[2018] JMSC Civ. 191

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV02195

BETWEEN	**NIECKO ORTAGO WALCOTT**	**CLAIMANT**
AND	**LLOYD CLAYTON**	**1ST DEFENDANT**
AND	**JASMINE CROOKS**	**2ND DEFENDANT**

Ms. Oraina Lawrence instructed by Kinghorn & Kinghorn for the Claimant

Ms. Racquel Dunbar & Ms. Keisha M. Grant instructed by Dunbar & Co. Attorneys-at-law for the Defendants

July 30 and 31, November 20, 2018

Civil practice & procedure – Negligence – Motor vehicle accident – Personal injury – Whether the Claimant was contributorily negligent – Respective duties of driver and pedestrian – Standard of care of driver to child road user – Assessment of damages

IN OPEN COURT

PALMER HAMILTON, J. (AG)

BACKGROUND

[1] This is a Claim in negligence arising out of a motor vehicle accident which occurred on or about the 29th day of July 2011 along Waterford Park Way in the parish of Saint Catherine. The accident involved the Claimant, who at the material time was a minor and a Toyota Corolla motor vehicle licensed PF 0027 owned by the 2nd Defendant and driven by the 1st Defendant.

[2] The facts giving rise to the collision are in dispute and diametrically opposed. Therefore, much will turn on the credibility of the witnesses and the reliability of their respective accounts. I will set out the pleadings and the evidence elicited in support thereof to determine the issue of credibility and ultimately, the burning question of negligence.

THE PLEADINGS

[3] The Claimant's case is that on or around the 29th day of July 2011, he was a pedestrian lawfully walking along Waterford Park Way in the parish of Saint Catherine, when the 1st Defendant so negligently drove and/or operated and/or permitted the said motor vehicle to come violently into collision with the Claimant. The Claimant was thirteen (13) years old at the time of the accident.

[4] In of the Particulars of Claim the Claimant averred that a bus had stopped for him to cross and having passed the front of the bus and looking right then left and having not seen any vehicle coming towards him, he proceeded across the road when the collision occurred.

[5] The Claimant says as a result of this collision he sustained serious personal injuries and has suffered loss and damage. At the filing of this Claim, the Claimant was fourteen (14) years old and sued by his mother and next friend Ms. Peta-Gaye Pinnock. However, when the Claim matured to trial, the Claimant attained the age of twenty (20) years old and carried on proceedings in his own right.

[6] The Particulars of Negligence of the 1st Defendant were itemized to be: -

"(i) Colliding with the Claimant

(ii) Failing to see the Claimant within sufficient time or at all.

(iii) Failing to apply his brake within sufficient time or at all.

(iv) Driving along the said road in a careless manner.

(v) Failing to stop, slow down, swerve, or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

(vi) Failing to exercise due care and caution in all the circumstances."

[7] Alternatively, the Claimant pleaded the doctrine of res ipsa loquitur.

[8] The Defence of the 1st and 2nd Defendants is a denial of responsibility for the accident and negligence. It is centered on the Claimant being solely responsible for the accident or, at least contributorily negligent when he suddenly and without warning attempted to cross the road from in front of a stationary bus and ran out into the lawful path of the 2nd Defendant's vehicle, thereby colliding with same.

[9] At paragraphs 6 and 7 of the Defence, the Defendants averred that Waterford Parkway is a dual carriageway and that the 1st Defendant was lawfully travelling in the right lane while the bus had stopped in the left lane of the two lanes heading towards the bus terminus direction. The bus was stationary to the left as it was letting off passengers at the material time.

[10] In detailing the Particulars of Claim of the Claimant, the Defendants have the Claimant being negligent by: -

"a. Failing to keep any or any proper lookout;

b. Failing to observe and/or heed the presence of the 2nd Defendant's vehicle while same was lawfully proceeding along the right lane of Waterford Parkway;

c. Crossing and/or attempting to cross the road at a time when it was manifestly unsafe to do so;

d. Crossing and/or attempting to cross the road from in front of a parked vehicle;

e. Failing to look and ensure that it was safe to cross the road before attempting to do so;

f. Colliding with the 2nd Defendant's vehicle while same was traveling in its proper lane;

g. Failing to take any or any sufficient steps to ensure his own safety and to avoid the said collision."

[11] Further, The Defendants maintained that the doctrine of res ipsa loquitur is not applicable to the allegations of the Claimant.

ISSUES

[12] The issues to be determined are: -

1. Whether the collision was caused by the 1st Defendant
2. Whether the Claimant was contributorily negligent in the cause of the collision
3. What is the quantum of damages, if any, to be awarded to the Claimant

[13] Written submissions were provided by Learned Counsel for the Claimant and the Defendants in the matter and I am grateful for their assistance to the Court in determining the issues to be addressed.

THE EVIDENCE

[14] The evidence on which the Claimant's case is grounded was illicited from the Claimant, his mother, formerly his next friend Ms. Peta-Gay Pinnock and the medical reports of Dr. Ravi Prakash Sangappa.

[15] The evidence on which the Defendants' case rested is that of the 1st Defendant.

Whether the collision was caused by the 1st Defendant

[16] The Claimant's witness statement and further witness statement were allowed to stand as his evidence in chief. His witness statement indicated that on the 29th day of July 2011 between the hours of 3pm and 5pm, his grandmother had sent him across the main road to the shop, to go and buy some bags for her to put cheese in. He indicated that he had to go on the Waterford main road to get to the shop, which is a dual carriageway in each direction.

[17] He stated that he went across the main road and to the shop with a friend. On his way back from the shop, he and his friend stopped at the bus stop to go back across the road to his house.

[18] He further indicated that there was a coaster bus parked at the bus stop and he saw the driver of the bus put his right hand through his right window and waved, signalling for any traffic coming to stop. He stated that the driver of the coaster bus then used his left hand to call them to go across the road as they were standing in front of the bus.

[19] The Claimant stated that he stepped out in front of the bus with his friend behind him. He then looked up the road which was to his right and he did not see any vehicle. He then proceeded to cross the road. While going across, he remembered glimpsing a light colour vehicle that could be white or silver. The Claimant further indicated that the next thing he remembered was waking up in a vehicle and seeing blood everywhere on the seat.

[20] Under cross examination the Claimant agreed with the suggestion that he was in a hurry because his grandmother was waiting on him. He further agreed that the reason he only glimpsed the car was because he was running.

[21] Ms. Pinnock's witness statement filed on the 6th day of March 2018 was allowed to stand as her evidence in chief. Her witness statement indicated that on the morning after the accident, she was at her mother's house in Waterford when the driver of the car came to the house. He was first speaking to her mother when he came to her and identified himself as Lloyd the driver that had hit her son. He explained that he didn't see her son and that when he took him off the ground, he thought he was dead because he wasn't responding. Ms Pinnock also indicated that the 1st Defendant stated that he took the Claimant to the hospital and whilst on his way, about five minutes before reaching the hospital, the Claimant started to talk. When cross-examined by Learned Counsel for the Defendants, Ms. Pinnock maintained her position in that regard.

[22] The witness statement of the 1st Defendant filed on the 9th day of March 2019 was allowed to stand as his evidence in chief. In his witness statement, the 1st Defendant stated that on or about the 29th day of July 2011 at about 6:15pm, he was in the community of Waterford in the parish of Saint Catherine. He indicated that he was driving along Waterford Parkway and he was alone in the vehicle at the time. He further stated that he was operating the vehicle as a taxi for the 2nd Defendant and that it was still light enough to see without headlights.

[23] He indicated that he was driving in the right-hand lane and was closer to the median in the middle of the road and was traveling at a moderate speed. He was heading into Waterford at the time. He stated that he saw a Toyota Coaster bus stop on the left hand side of the road a few metres from the bus stop and that he saw people coming off the bus. He further stated that he tooted his horn twice and slowed down as he approached the bus because he knew people tend to cross the road when they come off the bus.

[24] The 1st Defendant stated that the next thing he saw was a young man run across the road to cross from his left to the right. He stated that he stepped down hard on the brake and swerved to his right in order to try and avoid hitting him (the Claimant). He further indicated that the young man hit into the left front fender, closer to the corner light of the car he was driving.

[25] He averred that he managed to stop the car just as the Claimant hit into it. It was the right side of the Claimant's body that hit the front corner section of the car and the Claimant staggered in front of the car and fell on the road in front of the car.

[26] The 1st Defendant stated that when the Claimant fell, he hit his head on the curb wall on the median in the middle of the road. He stated that the car stopped with the front just a little beyond the front of the bus beside it and that most of the car was actually beside the bus. He indicated that he got out of the car and got some assistance from another young man to put the Claimant in the car and took him

to the hospital. He further explained that when he took up the Claimant he was on the roadway in front of the car with his head on the curb wall and his legs towards the centre of the road.

[27] The 1st Defendant also disclosed that he never found out the Claimant's name or where he lived and that he never saw him again until they went to Mediation. He stated that the first time he knew the Claimant's name was when he was served with court papers in 2012. He also indicated that the first time he saw the Claimant's mother was at the Mediation and he realized that he knew her when she went to Waterford High School and he was working there as a security guard.

[28] Under cross examination, the 1st Defendant revealed that he was exhausted and felt like he needed some time to cool off and relax. He stated that he was heading out to a big tree by highway 95, a location where he usually spends between ten (10) to (15) minutes and relax.

[29] He also revealed conflicting accounts of how the accident occurred, in that in one instance he stated that the first time he saw the Claimant was when he hit into the car. On the other hand, he stated that as he saw the Claimant running across the street he swerved away from him and hit the brakes. Learned Counsel sought some clarification of this inconsistency and the following exchange took place: -

> *"Q: Which is true: you first saw Mr. Walcott when he hit into your vehicle or when he dashed across the street?*
>
> *A: As I saw him running across the street I swerve away from him and hit the brakes. I saw him first when he dashed across the street."*

[30] Under cross examination, the 1st Defendant also revealed conflicting accounts of the Claimant's position after the collision. He asserted that after the Claimant was hit, he was lying exactly in front of the car and on another account he indicated that the car stopped in front of the Claimant.

Whether the Claimant was contributorily negligent in the cause of the collision

[31] On cross examination the Claimant revealed that he was crossing in front of the bus and this was the only thing that blocked his view. He also agreed with Learned Counsel for the Defendant that he could have walked around the back of the bus if he wanted to. He also agreed that he was not watching the road for traffic and that he only got a glimpse of the car before he went unconscious.

[32] Also, the Claimant agreed with the suggestion that he was in a hurry because his grandmother was waiting on him and he further agreed that the reason he only glimpsed the car was because he was running. The 1st Defendant indicated that it is the Claimant who collided into the motor vehicle.

What is the quantum of damages, if any, to be awarded to the Claimant

[33] The Medical Report of Dr. Ravi Prakash Sangappa dated the 24th day of February 2012 showed that the Claimant suffered the following injuries: -

> *"1. Multiple abrasion to the right side of the face*
>
> *2. Large lacerations to head*
>
> *3. Healing abrasion to left hand*
>
> *4. Healing abrasion to the left wrist*
>
> *5. Healing abrasions to the left and right elbow*
>
> *6. Left shoulder strain*
>
> *7. Soft tissue injury to left gluteal region*
>
> *8. Soft tissue injury to left hip*
>
> *9. Laceration to right thigh*
>
> *10. Multiple abrasions to left ankle and foot"*

[34] Dr. Sangappa's opinion and prognosis revealed that the Claimant's wounds had healed well however he had scars to the face and right thigh causing cosmetic defect. The Claimant was referred to a plastic surgeon for treatment of his scars.

[35] The Claimant detailed that he had sleep disturbances because of the pain. His witness statement also revealed that prior to the accident, he was on the cricket team for Waterford High School and that he also played football for the community. However, after the accident he attempted to play sports but wasn't able to do so as he would feel severe pain in his foot.

[36] Ms. Pinnock, the mother of the Claimant detailed the medical expenses incurred in her witness statement.

[37] The injuries of the Claimant were not disputed by the Defendants.

LAW & ANALYSIS

[38] The definition and elements of negligence are now trite law. In order to establish liability for negligence it must be proved that the defendant owed a duty to exercise due care to the claimant, that the defendant acted in breach of that duty by failing to exercise due care and that the damage sustained by the claimant was caused by the defendant's failure to exercise due care.

[39] As it relates to the burden and standard of proof in this matter, customarily it is the Claimant who must prove the case on a balance of probabilities. I find the case of **Glenford Anderson v. George Welch [2012] JMCA Civ 43** instructive in this regard where Harris JA in delivering the judgment of the Court indicated at paragraph 26: -

> *"…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."*

[40] However, in this matter, the 1st Defendant having counterclaimed, the burden of proof is on each party to prove his case on a balance of probabilities. This is in keeping with the maxim *"He who asserts must prove"*.

[41] The fact that the Defendants owed the Claimant, a pedestrian, a duty of care is not in dispute. On the issue of the standard of care owed to the Claimant by the

1st Defendant I find the decision of **Craig Martin (B.N.F. Carmen Brown) v John Archer** (unreported) Supreme Court Jamaica Claim no. 2008 HCV 05180, judgment delivered on the 19th day of December 2011 instructive. The Honourable Mrs. McDonald-Bishop (as she then was) conducted an analysis into the standard of care required of a defendant in the exercise of his duty of care owed to users of the road. At paragraph 49 of the judgment she stated: -

> *"…The fact is that he owes a duty of care to children pedestrians to exercise reasonable care for their safety while using the road. The degree of care required to discharge this duty may be greater than the norm depending on the circumstances of the case, which includes the age and understanding of the child."*

[42] The issue in dispute is whether this collision resulted from the Defendant's breach of that duty. Both parties in the matter gave opposed accounts of how the accident occurred. The two versions cannot be accepted therefore much will turn on the credibility of the witnesses and the plausibility of their evidence.

[43] In determining the issue of liability based on the evidence I find that the 1st Defendant was the cause of the collision and that the Claimant has discharged his burden in that regard on a balance of probabilities. The credit of the Claimant as it relates to how the collision occurred was not eroded under cross examination however, in contrast, the 1st Defendant provided telling inconsistencies.

[44] The first inconsistency is his account of how the accident occurred and I find this to be material. In one instance the 1st Defendant stated that the first time he saw the Claimant was when he hit into the car. On the other hand, he stated that as he saw the Claimant running across the street he swerved away from him and hit the brakes.

[45] The 1st Defendant also revealed conflicting accounts of the Claimant's position after the collision. He asserted that after the Claimant was hit, he was lying exactly in front of the car and on another account he indicated that the car stopped in front of the Claimant.

[46] I find that these inconsistencies go to the root of the 1st Defendant's case. Additionally, what is compelling is the 1st Defendant's revelation that he was aware and contemplated that pedestrians might have attempted to cross the road at the material time. Notably, the 1st Defendant disclosed that he was tired and exhausted at the material time and I deem that this would have impaired his mindfulness and attentiveness. I therefore find that the 1st Defendant was not driving with due care and attention and failed to have a proper lookout in all the circumstances. Indeed, he failed to have any proper lookout for other users of the roadway, in particular the Claimant. The fact that the 1st Defendant contemplated and anticipated that pedestrians might have attempted to cross the roadway, in my judgment, he should have appreciated the possibility of them doing so by ensuring that he could stop or avoid collision. I deem that the particulars of negligence against the 1st Defendant have been made out.

[47] **The Road Traffic Act** also places a duty on pedestrians to be cautious in their use of the road. I therefore have to address my mind to the possibility of the Claimant being contributorily negligent in the cause of the collision.

[48] Lord Denning in the case of **Gough v Thorne** [1966] 3 All ER 398 indicated the circumstances under which a judge should find a child contributorily negligent. He stated at page 399: -

> *"A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances.* ***Judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her 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 of the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy." [Emphasis added]*

[49] I am also persuaded by the principle stated in the 10th edition of **Charlesworth and Percy on Negligence**. At page 182 paragraph 3-28 the authors stated the following: -

> *"Accordingly, while the fact that the claimant is a child does not prevent a finding of contributory negligence, the crucial points are the child's age and*

> *understanding. Infancy, as such, is not a "status conferring right", so that the test of what is contributory negligence is the same in the case of a child as of an adult. That test is modified only to the extent that the degree of care to be expected must be apportioned to the age of the child. The degree of care it is appropriate to expect of a child is a matter of fact for decision on the evidence in the particular case."*

[50] In analysing the evidence of the case and having regard to the age and the conduct of the Claimant, I do find that he was contributory negligent in causing the collision. In observing the Claimant, I find that he was of average development and intelligence as that of a reasonable thirteen (13) year old child.

[51] The Claimant gave evidence that he had knowledge and was exposed to the precautions that should be taken when crossing the road. The Claimant indicated that he did not see the motor vehicle before he was hit, which suggests that he did not proceed with sufficient caution in the light of the fact that it was a dual carriageway. It can be inferred that the motor vehicle being driven by the 1st Defendant must have been in proximity to the Claimant while he crossed the road for the collision to have occurred. I therefore find that the Claimant failed to see the vehicle approaching because he did not look at all or because he failed to look properly. I also deduce same from the Claimant's admission that he was in a hurry.

[52] I am satisfied that the Defendants have proven that the Claimant to a certain extent, has failed to take ordinary care for his own safety when crossing the road and that failure was a contributory factor to the collision.

[53] At this juncture, I will deal with the Claimant's pleading of 'res ipsa loquitur' to prove his case. The Honourable Mr. Justice Kirk Anderson in the case of **Oscar Clarke v Attorney General of Jamaica** [2016] JMSC Civ. 65 at paragraph 26 stated: -

> *"Res ipsa loquitur, which stems from the judgment of Erle C.J in **Scott v London and St. Katherine Docks** – [1865] 3 H and C 596, at 601, applies where:*
>
> *(i) The occurrence is such that it would not have happened without negligence; and*

> *(ii) The thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible, or whom he has a right to control; and*
>
> *(iii) There must be no evidence as to why or how the occurrence took place."*

[54] From this guidance, I glean that the 'res ipsa loquitur' doctrine has no applicability in circumstances where the accident complained of could have normally happened, without any negligence on the defendant's part. On this issue, I am guided by the principles stated by Kodilinye, **Commonwealth Tort Law**, 5th Edition at page 101-

> *"…when a pedestrian is knocked down by a vehicle as he is crossing a road and there are no eye witnesses to the accident and no evidence of excessive speed on the part of the driver of the vehicle,* ***res ipsa loquitur cannot be relied upon to establish negligence on the driver's part since this is not the sort of accident which only happens in the ordinary course of things by reason of the driver's negligence and pedestrians frequently get run over when they attempt to cross the road, having failed to see the oncoming traffic****." [Emphasis added]*

[55] I am of the view that the first condition has not been satisfied in this case especially on the evidence that the Claimant wholly contributed to the cause of the accident. Negligence in this case was established on the part of the Claimant because he failed to see the oncoming vehicle being driven by the 1st Defendant when he attempted to cross the roadway. Also, the principle is inapplicable in circumstances where evidence is led as a part of the claimant's case, as to why or how the accident, took place. In this case, the Claimant led evidence that he was crossing the Waterford Park Way dual carriage road when he was hit by the motor vehicle being driven by the 1st Defendant and that he did not see the vehicle before his attempt to cross the roadway. In my judgment, the doctrine of res ipsa loquitur has not assisted the Claimant to prove a prima facie case of negligence against the 1st Defendant.

[56] The fact that the Claimant sustained injuries consequent upon a collision with the motor vehicle being driven by the 1st Defendant is not in dispute. I must now determine the quantum of damages to be awarded to the Claimant. In seeking to arrive at an award for pain and suffering and loss of amenities, I am guided by

the dictum of the Honourable Mrs. Justice Audre Lindo at paragraph 20 in the case of **Kamaal Pitterson v The Attorney General of Jamaica** [2016] JMSC Civ. 49 where she adopted the dictum of Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481. The dictum is as follows: -

> *"The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the board criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages."*

[57] The Consumer Price Index (C.P.I) that is applicable at this time 250.4.

[58] Learned Counsel for the Claimant submitted that the case of **Delroy Beckford v Emeilnd Doyley and Albert Allen** (unreported), Supreme Court Jamaica, Suit No. C.L 1990/B144, judgment delivered the 23rd day of July 1991 is a useful guide for the appropriate award for general damages. In this case the Claimant suffered lacerations to his face, scalp, abrasion to the head, right hand, neck and keloid scarring to scalp and forehead. The award for general damages was $90,000.00 which updates to $2,500,000.00.

[59] Learned Counsel for the Defendants submitted the following cases: -

1. **Aneita Hall v Denham Dodd & Audrey Wilson** (unreported), Supreme Court Jamaica, Suit No. C.L 1987/H161, judgment delivered the 27th day of September 1990. The Claimant suffered jagged laceration to the left parieto-occipital area and loss of tissue in the parieto-occipital area. Abrasion to the left shoulder and haematoma to the left forehead. She underwent plastic surgery due to the loss of tissue and was hospitalised for four weeks. The award for general damages was $30,000.00 which updates to $1,225,448.61.

2. **Melvin Fenton v Daniel Lewis** (unreported), Supreme Court Jamaica, Suit No. C.L 1987/F197, judgment delivered the 12th

day of July 1991. The Claimant suffered lacerations to the face, right side of neck and right knee with loss of skin. He spent approximately one week in hospital where he was treated with antibiotics and analgesics. There was no resulting disability or deformity. The award for general damages was $30,000.00 which updates to $960,964.91.

3. **Gilbert McLeod v Keith Lemard** (unreported), Supreme Court Jamaica, Suit No. C.L 1993/M196, judgment delivered the 20th day of March 1996. The Claimant suffered pain and tenderness to the right side of chest, multiple scattered abrasions to the right thigh, knee and leg, 4cm laceration to right side of forehead, 5cm laceration to right foot, loss of consciousness and was hospitalised for 2 days. He had no disability. The award for general damages was $100,000.00 which updates to $642,710.47.

[60] I find that the case of **Delroy Beckford v Emeilnd Doyley and Albert Allen** provided the most assistance since the injuries suffered by the claimant in that case are closely aligned to the injuries suffered by the Claimant at Bar. In the cases cited by Learned Counsel for the Defendants, I am of the view that those injuries were not analogous to that of the Claimant in the instant case. I am therefore satisfied that an award of $2,300,000.00 is adequate to compensate the Claimant for his pain and suffering.

[61] Special Damages were particularised as follows: -

a) Medical Expenses $54,500.00

b) Transportation $39,170.00.

[62] The medical expenses were supported by receipts. In relation to transportation cost, the authorities have shown that strict proof is not an absolute prerequisite in making an award given the nature of public transportation in our jurisdiction.

[63] Future medical expenses were pleaded as $400,000.00 and I am prepared to award that sum.

ORDERS & DISPOSITION

[64] Accordingly, I make the following Orders: -

1. Special Damages is awarded in the sum of $85,800.00 to be apportioned 90% of which is to be paid by the Defendants with interest at a rate of 3% per annum from the 29th day of July 2011 to the 20th day of November 2018;

2. General Damages is awarded in the sum of $2,300,000.00 with interest at the rate of 3% per annum to be apportioned 90% which is to be paid by the Defendants from the 22nd day of May 2012 to the 20th day of November 2018;

3. Future medical expenses is awarded in the sum of $400,000.00 to be apportioned 90% to be paid by the Defendants;

4. Costs to be taxed if not agreed pursuant to the apportionment made in judgment awarded.