



[2019] JMSC Civ 148

ORAL JUDGEMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 00436

BETWEEN	KATHLEEN HARRISON	CLAIMANT
AND	ORVILLE OAKLEY	DEFENDANT

IN OPEN COURT

Mr. Joseph Jarrett instructed by Joseph Jarrett and Associates for the Claimant

Mrs. Claudeen Stewart-Linton instructed by Burton Campbell and Associates for the Defendant.

HEARD: June 17 & 18, 2019 and July 18, 2019

Negligence, personal injuries, pre-existing condition - impact on general damages, future loss of earnings and future care.

PUSEY J.

INTRODUCTION

[1] November 4, 2014 was bright and sunny at about 11:30 am at the intersection of Barrett Street and Burke Road in Spanish Town in the parish of St. Catherine. The 59 year old claimant walked from the Spanish Town Hospital and had reached the left hand side of Barrett Street. She was trying to get across the road from the Rubis Gas Station to the side of the road where the Spanish Town Prison Oval is located.

- [2] Traffic lights are installed at the intersection. They were on red for the short line of stationary traffic on the left side of Barrett Street where the claimant was about 25-30 feet from the traffic lights. She went between the cars as she tried to cross the road and got near to the unbroken white line in the middle of the road. One white motor vehicle passed her there and she turned towards the light to see if it was safe to cross.
- [3] The defendant was coming from the Kinston direction on to Barrett Street driving an aquamarine coloured car. The traffic light for him was on green. He had to drive across the spacious intersection and turn almost at a right angle to cross from Burke Road to Barrett Street. He manoeuvred the turn and about 30 feet onto Barnett Street he collided with the claimant. She fell to the ground and asserts that the wheels of the car ran over her.
- [4] The defendant did not stop. Eyewitnesses got the defendant's car registration number and later that day he was contacted by the police.

ISSUE

- [5] The issue for the court's determination is who is responsible for the collision; whether the claimant contributed to the collision and what damages are recoverable by the claimant, if any.

THE CLAIMANT'S CASE

- [6] The claimant's evidence is that she was attempting to cross the road. She walked behind a stationary car and before she could complete the width of the car she saw a white car passed. She continued walking and while just a step from the white median line she saw the defendant's car approaching at a fast rate of speed. She stopped and stood up hoping the car would pass her. Instead the car crossed the white line and came down on her and hit her on her knee. She fell and its wheel ran over her leg. She said she saw the car before it hit her but there was nothing she could do. She disagreed that it was the wing mirror of the car that hit her and asserts that it was the front of the car near the headlight that hit her.

THE DEFENDANT'S CASE

- [7] The defendant gave evidence that he was travelling from Burke Road unto Barrett Street at 30 kilometres per hour. He had just moved off from a stationary position at the traffic light and was proceeding at about 30 kilometres per hour. He passed three stationary cars on his right. As he was about to pass the fourth car the claimant walked out from behind the car, over the unbroken white line into his path. He swerved to his left to avoid hitting her but it was too close and his wing mirror struck her on her left side. She fell but his wheels did not run over her. A threatening crowd was gathering and he drove away.

CLAIMANT'S SUBMISSIONS

- [8] The claimant submits that the accident is entirely the result of the negligence of the defendant. He crossed the unbroken white line and struck her. He was travelling too fast to avoid her and was unmindful of her presence on the roadway.
- [9] The injuries she sustained are inconsistent with the manner in which the defendant says the accident occurred. She was struck on her knee and fell and the car ran over her. She was not struck by the wing mirror in her side as he swerved to avoid her. She urged the court to accept that the defendant was driving without due care and attention and at a fast rate of speed and failed to manage the vehicle he was driving to avoid striking her.

THE DEFENDANT'S SUBMISSIONS

- [10] The defendant urged the court to find that the claimant is the author of her demise. She walked out from behind a car into his pathway and he swerved to avoid hitting her but his wing mirror clipped her. He was only driving at 30 kilometres per hour and he did not cross the unbroken white line.

LAW

- [11] In **Glenford Anderson v. George Welch** [2012] JMSC Civ. 43 at paragraph 26, Harris, JA stated the relevant principle that is applicable in a claim of negligence 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.

- [12] In the matter at Bar it is for the claimant to discharge that burden by the evidence that she presents. This proposition is supported by dictum 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 per Lord Griffiths).

- [13] In **Jowayne Clarke and Anthony Clarke v. Daniel Jenkins Claim No. 2001/C211** delivered 15/10/2010 Sarah Thompson James J commenting on the duty of a motorist said;

“A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users – whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty, he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations. **It is a question of fact in each case whether or not the driver had observed the above stated standard of care required of him.**

Emphasis mine.

[14] Section 51(2) of the Road Traffic Act succinctly sets out the duty of a motorist on the road. It states;

Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.

[15] In the decision of **Cecil Brown v. Judith Green and Ideal Car Rental Claim No. 2006 HCV02566** delivered October 11, 2011, Mrs. Justice McDonald-Bishop commenting on this provision of the Road Traffic Act and the common law stated;

It is clear that there is indeed a common law duty as well as a statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident.

[16] A pedestrian is not devoid of responsibility for eventualities that may befall him/her while using the roadway. The Privy Council decision of **Nance v. British Columbia Electric Railway Co. Ltd. [1951] 2 All ER 448, 450** provides some guidance on this issue Per Viscount Simon when he said;

Generally speaking, when two parties are so moving in relation to one another so as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.

[17] The defendant in the matter at Bar has asked the court to examine whether the claimant contributed to her injuries by the way she proceeded along the roadway, if it finds that the defendant is liable. The decision in **Jones v Livox Quarries Limited [1952] 2 QB 608** decided that the extent of the liability and

hence the damages recoverable by the claimant for negligence is to be reduced to the extent that the claimant contributed to her injuries.

ANALYSIS AND CONCLUSION

[18] There is no dispute that it was the defendant's car that struck the claimant somewhere in the middle of the road that fateful day. The bone of contention concerns whether it occurred as the defendant strayed over the unbroken white line that divides the 20 feet wide road in half, or the claimant walked over the line into the path of the defendant's car and was struck. There is also some contention as to what part of the car struck the claimant. The resolution of these questions is based on the credibility of the witnesses in the accounts they have given of how the accident occurred.

[19] The expert medical report agreed into evidence is instructive in resolving the issues. Under the heading 'Physical Findings' the learned Dr. Edgar A. Abbott, Consultant Orthopaedic Surgeon made the following findings;

Physical Findings were of a sub-cutaneous oedema affecting her left leg

When seen on the 19th of December 2014, there was a possible area of fat necrosis with persistent swelling on the medial side of the left knee and some hyper pigmentation of the medial side of the leg.

[20] The claimant says she froze when she saw the car approaching her at a fast rate of speed hoping it would not strike her but the front section, in the vicinity of the head light, hit her on her knee and the wheel of the car ran over her foot. The defendant says he swerved when she stepped suddenly into his path and his wing mirror hit her in the region of her side.

[21] This independent finding by the doctor is critical. It suggests that the claimant was struck on her knee, which is some distance from her side and well below the level of the wing mirror. It supports the claimant's account of what transpired. I accept the doctor's independent evidence about where she was

hit. Having accepted that, it follows that I reject the account given by the defendant about what happened.

[22] Much has been said about whether the defendant or the claimant had crossed the unbroken white line. I am prepared to accept the claimant's evidence that she had not. Notwithstanding I am of the view that it matters not whether either of them had crossed the unbroken white line. The claimant was crossing the road and by her evidence of not getting in the way of the white vehicle that had passed, she was paying reasonable attention to oncoming traffic in deciding when to cross the road. I reject the defendant's evidence that she suddenly stepped into his path and find that he, as the claimant maintains, was travelling at a fast rate of speed and was unable to manage the vehicle so that it did not hit her.

[23] The parties agree that from the top of Barrett Street to where the claimant was struck is about 30 feet. It was a clear sunny day and there is no evidence that anything obstructed the defendant's view of the road. He says he was driving at 30 kilometres per hour – a mere crawl. Both parties agree that a white vehicle passed the point of impact ahead of him. The road is 20 feet wide, so he had 10 feet of roadway to manoeuvre. To my mind at that rate of speed consistent with section 51(2) of the Road Traffic Act he had a duty to take reasonable steps to avoid the accident but was unable to do so.

[24] The question that arises is whether the claimant contributed to the accident. Her presence in the road trying to get to the other side is not, prima facie, unlawful or unreasonable. Did she take reasonable steps to protect her own safety? I think she did. She saw and kept out of the way of the white vehicle. The defendant's vehicle approached her so fast that she said she could do nothing. She was 59 years old and seemed to be a responsible person based on her demeanour. She was able to say where in relation to the unbroken white line she was. I find that she did take precautionary steps to ensure her safety that day. I find that the cause of the accident is the full responsibility of the defendant. I find he did not heed the presence of the claimant on the road and was unable to so manage and operate the vehicle so as not to strike her. There was space and the rate of speed he says he was travelling he could

have avoided her. The swerving he recounts and the part of the vehicle he said struck the claimant are rejected as inconsistent with the physical and independent evidence.

ASSESSMENT OF DAMAGES

- [25] The claimant sustained the following injuries: blunt trauma to the left parietotemporalzone of the head, the left mandible, the left shoulder, left hip, thigh and knee with extensive swelling, tenderness and bruising especially overlying inner aspect of the distal thigh, knee and proximal left leg.

ASSESSMENT OF DAMAGES

- [26] In **The Susquehanna** [1926] ALL ER 125, AT PAGE 127, Viscount Dunedin outlined the law applicable to the assessment of damages. The principle is that of *restituto in integrum* – to put the claimant in the same position he was in, as far as money can do, as though the damage had not happened. The standard practice has been to refer to previous awards in similar cases and update the sum to account for changes in the cost of living, utilizing the Consumer Price Index at the time of the computation. (See **Central Soya of Jamaica Ltd. v Freeman** 22JLR 152).
- [27] In conformity with this, both parties have submitted various cases for the court's consideration.
- [28] The claim is for special damages, general damages for pain and suffering, loss of earnings, handicap on the labour market and future cost of care.
- [29] The claimant had some pre-existing conditions – diabetes which was controlled by medication and hypertension. She also has a pathology of pre-existing bilateral osteoarthritis in the knees.
- [30] The defendant emphasized the pre-existing condition of the claimant as a factor that should reduce the amount of the award for loss of earning and future care as well as general damages. She referred to the approach of

Sykes J (as he then was) in *Margaret Campbell v Anthony Clarke* Suit No. CL C451 of 1997 and reduced the award for general damages accordingly.

GENERAL DAMAGES

[31] Further she submitted the authorities of *Smith v Arnett McPherson and Donald Oldfield* Suit No. CL 1990 S 130 and *Garfield Scott v Donovan Cheddesingh and Phillip Campbell* Suit No. CL 1995 S 217 with similar soft tissue injury as that sustained by the claimant at Bar where general damages in the amount (updated) \$1,648,871.70 and \$1,517,132.72 respectively was awarded as useful guides in the assessment of general damages and suggested that \$1,400,000.00 is a reasonable award in this matter.

[32] The claimant submitted 6 authorities without discussion or qualification for the court's consideration as guides to the appropriate award. Unfortunately the cases concerned patients with fractures and crush injuries, far more serious than those of the claimant herein and not soft tissue injuries and were unhelpful in this exercise.

[33] It is my finding that an award of \$1,200,000.00 would be appropriate for general damages including consideration of the pre-existing condition and the fact that the injuries sustained in the authorities cited by the defendant are more serious than what the claimant experienced.

LOSS OF EARNINGS

[34] The claimant, a nurse, was unemployed as a caregiver for the elderly at the time of the accident. Her last patient had died and she was seeking employment. It is interesting that her right leg was not affected by the accident and manifested significant deterioration as a result of the osteoarthritis leading to a suggestion by Dr. Abbott that she wears a knee brace. It is not far-fetched to my mind, that the left leg which has the same diagnosis would manifest similar condition soon. The deterioration of the left leg was accelerated but not fully responsible for the state of the claimant's leg. The doctor gave no adjectives to assist with the extent of the accident's contribution to the condition of the leg.

- [35] In assessing loss of earning for this self-employed nurse one must consider that there is a high probability that her working life would be truncated by the pre-existing condition. She was 57 at the time of the accident and would probably work for another 3 years as a nurse and probably later on to less strenuous activities. However, there is no evidence to support this conclusion.
- [36] She is paid in cash by her patients and has no record of payment. She said she earns between \$15,000.00 and \$18,000.00 per week.
- [37] Loss or earning as explained in ***Moeliker v A Reynolle & Company Limited*** [1977] 1 ALL ER 9 dealt with an employed individual. Past loss of earnings is an item of special damages and is to be specifically pleaded and proven and represents an inability to work because of the accident. What the evidence reveals is that the claimant was unemployed. Reciting past salaries is not to my mind enough to attract an award for loss of earnings for an unemployed person.

HANDICAP ON THE JOB MARKET

- [38] In attempting to assess a reasonable award for this head of damage it is useful to look of the medical report of Dr. Abbott. Under the head of 'Clinical Findings' he says;

The symptoms that she now has can be related to her osteoarthritis. This is a chronic degenerative condition of the joint, and in this instance, this affects both knees and is more symptomatic on the left injured leg. Trauma can aggravate or make a relatively asymptomatic or rather a pre-symptomatic arthritic joint become painful and disabling. So despite the pre-existing osteoarthritis that was well documented early in her presentations, I would ascribe some of her impairment as being related to her recent injury.

I have attempted to do so and I felt there is justification to do so, as she has bilateral degenerative changes in the knees but the right is asymptomatic. This is further evidence that the injury

may have initiated her current state of impairment, even though, this may only have just expedited, what may have been an inevitable presentation.

[39] As I understand this statement the claimant's current condition was accelerated by the injury but was inevitable. She would have developed difficulties with her knee even without the accident. The finding of the doctor is significant as it speaks directly to any award for future loss of earnings and handicap on the job market. The doctor's finding also speaks to an award for future care. The current state of the claimant is not the result of the injury she received, although it may have accelerated it. It follows there can be no award for future loss of earning or handicap on the job market nor for future care.

[40] The following awards are made:

Special Damages	\$217,983.37 (agreed)
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General Damages	\$1,200,000.00
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Costs to the claimant to be agreed or taxed.