IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005/HCV 02718

BETWEEN	ALTHEA BARRETT	CLAIMANT
AND	ASQUITH C. VASSAL	1ST DEFENDANT
AND	THE LINSTEAD PENTECOSTAL TABERNACLE	2ND DEFENDANT

Mr. Sean Kinghorn and Mr. Dale Staple instructed by Kinghorn & Kinghorn for the Claimant

Mr. J. Givans and Miss T. Walters instructed by Chandra Soares & Co. for the Defendants.

HEARD: October 30, 2009 and September 17, 2010

McDonald J

The case for the Claimant is that on the 19th November 2004 she was walking along the sidewalk of the Kent Village Main Road in the parish of St. Catherine when the 1st Defendant so negligently drove and/or operated and/or managed motor vehicle registered 1191EA the property of the 2nd Defendant along the said road, that he caused and/or permitted it to come violently into collision with the Claimant.

The Claimant claims to have sustained injuries, suffered loss and incurred expenses as a result of the accident.

The particulars of negligence set out in the Particulars of Claim are:-

(i) Driving at or into the Claimant

(ii) Causing motor vehicle registered number 1191EA CD to collide with the Claimant.

(iii) Failing to see the Claimant within sufficient time or at all.

(iv) Failing to apply his brake within sufficient time or at all.

(v) Driving at too fast a rate of speed in all the circumstances.

(vi) Failing to maintain sufficient control over the said motor vehicle.

(vii) Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

The Claimant in her witness statement treated as her evidence-in-chief said that at about 2pm on the 19th November 2004 she was walking along the sidewalk in the direction of Flat Bridge on the right hand side of Kent Village main Road facing traffic coming in the opposite direction.

The vehicle that hit her came around a bend came off the road and hit her down on the sidewalk. This vehicle was travelling at a fast rate of speed. She dropped over into the bush on the right side of the road. After she was hit down she noticed that the vehicle was a white bus.

In cross-examination the Claimant said that at the time she got hit she cannot remember if she was walking in the bend or below the bend. She uses that corner everyday.

She did not walk on the other side of the road because"enough sidewalk is not on the other the road, and there are two big mango trees out in the road and a fence."

Additionally she explained that she was going straight home carrying a small scandal bag with some oranges on her shoulder. Her house was on that side of the road.

Miss Barrett testified that she was walking as close as possible to the banking of the road that day. She described the banking as clear dirt, she said "the dirt was the sidewalk, there was no concrete."

Case for the 1st Defendant

The 1st Defendant alleges that the collision was caused or contributed to by the negligence of the Claimant.

The Particulars of Negligence pleaded are:-

- Failing to keep any or any proper lookout or to have any or any sufficient regard for her own safety when walking in the road.
- Walking on the road in the path of the Defendant without giving him any reasonable opportunity of avoiding the collision.
- Failing to pay any or any sufficient heed to the presence of the 1st Defendant's motor vehicle in the road.
- Walking in the road when it was unsafe and dangerous to do so.

In his witness statement, Mr. Vassal said that he was driving around a corner on the left hand side of the road when he noticed the Claimant coming around the corner with a heavy bag of oranges on her head.

She was walking out in the road and facing the vehicle he was driving. She was walking in the path of the vehicle.

He also noticed a man a little ahead of her near to the embankment, but she was out in the road.

There was no sidewalk on Kent Village Main Road. Mr. Vassal stated that by the time he noticed the Claimant as he came around the corner he could not swerve

the motor vehicle to avoid hitting her as there was a line of oncoming traffic on the other side of the road, and a motor vehicle was close behind him so he could not stop suddenly.

He said that the Kent Village Main Road is narrow and he had no space to swerve the motor vehicle so as to avoid hitting the Claimant.

He stated that the man who was walking in front of the Claimant was not hit because although there is no sidewalk on Kent Village Main Road, he was walking close to the embankment, whilst the Claimant was walking into the road and in the path of the motor vehicle.

In cross-examination Mr. Vassal said that as he entered into the bend he saw the man. Further that when he first saw the man he was one (1) foot away from him to his left in front of his vehicle to the side.

This man, was six (6) inches from the edge of the left side of the road when he first saw him, and when he passed this man he was one (1) foot away. He did not swerve when he saw the man.

He said that when he first saw the man the Claimant was three (3) feet behind the man.

He said his vehicle was in line with the Claimant when he passed the man. He said "after I was in line, the vehicle drove a little before I eventually hit her."

Mr. Vassal said that he tooted his horn and slowed down before he hit the Claimant.

He asserts that he was traveling at 40kph and he slowed down before he hit the Claimant, but he was unable to give his speed.

There is no evidence before the court as at what stage he reduced his speed. On his case he would not have seen the man or the Claimant until he entered the bend. The 1st Defendant's evidence is that he travelled frequently on this road, that he was negotiating a blind short corner, and according to him there was no sidewalk for pedestrians to use, in the circumstances there would be a duty on him to reduce his speed on approaching this corner.

Mr. Vassal's evidence as to the Claimant being behind the man is contrary to his evidence-in-chief, and this I find to be a material inconsistency which substantially affects his credibility.

Interestingly the Claimant's case is that this man and herself were walking on the same side of the road; he was walking ahead of her and that the vehicle coming from the opposite direction passed him and hit her.

I find that this man was infact walking ahead of the Claimant at the material time.

Both Claimant and 1st Defendant agree that there was a white line in the road.

There is no evidence before the court as to the width of the road at the point of impact or the width and length of the motor vehicle ie bus.

There is no evidence as to whether or not any vehicle was travelling in front of the bus. Mr. Vassal's evidence is that the road was narrow, and his vehicle took up more than fifty percent of the road. It is not clear whether this reference is to fifty percent of the entire road or fifty percent of his driving side of the road.

I do not find that the accident occurred in the manner described by Mr. Vassal.

If infact the Claimant was three (3) feet behind the man when Mr. Vassal first saw the man one foot away and was traveling at 40 kph or a little less the accident

could not have happened as described by the 1st Defendant. Given the vehicle was travelling at 40kph or 24.85mph it would have covered 36.45 feet in one second.

On the 1st Defendant's account I find that he was negligent in not stopping when he saw the Claimant. His explanation was that a vehicle was close behind him. This clearly was not a reasonable choice to have made.

I find that the 1st Defendant's account as to how the accident occurred in his draft defence attached to his affidavit exhibit 3 in particular the section which states that the Claimant stepped out into the path of the vehicle driven by the 1st Defendant is inconsistent with his evidence at the trial.

I find that his explanation that "this is a blunder on my part" unacceptable. I find that this inconsistency impacts on his credibility.

It is also noteworthy that when he was cross-examined the 1st Defendant declared "if he said that she stepped out into the pathway of the vehicle I would be telling a lie there."

I reject Mr. Vassal's evidence that there was no sidewalk on the Kent Village Main Road. Under cross-examination he said "at the pedestrian crossing before persons go on pedestrian crossing they stand on the sidewalk and wait." He also said "when you come out of the businesses there is a sidewalk before you enter unto the road."

I do not find the 1st Defendant to be a credible witness and in areas where the 1st Defendant's evidence differs from that of the Claimant, I accept the Claimant's evidence as being more credible.

I accept the Claimant's evidence that the vehicle driven by the 1st Defendant hit the Claimant whilst she was walking along the sidewalk of the said road.

I find that the 1st Defendant was negligent as alleged and on a balance of probabilities I find that the Claimant has proven her case.

Claim in respect of 2nd Defendant

There is no allegation in the Claimant's pleadings that at the material time the 1st Defendant was the servant or agent of the 2nd Defendant. The fact that the 2nd Defendant owns the motor vehicle is not in dispute. Paragraph 2 of the 2nd Defendant's Defence admits paragraph 2 of the Particulars of Claim. The latter reads:-

"the 1st Defendant is and was at all material times the driver of the motor vehicle registration number 1191. The 2nd Defendant is and was at all material times the owner of the said motor vehicle."

However there is no evidence showing how Mr. Vassal came to be the driver of the vehicle at the material time.

I find that in these circumstances proof of ownership raises a rebuttable presumption that the driver (who in this case was not the owner) was the servant or agent of the owner. The onus of displacing this presumption is on the 2nd Defendant, the owner and I find that he has failed to do so.

I find that the 2nd Defendant is vicariously liable for the negligence of the driver Mr. Vassal.

Cases relied on are Rambarran v Gurrucharan (1970) 15 WIR 212 and Currey Campbell v Ferdinand Flash etal Suit no. C.L. C471 delivered on July 12, 2004. (unreported)

Damages

The following items of Special Damages were agreed as proven by receipts tendered. Medical expenses in the sum of $37,700 and transportation expenses in the sum of $15,000.

Loss of Earnings

The Claimant claims loss of earnings at $24,000 per month for 8 months and continuing amounting to $192,000.

In the Claimant's written submission her Attorneys state that Miss Barrett has not worked since November 19, 2004, a period of 5 years and claim $1,440,000.00 (ie $288,00 per year) on her behalf.

The amount claimed under the heading of loss of earnings was $192,000 and this amount has not been amended; hence the Claimant's claim cannot exceed this amount.

It is the Claimant's case that at the time of the accident she was employed as a "days worker' to several different persons.

In her evidence-in-chief the Claimant said that she would earn $1,000 per day doing domestic duties for persons as they demanded, such as washing, ironing, cleaning etc. She worked 6 days per week.

Miss Barrett said that because of the severity of her injuries she has not been able to return to work.

She was unable to do so because she could not walk and her hand was broken.

She said that although she reached maximum medical improvement after 1 year of the injury, she has not been able to return to work as she can no longer use her left hand to wash cook and clean as before.

Her left hand pains her terribly when she tries to do any manual task, and it is limited in its use.

She asserted that her left hand is like a "fin hand" and she cannot even stretch it out.

She said that she is unable to stand for any length of time as her left foot will swell up and become cramped. The foot also pains her.

In cross-examination she said that she actually worked everyday. The pleadings were not amended to reflect this.

Two medical reports from Dr. Roy Dixon dated 28th June 2005 and 23rd September 2009 were tendered into evidence as exhibits 1 & 2 respectively.

There is no medical evidence before the court indicating that as a result of the injuries inflicted Miss Barrett was unable to work or was unemployable.

There is no evidence of any attempt by her to seek suitable employment or any employment at all. When asked if she tried to get work, she replied "no, sir not now."

She maintains that because of the severity of the injuries, she has not been able to return to work i.e. domestic work.

The Claimant has a duty to mitigate her loss, and there is no evidence that she attempted to gain employment in an area other than domestic work.

I award the Claimant loss of earnings for 6 months amounting to $144,000.

I make the award notwithstanding the fact that the Claimant has failed to provide any evidence from her various employers as to her employment and income.

General Damages

The particulars of injury pleaded are:-

(i) Comminuted intrarticular fracture of the distal left humerus

(ii) Fracture of the left olecranon

(iii) Fracture of the proximal left radius and ulna

(iv) Fracture of the tibial spine left knee

(v) Wasting of the left quadriceps (thigh muscles) with a 20 degree extension and flexion limited to 90 degrees.

(vi) Limited movement in the left elbow

(vii) Stiff left wrist

(viii) Permanent limitation of movement of elbow

(ix) Whole person impairment to the elbow of 10% with a possibility of worsening to 13%.

(x) Whole person impairment of 5% with possibility of progressing to 20%

(xi) Whole person impairment pf 15% with possibility or worsening to 30%

The Claimant relies of the cases of Richard Myers v. Electoral Committee of Jamaica – Khan, Volume 6 at page 21. Sydney Fearon v. Fred Brown, Khan – Volume 5 at page 9 and Gladston White v. Doreen Ellis, Khan Volume 5 page 11.

In my opinion Richard Myers case does not offer appropriate guidance in the computation of an award because the injuries suffered by this plaintiff are not closely comparable to those suffered by Miss Barrett.

Likewise in Sydney Fearon's case except for a compound transverse fracture of the right olecranon bone the injuries sustained by the claimants are different as well as the resultant disabilities.

In Gladstone White's case the claimant suffered injury to his arms, leg, chest neck and right hip. His right arm and right leg were fractured.

I do not find this case helpful especially in light of the fact that there is no indication of a whole person disability rating.

The Defendants relied on Richard Hoehner and Celia Hoehner v. W.A. Reid Construction Co. Ltd. Khan's Volume 5 page 83 which I find to be a useful guide.

In that case the Claimant suffered:-

1. Minor concussion with loss of consciousness
2. Fracture of nasal bone
3. Fracture of left ulna, radius and humerus
4. Fracture of right femur
5. Lacerations and cuts to left thigh, knee, leg, buttock, groin and forearm.
6. Trauma to abdomen and chest
7. Deformity of thigh and forearm
8. Weakness in hip

She was left with scars on her thigh, legs, forearm and other parts of her body. She underwent four (4) operations and Dr. Rose advised another operation as she was still having difficulty in walking. Her permanent partial disability of the lower extremity was assessed at 25% equivalent to 10% of the whole person.

On the 26th March, 1999 she was awarded $1,000,000 general damages for pain and suffering and loss of amenities

This figure updated would be $3,292,348.30 today using CPI August 2010 of 162.0

It is clear that the range and variety of injuries in this case are greater that those suffered by the instant claimant. It is also recognized that the claimant suffered greater whole person disability that Celia Hoehner.

I find an appropriate award in this case for pain and suffering and loss of amenities is $3,500,000

Handicap on the Labour Market/Loss of Earning Capacity

The Claimant's Attorney submitted that the court awarded $4,320,000 under this head.

The multiplier/multiplicand method was urged on the court as the method of calculating this award.

It was further submitted that if the multiplier approach was not favoured, then the conventional approach would allow for an award of $500,000 - $1,000,000.

Under this head it has been established that for an award to be made, the Claimant must show that there is a real or substantial risk of her losing her job as a result of the injuries sustained before the estimated end of her working life and be thrown on the labour market where she would be placed at a disadvantage in getting another job or an equally well paid job as a result of the injuries. See Moeliker v. Reyrolle Co. 1977 1WLR 132

The fact that the claimant was unemployed at the date of the trial is not a bar for an award under this head of damages. See Cook v. Consolidated Fisheries Ltd. 1977 1All ER 915

The Claimant's evidence is that she is unemployed and was unable to return to work because of the severity of her injuries. She said that although she reached maximum medical improvement after one (1) year of her injury she has not been able to return to work as she can no longer use her left hand to wash, cook and clean as before. Her left hand pains her terribly when she tries to do any manual task. Her left hand is like a fin-hand, and she cannot even stretch it out. She is unable to stand for any length of time as her left foot will swell up and become cramped. When she was asked in court to raise her arm nothing resembling "fin" was evident, and she did not display any effects of her injuries. She did not limp while walking to the witness box, she gave her evidence whilst standing and left the witness box without difficulty. The claimant relied on her medical report outlining her condition as assessed by Doctor Dixon.

However the reports do not reveal that as a result of her injuries she could not be gainfully employed or work at all.

Her evidence is that she was has made no attempt to obtain employment, which had she put herself on the labour market and failed to find a job would have formed a basis for a claim under this head of damages.

No award is made under this head.

Loss of Future Earnings

The Claimant claims $4,320,000 for loss of future earnings.

Loss of future earnings are calculated specifically and generally in circumstances where the injured party is earning a settled wage and there is likely to be a diminution in his future earning capacity due to his disability.

The Claimants' medical reports do not indicate that as a result of her injuries she is unable to work now or in the future.

She has made no attempt to gain employment and to put herself on the labour market.

There is no basis on which the court can make a calculation under this head. The claim for loss of future earnings is refused.

Future Medical Care

Under this head the claimant claims US $8,500 amounting to $756,700 (using exchange rate of US $1-JA$89.00

Dr. Rory Dixon's medical report dated 29th September, 2009 states "If the arthritis in the knee progresses she would require a total knee replacement or arthrodesis (fusion of the knee) depending on her level of activity. With reference to the 'Connecticut Practitioner Fee Schedule' 2002, an approximate cost for an arthrodesis is presently US $3,500 excluding hospital fees, and a total knee is US $5,000 excluding hospital fees. If the subtalar arthritis worsens it may necessitate an arthrodesis, but the likelihood of this cannot be predicted at this time".

This claim is refused on the basis that it is too speculative. There is nothing in the Doctor's evidence as to the certainty of the arthritis progressing, there is no projection by the Doctor that it is likely to happen.

Future Household Help

The evidence of the Claimant is that the cost of a household helper is $5,000 per week. This amounts to $260,000 per year. Applying a multiplier of 15 the Claimant claims an award of $3,900,000 under this head.

The Claimant's evidence is that her hand is worsening as she can no longer do some simple tasks which she could formerly do. She cannot wash her underwear – neither can she comb her hair properly. She can't pay a helper, so she has to make do with her clothes not being washed properly and her hair not being combed properly.

There is no medical evidence to support this aspect of the claim. Dr. Dixon's examination of the claimant on 5th April 2009 reveals that there was normal range of motion of the wrist.

Further that in the left elbow there was limitation of pronation to 30 degrees, and no supination and there was almost full flexion and extension. This claim is refused.

Judgment for the Claimant:

Damages assessed as follows-

Special Damages

Medical expense	$ 37,700
Transportation	$ 15,000
Loss of earnings	$144,000
Totaling	$196,700

Interest at 6% per annum from November 19, 2004 to June 21, 2006 and at 3% per annum from June 22, 2006 to date of Judgment.

General Damages

Pain and Suffering and

loss of amenities $3,500,000.00

Interest at 6% from the date of service of Claim Form to June 21, 2006 and at 3% per annum from June 22, 2006 to date of Judgment.

Costs to the Claimant to be agreed or taxed.

Stay of execution for 6 weeks from the date hereof.