In the Supreme Court of Judicature of Jamaica

In the Civil Division

Claim No. 2011 HCV 00293

Between	**Dexter Cole**	**Claimant**
And	**Lissa Pinkney**	**Defendant**

Richard Ritzen for Claimant

Walter Scott QC, Mathieu Beckford instructed by Rattray, Patterson, Rattray for Defendant.

Heard: 25th November, 2014 and 5th December, 2014

Negligence – Bicycle Rider – Duty of Motor vehicle exiting premises onto roadway – Whether cross examiner can raise issue not raised in pleadings or witness Statement – Whether Loss of Earning Capacity and Loss of Earnings are the same head of damage.

Batts, J

[1] This judgment was delivered orally on the 5th December, 2014. The claim is in Negligence and concerns a collision between a motor vehicle and a bicycle. The issue for my determination is largely factual that is, precisely how did the accident occur. I say "precisely" because at the end of the day the parties' respective accounts are not vastly different.

[2] The Claimant stated that he was lawfully riding his bicycle westerly along West Kings House road when suddenly and without warning the Defendant exited premises along that road. He had no time to brake and so avoid colliding with her vehicle. The initial impact caused him no physical injury. He alleges however that the Defendant then drove off after the impact and

in doing so pulled the bicycle in which he became entangled; the car wheel in this process drove over his leg causing injuries.

[3] The Defendant's case was that although it is true she was exiting premises on West Kings House road, the accident did not occur at the entrance to those premises. Rather it took place on the far side of the road. The Defendant alleges that she had safely crossed the side of the road with the lanes heading westerly when the impact occurred. It is the Defendant's contention that the Claimant was proceeding on the wrong side of the median (and hence the wrong side of the road). The collision was therefore primarily if not entirely his fault.

[4] Having seen and heard both Claimant and Defendant give evidence I regarded the Claimant as a truthful witness. I accept on a balance of probabilities that the accident occurred in the manner he described. This preference is due in part to his admirable demeanour in the witness box and to the clarity of his account. It has also to do with the consistency of his evidence with the physical damage to the vehicle and with the totality of the evidence. I will reference the evidence given only to the extent necessary to demonstrate the reasons for my decision.

[5] The Claimant's witness statement dated the 2nd October, 2013 stood as his evidence in chief. He is now 48 years of age, he was 44 at the date of the accident. He is a mason by trade but now does farming. The accident occurred at approximately 6:45 p.m. He was riding in moderately heavy traffic. His exact words used to describe the accident were as follows:

> "I was riding not too fast and not too slow. Just as I got within a few feet of the exit, the car driven by the

> defendant came out into the road, West King's House Road, suddenly and without warning from my left, and directly into the path of my bicycle. I tried to stop but she was too close and my bicycle hit the right hand side of her car in the area of the pillar between the windscreen and the front driver's side window. The car stopped immediately. Although there was quite an impact, I was not badly hurt at that time. My bicycle and I were up against the car – on the uphill (western) side of the car. Then suddenly and without warning, the defendant drove off in the direction of the centre of West Kings House Road. As a result, I was thrown to the ground along with my bicycle. I became entangled up with the bicycle. As the defendant's car was moving it was drawing me – dragging me across the road. Then one of the wheels of the car rode right over my right leg."

[6] The Defendant be it noted, admitted in the course of cross-examination that the area of the car that was impacted by the bicycle was the area as described by the Claimant. That aspect of her evidence is as follows:

> "Q: There was a dent to right hand pillar between windscreen and drivers window after accident.
>
> A: Yes
> Q: That was not there before the accident
> A: No
> Q: Any other damage to the car
> A: Right rearview mirror also damaged
> Q: Where on car was that, attached to driver's door
> A: On front right quarter panel
> Q: What damage you noticed to rearview mirror
> A: Fractured
> Q: Mirror broken
> A: No the casing was fractured
> Q: the damage to vehicle was to front and right if viewed from driver's seat
> A: Correct
> Q: If a bicyclist had hit car at that place would be to your front right
> A: Perhaps so I am not an expert in accidents

Q: It does not take expertise to see something to your front right
A: No”

[7] The latter part of the exchange also indicates an aspect of the Defendant’s way of giving evidence which has caused me to doubt her credibility. But more of that anon.

[8] The Defendant be it noted, also admitted during cross examination, that she had come to a fullstop after the initial impact. She thereafter drove forward. That portion of the evidence is as follows:

“Q: suggest that immediately after impact you stopped very briefly
A: ok, I agree
Q: Then you moved on again
A Correct
Q: It was then you came out of car
A: Correct
Q: It was then the car was opposite side from exit
A: Correct

Then a little later,

Q: you are unable to say that the car did not run over him
A: Correct
Q: Do you accept now that the car did run over him
A: I accept
Q: do you accept it was probably the rear tyre that ran over him
A: no
Q: the initial impact was behind the front right hand tyre
A: yes
Q: you did not reverse
A: Correct
Q: So only wheel that could run over him was right rear wheel
A: That’s incorrect

Q: Do you accept it was probably the right rear wheel that ran over him
A: No,….
Q: Mr. Cole told you that in his witness statement
Q: Please show Mr. Cole's statement to the witness, please show me where he said it was right front tyre
A: Ok no, he said a tyre
Q: having been shown Mr. Cole's witness statement do you still say he said right front tyre
A: No

[9] This extract from the evidence again demonstrates the Defendant's tendency to prevaricate. It also clearly establishes the truth of the Claimant's account, that the Defendant stopped her vehicle after the impact and then drove forward and over his leg. There was no explanation given by the Defendant for driving forward after the impact. Mr. Scott in oral submissions hypothesized that she may have wanted to clear the roadway given, on her account, that she was then at the median. On the other hand, it may have been a panicked frightened reaction or at worst an attempt to place her vehicle in a "better" position after the accident. Whatever the reason however, what is clear is that the Defendant had not previously stated that she stopped after the impact and then drove forward. It is also clear that it was her act of driving off after the impact which caused the Claimant personal injuries.

[10] The Claimant was expertly cross examined by Mr. Scott. He explained without hesitation, the circumstances which lead him to be on that road and at that time. He explained the route he had taken. He even explained that his colleague was riding ahead of him. He was frank in saying that he could not recall his colleague's name as they had only recently met at the worksite. Mr. Scott in closing submissions made much of the fact that the Claimant for the first time in cross examination mentioned that prior to the

collision his bicycle had swerved to the right. He suggested that this evidence meant the accident took place in the vicinity of the median. With respect I did not understand that to be the Claimant's evidence. I will quote that aspect in full,

> Q: Suggest to you, you failed to see the motorcar in time to avoid the collision
>
> A: It was too close when I saw it. When she drove out it was too close. I took the right and she continue going to right. That's when my bicycle hit her car.
>
> Q: Am I to understand you pulled to the right
>
> A: Yes I pulled a bit to right
> Q: In the middle of the road
> A: Going to the median
> Q: That is how it took place
> A: Yes, sir
> Q: can you read and write
> A: My handwriting not that wonderful but I can read and write
> Q: Have you previously said the following: (Paragraph 10 of Claimant's witness Statement read to him)
> A: Yes sir
> Q: That is how you describe accident
> A: Yes
> Q: Not over on right side by median
> A: No sir."

[11] It is fair to say that the witness when referencing the median in this extract, was indicating the direction in which he swung his bicycle. He was not indicating the point of impact. It was a response to the suggestion that he had pulled towards the middle of the road. The witness was agreeing with the cross examiner. The median of course is in the middle. The road be it noted has two lanes going westerly and two lanes going easterly. In the

vicinity of the centre of the road is a painted median separating the dual lanes.

[12] I do not find that there was a significant inconsistency with his earlier evidence. Indeed it is only natural and hence quite probable that a bicycle rider who has not the time to brake, will attempt to change direction. This manoeuvre would have shifted the point of impact from the exit way and into the roadway.

[13] The Claimant also impressed me with his candour. He admitted that at the time of the accident it was beginning to get dark. As he put it "dusk up." The witness also admitted that he was tired after a hard day's work as "anyone would be tired."

[14] I should indicate that Mr. Scott attempted to ask the witness whether he had turned on his bicycle lights. Mr. Ritzen objected on the ground that there was no allegation in the Defence or in the Defendant's Witness Statement, as to there being an absence of light on the Claimant's bicycle or as to that playing any part in this matter. I agreed with the objection. Mr. Scott indicated that he desired to ask a series of questions having to do with lighting such as whether the Claimant's bicycle had reflectors. I ruled that in the absence of an amendment to the Defence such a line of questioning would be irrelevant. Relevance has to do with the issues joined. The Civil Procedure Rules emphasize fairness and efficiency. Trial by ambush having long been abolished in civil proceedings. Rule 10 (7), and 10(5) for example, are clear. Any fact to be proved must be pleaded. The Defence makes no averment about light or lighting. All the Particulars of the Claimant's negligence relate to his mode of operation of the bicycle. There is no hint or suggestion that the condition or state of the bicycle was

to be an issue. It would therefore be manifestly unfair to allow such questions at this stage. If on the one hand the Claimant were to admit that his bicycle had no lights or reflectors then, he may wish to provide evidence that the lighting e.g. by the presence of street lights would be otherwise adequate. However all witness statements have by this time been filed. On the other hand if he needs to establish that the bicycle had lights and reflectors he might have wanted to preserve it and tender the bicycle at trial. He would not have anticipated such a necessity given the averments in the Defence and the Defendant's witness Statements. I hold therefore that it would be unfair to allow such cross-examination.

[15] I am comforted in this view as the Rules enable parties to request information see Rule 34. In this way and also by an Order to preserve or examine the bicycle Rule 17.4, the Defendant may have obtained information prior to trial and therefore appropriately amend the Defence. It would be unfair, and manifestly so, to allow such an amendment for the first time during a trial 4 years after the accident. In any event no application to amend the Defence was made. I therefore ruled that that line of questioning was not relevant to the issues raised before me.

[16] The Defendant's evidence did not impress me. This notwithstanding that she is a trained professional and well spoken. Her witness statement indicated that she had crossed one side of the dual carriageway and was at the median waiting to turn. She stated,

> *"I was making a right turn into the right lane of the dual carriageway for traffic heading towards Waterloo Road. As I moved off from the median I felt an impact to the right of my motor vehicle. After I felt the impact, I went a little further before coming to a complete stop in the roadway."*

[17] As indicated earlier, it is only when cross examined that we are told the Defendant stopped upon impact. The Defendant continued to maintain even during cross execution that she was unaware of what had collided with her vehicle, notwithstanding that the Claimant was to her immediate right driver's side window. I was not impressed with the Defendant's assertion that she was unaware of the level of traffic normally expected at that time in that area on a Friday. She asserts that there was no traffic when she made her turn. I find that incredible. If that was so one wonders why did she stop at the median. Her statement indicates she stops because, as quoted above, the Defendant says "As I moved off from the median." There would have been no need to "move off", if there had been no stop. However, there would have been no need to stop if, as the Defendant asserted, there was no traffic at the time she exited her driveway.

[18] I believe I have said enough to indicate why I did not accept the Defendant's evidence as to how the accident occurred. I find on a balance of probabilities that the Defendant was exiting premises along West Kings House road. She did so just as the Claimant was riding his bicycle westerly along that road. She failed to take due care prior to exiting the premises and as a result failed to observe the Claimant and his bicycle. The Claimant attempted to stop and swerve. The Defendant emerged turning right and a collision occurred in the middle of the side of the dual carriageway for westerly bound traffic. The Defendant brought her vehicle to a halt. The Claimant was not injured and was still astride his bicycle. The Defendant did not remain stationary but recommenced her manoeuvre. This caused the bicycle and the Claimant to fall and the right rear wheel of the Defendant's car ran over the Claimant's leg. The

Defendant also acted negligently when she failed to remain stationary after the initial impact without first ascertaining it was safe to proceed. I find the Defendant liable and entirely to blame for the accident.

[19] On the matter of damages the parties agreed the figure for Special Damages at $241,917.01. There however remained the matter of Pain and Suffering and Loss of Amenities as well as past lost earnings (or earnings lost in the period prior to trial) and future loss of earnings, to be determined.

[20] In so far as the award for Pain Suffering and Loss of Amenities is concerned I first need to consider the medical evidence, exhibits 1, 2 and 3. Dr. Dean Wright by report dated the 16th December, 2010 says he saw the Claimant on the day he was injured. He was seen to be conscious and alert and haemodynamically stable. There was a tender right knee effusion and tender swelling to right proximal leg. There was no wound. Radiographs revealed a depressed right lateral tibia plateau fracture and an associated proximal fibulae shaft fracture. Surgery was done to him under general anaesthesia on the 23rd November 2010. The meniscal injury was suture repaired and the fracture fragments manipulated and elevated to restore the lateral tibial plateau, a corticocancellous bone graft was harvested from the right iliac crest and placed in the gap below. The reconstruction was held in place with an L-buttress plate and screws. After surgery he was fitted with a hinged knee brace. Post operative radiographs were satisfactory. It was too early to say what if any permanent disabilities might result.

[21] Dr. Andrew Bogle gave a report dated 27th March 2013 (the day he examined the Claimant). He had available to him the Claimants hospital

file as well as the report done by Dr. Dean Wright. On examination Dr. Bogle diagnosed

a) Healed right leg fractures
b) Clinical evidence of early osteoarthritis
c) Range of motion limitations

The doctor stated that the early osteoarthritis development "can be related to the initial injury and also secondary to the intra-articular fracture." The doctor said that although he was ambulating normally and his range of motion was within normal ranges, the Claimant's occupation was most affected by the injury as it involves bending. The doctor expected the knee function to be further affected by the rate of progression of secondary osteoarthritis. The doctor assessed the Claimant as having a 20% disability of the lower extremity or 8% impairment of the whole person.

[22] Dr. Warren Blake's report is dated the 6th December 2013. He saw the Claimant on the 5th November 2013. He had with him both Dr. Wrights and Dr. Bogle's reports. The doctor also examined the x-rays of the 25th February, 2011, 2nd July 2011 and 27th March, 2013. Dr. Blake also assessed the Claimant as having an impairment of the lower extremity of 20% and of the whole person of 8%.

[23] Mr. Ritzen submitted for an award of 2.5 to $3 million. He relied primarily on the case of ***Ankle v Cox Suit CL 1987/A157***. A judgment of Malcolm J delivered 18th October 1994 and annotated in **Harrisons Assessment of Damages for Personal Injuries (#2).**

[24] Mr. Scott Q.C. for his part submitted that $1,730,500 was an appropriate award. He relied on ***Cowan v New Era Homes*** **Khan Vol. 6 p. 72**; and ***Thomas v. Francis Khan*** **Vol. 6 page 54**.

[25] I accept that these authorities were reasonably similar to the case before me and provided useful guidance. Mr. Ankle's suffering was however considerably more than the Claimant in the case at bar as he spent 2 months in hospital as against less than one month by the Claimant. Mr. Ankle walked with a limp after full recovery, not so in the case before me. Therefore although the assessed permanent impairment is identical the Pain Suffering and Loss of Amenities is not.

[26] When regard is had to the previous decisions cited as well as the evidence peculiar to the pain and suffering of the Claimant before me, (See in particular paragraphs 58 to 74 of his witness statement), I award $2 million for Pain Suffering and Loss of Amenities.

[27] Mr. Ritzen submitted that the Claim for Loss of Earnings is properly called lost earning capacity as this is what the Claimant lost as a result of his injury. I am afraid I will continue to see a distinction between a claim to earnings lost on the one hand and a claim to handicap on the labour market (or lost earning capacity) on the other. This latter is assessed based upon the risk of losing one's job and the difficulty, due to the injury suffered, of obtaining another. It is therefore possible to be awarded both lost earnings and lost earning capacity.

[28] In the case before me the Defendant is now gainfully employed as a farmer. No evidence has been lead to suggest that there is any probability (or even possibility) that this ability to earn may be lost to him some day. Indeed he does the farming on his "fiancées" land. He admits that he does weeding and planting, albeit on a communally organized basis. At the end

of the day therefore there is no evidential basis for an award of lost earning capacity (or as it is sometimes called) Handicap on the labour market.

[29] The Claimant does lead evidence to support Loss of Earnings both prior to and post trial. At paragraph 63 of his witness statement he says,

> "I can't work as a mason anywhere near as much as before I can't bend my knee fully. Also whenever I try to engage in that kind of work I get pain and stiffness in my right leg and knee also in my waist."

[30] He indicates (paragraph 80 et seg) that at the time of the accident he was working on a renovation job as a mason. He was earning $3,500 per day net in cash. He worked as a mason "whenever work was available." He said a job would last 2 or 3 months and there might be a week's break before the next job. On average in the year before the accident he earned $80,000 to $90,000 per month.

[31] In Para (87) the Claimant explains that after his recovery he tried to work as a mason but was unable to do so due to the pain. He tried vending but the earnings therefrom were inadequate. He now farms in St. Ann and earns approximately $30,000 per month. I accept the Claimant's evidence on this aspect.

[32] Mr. Scott suggested that if the Claimant could bend to farm then he should also be able to bend for masonry. I am not satisfied as to that. There is no expert or other professional evidence in that regard. My own experience of daily living tells me that a mason spends most of his time on the job with knee and back bent. A farmer on the other hand can plough standing and can even sow seeds while walking. Weeding is a regular but not the only

activity of the farmer. It does not follow that if he could manage farming he could work effectively in the mason's trade.

[33] I accept the Claimant's figures as fair and reasonable. I accept also that the absence of documentary support is not fatal to the claim. Mr. Ritzen conceded that a reduction for taxes ought to be made and this I estimate at ⅓. No evidence was lead as to the appropriate tax allowances for the period.

[34] Mr. Ritzen put forward various tables, one of which includes a compilation of lost earnings (which he called earning capacity). I do not accept his computation. My award is premised on among other things, the fact that work in the construction industry (and indeed for tradesmen generally) tends to be irregular. I balance this with the knowledge from my own experience of daily living, that good tradesmen can be in such high demand that they are kept busy a great deal of time. In the absence of documentary evidence to support the claim I will assume the Claimant was busy every other month of the year so in effect he worked 6 months out of 12. Farming also is seasonal so I assume it is 6 months in the year that he earns $30,000.

[35] My computation for Loss of Earnings past is therefore as follows:

a) Loss of Earnings

Date of injury 12th November 2010 to date of recovery 31st March 2011
$80,000 x 2.5 months = $200,000

b) Date of recovery to date of trial (4 years)
80,000 x 6 months = $480,000 less
30,000 x 6 months = (less) $180,000)

Loss per year =		$300,000
Loss for 4 years =		$1,200,000
(less 1/3 for tax) =		($360,000)
	=	$840,000
Total Past Loss of Earnings	=	$1,040,000

[36] My computation of Future Loss of Earnings is as follows:

$300,000 (being the loss per year as calculated above) by 7 (multiplier suggested by Mr. Ritzen and agreed by Mr. Scott)

= $2,100,000 less ⅓ for tax

Total = $1,470,000

[37] There will therefore be judgment for the Claimant against the Defendant as follows:

General Damages:	
Pain Suffering and loss of Amenities	$2,000,000.00
Loss of Future Earnings	$1,470,000.00
Total General	**$3,470,000.00**

Special Damages	
Expenses Agreed at	$241,917.01
Past Loss of Earnings	$1,040,000.00
Total Special Damages	**$1,281,917.01**

Interest will run on Special Damages at 3% from the 12th November 2010 to the date of this Judgment and at 3% on General damages from the 3rd June, 2011 to the date of this Judgment.

Costs to the Claimant to be taxed if not agreed.

Stay of execution granted for 14 days.

David Batts
Puisne Judge
5th June, 2014