



[2015] JMSC Civ.69

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

**CIVIL DIVISION**

**CLAIM NO. 2011HCV04066**

**BETWEEN BILLARD GRAHAM CLAIMANT**

**AND JEREMY WRIGHT DEFENDANT**

**Mr. Leonard Green and Ms. Sylvan Edwards instructed by Chen Green & Co. for Claimant**

**Ms. Nicosie R. Dummett for the Defendant**

**Heard: December 1, 2014 and April 23, 2015**

**Negligence - Motor vehicle accident - credibility of witnesses - Personal injury – quantum of damages**

**LINDO J (Ag.)**

[1] This is a claim by Mr. Billard Graham filed on June 22, 2011 in which he alleges that on August 17, 2009, the defendant, being the driver of Nissan motor truck registered 7483FK so negligently drove, managed and/or controlled the vehicle causing same to collide into his Honda motor cycle as a result of which he sustained personal injuries, suffered loss and damage and has incurred considerable expenses.

[2] By his defence filed on October 12, 2011, the defendant is disputing the claim alleging that the accident was solely caused or alternatively significantly contributed to by the negligence of the claimant. The defendant is contending that the claimant was negligent as he was speeding and driving in a negligent manner causing his motor cycle to overturn and failed to keep proper control of his motor cycle when he was travelling on loose gravel.

**[3]** The court has the task to decide how the accident happened based on the evidence placed before it, and to determine whether there was negligence on the part of any of the parties. The task is made difficult because the litigants and their witnesses have provided opposing versions of how the accident happened.

**[4]** Before dealing with the merit of the case however, I must address a procedural matter which was raised at the end of the hearing.

**[5]** Mr. Green, lead counsel for the claimant, made an oral application for the defendant's statement of case to be struck out on the basis that the defendant has not set out his case. He conceded that the point ought to have been taken earlier in the proceedings but gave no reason for it to be taken at the stage where all the evidence had been heard by the court. He indicated that the error by the defendant is not procedural but is material and of importance when the court has to determine which version to rely on.

**[6]** Ms. Dummett submitted that the application should have been in writing and should have been made at the Case Management Conference or Pretrial Review stage and if the court was minded to grant the claimant's oral application the defendant would seek an order to amend the defence. She noted that the defence as filed, was in response to the claim, as pleaded, and that based on the claimant's claim, he should not be allowed to rely on any factual allegation that was never pleaded.

**[7]** I accept that the court exists for the purpose of determining the real issues of controversy between parties. As the matter has proceeded thus far with the claimant and defendant providing evidence to substantiate their version of the events, and witness statements were filed and the parties took no issue, I will deny the claimant's application. I find that on the pleadings the defendant answered the claim, pleading contributory negligence and providing particulars of negligence of the claimant. Further, and to ensure procedural correctness, both the claimant and defendant would have needed to seek court orders to amend their statements of case bring them in line with the evidence produced.

**[8]** I believe the interest of justice would dictate that the court treats with the matter based on the evidence as presented.

**[9]** In view of the dispute between the parties, the issue that falls to be considered is who should be held responsible for the accident. Additionally, consideration must be given to the extent of such liability. I have therefore thoroughly considered the evidence put forward by the parties and their witnesses to come to a determination.

**[10]** The claimant's case is that on the day in question he was travelling from along Station Road heading in the direction of Negril and on reaching a certain section, he put on his indicator to make a left turn into a lane when the motor truck which was travelling close behind him, and transporting lumber, began to overtake his motor bike and as it "proceeded to pass my motor cycle, pieces of lumber fell out of the said truck and hit me off my motor cycle". The next thing he says he remembers is waking up in the Savanna-la-mar Public General Hospital where he was admitted and treated for multiple body injuries and fractures and that he was taken to the Cornwall Regional Hospital (CRH) for further treatment.

**[11]** It is Mr. Graham's evidence that after he was discharged from hospital he was an outpatient for a little over a year and he was subsequently re admitted to the CRH where he did surgery "to get his right hand pinned". He indicates that he spent one week in the hospital.

**[12]** He further states that before the accident he would earn about \$40,000.00 per month from selling farm produce and he also earn money from doing welding, but because of the injury to his hand he is unable to use it for long periods and his earnings from farming have been severely affected and he has stopped welding altogether "because it is too painful an exercise for me"

**[13]** In cross examination, the claimant insisted that the defendant was travelling behind him at a distance of nearer than five feet, for about four minutes. He stated that he was travelling close to the corner because he wanted to make a left turn and he denied the suggestion that the accident was caused by him when his motor cycle skidded and that he had caused the accident because of his carelessness. He agreed

that his friend Tuffy visited him in hospital and told him what happened that day but denied that it was Tuffy who gave him the registration number of the vehicle.

**[14]** Mr. Leighton Clarke, who said he was called Tuffy, was the witness called by Mr. Graham. His evidence is that he was travelling on his motor bike from Negril to Little London and he saw the claimant coming towards him from the opposite direction. He states that he observed that his left indicator was on and the truck which was travelling close behind swerved to his right and started to overtake Mr. Graham's motor bike and as it passed the motor cycle, pieces of lumber that the truck was transporting fell from the truck and hit him off his bike. He further states that the truck did not stop and that he saw Mr. Graham on the ground lying unconscious and bleeding from his head.

**[15]** When cross examined by Ms Dummett, he insisted that he did not visit with the claimant in hospital and indicated that he was not a good reader and that in relation to that aspect of the witness statement which indicates that he visited the claimant in hospital, he said "this was put together by someone".

**[16]** He further stated that the soft shoulder on the side the claimant was travelling "had gravel all over it. Things washed down". He indicated that he did not see any board "tied down" but saw it "stick over the top of the cab" from a distance of about "less than a chain". He pointed out the distance which was accepted to be 16 feet. He said that the cab of the pick-up was higher than the body, and that he "couldn't judge the amount of board", but indicated that the pick-up truck swerved to the right and one piece of board hit Mr. Graham off his bike and he fell with the bike. He explained that the board did not fall to the ground "because someone hold it"

**[17]** In his account of the accident, the defendant said that he was driving at 40 – 50 km/ph and the claimant was travelling in front of him, a distance of about six to ten feet when he drove onto the soft shoulder, slid on loose gravel, slid to the right and into the path of his vehicle. He states that he "swung to the right and went in front of the claimant and stopped." He indicates that he felt and heard an impact of something but he was not sure if it was the bike or the claimant that made contact with his vehicle.

**[18]** In cross examination, he said he sought to enquire what caused the impact by stopping and looking and he looked behind him and saw the gentleman and the bike in the road. He denied overtaking the bike and stated that the bike was in front of his vehicle “before it fell into my vehicle”. He states that he went to the Negril Police Station where he told the police that the bike turn over and “contact with my pick- up truck.”

**[19]** Mr. Lambert Dixon, the witness for the defendant, gave evidence that he was a front seat passenger in the vehicle driven by the defendant and there were three other persons in the vehicle. His evidence further is that the claimant was riding in front of the defendant’s vehicle, he turned left onto a gravel road, “picked up a skid”, and fell off.

**[20]** In cross examination, Mr. Dixon stated that when he first saw the claimant he was about 10 feet away and that he did not hear a noise until “the bike turn off the road” and that he did not feel an impact to the vehicle and did not know what caused the noise. He stated that the rider of the bike fell in the path of the motor vehicle, Mr. Wright swerved around the rider, stopped and shortly after proceeded to the Negril Police station.

**[21]** It is well settled that in a claim for negligence, in order for the claimant to succeed he must provide evidence to satisfy the court on a balance of probabilities that the defendant owed him a duty of care at the material time, that there was a breach of that duty and it resulted in damage to him.

**[22]** It was submitted on behalf of the claimant that the loss and damage sustained by the claimant was a result of the negligence of the defendant.

**[23]** On behalf of the defendant Ms. Dummet submitted that the issue to be determined was whether the claimant skidded and fell in the path of the defendant’s vehicle or whether the defendant’s boards hit the claimant off his motor cycle. She further submitted that as the defendant has pleaded contributory negligence, the court should consider whether the claimant was the author of his own misfortune entirely and if not entirely, to what degree or proportion.

**[24]** Aspects of the evidence on which all the witnesses seem to agree include that the claimant was riding on the left in the same direction as the defendant, and in front of the defendant's truck which was transporting board, that immediately before there was any sound or impact, the defendant swerved to his right and that after the accident the motorcycle was more to the left of the road, and the defendant came to a stop in front of the claimant and his motorcycle.

**[25]** Having had the opportunity to assess the witnesses as they gave evidence and were cross examined, I found the claimant to be frank and he remained unshaken during cross examination. The defendant on the other hand, I did not find to be credible as he claimed to have felt and heard an impact of something making contact with his motor vehicle but expressed uncertainty as to whether it was the claimant or the motor bike and he did not exit his motor vehicle to see what happened. I was therefore not impressed with his testimony.

**[26]** The two witnesses were not very helpful either. Mr. Dixon, who said he was in the front of the pick- up truck stated that he did not feel an impact to the vehicle and in relation to the cause of noise he heard, his response was "I don't directly know". Mr. Clarke, who said he was travelling from the opposite direction, was unable to state how close to the soft shoulder of the road the claimant was travelling.

**[27]** I find on a balance of probabilities that the claimant was travelling ahead of the defendant along the straight Little London main road. I find that he had slowed down and indicated to turn left but had not yet turned at the section where there was loose gravel on the road. I also find that the defendant, driving at a speed of 40 -50 kmph which I find excessive in the circumstances, swerved to the right in the act of overtaking, and a piece of the boards he was transporting slid to the left and hit the claimant causing him and his motor bike to fall and he thereby sustained injuries. I find that after the accident, the claimant and the motor bike were to the left of the road and that the pick- up truck stopped in front of the motor bike and that the defendant left the scene soon thereafter and went to the Negril police station.

**[28]** I accept the evidence of the claimant that he was riding his motor cycle on the left at about 15mph, that he indicated an intention to turn left and that the defendant driving at an excessive speed and in the act of overtaking, swerved to the right and board he was transporting fell and hit him from his motor cycle causing injuries. I therefore find on a balance of probabilities that the claimant has made out his case against the defendant for negligence.

**[29]** The injuries sustained by the claimant to his right humerus in my view are more consistent with his version that board being transported by the defendant, slid and hit him causing him and the bike to fall , when the van was in the process of swerving to overtake him. There is no evidence to suggest that there was any impact of the claimant's right hand or side with the defendant's vehicle or even with the ground or any evidence of any bruises suffered by the claimant and neither is there any evidence of any damage to the motor bike or to the defendant's vehicle. I therefore find it unlikely that the claimant could have sustained the injury stated in the medical report in the manner in which the defendant is suggesting.

**[30]** The burden of proving contributory negligence is on the defendant. There is nothing on the evidence from which I can find that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his injury as I do not accept the defendant's version of how the accident happened. I therefore do not find that the claimant was contributorily negligent.

**[31]** I will now determine the quantum of damages that the claimant should receive.

**[32]** The medical report of Dr Gilbert reveals that the claimant suffered an open fracture of the right humerus, was seen at the SPH and placed in a splint and was transferred to the CRH where he was diagnosed with a non union of the right humerus and underwent surgery for open reduction and internal fixation of the right humerus augmented with bone graft. This non-union of the right humerus was expected to heal within six months and he required physiotherapy to regain the range of motion and strength in the shoulder and elbow.

**[33]** Counsel for the claimant referred to the following cases to assist in determining the level of damages:

1. **Marsha Page v Malcolm Campbell**, CL 2002/P 006, unreported, delivered June 29, 2004, where the claimant sustained numerous soft tissue injuries, lacerations to face and neck, numerous abrasions and lacerations to upper left limb, laceration over the left patella, pain and tenderness to left ankle and the left humerus had a displaced fracture at the neck and was awarded \$1,700,000.00 (CPI 76.81) which updates to \$4,930,000.00 applying the current CPI of 221.5.
2. **Dennis Brown v Pre Mix Ltd.**, Khans Vol. 5 page 99, where the plaintiff sustained injuries to both humerus and wrist, did not have the surgical procedure of bone grafting, was assessed as having a 19% whole person disability and was awarded \$850,000.00 in March 2001 (CPI 56.52) which converts to \$3,400,000.00, and
3. **Hubert Watson v Guy Fraser** Khans Vol. 4, page 101, where the claimant, a 76 year old tractor driver, had fractures with displacement of carpal bones of left wrist requiring bone grafting, multiple lacerations and bruises and blow to head and had to undergo surgery for bone grafting and an award of \$300,000.00 was made in March 2001(CPI 56.52 ) which converts to \$1,200,000.00 applying the current CPI of 221.5.

**[34]** He expressed the opinion that the case of Marsha Page pales when compared to the case at bar, as the injury to the humerus was minor and was of the view that “an award for general damages would reasonably fall in the region of \$3,000,000.00”.

**[35]** Counsel for the defendant referred to the following cases as instructive:

1. **Ivan Clarke v Lionel Bayliss**, reported in Harrison’s Assessment of Damages for Personal Injuries at page 255, where the claimant suffered undisplaced fracture of the greater tuberosity of the left humerus, abrasions to left palm, leg and pre-patellar and paresthesia of the left knee and was awarded \$40,000.00 general damages in May 1992(CPI 16.11) which updates to \$552,000.00 current CPI 221.5



2. **Brendolph Ashley v Delval Nugent**, reported in Harrison's Assessment of Damages for Personal Injuries at page 254, where the injuries were fracture of the humerus in two places, dislocation of right elbow, deformity of the humerus with wasting of muscles around the upper third of the right arm with limited range of movement and was assessed as having 25% permanent functional impairment of right upper limb and an award of \$50,000.00 was made in November 1990 (CPI 6.73) which updates to \$1,650,000 (CPI 221.5)
3. **Thomas Williams v Carl Brown**, Khan's Vol. 4, page 98 where an award of \$355,000.00 made in March 1997 (CPI 42.67) which updates to \$1,846,000.00 (current CPI 221.5). In this case the claimant suffered deformed right shoulder with loss of normal contour, swollen and tender shoulder with limited range of motion and persistent pain and was assessed as having 23% whole person disability
4. **Leroy Swaby v Steve McIntosh**, Khan's Vol. 6, page 91 An award of \$740,000.00 was made January 2007 (CPI. 101.10) which updates to \$1,628,000.00 where the claimant had tenderness and swelling of the left shoulder and left arm, comminuted midshaft fracture of left humerus and tenderness to left ankle.
5. **Pauline Willis (bnf James Willis) v Fitzroy Hamilton and Barrington Laidley**, Khan's Vol. 3, page 110 where an award of \$40,000.00 was made June 1990 (CPI 5.79) which updates to \$1,532,000.00 (current CPI 221.5) where the claimant suffered unconsciousness, fracture of the right humerus with deformity and tenderness of the right upper arm, multiple bruises over left side of body ; and
6. **Tenisha Samuels (bnf Calvin Samuels) v Grace Watt & S. Lewin** Khan's Vol. 6, page 92 where an award of \$900,000.00 was made in November 2005 (CPI 94.57) which updates to \$2,160,000.00 (current CPI 221.5). In this case the claimant had pain and swelling of the right elbow, displaced fracture of olecranon and T- condylar fracture of the distal humerus.

[36] With reference to the case of **Marsha Page**, Counsel for the defendant submitted that it was not a good case for comparison as Marsha Page was disfigured

and suffered keloid scarring. She also submitted that there is no medical evidence that the claimant in the case at bar, suffered a permanent disability as a result of his injuries or that he had undergone physiotherapy and that the “question of mitigation or failure to mitigate is a live one”. She therefore recommended an award of a range between \$800,000.00 and \$1,200,000.00 for general damages.

[37] I have taken into account the injury and subsequent surgical intervention outlined in the medical report of Dr Gilbert and having reviewed the cases referred to by both counsel, I find that the cases are not comparable as the claimants in those cases had other significant injuries or were assessed as having a degree of disability.

[38] The court is of the view that the injury sustained by Mr. Graham should attract a lower award than those made to Marsha Page, Dennis Brown, Brendolph Ashley, Thomas Williams, Leroy Swaby and Tenisha Samuels as they had other injuries while there was no indication that the claimant in the case at bar had more than the injury to his right humerus.

[39] On the issue of mitigation, there is authority that the defendant has the burden of proving that the claimant could have mitigated his loss. I am guided by the decision in **Geest PLC v Lannsiquot (St. Lucia)** 2002 UKPC 48 where the issue for the Board was whether the claimant acted unreasonably in refusing surgery and therefore failed to mitigate her loss. Lord Bingham of Cornhill at paragraph of the judgment had this to say: “...it should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to meet it...”

[40] The defendant has not provided any notice to the claimant but has raised the issue in relation to the claimant’s non-attendance for sessions of physiotherapy. I am satisfied based on the claimant’s evidence that he stopped going “through the journey so far I couldn’t afford it”

[41] On the question of the award to be made to the claimant, in my opinion an award of \$3,000,000.00 as suggested by Counsel for the claimant would be excessive in the

circumstances as the only evidence of injury was to his right arm and when seen by the doctor one year after he denied having any pain and further, the only evidence in relation to any curtailment of activities he formerly pursued is that he can no longer do welding. I am therefore of the view that an award of \$1,400,000.00 is appropriate in the circumstances, for general damages for pain and suffering and loss of amenities and I so award.

[42] For special damages, counsel for the defendant noted that the bulk of the claimant's claim under this head is for loss of earnings but that he has provided no proof to substantiate this claim. She referred to the cases of **Kenroy Biggs v Courts Jamaica Limited & Peter Thompson** delivered January 22, 2010 and **Owen Thomas v Constable Foster & The Attorney General of Jamaica** to make the point that the claimant is required to specifically plead and prove all special damages. She therefore submitted that in so far as the claimant has not provided proof of his earnings, especially where this is clearly significantly above the minimum wage, with no corroboration for same e.g. income tax returns, or at the very least receipts in respect of seeds purchased or fertilizer or other raw materials for his alleged business, that these should not be awarded.

[43] For special damages, the following has been pleaded:

Reasonable transportation expenses	\$10,000.00
Police Accident Report	\$1,000.00
Medical Report of Dr Gilbert	\$20,000.00
Royal Imaging Centre	\$16, 500.00
Medical expenses	\$13,132.00
Loss of earnings for 1year @\$60,000.00 pm	\$720,000.00
Attorneys-at-law cost	\$45,000.00.

**[44]** The claim for special damages in respect of transportation, police report, medical report of Dr Gilbert and receipt from Royale Imaging centre were agreed, being a total of \$47,500.00.

**[45]** In respect of the other items of special damages pleaded, the claimant has not shown that he had in fact incurred expense of \$13,132.00 and \$45,000.00 for medical expenses and attorneys-at-law cost, respectively, that he has claimed and neither has he strictly proved loss of earnings of \$720,000.00 as a welder and farmer and these sums are disallowed.

**[46]** There shall therefore be judgment for the claimant with damages assessed and awarded as follows:

General damages in the sum of \$1,400,000.00 with interest at 3% from the date of service of the claim form to today.

Special damages in the sum of \$47,500.00 with interest at 3% from August 17, 2009 to today

Costs to the claimant to be agreed or taxed.