[2016] JMSC Civ 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV02759

BETWEEN	**DERRICK CRUMP**	**CLAIMANT**
AND	**ANDRAE BRUCE**	**DEFENDANT**

Ms. Christine Hudson instructed by K. Churchill Neita and Co. for the claimant

Ms. Raquel A. S. Dunbar instructed by Dunbar & Co. for the defendant

February 12, 2013; May 6, 2016

Motor Vehicle Accident – Liability – Quantum of Damages

D. FRASER J

INTRODUCTION

[1] On July 4, 2009 there was an accident which occurred at night along the Goshen Main Road, in the parish of St. Elizabeth. It involved the motorcar registered 0195 ES being driven by the claimant in the direction of Gutters and the motorcar registered 6382 EU being driven by the defendant in the opposite direction towards Santa Cruz. Both the claimant and defendant allege that the accident was caused by the negligence of the other driver failing to properly negotiate a corner; a left hand corner for the claimant and a right hand corner for the defendant. Accordingly, in their respective claim and counterclaim they each seek damages alleging injuries, loss, damage and repayment for expenses incurred.

[2] The Acknowledgment of Service of the defendant filed September 3, 2010 indicates the Particulars of Claim were served on him on July 29, 2010. The Ancillary Claim form was filed and served on the claimant/ancillary defendant on September 8, 2010.

THE QUESTION OF LIABILITY

[3] The claimant's version of the accident as outlined in paragraphs 4 – 5 of his witness statement which was received as his evidence in chief is as follows:

> On reaching about 3 chains from the Power of Faith Tabernacle Church which is on the opposite side, there is a left hand corner. On approaching the corner, I saw a motor vehicle coming from the opposite direction, part of this motor vehicle was on my side of the road. Basically the car was in the middle of the road, part of the motor vehicle was on my correct driving side of the road and the other side on the Driver's correct driving side. The vehicle was travelling at a fast rate of speed.
>
> On seeing this vehicle, I applied my brakes, tooted my horn, dimmed my lights and swerved to the left, because of an embankment which is about 6 feet high, I could not go very far. The motor vehicle never slowed its speed, it continued and collided into my right indicator and right fender. With the impact, my vehicle ride up on the embankment. I then swerved to the right and my motor vehicle lost control and ended up on the opposite side of the road in front of a shop, with the front of my vehicle positioned up the road in the direction I was headed.

[4] The claimant claims that the defendant is solely liable for the accident as he was *inter alia* negligent in failing to keep a proper lookout, failing to negotiate a corner without encroaching on the correct driving side of the claimant and driving too fast around a corner without due care.

[5] The defendant's contrasting version outlined in his witness statement received as his evidence in chief indicates that:

> I was approaching a right hand corner when I saw a vehicle coming from the opposite side of the road and he was on my side of the road. I saw the headlights coming from my side of the road, so I slowed down and

> moved further to my left. The car kept coming over to my side of the road so I slowed down and held on to my horn. I almost stopped when the car kept coming over and I felt an impact to the right front section of my car. After I felt the hit, the front of my car drop down and the car slide to the right. When it stopped, I came out and saw that it was still facing Santa Cruz direction but the front section was in the right lane. About ½ of my car was in the right lane and in a slant position. I saw that the front right wheel was no longer on the car so it was resting on the control arm.

[6] He continued that after the impact, he saw the other vehicle up the road on his left side, in the parking area of a bar. It was completely off the road. He stated that there was no light at the point of impact but that there was light by the bar and so he was able to see the other car.

[7] The defendant states that the road was 23 feet wide and that there were embankments on both sides of the road. He noted that the embankment to his left was bushy. He also maintained that there was glass from the cars in the road on his side of the road. He further indicated that he saw a gouge in the road starting from his left lane going over the white line up to the point where his car had stopped.

[8] In cross-examination the claimant resiled from certain statements contained in his witness statement relating to the time of the accident and the speed at which he was travelling. He therefore stated that the accident happened about 10:30 – 11:00 at night rather than at about 9:30p.m. Concerning his speed he said he was travelling about 40 even though in his statement he stated he was travelling at about 60 mph.

[9] Regarding distances he said his vehicle stopped about ¼ chain from the point of impact (when pointed out in court it was estimated at 13 feet) and not two chains away as was suggested to him. He then stated that the defendant's car stopped ¾ chain away from the point of impact rather than ½ chain as was suggested to

him. He also maintained that the road was 27 feet not 23 feet wide as was also suggested to him. He said he had measured it at 27 feet.

[10] In cross-examination the defendant denied that the accident happened on the claimant's side of the road and that he never slowed down or tooted his horn. He indicated however that he had never measured the road. In explaining the accident he stated that, *"Because it is a right hand corner as I was turning right after the car hit I feel the impact then my car drift to the right. My entire front wheel was hit off completely and I found that wheel in bushes on the right hand side of the road."*

ANALYSIS

[11] Both the claimant and defendant maintain that the other came over onto their side of the road and caused the accident. The most significant factor in determining the question of liability is where the point of impact occurred. Was it on the side of the claimant, the side of the defendant or in the middle of the road?

[12] There are two critical pieces of evidence given by the defendant that were unchallenged by the claimant which assist in determining this issue. The court recognises that the claimant was assisted to leave the scene shortly after the accident to obtain medical treatment and would not have had the time to make observations that might have countered the assertions of the defendant. However the court accepts the evidence of the defendant that the glass from the accident was on the defendant's side of the road. Also the court accepts that the gouge in the road was caused by the right control arm of the defendant's car after the right front wheel had been hit off by the impact and that the gouge mark extended from the defendant's side of the road across to the claimant's side. The defendant's evidence that his vehicle was partially on his side and partially on the claimant's side of the road supports the finding that the gouge mark extended from his side of the road to the claimant's side. Those three findings in relation

to the physical evidence settle the question of where on the road the accident occurred — on the defendant's side.

[13] Counsel for the defendant relied on the case of ***Samuel Street v Robert Berry*** 1966 GLR 270 in which there was an accident between a car and a motor truck travelling in opposite directions. The Resident Magistrate found that prior to the impact neither of the drivers was keeping to his proper side of the road and that the accident was caused when each driver was in the act of swinging over to his proper side. He however found that the point of impact was on the car's side of the road. The learned Resident Magistrate having apportioned negligence equally, on appeal it was held that liability should not have been apportioned as it was irrelevant if the driver of the car had been driving across the line before the accident so long as he was on the correct side of the road before the accident. In the instant case having found that the point of impact was on the defendant's side of the road the claimant is the one liable for the accident.

[14] There are other factors which point to the claimant being the one responsible for the accident. Firstly I accept the estimate of speed of 60mph that the claimant said he was travelling at in his witness statement rather than the reduced speed of 40mph he gave in cross-examination. I also accept the estimate of distances given by the defendant rather than by the claimant. The claimant indicated that after the impact he swung to the left and because of the embankment to the left had to swerve right which explained why he ended up by the bar on the defendant's side of the road. Counsel for the defendant questioned the credibility of that account suggesting that the claimant would not have been able to manoeuvre his car in that manner given the damage to his right wheel and having worn tyres. There was however no technical evidence to support those submissions and the critical factor remains the court's finding as to the point of impact. However the speed of 60 mph would help to explain why the claimant's vehicle ended up two chains away from the point of impact. The defendant's estimate of his vehicle stopping ½ chain from the point of impact supports his evidence that he was going only about 10 -15 kph at the point of impact. The

court of course also takes into account that after the right front wheel of the defendant's car was hit off it would have retarded the distance that his car could thereafter travel.

[15] I therefore find that the cause of the accident was due to the claimant encroaching on the lane of the defendant as they were both negotiating a corner with the point of impact being in the defendant's lane. The speed at which the claimant was travelling appears to have been a contributing factor to the cause of the accident. I find the claimant is 100% liable for the accident.

DAMAGES

SPECIAL DAMAGES

[16] The defendant paid $1000 for hospital fees. Tyrone's Wrecking Service towed his car from the scene at a cost of $12,000.00. He paid $6,500 for the assessment of damage to his car conducted by Priority Loss Adjustors. They found his vehicle to be a total write off valued at $100,000.00. He maintained that he was a wood carver and that he would go to Negril on Fridays and Ocho Rios on Tuesdays to sell his carvings. He also indicated that he had to charter vehicles to make these journeys after the accident with it costing him $6000 to go to Negril and $12,000 to go to Ocho Rios. He indicated that he was unable to work for two weeks because of the pain in his right shoulder and that he would` normally earn about $30,000 net each week from selling his carvings.

[17] Counsel for the claimant took no issue with the assessed loss of the car, the cost of the assessment, the wrecking fees and hospital fees. The sum of $119,500 was therefore unchallenged. However counsel was not prepared to agree the sums claimed for loss of use of the vehicle or loss of earnings. Rightly so. It is trite law that special damages must be both specifically pleaded and proven. While the sums for loss of use and loss of earnings were pleaded as was submitted by counsel for the claimant no attempt was made to prove these special damages. The defendant did not give any evidence about his industry,

costs of equipment or wood used. No evidence for example from any vendors to whom he would sell carvings was provided. It has not escaped the court as highlighted by counsel for the claimant that the sum claimed for loss of use far exceeds the value of the car.

[18] As submitted on behalf of the claimant, even though the defendant is a street vendor who may not be expected to have documentary evidence he is obliged to put some evidence, even if only viva voce, before the court for analysis and assessment. See for example the discussion of this principle in cases such as ***Walters v Mitchell*** (1992) 29 JLR 173 and in my own judgments of ***Shaquille Forbes (an infant who sues by his mother and next friend Kadina Lewis) v Ralston Baker, Andrew Bennett and the Attorney General of Jamaica*** 2006HCV02938 (March 10, 2011), ***Omar Wilson v VGC Holdings Limited*** 2010HCV04996 (November 21, 2011) and ***Cedric Morrison v Reginald White and Guardsman Group*** [2013] JMSC Civ 186.

[19] It is only when there is some evidence before the court that the court can weigh the circumstances and say whether or not the evidence provided is reasonable and sufficient proof. Counsel for the claimant maintained that only one month's loss of earnings at minimum wage ($4070 per week) should be allowed and in the circumstances the court finds that to be reasonable ($16,280). No award will be made for loss of use.

[20] The total sum allowed for special damages will therefore be $135,780.00.

GENERAL DAMAGES

[21] The defendant said that after the accident he was feeling pain across his right shoulder and head and went to the Mandeville Hospital. He did an X-ray on his head and shoulder and was given an injection for the pain. There were splinters in his shoulder as well.

[22] The medical report of Dr W. Tolan received as an exhibit 11 indicated that on examination the defendant had mild tenderness over his right fronto temporal area and he had multiple small abrasions to his right anterior shoulder and upper arm. An X-ray of his skull revealed no fracture. The defendant was sent home on analgesics.

[23] Counsel for the defendant relied on the case of ***Boysie Ormsby v James Bonfield and Conrad Young*** Suit No. C.L. 1992/017, Khan's Recent Person Injury Awards Vol. 4 page 213. In that case a 61 year old Dray operator suffered multiple superficial wounds to left supra orbital area and had muscular tenderness in upper limbs. The medical report stated he was unable to work for 10 days as a result of his injuries. However in evidence he testified that he felt pain and was incapacitated for 20 weeks. The award of $82,000 updated to $383,000 in December 2012 and counsel submitted that an award of $400,000 should be made. (That updates to 480,623. (Jan. 2016)). However counsel for the claimant submitted that the injuries in ***Boysie Ormsby*** were more serious with the plaintiff testifying of incapacity for 20 weeks. The reduced sum of $200,000 (which updates to $240,311 (Jan. 2016)) was submitted as a reasonable award.

[24] I agree with counsel for the claimant that the ***Boysie Ormsby*** case is more serious than the instant matter. The defendant in this case saw a doctor once, suffered only mild tenderness to his head, minor small abrasions to his shoulder and received analgesics for pain. In all the circumstances I believe an award of $250,000.00 for pain and suffering is appropriate.

DISPOSITION

[25] The following is the order of the court:

a) **Judgment** for the defendant on the claim and counterclaim.

b) **Special damages** awarded to the defendant in the sum of $135,780.00 with interest thereon at the rate of three percent per annum from July 4, 2009 to May 6, 2016.

c) **General damages** awarded to the defendant in the sum of $250,000.00 with interest thereon at the rate of three percent per annum from September 8, 2010 to May 6, 2016.

d) **Costs** to the defendant to be agreed or taxed.