[2017] **JMSC Civ. 159**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV00649

BETWEEN	**DUZETH GRIFFITHS**	**CLAIMANT**
AND	**BRILLYAN SCARLETT**	**DEFENDANT**

Miss Daniella Ancher instructed by Kinghorn and Kinghorn for Claimant.

Miss K. Michelle Reid instructed by Nunes Scholefield Deleon and Co. for Defendant.

Heard: 3rd , 6th June, 2014 and 3rd November, 2017

Motor Vehicle Accident – pedestrian – one way Road- breach duty of care – cause of injury to pedestrian – past injury to left leg by gunshot or present injury to left ankle - Damages

DAYE, J

[1] The Claimant is a labourer and resided in St. Ann's Bay in the parish of St. Ann.

[2] On the morning of the 24th November, 2008 he was about to walk along the right hand side of Main Street, from the right side walk, in the town of St. Ann's Bay, Main Street is a one way road. A car hit his left foot and fractured it. It is the defendant's car he claimed that hit him.

[3] The defendant was driving that morning his 1982 Ford F150 XLT pick up along Main Street on the right hand side of the road in the vicinity of Chuck's Plaza. He

was driving in a bumper to bumper traffic and the road was busy with pedestrian and other vehicles parked on the left. He saw a man with his back to him facing to side walk on the right side of the road. He blew his horn several times and drove along in the traffic .and drove passed the man. But he claimed his vehicle did not have any impact with this man at all. He described how he was driving in his evidence in chief (paragraphs 10 – 14 of his Witness Statement). This account is quite naturally in conflict with the claimant's account (paragraphs 4 to 6 of his Witness Statement) received as his evidence in chief.

[4] The claimant's version

> "4. Upon reaching the vicinity of Church's Bakery, I stopped because I needed to cross the road to get to Sonia's Supermarket which is on the left side of the road. I was walking on the side walk and when I decided to cross the road I placed my left foot in the gutter which is next to the side walk.
>
> 5 As I was about to turn to look at it was clear for me to cross. I felt a hit to my left ankle and I fell to the ground facing the direction of the market. I fell in the gutter..."
>
> 6. As I looked towards the road I saw a big chevy van with a red, green and gold flag on it. The flag had on it a Lion. The vehicle did not stop but I saw the driver peeping through the rear view mirror.

[5] The Defendant's version

> "9. I was not driving fast at all. The bumper to bumper traffic ahead of me was moving at a stop and crawl speed and so I had to stop and go based on the vehicle driving ahead of me.
>
> 10. While in this traffic a man facing the side walk on the right with his back turned to the traffic. He was standing to the right side of the road on a step by the side walk and it appeared to me as if he intended to step up onto the sidewalk. He was in a bent position talking to the gentleman
>
> 11. When I first saw this gentleman I was in the vicinity of Chuck's Plaza and he was about 3 or so car lengths away from my vehicle. The vehicle ahead of me started to crawl and so I moved as well.
>
> 12. When I reached 2 or so car lengths away from the man I was again stationary in traffic. I blow my horn three times as a precaution to alert the

man that I was approaching. He was still on the step in a bent position with his back turned to the traffic.

17. When the traffic moved again and moved about ½ car length and stopped behind the car ahead of me. I tooted my horn. The car ahead of me began to move. I tooted my horn and drove without feeling any impact to my vehicle. The front of my vehicle had passed where the man had been standing before. I again come to a stop in traffic."

It is after this he said persons alerted him that his tyre had hit the man on his foot.

Pleadings

[6] The claimant based on his account allege the following Particulars of Negligence against the defendant:

(i) Failing to apply his brakes within sufficient time or at all.

(ii) Failing to stop, slow down, swerve, on otherwise, conduct the operations of the said motor vehicle so as to avoid the collision.

(iii) Fail to blow his horn to alert the claimant of his presence

(iv) Driving on to the said soft shoulder and colliding with the claimant.

(v) Failing to see the claimant with sufficient time of all.

The defendant denies each of these allegations of negligence in his Defence.

[7] It is useful to examine the physical evidence at Main Street which is supposed to be the point impact. There is on this one way road: the sidewalk, a step a gutter or drain of soft shoulder to the right side of the road.

[8] In cross examination the claimant admits there was no soft shoulder on the road. This Particular of Negligence would then fail. The claimant also deponed that the gutter and the drain are the same and he was walking in the gutter where he had stepped from the side walk.

[9] I find that there was not a literal step from the side walk to the road way. But a person had to step down from the side walk into a gutter and then on to the road

way. I find the claimant did in fact step down from the side walk into the gutter/drain and began walking and then placed his left foot in the road when motor vehicle was driving bumper to bumper.

[10] The failure of the claimant to prove the Particular of Negligence that the defendant drove on to soft shoulder and collided with him does not mean he has failed to discharge the burden of proving his case on a balance of probability. He alleged other Particulars of Negligence. For instance he alleged the defendant at sub paragraph (ii) of his Particulars:-

> *'fail to stop, slow down, swerve or otherwise conduct the operation of the said vehicle so as to avoid the collision.'*

[11] I bear in mind the defendant's response in his defence and witness statement that he blow his horn several times when he saw a man on the side walk to alert him he was approaching i.e driving towards him.

[12] The circumstances of how the claimant sustained his injury can and does provides inferential evidence of the failure of the defendant to exercise reasonable care towards this pedestrian as a user of the main road on the day of the accident. If the circumstances show the defendant breached his duty of care then the claimant would have discharged the burden of proving his case on a balance of probability in a particular even though he has not prove each and all the other particulars.

[13] Counsel for the defendant in her extensive written submission argued that the claimant's credibility is destroyed. One of the reasons is that he failed to proved that he was on any soft shoulder. Further she say that the claimant deponed he was hit by a chevy car and he did not see the license number or driver of the car. The defendant drive a 1982 Ford pick-up on that day. There is discrepancy between his pleadings, his Witness Statement, that is, his evidence in chief and his cross examination on his account where he was when his left ankle was injured.

[14] The circumstances indicate, and I find, that it was the defendant's pick up that came into contact with the claimant's left foot. The defendant depone.

a) He was driving along right side of Main Street. He saw a man on the sidewalk of Main street with his back to him

b) He was about 3 car length from this man

c) He toot his horn several times when he saw this man

d) He drove pass this man

e) When the bonnet of his car passed the man he stopped in traffic

f) Person called to him and told him that the tyre of his car hit the man's foot

g) He later parked his car, came back to the side walk and saw the man lying injured.

He went to the St Ann Bay hospital and saw and spoke to this man who was taken there for treatment.

[15] By the defendant's conduct he accept that his car come into contact with the claimant. This is not necessarily an admission that it was any failure to exercise reasonable care in driving that caused his car to come in contact with the man. I do not find his act of visiting the man at the hospital, or at his home, any offer of money an admission of liability. I accept these were acts of a concerned driver. Nevertheless the issue remain whether the circumstances show that the defendant failed to exercise due care and attention. This is not the only issue in these circumstances. There is the issue whether the claimant himself failed to exercise reasonable care as a pedestrian before he attempted to cross the busy main street that morning.

[16] Counsel Miss Michelle Reid submitted the Privy Council decision **Nance v British Columbia Electric Railway Co. Ltd** cited in Bingham and Berryman's Motor claim cases, 11th ed. contain a dicta that shows what is the duty of care owned by a pedestrian to other road users. It is thus:

> *"in running down accidents when two parties are moving is relation to one another as to involve a risk of collision each owe the other a*

duty to move with due care, and this is so whether they are both in control of vehicles or ... whether one is on foot and the other controlling a moving vehicle... when a man steps from a kerb into the road way he owes a duty to traffic which is approaching him with a risk to exercise due care"

[17] Counsel submitted the claimant stepped into the main road full of traffic and failed to look before trying to cross and thereby did not exercise reasonable care for his safety and other road users (See paragraph 42 – 44 of Defendant's written submission) So the defendant is raising the issue and defence of contributory negligence. Though this was not specifically pleaded in the Defence. Nonetheless if there is evidentiary material that support the issue then I am constrained to consider it.

Counsel submits the claimant is solely to be blamed for any accident at all. She faintly leave open the possibility that the defendant may share some blame. Though she stood on her case that the defendant took precaution for the safety of the claimant. He blow his horn several times to alert the claimant the he was approaching. She cross-examined the claimant intensely that he did not look right and left and right again before he placed his foot in the road in an attempt to cross it. She invites the court to hold that the claimant is not credible also in this area of his evidence. She contended that his evidence-in-chief about looking is inconsistent with his cross examination. It is more likely he did not look before he entered the road she submitted.

[18] Two issue of fact arise at this point. Did the claimant look before he try to cross the road? And did the defendant blow his horn several times to alert the claimant who he saw on the side walk of the road? The answer to the latter question is relevant to the defendant conduct and to the fact if he should share the blame for this accident. In **William v Neadham** [1972] RTR 387, at 389 Judge Stubb adopted and applied the principle below to a case of a pedestrian and motorist.

"If ... a driver knows or accepts that a person is standing not looking to see what is coming, but nevertheless intending to cross the, the driver should either take some precaution against the possibility of

that person taking a step which would be regarded as a risky step. Children and old people walk out and cross the road without looking where they are going, and drivers of cars on roads have obviously to be prepared for emergency of that kind."

[19] The judge found the driver did not take any precaution even though he saw and knew the pedestrian lady intended to cross the road. There he found the driver had to take one-third share of the blame of the accident.

[20] In the present case the defendant, I find, took some precaution when he saw the claimant by blowing his horn several times. This may not be enough in the circumstances. In a slow moving traffic where the claimant was not running across the road the driver have stopped his pickup. He blow his horn several times indicating that he was aware the pedestrian was not heading his warning. He therefore has to share the blame for the accident.

[21] It follows that my view is that the claimant is also to be blamed for the accident. Implicit in my opinion is my finding that the claimant attempted to cross the road without looking and making sure it was safe to do so.

Damages/Injury

[22] The claimant alleges it is this accident that caused a fracture to his left leg. The claimant has the burden to prove on a balance of probability that he sustained a fracture of his left ankle and it was the defendant's pick up that that caused it. Counsel for the defendant submitted there was no evidence of any fracture to the claimant's left ankle.

The court granted an amendment at the end of the claimant's case to the particulars of injuries pleaded. The court allowed the claimant to add that he sustained a fracture to the fifth metatarsal bone of his left leg. This is the third bone that leads from the left big toe up to the instep of the foot. Understandably, counsel for the defendant argued then as before that amendment the claimant's credibility was destroyed by this material change of fact.

[23] True it is the claimant was adamant that his left ankle was fractured. His opinion was that of a lay person. The bone leading from the big toe is not the same place as the ankle but it is in the area of the foot.

[24] The medical history of the claimant emerged from the very day of the 24th November, 2008 when he was taken to St. Ann Bay hospital. An X-Ray showed that he had a bullet wound to his left leg. The bullet was still in his leg and this wound caused among other things a fracture to his left fibia (shin) in July 2006.

[25] It is this pre-existing fracture it was argued that caused the claimant's pain and suffering, not any fracture as a result of an accident in 2008. The learned authors of **Kemp and Kemp, Quantum of Damages** (1994 ed.) in vol. 1 ch. 11 paragraph11-010-11-020 discussed the effect of pre-existing disability and conditions of an injury.

[26] It was discovered that the claimant's injury on the 24th November 2008 is a fracture of the fifth metatarsal left leg.

[27] The learned authors commented that pre-existing disabilities or conditions may be relevant in the assessment of damages for personal injury in two respect. First, it may reduce the damages. They reasoned that the Court of Appeal decision **Fowler v A. W. Hawkskley Ltd** [1951] (injury to thumb, pre-existing injury to forefinger and eye) was authority for the view that pre-existing disabilities and condition may be considered by the court. The court must consider what effect the pre-existing injury had on the present injury (c/f **Hagar v De Placido** (1972) 1 W.L.R 716.

[28] Secondly the pre-existing injury may increase the damages awarded for the relevant injury because the existing condition means that the relevant injury has a more serious effect than it would have had apart from the pre-existing condition.

[29] In the present case the present injury of the fifth metatarsal bone did not aggravate or accelerate the fracture of the proximal tibia. Neither did it have a more serious consequence to the claimant condition.

[30] It has not affected his earning power. It has not shortened his working tears. He has not been put at a disadvantage in the labour market. The expert opinion is that this injury is a class 1 injury. The claimant's left subtalar joint was midly uncomfortable with movement but the range of motion was full and without crepitus.

Medical Evidence

[31] The injuries the claimant sustained on the 24th November, 2008 at age 49 are reflected in the Agreed exhibit Medical report April 14, 2014 from St. Ann's Bay hospital. They are:

> "Tender swelling to left foot X-ray fracture to fifth metatarsal bone of left foot"

[32] He was diagnosed in accordance with the fracture to the left foot. He was treated with analgesics and discharged the same day. He did not follow up on this treatment at the Orthopaedics Out-patient Department.

[33] The pre-existing injury of the claimant at age 46 are described in the Agreed Exhibit, Medical report dated 16th June, 2007. He was admitted for 9 days at the St. Ann's Bay hospital from the 10th July, 2006 to the 19th July, 2006. He was diagnosed as having a gunshot wound with fracture to left tibia. He was treated with antibiotics, analgesia and splint-plaster. His post treatment showed he had non union of the bone and osteomyelitis.

[34] Dr. Mica Campbell (M.D), a private doctor, saw the claimant, age 5,1 for the first time for consultation the 24th October, 2009 about his injuries of the 28th November, 2008. He diagnosed the claimant had a fracture left ankle with pathological healing and chronic osteomyelitis. He did not have the X-ray results of the 20th November, 2008. The claimant reported to him he was having

infection of the leg and a bad odour from the leg. He also complained that he wasn't able to work and walk properly. His foot he said was constantly swollen and he had a lot of pain.

[35] Dr. Konrad A.R. Lawson, Consultant Orthopaedic Surgeon FRCS (E) was accepted as an expert witness. His medical report of his evaluation and consultation of the claimant was dated January 3, 2011 and admitted as an agreed exhibit.

[36] The doctor reported when he saw the patient he had an obvious short-leg gait. His left knee was swollen and tender. There was restriction of motion of his knee joint. His left ankle was not swollen and had full and pain free range of motion. The doctor found no significant abnormality attributable to a fracture of the left ankle. He acknowledged he did not have the benefit of any radiological result of the left ankle.

The doctor's opinion was that

> *"The discomfort (the patient] ...is experiencing must undoubtedly be contributed to, in a major way, by the serious complications of infection and knee joint crepitus"*

[37] In his opinion the patient had a class 1 diagnosed based impairment (previous fracture with mild residual problem) attributable to the ankle fracture with a five percent (5%) lower extremity impairment which represent two (2%) whole person impairment.

[38] This metatarsal fracture to the claimants left leg is not the same as a left ankle fracture. This injury is to the region of the left foot near the left ankle. There was a pre-existing fracture to the left tibia of the claimant's foot from July 2006. There were complications surrounding the post recovery healing of this foot. This injury was more serious (left tibia fracture) than the left metatarsal fracture. It caused recurrent pain and infection and swelling to claimant's leg. He had to be admitted in the hospital to treat this injury. For the injury of 2006 he was treated and discharged the same day. The medical evidence do not shown any swelling,

deformity or disability to the claimants left ankle. I take this to refer to the area of the fifth metatarsal bone. Even he PPD of 5% of the lower extremity would be lower for this injury. I accept the Consultant Orthopaedic opinion the claimant present discomfort and pain are contributed by this pre-existing fracture. Added to this is the fact that the bullet still remains in his left foot though it is not proved what exact part of the foot it is.

[39] It does not mean the defendant's pick up did not hit the claimant foot. It is not known what part of the pick-up hit the claimant's foot but it did notwithstanding the defendant did not feel any impact to his vehicle nor was there any impact on his vehicle.

[40] Looking at the evidence and based on my findings of fact I hold the defendant did not exercise reasonable care and skill in the operation of his pick up sufficiently to avoid the risk of causing injury to the claimant. He is therefore liable to the claimant for his injury.

[41] I apportion this liability on a 50 per cent basis with the clamant. The reason is that the claimant also did not exercise reasonable care for his safety as a pedestrian. He did not look before he stepped into the road.

General Damages

[42] Now it remains what damages the court should award for his injury. Counsel refer the court to two cases of injuries to the metatarsal of a claimant's foot. They are:

[43] **Errol Finn v Herbert Nagimesi and Percival Powell**: 5 Khan page 66. The facts are that Errol Finn suffered a compound fracture of the fifth metatarsal of the left foot and a wound at fracture site required stitches. The claimant's wound was sutured and his lower leg was immobilized in a plaster of paris. He received out patient care and experience disability for about 3 months. The court awarded General damages for pain and suffering at $64,365.00. This is updated to $536.211.94.

Joy Hew v Sandals Ocho Rios Ltd. C.L. No. 2007HCV00549 delivered April 5, 2013 (per Batts, J). The facts are Joy Hew suffered swelling to the right tendon of the 4th metatarsal and base of the 5th metatarsal. X-Ray revealed a comminuted un-displaced intra-articular fracture to the base of the right metatarsal. A cast boot was applied. The claimant had tendonitis 3 years later and experienced mild tenderness and pain. The claimant was assessed at 1% of the whole person disability. This claimant was in August 2013 $650,000.00. This is updated to $699,405.00.

[44] Counsel submits on these authorities any award to the claimant should be discounted to $400,000.00 as he gave no evidence of pain suffering.

[45] The first case is closer to the claimant's injury than the second case. However the PPD of 1% is close to the 2% PPD assessed for the claimant on the assumption he had a left ankle fracture. As I said I believe the PPD assessment for the claimant would be less than 2% for this left big toe bone injury. Up to 2011 when the claimant was assessed by the Consultant Orthopaedic surgeon his injury was healed. He had no deformity or swelling or pain. His complaint was really about the effects of the pre-existing injury. I do not find any acceleration or aggravation of the pre-existing injury.

[46] In my opinion a fair and reasonable award for pain and suffering and loss of amenities is $850,000.00. This sum must be apportioned on a 50:50 basis of liability between the claimant and defendant.

General damages award is $425,000.00.

Interest on this sum of 3% per annum from the date of service of claim to date of judgment

Special Damages

[47] I agree the Claimant has only proved special damages of $31,000.00. He provided receipts of $30,000.00 for medical report of Dr. Campbell and another

receipt of $1,000.00 for medical report from the public hospital. He has not lead any evidence of the cost and payment of transportation for medical care or any other necessity.

[48] I therefore award $31,000.00 for special damages.

Interest awarded at 3% per annum from the date if injury to date of Judgment.

Costs of one-half to the claimant to be agreed or taxed.