



[2015] JMSC Civ. 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV05624

BETWEEN IGNATIUS DAVIDSON CLAIMANT
AND ALDURNAN MORGAN DEFENDANT

**Ms. Avrine Bernard instructed by Forsythe and Forsythe for the claimant
Ms. Althea Wilkinson and Miss Loraine Moore instructed by Dunbar and Co. for
the defendant**

HEARD: 17th February 2015 and 30th April 2015

***Negligence – Collision - Motorcar and pedal cyclist - duty of care of road users-contributory
negligence***

CORAM: Dunbar-Green J (Ag)

The Claim

[1] The claimant, 69 year old Ignatius Davidson, seeks damages from the defendant, Aldurnan Morgan, for injuries caused to him when he was hit by the defendant's motor car from the sidewalk along the Annotto Bay main road (the road) in the parish of St. Mary, on 29th April 2009.

[2] The particulars of the defendant's negligence are as follows:

- (i) driving at an excessive or at an improper speed in the circumstances;
- (ii) failing to keep any or any proper lookout or to have any or any sufficient regard for other road users;

- (iii) failure to blow the vehicle's horn or otherwise alert the claimant to his presence so that he might have avoided the collision; and
- (iv) failing to stop, slow down, swerve or otherwise control the said motor vehicle so as to avoid colliding with the claimant.

[3] The injuries are particularized as follows:

- (a) lacerated wound to scalp;
- ((b) abrasion on forehead
- (c) lacerated wound to right leg; and
- (d) fracture of left arm.

[4] Particulars of Special Damages are:

(i)	Loss of earnings as a farmer for 1 year at \$5,000.00 per week	\$260,000.00
(ii)	Taxi fare at \$1,000.00 return each time for 21 times	21,000.00
(iii)	Medication	30,000.00
(iv)	Medical report	<u>3,000.00</u>
	TOTAL	\$314,000.00

The Defence

[5] The defendant admits to the collision but denies that his vehicle climbed the sidewalk and hit the claimant there. He also denies that the claimant had been on the sidewalk at the time of the collision.

[6] The defendant claims that the collision was caused solely by the claimant or substantially contributed to by him, in that he suddenly and without warning rode out

from behind a parked vehicle, into the path of the defendant's vehicle, and collided with it on the main road.

[7] Particulars of the claimant's negligence are as follows:

- (i) riding at a fast and/or excessive rate of speed;
- (ii) failing to keep any or any proper lookout;
- (iii) failing to heed and/or observe the defendant's vehicle as it was travelling along the main road;
- (iv) suddenly and without warning, riding out from behind a parked vehicle and into the lawful path of the defendant's vehicle;
- (v) placing the defendant in a dangerous position;
- (vi) colliding with the defendant's vehicle while same was lawfully proceeding along in its lawful path;
- (vii) using the said road without any or any proper care and attention for other users of the roadway;
- (viii) failing to maintain any or any proper and effective control of the said pedal cycle; and
- (ix) failing to stop, slow down, swerve or in any other way manage or control his said pedal cycle so as to avoid the said collision.

Agreed Evidence

[8] Medical report of 25th June 2010 and receipt in the sum of \$1000, were agreed and admitted into evidence as Exhibits 1 and 2, respectively.

Claimant's Evidence

[9] The claimant's witness statement filed 4th March 2014, was ordered to stand as evidence in chief.

[10] In Paragraph 6 of the witness statement, the words “I am told that after this incident...I was taken to the Annotto Bay Hospital” were struck out as hearsay. So too were paragraph 7 and the first sentence of paragraph 11.

[11] Contrary to the particulars of claim, in which it is stated that he was hit from the sidewalk, the claimant said in paragraph 2 of his witness statement, that he was pushing his bicycle along the road when the motorcar hit him from behind.

[12] The claimant would have also been unable to say how the collision occurred because in the witness statement he said: “Just before the said vehicle hit me, I heard loud sounds and people shouting “oonoo look out” and before I could turn to see what the matter was, the motor vehicle hit me...I felt the hit to my hip area and I felt like was (sic) thrown into the air and I fell down on my face. I believe I fell near to the sidewalk but the hit made me black out for a short time.” (paras. 3 and 4).

[13] At the time of the incident, the road was to the right of his body and the bicycle to his left. There was a water table beside the sidewalk.

[14] In cross examination, he placed the water table closer to the road but on the same level as the sidewalk. Both of his feet were in the water table and his right side was to the roadway. Vehicles were parked on both sides of the roadway, which narrowed the pathway for passing vehicles and pedestrians. He was travelling on the left side of the road and was coming out from between vehicles, which were parked beside the water table, when the collision occurred.

[15] The claimant said that he was carrying “pigs feed” in two (2) buckets which were balanced on the handle of the bicycle. The buckets, he said, were not heavy and he denied that they caused the bicycle to be unbalanced.

[16] In cross examination he insisted that he was hit whilst being on the sidewalk, pushing his bicycle.

[17] He vacillated on the positioning and presence of the parked vehicles. He told the court that vehicles were not on the right side at all but also said that vehicles were parked on both sides.

[18] The claimant admitted that there was little space between the parked vehicles and that many persons were in the vicinity, some of them on the roadway. Taxis and buses were on both sides loading passengers but the taxis were mostly to the left. However, he did not see a coaster bus parked on the left side of the road (that is, the left opposite the side he was on), at the time of the collision.

[19] He vehemently denied that he was riding the bicycle when the collision occurred and insisted that it was being pushed.

[20] He did not know whether it was the front of his bicycle which had come into contact with the right side fender of the defendant's vehicle. Neither did he know whether the bicycle had been damaged, as he did not see it any time after.

[21] The claimant also denied that the defendant spoke to him after the collision and that he told him that his shoulder was hurt.

[22] He spent ten (10) days in the Annotto Bay Hospital and said he was an outpatient for about one year and six months.

[23] According to the claimant, up to the time of trial, he was still experiencing pains and had been receiving treatment. However, he provided no supporting evidence.

[24] He testified that at the time of the collision he was a farmer, raising pigs and growing crops but as a consequence of the collision, he is no longer able to do so.

Defendant's evidence

[25] The witness statement of Mr. Aldurnan Morgan, dated 19th November 2013, was ordered to stand as his evidence in chief.

[26] The defendant's evidence is that on reaching Annotto Bay Square, there was a coaster bus parked on the left and two men were standing close to it, in the street. There was a line of vehicles parked on the right hand side of the road.

[27] The coaster bus was parked partially onto the left hand side soft shoulder and partially onto the roadway. The cars on the right hand side were parked on the roadway. There was a gutter to the right side of the road, so the vehicles were parked on the roadway. Two vehicles could not pass at the same time and there was no other vehicle coming in the opposite direction.

[28] As he reached the coaster bus, a bicycle suddenly emerged from between two parked vehicles to the right of his vehicle and into his path. He said:

It was so sudden that all I could do was to swerve to my left but bearing in mind that the coaster bus was parked there ... The man then rode his bicycle into the right hand side fender whereupon he flipped into the right side of my car by the windshield post and bounced back and fell onto the roadway. I drove to the front of the coaster bus and pulled over to the left and stopped.” (Witness Statement, para. 3)

[29] Damage was caused to the right fender of his vehicle. The right mirror was also broken off and the right side windshield post was slightly bent. There was no damage to the left side. No supporting evidence was provided.

[30] In cross examination, it was suggested and denied that the defendant was trying to avoid hitting the coaster bus and this caused his vehicle to collide with the claimant. He agreed that there was a water table on each side of the road but said that there was none in the vicinity of the coaster bus. There was a piazza, he said, but no sidewalk.

[31] He denied that both he and the claimant were travelling on the same side of the road. He also denied that he was going at a fast rate of speed and said he was travelling at 30 and had slowed to between 20 and 25 kilometres per hour, on seeing the claimant.

[32] The defendant also told the court that his car was moving when it was hit by the bicycle. On seeing the claimant, he braked and swerved to the left but his vehicle did not come to a stop. The bicycle, he said, had the greater force when it hit his car.

[33] The defendant said that his vehicle had comprehensive insurance but he had effected the repairs to avoid an increase in the premium.

Issues

[34] This court has to decide, on a balance of probabilities:

- (i) whether the defendant owed a duty of care to the claimant and if so, did he breach that duty;
- (ii) whether the defendant's action caused injury and loss to the claimant;
- (iii) whether such injury and loss were foreseeable;
- (iv) the quantum of damages, if any, to be awarded to the claimant; and
- (vi) whether the claimant, by his own action, contributed to his injuries and loss.

Findings of Fact

[35] It is not in dispute that the defendant was the owner and driver of motor car licensed 7068EZ and that there was a collision involving the claimant in the morning of 29th April 2009, along the Annotto Bay main road. The claimant was in possession of a pedal cycle and two buckets of "pig feed". The claimant sustained injuries and was taken to Annotto Bay Hospital.

[36] I accept the defendant's unchallenged evidence that his motor car was damaged to the right front side. I, therefore, accept that it was the right side of the defendant's vehicle which was exposed to the claimant. They would have, therefore, been travelling in opposite directions.

[37] That version contrasts with the claimant's that the motorcar came from behind, as he travelled on the left. If he were travelling on the left and the defendant was also travelling on the left, the impact would likely have been to the left side of the motor vehicle.

[38] On examining the claimant's evidence, in relation to the events leading up to the collision, it is apparent that he did not see the direction from which the defendant's vehicle came. He said:

Just before the said vehicle hit me, I heard loud sounds and people shouting, 'oonoo look out' and before I could turn to see what the matter was, the motor vehicle hit me.

[39] There was no supporting evidence of either version. The defendant's motor vehicle had been repaired at the date of trial and there was no evidence of damage to the bicycle. Neither can the medical report assist the court in determining how the accident occurred, as the injuries could have resulted from the events of either version.

[40] The defendant said the claimant rode from between parked vehicles on the right into the path of his motorcar. The claimant also said, in cross-examination, that he was coming out from between the parked vehicles on the left. Both witnesses, therefore, agreed that vehicles were parked on the roadside and that the claimant was coming from between parked vehicles.

[41] I, therefore, do not accept as credible, the claimant's evidence that he was hit on the sidewalk or the manner in which he said the collision occurred. His version of the incident was contradictory. The pleadings say that he was "standing on the sidewalk along Annotto Bay main road...when the defendant so negligently drove his motor vehicle causing it to hit [him] from the side walk." His witness statement says, to the contrary, that "[he] was pushing [his] bicycle along the Annotto Bay main road when a motor vehicle hit [him] from behind..." In cross examination, when he was asked which of the two versions was correct, he said both. Clearly, he could not have been standing and moving at the same time.

[42] Counsel for the claimant submitted that the defendant swerved from a coaster bus and hit him, but the claimant gave no such evidence and as has already been established, he had not seen how the defendant's vehicle had manoeuvred.

[43] I find the version given by the defendant more believable. It is also consistent with the unchallenged evidence of the damage to his motorcar.

[44] I find as a fact that the claimant had come from between parked vehicles, into the path of the defendant's vehicle, when the collision occurred. I also find that they were travelling in opposite directions. The defendant saw the claimant emerge from his right side but did not have much room to manoeuvre.

[45] I am not certain whether the claimant was pushing the bicycle, as he claims, or riding, as the defendant claims, at the time. I do believe, though, that the extent of vehicular and pedestrian congestion, which they both described, might have impeded riding, quite apart from the possibility that it might have been difficult for the claimant, at 69 years old, to be riding a bicycle between parked vehicles and manoeuvring between several persons, whilst balancing two buckets. It is not impossible or improbable for this to happen on the streets of Jamaica, but this level of agility seems to belie the claimant's age and conditions on the roadway.

[46] That I am unable to resolve this conflict is immaterial, in the context of this case, because I do not believe that in either scenario, the bicycle, which at the time had just emerged from between parked vehicles, could have impacted the defendant's car with the greater force.

[47] I accept the defendant's evidence that his car was in motion at the material time. He told the court that he had slowed from 30 to between 20 and 25 kilometres before braking, at the time he saw the claimant.

[48] It is significant that the vehicle did not stop on braking. This suggests that the defendant was travelling at a greater speed than he claimed. On such a congested roadway, he should have been able to come to an immediate stop upon braking. I, therefore, find that he was travelling at too fast a speed, based on the conditions which obtained.

[49] There is no evidence that the defendant blew his horn. He said he swerved to the left but the claimant's pedal bicycle impacted the car. Given how congested the

area was it ought to have been in the contemplation of the defendant that a pedestrian or cyclist could emerge from between the vehicles. This made it even more necessary for him to have drastically reduced his speed in coming through the narrow path. I, therefore, find that the defendant did not manage the vehicle as an ordinarily skilled driver would.

Analysis

[50] Harris, JA in **Glenford Anderson v. George Welch** [2012] JMSC Civ. 43 at paragraph 26, enunciated the relevant principle in these terms:

It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.

[51] Lord Griffiths in **Ng Chung Pui and Ng Wang King v Lee Chuen and Another** Privy Council Appeal No. 1/1988 delivered on 24 May 1988, pp. 3,4 dealt with the burden of proof and role of the court. His lordship said:

The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an incident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred.

... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and

on the inferences he is prepared to draw he is satisfied that negligence has been established.

[52] I also adopt the principle expounded by Theobalds, J. in **Ronald Webb v Anthony Rambally** Suit No. C.L. W101 of 1990 (unreported) at page 5, as a correct statement of the law. He said:

Generally speaking, when two parties are so moving on the public roads in relation to one another each party owes a duty to avoid the consequence of a collision. Each owes to the other a duty to move with due care and this is true whether one is on foot and the other is controlling a moving vehicle.

[53] This requires that a driver on a congested road should keep a proper look out for other vehicles and pedestrians and travel at such a rate of speed that he can bring his vehicle to an immediate stop if, as a consequence of the congestion, he needs to do so in order to avoid a collision.

[54] If he fails to operate his vehicle in that manner, he acts unreasonably and imprudently and is negligent (**Blyth v Birmingham Waterworks Co.** (1856) 11 Ex. at p. 784).

[55] On the defendant's account, I find that he drove at a rate of speed which was inappropriate for the level of congestion and also because the coaster bus on his side would have limited the degree to which he could swerve to avoid the collision. The speed at which he was travelling prevented the motor vehicle from coming to an immediate stop when he braked in an attempt to avert the collision. He also failed to blow the vehicle's horn to alert the claimant of his presence on the road.

[56] For these reasons, I find that the defendant did not act as a reasonable, prudent and careful driver. I, therefore, hold that he is liable to the claimant in negligence. The breach of duty resulted in foreseeable injury to the claimant.

Contributory Negligence

[57] The principle of contributory negligence is that the damages awarded to the claimant should be reduced to the extent that his fault contributed to the injury or damage. The test is whether the claimant had taken proper care for his own safety (*Jones v Livox Quarries Limited* [1952] 2 QB 608).

[58] The claimant, as is with other road users, has a duty to take reasonable steps to avoid injury to himself. On the facts, he failed to take care for his own safety.

[59] The claimant was riding or pushing his bicycle between vehicles parked on the side of the road. This manoeuvre involved him travelling alongside some of the said vehicles when he was not between them. It means that at some points he would have been in the path that is left for motor vehicles to traverse.

[60] Having regard to the congestion, narrowness of the path for moving traffic, the obstacles caused by buses and taxis which were being loaded and the fact that he was travelling with two loads on the handle of his bicycle, he would have been encumbered in the ordinary use of the road.

[61] For those reasons, he should have exercised a proper look out for other vehicles proceeding in either direction and enter the roadway only when he could do so safely. I have already accepted the evidence that he had emerged from between two parked vehicles. He ought not to have done so without making sure the pathway was clear and he could have safely manoeuvred his bicycle, clear of the path of any oncoming vehicle.

[62] On the facts of this case, as I have found them to be, contributory negligence has been established. I find the claimant to be forty percent (40%) liable for his own injuries.

Assessment Of Damages

[63] The medical evidence having been agreed I now turn to assess the damages that the claimant is entitled to.

[64] The claimant relied on the cases of **Headley Samuels v National Housing Trust, George Rainford and the Attorney General** Suit No. C.L. (1993) 368 (assessed 3/2/97) reported in Vol. 5 of Khan's p. 126; **McLeod v Lemard** Suit No. C.L. 1993/196 (assessed 20/3/96) reported in Vol. 4 of Khan's p. 205; and **Stephens v Bonfield and Young** Suit No. C.L. 192, 230 (assessed 23/9/96 reported in Vol. 4 of Khan's compilation Recent Personal Injury Awards made in the Supreme Court of Jamaica at p. 212.

[65] In **Headley Samuels**, the claimant suffered a fracture to the right humerus. His injured limb was placed in a cast and he was released from hospital after two days. He was assessed as having a 2% whole person disability. He was awarded \$250,000.00 at 3/2/97.

[66] In **McLeod**, the claimant's injuries and treatment were as follows:

- (a) pain and tenderness to right side of chest;
- (b) multiple scattered abrasions to right thigh, knee, and leg;
- (c) 4 cm laceration to right side of forehead;
- (d) 5 cm laceration to right foot;
- (e) loss of consciousness; and
- (f) hospitalization for two days.

He was awarded \$100,000.00 at 20/3/96.

[67] In **Reginald Stephens**, the claimant's injuries and treatment were as follows:

- (a) abrasion of left leg;
- (b) bruise on right foot; and
- (c) pain for 4 weeks.

He received \$40,000.00 at 23/9/96.

[68] The defendant relied on the cases of **Ivan Clarke v Lionel Baylis and Anor** Suit No. C.L. 1990/C-232 (Harrison P. 255) **Nellie Daley v Vincent White** Suit No. C.L. 1991/D152, (Harrison P. 256); and **Leroy Swaby v Steve McIntosh** Claim No. 2004 HCV00020 (Khan's Vol. 6 p. 91).

[69] In **Ivan Clarke**, the claimant's injuries and treatment were as follows:

- (a) undisplaced fracture of the left humerus;
- (b) abrasions to the left palm, elbow and left leg; and
- (c) prepatellar with paresthesia of the left knee.

The award was \$40,000.00 at 17/5/92.

[70] In **Leroy Swaby**, the claimant's injuries and treatment were as follows:

- (i) tenderness and swelling of the left shoulder and left arm;
- (ii) comminuted midshaft of the left humerus;
- (iii) tenderness to the left ankle;
- (iv) restricted movements at the elbow joint; and
- (v) callus at the fracture site.

The award was \$740,000.00 at 31/1/07.

[71] **Nellie Daley**, was a consent judgment and as such I have decided not be guided by it. Of the other cases, I found **Leroy Swaby** most helpful. However, it does not take account of lacerations to the scalp and leg and includes tenderness, swelling and restricted movements which the claimant in the instant case did not suffer. The award of \$740,000.00 at current value approximates to \$1.7 million. Taking account of the injuries, I find this to be a reasonable award and so order.

Special Damages

[72] The claimant gave evidence that he was a farmer at the time of the accident and that he had 30 pigs and planted a variety of crops. He said he had an income of \$15,000 per week and during the Christmas period it increased to approximately \$25,000. His expenses for supplies and help on the farm were estimated at \$40,000 per annum. He also claimed transportation costs for medical treatment at \$600 per trip to St. Ann's Bay Hospital (39 trips), \$100 per trip to Annotto Bay Hospital (30 visits) and \$3000 per trip to Kingston (6 visits). In addition, he claimed cost of medication.

[73] He said he bought bags of feed for the pigs but at the time of the collision he was carrying two buckets of refuse from a restaurant which he said was feed for the pigs. Based on the description of the buckets and its contents, I find that there was hardly enough to satisfy one pig.

[74] He also said that he was unable to work since the accident. This is inconsistent with the findings of the doctor, in the report dated 25th June 2010, that his progress was good, except for the fracture which would have required follow-up for one month as a surgical outpatient.

[75] The claimant also said that he still suffers from the effects of the accident and has had to visit the doctor regularly. He has also said that he incurred transportation costs for those visits but brought no supporting evidence of either claim. Neither was there supporting evidence of purchase of medication.

[76] It has been long established that special damages must be strictly proved. Figures ought not to be thrown at the court as if plucked from the air (**Lawford Murphy v Luther Mills** (1976) 14 JLR 119,121). I will consider, however, that a small farmer might not operate as a sophisticated business person with receipts for payments and expenditure. The particularity of proof must therefore be tailored to the facts (McGregor on Damages, 12th ed. 1528).

[77] The claimant did not demonstrate how he arrived at the earnings claimed, such that court could give judicial consideration to the circumstances and make a commonsense judgment. I do not know how he arrived at the figures claimed. Although the strict proof of damages can be relaxed in certain circumstances, the basis of the claim must be sufficiently established.

[78] I accept that he was a farmer but there is no evidence to support the claim that he had 30 pigs. In these circumstances, the court considers it reasonable to make an award of \$3700 per week commensurate with the minimum wage in 2009, for a period of 12 weeks. I arrived at 12 weeks based on the nature of the injuries, the prognosis being good, and that the medical report established that he would have required further treatment.

[79] He did not provide any receipts for transportation, which is understandable, but beyond that, he provided no medical report or any other documentation to support the claim of further medical visits to the extent claimed or for medication. I take note that his treatment was at a public hospital. In the circumstances, I award \$3,600 for transportation and \$1000 for the medical report from Annotto Bay Hospital.

Orders

[80] Accordingly I make the following orders:

- (i) judgment for the claimant in the sum of \$1.7 million less 40% of sum (representing the claimant's contribution to his injuries).
- (ii) interest of 3% per annum on General Damages from the date of service of claim to the date of judgment;
- (iii) Special Damages in the sum of \$49,000.00
- (iv) interest of 3% per annum on Special Damages from date of accident to date of judgment
- (v) Costs to the claimant to be taxed if not agreed.

