



[2022] JMSC Civ.35

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 04561**

<b>BETWEEN</b>	<b>OMAR EDWARDS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE JAMAICA DEFENCE FORCE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>LANCE CORPORAL I STEWART</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> DEFENDANT</b>

Mr. Raymond Samuels instructed by Samuels and Samuels for the Claimant

Mrs. Taniesha Rowe-Coke instructed by the Director of State Proceedings on behalf of the 3<sup>rd</sup> Defendant

Heard: January 19, 2022, January 20, 2022 and March 25, 2022

**Negligence – Contributory Negligence – Damages**

**Carr, J**

**Background**

[1] By way of a claim form filed on the 1<sup>st</sup> of November 2016, the Claimant sought damages for negligence against the Defendants, arising out of an incident which occurred on the 16<sup>th</sup> of October 2014. The Claimant was a pedal cyclist travelling along Cox Street in Port Maria St. Mary, he avers that the 2<sup>nd</sup> Defendant while travelling in the opposite direction operated his vehicle negligently and collided with him. He sustained injury to his finger, and his bicycle was also damaged.

- [2] The 3<sup>rd</sup> Defendant in its defence averred that the 2<sup>nd</sup> Defendant was travelling along the said street when the Claimant attempted to overtake a line of motor vehicles parked on the left hand side of the road and collided with the tail of the vehicle being driven by the 2<sup>nd</sup> Defendant. They have posited that the collision was caused solely by the Claimant or in the alternative that the Claimant materially contributed to it.
- [3] The Claimant's Attorney-at-law conceded in his closing submissions that the claim ought not to have been brought against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pursuant to the Crown Proceedings Act. He indicated that if judgment is entered for the Claimant it should only be in relation to the 3<sup>rd</sup> Defendant.
- [4] The 3<sup>rd</sup> Defendant filed a notice of intention to tender hearsay documents on the 24<sup>th</sup> of November 2021. The notice contained statements made by the 1<sup>st</sup> Defendant who was no longer available to give evidence in the matter. There was an objection raised by Counsel for the Claimant in relation to this document in particular, as he indicated that there would be no one available through whom it could be tendered and admitted as evidence. The objection was filed on the 14<sup>th</sup> of January 2022, and the trial was scheduled to commence on the 19<sup>th</sup> of January 2022.
- [5] The 3<sup>rd</sup> Defendant's attorney in response, argued that it would be unfair at this stage of the proceedings to raise such an objection when the notice of intention was filed some time ago and the Claimant had an opportunity to file his counter notice well in advance of the trial dates. Although there is no stated time in the Evidence Act outlining when this objection may be raised, Counsel relied on the decision of Mangatal. J in the case of **Olga James Reid v. Stephen Clarke and David Davis**<sup>1</sup> where it was said, **"it could not be the case that sub-section 31E(3) is fulfilled by coming to trial and at the time orally requiring persons**

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<sup>1</sup> Claim No. J004 of 2001

**who made statements to be called as witness. I would be exceedingly surprised if the law or practice were to support such an unfair position.”<sup>2</sup>**

**[6]** Although Counsel for the Claimant filed his objection in writing prior to the trial dates, the delay in filing made it very difficult for the 3<sup>rd</sup> Defendant to have the makers of all the documents available on the day for trial on such short notice. I accepted that such an objection at this stage would result in a delay of the proceedings and would not auger well for the interests of justice. I agreed with Counsel for the 3<sup>rd</sup> Defendant and overruled the objection.

### **Issues**

- a) Whether the Third Defendant is liable to the Claimant in Negligence.
- b) If so, whether the Claimant is contributorily negligent.

### **The Law**

**[7]** The tort of negligence is proved when a Claimant can satisfy a court on a balance of probabilities as to the following:

- a. That they were owed a duty of care by the Defendant.
- b. That the Defendant breached that duty.
- c. That as a result of that breach the Claimant suffered damage, and that damage is not too remote.

**[8]** Statute provides for a reduction to an award in damages in the event that the court finds that the Claimant is partially responsible for any damage that has resulted from a Defendant’s act of negligence. This is provided for in The Law Reform (Contributory Negligence) Act which states as follows:

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<sup>2</sup> Ibid. pg. 14 para. 22

**“Where any person suffers damages as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”**

### **Analysis and Discussion**

**[9]** The issues for determination in this case are solely dependent on the credibility of the witnesses. The Claimant’s witness statement stood as his evidence in chief and he was cross examined. During the course of internal investigations by the Jamaica Defence Force (JDF), a statement was taken from him. He was also asked several questions by an investigator and those questions and answers formed a part of the evidence. The sole witness for the 3<sup>rd</sup> Defendant was Lance Corporal Ingleton who was a passenger in the service vehicle on the day in question. The 2<sup>nd</sup> Defendant although providing a witness statement was not present on the day of trial, his statement to JDF investigators was admitted as an exhibit in the case.

### **Issue #1**

#### **Whether the 3<sup>rd</sup> Defendant is liable to the Claimant in negligence**

**[10]** It is trite law that all users of the road way have a duty of care to fellow road users. *“The duty of a person who drives or rides a vehicle on the highway, is to take reasonable care to avoid causing damage to persons, vehicles or property of any kind...In this connection reasonable care means the care, which an ordinarily skilful driver or rider would have exercised, under all the circumstances...”*<sup>3</sup> There

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<sup>3</sup> Charlesworth & Percy on Negligence 7<sup>th</sup> ed. p. 671

is therefore no question that the driver of the service vehicle owed a duty of care to the Claimant.

- [11] The Claimant's evidence as set out in his witness statement, is that he observed a line of parked motor vehicles along the road way and he stopped behind the last parked motor vehicle because he observed that the vehicle being driven by the 2<sup>nd</sup> Defendant was coming from the opposite direction at a fast speed and heading towards him. He recognized that he would not be able to manoeuvre his bicycle safely through the space and so he stopped to wait until the vehicle passed.
- [12] While he was waiting he observed that the road was quite busy with pedestrians milling about on the sidewalks, in the drains, along the road, as well as in the road way itself. The truck being driven by the 2<sup>nd</sup> Defendant swung onto his side of the road and the tail of the truck hit his bicycle handle, and his right hand. After the vehicle hit him, it stopped and two men stepped out. He informed the men that he had been hit by their vehicle.
- [13] In his statement, which he gave to JDF investigators (**Exhibit 5**), he stated, *"I came to a halt at the back bumper of the first car that was now parked on the left so as to allow the service vehicle that was coming up the road to pass. The tail of the service vehicle then came into contact with the little finger of my right hand as it passed due to a right swerving action."* He didn't mention in that statement that his bicycle was hit, neither did he give any indication as to the speed of the truck.
- [14] The question and answer document was **Exhibit 6**. He was asked about the estimated speed of the truck and he stated approximately 60-70km per hour. He was asked if there was any damage to the bicycle and he responded, *"yes to the right brake handle"*. He was asked where on the truck his finger came into contact with and he stated *"on the last piece of vertical metal at the end of the body of the truck."*
- [15] At question 11 he was asked *"Why didn't you pull back from behind the car upon having doubt?"* his response was *"The truck could have passed had it not been for*

*the right swing made by the driver of the service vehicle made.” At question 18 “Why didn’t you stop behind as opposed to beside the parked motor vehicle to your left?” his response “My initial estimate was that the truck could go through.”*

- [16] In cross-examination he stated that he was right on the back of the last parked car on the left. He insisted that the car was not in the gutter but he denied that it was out in the road. He said he stopped when he realized he could not pass and at that time the truck was at about the third vehicle in the line coming up towards the second vehicle.
- [17] He was unable to say why the truck swerved however he surmised that it was because of the many pedestrians walking along the roadway. He admitted that there was a sidewalk on the side of the road that the truck was on. He agreed that there was no vehicle obstructing the truck at the time. He denied suggestions that he tried to overtake the line of parked motor vehicles while the truck was approaching. He admitted that he knew the road code and that he was aware that as a pedal cyclist he was to give way to larger vehicles. He said that is what he was doing at the time.
- [18] In a statement provided by Lance Corporal Stewart to investigators which was admitted as **Exhibit 1**, he outlined the circumstances on the day in question. His absence at the trial, meant that he was not subject to cross examination. Further unlike his witness statement, this document did not include a certificate of truth.
- [19] The statement disclosed that he observed the pedal cyclist proceeding to go between the tail of the service vehicle and the last car. He noticed that the rider stumbled on his bicycle and placed his feet on the ground. He immediately stopped his vehicle and went to inspect. On his inspection he observed that the pedal cyclist had an injury to his right little finger, which the cyclist contended was as a result of the contact made between his hand and the service vehicle. He did not indicate that he heard a crashing sound, or that he believed that the pedal cyclist had come into contact with the service vehicle.

- [20]** Lance Corporal Carmichael Ingleton in his evidence indicated that he observed approximately six motor vehicles parked along the right hand side of the roadway in the vicinity of the Shiloh Apostolic Church along Cox Street in the town of Port Maria. Lance Corporal Stewart was driving at approximately 10-15 km per hour along the road way when he noticed a pedal cyclist travelling in the opposite direction.
- [21]** The cyclist was travelling at approximately the same speed as the service vehicle. He stated that there was a slight gradient and as the service truck approached, the pedal cyclist came off the gradient and tried to manoeuvre his way between the service truck and the parked cars. After the cab of the truck passed he heard a crashing sound to the right side of the vehicle. Lance Corporal Stewart stopped the truck and they both exited the vehicle. He noticed that the bicycle was on the ground and that the cyclist had what appeared to be an injury to his right little finger.
- [22]** He was cross-examined by counsel. He denied that they were moving fast. He denied that the Claimant was behind the last parked car, and he also did not agree with counsel that if the Claimant was out in the road that the wing mirrors on the cab of the truck would have hit him. It was suggested to him that he did not see the accident as he was sitting on the opposite side of the Claimant. This he denied and he indicated that he was able to see through the wing mirror on the right hand side of the vehicle.
- [23]** There are clear inconsistencies between the written statement of Lance Corporal Stewart and the evidence of Lance Corporal Ingleton. I do not accept that Ingleton was in a good position to see what took place on the other side of the cab. His evidence that he could see through the side mirror to the right is rejected. He heard a crashing sound yet Stewart who was closer to the pedal cyclist did not mention this in his statement. The contact with the service vehicle described by the Claimant could not account for a crashing sound.

**[24]** An assessment of the statement of Lance Corporal Stewart must take into account the fact that he was not present for cross-examination. His evidence was not tested and the inconsistencies between his statement and the evidence of Ingleton could not be clarified. It is my considered view however, that the account of the incident as outlined in the statement of Lance Corporal Stewart should be relied on as opposed to the evidence of Lance Corporal Ingleton based on his proximity to the Claimant.

**[25]** The statement of Lance Corporal Stewart confirmed that he saw the Claimant as he was approaching and that he observed him making his way between the vehicles. He had a duty to ensure that he was a distance away from the Claimant in order to avoid a collision given the width of the roadway as well as his recognition of the Claimant's attempt to manoeuvre his way between the vehicles. He ought to have taken reasonable care to ensure that he did all he could to prevent an accident. This he did not do and as such I find that he failed in his duty to the Claimant. As a result of which the Claimant suffered injury.

## **Issue #2**

### **Was the Claimant contributorily negligent**

**[26]** In examining the evidence of the Claimant it is evident that he has not been truthful on all accounts. He indicated that the truck was driving at a fast speed which he estimated at 60-70 km per hour. Given the description of the road way by the Claimant I cannot find that this is true. It was his evidence that the road was congested with foot traffic as well as the line of parked vehicles on his side of the roadway. Further, the road was narrow and could barely accommodate the truck as it was passing him. I do not accept his evidence that the truck was speeding on the day of the incident.

**[27]** The Claimant indicated that the truck swerved, and as a result the back part of the vehicle came into contact with his hand. He admitted that had it not been for that swerve the vehicle would have safely made its way past him without a collision.

His explanation for the swerve was that there were people in the road. He accepted that there were sidewalks and that the side with the truck did not have any other vehicles. Why then would the pedestrians be walking in the road on the side with the truck, and not on the sidewalk? There was nothing on his evidence that would explain the need for them to be on that side of the road way.

**[28]** It is more reasonable to accept that the persons who were walking in the road way and the drains were on the side of the road where the Claimant was, since that is the part of the road where the parked vehicles were lined up, causing an obstruction in the road way. I reject the evidence of the Claimant that the truck swerved on that day.

**[29]** The Claimant's evidence is that he stopped behind the last parked car on his side of the road way. He denied that he was to the side of that car and he denied that he was moving at the time he received his injury.

**[30]** I rejected his evidence in that regard I find that he was not to the back of the parked car but instead was to the side of that car. This is so because, had he been behind the parked car the truck would not have collided with him at all, since the parked car was somewhat out in the road way as he described it. I find and accept that the Claimant was attempting to make his way between the parked vehicle and the truck. Due to the height of the truck he was able to navigate past the wing mirrors, however when he got to the back of the truck his finger got caught on the vertical pole and he sustained an injury to his little finger.

**[31]** I find and accept that the Claimant being on the side of the road with the obstruction had the greater duty to wait until the truck passed before trying to move forward along the roadway.

**[32]** The Claimant by his actions, was contributorily negligent, and was partially responsible for the collision and resulting injury that day. In the circumstances I find that the Claimant had the greater duty and was 70 percent responsible for the

collision, any compensation for injury or damage must be considered in light of this finding.

## **Damages**

### **General Damages**

**[33]** The Claimant attended at the Port Maria Hospital on the 16<sup>th</sup> of October 2014 however he left before being seen. He was seen on the 18<sup>th</sup> of October in the following year. The findings on examination were outlined in a Medical Report dated May 30, 2015, as follows:

- a) Right hand tender.
- b) X-ray shows fracture to 5<sup>th</sup> finger distal phalanx of right hand.

The diagnosis was a fractured fifth finger.

**[34]** A Medical Report was also obtained from Dr Denton Barnes. He examined the Claimant on the 22<sup>nd</sup> of May 2015. On examination the following findings were made:

- a) In his right hand his right little finger had decreased range of movement; ranges of movement of his little finger were as follows: Metacarpal phalangeal joint range of movement was 40-90 degrees, proximal interphalangeal joint range of movement was 45-80 degrees, distal interphalangeal joint range of movement was 10-20 degrees.
- b) There are full ranges of movement of all other joints for the fingers.
- c) There was mild deformity of the middle phalanx of the right little finger.
- d) Grip strength was 4/5 on manual testing.
- e) There was no distal neurovascular deficit.

**[35]** He was assessed as having a healed fracture of the middle phalanx of the right little finger and was advised that he needs physiotherapy and analgesia. He had 61% impairment of the right little finger which is equivalent to 7% impairment of the

right hand. This is equivalent to 6% impairment of the right upper extremity which is equivalent to 4% impairment of the whole person.

- [36] It was also noted that the Claimant was a mason by profession and that he was able to continue working as such, with periods of rest due to pain in the hand.

### **Submissions by Counsel for the Claimant**

- [37] Three authorities were relied on by the Claimant. **Trevor Facey v. Phil's Incorporated Limited, Basil Phillips and Everton Weller**<sup>4</sup> was cited for the purpose of the percentage whole person impairment which was 4% in that case. An award of \$1,300,000 was made and when updated using the CPI for November 2021 is \$1,711.691.
- [38] In the case of **Trevor Clarke v. Partner Foods Ltd. and Marlon Scotland**<sup>5</sup> the Claimant suffered bruises to his ankle, right knee and right shoulder. He also had a compound fracture of his right index finger. He was assessed as having a 4% whole person impairment. An award was made in the sum of \$565,000. When updated the award would be \$3,135,885.00.
- [39] Counsel submitted that a reasonable award would be in the sum of \$2,700,000. He also claimed for handicap on the labour market as he argued that the Claimant in the present case has a medical impairment that would render him uncompetitive on the open market. He relied on the case of **Lorenzo Ward v. Palm Rose Commodity Limited**<sup>6</sup> and suggested that a standard award was made for the sum of \$500,000 in that case and when updated amounts to \$655,367.

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<sup>4</sup> [2015] JMSC Civ. 175

<sup>5</sup> Khan's Personal Injury Awards Vol. 5 at p. 112

<sup>6</sup> [2016] JMSC Civ. 97

## Special Damages

[40] Counsel submitted that the Claimant was entitled to special damages as set out as follows:

a) Dr. Denton Barnes	\$30,000.00
b) Port Maria General Hospital	\$1,000.00
c) Medications	\$1,715.23
d) Transportation to seek medical attention	\$24,000.00
e) Costs to repair pedal cycle	\$4,900.00
f) Loss of earnings at \$12,000 per wk For 106 weeks and continuing	\$1,272,000.00

[41] Counsel on behalf of the Defendants referred to both authorities and submitted that the injuries of the Claimant in the case of **Trevor Clarke** were far more severe than that of the Claimant in this matter. She suggested that the authority of **Lorenzo Ward** should be accepted by this court and the award should be in the sum of \$2,000,000 and reduced accordingly based on the Claimant's contribution to his injuries.

[42] It was argued that there was no evidence of handicap on the labour market as the Claimant's doctor indicated that he was able to continue in his previous employment.

[43] It was agreed that the Claimant was entitled to his medical expenses. The sum of \$8000 for transportation was specifically proved and this was accepted. It was submitted that the receipts did not extend to a greater figure as there was no nexus provided between the receipts and the dates of travel. Counsel suggested that the Claimant failed to prove loss of earnings as set out in his pleadings. The medical report of Dr Barnes gave a recovery time of two months. The sum of \$96,000 was suggested as an appropriate figure in the circumstances. The total sum to be awarded for special damages therefore would be \$136,715.23.

## Analysis and Discussion

### General Damages

[44] The Court in the determination of damages must seek to compensate the Claimant for the injuries suffered once and for all. An assessment of damages must take into consideration past, present and future loss and must compensate the Claimant in such a way as if the tort had not been committed. The guiding principle is that a court must not seek to rely on precedents but must instead look to former authorities as a guide as to the current range of damages.

[45] In this case the award of damages will be reduced by virtue of the finding that the Claimant was 70% contributorily negligent.

[46] The Claimant in the case of **Trevor Facey** suffered a crush injury to his little finger. The severity of those injuries is not comparable to the injuries of the Claimant in this matter. The authority of **Trevor Clarke** appears to be more in line with the injuries suffered by the Claimant. The injuries suffered by the Claimant in **Lorenzo Ward** were more severe than that of the Claimant in this case. Ward had a 6% impairment of the whole person. He was unable to make a fist and could not perform basic tasks for himself.

[47] The case of **Trevor Clarke** is accepted as the authority most aligned to that of the injuries of the Claimant. The award of \$565,000 in June of 2000 at a CPI of 54.5 updates to \$1,219,155.96 using the CPI for January 2022 (117.6). When reduced by 70% the award would be in the sum of \$365,746.96.

### Special Damages

[48] The Claimant in his witness statement outlined that he went to the Port Maria Hospital on two occasions. On the first date, the 17<sup>th</sup> of October 2014 he was unable to see a Doctor, he left and returned the following day. On that day he was examined and sent to the Annotto Bay Hospital, he returned to the Port Maria Hospital and was treated there.

- [49] There was no contention in relation to the medical expenses which amounted to \$32,715.23. Only three of the receipts for transportation were dated amounting to \$8000. The remaining receipts were for travel to Kingston, and from St. Ann's Bay to Port Maria. The receipt for transportation from St Ann's Bay to Port Maria Hospital was explained by the witness statement however there is no nexus to the receipts for the trips to Kingston. The travel expenses on the evidence totals \$12,000.
- [50] The evidence of loss of earnings was set out by the Claimant in his witness statement. He indicated that he earned a sum of \$12,000 weekly and that due to the accident he was unable to work for a period of 106 weeks. He was unable to use his right hand as he could not grip tools, he says he has been left at a disadvantage on the job market.
- [51] The medical evidence of Dr Denton Barnes did not support this. The prognosis outlined in the medical report indicated *"he is not a candidate for surgical correction of the deformity, he is to continue his exercises and should be able to do normal duties. Mr. Edwards is a Mason by profession and should be able to continue as a Mason but with periods of rest due to pain in the hand."* Of significance, is that the Claimant attended on Dr Barnes's office on the 22<sup>nd</sup> of May 2015, the accident occurred on the 16<sup>th</sup> of October 2014. He was discharged from the Doctor's care on the 31<sup>st</sup> of July 2015. The medical report from the Port Maria Hospital was also dated a year following the accident. Although the Claimant mentioned being treated at St. Ann's Bay Hospital there is no report from that institution. There is therefore no evidence before this court to substantiate a claim for loss of earnings for the period stated.
- [52] Counsel for the Defendant submitted that a sum of \$96,000 was appropriate based on the fact that he was discharged by Dr Barnes two months after his initial visit. I am minded to accept that submission, as there is no evidence as to the extent of his injury and its impact on his job prior to this medical report.

**[53]** The total sum to be awarded for special damages is that of \$140,712.53. When reduced by 70% the award is \$42,213.75

**[54]** There is no evidence before the court to find that the Claimant is handicapped on the labour market as he is able to perform his previous job as indicated by the medical report.

**Orders:**

1. General Damages is awarded in the sum of \$365,746.96 with interest at 3% from the 4<sup>th</sup> of November 2016 to the 25<sup>th</sup> of March 2022.
2. Special Damages is awarded in the sum of \$42,213.75 with interest at 3% from the 16<sup>th</sup> of October 2014 to the 25<sup>th</sup> of March 2022.
3. Costs to the Claimant to be agreed or taxed.