[2017] JMSC Civ.131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 02458

BETWEEN	**ALECIA WHYTE**	**CLAIMANT**
AND	**DWAYNE SMITH**	**1ST DEFENDANT**
AND	**JOHN SMITH**	**2ND DEFENDANT**

Mr. Canute Brown instructed by Brown Godfrey & Morgan for the Claimant.

Ms. Tashell Powell instructed by Zavia Mayne & Company for the Defendants.

Heard: 22nd July, 2017, 23rd July, 2017 & 22nd September, 2017.

Motor Vehicle Accident - Negligence - Contributory Negligence - Personal Injury- Quantum of Damages

CALYS WILTSHIRE, J (AG.)

Background

[1] On the 14th June, 2007 the claimant, Alecia Whyte, by her next friend and father Stavon Whyte commenced an action seeking damages for injuries which she suffered on the 31st December, 2004. She alleges that on that day at about 7:00pm she was standing on the embankment of the main road at Bromington Hall in the parish of St. Elizabeth, when she was struck down by a green pick-up truck driven by the first defendant and owned by the second defendant.

Claimant's Case

[2] The claimant alleges that she was standing on the embankment with her sister and aunt when the first defendant who was driving along the roadway, lost control of the pick-up truck, causing it to mount the embankment and hit her. She alleges that the first defendant was negligent as he was driving at a speed that:

(a) *Was too fast in the circumstances,*

(b) *He failed to keep any or any proper look out or have any or any sufficient regard for other users of the road and in particular the claimant,*

(c) *He collided with the claimant and,*

(d) *He failed to stop, slow down, apply his brakes, swerve or manage/control the said pick-up truck so as to avoid the impact.*

Defendants' Case

[3] The defendants by their defence filed on the 10th July, 2015 and an amendment made at the close of the claimant's case allege that it was the claimant who stepped from the embankment into the path of the vehicle being driven by the first defendant, and hence the accident was caused or contributed to by the negligence of the claimant. The first defendant alleges that because of the action of the claimant he was not able to stop, swerve or otherwise avoid the collision.

Evidence

[4] The witness statements of the claimant, her father Stavon Whyte and the first defendant were accepted as their evidence in chief. The claimant also relied on the expert evidence of Dr Colin Abel who had prepared a medical report dated 5th May, 2005. I will not set out the evidence in detail but will instead refer to the parts which are relevant and which require deliberation for my findings.

Issues

[5] The matters for this court to determine are:

(2) Did the 1st defendant fail to exercise his duty of care to other road users and lose control of the motor vehicle causing it to mount the embankment, hit the claimant and resulting in her being injured.

(3) Did the claimant step into the path of the second defendant's vehicle suddenly, thus the first defendant was unable to stop, swerve or otherwise avoid the collision.

(4) Can the claimant, if it is found that she stepped into the path of the second defendant's vehicle, be held to have caused or contributed to the accident.

Law

Negligence

[6] In this claim for negligence the elements necessary to be established are:

(a) That a duty of care was owed

(b) That said duty was breached

(c) That damage resulted from said breach.

Duty of Care

[7] It is accepted that all road users owe a duty of care to other road users and in the instant case this duty was owed to the claimant by the first defendant. As the driver of a motor vehicle he was required to keep a proper look out, avoid excessive speed and observe all traffic rules and regulations. On what was owed by one member of the public to another in the use of the road, Lord McMillan In **Corporation of Glasgow v. Muir & Ors** [1943] 2 ALL E.R.44 indicated that it was not, "to guard against every conceivable eventuality, but only against such

eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience". Lord McMillan further stated that,

> *"The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances." And further, "It may be said generally that the degree of care required varies directly with the risk involved."*

Analysis of Evidence

[8] The claimant has stated in her evidence in chief that "the pickup lost control and collided with me on the embankment." Under cross examination the claimant in response to Miss Powell's question answered, "I say it lost control because it hit me on the embankment and it had no business on the embankment". The other witness for the claimant, her father, also said in his evidence in chief that the pickup lost control and collided with Alicia on the embankment. He further said under cross examination that, "vehicle not suppose to be on embankment, "and "is the speed and what happen why I say he lose control".

[9] The first defendant denied losing control and mounting the embankment and under cross examination stated that he was travelling at between 30 - 35 km per hour and no more than 40 km per hour. The court notes that the evidence of his speed was not challenged by the claimant. Her evidence of her position on the embankment is "I was on the left and my sister and my aunt was on my immediate right." She further states that "I was the only person the van hit." Although she says that she saw the van five (5) seconds before it hit her, she admits that it was her father who told her that the van lost control.

[10] Her father, also states that he saw the pick-up before it collided with the claimant and insists that she got hit on the embankment but also states "I didn't see the actual hit" and "I never saw the actual impact." He further says "flowers were on the road. Flowers don't grow in road, so it proves he go on the embankment." The claimant also said that her father told her, that she fell on the road and that was supported by Mr. Whyte's evidence in chief that the claimant after being hit, fell on

the road. However, under cross- examination he insisted that she fell on the embankment. I am of the view that the original version given of the claimant's post accident position being on the road is in fact the truth and Mr. Whyte has sought to change his evidence in an attempt to give credence to the claim that the first defendant mounted the embankment. Further I do not believe that based on the claimant's evidence of the proximity of her sister and aunt to her on the embankment, that a vehicle could have mounted same and yet nobody else but her was hit.

[11] Mr. Brown has submitted that in light of the contradiction in the first defendant's evidence, regarding his inability to stop and swerve as stated in his evidence in chief versus his swerving and his side mirror hitting the claimant as stated under cross examination, that the court should accept the claimant's version of events. It is not in issue that the claimant was hit by the vehicle driven by the first defendant. I however do not accept the evidence that he mounted the embankment. The inconsistency in his evidence as to whether he swerved or not does not, in my view affect the credibility of his evidence that he did not mount the embankment. That inconsistency I will address, if necessary, when determining whether the first defendant did breach his duty of care,

[12] I find that there is no evidence either that the first defendant was speeding or that he lost control and mounted the embankment. On said issues the witnesses on the claimant's case lacked credibility and the inconsistency of their evidence rendered it unreliable. I am of the view that it is more likely that the claimant did step into the path of the second defendant's vehicle and was hit.

[13] Although I have accepted that there is more likelihood that the claimant stepped into the path of the second defendant's motor vehicle, I must still determine whether there was any breach of the first defendant's duty of care as a driver. The first defendant in fulfilling said duty is required to guard against reasonable possibilities. In the Jamaican case of **Sirjue v. A.G. & Masters**, Suit No. CLS.122 OF 1984, Justice Bingham stated ,

> *"in my opinion there is no special duty of care owed to an infant plaintiff of whose presence the defendant driver 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, that is, prior and up to the time that the collision took place. Such a special duty of care would only arise if the defendant had been afforded 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 regard 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 traffic or playing on or near a highway as the decided cases have made reference to. "*

[14] This accident occurred on New Year's Eve, sometime after 7:00pm while the first defendant was driving a left hand drive vehicle. He admitted that he was negotiating a left hand bend and also that the verge was overgrown with bushes. He said, "It's a left hand drive car. I couldn't see who was on the left till I came around the bend" and further, "the accident was a few feet from the corner". The evidence given as to the position of the street light suggests that it would not have assisted the visibility for the first defendant. While it may not have been reasonably foreseeable that a child would have attempted to cross the road then and there, under the circumstances of such poor visibility, dangerous possibilities had increased and hence the need for more precautions by the first defendant would also increase.

[15] Since the defendant in negotiating the bend could not see who was on the left hand side of the road, he should have blown his horn or given some warning so that other users of the road would be made aware of his oncoming vehicle. I therefore find that the first defendant failed to exercise the degree of care required in light of the risk involved. Regarding the inconsistency in his evidence as to how he reacted on seeing the claimant, I am of the view that his version that he swerved and the side mirror hit the claimant is consistent with the claimant stepping into the road and suffering a fractured right humerus. Having however failed to give proper

warning of his presence in dangerous circumstances, he breached his duty of care and as a result of this breach, the accident occurred.

Contributory Negligence

[16] Miss Powell has submitted that should the court find on the first defendant's evidence that he was negligent, then the claimant should be held negligent on a contributory basis. The standard of care required by a driver to a child is greater than that owed to an adult and this special duty of care would arise if the first defendant saw the claimant before she set out on her journey across the road.

[17] The first defendant says that the claimant suddenly stepped into the path of the motor vehicle while she was engaged in a conversation with someone across the roadway. He however admits under cross examination that because of the road conditions he could only see the people on the right. Miss Powell has submitted that he could only see as far as his headlights permitted. A lower standard of care for its own safety is expected of a child. The child only has to attain the standard of care expected of a child of his or her age. In the case at bar, was the claimant at an age where it was reasonable to expect her to take precautions for her own safety? She was 9 years old at the time of the accident and at that age she was not going on the road by herself. She said "somebody was always with me," and "when I am crossing the road, I ask for assistance."

[18] This suggests to me that she would have been aware of the hazards of the roadways. However, we also know that children are prone to such behaviour as dashing suddenly across roads without looking out for oncoming traffic. The claimant was on the embankment in the care and under the supervision of two adults. The claimant says, "My aunt called out to me. She called out my name." The court has already accepted that the first defendant did not drive onto the embankment and therefore believes that it is very likely that the aunt's actions were motivated by her realization that the claimant was stepping into the road into the vehicle's driving path.

[19] I am of the view that the claimant would not have been aware of the first defendant approaching from around the bend without him sounding his horn. Regretfully in that moment when she may have forgotten the perils of the road, she stepped from the embankment into the road. However at 9 years of age, she indicated a clear understanding that she was to ask for assistance when crossing the road and she was in the care of two adults to whom she could have turned. I therefore find that 20% negligence should be apportioned to the claimant herein.

DAMAGES

[20] The medical report of Dr. Colin Abel relied on by the claimant, outlined the injuries suffered by her. The report indicates that on admission to the Bustamante Children's Hospital the following injuries were noted:

1) 1cm laceration occipital area of scalp
2) Bilateral Periorbital ecchymoses and edema-suggestive of a severe head injury
3) Deformity of right arm
4) Bleeding from the nostrils

[21] The report goes on to indicate that x-rays revealed the following:

1) Fracture right humerus
2) Opacification right lung suggestive of severe right ling contusion
3) The CT scan showed fracture frontal bone of skull with cerebral edema and pneumo cephalus. This implies fracture of the skull extending into the frontal sinus.

The claimant had one episode of a seizure and bleeding from nostrils. She was unable to attend school as result of the injuries but the court was not given the period of absence.

[22] Dr. Abel attended and was cross examined on the contents of his report. Miss. Powell has submitted that as Dr. Abel is a Paediatric Surgeon, he has no specialty in matters relating to the bone or the brain. Counsel challenged Dr. Abel on his

findings that the head injury suffered by the claimant was severe and suggested that it was in fact mild and that the doctor's findings of severity contradict the claimant's pleadings. She also submitted that based on the doctor's evidence of indicators of a severe head injury i.e. (a) bleeding from nose, from ears, around the brain and problems with brain function, the claimant in the case at bar did not suffer severe head injury. Dr. Abel indicated under cross-examination that the stay in hospital for a mild head injury is usually about 3 days. Based on the indicators given by Dr. Abel I would accept that Ms. Whyte's head injury was not severe. Generally however head injuries are serious and I accept that her total injuries were serious and life threatening as stated by Dr. Abel

[23] Mr. Brown has cited the case of **Vincent Campbell v. Bruce Clarke** at page 59 of the Harrison's Assessment of Damage, 1st edition, and submitted that same should be applied in the instant case. The claimant there suffered an open depressed fracture of the right temporal region of the scalp, fracture of the base of the skull, laceration to the left temporal region of the scalp and blood shot of right eye. He developed epilepsy as a result and experienced giddiness after standing for long. Mr. Brown has submitted that an award of $500,000.00 made in that case in May 1992, would be increased in the instant case in light of the more severe injuries and disabilities suffered by the claimant herein. Counsel has submitted that an award of $8,000,000.00 would be appropriate.

[24] While the Court accepts that there is some similarity in the injuries suffered, i.e. the fracture to the skull, the claimant's injuries and resulting disability in the instant case were not more severe. Despite the claimant's assertions, there is no medical evidence which supports that she is still experiencing problems with her arm when she lifts, headaches and dizziness as a result of the accident. She also agreed that she has not had any more epileptic episodes since the one after the accident. The court however notes the last sentence of Dr. Abel's report which states, "We expect her to have some disability because of the potential of further seizures based on the fact that she had a fractured skull and a seizure associated with this."

[25] Miss Powell has cited three cases as follows:

1) **Donald Henry v. Robinson's Car Rental Ltd and Errol Robinson** page 52 of Harrison's Assessment of Damages 1st edition
2) **Walter Coley v. Alphanso Smith** at page 58 of Harrison's Assessment of Damages 1st edition
3) **Phillip Kongal v. The Attorney General of Jamaica** at page 58 of Harrison's Assessment of Damages- 1st edition.

[26] In **Henry v. Robinson's Car Rental and Anor** the claimant suffered,

1) Cerebral concussion with closed unexpressed fracture of the right frontal bone
2) Head pains for about 1 month and bouts of amnesia
3) He spent 10 days in hospital and recovered fully within 6 weeks.

The court awarded $25,000.00 in January 1991 for his pain and suffering which counsel submitted would update to $854,642.86 today.

[27] In **Coley v. Smith** the claimant suffered

1) loss of Consciousness
2) 6cm laceration to the occipital area of the scalp
3) 6cm laceration over the left upper eyelid
4) abrasion to left shoulder
5) He had impaired function of the left side of the body, giddiness and black outs, inability to hold urine and general weakness of body.

He was awarded $40,000.00 for general damages in October 1991 which would update to $894,029.85.

[28] In **Kongal v. The Attorney General of Jamaica** the claimant suffered:

1) Head injury

2) Contusion of the right jaw
3) Laceration to the right side of face

An award of $15,000.00 was made for general damages which would update to $415,011.55 today. Miss Powell has submitted that based on these cases, an award of between $1,000,000.00 to $1,300,000.00 would be appropriate. The court finds that except for **Henry v. Robinson's Car Rental Ltd and Anor**, the claimants in the abovementioned cases suffered injuries which were less severe than those suffered by the claimant in the case at bar.

[29] Despite the claimant's evidence that she has not suffered any more seizures, the last sentence of the medical report is very significant. It suggests to me that there is a possibility of future seizures. In this regard I am guided by the case of **Petrona Black (bnf Karen Black) v. Jennifer Bhalai & Anor** at page 183 of Harrison's Assessment of Damages 2nd edition, where a 12 year old student sustained head injuries after being hit down. That claimant suffered loss of consciousness, three epileptic seizures on the day of the accident, bruises on face and knee, a fracture of the right parietal bone, post traumatic headaches and was subject to future epileptic attacks. At the time of the trial the epileptic seizures had not recurred since the initial three attacks. An award of $15,000.00 for general damages made at first instance was subsequently increased by the Court of Appeal to $100,000.00 in July 1991, in light of the possibility of future epileptic attacks.

[30] Carey P.(Ag) in delivering that judgment indicated that once the tribunal found that from the medical evidence there was a real possibility of the risk of future attacks of epilepsy then the question must be asked, "What are the chances after the date of trial of attacks of epilepsy of a serious nature?" He then continued that if one was satisfied that there was a chance then the next question was "to determine how that realistic figure must be set." Justice Carey acknowledged the difficulty in making an assessment in these cases where it cannot be said with certainty whether or not the attacks may occur. He referred to the method recommended by Lord Justice Widgery in Jones v Griffiths [1969] 1 W.L.R.795 at page 801:

> *"In these cases the trial judge has to fix what is a fair and proper figure to cover two conflicting eventualities, one,that the complications may arise, and the other, that they may not. It seems to me that there is only one practical method of approaching this kind of problem and that is to assess the kind of figure which would be appropriate in the extreme and serious case where the complications of future attacks were virtually certain. It then becomes possible to discount that figure according to the degree of optimism which is possible in light of the medical reports."*

[31] I have formed the view that since the claimant herein suffered a seizure associated with a fractured skull, there is always a chance of recurrence. If this were a case of absolute certainty that the seizure would recur then the figure of $7,000,000.00 would be appropriate. I would then discount that figure since there is uncertainty that there will be a recurrence and further take into consideration the peculiar circumstances of this case.

[32] I am required to consider the actual physical injury, pain and suffering (past, present and future) and the effect of the injury upon the capacity of the injured person to enjoy life. Since Miss. Whyte has fortunately not experienced a seizure in the last twelve (12) years I would apply a discount for the increased uncertainty and award the sum of $3,000,000.00 for general damages.

[33] Applying the 20% contributory negligence to the claimant, damages are awarded as follows:

1) For general damages the sum of $2,400,000.00 at 3% per annum from the date of the service of the writ to the date of judgment.
2) For special damages the sum of $99,870.00 at 3% per annum from the 31st of December 2004 to the date of the judgment.
3) Costs to the claimant to be taxed if not agreed.