[2018] JMSC Civ. 88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 03711

BETWEEN	**TYIANNA MILLS (an infant who sues by her father, Joshua Mills)**	**CLAIMANT**
AND	**SHELDON FORRESTER**	**DEFENDANT**
AND	**HALWAY GRAHAM**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. A. Leith-Palmer instructed by Kinghorn and Kinghorn for the Claimant

Mr. R. Paige instructed by Paige and Haisley for First Defendant

Negligence – Motor Vehicle/pedestrian collision – duty of road users to each other – standard of care of driver to child road user

Heard: April 9, 2018 and May 31, 2018

CORAM: MORRISON, J.

[1] March 10, 2009 was a regular day at school for young Tyianna Mills (then aged 16 years) a student at the Charlemont High School in the parish of Saint Catherine. After leaving school, sometime in the afternoon at about 3 p.m. and, being in the company of her school mates, as was her wont and custom, she was walking along the Ewarton main road where it intersects with the Charlemont main road. She attempted to cross at a certain point along that roadway from the right to the left, she having apprised herself of the state of vehicular traffic thereon when she was hit by a motor vehicle being driven by the First Defendant.

[2] It is agreed on both sides that the issue is primarily one of credibility. Here, I remind myself that the credibility of a witness is to be controlled and determined by the consideration of a witnesses' knowledge of the fact to which he or she testifies; his or her disinterestedness, that is to say, that the testimony to be examined is not influenced or given by such a witness to gain self-seeking advantage; his or her integrity; and, his or her being bound to speak the truth by such an oath, affirmation of declaration as such a witness deems binding on his or her conscience. The extent to which testimony deserves credit will be related to the degree of my assessment of those qualities. Ultimately, it is the witnesses' standing after hearing his or her evidence (including cross-examination) that I will determine who is to be believed. Also, I shall remind myself that suggestions put to a witness in cross-examination, if not adopted or agreed to by a witness, does not, on that score, elevate to it the status of evidence. A suggestion to the elevated to the status of evidence must be one which the witness accepts as being true.

THE PLEADINGS

[3] As for the Claimant she alleges that the negligence of the Defendant was constituted by the First Defendant:

a) driving at too fast a rate of speed in all the circumstances;

b) colliding with the claimant;

c) failing to see the claimant with in sufficient time;

d) failing to apply his brakes within sufficient time or at all;

e) failing to stop, slow down, swerve, or otherwise control the operation of the said motor vehicle so as to avoid the said collision.

[4] The Defence is at the same time a total denial or, if not, defiance in disclaiming responsibility for the accident or it hedged around the Claimant being contributory negligent. All the particulars of claim were traversed, that:-

i) the First Defendant was not driving at a fast rate of speed in all the circumstances;

ii) the Claimant ran into the path of the First Defendant's vehicle;

iii) the Claimant failed to make sure that the way was clear before running out into the road;

iv) the First Defendant did not fail to see the Claimant within sufficient time;

v) the First Defendant and not fail to apply his brake within sufficient time or at all;

vi) the First Defendant did not fail to stop, slow down, swerve or otherwise control the operation of the said vehicle so as to avoid the said collision.

THE ISSUES

[5] The issues as I see them are:-

a. whether the collision was caused solely by the negligence of the Claimant, or

b. whether the Claimant was contributorily negligence in the cause of the collision.

THE FACTS

[6] Let me at once particularly note that the Claimant's testimony of the events was given without anxious deliberation. Her testimony remained undisturbed even

after skilful and sharp cross-examination. She delivered herself with clarity, consecutiveness, cogency, consistency and credibility. In short her demeanour was unimpeachable. On the other hand the First Defendant's demeanour did not exude confident reliability. Hence, at the points of departure of their respective narratives I incline in favour of the Claimant's version.

[7] The Claimant on her account was walking on the Ewarton main road after leaving school when she got to a certain point and was attempting to cross from the left to the right in order to take a taxi ride as part of her routine to get home. She got onto the roadway as far as the middle of the lane in which the First Defendant's car was, became motionless through panic on seeing the said moving car when front middle section of the said car made violent contact with her, propelled her upwards airborne and she, like Newton's falling apple, landed on the windscreen of the said car. According to the Claimant she jumped when the car got to her and that after the car hit her "I don't know nothing more." She rejected the suggestion that was put to her that she had created an emergency when she "ran into the road." The evidence of her supporting witness confirms that she did not, as alleged by the First Defendant, do so. This witness in fact says, "i looked and saw her crossing the road when the car hit her.

[8] As for the First Defendant, he testified that between 2:30 pm and 3 pm the "area along where accident took place would have students on either side of the road." He agreed that at that time some students would be crossing the road. Initially puts his rate of speed within the law as less than 50 K.P.H. in this he was not consistent as in cross-examination he puts his rate of speed at 30M.P.Hh> or 50 M.P.H. Quite curiously he goes on to say that, within two seconds of seeing the Claimant "I applied my brakes immediately as i saw her but i still hit her." I didn't swerve as students were to my left walking on the road."

[9] It seems to me that, in the grand sweep of things the First Defendant's actions betrayed that of a responsible prudent driver conscious of the presence of other road users. After all, he was driving in a built-up area that is traversed by school

children particularly at that time of the day. I find that the First Defendant did not keep a proper lookout to safeguard other road users, in particular, school children. This rather benign explanation of the accident, seen through his rose-coloured lens, translates into his wish as guiding the thoughts of his heedfulness.

THE LAW

[10] The obvious starting point in ascertaining whether to fix liability on either or both parties for negligence is the Road Traffic Act Section 51(2) reads: "Not-withstanding anything contained in this section it shall be to the duty of a driver of motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this section." This statement of the law has received judicial interpretation and is now settled.

[11] In order to establish liability for negligence it must be proved first, that the defendant failed to exercise due care; second, that the defendant owed due a duty to exercise due care to the Claimant; and, third, that the defendant's failure was caused of this injury.

[12] As noted in NANCE v BRITISH COLUMBIA ELECTRIC RAIL Co; LTD; (1991) AC 601, "it is said that, in running down accident, when two parties are so moving in relation to one another as to involve risk collision, each owes to the other a duty to move with due care, and that 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. A pedestrian crossing the road owes a duty to the owner of a vehicle, e.g., if his rashness causes the vehicle to pull up suddenly as to damage its mechanism, or as a result in following traffic running into it from behind, or in damage to the vehicle itself by contact with the pedestrian. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care."

[13] The above statement, or, judicial pronouncement of the principle of law, does not stand by itself in splendid isolation, for in balance, noted by Lord Uthwatt in LONDON PASSENGER TRANSPORT BOARD v UPSON (1949) AC 155, a driver is not bound to forsee every extremity of folly which occurs on the road. Equally, he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of road users teaches that people do, albeit negligently: See also BERRILL v ROAD HAULAGE EXECUTIVE, (1952) 2 LLOYDS Rep. 490. I now segue to the second of the tripartite limb of the constituent principle. By my confirmed reckoning, such a driver has imposed upon him a duty to exercise diligence (the correlative of negligence) in the use of such skill and care as he possesses and as is necessary in the particular circumstances which he knows or would know if he had thought about it for the express purpose of safeguarding the interest of other road users: ANGLO-SAXON PETROLEUM CO., v THE ADMIRALITY LORDS COMMISSIONERS, (1947) KB 794.

[14] From the above, the principle seems to point to the forseeability of such an accident occurring had such a driver “though about it,” in the particular circumstances. Accordingly, it is not enough that the particular event should be one which can reasonably be anticipated or foreseen. That injury is likely to follow must also be in contemplation of a reasonable man before he can be fixed with liability for the negligent act. Hence, in order to establish links in the chain of causation it is not necessary that the precise details leading up to the accident should reasonably been forseen by a careful driver. It is sufficient if the accident which occurred is of a type which should have been foreseeable.

[15] At common law the authority of Boss v Linton (1832) 5 C&P 407, makes it pellucidly clear that, “all persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of the persons driving carriages upon it.”

[16] In pronouncing upon Section 51(2) of the Road Traffic Act, Campbell J in PAMELA THOMPSON AND OTHERS v. HENRY KENNEDY AND ANOTHER, Claim No. CL 2001/ T143, had these pertinent words to say in respect of it: "Section 23 of the Road Traffic Act places a duty on each to take steps to avoid an accident. I find hat neither driver was exhibiting the necessary care and skill in light of all those circumstances Mr. Campbell submitted that the driver, who is on his correct side, should her be saddled with additional responsibility. I understand that to mean that a driver, who is operating correctly, if confronted with a collision which he can avoid, has no responsibility to do so. I that ..... to the spirit and in Cordinant of section 23 of the Road Traffic Act." (Emphasis mine).

[17] The context of the above remarks have their basis in the fact that two motor vehicles were travelling in the opposite direction. There ensued a collision involving both vehicles, one of which overturned resulting in injuries to the several Claimaints. Questions of law and facts emerged as to which of the two diametrically opposed versions of both drivers should prevail.

[18] In BAKER v WILLOUGHBY (1969) 3 ALL ER 1528, is a description of a factual situation not dissimilar from the case at bar. The Judge of first instance determined that both parties were to blame and thereby apportioned blame, blaming the Defendant three quarters responsible for the accident. He found that, the Defendant having seen the plaintiff in his view for over 200 yards, and having not taken evasive action, he concluded that the defendant must have either been driving too fast or not keeping a proper look out. On appeal the Court of Appeal reversed the first instant judgment only for it to be restored by the House of Lords in these emphatic words: "There are two elements in an assessment of liability, causation and blameworthiness. A pedestrian had to look both sides as well as forwards. He (the driver) was going at three miles an hour and was rarely a danger to anyone else. A motorist had not got to look sideways and if he is going at a considerable speed must not relax his observation otherwise the consequences might be disastrous. It was quite possible for a motorist to be very much more blame than the pedestrian. "(Emphasis mine).

[19] As indicated overleaf, i find myself in agreement with Mrs. Leith-Palmer, that young Tyianna Mills, did in fact follow her didactic lessons of looking both ways in apprising herself of the state of vehicular traffic on the roadway which she wanted to cross and having got half way across the said road she was hit by the less than vigilant First Defendant who seemingly had relaxed his observation.

I also placed reliance on the pronouncement of Thompson-James, J in JOWANYE CLARKE (by his next friend, Anthony Clarke) AND ANTHONY CLARKE v DANIEL JANKINE, Suit No. C.L. 2001/C211, where the proposition is thus stated: “It is a question of fact in each case whether or not the driver had observed the.... standard of care required by him. The standard of care required by a driver to a child is greater than that owed to an adult. On the other hand, a lower standard of care for its own safety is expected of a child. The child only has to attain the standard of care expected of a child of his or her age.”

This proposition of law carries within it the highest sanction of approval from the highest source of authority, and is, may I say respectfully trite law. Though I have found that the Claimant was not to blame for the accident I am to state the legal basis for so deciding.

[20] In dealing with the principles of contributory negligence in GOUGH v THORNE, (1966) 3 ALLER 398, Lord Denning had this to say: “A very young child cannot be guilty of contributory negligence. An older child may be, but it depends on the circumstances. A judge should only find a child guilty on contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elder. He or she is not to be found guilty unless he or she is blameworthy.”

[21] In LEWIS v DENYE, (1939) IK.B 540 it is said, first, that in order for the defence of contributory negligence to have traction then such a defendant must prove that the plaintiff failed to take ordinary care for himself. That is to say, such care as a

reasonable man would care for his own safety. Second, that this failure to take care was a contributory factor of the accident. See comments of du Parcq, LJ. When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued. All that is necessary to establish the defence of contributory negligence as to prove that the injured party did not in his own interest take reasonable care of himself and, on that score, by his lack of care contributed to his own hurt and injury.

[22] The test of contributory negligence, re-iterates Lord Denning L.J in DAVIES v SWAN MOTOR COMPANY, (1949) ALLER 620, in the case of a pedestrian is not whether he is under a duty of care towards the defendant, over whether he was acting as a reasonable man and with reasonable care.

[23] The case of GOUGH v THRONE, [1966] 3 ALL E.R.398 is very instructive. There a $13^1/_2$ year old Plaintiff was with her older and younger brothers to cross the road. A lorry stopped in order to allow them to cross, the driver extending his right hand as a signal to warn other traffic and beckoned to the children to cross. After having got across just beyond the lorry a car driven by the defendant sped past the lorry and hit the plaintiff. The judge found that the plaintiff was one-third to blame in that she had advanced past the lorry without pausing to see if any traffic was coming to her right.

[24] On appeal the Court of Appeal found that the plaintiff was not to blame. The court reasoned that though there was no age below which it could be said that a child could be guilty of contributory negligence, age was a most material fact to be considered. The question which fell for determination was whether any ordinary child of $13^1/_2$ years could be expected to do any more that the plaintiff did. If she had been a good deal older she might have wondered whether a proper signal had been given and had looked to see whether any traffic was coming. It was quite wrong, the Court of Appeal said, to suggest that a child of $13^1/_2$ years should be caused to be put through such mental processes.

[25] To synthesize the principles then I arrive at the following:-

A child qua a child mental process should be treated as such and it ought not to be assumed that such a child has the mental attribution as an adult in acting as a reasonable man would do in order take reasonable care of his own safety. Accordingly, per Thompson-James, J, the standard of care owned by a driver to a child is higher than the standard of care owed by a driver to an adult.

GENERAL DAMAGES

[26] I have no diffiantly in determining that this was a high impact collision case as the Claimant suffered the following injuries'.

a) Abrasions to the forehead, right side of the face, left shoulder and knees;

b) Mild concussion to forehead;

c) Deformity of right leg lower third;

d) Laceration to right ankle;

e) Grade 2 compound fracture of the right distal tibia; an,

f) Displaced closed fracture of the right proximal fibula

[27] Of the two cases cited in support of general damages, namely, BARRINGTON M^{C}KENZIE v CHRISTOPHER FLETCHER AND JOSEPH TAYLOR, Suit No. C.L. 1996/M 075, and ANDREW EBANKS v JEOTHER M^{C}CLYMONT, Claim No. 2004 HCV 2012, I prefer the former to the latter to the extent that it is more analogous with the injuries suffered by the Claimant herein.

[28] The Defendant anchored his reliance upon the authority of LINDEL GARIBALDI v ANTHONY NICHOLSON, Suit No. C. L. 1994/G-216; and, ISSAC LEWIS v THE ATTORNEY GENERAL & TREVOR THORPE, SUIT No. C.L. 1986/ L 240 in proposing that the sum to be awarded for general damages be $950,000/00

[29] I have not had the benefit of physical sight of the Defendant's authorities. However, it seems clear to me that in the context of the very serious injuries to the Claimant's person, including but not limited to the deformity of her right third lower leg, compound fracture of the right distal tibia and the displaced closed fracture of the right proximal fibula, that the Defendant's paltry offering is not meet and just.

[30] I go along with Mrs. Leith-Palmer in saying that the Claimant at bar agonised and suffered for a greater period thou the Claimant in the BARRINGTON M^{C}KENZIE case, supra. With that in mind, I am to award a sum of $2,500,000/00 for general damages.

[31] As to special damages, I find that the claims for the relevant expenses have been particularly proved. As such I award the sum of $76,300/00 as per receipts that were tendered and received into evidence.

[32] In fine I award the sum of $2,500,000 for general damages with interest thereon at 30% from the date of service the Claim Form and Particulars of Claim being …….. to the date on judgement being ……

[33] Cost are to go to the Claimant and are to be agreed, if not agreed, then such costs are to be taxed.