[2014] JMSC Civ. 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 0411

BETWEEN	**MELVIN McCURDY**	**CLAIMANT**
AND	**GEORGE CAMPBELL**	**1ST DEFENDANT**
AND	**JIN HEE KIM**	**2ND DEFENDANT**

Ms. Audrey Clarke instructed by Judith M. Clarke & Co., for Claimant.
Mr. Garth Lyttle instructed by Garth Lyttle and Co., for the Defendants.

Heard on: 18th April 2013 and 31st January 2014

Negligence - Motor Vehicle Accident – Whether pedestrian walked into the path of moving motor vehicle – Whether driver of motor vehicle negligent – Injuries to pedestrian – Measure of damages

Coram: Morrison, J.

[1] On May 30, 2009, motor vehicle registration number 9584 DM came into violent contact with the Claimant and in the result caused the Claimant to be treated for resultant injuries to his person.

[2] The facts giving rise to this accident are in dispute. I propose to set out the pleadings and the evidence in support thereof in order to determine the issues of credibility and ultimately, the vexed question of liability for negligence.

THE PLEADINGS

[3] According to the particulars of Claim, the first Defendant was at all material times the driver, employee/servant and/or agent of the second Defendant who was the owner of the motor vehicle under reference.

Paragraph 3 asserts that on or about the 30th day of May 2009, while the Claimant was going about his business in the vicinity of the Liguanea Shell Service Station, at the intersection of Old Hope Road and Munroe Road in the parish of Saint Andrew, the first Defendant so carelessly, recklessly and negligently drove, operated, managed and/or controlled motor vehicle registration No. 9584 DM along the said Service Station that the same collided with the Claimant as a consequence of which the Claimant sustained injuries, suffered loss and damage and incurred expenses.

[4] The Particulars of the Negligence of the first Defendant were identified to be:

i. Driving without due care and attention

ii. Driving at a speed which is excessive in all the circumstances.

Iii. Failing to have any or any sufficient regard for other users of the roadway.

Iv. Failing to have proper look out in all the circumstances.

v .Failing to stop, swerve, stop, slow down or to otherwise operated the said motor vehicle so as to avoid the said collision.

[5] As against the second Defendant the Claimant pleaded rather elliptically: "Permitting the 1st Defendant, employee/servant and or agent (sic)".

As to the Particulars of Injuries they charge loss of consciousness, fractured neck with limitation of range of motion of the cervical spine, broken nose, herniated disc (3/C4 5% Whole Person disability.

[6] The Defence of the first and second Defendants, at paragraph 1 is a denial that the first Defendant drove the said vehicle recklessly, carelessly or negligently or that the first Defendant was the cause of the accident. In fact, say both Defendants "the injuries, damage and losses suffered by the Claimant were wholly caused by the Claimant who negligently walked from the Texaco Gas Station before a parked truck along Munroe Road into the path of the Defendant's vehicle who was driving in the same direction on said road and on the correct side of the road".

[7] Further, in descending to the Particulars of Negligence of the Claimant, the Defendants have the Claimant:-

a) Negligently and carelessly walking into the path of the Defendant's motor vehicle".

b) Walking from the Shell Gas Station premises at Liguanea before a parked truck, into the path of the second named Defendant's vehicle.

c) Walking across the street without due regards to the other users of the said street (sic).

d) Stepping form before a parked truck into the path of the Defendant's vehicle.

e) Not having any or any proper look out and thereby cause the said accident.

The Defendants ended by saying that all the allegations of injury and or loss suffered by the Claimant are denied.

THE EVIDENCE

[8] The evidence on which the Claimant's case rests is comprised of the Claimant himself, and Mr. Alrick Stanford, his walking companion at the relevant time.

According to the Claimant, he was walking along the side of the road in the company of Mr. Stanford in the vicinity of the Liguanea Shell Service Station at the intersection of Old Hope Road and Munroe Road, Saint Andrew, when, on reaching the vicinity of the said Service Station he saw a parked truck on the sidewalk close to the entrance of the Service Station "which compelled me to walk along the side of the truck on the outer side to enter the service station". When he reached towards the front of the truck, he continues, and was proceeding to the Mini Mart to purchase something to eat, "I felt something hit me from behind causing me to fall to my face. It felt like a blow from a motor vehicle. I fell on the ground and lost consciousness for a while". The above constitutes the nub of the Claimant's account of the material event.

In support, Mr. Stanford's evidence substantially supports the evidence of the Claimant:"... we were walking towards the Liguanea Shell Service Station… A truck

was just below the entrance of the Shell Service Station… I was in front of the Claimant. I passed the truck and entered from the sidewalk to the Service Station… The Claimant was approximately four (4) feet behind me. As soon as I entered the Service station and realized that a Nissan Serena station wagon motor vehicle registration No. 9584 DM had hit the Claimant… When the Claimant was hit by the motor vehicle, he fell in front of the truck…".

[9] As for the first Defendant driver he testified that he was travelling at about 15-20 kilometres per hour along Munroe Road when, "as the front of my vehicle was about to clear the front of the truck", which was parked in such a position that half of the truck was on the sidewalk and half on the road surface, "a man walk (sic) from in front of the parked truck and into the side of my vehicle. I immediately applied my brakes and the car came to a complete stop".

The evidence of Mr. Garfield Garvey, front left seat passenger, of the vehicle being driven by the first Defendant supports that of Mr. Garvey: "Just as my vehicle reached the front of the truck a man stepped from before the truck into the path of our vehicle and it was the left wing mirror that hit him and he fell to the ground".

[9] Under cross-examination the Claimant testified that he had walked for about twelve (12) feet from the front of the truck to go to the Gas Station when he was hit. However, he testified he had not yet turned to go into the Gas Station. However, his evidence continues, "I passed the truck and pulled to my left… I was hit on the sidewalk". He denied that he was coming out of the Gas Station and that he had stepped out into the path of the motor vehicle.

[10] Mr. Stanford in cross-examination testified that as he and the Claimant were walking, he was in front of the Claimant by about a distance of ten (10) feet. As he turned to go into the Gas Station the Claimant had not yet done so but was in front of the truck. He maintained that the Claimant fell, after being hit, beside as opposed to, in front of the parked truck.

[11] Under cross-examination the first Defendant testified that he was not turning into the Shell Gas Station and maintained that the Claimant walked out into the path of his car. However, he says, "I don't know what part of the Claimant's body made contact with the vehicle. This is so as there is a 'blind spot' on the windscreen… I was almost past the truck when I saw an image coming out so I just applied my brakes. When I did so the collision had already occurred". He was categorical in maintaining that the collision took place on Munroe road and not in the entrance to the Gas Station.

He denied that the Claimant was hit when the Claimant's back was to his vehicle. Significantly, he did not see the Claimant cross any road or street without due regard to other road users.

According to the left front seat passenger of this right-hand driven vehicle, Mr. Garvey, in cross-examination, when the Claimant was hit he fell backwards. Importantly, he admitted that he did not see the Claimant go across any street that day.

ANALYSIS OF EVIDENCE

[12] I wish to state at the very outset that on the issue of credibility, I prefer the evidence of the Claimant and his witness to that of the Defendant and his witness. I find the Claimant to be more reliable than his counterpart. I reject the defence's assertion

that the Claimant had walked into the path of the motor vehicle as it incongruous with other evidence. For instance, according to the medical report (Exhibit 4), the Claimant was taken to the Accident and Emergency Department on the same day where he was admitted with “a suspected fractured neck and a broken nose”, which is more in keeping with the Claimant falling on his face as opposed to the Claimant falling backwards.

[13] I deem that the first Defendant was not driving with due care and attention and that he failed to have a proper look out in all the circumstances. Indeed, that he failed to have any or any sufficient regard for other users of the road way. In summary, I find that the particulars of negligence against the first Defendant have been made out to my satisfaction. It is rather revealing to hear the first Defendant say that he was unable to say what part of his vehicle made contact with the Claimant owing to there being a “blind spot” on the windscreen and that he had almost passed the parked truck when “he saw an image coming out” of the Gas Station compound which instinctively forced him to apply his brakes. Had the Defendant been heeding the presence of other road users he may have avoided the accident.

[14] What is even more telling is that the pleading by the Defendants speaks to the Claimant walking across the street whereas both witness for the defence distinctly deny that this was so. In other words, that part of the evidence does not support the Defendant’s pleadings.

THE LAW

[15] In addition to damage there are two other constituent elements to be satisfied in proving negligence. They are a careless act and a duty to the injured person.

Indeed there is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected.

Even if one assumes that the Defendants' account of what transpired is correct, which I have already rejected, that does not exonerate the first Defendant from liability.

[16] In **Kayser v London Passenger Transport Board** [1950] 1 AllER 231, the Plaintiff and her 13 year old daughter wished to cross the road at a junction controlled by traffic lights. They ensured that the traffic lights were showing red and then began to cross in front of a bus which was stationary at the traffic light on the nearside of the road. Whilst they were passing in front of the bus the traffic light changed to red-amber and the bus driver caused the bus engine to turn over in a manner indicative of his preparation to move off. This alarmed the Plaintiff who took a step forward in an effort to evade the bus if it moved forward. The Plaintiff was struck by the Defendant's lorry which was passing the bus.

It was held that the lorry driver was clearly negligent as a reasonable driver in such circumstances would not have let the front wheels of his lorry get level with the bus until the bus had got halfway across the crossing. To pass a stationary vehicle under such circumstances was a dangerous practice: the danger ought to be realised by all motorists.

[17] In the instant case the first Defendant ought to have been cautious in passing the parked truck as it had encroached upon the roadway. He ought to have borne in mind the probability of pedestrians being inconvenienced by the truck and accordingly to

have paid due regard and attention to that probability by slowing down or honking his horn or swerving to avoid hitting such a pedestrian.

MEASURE OF DAMAGES

[18] Here the damages ought to reflect in monetary terms the pre-accident state of the Claimant. From the medical report (Exhibit 4) the Claimant was diagnosed with herniated disc C3/C4 with resolved symptoms.

He had been admitted at the University Hospital of the West Indies from May 30, 2009 to June 8, 2009 when he was discharged to the Outpatient Clinic for follow-up visits until August 17, 2009. As was said earlier, the Claimant was suspected of having a fractured neck and broken nose and he had complained of right sided neck-pain with limitation of range of motion of the cervical spine. In consequence the Claimant was placed in a collar and kept in hospital until 8th June 2009 when on 17th August 2009 the collar was removed.

[18] As regards the Claimant's disability the doctor was of the opinion that Mr. McCurdy qualifies for a Diagnosis Related Impairment rating category 11 as he had a symptomatic herniated disc which resolved with treatment. Accordingly the Claimant's permanent partial disability was assessed as 5% of the Whole Person.

[19] The Claimant has asked for compensation to the value of $2,700,000.00 whereas the Defendants are uncommitted to a particular figure. In **PauL Jobson v Peter Singh, Sonia Singh And Collin Linking**, reported at Volume 4 of Khans compendium of Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica (Khan's), the Plaintiff suffered unconsciousness, head injuries,

bruises to arms and legs and pains to neck, down back and across the shoulders. He was admitted overnight to the Spanish town Hospital where he had medication. He was left with recurrent intermittent pains and can no longer play football. The plaintiff was awarded $430,000.00 as at 3rd July 1997. That sum updated to $1,936,469.25 as at May 2013.

[20] In **Christopher Russell Land Shirley Russell v Patrick MARTIN And Sheldon Ferguson**, the 1st Claimant suffered pain the neck, pain in the wrist, tenderness of trapezius muscle on lateral flexion and rotation of the neck and marked tenderness of the dorsal aspect of the right wrist. The doctor's view was that the 1st Claimant suffered chronic cervical strain (chronic whiplash injury). He assessed permanent partial disability as is related to the cervical spine as 5% of the whole person. In the upshot Mrs. Justice Thompson-James (Ag.), as she then was on February 19, 2008 awarded $1,655,805.17 for general damages which translated as at May 2013 to $2,694,260.76.

[21] In the instant case the significant injuries were to the neck and back and although diagnosed with herniated disc C3/C4 with resolved symptoms the prognosis is he may suffer further neck pains in the future.

[22] In **Marlene Neslon v Edgar Cousins**, Mr. Justice Pitter awarded the sum of $525,000.00 on the 29th November 1996 for general damages for injury to neck and back to a Plaintiff whose assessed Permanent Partial Disability did not exceed 10%. It is reported at Khan's, volume 5, p.162.

[23] I am to say that I prefer the **Nelson** case to the others it being the more analogous to the instant circumstances. However, the translated figure of $525,000.00

reflects a value of $2,689,615.00 as at April 2013 which has to be discounted to take into account the Claimant's lesser permanent partial disability which is 5% of the whole person. Accordingly, I award general damages in the sum of $1,400,000.00 with interest thereon at 3% per annum from the date of the service of the claim form to the date of judgement. I award special damages, notwithstanding the criticism of counsel for the Defendants, on the basis of the authority of the Court of Appeal decision in **Garfield Hawthorne v Richard Downer**, SCCA 12 OF 2003 delivered on July 29, 2005. In that regard I award for special damages the sum of $300,728.71 from the 30th May 2009 to the date of judgement at 3% per annum.

Attorney-at-Law costs of $52,000.00 is awarded as per the Civil Procedure Rules.