



[2021] JMSC Civ 119

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV01193

BETWEEN	TAMARA TASSANYA NOBLE BNF STACY-ANN REEVES	CLAIMANT
AND	EARL POWELL	1ST DEFENDANT
AND	DONALD CLARKE	2ND DEFENDANT

IN OPEN COURT

Mr Devon G. Deslandes for the Claimant.

Mr O'neil Brown instructed by O'neil Brown and Co for the 2nd Defendant.

Heard – March 16th, 2021 and July 2nd 2021

Motor vehicle accident – negligence – duty of care – vicarious liability – presumption of ownership – entry of appearance by defendant who was not served

CORAM: HUTCHINSON, J

INTRODUCTION

[1] On the 17th of February 2017, the infant Claimant was on her way to school in a Toyota Camry registration 1853 EM which was being driven by George Peart. While travelling along Market Street in Falmouth, Trelawny, the vehicle was involved in a collision with a Toyota Axio motorcar which was owned by Donald Clarke, the 2nd defendant and was being driven by Earl Powell, the 1st defendant. As a result of the collision, both vehicles were extensively damaged and Tamara sustained a number of injuries which resulted in her becoming a paraplegic.

[2] As a result of these injuries, this claim was filed against both defendants. The 1st defendant was sued in his capacity of driver of the Axio motorcar and the 2nd Defendant was sued in his capacity as the owner of the vehicle and also that the 1st Defendant was acting as his servant and/or agent at the time of the collision. Notice of Proceedings was also served on G.K. Insurance Co Ltd. In the Claim against both Defendants the following orders have been sought;

1. Damages (for negligence)
2. Interest of 3% on Special and General Damages
3. Costs and Attorneys Costs
4. Further relief or other relief as the Court shall think fit to be awarded

[3] An acknowledgment of service was filed on behalf of both Defendants as well as a joint defence. The 2nd Defendant was subsequently permitted to file an Amended Defence which speaks to his position only. Notice of the Trial herein was published in the Sunday Gleaner by the Claimant as permitted by the Court in the absence of any information to have documents personally served on the 2nd defendant in respect of same. The 1st defendant did not attend or participate in the trial. I am satisfied however that he was served in keeping with the order of the Court.

Claimant's Case

[4] There were two witnesses called on behalf of the Claimant. The first was Mr George Peart who appeared by way of a witness summons. He told the Court that on the relevant day he collected the Claimant and was transporting her to school while on his way to work as a contractor. While travelling along Market Street he observed two cars which appeared to be racing. He stated that on seeing this he pulled off to the side of the road.

[5] The first car was in the process of passing him when the driver of the second car, a neon green Axio tried to overtake it. The driver of the second car lost control,

skidded across the reflectors in the middle of the road, rolled and crashed into the front of his vehicle. He observed that Tamara who had been sitting with her seat belt on in the back seat was flung forward between the two front seats by the impact and he also observed that she was bleeding from an area on her face. He was unable to assist her as he was pinned down in the vehicle as a result of the steering wheel breaking in his stomach. He observed when the firemen arrived on the scene and removed Tamara after which they left with her. He was later extricated from the driver's side. He stated that the front of the vehicle was damaged.

[6] In cross examination he was asked if he had been operating a taxi and he denied that he was. He also acknowledged that there was no hackney carriage licence for his vehicle. He was asked about the number of persons in his vehicle at the time of the collision and indicated that it had only been Tamara and himself. He denied the suggestion that there had been 9 other children in the vehicle at that time or that they had sustained injuries. He insisted that Tamara had been wearing her seatbelt and had been properly buckled in.

[7] The second witness was Ms. Stacy Reeves, the mother of Tamara Noble. In her witness statement which stood as her evidence in chief, she explained that on the 17th of February 2017, she placed her daughter in the vehicle of Mr Peart as there was a contractual arrangement for him to transport her to school. Later that day she received a call and went to the Falmouth Hospital where she saw her daughter. She observed two cuts to her face and signed authorization for an X ray to be conducted after which Tamara was discharged.

[8] At about 2 am the following morning Tamara complained of not feeling her legs and she took her back to the hospital. In the process of getting her dressed she realised that she was unable to stand. She stated that Tamara was examined and a decision was taken to transfer to Bustamante Children's Hospital (BCH) and they were transported there by helicopter. She was admitted from the 18th to 28th of February 2017 and underwent a number of test, scans and examinations. She also

had a laminectomy surgery. As a result of her continued inability to stand, walk or sit up Tamara was transferred to the Sir John Golding Rehab Centre where she remained a patient until 12th of June 2017.

- [9] As a result of the challenges experienced in having to travel between Falmouth and Kingston, Tamara was transferred to Cornwall Regional Hospital for continued rehabilitation. Ms Reeves outlined that between the 10th of August 2017 and the 10th of July 2020 Tamara had undergone 23 sessions of physical therapy. Additionally, she had to be seen by the doctors at BCH every 3 months for evaluation and she also received treatment at other institutions, all of these visits had to be taken using private transportation.
- [10] Ms Reeves explained that in addition to these injuries, Tamara also suffered incontinence and had to wear a diaper, using as many as six per day. She stated that prior to the accident, Tamara had been active, always running, jumping and playing with her friends, family and siblings. She noted that she now has to get around by creeping on her knees and has to sit in one place unless she is carried around by others even at school. She also explained that although Tamara used to sleep well at nights she now cries in her sleep.
- [11] She was asked in cross examination if she would pay Mr Peart to transport Tamara to school and she stated that she didn't. She explained that by a contractual arrangement she meant that he would take Tamara to school if he was going to work but if he did not have work she would make other arrangements. Tamara's Birth Certificate was agreed as part of the Claimant's case and shows that she was born on the 15th of June 2013.

2nd Defendant's Case

- [12] In his witness statement which stood as his evidence in chief, Mr Clarke acknowledged that his motor vehicle which was being driven by Earl Powell was involved in a collision in Falmouth on the 17th of February 2017. He stated that he did not believe or accept that the accident was caused solely or partly by the

negligence of Mr Powell who was an authorized driver. He denied that Mr Powell had been acting as his servant and/or agent or an employee and maintained that he had been engaged in his own business of which he had no previous knowledge.

[13] Mr Clarke deponed that on the evening of the 16th of February 2017, Mr Powell had borrowed his vehicle to perform a number of errands in and around Montego Bay and to return same early the following morning. He said that the next time he heard from him was when he was informed that the vehicle had been involved in an accident in Trelawny. He declared that he was never aware that Mr Powell intended to take his vehicle outside of the parish and if he had known this he would have taken it back from him.

[14] In cross examination he was asked whether he was the proprietor of a business which sold cars. He initially agreed that he and his wife were owners of this business but subsequently clarified his response to say that they were directors and not proprietors. When asked the identity of the owners he stated that it was owned by the directors who were himself and his wife. He was asked about his relationship with Powell and stated that he met him through a friend. He insisted that he had loaned Powell his vehicle to run errands in town and to return it that same evening in order for him to drive home.

[15] He stated that the vehicle was not returned and calls to Powell went unanswered and as a result he ended up either taking a cab or getting a ride home. He was asked if Powell has used his car before and he replied that he had but qualified this response to say maybe once or twice before the 16th of February 2017. He acknowledged that the vehicle loaned to Powell was a neon green Axio with plate number 3107 GL.

Medical Evidence

[16] Dr Shomari Prince has a speciality in Orthopaedics and saw the infant Claimant at the Bustamante Children's Hospital. In a report dated the 7th of November 2017 he stated that on assessment at BCH she was found to have T12 L1 sensory level

and paraplegia but was in spinal shock. A diagnosis of paraplegia 2' to motor vehicle accident was made. Documentation of an MRI scan showed spinal cord oedema from T11 L1 and a possible hemisection of cord at T12 level. The diagnosis made by Neurosurgery was a possible Astrocytoma. He was unable to give a permanent disability rating as the minor was under treatment by another service.

[17] Dr Abigail Creighton prepared 2 reports both dated the 6th of July 2017. She was the Acting Senior Medical Officer at Falmouth Hospital. She noted that the Claimant was seen on the 17th of February 2017 as a result of a motor vehicle accident (MVA) but was brought back to the hospital the following day. Examination revealed that in respect of the nervous system there was normal power in the upper limbs but zero power in the lower limbs. The minor was also noted to be areflexic and had no sensation in lower limbs. She was also tender over the L4/L5 area of her lower back and her abdomen was mildly tender and distended. The assessment made was (a) MVA with paraplegia (b) Lumbar spinal injury.

[18] The other report was specific to the 17th of February 2017. Examination findings revealed 3 x 1 cm bleeding laceration to forehead. No abnormalities were noted to the respiratory, cardiovascular and abdominal systems. X rays done of facial bones and pelvis detected no abnormalities. She was deemed fit and discharged.

Police Traffic Report

[19] This detailed that a MVA occurred on the 17th of February 2017 at 8:05 am along Market Street in Falmouth. One of the vehicles involved was a Toyota Camry registered n 1853 EM driven by George Peart. The entire front section of this vehicle was noted to be damaged. The report listed 9 children ranging between ages 3 and 11 as being passengers in that vehicle who also sustained injury. The 2nd car was a Toyota Axio which was green in colour registered 3107 GL. The driver was noted as Earl Powell of a Mt Salem address in St James and the owner was Donald Clarke of Montego Hills, St James. The entire left side of that vehicle

was also extensively damaged. The findings of the investigator showed that the vehicles were travelling in opposite directions when the driver of the Axio overtook 2 vehicles, swerved left to re-enter the lane and lost control of the vehicle which slid sideways into the right lane and into the path of the Camry causing a collision.

Issues

[20] In order to resolve this matter, the Court must determine the following issues;

- a. Did Mr Powell owe a duty of care to the Claimant?
- b. Did he breach this duty of care?
- c. Was the collision caused by his breach of his duty of care?
- d. Did the Claimant suffer injuries and damages as result of Mr Powell's breach of his duty of care?
- e. Was Mr Powell acting as the servant or agent of Mr Clarke at the relevant time?
- f. Was Mr Clarke vicariously liable to the Claimant?
- g. What is the quantum of damages, if any, which would be assessed?

Discussion/Analysis

[21] Although an acknowledgment of service and defence had been entered on behalf of the 1st defendant, as previously stated, he did not appear for this trial neither was he represented. The issue of whether he had been properly served had previously been raised but the matter had been resolved on the basis that by entering an appearance he had waived the necessary service¹. I have previously stated that I am satisfied that he has been provided with notice of this hearing by

¹ McDonald-Bishop in Joseph Nanco v Anthony Lugg etal [2012] JMSC Civ 81 applying the principles previously stated in Warshaw etal v Drew (1990) 38 WIR 221.

way of the publication in the daily newspapers of the proceedings in keeping with the order of the Court. In the course of his defence, it was denied by the 2nd defendant that Mr Powell was solely or partly to be blamed for the accident. The question of the overcrowding of Mr Peart's vehicle was also raised but I found that this was wholly irrelevant for the purpose of determining who was at fault in this collision. In coming to a decision in respect of this claim, I considered that the better approach would be for the discussion to follow the order of the issues identified above.

Did Mr Powell owe a duty of care to the Claimant? Did he breach this duty of care? Was the collision caused by his breach of his duty of care?

[22] In order to establish liability, the Claimant must prove that she was injured as a result of the defendants' negligence. In doing so she must establish that the defendants owed a duty of care to her and that there was a breach of that duty. It must also be proved that the said breach caused her to suffer injury and loss. This principle was expressed by Lord Atkin in ***Donoghue v. Stevenson [1932] A.C. 562***, in the following terms: -

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".

[23] The legal principles enunciated in that decision were applied by our Court of Appeal in ***Glenford Anderson v. George Welch [2012] JMCA Civ.43*** where Harris JA stated as follows;

"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty".

[24] Having made this pronouncement, the Learned Judge went on to state;

It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities

- [25] This duty of care has also been codified in statute as Section 32 (1) of the Road Traffic Act imposes a general duty on all motorist to drive with due care and attention for all other road users. It states:

“if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence”

- [26] Section 51 of the Act imposes specific duties on motorists and section 51(2) cautions every driver that they have a duty to take necessary action to avoid an accident. It states;

“Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”

- [27] The fact that a motorist operating his vehicle on the roadway is under a common law as well as statutory duty was recognised in a number of decisions from this Court to include ***Edward George Taylor v Bernard Mahoney [2014] JMSC Civ 24*** which was cited by Counsel for the Claimant. In that matter, the Learned Judge made reference to the dicta of McDonald-Bishop J in ***Cecil Brown v Judith Green and Ideal Car Rental 2006HCV02566***, where after a review of the provisions of the Road Traffic Act and the common law she declared;

‘It is clear that there is indeed a common law duty as well as statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident’

- [28] Applying these principles of law to the instant matter, it is clear that Mr Powell as the driver of the Toyota Axio motor vehicle was under a duty of care to other road users which included the Claimant. This duty required him to operate the motor

vehicle in a manner that would not cause harm or create a risk of harm to others. From the evidence of Mr Peart, it is clear that Mr Powell was operating in breach of this duty on that day, as he was racing along Market Street and sought to overtake another vehicle which was also travelling at a high rate of speed in circumstances where it was not safe to do so. This precipitated his loss of control over the vehicle which then collided in the Camry in which the Claimant was a passenger.

[29] The account of Mr Peart was supported by the content and conclusion outlined in the police report which was agreed evidence before the Court. The physical evidence in terms of the location of the damage done to both vehicles as well as the fact that the Axio ended up on the opposite side of the road also confirms this. As such, I found that there is no question that Mr Powell had breached his duty of care and the sole reason for this collision was his negligent manner of driving.

Did the claimants suffer injuries and loss as result of Mr Powell's breach of his duty of care?

[30] In his evidence, Mr Peart outlined that when he saw the Claimant he noted that she was bleeding from a wound to her face. The contents of the medical reports which were outlined at paragraphs 16 to 18 above makes it clear that she sustained a number of injuries, the most significant one being a spinal injury which resulted in paraplegia. From the account of Ms. Reeves, her daughter had been an active child before this incident and now she is unable to move around without assistance. Her inability to stand or walk was noted on the night following this collision. The report of Dr Creighton also makes it clear that these injuries likely resulted from the motor vehicle accident. The evidence of Ms. Reeves also disclosed that in addition to the physical injury, she has faced a heavy financial burden associated with the care of her daughter and her own trips to see her at various institutions or to take her for follow up care. In these circumstances it is evident that the answer to this question would be in the affirmative.

**Was Mr Powell acting as the servant or agent of Mr Clarke at the relevant time?
Was Mr Clarke vicariously liable to the Claimant?**

[31] There is a presumption in law that ownership of a motor vehicle is prima facie evidence that it was being driven by his servant or agent. This prima facie case of agency would have to be rebutted by evidence to the contrary. This presumption is grounded in the long established principle which was expounded in ***Barnard v Scully (1931) 47 TLR 557***, and reiterated by Clarke J in ***Mattheson v Soltau and Anor (1933) 1 JLR 72*** as follows,

“It is now accepted in our courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him.”

[32] This principle was confirmed by the Privy Council in ***Rambarran v Gurucharran [1970] 1 All ER 749, 751*** where it was stated,

“Where no more is known of the facts therefore than that at the time of an accident, the car was owned but not driven by A it can be said that A’s ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known or sufficiently known, then clearly the problem must be decided on the totality of the evidence.”

[33] This issue was more recently considered in the consolidated appeal of ***Eric Rodney v Alan Werb and Alan Werb v Eric Rodney and Patricia Philpotts [2010] JMCA Civ 43*** in which the Court confirmed the presumption and noted that the onus was on the owner of such a motor vehicle to provide sufficient credible evidence to satisfy the Court that the driver was neither his servant nor agent. In the instant case, Mr Clarke has given evidence in which he makes this assertion. He went even further to note that while he had agreed that his vehicle be used for the purpose of running errands he was surprised to learn that Mr Powell had driven it to another parish.

- [34] In my review of Mr Clarke's account, I found that he was not always straight forward or honest in his account. An example of this was the fact that although his witness statement outlined that he expected to have his vehicle returned the next day, under cross examination he gave a detailed account of expecting his vehicle to be returned the same evening. He also mentioned numerous calls to Mr Powell in respect of same and the fact that he had to get a ride home. He was also contradictory on matters that did not go to the question to be determined as seen in his responses to questions as to whether he owned a car mart.
- [35] I noted however that in respect of his assertion that Mr Powell was essentially on a frolic of his own and was not engaged in any business or mission on his behalf, his account was unshaken. He denied all suggestions to the contrary and I believed his account that the vehicle had been loaned or otherwise handed over to Mr Powell in order for him to conduct his own affairs. Mr Clarke was cross examined extensively but there was nothing unearthed which I founded contradicted his assertion on this point or called into question the reliability of his account.
- [36] Applying the relevant legal principles to the facts of this case which I am satisfied have been proved, I found that on the day of the collision, Mr Powell was not acting as the servant or agent of the 2nd defendant. As such, Mr Clarke is not vicariously liable for the damage occasioned by him.

What is the quantum of damages, if any, which would be assessed?

Special Damages

- [37] In respect of special damages, although a number of items were pleaded in this regard, no evidence was led in respect of this class of damages neither was it the subject of agreed damages. The only head of damages before me then was general damages and this was assessed in respect of the 1st defendant only.

General Damages

Pain and Suffering

- [38] A number of authorities were cited by Mr Deslandes in respect of the appropriate award to be made. The first was ***Lloyd Clarke v Corporal E.F Quest 2007HCV01550***. In that matter, the Claimant suffered a gunshot wound to his back and right elbow. As a result of this he suffered a completely severed spinal cord at T10 vertebra which caused complete paralysis from the navel down. He was diagnosed with complete paraplegia between T10-11 urethral level. He spent a week at Cornwall Regional Hospital and 42 days at Sir John Golding Rehabilitation Centre. The medical report indicated that it was unlikely he would ever walk again and would have to be assisted. The award for pain and suffering and loss of amenities in December 2008 was \$26,000,000. A separate award was made of future medical care in the sum of \$4,479,840.
- [39] The decision of ***David Cameron v Feron Williams etal [2017] JMSC Civ 82*** was also cited. The Claimant in that matter was injured in a motor vehicle accident. He suffered paraplegia and posterior dislocation, lower spinal cord injury, spinal cord compression, vertebral body displacement into spinal cord and fracture subluxation and facet dislocation. The spinal cord injury was noted at T12-L1 level. He was unable to move his lower limbs and lost control of his bowel movements. An award for general damages was made in May 2017 in the sum of \$24,744,298.54
- [40] The final decision considered was ***Neimah Williams v Islandwide Concrete Company Ltd etal [2017] JMSC Civ 37***. In this matter the Claimant had also been involved in a motor vehicle accident. She was later diagnosed with a resolving incomplete spinal cord injury secondary to a type 11 odontoid fracture. She lost neck movement as a result and experienced posterior spinal fusion and residual pain over her bone graft donor site. She also demonstrated urge incontinence of both urine and stool. She was able to move around but was unable to run or walk fast and every physical movement had to be calculated. She also experienced

challenges doing basic housework. An award of \$35 million dollars was made in March 2017.

[41] On a review of the authorities cited it is evident that the injuries suffered by the infant Claimant closely mirror those that had been sustained by the Claimant in both the **Lloyd Clarke** and **David Cameron** cases. Her prognosis in terms of the need to be assisted in the future in light of her inability to walk as well her diminished quality of life are also quite similar to both individuals. Her situation is compounded by the fact that at the time of the accident she was a little girl who had a number of years of life before here. The sum of \$24,744,298.54 which had been awarded in the **David Cameron** case when updated using the CPI for April 2021, reveals that an appropriate award would be \$29,030, 075.73

Future Medical Care

[42] Although damages for future medical care had been pleaded in the particulars of claim filed there was a paucity of evidence as to what this would involve. From the witness statement of Ms. Reeves, it is evident that the minor had to be receiving physiotherapy and there was also the need for diapers to be purchased for her given her incontinence. The evidence also disclosed that she has to be physically assisted in order to move around at home as well as at school. In light of these factors, it is clear that there will be expenses associated with her ongoing care. I believe that a sum of \$100,000 annually would not be unreasonable to meet same. The birth certificate presented shows that the Claimant will be 8 years old on the 15th of June. In light of her age I believe a multiplier of 25 is appropriate in coming to a decision as to the appropriate award under this heading. Accordingly, I am prepared to make an award of \$2,500,000 for damages under this heading.

Conclusion

[43] As such, my ruling in this matter is as follows,

- a. Judgment is entered in favour of the Claimant against the 1st Defendant.

- b. In respect of the claim against the 2nd Defendant, judgment is entered in his favour against the Claimant.
- c. General Damages are awarded to the Claimant against the 1st Defendant as follows;
 - i. Pain and suffering in the sum of \$ \$29,030,075.73. Interest is to apply at a rate of 3% from the 30th of March 2018 to today's date.
 - ii. Future medical care in the sum of \$2,500,000 no interest.
- d. Costs are awarded to the Claimant against the 1st Defendant to be taxed if not agreed. The 2nd Defendant is awarded his cost against the Claimant to be taxed if not agreed.
- e. Claimant's Attorney to prepare, file and serve order herein.