[2018] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 11/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**ROGER McCARTHY**	**APPELLANT**
AND	**PETER CALLOO**	**RESPONDENT**

Kevin Williams and David Ellis instructed by Grant Stewart Phillips & Co for the appellant

Respondent in person

26 January, 16 and 23 February 2018

MORRISON P

[1] I have read, in draft, the reasons for judgment of my brother Brooks JA. I agree with his reasoning and conclusions and have nothing that I can usefully add.

BROOKS JA

[2] We heard this appeal on 26 January 2018 and handed down our decision on 16 February in the following terms:

(a) The appeal against liability is dismissed.

(b) The appeal against the award of damages is allowed, in part.

(c) The award of damages is set aside.

(d) Damages are awarded as follows:

Special damages:	$214,700.00
General Damages for negligence:	$500,000.00
Damages for Assault	$ 50,000.00

(e) No order as to costs.

[3] At that time we promised to put our reasons in writing. These are my reasons for agreeing with the decision.

[4] On 5 September 2009 two motor vehicles collided outside the Angel's Plaza along Crescent Road in the parish of Saint Catherine. Arising from the crash, Mr Peter Calloo, the owner and driver of one of the vehicles, sued Mr Roger McCarthy, the driver of the other vehicle. Mr Calloo claimed damages from Mr McCarthy for personal injuries, assault and property loss. After a trial in the Parish Court for the parish of Saint Catherine, the learned Parish Court Judge, on 31 March 2017, gave judgment for Mr Calloo. The formal order of the judgment revealed that she awarded general damages of $800,000.00 for negligence, $50,000.00 in respect of a claim for assault, and special damages of $249,000.00.

[5] Mr McCarthy has challenged the decision in an appeal to this court. The grounds of his appeal are that the learned Parish Court Judge erred on both the questions of liability and damages.

[6] The main issue before the learned Parish Court Judge was based on a divergence between the parties as to the way in which the collision occurred. Mr Calloo testified that he was driving his Isuzu vehicle, configured as a wrecker, along the main road outside the plaza when Mr McCarthy drove his Toyota Hilux pick-up out of the plaza, without stopping, and struck the side of the Isuzu. Mr McCarthy, on the other hand, testified that he was sitting in his parked Toyota pick-up on the soft shoulder of the road outside of the plaza when Mr Calloo drove the Isuzu alongside Mr McCarthy's Toyota in such a manner that the side of the Isuzu scraped along a point on the Toyota. The manoeuvre, according to Mr McCarthy, was a "side swipe".

[7] Mr Calloo adduced expert evidence by way of a motor vehicle assessor's report. The report showed that the Isuzu suffered damage to the left cab door, fender and chassis frame. The assessor's report stated further that the "rear section [of the chassis] bowed down as a result of the impact to the left front section of the carrier bed". There was no independent evidence of damage to Mr McCarthy's vehicle.

[8] The learned Parish Court Judge faced the issue of fact squarely. She said:

> "13. The court accepts on a balance of probabilities that the Toyota Hilux caused damage to the flat bed truck as described by [Mr Calloo] the damage noted by the assessor is clear and is accepted. A side swipe could not have resulted in that type of damage. The assessors report from MSC McKay speaks to damage to the left front section of the vehicle. The left cab door and fender and chassis frame (rear section) bowed down as a result of the impact to the carrier bed. [Mr McCarthy] wants us to accept that the [Mr Calloo's] vehicle travelled off the road onto the soft shoulder and swiped the side of his vehicle but that it

> sustained no damage. I do not accept that evidence. It is telling that [Mr McCarthy] said when he first saw the Plaintiff Mr. Calloo accused him of driving out and hitting his vehicle. Why would he have said so if the vehicle was stationary as described by [Mr McCarthy].
>
> The damage to the vehicle supports the claim of [Mr Calloo] on a balance of probabilities. It was a direct hit to the left side of the vehicle which caused damage to the chassis of the vehicle. Therefore the court finds [Mr McCarthy] liable in negligence for the damage caused to [Mr Calloo's] vehicle and for the injuries sustained as set out in the medical report."

[9] There was an additional aspect to the claim. Mr Calloo claimed damages for assault. He testified that after the collision, he went to Mr McCarthy to ask why he had come out of the plaza without stopping. He said that Mr McCarthy's response was to slap him. The doctor who examined Mr Calloo later that day, observed a contusion to the left side of Mr Calloo's face. He also assessed Mr Calloo to be suffering from:

> "1. Acute back strain
>
> 2. ...
>
> 3. Post traumatic vertigo with headache
>
> 4. Acute whiplash injury with grade 2 whiplash associated disorder"

The doctor opined that Mr Calloo's prognosis was as follows:

> "The patient's injuries are serious, with risk of permanent impairment. He will need one(1) to three (3) months of rehabilitation. Chronic pains are by their nature unpredictable and dependent on the patient effect and routine activity to get the best results and to prevent their occurrence. His risks of earlier onset of osteoarthritis to his affected joints are significantly increased."

The appeal in respect of liability

[10] Mr McCarthy contended that the learned Parish Court Judge erred in accepting Mr Calloo's version of the events. His grounds of appeal in this regard are set out below:

> "a.) The learned Judge erred in finding that [Mr Calloo] had proved his case against [Mr McCarthy], notwithstanding her indication that [Mr Calloo's] case was not properly fleshed out.
>
> b.) The decision of the learned Judge was against the weight of the evidence adduced at the trial."

[11] Mr Williams, on Mr McCarthy's behalf, submitted that, by the vagueness of his evidence, Mr Calloo had failed to discharge that burden of proof that lay on him. Mr Calloo, in fact stated, Mr Williams pointed out, that he could not remember the severity of the damage done to his vehicle. Learned counsel submitted that, in contrast, Mr McCarthy's evidence was precise and credible. He argued that the damage to Mr McCarthy's vehicle was such that it could not have caused the damage to Mr Calloo's vehicle that the assessor's report spoke about.

[12] Mr Williams was alert to the burden that Mr McCarthy bore in attempting to have this court overturn findings of fact made by a tribunal at first instance. He referred to the cases of **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 and **Industrial Chemical Co (Ja) Limited v Owen Ellis** (1986) 23 JLR 35. Those cases are often cited in support of the principle that this court will only interfere with findings of fact which are obviously and palpably wrong.

[13] It was a major part of Mr Williams' submission that the learned Parish Court Judge ought not to have had any regard to the documentary evidence that had been adduced before her. On learned counsel's submission, those documents (including the assessor's report) were adduced at a time when the case was proceeding by way of default judgment before her. Before the case later continued as a trial, Mr Williams submitted, there had been filed, on Mr McCarthy's behalf, a formal objection to the admission of those documents. When the trial did commence, the documents were therefore, learned counsel, argued, not properly before the learned Parish Court Judge.

[14] Mr Williams' former submission can only succeed if the latter submission is valid. It is not. The documents had been properly admitted into evidence before the learned Parish Court Judge and there was no formal request for that admission to be set aside. The record of appeal shows that the assessor's report and other documents were admitted into evidence during the course of the taking of evidence during default proceedings against Mr McCarthy. He had failed to attend court when summoned and as a result the case was set for default judgment.

[15] The default judgment proceedings were incomplete when Mr McCarthy had the default judgment set aside and the matter set for trial. Importantly, although the notice of objection to the admission of the documents had been filed before the hearing of evidence in the case resumed, the record of the proceedings shows that when the case resumed, Mr McCarthy's counsel immediately proceeded to cross-examine Mr Calloo. There was no fresh commencement of the case. There was no oral objection of the documentary evidence that had already been adduced. The case proceeded as if the

evidence, which had been previously adduced, was properly before the court. Mr McCarthy cannot properly now say that some of Mr Calloo's evidence in chief was properly before the court but the rest was not. The substratum of Mr Williams' major submission is therefore undermined.

[16] Contrary to Mr Williams' submission therefore, although Mr Calloo's evidence, concerning the damage done to his vehicle, was admittedly vague, there was the unchallenged evidence contained in the assessor's report. It spoke more eloquently and precisely than Mr Calloo ever could. The only challenge during the cross-examination as to the damage done to Mr Calloo's vehicle was that it was caused by his negligence. That aspect of the evidence is recorded at page 10 of the record of appeal:

> "S. Any damage to your vehicle was as a result of you colliding in [sic] [Mr McCarthy's] vehicle.
>
> A. Mr. McCarthy's vehicle collided into [sic] my vehicle and caused damage to my vehicle.
>
> S. [Mr McCarthy] is not liable to you for any damage or injuries.
>
> A. Yes he is the one that collided into my vehicle."

[17] With Mr Calloo's testimony, and the evidence of the damage as set out in the assessor's report, it could not possibly be said that the learned Parish Court Judge was palpably wrong in her finding that Mr Calloo's account was more probable than Mr McCarthy's. Indeed, her assessment of the issue accords with common sense. It cannot be faulted.

[18] Mr Williams' reliance on the case of **Paul Blake v Donald Williamson and Frank Dunkley** [2016] JMCA Civ 55 does not assist his submissions. In that case, the presiding Parish Court Judge accepted the documentary evidence that was placed before her as opposed to the oral testimony of the claimant to the contrary. This court upheld her decision. That is similar to the situation in the present case, where the learned Parish Court Judge accepted the documentary evidence as supportive of Mr Calloo's case.

[19] The issue of liability was properly decided in Mr Calloo's favour. These grounds of appeal must therefore fail.

The appeal in respect of the issue of damages

[20] The relevant grounds of appeal filed on behalf of Mr McCarthy, in respect of the issue of damages, state:

> "c.) The award made for general damages is unreasonable.
>
> d.) [Mr Calloo] failed to specifically plead and prove special damages."

[21] Mr Williams submitted that the award of damages was not only inappropriate, in that the general damages award, especially in respect of the claimed injuries, was excessive, but that it was flawed because the overall damages totalled a sum in excess of the Parish Court's jurisdiction. Learned counsel pointed to a curious factor in the case. Whereas the formal order containing the judgment indicated that the award made by the learned Parish Court Judge for general damages was $800,000.00, the award for

those damages that was set out in her reasons for judgment was $500,000.00. If the award was the former figure, Mr Williams submitted, the result was a total award in excess of the limit of the jurisdiction of the Parish Court, which is $1,000,000.00. If the award is the latter figure, learned counsel argued, it was excessive and inconsistent with the decided cases dealing with injuries such as Mr Calloo's.

[22] Learned counsel relied on the cases of **Francine Francis v Karel Nicholson** Suit No CL 1985/F126A Supreme Court Jamaica (judgment delivered 30 May 1991) and **Ronald Holmes v Jeremiah Anderson** Suit No CL 1990/H170 Supreme Court Jamaica (judgment delivered 12 June 1992), both reported in Harrison's Assessment of Damages for Personal Injuries, at pages 85 and 86 respectively, to support his submissions concerning the general damages, in respect of Mr Calloo's personal injuries. He argued that the appropriate award for general damages for those injuries was $300,000.00.

[23] Mr Williams made a further complaint of the learned Parish Court Judge's award in respect of general damages. This complaint concerned the award for damages for assault. Learned counsel submitted that there was no evidence of an assault, there was only evidence of a battery. Accordingly, he argued, no award should have been made. He further submitted that if an award for Mr McCarthy's action was merited, the award that the learned Parish Court Judge made for that action ought not to have been separated for the award for general damages for Mr Calloo's injuries, but ought to have been included in that award.

[24] There was a curious divergence in the documentation concerning the award for damages. The formal order, as outlined in paragraph [3] above, set out the award as being $800,000.00 for general damages for negligence, $50,000.00 for assault and $249,000.00 for special damages. In her reasons for judgment, the learned Parish Court Judge set out the award as being $500,000.00 for general damages, $50,000.00 for assault, and $249,700 for special damages.

[25] Clarification was sought from the learned Parish Court Judge. She confirmed that the award was in the sum of $800,000.00. The following discussion proceeds on that basis.

General Damages

[26] The discussion in respect of general damages must, perforce, commence on the basis that the learned Parish Court Judge was in error in her award of damages. Although in her written reasons for judgment, she seemed alive to the risk of exceeding the monetary limit to the jurisdiction of the court, she nonetheless made an award for an amount which exceeded the limit of $1,000,000.00 fixed by the Judicature (Resident Magistrates) Act (Increase in Jurisdiction) Order, 2013, dated 15 January 2013. The total award of $1,099,000.00, made by the learned Parish Court Judge must therefore be set aside. This court is entitled by virtue of section 251 of the Judicature (Parish Courts) Act, to assess the damages afresh and make an award in substitution of that made by the court below. The relevant portion of the section states:

> "And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order

> a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; **may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order;** or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
> ..." (Emphasis supplied)

This court's task is made more difficult because of the learned Parish Court Judge's failure to explain the method by which she arrived at the award she made for general damages.

[27] Regrettably, Mr Calloo represented himself before this court. He was therefore unable to provide any assistance to this court in respect of the appropriate award to be made for general damages. It may be said, however, that the cases to which Mr Williams referred in this regard were very old and not reflective of the current approach to injuries of the nature suffered by Mr Calloo. The **Holmes** case (a 1992 decision), on Mr Williams calculation, would have resulted in an award of $164,520.00. The award in the **Francis** case (a 1991 decision), when updated for inflation, using Mr Williams' reckoning, would have been $252,668.00.

[28] It may also be noted that Lord Carswell in **Seepersad v Persad and Another** (2004) 64 WIR 378, at page 388, at paragraph 15, sounded a cautionary note about reliance on older cases dealing with the award of damages. He said:

> "The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number

> of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms...."

[29] It is lamentable that the excellent compilations, by Mrs Ursula Khan, of awards in personal injury cases have ceased to be published. They served the profession well for many years. Although research of relevant previous cases has become easier with the availability of judgments on the respective websites of the Supreme Court and the Court of Appeal, a publication such as Mrs Khan's would still be beneficial.

[30] Nonetheless, there has been a fairly recent decision from this court which does assist the consideration of the issue of damages in the present case. Sinclair Haynes JA (Ag) (as she then was), in **Derrick Munroe v Gordon Robertson** [2015] JMCA Civ 38, made a comprehensive review of cases involving less serious whiplash injuries. She found that an award of $300,000.00 made to Mr Munroe in 2009 was not unreasonable for the injuries that he had received. Although Mr Munroe testified that he continued to be adversely affected by the injuries suffered as a result of a motor vehicle collision, the first medical report that he received stated that he had fully recovered. The award in that case, when updated to March 2017 (the time of this award), would result in a figure of approximately $504,300.00.

[31] In **Peter Marshall v Carlton Cole and Alvin Thorpe** reported at page 109 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 6, compiled by Ursula Khan, Mr Marshall suffered, among other injuries, moderate whiplash and moderate lower back pain and spasm following a motor vehicle accident. He underwent continuous medical care for 16 weeks. On 17 October 2006, he was awarded $350,000.00 in general damages. The equivalent as at March 2017, when updated for inflation is $836,872.68.

[32] **Dalton Barrett v Poncianna Brown and Leroy Bartley** is reported at pages 104-105 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 6, compiled by Ursula Khan. In that case, following a motor vehicle accident and an assault on him immediately after the accident, Mr Barrett suffered tenderness around the eye and face and in lumbar spine and left hand. He had continuous pain for about eight months. On 3 November 2006, he was awarded $750,000.00 in general damages for the negligence and $80,000.00 for the assault. The current equivalent for the award for general damages for the negligence is $1,797,078.90.

[33] In **Dawnette Walker v Hensley Pink** (unreported) Court of Appeal, Jamaica, SCCA No 158/2001, judgment delivered 12 June 2003, this court increased the award handed down in December 2001, for general damages from $220,000.00 to $650,000.00, on the basis that the sum awarded by the trial judge was "inordinately low". Eight months after the crash, Ms Walker's injury was classified as "a Class 2 cervical whiplash injury". She was also diagnosed with a permanent partial disability of

5% of the whole body. The value of that award at March 2017 is approximately $2,561,000.00.

[34] Mr Calloo's injuries were much less severe than those in the cases mentioned above. His testimony in this regard is set out at pages 8-9 of the record of appeal thus:

> "I get shake up in the accident, my left shoulder, my complete left side and my back. I went to the doctor I saw Dr. Ijah Thompson. I was examined and treated. I can't recall how many times I saw him. I obtained documents in relation to the examination and treatment. I got a medical report….
>
> I feel pain now and then don't know if it is arthritis in my knee."

[35] The medical report that he put in evidence did not mention that he had any permanent disability. An award in the sum of $500,000.00 as contemplated by the learned Parish Court Judge, in her reasons for judgment, for general damages for negligence would not be inappropriate.

[36] Mr Williams' submissions in respect to the issue of the assault are without merit. It is accepted that there is a difference in law between an assault and battery. The term assault is sometimes used to encompass both torts. The learned authors of the 18th edition of Winfield and Jolowicz on Tort, so state, at paragraph 4-5 of their work:

> "In popular language, the word 'assault' is used to describe either or both of these torts [of assault and battery]…"

[37] The Parish Court is not a court of pleadings. The learned Parish Court Judge was entitled to consider the fact that although the claim was for damages for assault, the evidence of the battery inflicted on Mr Calloo would have been comfortably

accommodated under the rubric of that claim. Similarly, there is nothing wrong with a court giving separate awards for general damages for negligence and for battery.

Special Damages

[38] The issue of the special damages is more straightforward, although not without some uncertainty. The special damages consisted mainly of the cost of the repairs to Mr Calloo's vehicle and the receipts for the services that were rendered in relation to both the vehicle and Mr Calloo personally. None of the expenditures was challenged in cross examination. The loss said to be incurred in respect of the vehicle, as evidenced by the assessor's report and receipt, respectively, was:

Cost of repairing the vehicle	$188,000.00
Vehicle assessor's fee	$ 11,700.00

[39] The cost of providing the medical report was the aspect that carried some uncertainty. In his oral testimony Mr Calloo only said "I paid for medical report. I got a receipt. I could recognize it my name is on it". He identified the receipt and it was tendered into evidence. The receipt showed that the sum of $50,000.00 had been paid for the medical report. The report, which was prepared by Dr Ijah Thompson, stated that the cost of the report was $15,000.00.

[40] Mr Williams, quite correctly, pointed to the inconsistency and noted that the learned Parish Court Judge did not address the difference in the figures, but merely awarded the sum of $50,000.00 for that expense. He submitted that she was in error not to have assessed the matter before giving her decision.

[41] In light of the fact that the cost of the report was said to be $15,000.00, that should be the figure awarded for that expense. Mr Calloo may have paid a sum in excess of that figure, but Mr McCarthy is not responsible for remunerating him for that additional expense. In pointing out the discrepancy to this court, Mr McCarthy would have discharged the onus placed on him to show that Mr Calloo, in this instance, had not acted reasonably in mitigating his loss.

[42] The total award for special damages, as proved by the evidence should therefore be:

Cost of repairing the vehicle	$188,000.00
Vehicle assessor's fee	$ 11,700.00
Medical Report	$ 15,000.00
	$214,700.00

[43] These grounds succeed, in part, based on the reasoning set out above.

Conclusion

[44] The learned Parish Court Judge cannot be faulted in her assessment of the issue of liability. She decided the issue of fact that was before her. She cannot be said to be palpably wrong. In fact, it is difficult to envisage her arriving at a different conclusion as to the way the collision had occurred.

[45] She was, however, in error in so far as the award of damages is concerned. The total award made was in excess of that court's jurisdiction and therefore this court was obliged to assess the damages afresh. The injuries suffered by Mr Calloo, when

assessed against previous decisions, merit an award of $500,000.00 for general damages for negligence. An award of $50,000.00 for the assault as indicated by the learned Parish Court Judge is not an unreasonable figure. It should be awarded. The special damages, as set out in the report and the receipt from the assessors, and what the medical report stated to be the cost of its preparation, totalled $214,700.00.

[46] It was for those reasons that I agreed with the order, which is set out at paragraph [2] above.

SINCLAIR-HAYNES JA

[47] I have read the draft reasons for judgment of my brother Brooks JA and agree with his reasoning and conclusions. I have nothing that I can usefully add.