2017 JMSC. Civ. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 00797

BETWEEN	**ALTHEA YOUNG**	**CLAIMANT**
AND	**WAYNE CHEN**	**1ST DEFENDANT**
AND	**DIANA THORBURN**	**2ND DEFENDANT**

Mr Kent Gammon instructed by Kent Gammon and Co for the Claimant

Mr Nigel Jones instructed by Nigel Jones and Co for the Defendants

Negligence - Branch falling from tree causing injury to passerby – Liability

Damages - Assessment

Heard: July 28 and 29, 2016 and March 3, 2017

LINDO J

[1] By claim form and particulars of claim filed on February 14, 2013, the claimant claims that on September 19, 2012 at approximately 6pm she was being transported by her son George Duncan Young in her Mitsubishi Outlander motor vehicle registered 4437 FN along Millsborough Avenue in the parish of Saint Andrew when a dry branch from a dead tree fell from the defendants' land onto the windshield of the motor car violently smashing through it and striking her left forearm and breaking same. She is claiming damages in negligence for personal injuries, loss and damage.

[2] In her Amended Particulars of Claim she states: "the lack of maintenance of the dead tree and of the overhanging dead branches was negligence on the part of the defendants" and in the particulars Negligence she states the following:

(1) "failed to properly maintain a tree...thereby causing a public nuisance

(ii) failed to ensure that members of the public would be safe in traversing Millsborough Avenue which had dead branches from a tree on the defendants' subject land overhanging onto the road.

(iii) failed to give any warning to members of the public.

(iv) Res ipsa loquitur"

[3] By their amended defence filed on May 13, 2013, the defendants aver, *inter alia*, that they were not the persons in possession of the subject property as it was sold to Milton and Charlotte Brady and that possession was given to them by letter dated July 11, 2012 and they assumed the risks and responsibilities associated with the property and were the persons entitled to use and enjoy the property. They further state that the tree posed no danger to passersby and/or the claimant and they denied that there were dead branches overhanging onto the road.

[4] On April 9, 2013 the defendants had filed an ancillary claim against Milton Brady and Charlotte Brady claiming an indemnity or alternatively a contribution and costs in the event that they are held liable. However, this ancillary claim was not pursued.

The Claimant's Case

[5] The claimant's witness statement filed on June 6, 2016 was admitted as her evidence in chief after it was identified by her and she was subject to cross examination. Her evidence is that upon passing 35 Millsborough Avenue, a large dry branch from a dead tree on the defendants' property fell and violently smashed through her windshield striking her left forearm and she felt intense pain and was in a state of shock. She states that she suffered a fractured left arm and bruises on her left arm.

[6] She also gave evidence that there was a big, dead tree near to the front of the premises with branches which extended over the road and that the premises looked like an empty property, with a chain across each gateway and it had a "disused look".

[7] In cross examination, she stated that at the time of the accident she did not know anything about the property and she could not recall seeing the letter which states that the property had been transferred. She also stated that shortly after the accident the tree was chopped down.

[8] She related that she was sitting at the left front of the car, the window was open and the branch came down and broke her hand. She added that her son stopped, turned around and they took the branches out of the windscreen and put them on the road. She indicated that as far as she was aware her son took at least one photograph on the day of the accident.

[9] She insisted that a branch fell from a tree and stated that the next morning she went with her son to the scene of the accident and saw a piece still lying on the

road. She described the tree from which the branch had fallen as “a dead tree” and indicated that she saw dead branches sticking out.

The Defendants’ Case

[10] The 1st defendant’s witness statement dated November 2, 2015 stood as his evidence in chief. His evidence is that both defendants acquired the property in 2004 and that as at September 19, 2012 they had conveyed their interest in the property to Milton and Charlotte Brady. He indicates that an agreement for sale was executed from as early as October 30, 2009, the sale was not completed in 120 days as contemplated by the agreement for sale and that they received the full purchase price for the property on or about July 11, 2012 and gave the purchasers possession of the property by letter dated July 11, 2012.

[11] He states further that at the time of the accident they no longer managed or otherwise dealt with the property. He adds that he is familiar with the trees on the property and prior to giving possession of the property to the purchasers, the trees posed no danger to any passerby and that based on the sturdiness and look of the trees and particularly the tree at the front which the claimant says caused her loss and injury, no one could tell that the tree would fall.

[12] When cross examined the 1st defendant agreed that at the time of the incident he was a developer of lands in the Millsborough area, “in this specific instance” and that he was familiar with the subdivision of Lots 8 and 9. He also agreed that it is an open lot, “the grass may have grown up” and Lot 8 had a few trees that were not overhanging, but “fairly close” to Millsborough Avenue. He indicated that it was not to his knowledge, and he could not agree, that trees on Lot 8 were fairly

close to the road that if they were to fall over they would fall onto the road. He said he could not recall any dead trees on either Lot 8 or 9.

[13] He recalled being made aware of the accident although he could not recall the specific time and indicated that he was told “a branch had fallen from my land onto a car driving on the road”. He stated that he did not say he was going to have the tree cut down, but that he “may have said he was going to have men go and look at the site”.

[14] He admitted that there used to be a “for sale” sign on the wall by 35 Millsborough Avenue but was unable to say if it was there on that specific date. He said he did not recall a tree being by the side of the road but that he would not “rule it out”. He also admitted that it was possible that there were trees to the front of the premises, 6 feet from the boundary.

[15] When asked if he agreed that as at July 11, 2012 no conveyance of the property had been made to the Bradys, he said, “I can’t say”, and when asked if he agreed that as at July 11, 2012, the Bradys were not the registered proprietors he also said “I can’t say”.

[16] He stated that only one Instrument of Transfer of land was signed in respect of the land. When shown exhibits 9 and 21(the instrument of transfer with the date August 3, 2012 and the instrument of transfer with the date July 17, 2012, at the top) he admitted that there are quite a few notations on Exhibit 9 which are not on the other. He also admitted to seeing the date ‘September 24, 2012’ on the last page of Ex 9, but quickly added that that was not the date on which he was paid.

[17] When it was suggested to him that the transfer of Lots 8 and 9 did not take place until October 23, 2012, he did not agree. He stated that the transfer, Ex 9, had

"stamp office date...September 17, 2012" and when shown page 7 of the said exhibit, he said he agreed that it said " ...October 23, 2012...".

[18] In response to a suggestion that he did not hand over any keys to the Bradys, he indicated there was nothing to "put under lock and key". He disagreed that the property had wild bush and trees, and when asked if the reason he did not hand over a key to the property is that the property was undeveloped, he said "that is the answer, yes sir"

Issues

[19] It is not in dispute that the defendants were noted as the registered proprietors of the property in question at the material time and therefore it falls to be determined whether they were the persons in possession, occupation or control of the property and if so, whether they are liable for the injury and damage caused to the claimant by the branch which fell from a tree on the said property.

Submissions on Liability

[20] Both Counsel have provided the court with their written submissions on liability and quantum of damages as well as authorities relied on, for which I am grateful. I have given due consideration to these submissions as well as to the evidence presented and will not restate the submissions on liability in this judgment.

The Law

[21] The claimant claim is in negligence and it is settled that in order to establish a case in negligence the claimant must show that a duty of care was owed to her, there was a breach of that duty and as a result she suffered loss and damage.

[22] In the case of **Caparo Industries plc v Dickman** [1990] 1 All ER 568 at 573-574, Lord Bridge of Harwich, in dealing with the test of whether a duty of care exists, said:

> *"... in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

[23] It is established that owners of trees near to roadways owe a duty of care to the persons using that roadway to ensure that the trees do not present a danger. Such tree owners must take all reasonable steps to avoid foreseeable injury or harm being caused by the trees and thereby ensure the safety of passersby in order to discharge that duty of care. The steps required to be taken to prevent such an occurrence in my view, could be accomplished by the defendants ensuring that they carry out regular examination and maintenance of the trees on the property. There is authority that it is the condition of the tree that indicates how much care is required.

[24] Persons using the roadway in my view would be those persons to whom a duty is owed being those persons who are likely to be affected by the negligence of the property owner whose failure to exercise due care to maintain his property leads to injury.

[25] As a result of the branch falling and causing injury to the claimant, the question is whether the defendants were careful enough in how they managed the trees on the property.

[26] The evidence which I accept as true, is that the tree from which the dry branch fell causing injury to the claimant, was fairly close to the road so that it cannot be said that the risk of injury or harm to a person from negligence in the failure to maintain it was so small that the probability of a branch falling and causing such an injury could not be anticipated by a reasonable man.

[27] Although the court did not have the benefit of any expert opinion in relation to the condition of the tree, I accept that the claimant's description that she saw dead branches sticking out from the tree and that it had a dead top. The evidence of the 1st defendant is that there are times when the tree sheds its leaves and he also gave evidence that trees on the property would have lost branches during the hurricane in 2006.

[28] I prefer and accept the evidence of the claimant as to the condition of the tree at the material time and I find on a balance of probabilities that the defendants knew or ought to have known that the condition of the tree and that it posed a danger to passersby.

[29] While I am of the view that evidence as to the type of tree and the nature of the care required to maintain it would have further assisted the court in coming to a determination as to whether there was a breach of duty of care, I accept the description of the tree given by the claimant and find that as a result of the failure of the defendants to ensure that the tree on their property was properly maintained they were in breach of their duty of care to passersby to prevent harm caused by a branch falling from a tree from the premises and causing injury.

[30] At the time of the incident, the defendants were still the registered proprietors noted on the title. This, on the face of it, would indicate that the defendants would have a duty to maintain the property and would therefore be liable to the claimant for the injury resulting from the branch falling. However, I agree with Counsel for

the defendants that the Claimant must go further than showing that the defendants were the registered proprietors.

[31] The 1st defendant's evidence is that the defendants gave possession of the property to the Brady's and on or about July 11, 2012 they had received the full purchase price of the property. In this regard, they place reliance on the letter of possession, which is the letter dated July 11, 2012 and the copy cheque. These are documents described as "contemporaneous documents from third parties". by the defendants' Counsel.

[32] The letter of possession, (Exhibit 13), is dated the same date on which it indicates that the Brady's "have been" entitled to possession and incorrectly states that the Brady's are now the registered proprietors. The copy of cheque No.01504 from First Caribbean International Bank (Jamaica) Limited in the sum of US$25,000.00 is made payable to Victoria Mutual Building Society and this the 1st Defendant states is the balance of the purchase price.

[33] The defendants have also sought to show that they were seeking to have the property transferred to the Brady's and have pointed, in particular, to the original transfer tax receipt, the stamping requisition which was completed in relation to the transaction submitted on July 17, 2012 and the Notice of Assessment for stamp duty dated July 17, 2012 and submit that these exhibits support the defendants' position that they no longer had any control of the property.

[34] I have carefully examined the documentary evidence, considered the evidence presented and assessed the demeanour of the two witnesses.

[35] I note that the sale agreement dated October 30, 2009 refers to Lots 8 and 9 which were formerly registered at Volume 940 Folio 414 and Volume 1088 Folio 273 of the register Book of Titles, respectively, and the agreed sale price is noted as US$355,000.00. There are two documents with the heading "Transfer of

Land" (Exhibits 9 and 21) the 1st defendant's evidence in chief is that "the instrument of transfer was executed by the defendants and the Purchasers on July 17, 2012". Exhibit 21 bears no date at which it was signed but shows that it was assessed for stamp duty and transfer tax on July 17, 2012. Exhibit 9 bears a date which appears to be the 24th of July or August, 2012. Both documents were signed by the defendants and the Brady's. It is therefore clear on the evidence that at least two transfer documents were signed.

[36] Exhibit 9 bears a stamp which in my view shows payment in respect of transfer tax and stamp duty and has 'August 31, 2012' as the date of assessment, for sum to be paid by September 14, 2012.

[37] Exhibit 16, the letter from the Brady's' attorneys, shows that on July 11, 2012 cheque No 01504 for the sum of US $25,000.00 was sent to Jeniffer Messado & Co as representing balance to close "less US $1,795" which the letter stated "we will forward to you on your undertaking to let us have..." certain documents stated in a list. This list included the letter of possession and the Duplicate Certificate of Title in the name of the Brady's.

[38] I find on a balance of probabilities that the complete balance to close was not submitted to the attorneys who wrote the letter dated July 11, 2012, as at that date, the significance of which would be that the defendants would not have received the balance of the purchase price and would not have passed the right of possession and control of the property to the Bradys as at July 11, 2012.

[39] I therefore find that there is a high degree of probability that the defendants were still in possession and control of the property at the time of the incident. I find that in addition to the fact that the defendants were still noted as the registered proprietors, it is more likely than not that the defendants were still in possession and control of the property at the time of the accident as I accept as true the

evidence that the 1st defendant indicated that he would have addressed the situation after discovering that the claimant was injured and that he would not have done so if they were not still either in possession, ownership or control of the property. I find also, that the fact that the defendants filed an ancillary claim against the Brady's and have not pursued it, speaks volumes.

[40] I therefore find on a balance of probabilities that the defendants were still in control of the property on which the tree was located, knew or ought to have known of the condition of the tree on the property, took no steps to prevent or minimize the risk of injury or damage to passersby and therefore had breached their duty of care to the claimant.

Res ipsa loquitur

[41] Although the claimant pleaded the doctrine of res ipsa loquitur, no emphasis was placed on it except to state that it has the effect "that the mere happening of the accident affords reasonable evidence in the absence of specifically contradictory explanation by the defendant that it was due to the defendant's negligence".

[42] I agree with the Counsel for the defendant that having asserted that the accident was as a result of the defendants not maintaining a tree on the property, the claimant has not established this. I find that there was no scope for the operation of the doctrine in this case, as the conditions for its application do not exist, particularly as the claimant had put forward a theory of what caused the accident.

Findings

[43] This court finds on the evidence that a branch fell from a tree on the property at 35 Millsborough Avenue causing damage to the claimant, a passerby. The risk of the branch falling onto the roadway ought to have been known by the owners of the property.

[44] I am satisfied on a balance of probabilities that if the property owners had been managing their property to achieve a reasonable level of safety, the condition of the tree would have been detected and the accident prevented.

[45] This court also finds on a balance of probabilities that the defendants were still in control of the said property. They therefore had a duty to maintain it and to do whatever was necessary to prevent harm to the claimant. No evidence has been provided to show that the defendants took any or any reasonable steps to manage the trees on their property such as to trim and lop when necessary to discharge their duty of care to passersby and I find that they knew or ought to have known that there was the risk of a branch of the tree falling onto the roadway).

[46] I prefer and accept the evidence of the claimant that the branch fell from what she described as a dead tree from the property belonging to the defendants.

[47] I find on the evidence that in the immediate aftermath of the incident the tree was chopped down and that the 1st defendant was advised of the incident and gave an indication that he would have done something to address the situation. There is no evidence that any inspection of the tree had been carried out whether before or after the incident.

[48] I find that the defendant was being a witness of convenience when he gave evidence of trees on the property having “shed leaves” at some stage, and this in my view also points to a finding that they knew or ought to have known of the condition of the trees on their property and therefore had a duty of care to the claimant which they breached.

[49] Having found that the defendants were still in ownership of the property, coupled with the fact that on the evidence of the 1st defendant I accept that they had

control of the property at the time of the incident, this leads the court to a finding that they are responsible for the injuries sustained by the claimant.

[50] In view of the foregoing, there shall be judgment for the claimant with damages to be assessed and costs to be agreed or taxed.

[51] I will now determine the quantum of damages to which the claimant is entitled.

General damages:

[52] Both Counsel referred to the case of **Leeman Anderson v The Attorney General,** CL2002/A017, unreported, delivered July 16, 2004. In that case, the claimant suffered an undisplaced fracture of the right ulna and had swelling, deformity and tenderness over the right forearm and was awarded $400,000.00 which when updated amounts to $1,210,933.47. Counsel for the claimant submitted that the updated award in the case of Anderson should be made to the claimant.

[53] Counsel for the defendant also sought to rely on the case of **Annette Christie v Nutrition Products Ltd.** CL 1990/C429, unreported, delivered March 30, 2001 in which the claimant fell, lost consciousness and suffered a fractured wrist. She was awarded $450,000.00 which, when updated, amounts to $1, 866,125,04.

[54] He submitted the injuries suffered by the claimant in the case of **Christie** are greater than the claimant in the instant case, and as it relates to **Anderson**, while both claimants had fracture of the arm, Anderson was beaten about the head and body, did not have the full use of his arm for 3 months and there was tenderness of his arm and deformity. The claimant in the case at bar, he noted had her arm in a cast for approximately 45 days and after the cast was removed she was unable to stretch her left arm and the muscles were rigid, but she did not indicate

how long the rigidity continued. He suggested that an appropriate award would be $700,000.00.

[55] Using the case of Anderson as the preferred guide, I am of the view that the award to Anderson should be discounted to compensate this claimant, as I find that her injuries were not as serious as Anderson's. I therefore believe the sum of $900,000.00 would be reasonable compensation and I so award.

Special damages

[56] The claimant has specifically pleaded special damages in relation to her motor vehicle in the amount of $221,757.14; medical bills of $5,252.01; the cost of hiring an individual to take care of bees in the sum of $16,000.00 and transportation costs of $148,310.00.

[57] There has been no challenge in relation to the sum claimed as costs of looking after the bees and the medical expenses. However, with regard to the claim for transportation, Counsel for the claimant submitted that this is for using other means of transportation as a consequence of the accident and that the claimant and her son shared the motor vehicle and the usage and accompanying expenses for both should be awarded.

[58] I agree with Counsel for the defendant who submitted that the claimant ought not to recover transportation expenses incurred by her son. He submitted that the transportation costs for the claimant would be no more than $48,600.00

[59] The claimant has provided evidence of payment in respect of medical bills and transportation expenses. I find that the claimant has proved expenses relating to transportation incurred by her in the sum of $52,800.

[60] In relation to her claim for damage to her motor vehicle, she has not provided any evidence from which this court can find on a balance of probabilities that she

incurred the expenses claimed. The undated invoice (Ex. 5).notes “Mr Duncan” as the customer, and is for the sum of $221,757.14. It does not bear any relation to the claimant or to the claim, save and except it speaks to repair to “Mitsubishi Outlando”. Further, the claimant has given evidence that her vehicle was repaired and the cost was covered by her insurance. There will therefore be no award made in respect of this claim.

[61] The sum awarded for special damages will therefore be $74,052.01.

Disposition:

1. Judgment for the claimant against the defendants.
2. General damages awarded in the sum of $900,000.00 with interest at 3% per annum from the date of service of the claim form to the date of judgment
3. Special damages awarded in the sum of $74,052.01 with interest at 3% from September 19, 2012 to date of judgment.
4. Costs to the claimant to be taxed, if not agreed. .

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