



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 02388

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| BETWEEN | DANIELLE ARCHER | CLAIMANT |
| AND | JAMAICA INFRASTRUCTURE OPERATOR LIMITED | DEFENDANT |

Occupiers Liability Act – Negligence – Toll Road – Animals Crossing – Collision with motor car – Whether Toll Road Operators in breach of duty - Damages

Heard: 28th, 29th, 30th January; 14th March & 31st May, 2013

Sean Kinghorn instructed by Messrs. Kinghorn & Kinghorn for the Claimant

Maurice Manning, Camille Wignall and Michelle Reid instructed by Nunes Scholefield Deleon & Co. for Defendant

CORAM: JUSTICE DAVID BATTS QC

[1] Counsel for the Claimant in his opening submissions described this as a “simple matter.” He opened to the facts stating that at 8:00 p.m. on the 8th day of April, 2010 the Claimant was driving along Highway 2000 in that portion of it that is located in the vicinity of Old Harbour. She was heading towards the Vineyard Toll Plaza. Suddenly a herd of goats appeared. In such circumstances and despite her best efforts the Claimant’s motor vehicle collided with the goats. Counsel further submitted that by allowing goats to be on the highway the operators of the highway were in breach of a duty of care owed to his client in that:

- a) The road was not properly lit
- b) There was no warning given about the presence or possible presence of goats on the road.
- c) Goats ought not to have been on the road

[2] The claim as filed relied upon

- a) Breach of the Occupiers Liability Act
- b) Negligence
- c) Breach of Contract

The Particulars of Claim dated 8th May 2010 list the following Particulars of Negligence –

- i) Causing or allowing the said herd of goats to come unto the said Highway.
- ii) Causing or allowing the said herd of goats to collide with the Claimant as she drove along the said Highway.
- iii) Failing to take reasonable steps to prevent the said herd of goats coming unto the said Highway.
- iv) Leaving the said herd of goats along the said Highway unattended and unrestricted
- v) Suffering the said goats to remain upon the highway
- vi) Allowing the said goats to remain upon the highway
- vii) Failing to take reasonable care to prevent loss, damage and injury to the Claimant in her lawful use of the said Highway.
- viii) Failing to detect the presence of the said goats along the said Highway
- ix) Failing to take reasonable care to institute and maintain an efficient and effective patrol system (whether mobile electronic or otherwise) that would detect the presence of the said goats along the said Highway.
- x) Maintaining and controlling the said Highway in such a manner that the said herd of goats were able to come unto the said Highway, remain there undetected and consequently cause a collision with the Claimant's motor vehicle.
- xi) Causing the Claimant to collide with the said goats or vice versa.

[3] The particulars of Breach of Occupiers Liability Act are as follows:

- (i) [The Claimant repeats the Particulars of Negligence set out in paragraph 5 above].
- (ii) Failing to provide any lighting along the particular area of the said Highway 2000 where the Claimant collided with the said goats.
- (iii) Failing to provide adequate and/or sufficient and/or proper lighting along the particular area of the said Highway 2000 where the Claimant collided with the said goats.
- (iv) Maintaining the particular area of the said Highway 2000 where the collision occurred in a dark, dangerous and unsafe condition.
- (v) Failing to erect signs or give any notice or adequate notice or warning that the particular area of the said Highway was dark, dangerous and unsafe.
- (vi) Failing to warn the Claimant, whether by the use of conspicuous signs or otherwise, of the potential for goats or other animals along the said Highway.
- (vii) Failing to warn the Claimant, whether by the use of conspicuous signs or otherwise, of the potential for goats or other animals to be present along the said Highway.
- (viii) Constructing or maintaining the said Highway in an unsafe, dangerous and defective manner so as to allow animals to access the said Highway.
- (ix) Instructing and advising the Claimant that she was able to travel at a speed not exceeding 110 kmh along the said Highway when such a speed limit was manifestly unsafe in the circumstances having regard to the presence of animals along the said Highway.
- (x) Instituting, maintaining a speed limit along the said Highway which was manifestly dangerous and unsafe in the circumstances.
- (xi) Failing to warn the said Claimant who was an invitee of the Defendant in the using of the Highway 2000 of the dangers of the said Highway.
- (xii) Failing to take such care as in all the circumstances was reasonable to see that the Claimant would be reasonably safe in using the said Highway 2000 for the purposes for which she was invited or permitted by the Defendant to be on the said Highway.

[4] Paragraphs 7 to 9 in the Particulars of Claim are as follows:

- “7- Further, or in the further alternative, the Claimant claims against the Defendant for Breach of Contract. On or about the 8th day of April 2010, the Claimant entered into an Agreement with the Defendant whereby it was agreed that in consideration of the Claimant paying a Toll to the Defendant, the Claimant would be permitted to drive on the said highway 2000 in the parish of St. Catherine.

- 8- It was an implied term of the said Agreement that the said Highway would be managed, controlled and maintained by the Defendant in such a manner that the Claimant would not be exposed to unnecessary and foreseeable risks of injury and danger.

- 9- In breach of the said Agreement the Defendant have failed and/or refused to take reasonable care to control, maintain and manage the said Highway in such a manner so as not to expose the Claimant to unnecessary and unforeseeable risks of injury and/or danger. In particular, on or about the 8th day of April, 2010 as the Claimant drove her motor vehicle registration number 2685 FD along the said Highway 2000, the Defendant caused and/or permitted the Claimant to collide with a herd of goats which were left unattended and unrestricted along the Highway 2000 by the Defendant.

[5] By way of Defence filed on the 24th June 2010 the Defendant stated, in paragraph 3 that on or about the 11th April, 2010 it received a report that the Claimant had a collision with a herd of goats while driving along the Highway 2000 in the vicinity of the Vineyard Toll Plaza, but stated,

“The Defendant neither admits nor denies the allegations made therein as it does not know if they are true and will require the Claimant to provide strict proof thereof.”

[6] The Defence denied negligence, breach of the Occupiers Liability Act and breach of contract. The Defendant averred that the responsibility was to take

reasonable steps to prevent loss damage or injury to the motorists using the highway. They allege that the following constituted such reasonable steps:

- a) the installation of lattice grills at entry and exit ramps
- b) the erection of fences along the entire corridor of the highway
- c) regular patrols by safety officers along the highway corridor to remove obstacles, living or inanimate that may pose a safety risk
- d) erection of signs along the highway clearly indicating that no animals are allowed on the highway

[7] The Defendant alleged that motorists are advised to drive at a speed within the speed limit at which they are able to manage operate control and/or manoeuvre their vehicle for the safety of themselves and other motorists. It was alleged also that the Claimant caused or contributed to the alleged collision in that she:

- a. Drove at an excessive speed.
- b. Drove at a speed which was dangerous and manifestly unsafe in the circumstances.
- c. Failed to have any or any proper lookout
- d. Failed to have any regard for her safety and other motorist while using the highway.
- e. Failed to acknowledge that she should drive on the roadway at a safe speed in order to take evasive action, if necessary.
- f. Failed to manage, operate, control and/or manoeuvre the said motor vehicle so as to avoid the alleged collision.
- g. Failed to maintain an appropriate or reasonable speed that would allow her to avoid the alleged collision especially in these circumstances.
- h. Failed to stop, swerve, brake and/or slow down so as to avoid the said collision.
- i. Causing her motor vehicle to collide with the alleged herd of goats.

[8] The Defendant although admitting that the Claimant paid a toll and was permitted to drive on Highway 2000 required the Claimant to prove that there was an agreement between the parties and the terms of the agreement if any.

[9] At commencement the Defendant indicated agreement with the medical reports of Dr. Clifton Reid and these were tendered and admitted by Consent as Exhibit 1(a) Report dated 5th May 2010 and Exhibit 1(b) Corrected Report dated 5th May 2010.

[10] The Claimants' attorney indicated that his first witness would be Everton Thorpe, the person who filmed certain video footage. Defendant's counsel objected on the basis that:

- a) No witness statement had been served
- b) There was no evidence the video footage was contemporaneous
- c) A notice of objection had been filed.

Claimant's counsel responded by saying that the Claimant's witness statement had referred to the video footage and that the only reason for calling Mr. Thompson was to satisfy the Notice of Objection to the footage going into evidence. The video footage had been disclosed and served upon the Defendants. The Defendant's counsel then submitted that the Claimant should give her evidence before the video/footage.

[11] I ruled that the videographer would be allowed to give evidence to put in evidence the video. In the first place the video was like any other document and where notice of objection is served pursuant to the Evidence Act then the person seeking to rely on it has to either prove the document by conventional means or bring evidence to show that one of the statutory exceptions applied. The Claimant had clearly elected to prove the document. Although it is best that this be done by a Witness Statement, I allowed it in this case as there is unlikely to be any surprises given that it is a video which speaks for itself and which had been served upon the Defendant. The Defendant has not complained of short service or surprise. I allowed the videographer to give his evidence in chief orally. The order of witnesses was a matter for the Claimant and there was no unfairness indicated if the videographer gave evidence first.

- [12] He gave his name as Everton Thorpe and was duly sworn. He described himself as a videographer. He described the equipment he used to do the videotape as a small PD170 Sony Camera and described how it was operated. He described his experience and training. He stated that he did footage on highway 2000 on the 17th February 2012 and explained the circumstances that led him to do so, in that he received a call from Mr. Sean Kinghorn Attorney at Law who required his services. He described where they went, what they saw and how and what he recorded. He had the master tape of the recording in his possession and he had the equipment which would enable him to project it on a screen.
- [13] The Defendant's Attorney objected to audio on the tape being played as it contained hearsay and prejudicial statements from persons who were not present or available for cross examination. The Claimant's counsel agreed and instructed that the sound be turned off when the tape was to be played. The videographer was also asked to give details of the locations from which he filmed. This he did.
- [14] The video [without audio] was admitted as exhibit 3 and was played in court. It is fair to say that the footage revealed several holes in the fencing along the highway, some large enough for a human being to easily pass through. Animals were also shown as well as a section of fencing that was down.
15. When cross examined Mr. Thorpe admitted that when contacted by Mr. Kinghorn he already knew about the problem of goats straying onto the highway, but he had not looked into it as a media story before. He admitted that his intent was to get footage to carry it on TVJ. He denied that the footage shown to the court had been edited. The video was never shown on national television as he had not submitted it for TV news. He was cross examined about the location and as to whether it was Mr. Kinghorn who showed him where to film. He admitted that

“both persons” told him where to film. He admitted he did not drive and film the entire fence along the toll road. He admitted seeing signs and cattle traps.

16. In re-examination the witness stated that the reason he had not submitted the film to TVJ was because he wanted a comment from the Toll authority before publishing the story. He was awaiting more information.
17. The Claimant Danielle Archer, then gave evidence. Her witness statement dated 10th November 2010 was allowed to stand as her evidence in chief. That statement details the fact that she is an attorney-at-law with one home in Mandeville and one in Kingston. Her duties often take her to St. Catherine. On the 8th April 2010 she journeyed to the Old Harbour branch office of Kinghorn and Kinghorn. She drove her 2007 Suzuki Grand Vitara and travelled by way of Highway 2000. Upon completing her assigned tasks she left the office about 8:00 p.m. and drove onto Highway 2000. She was alone in her vehicle but Mr. Kinghorn and his driver David Reid travelled in Mr. Kinghorn’s vehicle “some distance” ahead of her. She drove in the direction of Spanish Town. She was in the left lane of the road and travelled at approximately 35 – 45 mph. Her headlights were on but there were no lights along the road. She then states,

“I suddenly saw a herd of goats dashing across the path of my vehicle. When I saw this herd of goats they were already into the path of my car and no more than 1 or 2 feet from the front of my vehicle. I immediately applied my brakes but because the goats were already in front of my vehicle and were already so close to the front of my vehicle, I collided with the herd of goats and actually ran over some of the goats.

- [18] At paragraph 20 of her witness statement the Claimant says:

“Subsequent to my accident occurring I have walked along several areas of the highway with my attorney. I have noted several areas along the Highway where the protective fencing along the highway is defective because of huge

holes. Having seen these defects in the highway I have returned with my attorney and a videographer who has filmed the areas where we have seen defects in the protective fencing. While looking at these areas I saw goats, just like the ones that ran in front of my vehicle, come through the defective fencing and come unto (sic) the property of the highway. One of the areas where there is need to repair the fencing along the highway is the area that my accident with the goats occurred. I have viewed this video and should I see it again I would be able to identify.”

[19] Her statement also details her personal injuries loss and damage.

[20] When cross examined she gave further details of the exact location of the incident. She indicated that her car’s headlamps were on the high beam at the time and her visibility was about a car length and a half. The distance was pointed out and measured with a tape measure at about 36 feet. It should be noted that the witness had earlier described the distance as 6 feet and when asked whether it was a misjudgment said,

“I am not good at distances.”

[21] The Claimant indicated that Mr. Kinghorn’s vehicle was about 2 car lengths ahead of hers in the right lane. Other vehicles were way ahead of hers. Vehicles had passed her both before and after the accident. She described the road conditions as good. She admitted that she travelled on that road at least once per week. The witness was asked whether prior to the accident she had seen signs of animals on the toll road. She responded,

“I never noticed goats on the road. I never noticed it before the incident.”

[22] The witness was asked whether prior to the accident she had heard that the Toll road fencing was being vandalized. She answered in the negative. She was asked how far away was the herd of goats when she first saw it, and answered 1

to 2 feet. She was asked to point out the distance and when this was done and measured it was 6 feet 7 inches. The following exchange occurred,

“Q. So when you first saw goats they were in the roadway in front of you

A. Yes

Q. All were in front of you

A. Yes

Q. Were you doing anything else? On cell phone

A. No

Q. Listening to music

A. No

Q. Following right behind Mr. Kinghorn’s vehicle

A. Yes

Q. You had no opportunity to observe goats before you saw goat moving in front of you

A. Correct”

[23] The witness was also crossed on the pleading in her Particulars of Claim. There she had described the goats as “cantering along” the highway. The witness said “cantering” meant running and the goats were running across the highway. The following exchange occurred,

“Q. You understand the difference between ‘along’ and ‘across’

A. When use singularly

Q. Along and across what difference

A. Along different from saying cantering along

Q. Cantering along is different from cantering across

A. No”

[24] The witness was also asked her speed prior to the accident and answered 35 – 45 mph. The following exchange occurred:

“Q. Road was dark, you felt it was safe speed

A. yes

Q. Based on your visibility that speed was safe

A. No

Q. You felt sure that you could safely stop if required to do so in an emergency.

A. (Pause) I could stop depending on the circumstances

Q: Did you feel sure about that

A. The circumstances dictate whether or not I could stop

Q. you recognize it was dark and on a dark road that an emergency can arise.

A. Yes

Q. Did you feel the speed you were travelling that you could stop if an obstacle was in front of you.

A. Yes if something before me in visibility of headlights I could stop.”

[25] The witness was also asked about the width of her headlight beam and she responded that she could not say but it was within the lane she was in. She pointed out a distance which when measured came to 6.5 feet. It was suggested to her that she was driving at a speed that was too fast in the circumstances. Her response was to disagree. It was also suggested that she had failed to keep a proper lookout, and in her response she stated,

“A. The goats come from the right. I disagree

Q. When you were in left lane heading to Kingston.

A. Yes

Q. You say goats were to your right

A. They appeared to be coming from right.”

- [26] The Claimant was then asked whether there was a median in the road and she said yes but that it was not a solid concrete structure a part was metal and a part was concrete. The metal part she described as having spaces. The witness maintained that the goats suddenly appeared before her.
- [27] There was no reexamination but Claimant’s Counsel sought permission to lead further evidence with regard to some photographs. Some 27 photos were marked ‘A’ for identity. When cross examined the witness stated that the photos were taken by her attorney Mr. Sean Kinghorn but that she had not been present when they were taken. The photos were never put in evidence.
- [28] In answer to the court the witness stated that the video footage was taken in February 2010 and that she was present. The Defendant’s Counsel objected to that answer as the witness had not been shown the video when she gave evidence. Counsel also objected to the video being shown to the Claimant. The objection was overruled and the video shown to the witness. In answer to the court the witness indicated that what she observed on the video was ‘basically’ the same condition she observed in 2010.
- [29] When cross examined on the matters raised in her answer to the court, the witness indicated she was unaware of any steps taken between 2010 and 2012 to repair the fence. It was suggested there had been repairs and this was not agreed.
- [30] The case for the Claimant was closed subject to a Bundle of Agreed documents being put in.
- [31] In his opening submissions counsel for the Defendant stated that the question for this court is whether all reasonable steps had been taken in all the circumstances. The Defendant he said is not an insurer of persons using the highway. He said the Toll Road Act spoke to the applicable duties, and that the

Occupiers Liability Act did not apply. He admitted that the common law of negligence applied and stated that evidence would be lead to show the steps taken to secure the highway and the financial outlay in that regard. Alternatively the Defendant intended to rely on contributory negligence as there was a duty on the Claimant to be careful.

[32] The Defendant's first witness was a Mr. Desmond Levy. He is the Operations and Maintenance Manager of the Defendant and has been working there for 10 years. His witness statement dated 30th November 2012 was allowed to stand as his evidence in chief. However, I allowed his counsel to ask some further questions in chief relative to documents referred to in Para 24 of the statement.

[33] Mr. Levy stated that there were several service manuals governing the operation of the highway. There was a patrol manual which applied in 2010. Also a maintenance schedule. This details a variety of tasks. The witness stated that he had developed the documents with the input of a number of engineers. An attempt was made to put a document before the witness but objection was taken that it infringed the best evidence rule and that there was a distinction between the maker of the document and the one who approved it.

[34] In answer to questions to prepare a foundation for admission of the documents, the witness stated that there is an original manual with signatures. The following exchange occurred:

“Q. The original manual that existed in 2010 where is it?

A. The current documents supersedes that one but there is a summary page on the revised document indicating what revisions have taken place.”

The witness further indicated that the older manuals had been destroyed and copies were not kept. He said however he could produce originals of the current versions of the manual. He would have to go to his office for them. The court therefore rose at 11:15 a.m. and resumed sitting at 12:10 p.m.

[35] The witness then stated that he was able to locate the original which bore his signature and the date on each page. At this juncture counsel for the Claimant took an objection on the basis that the document was entirely different to that which had been disclosed. The document he said was 30 pages long and it was unfair to expect him to obtain instructions now. He cited CPR rule 28.14(1) and submitted that I ought not to allow the document.

[36] The Defendant's counsel submitted that he did not intend to rely on documents created in 2012. I indicated to counsel that I would defer my ruling on his objection until the Defendant had finished asking the questions laying foundation for the documents disclosed. The Claimant's counsel then withdrew his objection to the documents and said he would make submissions on weight. The matter adjourned until 2:00 p.m.

[37] At the resumption both counsel advised that the documents would form part of the agreed bundle which I would be provided with in due course. The examination in chief of Mr. Desmond Levy continued. He was referred to certain evidence the Claimant gave and stated that the merger was ½ kilometer from the Toll sign. He also disputed the Claimant's statement that nothing had changed since 2010. He was asked what were the changes and he responded,

“A. Number of changes as it relates to fence itself. I noted on footage section trampled next to centre wall. That area we have had a lot of trouble with residents. We have extended that wall to the end of the ramp.

J. What you saw on video is not how wall is now

A. No because wall extends

J. When was extension done

A. Started late 2011 and we are still having issues. The wall itself is finished.

J. In early 2012 it may have been like that

A. Yes

Q: In relation to the amount of fencing along highway what distance constitutes the fencing on each side of highway.

A. From Spanish Town to Sandy Bay we would have had 40 kilometers about 26 miles of fence. For both sides cumulative.”

[38] Mr. Levy’s witness statement stated that the Defendant has been contracted by Trans Jamaica Highway Limited to operate and maintain the Highway 2000 Toll Road (Highway). That they were obliged to operate and maintain the toll system, effect minor maintenance of infrastructure in accordance with international standards and perform safety intervention pursuant to their contract with the Trans Jamaica Highway Limited.

[39] He stated that the operations of the highway has been organized to international standards and that the Defendant’s internal procedures and policy have been certified compliant each year since 2008 with international standards.

[40] He described the highway in detail. He indicated that the speed limit when approaching the Toll Plaza is 80 km per hour but the designated speed limit for the highway is 110 km per hour. Cat eyes are located along the length of the highways these are reflectors affixed to the broken white line dividing lanes. There are reflectors on the unbroken white lines separating lanes from the soft shoulder on both sides. It is, he said, not usual for there to be lighting along highways and the lighting design on the highway compares with lighting he had seen on highways in other jurisdictions.

[41] The highway also had other safety features. a) Cluster of signs at all entry points and along areas close to residential communities. The signs indicate pedestrian warning, no entry, no horse drawn carriages, no animals. b). The highway is bounded by a perimeter link fence approximately 1.5 metres high. c). Cattle grids to prevent animals entering the highway are situated at entry and exit points.

- [42] The Defendant he said also had a system of monitoring and repairing damage. Patrol officers are employed who once daily on the afternoon shift do drive by inspections of the perimeter fence. If damage is detected they would do temporary repair by way of placing strands of wire down and across the damaged area. A report of the damage is then made to the Toll and Safety Supervisor.
- [43] Each Toll Plaza has a Safety Supervisor. It is a 24 hour post and one is always on duty. On receiving a report of damage the Safety Supervisor completes an action request to the Maintenance Supervisor. The Maintenance Supervisor then arranges for a subcontractor to effect repairs to the perimeter fence. The Defendant has numerous such subcontractors one of whom is Dennis Robinson.
- [44] Mr. Dennis Robinson has been such a subcontractor since 2007. A detailed check of the perimeter fence is done quarterly and subcontractors are engaged to effect repairs where necessary.
- [45] Mr. Levy states in paragraph 24 that he approved manuals in respect of highway operation and maintenance. The procedures for maintenance and repair is set out in the manuals. He gave details in his statement of the process by which the manuals were created.
- [46] At paragraph 31 of his statement Mr. Levy says that community residents cut the fence to allow their animals to graze on the verges or for them to access the highway. He stated that,
- “large and small portions of the fence are oftentimes removed”
- [47] In order to deal with that situation the Defendant started using barbed wire and also tried cementing the fence to the ground but residents still cut the fencing. The Defendant he says has “for many years” notified the community residents of the dangers of having goats traverse the highway and have taken steps to deter them from having their animals on the highway.

[48] The Defendant, says Mr. Levy at paragraph 35, also engaged animal catchers to eliminate goats from the motorway by removing them to the animal pound. Milton Bennett has been a sub-contracted goat catcher for many years. The Defendant also used goat traps but residents would release the goats so caught.

[49] In the year 2010 approximately \$4,690,125.03 was spent to repair the perimeter fence. The Defendant says it has taken all reasonable steps to deal with the problem of goats on the highway and damage to the perimeter fence.

[50] The Defendant received a written complaint no. 4484 on 9th April 2010 from the Claimant in this action. At paragraph 46 of his witness statement he said,

“By then a search had already been conducted by Patrol Officer Christopher Brown on April 8, 2010 for goats along the highway in the vicinity of the Vineyard Toll Plaza but he found none. This search was conducted by him based on a report from Christine Powell who was the Toll Booth Operator at the time the Claimant entered the EO2 lane on April 8, 2010 at around 8:30 p.m.”

He stated that despite checks there was no evidence of goats on the highway after the alleged incident.

[51] Mr. Desmond Levy was then cross examined by the Claimant’s counsel. He was asked whether having regard to Paragraph 5 of his witness statement the Defendants had, “a duty to have taken reasonable steps to ensure safety of users of the highway”, and responded: “Yes generally speaking.”

[52] The witness was extensively cross examined about the safety standards and the research done to ensure it met international standards. The following exchange occurred,

“Q. What based on?

A. Based on J10’s research on standard governing highway operations tailoring it to Jamaica’s environment and develop manual and submitted for approval.

Q. This is what you mean it is organized to International Standards.

A. Yes.”

[53] The witness was cross examined extensively on the system of inspection and on the video and was asked about several portions of it. He recognized the places shown in the video and acknowledged it to be highway 2000. One exchange was as follows:

“Q. Based on what you are seeing here is that how it was supposed to be

A. No the section was trampled down

Q. So if patrolman sees that what would he do

A. pull it back in place and affix it to the wall”

Later the witness was asked,

“Q. Mr. Levy what system does J10 have in place to ensure compliance by Patrol Officers.

A. The patrol officer follows a procedure. When he stops he radios his position and talks to supervisor who coordinates assistance depending on the situation.

Q. That completes your answer

A. Yes so far.”

[54] The witness was later asked:

“Q. You agree that you have a problem with goats coming on the highway

A. Yes”

And,

“Q. You are aware of occasions when goats have been seen on highway

A. Yes.

Q. That happens frequently. Two times per week is frequent

A. Yes

Q. On these occasions as far as you are aware how have goats got on highway.

J. He has not said frequently

Q. Do goats frequently come onto highway

A. Yes 2 or more times per week.”

[55] The witness also stated they mostly come on the highway through holes in the fence. He had never seen the goats jump the fence. The witness also said they had replaced a part of the chain link fence with a wall subsequent to the accident. The wall has helped with the coming of goats onto highway. The witness admitted that the problem with goats had been plaguing the highway since it was built in 2003.

[56] The witness was then asked about the warning to motorists about possibility of goats on the highway. He admitted there was no specific warning to motorists. The following exchange then occurred,

“Q. Do you believe it would be prudent to warn motorists that there is this danger of animals trespassing on highway.

A. Yes it could be.”

[57] The witness was asked about lighting. He admitted most of the highway was unlit because this enhanced the cat eyes and motorists drove faster when the place was lit. He said research was done in France and this was prior to their problem with goats. The witness was asked,

“Q. In light of the knowledge J10 has about frequency with goats on highway do you consider it an issue threatening safety of motorists that absence of lights presents a danger to motorists.

A. Yes it is an issue but one that has to be addressed very very carefully.

Q. Issue threatening the safety of motorists

A. Yes”

[58] The witness was asked what if any recommendations for change had been made to Trans Jamaica Highway (the Defendant’s parent company). He answered:

“A. Change the existing lighting on the highway”

Further cross examination revealed that a pilot project for solar lighting was being attempted. The witness also indicated that requests had been made for police assistance to deal with goat problem and wanted more police patrols.

[59] The witness later stated in cross examination that prior to the 8th April 2010 he had received reports of motorists colliding with goats. However, this was the first report of such a collision at night. He said there were 2 or 3 such reports prior to the Claimants. He later stated that the prior encounters were not collisions with goats. He could not recall if there were any collisions with animals.

[60] The witness was asked about speed limits and admitted that in the vicinity of Highway 2000 where the accident occurred the speed limit is 110 km, and this was the position in 2010. The following exchange occurred,

“Q. 110 km was instituted because you consider it a safe speed for that area

A. Based on the design yes

Q. That speed did it take into consideration the fact that area plagued with animals trespassing.

A. No not when designed

Q. Having regard to the goat problem is 110 km still a safe speed.

A. (After a pause) May be, depends on who is driving, a number of factors.

Q. You don't think it safe to reduce speed limit in light of problems

A. It could be

Q. Is it

A. Can't say with certainty I have not considered it but it has been raised in certain forums. We have regular operations meetings and these issues come up. And the suggestions have been made.

Q. Do you as operations manager agree with the suggestion?

A. I would need to think of it seriously."

[61] When his cross examination was completed the Defendant's Counsel reexamined Mr. Levy. It is fair to say that the re examination did not do much to ameliorate the effect of his evidence. One might have thought that given the admissions made by Mr. Levy the Defendant would have sought dialogue with the Claimant. However they proceeded to call their next witness Mr. Dennis Robinson.

[62] He described himself as a subcontractor of the Defendant. His witness statement dated 29th November, 2012 stood as his evidence in chief. In that statement he said he was contracted by the Defendant to manufacture a goat trap and to perform repair and maintenance services to the perimeter fencing. He indicated that when called he would proceed to the relevant area and effect repairs. He also kept detailed records of the work done since he was engaged in 2007. He said that in 2010 he did repairs to the fencing on an average of twice per week.

[63] The Defendant's counsel applied for and was granted permission to amplify his statement. The witness identified his notes of work done. An objection was made to it being admitted on the basis it was a previous consistent statement. I admitted the document as exhibit 4 (being chart notes from 30th April 2007 to present) on the basis that it was a document created contemporaneously with the work done and adopted by reference as part of witness statement. In other

words it was as if the witness had given the detailed evidence, by reference to his notes made at the time, of the work he did.

[64] When cross examined this witness admitted he did twice weekly repairs to the fence in 2010 and 2011. He said corrosion sometimes caused holes in the fence. He said he had never been called to repair fencing in the night.

[65] The Defendants next witness was Mr. Milton Bennett. He was also a subcontractor and his witness statement dated 29th November, 2012 stood as his evidence in chief. In that statement he stated that he was contracted to repair fencing and later to remove animals. He worked every day Monday to Sunday. He said the majority of animals he catches are goats. He patrols the highway everyday on average 2 – 3 trips. In 2010 his route was from Mandela to Sandy Bay. When he catches goats he also reports on the path that they used to get on the highway. After reporting the catch of goats he turns them in to the Kingston and St. Andrew pound. He recalls that in early goat catching days almost every day there were goats on the road. He describes the owners of the goats as very hostile to him.

[66] When cross examined he admitted he caught goats along the Vineyard leg of Highway 2000 in 2010. He was referred to Exhibit 5 [the Agreed Bundle of documents] pages 30 – 48, and admitted that there were reports of goats caught in February, March and September 2010 but there were none for April to August 2010. He admitted that as far as he could recall nothing changed on the highway between the end of March to end of April. He stated he caught more goats in the evening sometimes as at nights and in the afternoon they let the goats out to feed. The witness stated-

“Q. You work at 8 p.m. as well

A. Yes

Q. possible to catch goat at that time

- A. Yes I catch goat that time a lot of time. Sometimes they are the ones who call me at night.”

[67] The Defendant’s Counsel having earlier indicated that the witness Christopher Powell would not be called and the Claimant not requiring him that was the case for the Defence. The parties were asked to submit written submissions and a date set for oral submissions by way of a response to the written submissions. These oral submissions were not made until the 14th March, 2013.

[68] The Claimant’s written submissions may be summarized thus;

- a] There was a duty owed under the Occupiers Liability Act. The Defendant had a sufficient degree of control over the highway and ought to realize that any failure to use care may result in injury to a person coming lawfully there. **Wheat v. Locan [1996] AC 552 and Professor Gilbert Kodilinye Commonwealth Caribbean Tort Law 4th Edition.**
- b] The duty of the Occupier is the common duty of care. That is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. **Anatra v. Ciboney Hotel Ltd. Suit CLA 196/197** 31st January 2001 per Reckord J and **Victoria Mutual Building Society v Berry SCCA 54/2007** judgment delivered 31 July 2008, Per Harris JA Para 8 and 9

“8 - Where a visitor sustains damages by a degree of which he has been warned by the occupier, the warning in itself does not exonerate the occupier from liability unless the circumstances are such that the warning was sufficient for the visitor to be reasonably safe. In deciding whether an occupier has discharged his common duty of care, regard must be had to all the circumstances.

9. - It is a question of fact whether a Defendant as an occupier failed to take reasonable care for the safety of his visitor, and whether the visitor was contributorily negligent.”

In **Indermaur v Dames (1987) IR 2 CP 311** Kelly CB in affirming the decision of the lower court quoted Witter J who opined,

“... with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact.”

- c] An invitee, the Claimant further submitted, is anyone who enters premises on business which concerns the occupier on his invitation express or implied, **Indermaur v Dames** (above).
- d] An “unusual danger” is one not usually found in the carrying out of the task or fulfilling the function and is to be determined by reference to the character of and the nature of the premises and the invitee’s range of promises and the invitee’s range of experience. **London Graving Dock v. Horton 1951] AC 737 and Kodilinye** were cited.
- e] The tort of negligence has 3 elements, a duty of care, breach of that duty and damage caused by that breach. In this case the knowledge of the Defendants as to the danger of goats on the highway was similar to the knowledge that on race days large crowds gathered and horses might escape as was determined in **Mowser v. George De Nubriga [1909] 15 WIR 147.**
- f] The principles of law which partly immunize public authorities from liability for damage occurring on the highway as per Mangatal J in **Mavis Smith v. The Chief Technical Director and the Attorney General Claim CL 2002/04** judgment delivered 6th March, 2009, do not apply for the Defendants. This is because (1) the Defendant is not a public authority, (2) Highway 2000 is not a main or parochial road and does not fall under the Main Roads Act or the Parochial Roads Act. Section 8 of the Toll Road Act also demonstrated that the road is other than a main or

parochial road. In any event the Defendants' witness admitted owing a duty of care.

- g] On the evidence it is clear that the Defendant was aware of a danger to motorists because of the recurring problem of goats on the highway.
- h] The Defendant on the evidence has not done all they reasonably could to make the highway reasonably safe in that:
 - i) There was no lighting on the highway
 - ii) Motorists were not warned of the possible presence of goats or animals
 - iii) The fencing and type of fencing was inadequate
 - iv) No cattle grids along the side of the highway where the goats are known to enter
 - v) They maintained the speed limit notwithstanding the real threat posed by goats.
- i] The system of patrols was inadequate for the task. The video evidence was taken on a random day. The time to do the footage was some two (2) hours and in that entire time no patrol arrived. Counsel put it this way in his written submissions, Para 44-

“It is clear that the patrol system which apparently is the main trigger for the repairing of the perimeter fence will never be as effective as it was devised to be. Patrol men exercise an unfettered discretion when the perimeter fence is to be repaired. There is no evidence brought by the Defendant as to their training, competence, ability or judgment. There is no evidence of a proper system of accountability. There is no evidence of the level of compliance on the part of the Patrolman. Neither is there any system of what is in place to ensure compliance.”

Counsel also points to the fact that the Patrol Officer Operating Manual and Work Instruction Document have implementation dates which post date the accident.

- j] On the evidence there was no basis to impute contributory negligence to the Defendant. Reliance was placed upon **Friend v. Facey** [1963] Times LR 18th March in which a cow suddenly galloped on to a highway. The Court of

- a. The highway was not “premises” within the meaning of the Occupiers Liability Act. This because in the United Kingdom a duty to maintain lighting was created by the United Kingdom Act 1959. Toll roads and turnpikes were regulated by statute. Reliance was placed on the authorities of **Burnside v Emerson [1968] All ER 741** and **Heydon v. Kent County Council 1 QB 343**.
- b. The Jamaican Toll Roads Act creates no duty to the Claimant which is relevant to the facts of this case.
- c. It is the common law duty of care which applies to this case.
- d. A duty to fence did not mean that liability followed because a portion of fence had a defect,

“I do not think that the obligation to keep cattle from trespassing on the lines is at all analogous to the obligation imposed upon a ship-owner to have a seaworthy ship....

In this case the company was bound merely to take reasonable care that cattle did not stray onto the line”

Per Blackburn J Buxton v North Eastern Railway Corporation (1868). LR3 QB 549 @ 554.

- e. There was no duty to warn of a danger that was obvious to the visitor.
- f. The Claimant’s evidence is that the accident occurred before she paid the toll and hence there was no contract between the Claimant and the Defendant.
- g. The Claimant has not proved that the Defendant knew or ought to have known that goats were likely to frequent the particular section of the Highway.
- h. There is no evidence as to the state of the fencing in or around her location at the time of the accident. The evidence of the videographer is of no assistance in this regard.

- i. The evidence of the measures put in place by the Defendant were reasonable and the Defendant had social problems of vandalism and willful conduct of neighbouring residents to contend with.
- j. Even if there was a failure to warn motorists there is no evidence that this caused the accident.
- k. There is sufficient evidence for the court to conclude that the accident was caused because the Claimant failed to keep a proper lookout and was driving at a speed which was excessive having regard to the visibility allowed by her headlamps, this is because -
 - i) The area was dark and her headlamp even on high beam, on her evidence was confined to her lane alone.
 - ii) She did not observe the goats until they were directly ahead of her.
 - iii) She was driving at such a speed as to be unable to bring her car to a stop to avoid colliding with the goats 6½ feet ahead of her , in fact she drove over some.
 - iv) She was driving too fast in the circumstances.
 - v) She was able to state that Mr. Kinghorn was travelling in the right lane and 2 car lengths ahead of her, notwithstanding her headlamps when on high beams was confined to her lane alone, but she was unable to observe the goats as they crossed from the same right lane as alleged.
- l. It is incredible for a vehicle at that speed and with high beam to suddenly come upon goats 6.5 feet ahead. It was impossible for the goats to come from the right without first colliding into Mr. Kinghorn's vehicle which was a mere 2 car lengths ahead and in the right lane.
- m. It is clear the Claimant was not keeping a proper lookout and should be held at least 50% responsible.
- n. On damages the Defendant submitted:

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| i. | Special Damages | 327,916.57 |
| ii. | Pain Suffering and Loss of Amenities | 700,000.00 |

Reliance was placed on several authorities.

[70] Having considered the evidence and reviewed the submissions I find that the Defendant is liable in negligence and pursuant to the Occupiers Liability Act. I agree with the submissions made on behalf of the Claimant and reject the Defendants contention. On the totality of the evidence presented the matter has indeed been a 'simple' one to decide. I find as a fact that the Claimant was lawfully travelling along the Toll road when goats suddenly and without warning entered her line of travel from her right hand side. Goats, as they are wont to do, move quickly and in herds. Given their size and the direction from which they came as well as the absence of lighting along the highway it is not surprising that the Claimant did not see them approaching. I find as a fact that the Claimant in no way contributed to this accident and that she was not driving too fast in the circumstances known to her.

[71] I find further that the Defendant failed in its duty of care at common law as well as under the Occupiers Liability Act; in that although being aware for many years of the problem of goats on the highway the Defendant failed up to the time of the accident:

- a) To take any or any reasonable steps to warn motorists of the danger
- b) To reduce the recommended speed limit in the vicinity
- c) To take steps to improve the lighting on the highway.

The efforts taken to catch the goats over the years demonstrates that the Defendants were well aware of the significance of the problem. These measures met limited success. This is clear from the Defendant's witnesses' evidence and the fact that since 2011 they had embarked on a programme of replacing the fencing with a wall. The Defendant failed in its duty to warn

motorists using that section of the highway and in particular the claimant. The Defendant also failed to reduce their recommended speed limits. In so far as it is necessary I find that Highway 2000 is private property and occupied by the Defendant which allows access to persons who pay a toll. There is no jurisprudential reason why the Occupiers Liability Act should not apply to the Defendant. It is of no significance that the Claimant had not yet paid the toll. Once on the Toll road she will have had no option but to pay for the use prior to and after passing the Toll booth. I therefore find the Defendant liable at common law and by virtue of the Occupiers Liability Act. The Claimant has not pursued her claim for contractual relief and therefore I will say no more on that account.

[72] Insofar as damages are concerned the Claimant detailed the pains felt to her neck back and shoulder and the treatment received from Dr. Clifton Reid. She stated that on the 10th April 2010 she had to be driven to hospital by a friend as she had severe pains to back and neck.

[73] The medical reports detail the doctor's finding and prognosis.

- a. moderately painful distress
- b. marked restriction to range of motion due to pain
- c. significant pain when neck extended
- d. painful movements on right side shoulder
- e. Tender in distal calf muscle of right leg

The doctor assessed her as suffering multiple soft tissue injuries with mild to moderate whiplash. She was prescribed muscle relaxants and referred to physiotherapy. On his first review a week later he reported that the patient told him of worsening pains that landed her at Andrews Memorial Hospital. He advised her to start physiotherapy. At her last review two weeks later she reported feeling much better. The doctor stated-

"I expect Ms. Archer to recover fully from her conditions; this typically takes about three months but may be

prolonged. Indeed it is not unusual for a small subset of patients to wind up with persistent pain well after one or 2 years.

As an aside the doctor in his account of the accident states that the claimant told him she came upon a herd of goats, “which she had to drive through in order to avoid being hit by the vehicle behind her.” This is not stated by the claimant in her witness statement. The claimant was not however asked, about the inconsistency. The content of the doctor’s report in this regard is of course hearsay. In any event in the emergency which confronted the Claimant it would not have been unreasonable for her to be concerned about the prospect of being rear ended and to elect the “softer” target of the goats. The Claimant did say that she “ran over” some of them. I find therefore that the doctor’s observations do not affect my finding on liability.

[74] These injuries I find comparable to the following authorities cited to me.

- a. **Lascelles Allen v. Ameco Caribbean incorporated and Peter Perry unreported Claim no. 2009/HCV 03883** in which the award was \$600,000 for Pain Suffering and loss of Amenities and was made on the 7th January 2011.
- b. **Peter Marshall v. Carlton Cole Khan’s** Volume 6 page 109 in which the award for Pain Suffering and loss of Amenities was \$350,000 on the 17th October 2006.

[75] When updated Using the Consumer Price Index these awards come to \$688,320 and \$674,905.00 respectively. I however bear in mind the caution issued by Sykes J in **Icilda Osbourne v George Barnes** et al Unreported Claim No. 2005 HCV 2294, that although there ought to be consistency in personal injury claims this ought not to outweigh the fact that the court, “is not compensating an abstract claimant but the one before the Court.”

[76] In that regard therefore I considered that in this case the pain was so intense that days after the collision the Claimant had to go the Andrews

Memorial Hospital for relief. I therefore award for Pain Suffering and Loss of Amenities \$800,000.00.

[77] I find that save for lost earnings the Special Damages claimed are proved to the satisfaction of the court and to be fair, these have not been strenuously challenged. I find it was reasonable for a car to be hired when regard is had to the Claimant's evidence about where she lived and worked. The amount spent to rent a substitute vehicle is therefore awarded in respect of the loss of use of the car that was damaged. No evidence was led to support the lost earnings claim so I make no award in that regard. The Special Damages awarded is therefore:

| | |
|---|---------------------|
| Damage to motor vehicle | \$275,553.17 |
| Cost of Loss Adjusters Report | \$10,100.00 |
| Medical Expenses [being the total medical related receipts in Exhibit 5 the bundle of documents). | \$13,600.00 |
| Loss of use (Cost of rental of motor vehicle being the amount pleaded) | <u>\$38,904.00</u> |
| | <u>\$338,157.17</u> |

[77] There is therefore Judgment for the Claimant as follows:

General Damages \$800,000 with interest at the rate of 3% from the 8th April 2010 to the date of the judgment.

Special Damages \$338,157.17 with interest at the rate of 3% from the 17th May 2010 to the date of judgment.

Costs to the Claimant to be taxed if not agreed.

**David Batts Q. C.
Puisne Judge**