[2018] JMSC Civ 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 04546

BETWEEN	**NATASHA CLARKE**	**CLAIMANT**
A N D	**JACINTH MORGAN-COLLIE**	**1ST DEFENDANT**
A N D	**SHAWN COLLIE**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. A. Leith Palmer instructed by Kinghorn and Kinghorn for the Claimant.

Mr. Obika Gordon instructed by Frater, Ennis and Gordon for the Defendants.

Heard: June 6 and 22, 2018

Negligence – Motor vehicle accident – Inevitable accident – Contributory negligence – Personal injuries - Damages

WILTSHIRE, J.

[1] On the 4th October, 2010, Mrs Morgan-Collie was driving motor vehicle licenced 2041ER along the Lakes Pen Main Road in the parish of St. Catherine, when she collided into a wall.

[2] Miss Natasha Clarke who was a front seat passenger suffered injuries as a result and consequently filed a Claim Form and Particulars of Claim seeking damages.

[3] Miss Clarke claimed that the collision was caused or contributed to by the negligence of Mrs. Collie, and particularised her negligence as follows:

i. Driving at a speed that was excessive in the circumstances

ii. Colliding into the wall

iii. Failing to keep any or any proper look out

iv. Failing to stop, slow down or in any other way, manage or control the said motor vehicle so as to avoid the collision

v. Causing or permitting the said motor vehicle with registration number and letter 2041 ER to veer off the road

vi. Failing to have any or any sufficient regard for lawful passengers in said motor vehicle with registration number and letter 2041 ER and in particular the Claimant.

[4] Miss Clarke outlined her injuries as:

i. Swollen left knee

ii. Fracture of tibial plateau on left leg

iii. Gaping infected wound to left leg

iv. Destruction of lateral plateau of tibia with signs of bony infection

v. Valgus deformity of left knee

vi. Chronic osteomyelitis of left tibia

vii. Stiffness of left knee

viii. Instability of left knee

ix. Constant pain in left knee

x. Cosmetic deformity of left knee

xi. Large scar to anterolateral surface of left leg

xii. Tibio-femoral angle – 25 degrees

xiii. Grade III laxity to valgue force at left knee

xiv. Lateral soft tissue tight and contracted

xv. Range of motion 50-80 degrees flexion of left knee

xvi. Temporary disability twenty-one (21) months and continuing.

Claimant's Case

[5] Miss Clarke stated that she accepted a ride from Mrs. Collie on the morning of October 4, 2010. She said it had rained heavily over the weekend and the roads were still wet, and that morning it was raining slightly.

[6] She went on that she put on her seat belt as soon as she entered the car. Further she and Mrs. Collie spoke about the weather and Mrs. Collie's need to change her car tyres.

[7] Miss Clarke further stated that Mrs. Collie kept turning around to give and take the baby bottle from her daughter who was strapped into a child seat in the rear of the motor vehicle. In addition Mrs. Collier was also using her phone whilst driving.

[8] Miss Clarke deponed that there were a lot of big pot holes on Lakes Pen Dyke road and she noticed Mrs. Collie about to drive into one. She alerted her and Mrs. Collie swerved to avoid the pot hole, the vehicle got out of control and started to swerve left and right.

[9] She said that Mrs. Collie applied her brakes, then told her that there were no brakes and she would have to crash the car to stop it. Mrs. Collie then swerved left into the ditch on the side of the road and crashed into the wall.

[10] Miss Clarke said that her body slammed into the dash board and her head hit the window. She was feeling pain in her left leg.

The Defence

[11] Mrs. Collie has denied being negligent. The Defence filed outlined that her car picked up a skid in silt on the road and collided into a wall. She responded that the accident was an inevitable accident caused by extraneous substances on the road which could not be seen by her.

[12] She further denied speeding and maintained that she was travelling at fifty (50) kilometres per hour. Mrs. Collie's defence also stated the Miss Clarke was negligent in failing to wear her seat belt. Consequently if she sustained any injuries, they were caused solely or contributed to by her negligence in not wearing a seat belt.

Defendant's case

[13] Mrs. Collies' evidence is that on the morning in question she gave Miss Clarke a lift due to the inclement weather. She said the island was then experiencing the effects of Tropical Storm Nicole.

[14] Mrs. Collie's stated that she told Miss Clarke to put on her seat belt and she assumed that she had done so. The road was very wet and she was driving at approximately 50 km per hour when she picked up a skid from silt on the road and collided into a wall.

[15] She stated further that she did everything she could to control or steer the car but could not prevent the collision. She indicated that the accident was minor, the car only had minor scratches and dents and the main damage was to the windscreen where Miss Clarke's head had made contact.

[16] It was after the accident that she realised that Miss Clarke was not wearing her seat belt, despite her instructions to her to put on same.

Issues

[17] To resolve this matter the following must be determined:

i) Did the first defendant cause the collision or

ii) Was it an inevitable accident

iii) Did the claimant's actions or lack thereof cause or contribute to her own injuries

iv) What is the quantum of damages due to the claimant, if any

Law and Analysis

Inevitable Accident

[18] It is settled that in an action for negligence the Claimant must prove that the Defendant owed him a duty of care, the Defendant breached that duty of care and, as a result, caused damage to the Claimant.

[19] The driver of a motor vehicle owes a duty of care to passengers. There is an overarching duty to exercise reasonable care in the operation of the motor vehicle, so as to avoid accidents. It is the Claimant who must satisfy the court, on a balance of probabilities that the Defendant had failed to exercise care and therefore breached that duty of care.

[20] The Defendant, Mrs. Collie, in the instant case is denying negligence. Mr. Gordon has submitted that this is a case of inevitable accident. The 7th edition of Charlesworth and Percy on Negligence, at paragraph 3-83 of page 196, defines inevitable accident as:-

> *"where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention of his part."*

[21] At paragraph 3-86 the text further indicates what the defendant must do to discharge the burden of proving inevitable accident.

> *"They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to everyone of these possible causes that result could not have been avoided."*

[22] Both parties agree that the road surface was wet and there were potholes along the roadway and in the vicinity of the place of the accident. They also agree that on the morning in question it was raining lightly. Mrs. Collie's evidence is that where there were potholes, they were filled with water, and the rest of the road surface had silt and debris. It is very evident that the road conditions were less than ideal and combined with the weather, travel would be hazardous.

[23] There is no evidence of speeding. Miss Clarke could not say at what speed Mrs. Collie was travelling. Mrs. Collie in her evidence in chief said that she was going at approximately fifty (50) km per hour when she picked up a skid from silt on the road and collided into a wall. Under cross-examination there was the following exchange:

Mrs. Leith-Palmer: When the vehicle lost control and you picked up a skid, were you travelling at 50 kmph?

Mrs. Morgan-Collie: I assume. That would have been the last time I looked at it.

[24] Miss Clarke stated that Mrs. Collie swerved from a pothole, the vehicle got out of control and started to swerve left and right. She has contended that Mrs. Collie told her that she had no brakes and hence she would have to crash the car in order to stop it.

[25] Mrs. Collie's evidence in chief was that she picked up a skid from silt in the road and collided into a wall. Permission was granted for amplification of her witness statement and she stated,

> *"The vehicle picked up a skid based on the road filled with silt, potholes and was wet as the storm had just hit on the weekend. I picked up a skid. I applied my brakes and picked up a skid and I impacted the wall of the Wysinco warehouse"*

[26] It was under cross-examination that Mrs. Collie in response to Counsel's question; "so you were driving and you just picked up a skid?" first mentioned hitting a pothole. She said, "I went into a pothole with water and silt and on coming out of the pothole, that is when I picked up the skid."

[27] Mr. Gordon has submitted that Mrs. Collie took all reasonable actions to avoid the accident and/or the accident was something over which she had no control. Clearly there was a pothole. Did Mrs. Collie swerve, pick up a skid, and deliberately crash the car because she had no brakes? Or did she hit the pothole, pick up a skid, lose control of the vehicle and crash into the wall?

[28] I do not believe that there was a loss of brakes and Mrs. Collie deliberately crashed her car. However, I do not believe that Mrs. Collie exercised sufficient care, caution and skill to prevent this accident. The speed limit of 50 kmph is usually the lowest norm on the roadway in ideal conditions. The prevailing conditions at the time of the accident required extra care and caution. Mrs. Collie was aware that there were potholes not easily discernible as they were filled with water. She was also aware of the silt and debris on the roadway. This suggests she was either not keeping a proper look out or travelling too fast.

[29] It was foreseeable that the car could fall into potholes and skid on the silt strewn road. That meant there was a need to proceed as slowly as possible since the road conditions and visibility were challenging.

[30] The motor vehicle skidding and colliding with the wall does create a prima facie case of negligence. The first Defendant's explanation does not displace same. I do not find that this is a case of inevitable accident. On a balance of probabilities, the first

Defendant was negligent in the operation of the motor vehicle and did cause the collision with the wall.

Contributory Negligence

[31] Contributory negligence is attributable only to the conduct of a Claimant. It is where the Claimant has failed to use reasonable care for his own safety, and by his own act or omission to act, materially contributed to the injury and/or damage caused.

[32] Contributory negligence does depend on the forseeability of harm to oneself. Lord Justice Denning explained it in **Jones v Livox Quarries** [1952] 2QB 608 at page 615:-

> *"A person is guilty of contributory negligence if he ought reasonably to have forseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."*

[33] The burden of proof in contributory negligence is on the Defendant. Mrs Collie has raised it as part of her defence. In order to succeed she must prove that Miss Clarke failed to take such care "as a reasonable man would take for his own safety" and that said failure contributed to the injuries she suffered.

[34] Mr. Gordon has submitted that where a Claimant suffers injuries in a motor vehicle accident whilst not wearing a seat belt then the Defendant can rely on the principle of contributory negligence to apportion liability.

[35] The Claimant has alleged that Miss Clarke was not wearing her seat belt. The evidence before the court is that both of Mrs. Clarke's medical reports refer to her as being an "unrestrained front seat passenger." Miss Clarke disputed the accuracy of those statements and denied that she was not wearing her seat belt.

[36] Mrs. Leith-Palmer submitted that the court ought not to rely on that aspect of the medical report as it did not form part of the doctor's objective examination and findings.

Reliance was placed on **Dixon-Hall v. Jamaica Grande Limited** SCCA No. 26/2007 to support the submission.

[37] It was in the dicta of Harris J.A. at paragraph 38 that the following was said,

> *"As a medical practitioner giving expert evidence, he is not at liberty to rehearse information given to him by the appellant about her past lupus attacks as evidence of the existence of the lupus. He may however give evidence of what the appellant told him to explain the basis of his opinion."..... "Nowhere in the report did he state that the appellant had given him a history of his past malady."*

[38] The aforementioned utterances of Harris J.A. arose because there was no evidence that the doctor in Dixon-Hall (supra) could speak from his own knowledge that the appellant had suffered a previous attack of lupus. He was not the doctor who made the diagnosis.

[39] The Dixon-Hall case can be distinguished from the instant case, and in my view is not an authority for the position that the court ought not to rely on statements, about Miss Clarke being unrestrained, in the medical reports.

[40] Mr. Gordon contended that the statements in the medical reports, the Claimant's own evidence that her body slammed into the dash board and the unchallenged evidence of the first Defendant that the front windscreen was damaged by the Claimant's head all support the Defendant's case that the Claimant was not wearing her seat belt.

[41] I have noted however that the Claimant's evidence that her head hit the glass of the window on the left side was not challenged by the Defendants. In this instance where there is conflict in the evidence, I prefer and I find the first Defendant's version more probable and accept same.

[42] On the Claimant's case, the slamming of her body into the dash board would most likely occur if her body was not held in place by a seat belt. Further, any

information in Dr. Adams' report concerning the history could only have been provided by Miss Clarke.

[43] Mrs. Leith-Palmer submitted that in Dr. Wright's report, he states that he had Dr. Adams' report while preparing his, hence it would not be strange that the history of impairment is similar. It is worthy of note however that Dr. Wright's report captures far more details in the history of impairment than Dr. Adams'.

[44] It is therefore my finding that the Claimant was not wearing her seat belt at the time of this accident.

[45] The failure to wear a seat belt however, does not automatically establish contributory negligence. It must also be shown that the injuries suffered could have been avoided or minimised by the wearing of the seat belt.

[46] In the fifth edition of Commonwealth Caribbean Tort Law reference is made at page 381, to the Bahamian case of **Thurston v. Davis** where Thorue J held that it must be shown that the injured person failed to wear a seat belt when one was available and that the wearing of the seat belt would have prevented or minimised the injuries.

[47] While the court does find that Miss Clarke would not have slammed into the dash board if she was wearing her seat belt, there is no evidence that had she been restrained, her injuries would have been prevented or minimised. The court has been left to speculate. Consequently I do not find that Miss Clarke's omission to wear a seat belt either caused or contributed to her injuries.

Damages

[48] The report of Dr. Paul Adams in 2011 indicated that Miss Clarke, on admission to the University Hospital of the West Indies, had suffered a fracture of the tibial plateau on the left. Three days later she underwent surgery where she had open reduction and internal fixation and autologous bone grafting of the left tibial plateau.

[49] She developed post-operative complications in the form of a surgical site infection. The infection would not come under control so she had to be taken back to surgery. She was then left with a gaping infected wound which eventually closed.

[50] Dr. Adam's examination revealed that following:

I. Large scar to antero lateral surface of left leg

II. Valgus deformity of left knee

III. Tibio-femoral angle – 25 degree

IV. Grade III laxity to valgus forcr at left knee

V. Lateral soft tissue tight and contracted

VI. Range of motion – 50-80% flexion of left knee

VII. No neurological or vascular deficits

VIII. Destruction of lateral tibial plateau on the left

IX. Chronic osteomyelitis of left fibia

X. Stiff left knee

[51] Dr. Wright's report revealed that Miss Clarke was hospitalised for a period of six (6) months, and discharged in April 2011. She had a second hospitalization in March for approximately five weeks during which she underwent further surgery. She again experienced post-operative complications.

[52] Miss Clarke was admitted for a third time in July 2012, and a fourth time in September 2012 until November 28, 2012. In September 2013 when examined by Dr. Wright she was experiencing constant left knee pain, the left knee was stiff and deformed, and its instability required constant use of a hinged brace.

[53] Dr. Wright's findings were as follows:

I. Analgesic and Trendelenberg gait of left lower limb

II. Slight valgus thrust with gait without the brace

III. 1 centimetre .....limb length discrepancy (left leg)

IV. Wasting of the left quadriceps and calf muscles

V. Multiple scars on left lower limb

VI. Bilateral genu valga with tibiofemoral angles

VII. Range of motion – reduced in the left him, left knee, and left ankle

VIII. Severe left knee crepitus and moderate tenderness

IX. Grade II valgus laxity of the knee;

[54] The following diagnosis was tendered by Dr. Wright:

i. Valgus collapse of the left proximal tibia

ii. Severe osteoarthritis of the left knee

iii. Chronic latent post-traumatic osteomyelitis of the left proximal tibia status post repeated attempt at eradication of infection

iv. Healed left acetabular fracture

v. 14% whole person impairment

[55] Mrs. Leith-Palmer has submitted that a sum of $15,000,000.00 would be an appropriate award for pain and suffering. Counsel relied **on Milton Porteous v. Glenton Morrison et al Khan, Vol 6, pages 14-15 and Janet Williams v. Vincent Yee Singh-Khan, Volume 6, pages 10-11.**

[56] The Claimant in the Porteous case had fractures to both lower limbs, respiratory distress and an assessed permanent partial disability of 26% of the whole person. An award of $7.5 million was made for pain and suffering and loss of amenities. That award updates to $17,704,567.07.

[57] In the Janet Williams case, the Claimant also suffered fractures to both lower limbs. There was a resultant limb length discrepancy of 2½ inches shortening of the left lower limb, multiple ugly scars, post-traumatic osteoarthritis of the left ankle, and degenerative arthritis. The total percentage disability was assessed at 30% whole person. General Damages were assessed at $6 million in 2002 which updated to $22,841,798.37.

[58] Mr. Gordon has relied on the following cases in support of his submission on General Damages:

I. Fitzroy Gordon v. Dayton Clarke at Khans Vol 5, page 52 and

II. Lloyd Bell v. Alcar Construction & Haulage Company et al [2018] JMSC Civ 3.

[59] In Gordon's case, the Claimant suffered a dislocated right hip joint and fractured right pelvis along with back pains. There was resultant scarring, a slight limp and permanent partial disability of 15% of the right lower limb. The award of $710,000.00 for general damages updates to $3,557,168.82 today.

[60] In Lloyd Bell's case the injuries suffered were right shoulder strain, lower back strain, soft tissue injury. There was an assessed whole person disability of 21%. An award was made in January 2018 in the sum of $4 million.

[61] I find that the cases relied on by Mrs. Leith-Palmer had a multiplicity of fractures and permanent partial disabilities greater than Miss Clarkes. The proposed sum of $15,000,000.00 although reduced is still in fact out of line for the instant case.

[62] Mr. Gordon's submission on the other hand has gone to the other extreme, and is too low. While the permanent partial disability in Bell's case exceeded that in the instant case, the nature of the injuries suffered and the treatment tendered disqualified it for any consideration.

[63] In the instant case I must take into consideration the extensive periods of hospitalization, the multiple surgeries, the protracted period of healing, the multiple fractures, the resultant deformity, the whole person impairment, and the continuing complaint of pain.

[64] Miss Clarke stated that she has a difficulty climbing stairs and she cannot run. She also is challenged in using public transportation. I have found the following cases to be of assistance.

[65] In **Patrice Brown v. Kingston Wharves Limited and the Attorney General 2010 HCV03629,** heard March 2014, an injury to knee from falling objects. The Claimant there was diagnosed with posterior cruciate ligament tear along with posterolateral corner injury to right knee. Surgery was done. She was left with resultant scarring, reduced flexion of said knee, instability of knee, tenderness, loss of sensation, possibility of developing osteoarthritis and 15% whole person partial permanent disability. Batts J. awarded $3million for General Damages that now updates to $4.8 million.

[66] **Stewart v. Robinson – HCV 03004/2006** Heard July 2010 – Straw J. Fracture of left knee, 3 surgical interventions, 2 due to wound infections, 1cm shortening of left lower extremity, ugly scar from surgical intervention, deficit in thigh circumference, 28% whole person disability. Further surgery recommended to have knee arthrodesed. Walks with limp, cannot bend, difficulty climbing stairs. General Damages of $3M was awarded, that now updates to $4,593,924.36.

An appropriate award for Miss Clarke would therefore fall in the range between $4M - $5M. I would award the sum of $5Million.

Handicap on the Labour Market

[67] Based on the principles on **Moeliker v. A Reyrolle & Company Ltd.** (1977) 1All ER 9, I must consider whether as a result of the injuries suffered, the claimant is at risk, at some point before the end of her working life, of losing her job and being thrown on the labour market.

[68] There is no evidence before the court that Miss Clarke lost her job as a result of her injuries or was unable to secure a job because of her injuries. The question to be answered is whether there is a real or substantial risk that she will lose her job at some time in the future. If there is, then compensation ought to be paid for the value of the risk and the difficulty she may have (due to the injury) of getting another job. Miss Clarke has provided no evidence that she is at any risk of losing her job in the future. I will not make any award under this head.

Special Damages

Eighty-nine (89) Exhibits were put into evidence to support the sum of $2,267,506.28 for medical expenses. The court in a painstaking exercise examined these receipts and invoices. I find that the claim for medical expenses has been greatly exaggerated. There were receipts for expenses (1) incurred prior to the accident, (2) not related to the accident, (3) outlined on invoices hence duplicated, (4) for prescriptions from doctors beyond the period of hospitalization and not supported by any further medical evidence. Based on the receipts that I have accepted the:- Medical Expenses proved are $715,617.03 and for Transportation, there is no evidence of how this was incurred, so I will not make any award hereunder.

[69] I therefore award the following:-

> General Damages in the sum of $5 million less $1,000,000.00 paid by the Insurance Company with interest at 3% from 18/8/2012 to date of Judgment.

Special Damages in the sum of $715,617.03 with interest at 3% from 04/10/2010 to date of Judgment

Costs to the Claimant to be taxed if not agreed.