nd defendant to drive his car on the day of the collision. He indicated that the 1st defendant has not provided any satisfactory, credible evidence to rebut the presumption and pointed out that it is the 1st defendant's evidence that he never intended to hire the car to Rupert or Calvin and this provides support for the claimant's contention that the car was being driven by the 2nd defendant as the agent of the 1st defendant.

[19] Counsel suggested that the court view the 1st defendant's evidence "with trepidation" when he said that the 2nd defendant was going about Calvin's business and not his, and that he did not ask them to do anything for him and further submitted that little or no weight should be attached to the 1st defendant's evidence on a whole.

[20] Counsel also submitted that if, on the evidence, the court finds for the claimant against the 1st defendant, the issue of contributory becomes a live one but noted that there is no evidence to support the 1st defendant's pleading that the claimant contributed to the collision.

[21] In the written submissions on behalf of the 1st Defendant, Mr Johnson noted that although the 2nd defendant is named as a party to the claim he was never served and is therefore not a party to the proceedings.

[22] Citing the case of **Morgan v Launchbury & Ors.** [1972] 2 All ER 606, on the issue of vicarious liability, he indicated that at page 609 of that judgment, Lord Wilberforce stated the following: "...*For I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be*

shown that the driver was using it for the owner's purpose, under delegation of a task of duty...Every man who gives permission for the use of his chattel may be said to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability". He pointed out that our Court of Appeal in the case of **Lena Hamilton v Ryan Miller, Marlon Turner and Marie German** [2016] JMCA Civ 59, a case also cited by Counsel for the Claimant, confirmed that "in order to establish a relationship of agency one has to look at the totality of the evidence, albeit that there is a presumption of agency that arises from the fact of ownership".

[23] He expressed the view that the presumption of agency has been rebutted by the 1st defendant who, in his evidence in chief, states that his cousin borrowed the motor vehicle for personal reasons and that the 2nd defendant would be driving it and that he also expected them to replace the petrol which they used and he confirmed that he did not intend to travel with them on the day of the accident. He noted that a finding of negligence against the 2nd defendant, without a corresponding finding that the 1st defendant was vicariously liable, would not "entitle the claimant to judgment in this claim".

Law and Analysis

[24] It is a well established principle of law that in every claim for negligence, in order to succeed, the Claimant must prove on a balance of probabilities that the defendant owed him a duty of care, there was a breach of that duty and damage resulted from that breach. It is also settled, that all users of the road owe a duty of care to other road users (see **Esso Standard Oil SA Ltd & Another v. Ian Tulloch** (1991) 28 JLR 553) Additionally, drivers of motor vehicles must exercise reasonable care to avoid causing injury to persons or damage to property.

[25] Section 51(2) of the Road Traffic Act and the case of **Nance v British Columbia Electric Railway Company Ltd** [1951] AC 601 show that there is a common law duty as well as a statutory duty for drivers of motor vehicles to

exercise reasonable care while operating their vehicles on the road and to take all necessary steps to avoid an accident. Their Lordships of the Judicial Committee of the Privy Council in **Nance**, *supra,* speaking through Viscount Simon, at page 610 said:

> *"Generally speaking when two parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."*

[26] According to the claimant, the 2nd defendant while driving the 1st defendant's vehicle collided into the back of his vehicle. The 1st defendant has not put forward any evidence to indicate how the accident happened and no question was put to the claimant during cross examination to suggest that the accident did not happen in the manner he has pleaded and has stated in his evidence. I therefore accept the claimant's evidence as to how the accident occurred and find that the 2nd defendant breached the duty he owed and that the collision was caused by his negligence.

[27] The 1st defendant has pleaded contributory negligence on the part of the claimant and he therefore had a duty to prove it. In **Lewis v Denye** [1939] KB 540, duParcq, LJ stated that in order to establish the defence of contributory negligence, the defendant must prove, firstly, that the plaintiff failed to take ordinary care for himself or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident.

[28] The 1st defendant has however proffered no evidence to support his assertion that the claimant was contributorily negligent. As stated earlier, I find on a balance of probabilities that the accident was wholly caused by the negligence of the 2nd defendant.

[29] Having found that the 2nd defendant was negligent, I will now determine whether at the time of the accident he was acting as servant and or agent of the 1st

defendant, the owner of the motor vehicle he was driving so as to make a finding whether the 1st defendant is to be held vicariously liable.

[30] In **Halsbury's Laws of England**, 3rd Ed., Vol. 28, at page 71, the learned authors, in addressing the issue of liability of the owner of a vehicle for the negligent driving by another person, stated the law thus: *"The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purposes."*

[31] The critical question for this court is whether the 2nd defendant in driving the 1st defendants vehicle was acting on his instructions. What I find significant is that the 1st defendant pointed out that it was his cousin who was to be transported and he handed the keys to Rupert, the 2nd defendant. The 1st defendant in my view is taken to have retained control of his vehicle although Rupert was the driver and the fact that it was driven by Rupert it would have been reasonably foreseeable that he could have been involved in an accident. The 1st defendant would have known or ought to have known that if Rupert operated the car in a negligent manner some harm could come to him or to a third party. By allowing Rupert to drive the vehicle there was therefore a risk, created by the 1st defendant, of a third party sustaining injuries and as a result would be liable.

[32] On the totality of the evidence I find that the 2nd defendant was driving the 1st defendant's motor vehicle at the 1st defendant's express request and on his instructions for the benefit of the 1st defendant and for a purpose solely related to the him, as opposed to the 2nd defendant. The 2nd defendant was not using the car for his own purposes but for the purpose of transporting the 1st defendant's cousin with the 1st defendant's consent and permission. This leads me to conclude that at the time of the accident the 2nd defendant was clearly acting within the scope of what he was authorised to do by the 1st defendant and was therefore driving the 1st defendant's car as his agent and with his consent.

[33] I find that there existed between the 1st and 2nd defendants a relationship which gave the 2nd defendant the capacity to create legal relations between third parties and the 1st defendant. This relationship subsisted at the time of the accident as the 2nd defendant was authorised to act on behalf of the 1st defendant and this authority in my view was clearly and expressly given when the 1st defendant handed the keys to the 2nd defendant with the intention that he would be the driver to transport his, the 1st defendant's, cousin who had come from overseas, to his destination.

[34] I therefore find on a balance of probabilities that a principal/agency relationship existed between the two named defendants and as such I find that the 1st defendant is vicariously liable for the negligence of the 2nd defendant on the basis of agency and will therefore proceed to assess the damages to which the claimant may be entitled.

Damages

[35] The medical evidence discloses that the claimant was diagnosed with whiplash injury to the neck and lower back strain. Dr Phillip Henry who saw the claimant the day after the accident, provided a report dated January 19, 2017 in which he indicated that the claimant sustained a whiplash injury and a contusion to his thoraco-lumbar para vertebral muscles and soft tissues and "may now be left with a permanent whole body disability amounting to what I believe to be between 3 to 5%".

[36] The claimant underwent nine intensive sessions of physiotherapy as stated by Sathya Gogineni, Registered Physiotherapist in his report dated November 25, 2013, the first session being on July 23, 2011 and he was discharged on October 15, 2011. The claimant complained of intermittent neck and low back pain and was seen by Dr Dundas on December 11, 2013. Dr Dundas provided reports on the claimant's condition, the first of which is dated December 15, 2013. He provided an addendum thereto in which he assessed the claimant as having 19% WPI. In the latest report dated June 9, 2014, he indicated that MRI

scan refers to multiple levels of disc bulging as well as annular tear and disc herniation at L4/5 and disc herniation at L5/S1 and that the changes to L4/5 and L5/S1 are attributable to his accident.

[37] The claimant was seen by Dr Henry on the day after the accident, Dr Prakash Sangappa on July 12, 2011 and Dr Dundas on December 11, 2013 and was assessed by Dr Kenneth Vaughn, Consultant Orthopaedic Surgeon on September 26, 2014 at the request of the attorneys-at-law for the 1st defendant. He was further examined on May 29, 2015. In his medical report dated July 6, 2015, Dr Vaughn indicated that he had available to him the medical reports of the other doctors who had examined the claimant, the MRI report and the report of the physiotherapist. He noted that the history was provided by the claimant. He assessed the claimant as having a class one impairment of the lumbar spine with non-verifiable radicular complaints at the clinically appropriate level and assigned him 8% WPI.

[38] Counsel for the 1st defendant submitted that the findings/prognosis of Dr Vaughn ought to be accepted by the court as Dr Vaughn is an orthopaedic specialist, his medical evidence is the most current and he had the benefit of reviewing the several reports including Dr Dundas' while Counsel for the Claimant was of the view that the court should prefer the report of Dr Dundas, as he saw the Claimant on more than one occasion and has provided a more comprehensive report to that of Dr Vaughn.

[39] In relation to quantifying an award for general damages for pain and suffering and loss of amenities, Counsel for the 1st defendant referred the court to the case of **Andrew Morgan v The Attorney General & The Commissioner of the Fire Brigade** [2016] JMSC Civ. 137. In that case, the claimant suffered chronic lower back pain affecting both lower extremities, chronic degenerative facet joint and disc disease, chronic degenerative changes, sacral cyst, and aching sensation across lower back. The court accepted Dr Adolf Mena's finding of a whole person disability of 14% and made an award of $6,500,000.00 for pain

and suffering to the claimant on July 21, 2016. (CPI 232.1) This sum updates to $6,684,834.12.

[40] Counsel for the Claimant cited the following authorities as instructive:

a. **Marie Jackson v Glenroy Charlton and George Harriot,** Suit No. CL 1999/J 113, Khan, 5 pages 167-169, where the claimant had pains in the neck, back, left rib cage and left elbow and severe pains persisting to neck and lower back. She was diagnosed with whiplash with sequelae and left sacro-iliac contusion, was referred for physical therapy and was assessed with 8% PPD after having surgery. On May 4, 2001 she was awarded $1,800,000.00 (CPI 56.99) which updates to $7,539,217.41.

b. **Merdella Grant v Wyndham Hotel Company** Suit No. CL1989/G045, 4 Khan, pages 194 -196. In this case the claimant suffered lumbar strain in association with fracture of traverse process of 5th lumbar vertebra and chronic herniation of L4-L5 disc and was assigned a PPD rating of 25%. In July 1996 she was awarded $1,400,000.00 (CPI 40.38) which updates to $8,275,879.15. **(**

c. **Phillip Granston v The Attorney General of Jamaica,** Claim No. 2003HCV1680, where the claimant suffered severe lower back pain extending to thoracic and cervical region, neck pain. He was awarded $8,000,000.00 on August 10, 2009(CPI 143.3). This updates to $13,325,889.70.

General Damages

[41] The case of **Cornilliac v St. Louis** (1965)7 WIR 491, illustrates the factors a tribunal should take into account in assessing general damages for personal injury claims. These include the nature and extent of the injuries sustained, the nature and gravity of the resulting physical disability, the pain and suffering endured, the loss of amenities suffered and effect on pecuniary prospects.

[42] The first medical professional to examine and render medical assistance to the claimant appears to be Dr Phillip Henry and this was on the morning after the accident. He was then he was seen by Dr Ravi Prakash Sangappa on July 12, 2011, Dr Dundas on December 11, 2013. Dr Dundas had the benefit of the medical report of Dr Sangappa and the physical therapy report of Dr Gogineni at the time he saw the claimant. He was finally seen by Dr Vaughn on September 26, 2014, at the request of the defendant.

[43] The totality of the medical evidence presented shows that at the outset, the claimant experienced intermittent neck and low back pain and on being assessed by Dr Dundas he was assigned a PPD rating of 19% of the whole person. He had nine sessions of physiotherapy, was discharged from physiotherapy on October 15, 2011, "as he had no pain and the active movements and the muscle strength were achieved to normal". When examined by Dr Vaughn, he was found to have "symptoms of low back pain radiating to the right leg..." and in relation to his impairment the doctor noted that he "has a class one impairment of the lumbar spine...therefore has 8% whole person impairment.

[44] I note that there was no application made or any order sought for any of the medical professionals to be called as expert witnesses or for any of the reports to be admitted as expert reports. I have therefore treated the reports tendered in evidence as part of the ordinary evidence for the purpose of this assessment.

[45] I prefer and accept the report of Dr Vaughn dated July 6, 2015 over that of Dr Dundas. This report is later in time and Dr Vaughn had all the reports of the other doctors who had examined the claimant previously, save and except the report of Dr Henry. He also had the physiotherapy report of Dr Gogineni and the MRI report of the claimant's lumbar spine dated January 14, 2014 at the time of the examination.

[46] Having considered the similarities and distinguishing features of the cases provided for comparison, in conjunction with the principles stated in the case of

Cornilliac, I find that the injuries to the claimant are more comparable to that experienced by Marie Jackson than the other cases referred to. I note however that Marie Jackson underwent surgery, which was not a feature of the treatment to the claimant in the case at bar.

[47] I have also considered that the percentage bodily impairment is a factor to be considered in assessing damages and hasten to add that I do not accept the WPI of 19% assigned by Dr Dundas but as stated earlier I prefer and accept the report of Dr Vaughn, and accept that the claimant was found to have 8% whole person impairment. I note also that the claimant in the case of Jackson was also assessed as having 8% PPD but this was after having had surgery.

[48] I have also borne in mind the evidence of the claimant that he is no longer able to do some household chores or take care of his garden. In the circumstances, I believe that the award to Jackson should be decreased to provide reasonable compensation to the claimant in the instant case and I believe the sum of $6,000,000.00 would be adequate.

Handicap on the labour market

[49] The claimant has pleaded that there is a risk that he will lose his employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally paid job.

[50] Counsel for the 1st defendant submitted that the medical evidence does not indicate that the claimant could not continue in the job he was undertaking prior to the accident and that there is no objective evidence which indicates that he is at risk of losing his job. He therefore suggested that any entitlement to an award for handicap on the labour market should be quantified on the basis of a lump sum payment in the amount of $500,000.00.

[51] In a claim for an award for handicap on the labour market, the claimant needs to provide evidence, however tenuous it may be, for the court to make an award, as the court is being asked to assess his reduced eligibility for employment or

the risk of future financial loss. He has pleaded that “there is a risk that [he] will lose his employment...and may then, as a result of his injury, be at a disadvantage in getting another job or an equally paid job”. His evidence is that he “can no longer assist the guests on several paths of the Falls. Since the accident my duties have lessened”.

[52] This evidence is not sufficient for me to make a finding that he is handicapped on the labour market and the medical evidence has not shown that he is at risk of losing his job as a result of the injury he sustained and therefore does not support an award for handicap on the labour market. I will therefore make no award under this head of damages.

Special Damages

[53] The claimant in his “Further amended Particulars of Claim” has pleaded a total of $346,300.00 under the head of special damages. This includes his medical expenses claim and claims of $60,000.00 for transportation expenses, $80,000.00 for extra help and $1,000.00 for Police report. He has proved on his evidence that he incurred medical expenses totalling $237,090.00.

[54] In relation to his claim for transportation expenses, his evidence is that he used a chartered taxi and contributed $4,000.00 to attend on or about fifteen “medical visits”. Based on the principle that a claimant cannot recover by a judgment, more than that which has been pleaded, the sum allowed for transportation will be $50,000.00. I accept that the claimant had to make several visits to the doctors for treatment so I believe the sum claimed is reasonable in the circumstances. He has not provided any evidence to support his claim for extra help or for the Police report so there will be no award in respect of those claims.

Disposition:

[55] Judgment for the claimant with damages assessed and awarded as follows:

General damages for pain and suffering and loss of amenities awarded in the sum of $6,000,000.00 with interest at 3% pa from the date of service of the claim form ie January 17, 2012 to the date of judgment

Special damages awarded in the sum of $287,090.00 with interest at 3% from April 26, 2011 to the date of judgment

Costs to the claimant to be agreed or taxed.