



In The Supreme Court of Bermuda

CIVIL JURISDICTION
2014 No: 144

BETWEEN:-

CHUNCEY SMITH

Plaintiff

-v-

SHANNON JENNINGS

Defendant

JUDGMENT

Date of hearing: 29th February, 1st March 2016

Date of Judgment: 4th March 2016

Mr. Richard Horseman, Wakefield Quin, for the Plaintiff

Mr. Vaughn Caines, Marc Geoffrey Barristers & Attorneys, for the Defendant

Traffic collision, liability, reasonable care, quantum of damages, medical injury

Introduction

1. In this case the Plaintiff, Chuncey Smith (who I shall refer to as Mr. Smith), claims damages for personal injuries arising out of a road traffic accident that occurred on 1st August 2013 near the junction of Horseshoe Road and South Road, Southampton. The brief facts are that Mr. Smith was travelling west on South Road on a motorcycle (Registration No. BU438) at approximately 4:00 p.m. when

he was in a collision with a motor car (Registration No. 42512) being driven by Shannon Jennings, the Defendant (who I shall refer to as Mr. Jennings), which had emerged from Horseshoe Road with the intention of travelling west.

2. The accident occurred on a public holiday known as Emancipation Day. On that day a large celebration was taking place at Horseshoe Bay Beach. The popularity of the event was such as to require a police presence to regulate vehicular traffic entering and leaving the road leading to Horseshoe Bay Beach. This road is to the east of the junction of Horseshoe Road and South Road. The only truly independent witness was a police officer, PC 2355 Kendy Swainson, who was on duty at the entrance to Horseshoe Bay Beach. However, she did not actually see the collision.
3. Mr. Smith was the only person injured in the accident. He suffered injuries to his right foot for which he was treated at the King Edward VII Memorial Hospital. His claim for damages is comprised of an amount for loss of earnings, hospital and medical fees; and general damages for pain and suffering, etc.
4. Mr. Jennings denies the Plaintiff's allegation that the accident was a result of his negligent driving. Alternatively, he says that, if he was to blame for the accident, Mr. Smith was also at fault and his negligence contributed to the accident.
5. The evidence on the Plaintiff's side came from the Plaintiff and PC Swainson (as she then was). The evidence on the Defendant's side came from Mr. Jennings and Janikia Lightbourne, who was a passenger in his car.

Liability

6. The question of liability for the accident was a hotly contested issue. Apart from the drivers of the two vehicles there were no independent witnesses who actually saw the accident occur. As already noted, the police officer did not see the collision. She only observed the position of the vehicles and the damage to them

after the accident. Her attention at the time of impact was on regulating traffic exiting and trying to enter the road to Horseshoe Bay Beach. The evidence of PC Swainson was that there was a barrier placed in the road to block entrance to the beach, but that the lane for traffic exiting the beach was open.

7. Having heard the evidence I am satisfied that the accident was caused by the inadvertence of Mr. Jennings in the manner in which he conducted his vehicle at the time. My reasons for so finding are as follows.
8. Mr. Jennings' vehicle was entering a main road (South Road) from a minor road (Horseshoe Road). Mr. Smith had the right of way. The burden was therefore on Mr. Jennings to make sure that it was safe for him to enter the main road and to do so without causing any risk of a collision to vehicles already on the main road.
9. Extra caution was required from Mr. Jennings because of the difficult traffic conditions on the main road. There was evidence of eastbound traffic on South Road being at a standstill (because of taxis in the east bound lane trying to enter the road to Horseshoe Bay Beach and being prevented by the Police from doing so). Mr. Jennings had to navigate his vehicle through a gap left for him by eastbound vehicles. This added to Mr. Jennings' difficulties in observing what traffic there might be on South Road travelling west. The existence of such difficulties called for extra caution on his part.
10. The evidence of Mr. Jennings was to the effect that he was waved on by the driver of a car on the main road travelling east at the junction with Horseshoe Road. It is likely in my view that Mr. Jennings relied on this as an indication that it was safe to enter South Road and caused him to be less attentive to the possibilities of other vehicles travelling west on the road than was warranted in the circumstances.
11. The position of the vehicles following impact and the location of the damage to Mr. Smith's motorcycle, namely at the driver's footrest on the offside, are both

indicative of Mr. Smith having been hit in the middle of the offside of his motorcycle by the front left bumper of Mr. Jennings' car. The motorcycle came to rest (as testified to by the police officer) at the front of Mr. Jennings' car, lying on its nearside. This suggests that Mr. Jennings was in the course of executing his exit from Horseshoe Road when the accident occurred; rather than having completed the maneuver as he testified. There was some dispute about the location and extent of the damage to Mr. Jennings' car. With respect to this aspect of the case I accept the police officer's testimony that the damage was to the front bumper. I do not accept Mr. Jennings' testimony that the damage to his vehicle consisted of scrape marks along the nearside of his car starting from the passenger door and ending with the front bumper.

12. Although Mr. Jennings' witness, Janikia Lightbourne, supported him in this, I was left in considerable doubt about the accuracy of these statements by the failure of Mr. Jennings to produce any photographic evidence to show the damage to his car. I believe that, had there been such damage, Mr. Jennings would have produced evidence of it in court (as he did pictures of the junction in question). His statement in evidence that he gave them to his previous attorney did not convince me that the pictures exist.
13. Furthermore, I accept the evidence of the police officer as to the position of Mr. Jennings' car as she found it after the collision, i.e., at an angle across South Road mostly in the westbound lane but with the rear nearside of the vehicle still over the centre-line in the eastbound lane. This evidence is conclusive of the fact that the motor car had not completed the maneuver of entering the westbound lane.
14. On a final note about the damage to the motorcar I note that in his police statement made 10 days after the accident (Defence Exhibit 1) Mr. Jennings stated that "*As I was travelling west I was fully in the left lane travelling west when a bike came within the inside of me and pass [sic] my mirror to the left side of the car. He then hit the front.*" This explanation seems very improbable.

15. For the above reasons I find that Mr. Jennings failed to exercise reasonable care in exiting Horseshoe Road onto South Road and was the cause of the collision between his car and the motorcycle being ridden by the Plaintiff.
16. I am not prepared to find that Mr. Smith contributed to the accident in any way. There is no evidence that Mr. Smith was travelling at an excessive speed; nor was there any reason to believe that he was not paying proper attention. These were mere suggestions as to what may have caused or contributed to the accident. However, they lack any factual foundation.

Quantum of Damages

17. That leaves the question of damages. There was not much disagreement between counsel as to the calculation of the special damages or the appropriate amount for general damages. The special damages consisted of the following categories of loss:
 - a. Loss of overtime wages;
 - b. Hospital charges;
 - c. Medical fees.
18. The Plaintiff is a process controller at Tynes Bay Waste-to-Energy Facility. As a result of the injuries he sustained in the accident he was off work for a period of time. This resulted in some loss of basic pay (after his sick pay entitlement was used up) and, more significantly, a loss of the opportunity to earn overtime pay. The number of overtime hours he would have worked is uncertain. The Plaintiff sought to prove his total loss of income by producing evidence of his employment earnings in a four-month period leading up to the accident and comparing this to his earnings in a period of three months after the accident. The average for the four-month period before the accident and the average for the three-month period after the accident were calculated. The difference was assumed to be his loss of earnings (for both basic and overtime hours). The difference came to \$6,924.48.

19. This approach was generally supported by the authors of *Butterworths Personal Injury Litigation Service*. The section entitled “Assessment of Past Pecuniary Loss”¹ contains this statement under the heading “Financial loss”:

“Complexity arises when the claimant’s pre-accident circumstances may involve different or variable sources of income. So, a wage earner’s true loss of earnings may be properly reflected by taking into account bonuses and overtime which are likely to have been received but are uncertain and can only be calculated by an informed guess based on averages for the periods preceding the negligence”.

20. Counsel for the Defendant did not seek to challenge the methodology. There was some minor disagreement as to the calculation but it was *de minimis*. Accordingly, although I would have preferred a longer pre-accident period than four months to use as a basis for extrapolating his post-accident loss, I allow the claim for loss of income as calculated.
21. None of the other items of special damages (hospital charges and medical fees) were challenged. I accordingly allow the amounts claimed, viz., \$16,213.00 and \$500 respectively.
22. Neither was there significant disagreement over the general damages claim. It was accepted that this injury was close to or at the lower end of the category of “*Serious Toe Injuries*” described in The Judicial College Guidelines for the assessment of general damages² for which the appropriate UK award would be £7,050 to £10,100. Injuries in this category are described (so far as relevant here) as “. . . *serious injuries to the great toe and multiple fractures of two or more toes. There will be some permanent disability by way of discomfort, pain or sensitive scarring to justify*

¹ *Butterworths Personal Injury Litigation Service/Division XV Claims of the Utmost Severity/ A Personal injury actions – Major claims handling/ 2 The assessment of past pecuniary loss*

² *Butterworths Personal Injury Litigation Service/Division IX Quantus Summaries/The Judicial College Guidelines for the assessment of general damages in personal injury cases twelfth edition/7 Orthopaedic Injuries/(Q) Toe Injuries*

an award within this bracket". In the example of a UK award for a similar injury produced to the Court by counsel for the Plaintiff £6,000 was awarded³ in 2006.

23. The treating physician in this case (Dr. Steven Trott) comments on this injury in his report dated 28th November 2014 as follows:

"From his accident he suffered near complete avulsion of his right fifth toe, requiring surgical debridement and reattachment and extended wound care. His work disability time is as noted. He retains some soreness and achiness which fortunately does not prevent him from working. He is left with scarring through his webspace and bone loss in the toe".

24. In my view the injury in this case is not as serious as that described in the UK case decided in 2006. It is not quite in the category described as "*Serious Toe Injuries*" described in the Judicial College Guidelines. Accordingly, I accept counsel for the Defendant's view that the appropriate award in the UK today would be £6,500.

25. To convert this sum to Bermuda Dollars it was submitted by counsel for the Plaintiff that I should adopt what was said by Ground CJ in the case of *Coller v Hollis* (following the decision of Collett J in *Wittich v Twaddle* (1979) Civil Jurisdiction No. 117). Ground CJ applied a conversion rate of two dollars to the pound. This rate was not based solely on the actual exchange rate of the two currencies or an average over a period of time; but took into account what was perceived then as "*the marked difference*" in the cost of living between Bermuda and the UK. As this rule is routinely followed and was not disputed, I do not intend to depart from it. I would only comment that it seems to me to be a rule of practice rather than of law and might be ripe for review. The award for general damages comes to \$13,000.

³ *Evans v Turner (t/a Able Van Hire)* (20 January 2006, unreported) referred to in *Butterworths Personal Injury Litigation Service/Division IX Quantums Summaries/9 Legs and feet/Toe* at [1792].

Summary

26. I, therefore, find that the Plaintiff has proved his case; that the accident was caused by the Defendant's failure to exercise reasonable care in the way he drove his vehicle on the day in question; particularly, that he failed to keep a proper lookout for other traffic on the major road (South Road) when he emerged from a minor road (Horseshoe Road); and failed to heed the presence of the Plaintiff on the major road. I award the Plaintiff \$36,637.48 made up of the following amounts:
- a. Loss of employment income: \$6,924.48;
 - b. Hospital and medical expenses: \$16,713.00;
 - c. General damages for pain and suffering etc: \$13,000.00.
27. I can see no reason why costs should not follow the event and be taxed, if not agreed, on the standard basis, but will hear the parties if they so wish.

Dated the 4th day of March 2016.

David Kessaram, Assistant Justice