



[2022] JMSC Civ.60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV01033

BETWEEN

COLLIN GAYLE

CLAIMANT

AND

LEONDALE KELLY

DEFENDANT

IN OPEN COURT

Ms. Antoinette Wynter and Ms Ishia Robinson instructed by K. Churchill Neita and Co. for the Claimant

Mr. Clifton Campbell and Mr. Matthew Palmer instructed by Archer Cummings for the Defendant

Negligence – Contributory Negligence

Heard: May 2nd and 13th 2022

Carr, J

Introduction

[1] The Claimant, Collin Gayle, was standing along the road way in the vicinity of Woodlawn Road and the Mocho Main Road at approximately 7:00pm on the 13th of June 2015. He was waiting to cross the street to go into a shop when he heard the sound of screeching tyres behind him. He felt an impact to his left side and he fell on top of the bonnet of a car. The vehicle travelled with him on the bonnet for a little distance and then it came to a stop. He fell on the ground right in front of

the shop and the car was behind him. He was taken to the hospital by the driver of the motor vehicle where he was diagnosed and treated for injuries to his leg and arm.

Issue

- [2] Whether the Defendant, Leondale Kelly is liable in negligence for the injuries sustained by Collin Gayle.
- [3] Whether Collin Gayle was contributorily negligent or caused the collision.

Decision

- [4] After a careful analysis of the evidence I found that Mr. Kelly was not responsible for the collision that occurred on the 13th of June 2015, and therefore was not liable for any injuries sustained by Mr. Gayle.

Analysis and Discussion

- [5] 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.
- [6] 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...”.¹

[7] 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 Section 3 (1) of The Law Reform (Contributory Negligence) Act which states as follows:

“Where any person suffers damages as the result partly 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.”

[8] There was no issue raised with the fact that Mr. Kelly owed Mr. Gayle a duty of care. The point of contention was whether or not Mr. Kelly breached that duty. It was accepted by Counsel on behalf of both the Claimant and the Defendant that the determination of this fact rested wholly on the credibility of the witnesses.

[9] Mr. Gayle gave a witness statement which stood as his evidence in chief he was thoroughly cross-examined by Counsel and there were several inconsistencies and discrepancies which were brought to the fore.

[10] The claim commenced by way of a claim form filed on March 27, 2017. This was almost two years after the collision. In that claim form it was averred that, *“on or about the 13th day of June 2015 the Claimant was walking along the **right hand side (my emphasis)** of the Mocho Main Road in the parish of St. Elizabeth in the*

¹ Charlesworth & Percy on Negligence 7th ed. P. 671

vicinity of Ms. Faye's shop heading in the direction of Nightingale Grove and while walking thereon he heard the screeching of tyres coming from behind and thereafter felt an impact to the back of his legs after which he was thrown into the air and then he fell on the ground...".

- [11] In the Particulars of Claim which was filed on the same date at paragraph 3, the claim was outlined in this way;

*"On or about the 13th of June, 2015 he was walking along the **left hand side (my emphasis)** of Mocho Main Road in the parish of St. Elizabeth in the vicinity of Ms. Faye's shop heading in the direction of Nightingale Grove."*

- [12] Counsel for the Defendant in his submissions, pointed to the inconsistency between the two documents relative to which side of the road Mr. Gayle said he was on. It was argued that he was clearly uncertain as to whether it was the right or the left. Ms. Wynter argued that it was a genuine mistake, as the claim form referred to the right hand side of the road. Further she asked the court to take note that an amended particulars of claim was filed on the 22nd September 2021 which corrected the obvious error.

- [13] I agree with Mr. Campbell, that this inconsistency cannot simply be explained by categorization as an "obvious error". It becomes critical when you consider the evidence of Mr. Gayle in totality.

- [14] In his witness statement, Mr. Gayle said that he was walking along the Mocho Main road until he reached near to the intersection. He stood at the intersection facing Ms. Faye's shop. He looked to his right up Woodlawn Road and before he could turn left to look up and down Mocho Road he heard what sounded like the screeching of tyres from behind him. He felt an impact to his left side and he fell on top of the bonnet of a car.

- [15] His evidence differs from what he pleaded in his initiating documents. In the claim form and particulars of claim he stated that he was walking along the roadway, not

standing. Additionally, the pleadings indicated that he felt an impact to the back of his legs and he was thrown into the air and fell to the ground. In his witness statement he said that he was hit on the left side and that he fell on the bonnet of the car which carried him across to the left hand side of the road. There is no explanation for the inconsistency between what is contained in the pleadings, which is the case a Defendant is to answer to, and the evidence. This is significant in light of the fact that the pleadings were prepared closer to the time of the collision and it would be expected that it would provide a more accurate account of the events at that time.

- [16]** The evidence of Mr. Gayle is also diametrically opposed to the medical evidence which is before this court. A medical report from the Mandeville Regional Hospital was admitted as Exhibit 1. The information contained therein was obtained from Mr. Gayle's medical record and the report was dated December 19, 2016. He was diagnosed as having a fracture of the left humerus and a fracture of the right tibia and fibula. Mr. Gayle in cross-examination said that he was hit and he "drop" on the bonnet. He said in evidence that he was hit to his left side he doesn't indicate which part of his body connected with the ground or the bonnet of the car.
- [17]** In his witness statement he indicated that he had small cuts and bruises over his leg, head and foot and that his right ankle was swollen. There is no mention of this in the medical report. He further stated that the cuts were cleaned and dressed, if that was in fact the case I would expect that it would be mentioned in the report.
- [18]** I find it curious that Mr. Gayle was hit on the left side of his body but his injuries were to the right side of his leg. The right tibia and fibula are the lower part of the leg, without any evidence from him as to how he fell after the collision it is reasonable to assume that the contact of the car was made with the right side of his leg as opposed to the left. The medical evidence therefore contradicts the evidence of Mr. Gayle that he was hit to his left side, since the injury was to his right leg.

- [19]** There is also nothing pleaded in the claim form and particulars of claim to indicate that Mr. Gayle was carried on the bonnet of Mr. Kelly's car some distance to the left side of the road, instead it was said that he was thrown into the air and fell to the ground. In this case the pleadings are inconsistent with the evidence of Mr. Gayle on matters that go to the root of his credibility.
- [20]** The evidence of Mr. Kelly is far more credible. From the outset his case was that Mr. Gayle in an attempt to cross the road ran into the path of his motor vehicle and was therefore the cause of the accident. He filed a witness statement which stood as his evidence in chief. At paragraphs 3 and 4 he outlined his version of the collision.
- [21]** In summary he indicated that he observed three vehicles parked to his left as he was approaching the intersection. Upon passing the first two motor vehicles he saw a man dressed in full black. The man walked out into the road and into the path of his motor vehicle from between the two parked cars. He first saw the man some five feet away from his vehicle, although he applied his brakes the left front section of his vehicle hit the man and he fell on the windscreen then rolled off the vehicle.
- [22]** Apart from saying that the man walked, as opposed to ran, into the path of his vehicle, and in cross examination saying that there were two cars parked instead of three, as per his witness statement, there is no real divergence as to the circumstances surrounding the actual collision. I did not find that he was discredited in any way under cross examination.
- [23]** His evidence coincides with the medical report and suggests that Mr. Gayle was indeed on the left hand side of the road when he was hit. That is why his injuries were to the right tibia and fibula. It is a reasonable inference to be drawn that when he fell on the bonnet of the car and fell to the ground that he injured his left humerus.

[24] The fact that he fell on the left hand side of the road is also consistent with the evidence of Mr. Kelly. Mr. Gayle suggested that he was hit on the right hand side of the road and carried on the bonnet to the left hand side of the road. If the collision occurred on the right hand side of the road, as Mr. Kelly came around the corner, then Mr. Gayle would fall on that side of the road. There is no explanation as to how the car could have carried him across the road to the left hand side which was described as some 35 feet away. There was no indication of speed or any evidence that Mr. Kelly lost control of his vehicle.

[25] By walking out into the roadway Mr. Gayle failed to exercise due care and caution in crossing the street, and this resulted in the collision with Mr. Kelly's vehicle. Mr. Gayle did not deny that he was dressed in dark clothing, and I accept and find that it was difficult for Mr. Kelly to see him as he came around the corner. I also accept that Mr. Kelly did all that he reasonably could to avoid the accident, by applying his brakes as soon as he saw Mr. Gayle in the roadway.

Conclusion

[26] Mr. Gayle has the burden of proving his case on a balance of probabilities. In light of the inconsistencies between his pleadings and his witness statement as well as the discrepancy between his evidence and the medical report, it is my finding that he has failed to do so. The collision was caused solely by the actions of Mr. Gayle and I find that Mr. Kelly is not liable to him in negligence for any injuries sustained as a result.

Orders:

1. Judgment for the Defendant.
2. Costs to the Defendant to be agreed or taxed.