[2019] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 94/2018

APPLICATION NO 255/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**JACINTH MORGAN-COLLIE**	**1st APPELLANT**
AND	**SHAWN COLLIE**	**2nd APPELLANT**
AND	**NATASHA CLARKE**	**RESPONDENT**

Obika Gordon instructed by Frater, Ennis & Gordon for the appellants

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

8 and 10 May 2019

MORRISON P

[1] This matter initially came before the court as an application for extension of time within which to file notice of appeal against a judgment of Wiltshire J (Ag), as she then was, given on 22 June 2018. This application was necessitated by the failure of the appellants' attorneys-at-law to file notice of appeal within the time limited by rule 1.11(1)(c) of the Court of Appeal Rules 2002.

[2] At the outset of the hearing of the application, Mr Obika Gordon for the appellants and Mr Sean Kinghorn for the respondent advised the court that they had come to an agreement that, in the event that the court were minded to grant the application, the hearing of the application should be treated as the hearing of the appeal. The court is very grateful to counsel for taking this very sensible approach. It has resulted in a considerable saving of scarce judicial time.

[3] Having perused the material filed in support of the application, we considered that (i) the delay in filing the notice of appeal, which was not inordinate, had been satisfactorily explained; (ii) no prejudice had been suffered by the respondent as a result of the delay; and (iii) it appeared that the applicants had a prospective appeal that carried a real chance of success.

[4] In those circumstances, we therefore took the view that the appellants had made good their application for an extension of time within which to file notice of appeal, in keeping with the well-established preconditions for such an extension set out in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 12/1999, judgment delivered 6 December 2009, among other cases. We therefore granted the extension of time as prayed for and treated the notice of appeal filed on 9 October 2018 as having been properly filed.

[5] The matter before the judge arose out of a motor vehicle accident which occurred on the morning of 4 October 2010 along the Lakes Pen Road in the parish of Saint

Catherine. The first appellant (Mrs Morgan-Collie) was the driver of the motor car which she owned jointly with her husband, the second appellant. The respondent (Miss Clarke), having been offered a lift along the way by Mrs Morgan-Collie, was a passenger in the front passenger seat of the car. Mrs Morgan-Collie's 18 month old baby was in an infant car seat which was strapped into the back seat of the car. During what appears to have been a period of very heavy rainfall, the car picked up a skid, lost control and collided into a wall at the side of the road.

[6] Miss Clarke suffered serious injuries as a result of her left knee coming into contact with the dashboard of the car. The medical report annexed to her particulars of claim confirmed that she had suffered a fracture of the tibial plateau of the left leg. When seen by the doctor some eight months after the accident, she complained of constant pain in, and stiffness, instability and cosmetic deformity of, the left knee.

[7] Miss Clarke therefore filed an action against the Collies to recover damages for negligence. She alleged that the accident and her subsequent injuries were caused by the negligence of Mrs Morgan-Collie in driving the car. Among other things, Miss Clarke pleaded that, at the material time, Mrs Morgan-Collie had been driving at a speed that was excessive in the circumstances, particularly given the unfavourable road conditions prevailing at the time.

[8] In defending the action, Mrs Morgan-Collie denied that the accident was a result of any negligence on her part. She averred that the accident was "an inevitable accident caused by extraneous substances on the road way which were not seen and could not be

seen nor its presence detected …". But, in addition, Mrs Morgan-Collie pleaded that Miss Clarke had herself been negligent in failing and or refusing to wear her seat belt even after having been told to do so. In these circumstances, Mrs Morgan-Collie contended that Miss Clarke's injuries were solely the result of her own negligence in not wearing her seatbelt; or, alternatively, that by her negligence, Miss Clarke had contributed significantly to her injuries and any damages incurred.

[9] The judge found for Miss Clarke on the question of what caused the accident. This is how she concluded on the point:

> "[29] It was foreseeable that the car could fall into potholes and skid on the silt strewn road. That meant that there was a need to proceed as slowly as possible since the road conditions and visibility were challenging.
>
> [30] The motor vehicle skidding and colliding with the wall does create a prima facie case of negligence. [Mrs Morgan-Collie's] explanation does not displace same. I do not find that this is a case of inevitable accident. On a balance of probabilities, [Mrs Morgan Collie] was negligent in the operation of the motor vehicle and did cause the collision with the wall."

[10] But, despite finding as a fact that Miss Clarke was not wearing her seat belt at the time of the accident, the judge rejected the plea of contributory negligence in its entirety. She considered that the burden of proving contributory negligence lay on Mrs Morgan-Collie, she having raised it as part of her defence. Accordingly, it was for her to prove that Miss Clarke failed to take such care as a reasonable man would take for his own

safety and that that failure contributed to the injuries she suffered. This is how the judge resolved the question:

> "[45] The failure to wear a seat belt however, does not automatically establish contributory negligence. It must also be shown that the injuries suffered could have been avoided or minimised by the wearing of the seat belt.
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> [46] In the fifth edition of Commonwealth Caribbean Tort Law reference is made at page 381, to the Bahamian case of **Thurston v Davis** where [Thorne] J held that it must be shown that the injured person failed to wear a seat belt when one was available and that the wearing of the seat belt would have prevented or minimised the injuries.
>
> [47] While the court does find that Miss Clarke would not have slammed into the dashboard if she was wearing her seat belt, there is no evidence that had she been restrained, her injuries would have been prevented or minimised. The court has been left to speculate. Consequently I do not find that Miss Clarke's omission to wear a seatbelt either caused or contributed to her injuries."

[11] The judge then proceeded to award Miss Clarke general damages for pain and suffering and loss of amenities of $5,000,000.00, less $1,000,000.00 paid by the Collies' insurance company; and special damages of $715,617.03. The judge also ordered that both the general and special damages should bear interest at 3% per annum, from 18 August 2012 and 4 October 2010 respectively, to the date of judgment. There is no complaint on appeal as to the judge's award of damages.

[12] In their notice of appeal, the Collies challenged the judge's decision as to both Mrs Morgan-Collie's negligence and the rejection of the plea of contributory negligence. However, at the outset of the argument, Mr Gordon realistically abandoned grounds (i)

and (ii), which complained about the judge's finding of negligence, but pursued vigorously grounds (iii) and (iv), which related to contributory negligence. Grounds (iii) and (iv) are as follows:

> "iii. The Learned Trial Judge having accepted that the Respondent was not wearing a seatbelt erred when she found that the Respondent was not liable for contributory negligence.
>
> iv. The finding of fact by the learned Trial Judge that the Respondent's failure to wear a seat belt neither caused or contributed to her injuries was erroneous and unsupported by the evidence."

[13] So the single issue which arises on the appeal is whether the judge was right to conclude that the plea of contributory negligence could not avail the Collies in the circumstances of this case.

[14] It may be helpful to start with some authorities. In his very able submissions on this issue, Mr Gordon referred us to **Jones v Livox Quarries Ltd** [1952] 2 QB 608, an authority to which the judge had herself referred, for the following statement by Denning LJ (as he then was) on the nature of contributory negligence:

> "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

[15] Mr Gordon also directed us to the well-known decision of **Froom and Others v Butcher** [1976] QB 286, in which Lord Denning MR observed, firstly, that "a prudent man … should always, if he is wise, wear a seat belt". Secondly, "in the ordinary way a person who fails to wear a seat belt should accept some share of responsibility for the damage – if it could have been prevented or lessened by wearing it". Thirdly, as to the degree of blameworthiness to be attributed to either side in the case of a failure to wear a seat belt:

> "Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? …
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> Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence would only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."

[16] And lastly I will mention the case to which Mr Kinghorn referred us, **Stanton v Collinson** [2010] EWCA Civ 81. In that case, speaking for the Court of Appeal of England and Wales, Hughes LJ (as he then was) (i) emphasised that it is a matter for the trial

judge in each case to determine what effect to give to the evidence relating to the potential impact that wearing a seat belt would have had, bearing in mind that "[t]he judge trying the case has the incomparable advantage of seeing the evidence as a whole, the context in which it emerges, and the quality of those who give it"; and (ii) declined the defendant's invitation to revisit **Froom v Butcher** and to increase the level of contributory negligence attributable to failure to wear a seat in the light of developments over the time that had passed since that decision was rendered.

[17] These decisions clearly establish that, upon the occurrence of a motor vehicle accident which is said to have been caused by the negligence of the driver of the motor vehicle, a passenger's failure to wear a seat belt when one is available will amount to contributory negligence when it comes to apportioning responsibility for any damage or injury which he or she may have suffered. It is a matter for the trial judge in each case to determine the degree to which the passenger should be held responsible for his or her own misfortune. In cases in which the evidence shows that the failure to wear the seat belt would have made no difference, and the damage would have been the same even if the seat belt had been worn, then there should be no deduction from the damages awarded to the passenger.

[18] **Froom v Butcher** remains good authority for saying that, in a case in which the evidence shows that the injury to the passenger could have been avoided altogether had the seat belt been worn, the deduction for contributory negligence could be as high as 25%. On the other hand, where the evidence can go no further than to suggest that, had

a seat belt been worn, the injury may have been, even if not avoided entirely, considerably less, a deduction more of the order of 15% might be appropriate. But each case will depend on its own facts and it is a matter for the trial judge in every case to determine, based on the evidence, where to come down in the particular case.

[19] Against this background, and basing himself on the judge's findings, Mr Gordon pointed out the following. First, Miss Clarke was not wearing a seat belt at the time of the accident. Second, her body slammed into the dashboard of the car. Third, her injuries were caused as a result of her body slamming into the dashboard. Fourth, had she been wearing her seat belt, she would not have slammed into the dashboard.

[20] In these circumstances, Mr Gordon submitted that **Thurston v Davis**, unreported, Supreme Court of The Bahamas, Common Law Side No 1146 of 1988, judgment delivered 12 June 1992, the decision upon which the judge relied, was clearly distinguishable. Further, that the only reasonable inference open to the judge on the evidence in this case was that Miss Clarke's failure to wear her seat belt contributed to her injuries. And, on the basis of the facts of the case, Mr Gordon suggested a 25% reduction in the damages.

[21] Mr Kinghorn submitted that the judge did not have sufficient evidence before her showing how Miss Clarke's injuries could have been avoided or minimised had she been wearing a seat belt. In these circumstances, the judge's conclusion that contributory negligence had not been made out on the evidence should not be disturbed, particularly given an appellate court's traditional disinclination to interfere with a trial judge's findings of fact.

[22] In my view, Mr Kinghorn's brave efforts notwithstanding, Mr Gordon has by far the better of this argument. I will deal first with **Thurston v Davis**. That was a case in which the car driven by the plaintiff collided head-on with a motor truck. The plaintiff, who was not wearing a seat belt at the time, was found unconscious and slumped over the steering wheel of her car. The windscreen of the car was smashed and the whole front of the car was pushed in. The plaintiff suffered lacerations to her face and shoulder and lost three front teeth. Her tongue was also cut and she had multiple scrapes on her legs. On the question of whether the plaintiff's failure to wear a seat belt contributed to her injuries, the trial judge observed as follows:

> "There is no evidence … that any of the plaintiff's injuries would have been prevented or lessened if she had worn a seat belt. In the circumstances I hold that the plaintiff did not contribute to her injuries by failing to wear a seat belt."

[23] Given the state of the evidence in **Thurston v Davis**, this was, if I may say respectfully, a perfectly understandable – and perhaps inevitable - conclusion. It would clearly have been impossible for the trial judge on those facts to determine to what extent, if any at all, the plaintiff's injuries might have been avoided or minimised had she been wearing a seat belt.

[24] In this case, on the other hand, the judge's clear finding, based on obviously compelling evidence, was that "Miss Clarke would not have slammed into the dashboard if she was wearing her seat belt". In my view, in the light of this finding, the judge's further statement that "there is no evidence that had she been restrained, her injuries

would have been prevented or minimised", can only be regarded, with the greatest of respect, as a *non sequitur*. On the basis of the judge's own findings, Miss Clarke's injuries resulted from her left knee slamming into the dashboard and, had she been wearing her seat belt, this would not have happened. In these circumstances, the conclusion that Miss Clarke, at the very least, contributed to her injuries by not wearing her seat belt was, as it seems to me, as inevitable as was the opposite conclusion on the evidence in **Thurston v Davis**.

[25] As to the degree of contribution, this case plainly falls into the category of case in which, on the evidence, Miss Clarke's injuries would have been avoided altogether were it not for her own negligence. I therefore think that the 25% reduction in the damages sanctioned by the authorities in such circumstances is appropriate. I observe in passing that it may well be, as was submitted by counsel for the defendant in **Stanton v Collinson**, that that level of maximum contribution might one day soon warrant review and, perhaps, upward revision. However, I do not think that this case, in which we were told by counsel on both sides that they knew of no case in which a higher level of contribution had been assessed in like circumstances, would be a fit case for such a review.

[26] I therefore propose that the appeal should be allowed in part to reflect 25% contributory negligence on the part of Miss Clarke. The award for general damages should therefore be reduced to $3,750,000.00, less $1,000,000.00 paid by the insurance

company; while the award for special damages should be reduced to $536,712.77. The judge's award of interest on both general and special damages should remain unchanged.

SINCLAIR-HAYNES JA

[27] I have read, in draft, the judgment delivered by the learned President. I agree with it and there is nothing I can usefully add to it.

FRASER JA (AG)

[28] I too have read the learned President's judgment in draft. I agree with it and have nothing to add.

MORRISON P

A postscript

[29] After the court's decision on the appeal was announced, the parties were invited to make submissions on the matter of costs. Mr Kinghorn submitted that, in the light of the Collies having abandoned two of their four original grounds of appeal, there should be no order as to costs. But Mr Gordon resisted this submission, on the basis that the Collies had had substantial success on appeal and ought therefore to have their costs of the appeal.

[30] The usual rule is, of course, that costs should follow the event. However, in all the circumstances of this case, the court considered that, given that the Collies enjoyed only partial – albeit substantial - success in the appeal, they should have 75% of their costs, such costs to be taxed if not agreed.

ORDER

1. The appeal is allowed in part to reflect 25% contributory negligence on the part of Miss Clarke.

2. The award for general damages is reduced to $3,750,000.00 less $1,000,000.00 paid by the insurance company with interest at 3% from 18 August 2012 to the date of judgment.

3. The award for special damages is reduced to $536,712.77 with interest at 3% from 4 October 2010 to the date of judgment.

4. The Collies are to have 75% of their costs of the appeal, such costs to be taxed if not agreed.