[2015] JMSC Civ. 215

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02354

BETWEEN	**BILLY TAIT**	**CLAIMANT**
AND	**WESLEY SALMON**	**DEFENDANT**

Ms. Dorothy C. Gordon for the claimant.

Mrs. Andrea Walters – Issacs for the defendant.

Heard: 2nd, 3rd, and 5th November, 2015

Negligence – Motor vehicle accident – Both vehicles being driven on same side of dual carriageway – Claimant's vehicle stuck at the rear – Assessment of damages.

EVAN BROWN, J

Background

[1] This claim arose out of a motor vehicle accident which occurred along Marcus Garvey Drive in the parish of Kingston on the 7th October, 2009. Marcus Garvey Drive is a dual carriage way separated by a median. Both the defendant and the claimant were travelling on the southern side of the dual carriage way. That is, both were proceeding from the direction of downtown Kingston towards Portia Simpson Miller Square.

[2] It was agreed that the accident occurred when the right front of the defendant's Hiace motor bus vehicle collided with the left rear of the claimant's Toyota Corolla motor car. Each driver, however, gave a wholly different and inconsistent account of the circumstances. The defendant called one witness who was a passenger in the motor

bus. The claimant called one witness who went to the scene about an hour after the collision but while the police were present. None of the two police officers testified. One gave a witness statement but neither party attempted to make any use of it.

Claimant's case

[3] According to the claimant, he was travelling in the right lane, approximately six or seven car lengths behind a Honda motor car. The Honda motor car slowed down and a dog ran from under the vehicle. No sooner had he stopped that he felt an impact to the left rear of his vehicle. So violent was the impact from the collision that it pushed his motor car onto a concreted area, struck the median then spun around and stopped with its front facing the opposite direction.

[4] The particulars of negligence alleged were:

"The Defendant was negligent in that he :-

(a) Failed to keep any sufficient and proper look out;

(b) Drove without due care attention and without regard for other users of the roadway;

(c) Failed to exercise or maintain any proper or effective control of the said Toyota Hiace motor truck;

(d) Failed to keep the proper distance from the vehicle being driven in front of him;

(e) Travelling at too fast a rate of speed in the circumstance;

(f) Drove into the back of the vehicle being driven in front of him;

(g) Failed to stop, to slow down and to apply his brakes in time so as to avoid the said collision."

Defendant's case

[5] On the other hand, the defendant said he was proceeding in the left lane, somewhat behind the claimant's vehicle. Reaching almost in line with the back of the claimant's vehicle (about an arm's length), the dog ran from under the Honda motor car. The driver of the Honda motor car braked without coming to a complete stop. In

response, the claimant, suddenly and without warning, swerved into the left lane into his path. He honked and swung to his extreme left in an effort to avoid the collision. The claimant, however, swerved back towards the right lane. Those evasive actions proved futile as the claimant had cut in front of him when the vehicles were too close.

Analysis

[6] Each says it was the negligence of the other that caused the accident. The establishment of liability will, therefore, depend on whose evidence I accept. Having regard to that recognition, I paid very close attention to the witnesses during the giving of their respective testimony. I accepted the evidence of the claimant and his witness and rejected the evidence of the defendant and his witness for reasons which will, hopefully, be apparent. In accepting the evidence of Mr. Mark Campbell, the witness for the claimant, I considered that he was not an officious bystander but had gone to the scene in response to a call from the claimant. He was, therefore, not an independent witness.

[7] It may be instructive to commence the analysis with the establishment of the point of impact. The claimant's case was that the point of impact was in his lane, that is, the right lane. While the defendant and his witness both said the accident occurred in the left lane. Apart from those assertions, Mark Campbell, the claimant's witness, testified to having seen debris and drag marks on the roadway. The drag marks were about ten feet long. That supported the claimant's evidence which asserted the presence of debris and drag marks after the accident. When Mr. Campbell was cross-examined, he elaborated that the debris stretched for a distance of about two feet to the end of the drag marks. Further, although the debris was concentrated in the right lane, there were glass splinters trailing to about mid way the left lane.

[8] It is notorious that the presence of debris on a roadway may indicate the point of impact of the motor vehicles involved in the accident. Debris, in this context, is simply any material present on the road surface which is alien to the thoroughfare. For example, pieces of broken glass from the lights on the vehicle and dirt from the

undercarriage. So, where, as here, the debris was concentrated in the right lane, the reasonable and inescapable inference is that the collision occurred in the right lane.

[9] Another indicator that the collision took place in the right lane is the presence of the drag marks or, I think more properly, skidmarks. These are marks made on the surface of the road by the tires of the vehicle sliding over it. The marks are made by the abrasive action between the sliding tires and the road surface when the brakes are locked (see ***Scientific Evidence in Civil and Criminal Cases*** 4th ed. Andre A. Moenssens *et al*.) Skidmarks may show, among other things, the speed and course of the vehicle. Putting the skidmarks, which were all in the right lane, together with the debris, it is clear that the defendant was travelling in the right lane before the accident occurred. I therefore conclude that the point of impact was in the right lane.

[10] Locating the point of impact in the right lane is a finding which provides sufficient justification for not accepting the defendant and his witness but it did not stop there. The defendant's witness was wholly unable to take her evidence beyond reciting what was contained in her witness statement, notwithstanding her alleged vantage point in the front of the motor bus. She never saw the dog which ran across the road and set in motion the train of events culminating in the accident. Neither did she see the Honda motor car that slowed down. This witness seldom took her gaze from the floor although she did not appear to be shy or discombobulated by the cold formality of the courtroom. In short, she left me with the impression that she was a witness of convenience.

[11] With regards to the defendant himself, not only was his evidence at variance with the accepted physical evidence, his account of the accident was imbued with a healthy dose of unrealism. Admittedly, it was the right front of the defendant's vehicle which collided with the left rear of the claimant's car. Yet, the manoeuvre described by the defendant would take the right front of his vehicle further away from the left rear of the claimant's car, even if the claimant had swerved back to the right lane.

[12] Counsel for the defendant asked me to say that where the claimant's vehicle came to rest, or rather how it got into that position was more consistent with the defendant's explanation. The defendant said the claimant's vehicle came to be facing the opposite direction because the claimant "over steered" when he was trying to get back to the right lane. It was not conceivable that the car could have made what was an approximate one hundred and eighty degrees turn in a space about seven and a half feet wide.

[13] Firstly, the contention that the claimant over-steered is nothing more than creative conjecture. That contention found no expression in the defendant's evidence in chief and came only when put through the crucible of cross-examination. Secondly, its acceptance could only come at the expense of the physical evidence which placed the claimant's vehicle in the right lane. That is, I would have to discard that credible and reliable evidence and say the claimant's vehicle encroached upon the left lane.

[14] Thirdly, the space in which the vehicle spun around was greater than seven and a half feet. How much greater? The evidence did not go so far. The evidence is that the car mounted the concreted area. No evidence was elicited concerning the width of the area between the edge of the driving surface and the edge of the median, which would have represented the concreted area. That leaves the matter of the space for the spinning upon the credibility of the witnesses and in this it was the claimant who I found to be credible.

[15] That takes me to the other limb of the argument urged upon me to accept the defendant's theory. It was argued that tremendous speed and force was required to result in the claimant's vehicle facing the opposite direction. It was said that there was no evidence of any such speed. The claimant said he was driving at a speed of between 20 and 25 kilometres per hour (kph) then slowed just before the accident. The defendant, for his part, said he was travelling at between 30 and 35 kph at the time of the accident. The claimant did not give an approximate speed at which the defendant's vehicle was travelling at the time; he only said it was travelling fast.

[16] On this evidence, the claimant was driving slower than the defendant was at the time of the accident. Further, I accept that the defendant was travelling fast, whatever the actual speed of the vehicle was. When the weight of the motor bus is combined with its greater speed and accepting that it struck the car at the outer end of the rear bumper, it is entirely comprehensible that the collision would have sent the car spinning. Contact with the median, while it spun, would then bring it about.

[17] The upshot of the foregoing is that the defendant was the negligent driver. I find the particulars of negligence averred proved, on a balance of probabilities. I, therefore, give judgment for the claimant. That takes me to a consideration of the appropriate award in damages.

Assessment of Damages

Special Damages

[18] I found special damages proved in the amount of $178,717.90. The award for special damages is, therefore, $178,717.90 with interest at 3% from the 7th October, 2009 to the 5th November, 2015.

General Damages

[19] The claimant was treated by Dr. G. A. Bullock who saw him the day following the accident. The doctor's examination revealed:

> "(i) *Whiplash injury to the neck with moderate muscular spasm and pain in the muscles of the neck, upper back and shoulders accompanied by headaches. As a result of this injury movements in the neck were limited.*
> *(ii) Lower back strain with moderate muscular spasm of the muscles of the lower back, gluteal areas and hamstring muscles. As a result movements of the back were affected.*
> *(iii) Contusion to the sterna area of the chest with tenderness along*

the parasternal area. As a result deep inspiration and coughing were very painful."

[20] The treatment prescribed was analgesics, muscular relaxant and a cervical collar was recommended. X-rays of the lumbar and cervical spines were done on the 12th October, 2009. The claimant returned to Dr. Bullock on the 28th October, 2009 because his back and neck were still painful. A further course of analgesics was prescribed. The claimant again visited Dr. Bullock on the 23rd November, 2009 and complained of pain in his lower back. He was referred to a physiotherapist. On the completion of the physiotherapy he returned to Dr. Bullock on the 19th January, 2010 as the pain in his lower back persisted. Analgesics was again prescribed and he was advised on precautionary measures in lifting weights.

[21] Dr. Bullock gave eight weeks as the claimant's period of incapacitation. Two possible long-term complications were listed in the report. The first mentioned was chronic intermittent pain in the neck and lower back as a result of ligament damage. The second was castochrondritis of the sternocostal joint.

[22] Counsel for the claimant submitted that an award of $1,200,000.00 would be appropriate in the circumstances. She relied on three cases. The first of that trilogy was ***John Godfrey v Devon Hugh Campbell and others*** Cl.# 2006 HCV 01184 delivered on 1st June, 2007. The claimant in that case suffered injuries to the neck, back, right knee and left leg and received an award of $600,000.00 which updates to $1,314,285.71, using the Consumer Price Index (CPI) of 230 for September 2015.

[23] The second case relied on was ***Irene Byfield v Ralph Anderson and Others*** 5 Khan 255. Irene Byfield sustained injuries to her chest, neck, back and minor abrasions to lower leg and stomach as well as headaches. The court made an award of $300,000.00. Using the same CPI, that award is $1,597,222.22 in today's dollar.

[24] The last of the trilogy was ***Dalton Barrett v Poncianna Brown and Leroy Bartley*** 6 Khan104. Dalton Barrett received injuries which resulted in tenderness around the right eye and face, in the lumbar spine and left hand on the 5th December, 2002. Dr. Bullock examined him on the 9th December, 2002. That examination revealed pain in the lower back, left shoulder and left wrist. Anti-inflammatory and painkillers were prescribed.

[25] Because of the continuing pain which prevented Dalton Barrett from driving, he consulted Dr. R. C. Rose, Consultant Orthopaedic Surgeon on 3rd August, 2003. Dr. Rose diagnosed him as suffering from mechanic lower back pain and mild cervical strain. Dr. Rose prescribed physical therapy and lifestyle modifications. Physical therapy proved effective and Mr. Barrett was pain free when he was next examined in October 2003. Dr. Rose opined that Mr. Barrett was left with zero % Permanent Partial Disability (PPD) but cautioned that Mr. Barrett would likely experience lumbar pain upon resumption of prolonged driving. For his pain and suffering Dalton Barrett received an award of $750,000 which updates to $1,731,580.00, using the same CPI.

[26] Learned counsel for the defendant posited that an award of $800,000.00 would be reasonable and relied on three separate cases. The first to which reference was made was ***Peter Marshall v Carlton Cole and Alvin Thorpe*** 6 Khan 109. Mr. Marshall sustained moderate whiplash, sprain, swelling and tender left wrist and left hand and moderate lower back pain and spasm. He was given two weeks sick leave, analgesics and Cataflam injections. At the end of sixteen weeks he had no residual pain and suffering. His award of $350,000.00 is worth $806,365.00 today when the September 2015 CPI is applied to it.

[27] The second case relied on by Mrs. Walters-Isaacs was ***Anthony Gordon v Chris Meikle and Esrick Nathan*** 5 Khan 142. Anthony Gordon had pain in his lower back, left knee and left chest, multiple bruises to his right hand and left calf as well as tenderness of his left hip on movement arising from a motor vehicle accident on the 15th June, 1994. He was examined by Dr. Rose on the 11th December, 1997.

[28] Dr. Rose found moderate tenderness on palpation of the midline of the whole of the lumbar spine. Subsequent x-rays did not reveal any abnormalities. His diagnosis was cervical strain, contusion to the left knee and lumbo sacral strain. Mr. Gordon had a PPD of 5% of the whole person in respect of the lumbo sacral spine. The award made to Mr. Gordon was $220,000. Applying the September CPI to it, today it is worth $1,046,500.

[29] The third case defence counsel cited was ***Lascelles Allen v Ameco Caribbean Incorporated and Peter Perry*** Cl.# 2009 HCV03883 delivered on 7th January, 2011. Mr. Allen suffered injuries to his side, neck and back. He was diagnosed with whiplash injury and was expected to have a complete resolution of the injury, although relatively trivial trauma could cause a recurrence of his symptoms. There was also occasional numbness in his left hand. He had no PPD. His award for general damages was $600,000.00. Updated, that award is worth $825,840.00.

[30] In arriving at an appropriate award, I bear in mind the overarching principle of *restitutio in integrum*. That is, the claimant must be placed in the position he would have been, had the accident not occurred on the 7th October, 2009. In particular, I must have regard to the dictum of Lord Reid in ***H. West & Son Ltd. v Shepherd*** [1964] A.C. 326, 341, that "compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life." Further, in so far as reference to previous awards is concerned, I recall the learning in ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12th June, 1998 which enjoins me to make a reasonable, moderate and comparable award.

[31] This claimant, like those in the cases cited suffered whiplash injury. Whereas the evidence is that his complaint of pain led him back to Dr. Bullock on the 19th January, 2010, I do not know if and when that issue was resolved. Since no mention was made of continuing pain at the time of the trial, I will assume a resolution of his symptoms.

Since Dr. Bullock treated him for lower back pain in mid January, it seems reasonable to also infer that perhaps by the end of January he was pain free.

[32] The claimant in the instant case required physiotherapy and lifestyle modifications similar to the claimant in ***Dalton Barrett v Poincianna Brown***, *supra.* Unlike the claimant in that case whose pain and suffering lasted for at least eight months, Mr. Tait suffered for approximately fifteen weeks. That period is just shy of the experience of the claimant in ***Peter Marshall v Carlton Cole***, *supra.* However, unlike the claimant in ***Peter Marshall v Carlton Cole*** Mr. Tait's period of incapacitation was eight weeks in contrast to two weeks.

[33] Although Mr. Tait and the claimants in ***Lascelles Allen v Ameco Caribbean Incorporated***, *supra* and ***Dalton Barrett v Poincianna Brown*** had no PPD, the likelihood of continued suffering was not ruled out. Having considered the matter, I am of the view that a just award for general damages should be $900,000.00 with interest at 3% from the 17th May, 2010 to 5th November, 2015. Costs are awarded to the claimant, to be agreed or taxed.