[2018] JMSC. Civ. 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV02492

BETWEEN	**HYLTON WILLIAMS**	**CLAIMANT**
AND	**DAVID ALLEN**	**1ST DEFENDANT**
AND	**RICHARD FRECKLETON**	**2ND DEFENDANT**

IN OPEN COURT

Miss Chantal Campbell instructed by Kinghorn and Kinghorn for the Claimant
Ms. Karlene Afflick instructed by the Kingston Legal Aid Clinic for the 1st Defendant
2nd Defendant absent and unrepresented

Heard: February 6, March 16 and June 12, 2018

Negligence –Motor vehicle accident – motor car and pedal cyclist - credibility of parties – Whether Claimant contributorily negligent - Damages- Assessment - Personal Injury

LINDO, J.

[1] On or about April 3, 2007, the claimant, Mr. Hylton Williams, a pedal cyclist, was riding along the St. John's Road in the parish of St Catherine when there was a collision with motor vehicle registered 3470 PB owned by the Richard Freckleton, the 2nd Defendant, and driven by David Allen, the 1st Defendant.

[2] Mr. Williams filed a claim and particulars of claim on May 12, 2008 in which he claims damages, alleging that Mr. Allen "so negligently drove and/or operated and or managed the motor vehicle that he caused and or permitted the said motor vehicle to violently come into collision with him". He claims that as a

consequence of the collision he sustained serious personal injury and has suffered loss and damage.

[3] Both defendants acknowledged service of the claim on September 5, 2008 at which time they also filed a joint defence disputing the claim and alleging that the accident "was solely caused and or alternatively significantly contributed to by the negligence of the claimant".

The Claimant's Evidence

[4] At the trial, Mr. Williams' witness statement dated April 8, 2014 stood as his evidence in chief after he was sworn and he identified same. He states that at about 9:30 am on the morning of April 3, 2007, whilst riding along the St. John's Main Road he "felt a hit from behind in the back of my bicycle". He states that he was thrown up in the air, fell on the bonnet and rolled to the ground and was taken to the police station by a taxi operator and there he saw Mr. Allen giving a statement to the police. He states further that on the following day, he went to Dr. Humphrey Lyn and was given an injection and medication and when the pain got worse he would return to Dr. Lyn and that he visited him on several occasions.

[5] His evidence further is that after seeing Dr. Lyn he went home as he was feeling intense pain and was unable to move freely and that at the time of the accident he was bleeding from his mouth and his feet. He also states that Mr. Allen offered to repair his bicycle. He adds that whenever he sits or "do long standing" his lower back would pain him severely and that he is unable to perform moderate physical activities for long periods, that the accident reduced his work significantly, but he has been gradually able to increase his work load, over time.

[6] In amplification of his witness and statement, Mr. Williams disagreed that he rode into the path of the vehicle or collided in the front of the vehicle. He said he paid Dr. Lyn $5,000.00, received a medical report and a receipt, and that he also paid doctors for consultation and went about eleven times. Two receipts evidencing

payment of $3,500.00 each, on May 14, 2006 and April 10, 2007 and the medical report were tendered and admitted in evidence.

[7] Mr. Williams also said that at the time of the accident he had a job as a carpenter that he earned up to $25,000.00 per week and that after the accident he was at home for one year “through me back me couldn’t do anything”. He also stated that he took taxi to Dr. Lyn and paid $2,500.00 for the round trip.

[8] When cross examined by Ms. Afflick, he admitted that in 2014 he was 70 years old, and said he had a contract for a job. He stated that construction work and carpenter work are one and the same and indicated that on the day of the accident he was not working as he had come up from Ocho Rios where he was putting a roof on the house of Jeremiah Bashford, and that he was being paid $4,500.00 per day.

[9] He stated that he worked six days per week, for two months, and during the two months before the accident, he visited his home in Spanish Town every two weeks and would come up on the Friday or Saturday and go back on the Monday. When asked if he had a problem with his eyesight, he said “me eyes giving me trouble”. He then indicated that he does not wear glasses and never did and that it was after the accident “everything starts”.

[10] Mr. Williams stated that when he got to the intersection of 83 Lane, he stopped and looked “right and left” and saw the driver coming from the opposite direction and he was going across. He said he saw the vehicle on the left side of the road going to Spanish Town, and it had stopped when he crossed the road. He added that they were both travelling in the same direction and he was on the extreme left of the road when the defendant “ran in the back of the bicycle”

[11] He explained that “the hit from back carry me over and I drop on my face and it continues to push me and I find myself on top of the car and the windshield break”. He also said “all bout over my body was bleeding” when it was suggested to him that the extent of his injuries as set out in his witness statement, were not

so. He insisted that he had to go to the doctor eight times and that he travelled from Ocho Rios to the doctor in Spanish Town because he had a house down there, “you have to jus call it that I live in Ochi”. He denied that he was the one who rode into the path of the driver of the motor car, said his son provided care for him when he was in Ocho Rios and added that he was not able to work for “one full year” as he could not climb a ladder.

[12] In answer to the court, Mr. Williams said the accident took place between eight and nine in the morning, that he knew Mr. Allen before that date, and that it was a private taxi that took him to the police station. He also stated that Dr. Lyn is his private doctor and that he went to him on the same day of the accident.

The Defendant’s Evidence

[13] Mr. Allen’s evidence in chief is contained in his witness statement dated January 16, 2014. He states that he was driving the 2nd defendant’s vehicle and on reaching the vicinity of 81 Lane, the claimant negligently rode his bicycle from the right side of the roadway “straight across the said road,” into the path of his vehicle and collided in the front of the vehicle. He indicates that they were both travelling in the same direction at the time and it was “approximately 12:00 midday”.

[14] He adds that he applied his brakes and swerved further to his left when he observed the “cyclist” in an attempt to avoid the collision, “this notwithstanding the cyclist still managed to operate his cycle to cause or permit the said collision” He denies being responsible for the accident or contributing to it in any way and states that any damage suffered by the claimant “was as a direct result of his own action”.

[15] Under cross examination, he indicated that he is still a taxi driver and that before the collision he had been driving a taxi for about twenty years. When asked the width of the main road, he pointed to a distance estimated to be 20-25 feet. He indicated that there were a number of intersections along the right hand side of

the main road from St. John's Road to Spanish Town. One, he said is 83 Lane, from which it is normal for motorists to travel in and out, and that while travelling on St. John's Road he is able to see the 83 Lane intersection and to see vehicles going in and out.

[16] He admitted that on the day in question he stopped to pick up and let off passengers. He agreed that he said that on reaching the vicinity of 81 lane the claimant rode his bicycle from the right side of the road "straight across the said road" and admitted that he observed Mr. Williams at 83 Lane on the right hand side of the road while he was coming up the road "and all pon a sudden him turn from right to left". He added that he had stopped to let off a passenger and as he moved off, he observed the claimant ride out of 83 lane and "by the time I reach close to him him switch to the left"

[17] When asked how far away he was when he first saw Mr. Williams, he said "around 200 feet" and when asked how close he was when he made the switch, he said "ten or twelve feet". He said he was driving at about 25 kmph and when pressed as to whether he meant 25 mph or whether he could be travelling faster, he said "if a no 25, a caan more than 30".

[18] He said all he could do when he saw Mr. Williams 'switch', was to swerve to the left, because there is a gully. He said he held his brake, but the vehicle was still damaged and on a scale of one to ten, the damage was 'one'. He also said that the windscreen had "a little crack" which was caused by Mr. Williams' hand.

[19] He indicated that after the accident he came out of the vehicle and asked the claimant why he came across the road and that he then "jumped in the vehicle and drove straight to the police station for safety" and gave the police a statement. He stated that Mr. Williams did not go to the hospital and that the police visited the scene the following day and both himself and Mr. Williams were there as well.

[20] He disagreed that he caused the accident and repeated that the claimant came across the road. He said he tried his best to stop and disagreed that the reason he could not stop was because he was travelling faster than 25 or 30 kmph. He denied calling Mr. Williams after the accident in relation to the repair of his bicycle and indicated that when the collision took place he observed Mr. Williams' left foot and that "a there so get knock". He said that he did not see any blood, but he saw him hopping.

[21] He admitted that where the accident happened was a busy thoroughfare and that when he said Mr. Williams switch to the left, there was no vehicle headed in the direction of St. John's Road at that time and then said his vehicle was the only one on the road.

[22] No witnesses were called on behalf of either party.

The Submissions

[23] At the end of the trial, Counsel for the parties were ordered to file written closing submissions. The submissions on behalf of the claimant were filed out of time on March 16, 2018 and I allowed them to stand as if filed in time and took them in consideration in coming to a determination. However, up to the time of writing, no submissions were received from the 1st defendant's Counsel and to avoid further delay in the delivery of the judgment I have chosen to proceed without any input from her.

[24] Counsel for the claimant in her written submissions on the issue of liability, outlined the facts that were undisputed as well as the applicable law and having identified that the main issue to be determined was who was responsible for the collision, pointed out quite correctly that the resolution of the issue is a question of fact.

The Issues

[25] The statements of case and the evidence before the court show that there is no real dispute that the claimant's bicycle and the motor car driven by the 1st defendant came in contact with each other. What is in dispute is the precise manner in which the collision occurred and who is to be blamed or whether both parties are blameworthy to some extent, and the extent of the blameworthiness.

The Law and application

[26] It is well settled that in a claim for negligence, in order for the claimant to succeed, it must be established on a balance of probabilities that the defendant owed him a duty of care which has been breached and that damage to the claimant resulted from that breach.

[27] It is also well settled that all users of the road owe a duty of care to other road users and that drivers of motor vehicles must exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care is the care which the ordinary, skilful driver would exercise under all the circumstances and includes avoiding excessive speed and keeping a proper lookout**. (Bourhill v Young** [1943] AC 92).

[28] In this case, both claimant and 1st defendant owed a duty of care to each other as they were traversing the roadway, the claimant on a pedal cycle and the defendant in a motor car.

[29] The Privy Council decision of **Nance v British Columbia Electric Railway Co. Ltd**. [1951] AC 601 provides some guidance on the duty of care in matters such as the case at bar. Viscount Simon, at page 611, had this to say:

> "*Generally speaking when two parties are so moving in relation to one another so as to involve the risk of a collision each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a motor vehicle"*

[30] Additionally, **Section 51(2) of the Road Traffic Act** provides that a driver of a motor vehicle has a duty to take such action as may be necessary to avoid an accident. It states as follows:

> *"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".*

The issue of liability

[31] Having considered the evidence put forward by the parties and the submissions of Counsel for the Claimant, I recognize that the issue of liability rests on the credibility of the parties and the plausibility of the accounts given by them. In arriving at my decision I have placed reliance on my assessment of the parties, having examined their demeanour while they were giving evidence and during cross examination.

[32] The dispute is in relation to the manner in which the collision occurred and who is to be blamed as both parties have advanced different versions of the events leading up to the accident and there is no independent eyewitness

[33] The court did not have the benefit of an assessor's report on the condition of either the bicycle or the motor car immediately after the accident which could provide more conclusive evidence on the point of impact or exactly where on the car or the bicycle any damage was sustained. Mr. Allen had indicated that the front section of the car, the front bumper and windscreen were damaged, but this damage he said was minor. Mr. Williams, however, stated that after he was hit he was thrown in the air, he fell on the bonnet and the windshield was cracked and that he rolled to the ground.

[34] I find that both Mr. Williams and Mr. Allen were aware of each other's presence on the road that morning as they both admitted to having seen each other. The claimant said he saw the 1st defendant when he had stopped, and the 1st

defendant said he saw the claimant from a distance of about 200 feet in the first instance. It is therefore clear that the 1st defendant was not keeping a proper lookout.

[35] Mr. Williams' account of the accident was not significantly shaken in cross examination and I prefer and accept his version of what occurred over that of Mr. Allen.

[36] It may well be that the estimates of distances given by the parties may be inaccurate. However, I find as a fact that Mr. Williams rode across the road, from the right side to the left in the vicinity of 81 and 83 Lane and that he was hit from behind by Mr. Allen. I find also that Mr. Williams having crossed the road, was travelling in the same direction as Mr. Allen, and was hit when he was on the left hand side of the road. The evidence leads me to a finding that the claimant had in fact switched across the road, but I accept as true the evidence that he was already riding on the left hand side when he was hit from behind. In this regard I find that the Mr. Allen was negligent.

[37] Mr. Allen claims that he was travelling at a rate of 25 -30 kmph and that he saw Mr. Williams when he was about 200 feet away and that when he made the 'switch' he was about 10 – 12 feet away. These points to a finding that the 1st defendant must have been travelling at a faster rate of speed than he would have the court believe and that he was not keeping a proper lookout and neither did he take the necessary evasive action to avoid the collision. From the answers given by Mr. Allen in cross examination, it is clear that he was not keeping a proper lookout and was driving without due care.

[38] While I believe that Mr. Williams had crossed over from the right to the left before the collision took place, I find it difficult to believe that he could have gone a distance of 'a chain and a half'', when the collision occurred and even if the estimates of distances given by the parties are not good, it is clear on the evidence that both parties were aware of each other on the roadway just prior to the accident and the fact that the 1st defendant, being the person in the motor

vehicle, which would be travelling much faster than the claimant on a bicycle, and for the collision to have taken place in the manner in which I accept it did, I find that the 1st defendant ought to have acted reasonably to avoid the collision.

[39] The court is of the view that the evidence of the claimant is more credible and to be preferred. On a balance of probabilities, the court finds that the defendant was driving at a speed far in excess of the 20 or 30 kmph he claimed he was travelling, and that he hit the claimant from behind after he had crossed over from the right side of the road and was travelling on the left in the same direction as the 1st Defendant.

[40] Even on the 1st defendant's evidence in relation to the damage which he said the vehicle sustained, I find that it is more likely that the claimant was hit from behind.

Contributory Negligence

[41] Where a defence of contributory negligence is made out, it operates to reduce the claim of the claimant to the extent to which the court finds the claimant to be at fault. **Section 3 of the Law Reform (Contributory Negligence) Act** states as follows:

> *"3. (1) Where any person suffers damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."*

[42] The section does not specify how responsibility is to be apportioned, save and except requiring that the damages must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage, as opposed to the accident. However guidance on how to carry out the task of apportionment was provided in the case of **Stapely v Gypsum Mines Limited** [1953] AC 662 at 682 where Lord Reid said:

> *"A court must deal broadly with the issue of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness"*

[43] The defendant is required to specifically plead contributory negligence and has a duty to provide evidence from which this court can accept, on a balance of probabilities that the injury of which the claimant complains resulted from the particular risk to which the claimant exposed himself by virtue of his own negligence.

[44] The defendant has pleaded and asserted that the accident was "... caused and/or contributed by the negligence of the claimant". On his evidence he has indicated that the claimant "switched" from the right onto the left of the road.

[45] In **Nance,** supra, the court said in relation to the defence of contributory negligence: "all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury"

[46] Applying that principle to the facts of this case, I find that although the claimant said he saw the defendant's vehicle, he said that it had stopped and he rode out of the lane onto and across the main road and was riding in the extreme left hand lane when he was hit from behind. The defendant has not presented evidence from which I can find that the claimant did not in his own interest take reasonable care of himself. On the evidence before me I cannot find that the claimant, by his want of care, contributed to his injury.

[47] By the admission of Mr. Allen, he saw the claimant while he was on the road at a distance of about 200 feet from him. He admitted in his evidence that he saw him switch over to the left and that they were going in the same direction. Mr. Allen was therefore under an obligation to keep a proper lookout for the cyclist

that he had already observed and should have been able to take the necessary evasive action to avoid the collision.

[48] As it stands, this Court has found that Mr. Williams had already exited the 83 Lane and had crossed over onto St. John's Road and was travelling in the same direction as Mr. Allen when he was hit from behind. In the Court's view, the collision occurred because the Defendant was driving at an excessive speed and in all probability was less focused on the need for caution as for his need to probably get to his destination quickly. It is clear that he was travelling at a much faster speed than he has indicated to the court and he was unable to sufficiently reduce his speed when he came upon the claimant who had crossed over to the left side of the road. He claimed that he swerved but it is clear that this measure proved ineffective with the resulting collision in the back of the claimant's bicycle. The claimant cannot therefore be held to have contributed to the injuries he received.

[49] In my judgment, the conclusion that the accident was caused by the 1st Defendant's negligence, is inescapable.

[50] There will therefore be judgment for the claimant against the defendants and I will proceed to assess the damages to which he is entitled.

Damages

[51] On examination of the medical report of Dr. Humphrey Lyn dated March 18, it is noted that the claimant sustained "moderate contusion to the right side of his face, his chin, left wrist, lower lumbar sacral spine and left leg and an abrasion to his left wrist". Dr. Lyn states that the claimant was seen on two follow up visits for "post-traumatic neuralgia to his left leg" and states that he was not able to carry out his normal daily activities for six months.

[52] In support of the claimant's claim for general damages for pain and suffering, Counsel referred to the following cases as reasonable guides in coming to a

determination and suggested that an award of $1,200,000.00 would be reasonable in the circumstances:

a) **Wayne Hutchinson v Cyril Robinson**, Claim No. 2010HCV00293, unreported, delivered June 19, 2012, in which the claimant was awarded $1.5m. He was diagnosed with muscular ligament strain to the lumbar spine and right shoulder and topical bruising as a result of trauma to the right foot.

b) **Henry Bryan v Noel Hoshue,** Khan, Volume 5, page 177. Bryan sustained abrasions over the frontal region of the scalp and had severe headaches, which the doctor found to be consistent with inter alia, blunt injury to the head. He was awarded $350,000.00 on September 30, 1997.

c) **Dalton Barrett v Poncianna Brown and Leroy Bartley,** Khan, Volume 4, page 210. This claimant sustained contusions to his mouth especially his lower lip and contusions to his lower back and left shoulder. He was awarded $750,000.00 for pain and suffering and loss of amenities on November 3, 2006.

d) **Douglas v Warp and Others,** Khan, Volume 4, page 210 in which the claimant had bruises to right upper limb and weals all over right shoulder as well as bruising of left upper limb with swelling to left arm, tenderness over humerus, swollen and tender left forearm and left thigh. He was awarded $140,000.00 on April 6, 1994 for personal injuries.

[53] Using the cases guides, and bearing in mind that the injuries to this claimant were described as 'moderate contusions and an abrasion', while in the cases referred to, the injuries sustained appear to be more serious than that suffered by the claimant, I believe an award of $1,000,000.00 would be adequate compensation for Mr. Williams.

[54] In relation to his claim for special damages, Ms Campbell pointed to the medical expenses of the claimant and the transportation costs and indicated that the sum claimed for loss of earnings was for one year at $25,000.00 per week.

[55] The claimant in his particulars of special damages pleaded the following:

"medical expenses $8,500.00; loss of earnings $15,000.00 per day for 8 months) $480,000.00 and transportation costs (and cont.) $3,450.00" a total of $491,950.00.

[56] On the evidence however, I find that the claimant is exaggerating his claim, in particular as it relates to his special damages. He has provided documentary

evidence of his expenditure of $7,000.00 in relation to his medical expenses and $5,000.00 for the medical report. However, he has provided nothing to substantiate his claim for transportation or loss of earnings.

[57] Special damages must not only be pleaded but they must be proved. (**Lawford Murphy v Luther Mills** (19760 14 JLR 119) the claimant in his particulars of claim, claimed special damages in the sum of $491,950.00, which includes a sum for transportation which was noted to be “and continuing”, which I understand to mean that the sum stated is not final. No application has however been made for the particulars of claim to be amended.

[58] Applying the principles in the Court of Appeal decision of **Thomas v Arscott** (1986) 23 JLR 144, this court cannot award a greater sum than that which is pleaded unless there was an amendment to reflect the increased amount. There will therefore be an award of $3,450.00, as pleaded, in respect of his transportation expenses, notwithstanding that he has provided no documentary proof. I accept that he attended on the doctor at least three times and the sum pleaded appears reasonable.

[59] The oral evidence given by Mr. Williams, by itself, I find is insufficient to satisfy the requirement for specific proof in relation to his loss of earnings. His evidence, in my view, is “so bald as to amount to throwing up figures at the head of the court”.

[60] Especially in case of employed persons, it has been consistently held that some documentary evidence ought to be presented to support the sum being claimed in relation to loss of earnings. Mr. Williams had, under cross examination, stated that he was being paid $4,500.00 per day and was working six days per week for two months although in his examination in chief he had said he earned up to $25,000.00 per week. Based on the nature of his job I believe he should be able to provide documentary evidence of his earnings. I therefore do not find that Mr. Williams has made out a case for loss of earnings.

Disposition

[61] Judgment for the Claimant against the defendants with damages assessed and awarded as follows:

General damages for pain and suffering awarded in the sum of $1,000,000.00 with interest at 3% from May 24, 2008, being the date of service of the Claim form to today

Special damages awarded in the sum of $ 15,450.00 with interest at 3% from April 3, 2007, being the date of the accident to today.

Costs to the Claimant to be agreed or taxed.