[2022] JMSC Civ 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03705

BETWEEN	**JOHNICA MARSHALL**	**CLAIMANT**
AND	**ANDRUS MOLLY**	**1st DEFENDANT**
AND	**JEROME KADIAN WILKS**	**2ND DEFENDANT**
AND	**KERON TURNER**	**3RD DEFENDANT**
AND	**KERRON PATRICE ST CLAIRE YOUNG**	**4TH DEFENDANT**

IN OPEN COURT

Mr Dimitri Mitchell, instructed by Kinghorn and Kinghorn for the claimant

Mr Obika Gordon instructed by Frater, Ennis and Gordon for the 3rd and 4th defendants

Heard July 7, 2022, and November 18, 2022

Assessment of damages- soft tissue injuries to forehead, left hip and legs- Whether contributory negligence can be raised at the assessment of damages after a judgment on admissions - Whether the claimant is contributory negligent for not wearing a seat belt in the back seat of a taxi.

CORAM: JARRETT, J (Ag)

Introduction

[1] The claimant is seeking damages for the injuries she sustained in a motor vehicular accident along the St Thomas Main Road in the parish of St Andrew on September 13, 2017. She was an unrestrained back middle seat passenger in a taxi which collided with another motor vehicle. The taxi was owned by the 2nd defendant and driven by the 1st defendant while the other motor vehicle was owned by the 4th defendant and driven by the 3rd defendant. The 3rd and 4th defendants filed a defence limited to quantum, in which they admit that the 3rd defendant caused the accident but do not admit the particulars of negligence. They further deny the particulars of injury pleaded and say that if (which they do not admit), the claimant sustained the injuries pleaded, she suffered them as a result of her contributory negligence by not wearing a seat belt at the time of the accident. Consequently, they say that damages ought to be apportioned. Ultimately, on October 7, 2021, judgment on admissions was entered against the 3rd and 4th defendants. The claim was not pursued against the 1st and 2nd defendants.

[2] The claimant filed a notice of intention to tender hearsay documents, to which the 3rd and 4th defendants indicated their objection and requested that the makers of the documents attend the trial for cross-examination. Included in that notice were the medical report of Dr Ijah Thompson, the medical report of Dr H. Wong of the Kingston Public Hospital (KPH) and three receipts in respect of the payment for the medical reports and for physiotherapy. None of the makers of these documents attended the trial, and no explanation for their absence was given by counsel for the defendant. I upheld counsel for the claimant's objection to the defendant's application for an adjournment to have the makers of the documents present at an adjourned trial date, as over a year had elapsed since the defendant was made aware of the claimant's objection to the hearsay documents, and no explanation was forthcoming for the failure to have these persons present at trial. Between themselves, counsel eventually agreed the medical report of Dr Wong, which was tendered and admitted into evidence. The claimant pleaded transportation

expenses of $10,000.00 but gave no evidence in relation to this alleged loss. In the result, there was no evidence to prove special damages.

The Evidence

[3] The claimant provided evidence by way of witness statement and she was cross-examined. The 3rd and 4th defendants did not file witness statements and did not provide evidence at trial.

[4] According to the claimant, when the collision occurred, she fell between the front seats and hit her forehead on the dashboard. She managed to climb out of the front door and was taken to the KPH, where she was examined and told that she had soft tissue injuries. Pain medication was given to her, and she was sent home. She subsequently underwent six physiotherapy sessions, which helped reduce the pain in her leg and back. She is a farmer, but was a bartender at the time of the accident and was unable to work for about a month and a half afterwards. At the time of the accident, she was twenty-four years of age.

[5] On cross-examination, the claimant said that the medical report of Dr Wong on which she relies is correct and that when the accident occurred, she flung forward as “nothing was holding her back”. When asked whether this was because she was not wearing a seat belt, she said she does not think the middle seat of the vehicle carried a seat belt. She admitted that the injuries she received were because she was flung forward at the time of the accident.

[6] Dr Wong in his medical report said that the claimant presented at the KPH on September 13, 2017, the day of the accident. She reported that she had been the middle unrestrained back seat passenger in a motor vehicle involved in an accident. She complained of pain to the forehead, both shoulders, legs and lower back. On examination, her vitals were normal, and the significant finding was tenderness to the proximal aspect of both anterior thighs. She was diagnosed as having soft tissue injury as a result of the motor vehicular accident and discharged

home. By way of treatment, she was given voltaren, panadeine and zantac to be taken for a period of two weeks.

Submissions

The claimant

[7] Counsel for the claimant, Mr Dimitri Mitchell, relied on the decisions of **Dalton Barrett v Ponciana Brown and Leroy Bartley, unreported Supreme Court Decision Claim No 2003 HCV1358**; **Marion Landell v Judah Campbell, unreported Supreme Court decision, Claim No 2006 HCV01324;** and **Talisha Bryan v Anthony Simpson and Andre Fletcher [2014] JMSC Civ 31;** to argue for general damages within the region of $1, 200,000.00 to $1, 898,952.80.

The 3rd and 4th defendants

[8] Mr Obika Gordon started his submissions by positing that contributory negligence arises in his clients' case and is relevant in determining the quantum of damages. He said that the 3rd and 4th defendants are liable for the accident but so far as quantum of damages is concerned, there should be an apportionment based on the claimant's failure to wear a seat belt and the provisions of the **Law Reform (Contributory Negligence) Act.** The authorities of **Trevor Benjamin v Henry Ford and Others, unreported Supreme Court decision, Claim No 2005 HCV02876;** and **Valentina Worgs v Leon Bell [2018] JMSC Civ 25;** were relied upon to support his submission that general damages should fall within the range of $700,000.00 to $800,000.00.

Contributory negligence

[9] **Jacinth Morgan - Collie and Shawn Collie v Natasha Clarke [2019] JMCA Civ 16**; **Neil Lewis v Astley Baker [2014] JMSC Civ 1;** and **Donovan Hutchinson v Oshane Simon (By his mother and next friend Jacinth Smith) [2019] JMCA App 18,** were prayed in aid by Mr Gordon, to bolster his argument that contributory negligence is relevant on the evidence and that in this case, it does not go to

liability but to quantum and therefore is appropriately raised at the assessment of damages. According to counsel, an apportionment of 75% of the assessed damages should be awarded to the claimant, with 25% deducted for her contributory negligence in not wearing a seat belt at the time of the accident. He said it was this failure on the claimant's part to protect herself from injury that partially contributed to her loss. It was argued that the claimant ought not to have taken a vehicle which did not have seatbelts, and she gave no excuse for doing so. Counsel said that while his clients were 100% responsible for the accident, they are not 100% liable for the claimant's injuries.

[10] Mr Mitchell was of a different view. He said that contributory negligence goes to liability and that at the assessment of damages, liability is not a live issue. He argued that having regard to the provisions of 43(A)(1)(c) of the **Road Traffic Act**, the 3rd and 4th defendants would have to show that the motor vehicle in which the claimant was travelling was a public passenger vehicle which was required to have seatbelts in the back seat. He said that contributory negligence in any event would not arise in this case as there was a judgment on admissions and, procedurally, following such a judgment is the assessment of damages. Counsel further argued that in a case where a defence is filed which raises contributory negligence, there has to be a determination whether the claimant was, in fact, contributory negligent. According to him, the issue was raised at the wrong stage by the 3rd and 4th defendants and they should not have filed a defence limited to quantum if they intended to contend that the claimant was contributory negligent in relation to the injuries she sustained.

Analysis and discussion

[11] According to Dr Wong, the claimant on presentation at the KPH reported that she had pain in the forehead, both shoulders, legs and lower back. He found, on examination, tenderness to the proximal aspect of both anterior thighs. His diagnosis was that of soft tissue injury. Although he did not specify where the soft tissue injury was, I find, based on the evidence of the claimant, Dr Wong's findings on his examination of her, and the claimant's report on presentation at the KPH;

that she suffered soft tissue injuries of the forehead, shoulders, legs and lower back.

[12] I have considered all the authorities relied on by both counsel, but of them all, I find the decision of **Marion Llandell v Judah Campbell** to be most helpful, as the injuries suffered by the claimant in that case, come closest to the injuries suffered by the claimant at bar. In that case, the claimant was hit to the ground by a motor vehicle and as a result, she suffered soft tissue swelling in the forehead with severe headache and dizziness. She was found to have moderate lower back pain and spasm, left knee tenderness and swelling and mild thrombophlebitis or inflammation in the left leg. Subsequently, she was diagnosed with acute cervical strain and lower back pains. On December 4, 2009, she was awarded $950,000.00 for pain and suffering and loss of amenities. This award updates to $2,041, 840.20 using the current consumer price index. I agree with Mr Mitchell that the updated figure in **Marion Llandell v Judah Campbell** should be discounted to reflect the fact that the injuries in that case were more severe than those suffered by his client.

[13] Before pronouncing on the award of general damages, I need to consider the issue of contributory negligence raised by counsel Mr Gordon. As I observed earlier, the 3rd and 4th defendants in their defence limited to quantum admit that the 3rd defendant caused the accident, but deny the particulars of negligence. They also deny the particulars of injury, but go on to say that **if** in fact the claimant sustained the injuries pleaded, she was contributory negligent since she was not wearing a seat belt and therefore damages assessed ought to be apportioned. Despite this defence, however, judgment on admissions was entered in favour of the claimant.

[14] The tort of negligence has three known elements which a claimant must establish in order to succeed on his or her claim. These are: duty of care, breach of duty, and damage as a result of the breach. In relation to the damage suffered, the claimant must show that it is not unforeseeable to be too remote, and must show a causal connection between the breach and the damage suffered. These principles are of course elementary. I understand the defence limited to quantum

filed by the 3rd and 4th defendants to be that they accept that the 3rd defendant caused the accident, but do not admit that he was negligent and deny that the damage pleaded was suffered. Their alternative plea is that if the injuries were suffered, the claimant was careless in relation to her own safety and was therefore contributory negligent and consequently damages awarded must be apportioned. It seems to me that given the elements that constitute the tort of negligence, the primary defence pleaded was a denial of liability. It is only in the alternative that the 3rd and 4th defendants plead that if damages (which is the third element of negligence), is established, they contend that the claimant was contributory negligent. To my mind, the defence is therefore incongruous with one limited to quantum. Nevertheless, judgment on admissions was entered, signalling the 3rd and 4th defendant's admission to the claim with damages to be assessed.

[15] The question that arises is whether, in light of the judgment on admissions, it is permissible for the 3rd and 4th defendants to raise contributory negligence at the stage where damages are being assessed. At first blush, Mr Mitchell's argument appears attractive. But contributory negligence, although often described as a defence in decided cases and in learned treatise on the law of tort, has become a part of the law of remedies since 1945 and the passage of the **Law Reform (Contributory Negligence) Act 1945** in England. The English Act, which was replicated almost verbatim in Jamaica by the **Law Reform (Contributory Negligence) Act 1951,** mirror the rules of Admiralty relating to apportionment. A defendant, who is found liable in tort, is entitled to raise it to reduce the amount of damages awarded to a successful claimant. I will turn to the Act presently, but will first consider the common law, as it seems to me that fundamental to an understanding of the provisions of the Act is an appreciation of contributory negligence before the Act.

[16] At common law, if both the claimant and the defendant were both at fault for causing an accident, however small the blame, contributory negligence operated as a complete bar to the claimant's claim. Lord Blackburn in the House of Lords decision of **Cayzer, Irvine & Co. v Carron Co (1884) 9 App Cases 873 (HL) 881**,

memorably compared the position in Admiralty with that at common law. This is how he put it:

> "[W]here any one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in Law and in Admiralty. If the accident is purely an inevitable accident not occasioned by the fault of either party, then Common Law and Admiralty equally say the loss shall lie where it falls, each party shall bear his own loss. Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other party. **When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rules of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says on the contrary, both contributed to the loss it shall be brought into hotchpotch and divided between the two.** Until the case of **Hay v Le Neve (2 Shaw, Sc App 395),** which has been referred to in argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is I think , quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there

> is blame causing the accident on both sides they are to divide the loss equally, **just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."** [Emphasis added]

[17] Judges developed an exception to the common law rule to mollify its harshness[1]. The "last opportunity rule" therefore emerged, which was understood to be that where there is negligence on the part of a claimant, he was entitled to recover unless by exercising reasonable care, he could have avoided the consequences of the defendant's negligence. The decision in **Davies v Mann (1842) 10 M & W 546,** is often cited for establishing this exception. The Privy Council, in **British Columbia Electric Railway Co Ltd v Loach [1916] 1 AC 719,** later extended the rule to what was described as cases of "constructive last opportunity". This extended rule meant that if the defendant would have had the last opportunity to avoid the accident, but due to his own negligence he was unable to do so, he was treated as being in the same position as if he had actually had the opportunity, and thus the claimant could recover fully.

[18] It is manifest that at common law, contributory negligence applied to the claimant's fault prior to the commission of a tort. Subject to the last opportunity rule or the constructive last opportunity rule, it basically barred the claimant's claim and did not operate to reduce damages where a defendant was negligent. The Act, however, changed the common law and provided for the apportionment of responsibility between the claimant and the defendant, for the loss occasioned by a tort, and for the award of damages to reflect that apportionment. It evidently only applies if the defendant has committed a tort and where there is joint responsibility, not for causing the accident, but for contributing to the claimant's damages.

---

[1] See **Neil Lewis v Astley Baker [2014]JMSC Civ 1**

[19] I now turn to the Act. Section 3(1) of Jamaica's 1951 **Law Reform (Contributory Negligence) Act** reads as follows: -

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:"

"fault" is defined in section 2 to mean:

> "…negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence …"

It is to be observed, that "fault" as used in the Act in relation to the claimant refers to his failure to take reasonable care for his own safety, and as Lord Denning pointed out in **Jones v Livox Quarries Ltd [1952] 2 QB 608**, has nothing to do with any duty owed to anyone else but himself.

[20] In the case at bar, there is a judgment on admissions which means that the defendant is liable for the tort of negligence pleaded on the claim. Contributory negligence was, however, pleaded in the defence limited to quantum and apportionment of damages sought based on what the 3rd and 4th defendants contend in their pleadings, is the claimant's joint responsibility for her losses. Given that contributory negligence post 1951 in Jamaica is part of the law of remedies and, bearing in mind the judgment on admissions and the 3rd and 4th defendants' alternative plea in their defence limited to quantum; I am satisfied, that they are entitled, at the assessment of damages, to again raise the issue of

contributory negligence to potentially reduce the amount of damages awarded to the claimant.

[21] The question then is whether the claimant failed to take all reasonable care for her own safety on September 13, 2017. Put another way: what if any responsibility does she bear for her injuries? Her evidence is that on that day she was the back middle seat passenger in a taxi travelling from Downtown Kingston to Bull Bay. When the taxi collided with an oncoming motor vehicle, she was flung forward as "nothing was holding her back". She admitted that this was because she was not wearing a seat belt, and that the injuries she received were because she was flung forward at the time of the accident. It was also her evidence that she did not think that the middle seat of the taxi carried a seat belt. In **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke [2019] JMCA Civ 6,** Morrison P in determining whether the trial judge was wrong to reject contributory negligence which was raised by the defendant at trial, looked extensively at the law in this area. In particular, the learned President directed his attention to cases where contributory negligence was said to lie where a claimant failed to wear a seat belt and was consequently jointly responsible for damage suffered in a motor vehicular accident.

[22] After reviewing some of the well-known authorities on the subject, including **Froom v Butcher [1976] QB286,** at paragraph 17 of his judgment, Morrison P writing for the court, said the following:

> "These decisions clearly establish that, upon the occurrence of a motor vehicle accident which is said to have been caused by the negligence of the driver of the motor vehicle, a passenger's failure to wear a seat belt **when one is available** will amount to contributory negligence when it comes to apportioning responsibility for any damage or injury which he or she may have suffered." [Emphasis added].

[23] The claimant at bar was in a taxi. Her evidence is that she does not think that the back middle seat, where she was seated, had a seat belt. In his submissions, counsel Mr Gordon said, if that is so, she had a responsibility for her own safety, not to take a taxi which did not carry a seat belt.

[24] The Road Traffic Act makes provision for the wearing of seat belts by both drivers of motor vehicles and passengers while using public roadways. Sections 43A and 60(1) respectively provide as follows: -

> "43A.-(1) Subject to subsections (2) and (3), a motor vehicle shall not be used on a road unless it is equipped with seat belts:
>
> (a)
>
> (b)
>
> (c) in the case of public passenger vehicles as specified in section 60(1), that is to say:
>
> (i) stage carriages as specified in paragraph (a), on the front seat only;
>
> (ii) express carriages as specified in paragraph (b), on the front seat only;
>
> (iii) contract carriages (except trucks) as specified in paragraph (c), on the front seat and rear seat;
>
> (iv) hackney carriages as specified in paragraph (d), on the front seat and rear seat.
>
> 60.-(1) Public passenger vehicles shall, for the purposes of this Part and the regulations made thereunder, be divided into the following classes-
>
> (a) stage carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (any or all of which are less than ten cents for a single journey or such sum as may be prescribed), stage by stage, and stopping to pick up or set down passengers along the line of route, and any

other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages or hackney carriages as hereinafter defined;

(b) express carriages; that is to say, motor vehicles not being hackney carriages as hereinafter defined carrying passengers for hire or reward at separate fares (none of which is less than ten cents for a single journey or such sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying appropriate fares for the journey or journeys in question;

(c) contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum;

(d) hackney carriages; that is to say, motor vehicles carrying passengers for reward or hire used in standing or plying for hire on any thoroughfare or place frequented by the public and which have seating accommodation for not more than four persons;

(e) route taxis; that is to say, motor vehicles, adapted for carrying no more than ten passengers for hire or reward at separate fares along a designed route not exceeding thirty kilometres, and stopping to pick up and set down passengers along that route:

Provided that subject to section 21 of the Public Passenger Transport (Corporate Area) Act, a public passenger vehicle adapted to carry less than

eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares."

[25] The claimant's evidence is that when the collision occurred, she was a back middle seat passenger in a taxi. Taxis are public passenger vehicles, which are typically classified as contract carriage, hackney carriage or route taxis as those terms are defined in the **Road Traffic Act**. Contract and hackney carriages are required by the **Road Traffic Act** to have seat belts in the front and the rear of the vehicle. The position in relation to route taxis is not very clear. There is no evidence before me of the type of taxi in which the claimant was travelling. I bear in mind the claimant's answer on cross examination that she does not think that the taxi had seat belts. It is clear on the authority of **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke**, that whether the claimant is to be held contributory negligent depends on whether a seat belt was available to her at the time of the accident. Given the state of the evidence, I am not satisfied on a balance of probabilities that a seatbelt was available to her. In the circumstances, I cannot find that she was contributory negligent.

[26] In the result, I will not apportion the claimant's damages. I award the claimant the sum of $1,123,012.20 for general damages using as my guide, the decision in **Marion Llandell v Judah Campbell**. I have discounted the updated award in that case by 45% for the reasons I give in paragraph 12. For the reasons in paragraph 2, I make no award for special damages.

[27] Having regard to the foregoing, I make the following orders in favour of the claimant:

a) General damages in the amount of $1,123,012,20 with interest at 3% from March 4, 2019, to November 18, 2022.
b) Costs to be agreed or taxed.