IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 01615

BETWEEN	**GURNUS GAYLE**	**CLAIMANT**
AND	**VALNEY BENT**	**DEFENDANT**

OPEN COURT

Miss Audrey Clarke instructed by Judith M. Clarke and Co for the Claimant

Miss Houston Thompson instructed by Racquel Dunbar and Co for the Defendant.

Heard: July 10, and 18, 2023.

Negligence - Expert evidence – Whether expert evidence should be disallowed - Damages.

PETTIGREW COLLINS J

THE CLAIM

[1] The claimant filed a claim form on May 18, 2017, seeking damages for negligence against the defendant. The claimant alleges that on April 15, 2013, while he was riding his pedal cycle along the Southfield Main Road in the parish of St Elizabeth, the defendant through his negligent manoeuvre of his Toyota Starlet motor car

bearing registration number 5738 FX, hit the claimant from his pedal cycle causing him to be injured. Consequently, he suffered loss and damage.

[2] The claimant particularized the defendant's negligence as follows:

(a) Driving without due care and attention.
(b) Driving at a speed which was excessive in all the circumstances.
(c) Failing to have any or any sufficient regard for other users of the roadway.
(d) Failing to stop, swerve, slow down or to otherwise operate the said motor vehicle as to avoid the said collision.

[3] The claim turns primarily on the credibility of the parties. Neither party was being entirely truthful when giving evidence in this case, but this court on a balance of probabilities accepts the claimant's evidence over that of the defendant as far as it is material to the outcome of this claim.

[4] During cross examination of the defendant, it was revealed that he is unable to read and write. He also stated that his witness statement was not read over to him. There was no notation on his witness statement indicating the fact of his inability to read and write. The Civil Procedure Rules do not address how such matter is to be treated with. In the case of **Sunshine Pump & Supply v Island Concrete Co. Ltd**. [2014] JMSC Civ. 239, Batts J was faced with a similar scenario, and he permitted the witness to give viva voce evidence. Because the situation was not discovered until well into the cross examination of the defendant, it was not practical for him to give viva voce evidence. The court is therefore, as a practical matter, left with the defendant's evidence that emerged in cross examination. The court makes it clear that even if his evidence in his witness statement is fully considered, it will not make the difference in the outcome of this case.

[5] Incidentally, the claimant is also unable to read and write. That fact was however indicated on his witness statement and his attorney-at-law also made an

appropriate notation that his statement was read over to him and that he appeared to understand its contents.

FACTS NOT IN DISPUTE

[6] It is not disputed that there was a collision involving the claimant and the defendant's motor vehicle along the Southfield Main Road on April 15, 2013, as the claimant alleges. It is also not disputed that the defendant was the driver of his motor vehicle at all material times. Neither is there any dispute that the claimant was a pedal cyclist and that he was travelling in the opposite direction from the Toyota Starlet driven by the defendant. The parties also are at one that the collision took place in the general area of the intersection of the Southfield Main Road and Parchment Lane, also called Bongo Lane. Further, it is not disputed that the claimant was travelling on his pedal cycle and was going downhill while the defendant was driving uphill at the time of the collision.

THE EVIDENCE

[7] The claimant's evidence is that the defendant made the right turn across his path and hit him from the pedal cycle whereas the defendant states that he positioned his car in the middle of the road, put his indicator on and stopped in order to allow the claimant to pass, but the claimant rode into his car. It was also the defendant's evidence in his witness statement which he maintained in cross examination, that the claimant smelled of alcohol immediately after the collision.

[8] The defendant's evidence regarding the damage to his motor vehicle is that the damage was to the front middle section of the vehicle, including the bumper, grill, bonnet and windshield. The claimant's evidence in this regard differed in cross examination from that which was said in his witness statement. His evidence in cross examination is to some extent, consistent with that of the defendant in that

he said that he was hit by the middle section of the car in the area of the licence plate but he said that he fell onto the right section of the windscreen. In his witness statement, he had stated that his bicycle collided into the left front section of the defendant's car. I accept the evidence that it was the front middle section of the car that was impacted.

[9] It was the claimant's evidence in his witness statement that he first observed the defendant's car after he had made a corner and that the car was some 80 to 100 feet away. According to him, he was some 50 to 60 feet away from the intersection. If this evidence is accurate, it would mean that when he first saw the defendant, the defendant was closer to the intersection than he was. He also said that he was riding at a moderately slow speed. In cross examination, the claimant put himself at the same distance from the intersection as he estimated the defendant to be when he first saw the defendant. This court accepts that given that the pedal cycle was going downhill, it may have been going fast and not at a moderately slow speed as the claimant indicated. This also means that contrary to the suggestion put to the defendant, which suggestion is in keeping with the pleadings but was not in fact supported by evidence, the defendant could not have been speeding. If the claimant's estimate of distances is correct, the car was moving slower than he was travelling or the car would have had to be stationary as the defendant contends. I am mindful however that the claimant is not literate and may not have a proper appreciation of relative distances.

[10] The defendant's evidence is that he first saw the claimant from some two chains away and that he had stopped to allow him to pass. As earlier indicated, a lot turns on credibility. The defendant was demonstrably unreliable as a witness. Various examples of unbelievable aspects of his evidence may be given. The defendant did not maintain in cross-examination that the claimant had a flask of rum on his person. In fact, he said he did not see a flask of rum.

[11] The defendant was asked whether on the morning in question he was headed to his mechanic. His response was 'yes, they were heading to Santa Cruz in order to

purchase parts for the car'. Counsel requested that he repeat his response, whereupon the defendant said that he was going to buy parts for a different machine. The defendant said in his witness statement that it was a clear morning, and that visibility was good. The defendant, when asked in cross examination if it was a clear morning, reneged from his initial position and his response was that the sun was not up as yet, and that the morning was not bright and clear. He of course denied that he had told the claimant that the sun was in his eyes, in response to the claimant's query if he had not seen him. The defendant at first sought to say in cross-examination that it was the bicycle that broke the windscreen but when asked to repeat part of what he had said, explained that after the claimant hit into the front of his car, he rolled up on the bonnet and fell on the wind screen and the windscreen broke.

[12] I reject the defendant's evidence that the claimant smelled of alcohol. I reject his evidence that he had stopped and put on his indicator and that the claimant rode into his car while he was in a stationary position. I also reject his evidence that other persons were not present on the scene.

[13] I accept the claimant's evidence that it was a fair morning and visibility was good. I also accept that he had seen the defendant coming uphill and that the defendant had not stopped and put his indicator on, but instead just turned suddenly.

[14] Miss Thompson submitted that since the claimant's evidence was that the damage was to the right of the defendant's vehicle, the defendant could not have made the turn. She said further that the damage indicated by the claimant is supported by the defendant's evidence. Counsel's statement is not an entirely accurate reflection of the claimant's evidence. His evidence was that the damage was to the windscreen of the car. I am, however, mindful of the evidence of both men that the claimant collided with the middle section of the front of the motorcar. The point of the vehicle that was impacted by the claimant would have been dictated by the positioning of the claimant relative to the motor car as he was passing it, at the point of impact.

[15] The claimant has on a balance of probabilities, established all but one of the particulars of the defendant's negligence. He has failed to establish that the defendant was speeding. He is nevertheless entitled to succeed in his claim that the defendant was the negligent party. I am not of the view that the facts admit of any contributory negligence on the part of the claimant.

Evidence in support of general damages

[16] The claimant's evidence is that he received a cut to the middle of his head, and he received blows to his head top and right wrist. He said that at the time of the incident, he felt pain, and he still feels severe pains to his head, neck and right wrist. He also said that he felt pain across his shoulders and still feels pain in his neck and shoulders. He also said that when he stays in the sun for extended periods, he suffers from "blackout". I understand him to mean fainting spells.

[17] He stated that he was examined by a doctor at the hospital and placed on drip. Further, that a cast/neck brace or plaster was placed around his neck, and he had to do X-Rays of his head, neck and shoulders.

[18] He said that while he was at the hospital, he had to visit a private doctor for further medical attention. He referred to that doctor, Dr. Vish. He said that he later attended Dr. Vish's office on or about April 17, 2013 and he thereafter made several visits to Dr. Vish, the last visit being about August 2013. He said he received prescriptions for pain killers and for his nerves from Dr. Vish and that he is still taking tablets for his nerves.

[19] He stated that before the collision, he did not suffer from any illnesses or medical conditions and had no serious injuries.

The medical report of Doctor Glen Day

[20] Dr. Day prepared a medical report dated May 15, 2015. In that report he stated that the claimant sustained injuries when he was hit off his bicycle by a motor car on the 15th of April 2013 and was rushed to the Accident and Emergency Department of the Black River Hospital, where he complained of severe pain to his neck and complained of inability to move same. He said that the claimant gave a history of loss of consciousness for three minutes.

[21] He stated that the claimant was admitted urgently with a diagnosis of severe whiplash injury to the neck and mild concussion. He also stated that X-rays of the skull and cervical spine were normal in appearance and that the claimant was treated with pain relieving medication and allowed home the next day. He further said that when the claimant was reviewed on the 28th of May 2015, he still had major difficulty with his neck which had reduced rotation of only twenty degrees (20°) on the right and fifteen degrees (15°) on the left.

[22] Under the caption “impairment”, the doctor offered that there was evidently severe reduction of movement of the neck which has persisted despite pain relieving medication over the years. Under the heading “losses due to disability”, the doctor opined that the injuries were sufficiently serious to prevent the claimant from pursuing his occupation as a farmer and security guard for the two previous years. The doctor also stated that the claimant alleges that any attempt at farming causes severe shooting pain in his neck and shoulders.

ANALYSIS

[23] The law relating to claims in negligence is trite and will not be rehearsed in this case. Suffice it to say that the claimant must establish the requisite elements of duty, breach and damage. The claimant must therefore establish on a balance of probabilities that the defendant was negligent in one or more ways as pleaded.

[24] The court order reflects that Dr. Day was appointed as an expert and his expert report was admitted without the need for him to attend trial to be cross examined. The order appointing the doctor as an expert was made on June 22, 2023. The defendant was however permitted to put questions in writing to the doctor. The questions were to be filed and served by the following day, June 23, 2023. The doctor was required to respond and the claimant's attorney at law should have filed and served the doctor's responses on or before July 3, 2023. No doubt, because of the fast-approaching trial date, the doctor was not given the amount of time that would ordinarily be given to put his responses. This information did not come by way of evidence, but it was to the effect that the doctor had by then proceeded on vacation leave and was not available to respond to the many questions put by defence counsel.

[25] The defendant's position is that the court should entirely disregard the doctor's report because of the doctor's noncompliance with the order of the court.

[26] Miss Thompson further contends that the responses to the questions put would have been critical to the court's appreciation of the injuries suffered by the claimant since there is a want of clarity in that regard. For example, she stated that it would have been important for the court to know the reason for the time gap in the treatment of the claimant, and it would have been important to know what his early treatment entailed in order to determine his further course of treatment. She further contends that there is no medical evidence to explain whether the current pain being experienced by the claimant is related in any way to the accident. She states further that the doctor's report does not say whether the injuries were resolved when he saw the claimant in 2015.

[27] The medical report of Dr. Day was the only medical evidence admitted. The claimant sought to tender reports from two other doctors, but those reports were not allowed by the court, since the defendant had quite early in the day, at the time of the filing of his defence, intimated that he would be objecting to the medical

evidence from all three doctors. The reports of the other two doctors did not qualify as expert reports.

[28] The Civil Procedure Rules regulate how expert reports are to be dealt with by the court. In part the rules provide as follows:

> ***General requirement for expert evidence to be given in written report***
>
> *32.7 (1) Expert evidence is to be given in a written report unless the court directs otherwise.*
>
> *(2) This rule is subject to any enactment restricting the use of "hearsay evidence".*
>
> ***Written questions to expert witnesses***
>
> *32.8 (1) A party may put written questions to an expert witness instructed by another party or jointly about his or her report.*
>
> *(2) Written questions under paragraph (1)-*
>
> *(a) May be put once only;*
>
> *(b) Must only be in order to clarify the report; and*
>
> *(c) Must be put within 28 days of service of that expert witness's report, unless-*
>
> *(i) The court permits; or*
>
> *(ii) The other party agrees*
>
> *(3) An expert witness's answers to questions under this rule shall be treated as part of that expert witness's report.*
>
> *(4) Where-*
>
> *(a) A party has put a written question to an expert witness instructed by another party in accordance with this rule; and*
>
> *(b) The expert witness does not answer the question, the court may make one or more of the following orders, namely that-*

> *(i) The party who instructed the expert witness may not rely on the evidence of the expert witness;*
>
> *(ii) That party may not recover the fees and expenses of the expert witness from any other party; or*
>
> *(iii) The party asking the questions may seek to obtain answers from another expert witness.*

…

[29] It is evident from the rules that the court has a discretion to exclude or to admit the expert report in circumstances where the expert fails to respond to questions put to him. There is no basis for saying that the doctor or the claimant sought to flout the order of the court. Miss Thompson did not suggest that that is what transpired. The court considers that the time frame was short. Ultimately, some blame must be laid at the claimant's feet. The incident giving rise to this claim occurred in 2013. The claim was filed in 2017. There is no reason why an important matter, such as treating with medical evidence so that it can properly be admitted in evidence, was left for the last minute, so to speak.

[30] The rule is clear that questions are to be put to the expert solely for the purpose of clarifying the report. Evidently, some of the questions put would have been necessary to provide clarification, whilst others would have served no such purpose. Indeed, as the claimant's attorney-at-law observed, some of the questions put were in relation to matters that the claimant was competent to speak about, as the information was within his personal knowledge. In all the circumstances, this court exercises its discretion to allow the medical report into evidence. It will therefore be a question of weight to be assigned to the contents therein. To the extent that clarification was required, then its absence must impact the weight assigned to the particular aspect of the information provided. The court is also mindful that some of the contents of the report reflect information conveyed to the doctor by the claimant.

SPECIAL DAMAGES

[31] The claimant said that after the incident, he could not work for over two months. While on sick leave, he did not get paid fully except for a few days but he received half pay because someone else was employed to work in his place for that period. He did not make a claim for lost wages, thus there will be no recovery in that regard.

[32] He said that his bicycle that he had owned for some seven years was badly damaged. He gave its value at about $12,000.00. There was no supporting documentary evidence.

[33] The claimant tendered into evidence four receipts evidencing expenditure. These were the subject of a notice of intention to tender into evidence hearsay documents and were admitted as exhibits 1 to 4. The defendant has not disputed these receipts. They represent expenditure of $36050.09 which the claimant is entitled to recover.

GENERAL DAMAGES

[34] The claimant relied on the following cases to ground his claim for general damages:

Evon Taylor v Eli Mc Daniel, Beautiful Windows Limited, Northern Motors Limited and Robert Daley Suit No. CL 1997 T 128; and

Stacy Ann Mitchell v Carlton Davis, Kenneth Boyd Harold Henry and Keith Lindsay Suit No. CL 1998 M 315.

[35] In the former case, the claimant suffered loss of consciousness, severe tenderness in the back of the neck and head, a 4cm laceration in the occipital area of the scalp, pain on flexion, extension and rotation of the neck, tenderness over his lower back, fogginess of sight, difficulty hearing from his left ear and bruises to his right

shoulder and forearm. A diagnosis of moderate whiplash was made, and he had to wear a collar. He was admitted to the hospital for observation. He went to outpatient for follow up treatment on 4 occasions. The prognosis was that he would have severe pain for six weeks resulting in total disability for the period and thereafter, he would experience pain of diminishing severity for a further 4 months and intermittent pain for a further 2 months. The claimant was awarded a sum in June 1999 which now updates to just about $3,300,000.00.

[36] In **Stacy Ann Mitchell** (supra), the claimant suffered severe tenderness in the back of the head and neck, laceration to the back of the head, marked tenderness and stiffness of lower spine, continuous pains to the back of the neck and across the waist and swollen and painful left arm with difficulty in lifting weight. The sum awarded in May 2000 now updates to a sum in excess of $3,400,000.00.

[37] Miss Clark submitted that although the claimant in the instant case received fewer injuries, he is deserving of a sum no lower than the claimants in the cases relied on because of the intensity or seriousness of his injuries.

[38] The defendant, although contending that there is no liability on his part, relied on the cases of **Roger Mc Carty v Peter Calloo** [2018] JMCA Civ 7, and **Francine Francis v Karrl Nicholson** (Harrison's Assessment of Damages) and **Beverly Griffiths and Anor v Leroy Campbell** Khan Vol. 4, page 154, in the event the court finds him to be liable. In **Roger Mc Carty**, the claimant sustained a contusion to the left side of his face. He also suffered acute back strain, post traumatic vertigo with headache and acute whiplash injury with grade 2 whiplash associated disorder. The doctor opined that there was a risk of permanent impairment. The Court of Appeal lowered the award to the plaintiff to the sum of $500,000.00.

[39] In **Francine Francis v Karrl Nicholson** (Harrison's Assessment of Damages) The claimant suffered pain and stiffness in the neck and shoulders as well as headache. He was awarded a sum which now updates to 364, 640. In **Beverly Griffiths and Anor v Leroy Campbell,** the claimant suffered loss of

consciousness, superficial injury to the left foot and headaches. He was awarded a sum which now updates to $849,518.07.

[40] The claimant pleaded the following as his particulars of injuries: severe whiplash injury to the neck, mild concussion, minimal soft tissue swelling to left front parietal area of scalp and bruise with minimal soft tissue swelling to the right knee. He pleaded the following as his residual disability: severe pain in the neck, inability to sit or walk for long period of time and stiffness of neck.

[41] Miss Thompson explained that she relies on the cases put forward because in her estimation, based on the evidence, the injuries of those claimants most nearly equate to the injuries really sustained by the instant claimant.

[42] As accepted by Miss Clarke, the instant claimant did not receive as many different injuries as the claimant in the cases relied on. The court notes that the claimant made no mention in his pleadings of a wound to his head or any other part of his body.

[43] His evidence-in-chief was that after he fell off the vehicle and was on the ground, the car had started to run over him, but it eventually stopped before it could run over his head. He then stated that he became unconscious and then he regained consciousness whilst he was still beneath the car. In cross examination, he was asked if he agreed that he was conscious and was aware of the vehicle moving towards his head. His answer was no, it was when he slept and woke that he realized that the vehicle was moving towards his head. It would be difficult for this court to find that the claimant was at any moment unconscious of his surroundings based on that evidence. I am mindful of the fact that in the doctor's report, it is said that the claimant suffered loss of consciousness. However, that is information which was conveyed to the doctor by the claimant.

[44] I am satisfied on a balance of probabilities that the claimant suffered a whiplash injury and the other injuries mentioned in his particulars of claim. To the extent that

his evidence in his witness statement speak to other injuries and unrelated symptoms, this court rejects that evidence.

[45] It is not at all unusual for the effects of a whiplash injury to be long lasting. There is also no basis for the court to say that any symptoms that the claimant says he was experiencing up to the time of the making of his witness statement and is still experiencing, in terms pain to his neck and shoulder, and the inability to rotate his neck to the normal angle, are unconnected to the accident. The claimant's evidence is that he had no problems before the accident. He was not specifically asked if he received any injuries since but there is no reason to assume that he did. There is some doubt as to whether his inability to chew on hard food and the pain to both sides of his forehead are connected to the accident. Those are matters that would have required clarification. It is not true as Miss Thompson contends, that Dr. Day did not specifically speak to whether the claimant's symptoms had resolved when he was seen in 2015. It is contained in Dr Day's report that there was evidently severe reduction of movement of the neck. Further, there is the aspect of the report indicating the claimant's current status as at May 28, 2015.

[46] I am firmly of the view that the only significant injury that the claimant suffered was the whiplash. I reject that there was any inability to walk or sit for long periods that is in any way connected with the accident.

[47] Bearing in mind my findings and the cases cited by both parties, I believe that $2,000,000.00 is a reasonable sum to compensate the claimant for his pain and suffering and loss of amenities.

ORDERS

[48] In the result, I make the following orders:

1. Judgment for the claimant.

2. Damages assessed as follows:

    I. General damages in the sum of $2,000,000.00 with interest at the rate of 3%per annum from July 5, 2017, the date of service of the claim form to the date of judgment.

    II. Special damages in the sum of $36,050.00 with interest at the rate of 3% per annum from April 15, 2013, the date of the accident until judgment.

3. Costs to the claimant to be taxed if not sooner agreed.

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A Pettigrew Collins
Puisne Judge