[2020] JMSC Civ 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2011 HCV 00680

BETWEEN	**KEVIN MATTHIAS**	**CLAIMANT**
AND	**CRICHTON AUTOMOTIVE LIMITED**	**DEFENDANT**

Mr Sean Kinghorn and Ms Danielle Archer instructed by Kinghorn and Kinghorn for the claimant

Mr Kwame Gordon instructed by Samuda and Johnson for the defendant

5 – 6 February 2015 and 17 March 2020

Civil Procedure – Employers Liability – Duty of Employer to provide a safe place and system of work – Contributory Negligence – Assessment of Damages

D. FRASER J

INTRODUCTION

1. The claim in this matter is brought under the tort of employer's liability. The claimant alleges that the defendant failed to provide him with a safe place of work, for that on or about 15 April 2008 he was lawfully engaged in his duties as a detailer at the defendant's place of business when another one of the defendant's employees negligently placed a running board beside the motor vehicle in which he was working, so that, in the process of exiting that vehicle, he stepped on the running board and fell to the ground. The claimant further alleges that as a result of the negligence of the defendant's employee and of the defendant, he sustained injuries, suffered loss and damage and incurred expenses.
2. The defendant denies the claimant's allegations. Its defence is that the claimant did not injure himself during the course of his duties and could not have done so in the circumstances he alleges because, in 2008, the company did not use running boards. The partial defence of contributory negligence is also raised.

THE ISSUES

3. The following issues arise for consideration:

   I Were running boards being used by the defendant's business in April 2008, and if so, was the claimant injured during the course of his duties?

   II. If in fact the defendant used running boards, whether the defendant failed to provide the claimant with a safe place or system of work?

   III. If the claimant was injured during the course of his duties was he contributorily negligent?

   IV. If the defendant is found liable, what quantum of damages is due to the claimant?

I. Were running boards being used by the defendant's business in April 2008 and if so, was the claimant injured during the course of his duties?

4. The first consideration is whether running boards were on site on the day in question. If the answer to that question is no, then the claim cannot succeed. The claimant maintains that there was a running board which he had seen in use by the mechanic that evening 15 April 2008. In cross-examination he stated that the running board was about 3' long and about 1 ½' wide, and had about 6 sets of wheels on which it could go in any direction, as they are like a swivel. It was, he explained, like a skate board. He said it was used in the mechanical area to go under cars, but on the day in question it was being used in the detailing area as they were doing a "rush job".

5. At paragraph 5 of the Amended Defence filed 25 February 2013, the defendant denies that a running board was placed beside the motor vehicle. The defendant stated that if one was there, it did not belong to the defendant company which did not authorise its use. The defence maintains that running boards were first introduced to the business in December 2009.

6. Mr Crichton, Managing Director of the defendant supports the defence by stating in his statement that the start date of the use of running boards on the defendant's premises was December 2009. He however does not profess to knowing first hand the state of the premises on the date of the alleged incident. Mr Blondell Depass witness for the defendant was the supervisor at the time but he was unable to recall the state of the premises on the day in question.

Neither Mr. Crichton nor Mr. Depass was present when the Claimant allegedly fell; however based on their evidence the court is being invited to find that no running board was there to cause his fall. The defendant also relied on a receipt issued by National Supply Co Ltd on 3 December 2009 when it purchased two creepers i.e. running boards. The receipt is however not helpful in answering the question under consideration. It merely indicates that running boards were purchased in December 2009. It does not indicate that that was the first time the defendant had ever purchased running boards.

7. The question of whether a running board was on the defendant's premises on the day of the alleged incident is inextricably connected with the main issue of fact which the court has to decide, that is, was the claimant injured on the day in question while in the course of his duties, in the manner he indicated.

8. The claimant maintains that he was injured at work. In his witness statement he states that at the end of the work day, one of the managers asked two mechanics, Junior and Andrew and himself and Bruce Campbell as detailers to remain beyond the required work hours to finish servicing and cleaning one of the defendant's motor vehicles. He speaks of the vehicle being worked on by the four of them outside under a shed and that he turned on the lights when it became darker.

9. He indicated that after cleaning inside the vehicle he proceeded to exit the vehicle. He placed his left foot where he thought was ground but stepped on a running board, which moved and he found himself slipping. In his statement he indicated that as he was falling and trying to stop himself from falling, he hit his side on a piece of iron and hit his back on the door of the vehicle and on the ground.

10. When he was cross-examined he indicated that the door was right beside the post, but not resting on the post. Initially he also said the post was one foot away from the door then he said it could have been about four feet away. He said it happened fast and the hook of the door hit him after he hit his back on the post and he fell on his knee. He went on to indicate that he hit his left back and spine on the post and that the piece of iron that he said in his statement he hit into was the post. He maintained that he hit the metal post then the door hit him in his back.

11. In closing submissions counsel for the defendant argued that the difference in distances that the claimant suggested the door was away from the post, the equating of the post with the iron referred to in his statement, the first mention of him falling to his knee and the improbable sequence of events whereby he indicated his back hit into the post before his back also was hit by the door showed that the claimant was not speaking the truth.

12. The defendant, primarily through Mr Depass, maintained that the claimant was not injured on the job as he contends. Mr Depass says that he overheard other employees teasing the claimant that he had hurt his back after he fell from a wall, when he was engaged in spying on his baby's mother. It is therefore the defendant's case that it is not true that the incident alleged by the claimant occurred at all. Mr Depass testified that the claimant was being given money by the defendant's accountant, a Ms. Lewars, prior to 2008 to go to the company's doctor. Ms. Lewars was not called as a witness to speak to those assertions. Mr Depass maintains that the claimant was fired because he was always involved in fights and it was after the claimant was fired that he heard from the claimant directly that he had been injured, though he had already heard of it from the office.

13. Bruce was the detailing supervisor who the claimant said was working with him at the time he suffered the injury. When Mr. Crichton testified, he indicated Bruce was still working with the defendant company at the time of the trial. Bruce however was not called to testify. Neither was any other employee, some of whom continued to be employed to the defendant at the time of the hearing called to speak to when it was that the claimant started to complain about his back or that the incident did not happen at all.

14. What is clear is that the claimant did have an injury and was assigned lighter duties that he could manage because of that injury. An injury he maintains was sustained on 15 April 2008 and the defendant said pre-existed that date. Mr Gordon in his submissions contended that it is the claimant who must prove his injury. That is true. However it was the defendant that raised the matter of the claimant having a prior injury to his back in its defence and as such the defendant must prove that. It has not availed itself of adequate evidence to do so.

15. The claimant has the burden to prove on a balance of probabilities that he sustained the injury to his back while he was carrying out his duties at work. His evidence is supported by three medical reports which were admitted into evidence. The medical report from the Kingston Public Hospital signed by Dr Bolt dated 1 July 2010 was admitted into evidence as Exhibit 1; Dr Ravi Prakash Sangappa's medical report dated 23 February 2011 was admitted as Exhibit 2; and Dr Rory Dixon's report dated 25 March 2013 was admitted into evidence as Exhibit 3. The claimant's evidence is that he fell on 15 April 2008. At paragraph 12 of his statement he indicates that he went home and went to bed. He went to work the next day with some discomfort in his back. While at work he felt intense pain after he tried to lift a bucket of water. He went to the accountant and she sent him to a doctor. He got sick leave. Unfortunately no report from that first visit to a doctor was forthcoming.
16. The claimant's evidence at paragraph 14 of the witness statement is that during the night he had severe pains in his back. He was in torment and he could no longer walk. With the assistance of his wife and a co-worker, he was taken to the Kingston Public Hospital ("KPH"). That would have been 16 April 2008. The medical data that emanates from the KPH is that the claimant presented to KPH on 20 April 2008, that would be 5 days after the incident and 4 days after he was seen by the doctor near to his work place. It was indicated in the report that he presented with two days history of worsening back pain. He was diagnosed with lumbar disc prolapse, given analgesics and sent home with outpatient physiotherapy to which he responded well.
17. Apart from the slight discrepancies in the date that he presented to the KPH relative to the stated date of the injury, the significant value of this report is that it lends support to the claimant having sustained an injury in April 2008 within one or two days of the date indicated by the claimant. That by itself however does not mean that he could not have sustained an earlier injury.
18. Dr. Rory Dixon first saw the claimant on 5 March 2009 who complained of low back pain for a year. He was referred to physiotherapy. The claimant was seen again on 14 April, 16 June and 14 August 2010. He was last seen 6 March 2013. On none of his visits was he assessed as having any neurological deficit. He was not anticipated to have any permanent impairment. It was

recommended that he maintain a regular program of core strengthening exercises.

19. Dr Sangappa's report indicates that the claimant was seen by him for the first time on 29 March 2010. That would be two years after the incident and he referred him back to Dr Dixon who had seen him in 2009. Of importance is that Dr. Sangappa stated that the claimant's injury was consistent with the mechanism of the accident alleged by the claimant.

20. The evidence also disclosed that the claimant received National Insurance Scheme (NIS) benefits because he was injured on the job. These are payments which the NIS should not make unless the defendant provided documentation to substantiate the claim. See section 15(1) of the **National Insurance Act** and sections 3 and 4 of the **National Insurance (Employment Injuries) (Claims and Payments) Regulations 1970**. The court is aware that the assessment was only a provisional one however as the defendant produced nothing to rebut that assessment the court is inclined to accept it. Again, the evidence of Ms Lewars, the accountant would have been useful here, as she was the person who it appears submitted the information to the Ministry of Labour.

21. Having assessed the evidence I acknowledge but explain the inconsistencies in the account of the claimant regarding the sequencing of the accident, as being due to the passage of time and the claimant's inability to clearly recall the way the incident unfolded in each "frame of the action". They do not in my view suggest that the incident never happened. The claimant's account is also supported by the medical evidence and the evidence of his receipt of NIS benefits. The defendant has also not put forward cogent evidence in support of its defence that the claimant was previously injured and had by inference merely sought in effect to "extort" compensation from the defendant after he was dismissed for constant fighting. In light of all the evidence, I find on a balance of probabilities that there was a running board at the time of the claimant's injury on or around 15 April 2008 and that the claimant was injured when he fell after stepping on a running board.

II. Whether the Defendant failed to provide a safe place or system of work?

22. An employer has a duty to take care to ensure that the premises where his employees work are reasonably safe. This was so held by Straw J (Ag) (as she then was), in the case of ***Cranstan v Mars Auto Parts & Transmission Services Ltd*** CL1996/C117, jud. del. 16 December 2005. The employer's duty is however not absolute. It is sufficient if he maintains the premises in as safe a condition as an employer who takes reasonable care would (see ***Henry-Angus v The Attorney General*** C.L. H.111/1988 jud. del. 18 November 1994.

23. If the employer has an efficient system to keep the workplace clean and free from obstruction then that is all that is required of him (see ***Levesley v Thomas Firth and John Brown Limited*** [1953] 2 All ER 866, at 869 per Lord Denning). In the Trinidadian case of ***De Verteuil v Bank of Nova Scotia (Trinidad and Tobago) Ltd*** H.C.A. No. 2121 of 1995 jud. del. 12 July 2002**,** the bank employed professional cleaners to clean up during the night but the staff had the responsibility of cleaning up after themselves during the day. In those circumstances the court held that the bank was not liable for the injuries sustained by the claimant who had fallen in the kitchen of the Ellerslie Plaza branch of the defendant. There had been no history of slips and falls or complaints about the slippery floor prior to that incident, and as such the Bank was found to have done all that was reasonably demanded of it, in keeping its premises safe.

24. In the instant case the evidence is somewhat limited on both sides. Other than the oral warnings which Mr DePass says were given, there did not appear to be any signs that were installed or manuals distributed which would set out how employees were expected to conduct themselves or how equipment was to be stored after use. Paragraph 25 of the claimant's witness statement says that the defendant never instructed the workers about safety precautions at the workplace nor did the defendant have any safety seminars or training as it relates to safety at the work place.

25. Mr Depass on the other hand at paragraph 6 of his witness statement said that the safety procedure at the company in relation to the use of the running boards was that after use they were to be leaned on the wall so that nobody would slip on them. He also said running boards were never taken to the detailing area

because that area was wet and would present a safety hazard. In cross-examination he said that the claimant was the longest serving employee so he would know the safety instructions, he corrected the others. He said he (Depass) would correct the employees when he saw them doing wrong and that this happened on a regular basis. He also said he walked the floor a thousand times that day between the garage and the detailing bay but he did not see any running boards. He said once work was being carried out he would be physically there to supervise the work.

26. It is very unlikely that Mr Depass would, in carrying out his role as supervisor, be standing over the workers to monitor their every action in order to see that they were doing what they were supposed to do. In fact, he was not bound to have done so. As outlined by Singleton LJ in ***Woods v Durable Suites Limited*** [1958] 1 WLR 857 the standard duty of the employer is to take reasonable care so that his workmen are not subjected to unnecessary risk. In this instance, I believe Mr Depass is exaggerating somewhat the monitoring role he played as supervisor. Also, even if the rules were in place, the fact that he indicated he had to correct the workers frequently, means that those rules were often not obeyed; a fact which would have been known to him.
27. I accept that there was one car on which work needed to be completed. I find that the mechanics and the detailers were working together after regular working hours on a “rush job” to get the job done, which is what caused the running board to be in an area that it would not normally be in. I find that there was a running board that was not properly stowed after use. I accept that the claimant was working inside the car and that the mechanics were attending to their duties under or beside the car.
28. Counsel for the defendant argued in closing submissions that the claimant’s story was incredible as the mechanics would not risk going underneath the van while he was detailing inside. The evidence from the claimant was however that the horses are triangular metal stands about two feet high that have metal hooks for when the van goes on it. He denied that the vehicle could be toppled off the horse by movement. He did however indicate that the bus rocked when he was coming out.
29. I accept the evidence of the claimant that the two types of work were ongoing at the same time. It clearly was not ideal; however it is explained by the fact

that this was a “rush job” after hours. It seems clear to the court that this is a situation where, to get the job done, applying a metaphor from the case of ***General Cleaning Contractors v Christmas*** [1953] AC 180, the employees “made their decisions on narrow window sills and other places of dangers and in circumstances in which the dangers [were] obscured by repetition”. I adopt the reasoning of Lord Green in ***Speed v Thomas Swift and Co Ltd*** [1943] KB 557 at 567 when he said

> *“In addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen foreseeable carelessness”.*

30. I do not believe that the expectation reflected in ***Speed v Thomas Swift and Co Ltd*** was met in this instance in a context where employees were engaged in completing a job quickly, after regular working hours and as night was falling. In the circumstances that existed then, I have formed the view that the defendant did not provide a safe system of work for its employees, in particular the claimant in this instance.

III. Was the claimant Contributorily negligent?

31. Lord Simon in ***Nance v British Columbia Electric Ry Co*** [1951] 2 All ER 448 at 450 stated that where a man is part author of his own injury he cannot call on the other party to compensate him in full. In other words, if the claimant should have taken care but failed to take care, then he cannot expect the defendant to pay him all that he would otherwise be entitled to. In ***Bailey v Gore Bros Ltd*** (1963) 6 WIR 23 Lewis JA said:

> “*If the Claimant fell because he failed to look where he was going in conditions which admittedly called for the exercise of care, that this amounted to culpable failure to take care for his own safety, and that by this lack of care he contributed to his own injury.”*

32. I adopt that position. At paragraph 10 of his witness statement, the claimant said that he saw the mechanic using the running board while he was servicing the vehicle but he did not pay him any attention as he was focusing on his duties. He did not know when the mechanic went under the vehicle or came

back from under it or where he left the running board. He did not however expect him to leave it at the outside of the door of the vehicle where he would have to exit. He did not volunteer neither was he asked why he did not have that expectation.

33. In cross-examination, the claimant said when he was exiting the car he was not looking down. He said he was speaking to Bruce. He was not looking where he was putting his feet. It was also his evidence that the light in the detail area kept flickering. He could barely see when he was coming out. It is evident therefore that he ought to have taken more care when exiting the vehicle given all those circumstances — knowing that the running board was in the vicinity of where he was working, and on his own evidence, knowing that the area was poorly lit. He did not take as much care as he should, but I find this inattention not to be a very significant contributory factor. I therefore hold that damages awarded to him should be discounted by 15%.

IV. What quantum of damages is due to the claimant?

Special Damages

34. Special Damages have been agreed at $52,800.00 for medical expenses and $30,000.00 for transportation which together total $82,800.00. In the Amended Particulars of Claim the claimant had claimed Loss of Earnings in the amount of $68,000.00. However no submissions were made with respect to this item of special damages. I therefore confirm the amount the parties have agreed as special damages, subject to it being discounted based on the claimant's contributory negligence.

General Damages

35. The Amended Particulars of Claim does not seek an award of damages under the head of Handicap on the Labour Market/Loss of Earning Capacity, though in submissions made on the claimant's behalf, such an award has been sought. The Civil Procedure Rules (CPR) indicates that a claimant must include in the claim form or particulars of claim a statement of all facts on which the claimant relies (CPR 8.9). CPR 8.9A outlines the consequence of not setting out the case. The consequence is that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could

have been set out there, unless the court gives permission. It does not appear that any such permission was sought or obtained at the Case Management Conference, and was not sought at trial. In the circumstances therefore, the award has to be limited to the head of pain and suffering and loss of amenities which the claimant suffered as a result of the injuries he sustained.

36. The medical reports received in evidence generally outline his injuries as follows:

    a. Lumbar disc prolapse
    b. Lower back strain
    c. Pain in back

37. Dr Dixon, the consultant orthopaedic surgeon who saw the claimant in 2009 and then again in 2010 noted that the claimant had some back pain which is not uncommon with a back strain injury. He also indicated that the claimant was incapacitated for 6 months, but he did not anticipate the claimant having permanent impairment. The records for the KPH however do not support the statement by the claimant that he spent three days or by Dr. Sangappa that the claimant spent 2 days in the hospital. The KPH record indicates that *"he was treated with rest and analgesic for acute pain and sent home with outpatient physiotherapy to which he responded well."*

38. Counsel for the claimant cited several cases. However many were unhelpful as they concerned persons who were more seriously injured than was the claimant in this matter. Although the plaintiff in the case of ***Marcia Leslie v Danesh Panoe and Others*** reported at page 150 of Khan's Volume 5 had similar injuries to those sustained by the claimant, that was an uncontested case and as such I will not place much reliance on it. In the cases relied on by the defendant the plaintiffs were also more seriously injured than the claimant.

39. The following cases have assisted me in arriving at my decision:

    a. ***Avril Johnson v Lionel Ricketts and ors*** reported at Khans Vol 5 page 248. In this case the plaintiff was injured in a motor vehicle accident. She sustained the following injuries:
        - Whiplash causing back pain

- Swollen and bruised hip
- Glass in eyes causing watering eyes and gritting sensation
- Battered head.

She was treated with analgesics and muscle relaxants. She continued to have persistent back pains. She was diagnosed as having moderate whiplash injury to the spine and it was felt that she would continue to have back pains for several years which would lead to her having a PPD, which at the time of trial was unassessed. The court awarded her $235,000 under the head of General Damages in 1998. Using the CPI of February 2020 which is 269.5, the award now updates to $1,374,283.92. It is clear that the injuries suffered by Ms Johnson were more significant than that sustained by Mr Matthias and that she experienced pain for a longer period of time than he did. The sum will therefore have to be discounted.

b. At the higher end of the scale is the case of ***Irene Byfield v Ralph Anderson and ors*** reported at Khans Volume 5 page 255. In that case the Plaintiff had the following injuries:
    - Injuries to chest, back and neck
    - Trauma to back resulting in lumbar strain
    - Severe back pains
    - Abrasions to lower leg and stomach
    - Headaches

    He was awarded the sum of $300,000.00 in 1997. The award is now equivalent to $1,791,610.34. Again the amount will have to be discounted to take into account the fact that Ms Byfield had injuries to her chest and back as well as headaches.

c. Then there is the case of ***Cordella Watson v Keith James*** reported at page 256 of Khan's Volume 5. In that case, the Plaintiff had injury to her back. She was diagnosed as having chronic mechanical back pain and assessed as having a PPD of 3%. The award of $200,000.00 made in her favour, updates to $1,177,344.31. It goes without saying that this case would also have to be discounted.

40. Having reviewed these cases I am not of the view that the injuries suffered by the claimant in the instant case justify award of $2,500,000.00 for pain and suffering and loss of amenities his counsel have submitted. The defendant's attorneys-at-law have suggested that he be awarded $1,500,000.00. I find that sum to be reasonable in light of the facts and the comparable cases. Though he was expected to have no permanent disability, I am also mindful of the fact that having been injured in 2008 he continued to have some discomfort in 2010 when he was seen by both Dr Dixon and Dr Sangappa.

41. I had said earlier that the claimant would be responsible for 15% of the loss because he himself was negligent when stepping from the vehicle. It means therefore that $225,000.00 is to be deducted from the amount and so the award to the Claimant for his pain and suffering and loss of amenities will be $1, 275,000.00.

DISPOSITION

42. Liability in negligence for the injuries suffered by the claimant is apportioned 15% to the claimant and 85% to the defendant.
43. Damages payable to the claimant are therefore assessed as follows:
    a. General Damages for Pain and Suffering and Loss of Amenities of ($1,500,000.00 x 85%) = **$1,275,000.00** with interest thereon at 3% per annum from 6 May 2011 to 16 March 2020.
    b. Special Damages as agreed in the amount of ($82,800.00 x 85%) = **$70,380.00** with interest thereon at 3% per annum from 15 April 2008 to 17 March 2020.
44. Costs (85%) to the claimant to be agreed or taxed.

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