[2018] JMSC Civ 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV02851

BETWEEN	**GLAFTON WHYTE**	**CLAIMANT**
AND	**LASFORD POWELL**	**DEFENDANT**

IN COURT

Steven Jackson instructed by Bignall Law for the Claimant

Lord Anthony Gifford Q.C. & Justina Wilson instructed by Gifford, Thompson & Shields for the Defendant.

Heard: 9th January, 2018 & 19th January, 2018

Brown J. Y. Ag.

Negligence – Motor vehicle accident – who is liable – Personal Injury – head Injury – Assessment of Damages.

Introduction

[1] In the early afternoon of April 8, 2010, the claimant Mr. Glafton White, then about a month shy of his 50th birthday, was driving a motor truck registered CF6518 along the Old Harbour Main Road in the parish of St. Catherine. He was heading in the direction of that parish's capital, when the defendant's Nissan Sunny motor car collided with the motor truck. This collision resulted in the Claimant suffering injury, loss and damage and incurred expenses. It inspired him to file a claim for damages for negligence on April 7, 2016.

[2] In this claim, the claimant averred that the defendant whether by himself, his servant and/or agent negligently drove, managed or controlled the 1991 Nissan Sunny motor car registered 1976 FC, that it collided with the motor truck, causing the claimant to sustain injuries.

Particulars of Negligence

[3] The claimant went on to particularise the negligence of the defendant in the following terms:

- Drive at an excessive and/or improper speed;
- Failed to keep any or any proper look out;
- Drive without any or any sufficient consideration for others users of the road,
- Failed to maintain sufficient control over the said motor vehicle
- Failed to apply brakes within sufficient time or at all so as to prevent the collision from occurring;
- Failing to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to avoid the said collision;
- Failed to deep the 1991 Nissan Sunnay motor car on a safe path along the roadway, being that the said motor car along Old Harbour main road in the parish of St. Catherine drove in a careless manner, made a turn when it was manifestly unsafe to do so and collided into the right side of the motor truck lettered and numbered CF6518, aboard which the claimant was the driver at all material times, that was travelling in the opposite direction when the collision occurred, causing the claimant to suffer injury, loss and damage and incur expense;
- The Claimant is relying on the doctrine of *Res Ipsa Loquitor.*

The Claimant's Case

[4] The claimant's witness statement was allowed to stand as his evidence in chief. I will now proceed to highlight the salient features of his evidence. He stated that on the fateful day of April 8, 2010 between 1 pm – 2 pm, he was the restraint driver of the motor truck registered CF6518, travelling from the sugarcane factory

in Moneymusk in the parish of Clarendon, and heading towards Bernard Lodge, Spanish Town, in the parish of St. Catherine. To arrive at his destination, the claimant travelled along the Old Harbour Main Road, in St. Catherine. This roadway, the claimant described as wide enough to allow two large trucks travelling in either direction to pass comfortably. On that day, he stated, the roadway was smooth and traffic was flowing smoothly.

[5] He explained that there is a 45 degree left angle bend in the road in the vicinity of Wellside Lane, a minor road to the left of the Old Harbour Main Road. Upon reaching a section of the said roadway in the vicinity of the Crest Hotel, the claimant said he saw a motor car approaching from the opposite direction at a great speed. He indicated that this motor car completed the bend in the vicinity of Wellside Lane and then encroached on the Claimant's lane of travel, thereby colliding with the truck.

[6] The claimant testified that he had no time to take any evasive action as everything occurred very quickly. He added that the truck came to a complete stop in the left lane of the roadway about three (3) metres from the point of collision. Upon exiting the truck, the claimant said he noticed the right front tyre was destroyed and the rim was badly damaged. The control arm, front bumper and right front light were also damaged.

[7] The claimant stated that he also saw the Nissan Sunny motor car in the middle of the roadway and an old white man was around the driver's seat. He saw nobody else in the said car, he asserted, adding that the car had damage to its right front bumper extending to its right side. He said that at the time of the collision, he sustained injury to his head when he was thrown upwards and his head collided with the ceiling of the truck. The following day, the claimant said he sought medical treatment from Dr. A. E. Wainwright who diagnosed him as suffering from haematoma of the right side of the head. Despite, the medical treatment he received from Dr. Wainwright, the claimant stated that he experienced constant pain and headaches for about two months. Thereafter, he had headaches and

dizziness intermittently for months. A month after the accident and after the swelling to the right side of his head had subsided, the claimant indicated that he had difficulty walking briskly and was unable to run and play football due to the pain in his left leg. He then sought the intervention of Drs. Ravi Prakash Sangappa and Randolph Cheeks. The medical reports of these doctors were admitted into evidence.

[8] The claimant was exposed to the rigorous cross-examination of Lord Anthony Gifford, QC which was centered primarily on the medical aspects of his evidence. Nonetheless the claimant did not escape the probe as to whether the motor car coming from the opposite direction had made a sudden right turn and collided in the right of the truck as disclosed by Dr. Sangappa, or was it a frontal collision with the approaching car, as indicated by Dr. Cheeks.

[9] The Claimant responded that it was the right front section of the truck that the car collided with when it (the car) made a sudden right turn. He asserted that there was no head-on collision. He refuted the suggestion that he did not have a clear memory of the accident and declared that "I am telling the truth. I wasn't unconscious at the time." The claimant was reminded that in his witness statement he stated that he saw an "old white man" around the driver's seat of the Nissan Sunny motor car. He denied this position and said instead that it was an "unconscious black man" whom he had seen. It was also brought to the claimant's attention that in one of his documents, he had indicated that the accident happened on the Old Harbour main road in the vicinity of Marley Mount.

[10] I will unveil the cross examination on the medical evidence at a later stage in this judgment, as the issue of liability in my view, must first be determined.

[11] At this juncture I must state that at the close of the claimant's case, the defendant's counsel Lord Gifford QC announced that the defendant would offer no evidence and he was also withdrawing his witness statement. Having said that, Queen's Counsel proceeded to make a submission which was later reduced into writing. This prompted a response from Counsel Mr. Jackson who also

provided a written version of his argument. I will not venture to disclose a summary of Lord Gifford's submission.

[12] As regards the doctrine of *Res Ipsa Loquitur,* Queen's Counsel Gifford relied on the case ***Shtern v Villa Mora Cottages Ltd. & Monica Cummings [2012] JMCA Civ 2,*** and opined that this doctrine was not applicable to the instant case. He advanced that the present case is not one where there is "no evidence as to why or how," the collision took place, as in his particulars of claim and evidence, the claimant testified as to what had occurred. Hence, he asserted, the claimant's oral and written evidence disbars the invocation of the third condition of the doctrine which is that "there must be no evidence as to why or how the accident took place."

[13] He argued that the claimant's credibility was questionable as his evidence was "fundamentally self-contradictory." Offering instances of that contradiction, he said the claimant, in paragraph 9 of his witness statement, identified the driver of the 1991 Nissan Sunny motor car, numbered and lettered 1976 FC as a "white old man," which was contrary to the defendant in the matter. Lord Gifford went on to day that the claimant also gave, several different versions of how the accident happened and as such was "manifestly unreliable."

[14] These versions, he identified as follows:

> (i) The medical report of Dr. Sangappa disclosed that the claimant met in an accident due to a collision to the right side of the motor car after the driver of this motor car made a sudden right turn. Yet three weeks later, the medical report of Dr. Cheeks disclosed that the claimant indicated that his vehicle was involved in a frontal collision with an approaching car.
>
> (ii) The claimant's Further Amended Particulars of Claim pleaded that the motor car made a turn and hit the right side of the truck. This account was similar to the one given to Dr. Sanyappa but different from the frontal collision told to Dr. Cheeks.

(iii) The claimant further pleaded that the motor car encroached into the left lane and he had no time to take evasive action. This version was similar to the one given to Dr. Cheeks.

[15] Having made those observations, Lord Gifford contended that the claimant's account of the collision was riddled with inconsistencies as to whether the accident occurred as a result of the frontal collision or one to the side of the motor truck. He then posited that no credible explanation was given by the claimant for the contradictions and so he was "thoroughly unreliable." Based on the foregoing, Lord Gifford asserted that the claimant had failed to prove that the collision occurred as a result of the negligence of the defendant.

Mr. Jackson's submissions

[16] On the course, Counsel Mr. Jackson maintained that the claimant had proven his case against the defendant. According to him, the evidence presented by the claimant was a true account of what happened on the day of the accident. Furthermore, he said, the version given as viva voce evidence did not in any way contradict the mechanism of the accident as stated by the claimant in his Witness Statement, Claim Form and Particulars of Claim. Mr. Jackson argued that the defendant having not given evidence had left the court in a position to rely on the testimony of the claimant and to make a determination as to whether such evidence can be held as reliable.

Analysis in relation to the Liability

[17] I must state the obvious that the burden of proof of the defendant's negligence rests with the claimant and in order to succeed in his claim, he must discharge this burden on a balance of probabilities.

[18] Patterson JA (Ag.) ***in Jamaica Public Service Company Ltd. v. Pamela Rance,*** Civil Appeal No,. 1/92 at page 42, states that duty in this way:

"the burden of proof in an action for damages for negligence rests primarily on the plaintiff who to maintain

> the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible..."

As regards the tort of negligence, recognition must be given to the pronouncement of Lord Atkin in Donoghue v Stevenson [1932] AC 562 at pg. 580 that:

> ***"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? ... 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 in question."***

Section 51(2) of the Road Traffic Act also mandates that "... it shall be the duty of a driver of a motor vehicle to take such actions as may be necessary to avoid an accident..."

[19] Having stated what I regard as the legal principles relevant to the issue to be determined, that is liability, I will now review the evidence bearing in mind the arguments advance ed by the opposing counsels. Like Lord Gifford, I noted the contents of the medical reports of both Drs. Sangappa and Cheeks in relation to how the accident occurred. Those account I have assessed vis-a-vis the claimant's testimony that it was the right front side of the truck that the motor car collided with. I must therefore indicate that I do not find resonance with Lord Gifford that the versions are at variance. I have arrived at that conclusion because it cannot be accepted with certainty that the doctors recorded verbatim what was told to them by the claimant.

[20] Moreover, the significance of the medical reports lies in each doctors' assessment and treatment of the claimant's injuries. That is direct evidence, in my view, and not what was reported as having been told to the doctors by the claimant regarding how the collision happened. Furthermore, the damages to each vehicle, (the motor truck and Nissan Dunny motor car) as stated by the

claimant was restricted to the right front section; this is consistent with his account as to how and where the collision happened. I must also add that this description by the claimant of the damages to the two vehicles was unchallenged.

[21] Notwithstanding Queen Counsel's contention that the Claimant's evidence should be viewed with caution, the defendant mounted no challenge to this evidence that the accident happened on the 8th day of April 2010 and the vehicles involved were the 1991 Nissan Sunny motor car registered 1976 FC and the motor truck registered CF 6518. Neither was the claimant contradicted in his evidence and pleadings that the 1991 Nissan Sunny motor car was owned at the material time, by Lesford Powell, the defendant named in this suit.

[22] I must also say that the claimant's evidence in chief that he saw an old white man sitting in the Nissan Sunny motor car, does not affect the issue of liability when viewed in the context of the pleadings that the collision resulted from the negligence of the defendant whether by himself, his agent or servant. The principle of vicarious liability was thus enlivened and would not afford the defendant an escape from liability even if he had wished to distance himself from the accident scene. It must be noted that the defendant offered no evidence to disassociate himself from that accident.

[23] I do not accept Lord Gifford's submission that the claimant's credibility was fundamentally damaged due to his evidence "riddled with inconsistencies." Instead, I found his explanations regarding these inconsistencies highlighted by Lord Gifford-very plausible. Notably, his explanations in cross-examination regarding the reference to the "old white man" in his witness statement, did not engender a further probe as to whether he was the provider of that description or it was authored by his attorney's secretary; she, said had, received his account of the accident. Furthermore, his oral testimony that it was an unconscious black man that he had seen in the Nissan Sunny motor car at the accident scene, was received without challenge.

[24] The claimant was not hesitant in admitting that he had said in one statement that the accident happened along Marley Mount Main Road. He however, indicated that this collision occurred on the Old Harbour Main Road in the vicinity of Marley Mount. This explanation was not countered by the defendant and I deem it an acceptable clarification. In relation to the principle of *Res* Ipsa *Loquitar*, I find no fault with Lord Gifford's position.

[25] Throughout his evidence, I carefully observed the demeanour of the claimant and I can only conclude that he was forthright in his account of the accident and in cross-examination, he was unflinching in his responses.

[26] In light of the foregoing, I am satisfied on a balance of probabilities that the accident was caused by the negligence of the defendant whether by himself, his agent or servant and as such, he is liable to the claimant in damages whether vicariously or otherwise.

Assessment of Damages

[27] For special damages, the sum of $106,400 was agreed by the parties and I can find no reason to disturb that in light of the fact that the claimant's out of pocket expenses were substantiated.

[28] In relation to the general damages, the claimant relied on the medical reports of Drs. A. E. Wainwright, Ravi Prakash Sangappa and Randolph Cheeks. Dr. Wainwright examined the claimant on the 9th of April, 2010 and reported that he was suffering from a haematoma of the right side of the head. He was given analgesics for pain and advised to rest for two weeks.

[29] In his report, Dr. Sangappa stated that he had seen the claimant on September 6, 2011 and at that time, he had complained of intermittent headache every month and pain to the left knee which was also felt intermittently. He confirmed that the claimant had "head injury with resolve haematoma to head" and was advised to take analgesic for headache whenever necessary. This doctor pointed out that the claimant had not returned for review and hence his prognosis

could not be commented on. "However he was expected to gain from recovery from headache in three to six months from the date of last visit", the doctor noted.

[30] Dr. Randolph Cheeks, a consultant neurosurgeon indicated that he saw the claimant 17 months after the accident and he complained of occasional aching in his left knee and "feeling stressed at times." In his assessment, Dr. Cheeks stated that the claimant had no permanent disability resulting from his injury but he had been temporarily disabled for a period of two weeks following the accident. The prognosis Dr. Cheeks provided was that the claimant had recovered from the effects of the sub-concussive head injury and had no residual evidence of any defective clinical abnormalities. The doctor added that the claimant was not likely to suffer from any new complications in the future arising out of the injury. He stated that he did not find any indication that the claimant's ability to continue being competitive in his usual socio-economic environment had been affected.

[31] In urging the court to make an award of $800,000 to the claimant for general damages, Counsel Mr. Jackson submitted for guidance, the cases of ***Cephas Omphrey v Yvonne Williams*** cited at pg. 58 of **Harrison's Assessment of damages for Personal Injury AGC Edition**; ***Frederick Foulkes v Albert Thompson*** suit no CL 1988/F118 cited at **Harrison's Assessment of Damages for Personal Injuries** p. 56; ***Foster v McKenzie & Ors.,*** Claim No. 2005 HCV 02461 (unreported) and ***Andrew Roberts v Jeffery Lee*** 2006 HCV02425 (unreported).

[32] The claimant in Andrew Roberts's v Jeffery Lee suffered blister with mild swelling to the palm of the left hand; abrasion to the right elbow and posterior right forearm and right knee; abrasion and tenderness and swelling to the left foot. In May of 2008, he was awarded the sum of $400,000 for general damages which updates to $773,708.92 using the CPO (247.2) for November 2017.

[33] In ***Foster v McKenzie*** this claimant suffered contusion to the left leg. On January 12, 2004 when she was last seen by the doctor, the medical report

stated that the pain to her left leg compromised her "free motion about her daily chores." An award of $500,000 was made for general damages in February 2010 and this now updates to $792,815.90 using CPI of November 2017. ***Foulkes v Thompson*** involved a claimant who suffered severe blow to the head with abrasions to face, right hand and right costal areas; loss of consciousness and persistent headaches. He was also hospitalised for two days. For general damages an award of $20,000 was made in December 1990. This figure updates to approximately $715,484.80 using CPI for November 2017. And in Omphrey's case, this claimant suffered cerebral concussion, 1¼ laceration over the occipital region of the head. By consent an award of $20,000 was made in February, 1988. This updates to approximately $1,188,461.54 using CPI for November 2017.

[34] The defendant's counsel Lord Gifford submitted that an award of $250,000 was more fitting for what he described as the "fairly minor injury" that the claimant suffered. He substantiated his stance by highlighting the medical reports which indicated that the claimant had recovered from his injury without any residual pain. In that regard, he also discredited the claimant's evidence that he had suffered multiple and serious injuries and had to undergo extensive medical treatment. Despite the claimant's complaint of intermittent pain to the left knee, Lord Gifford brought to the fore, Dr. Sangappa's findings that no abnormalities were detected upon examination of the claimant. In support of his submission regarding quantum, Lord Gifford relied on ***Verta Scott & Ashborn v Tankweld Equipment Ltd. [suit no. CL 1990/S267].*** The claimant in this case suffered blow and wound to the head; injury causing pain in the head and neck. In January 1992 an award of $9000 was made for general damages. This updates to $169,641.17, Lord Gifford advanced.

[35] At this juncture, I must register my agreement with Queen's Counsel Gifford that despite the claimant's complaint of intermittent pain in his left knee, no medical evidence loan support to that claim. Furthermore, I cannot ignore the medical reports which all indicated that the claimant has recovered from his injuries. This

position was highlighted by Dr. Cheeks, the consultant neurosurgeon in his statement that, “he is not likely to suffer from any new complications in the future arising out of this injury and I did not find any indication that his ability to continue being competitive in his usual socioeconomic environment has been affected.” Hence the claimant’s averment that he can no longer engage in the game of football as a result of his injuries, has not been substantiated by medical evidence.

[36] After a careful review of the cases submitted for guidance, I note that only three of them had claimants who had suffered head injuries. It did not escape my attention, however, that those claimants had suffered more injuries than the claimant at bar. I therefore deem the sum of $500,000 an appropriate award for general damages for the claimant in the instant case. And so, in light of the foregoing, I make awards as follows:

1. Special Damages in the sum of $106,400 at the rate of 3% per annum from the date of the accident to today (January 19, 2018)

2. General Damages in the sum of $500,000 at a rate of 3% per annum from the date of filing of the Claim Form to today (January 19, 2018).

3. Cost to the claimant to the agreed or taxed.