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Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW /SUIT NO. C.L. B.217/1990

BETWEEN	CHRISTINE BLAKE	PLAINTIFF
A N D	LEABERT RICHARDS	FIRST DEFENDANT
A N D	EARL RAMSAY	SECOND DEFENDANT

Enoch Blake for plaintiff with him Miss Dodd.

Robin Sykes for the Defendants with him Miss Judith Haughton.

Heard: 30/9/92, 1/10/92, 10/8/94, 12/8/94, 30/8/94, 28/10/94, 24/11/94, 27/2/95 and 30/11/95.

SMITH J.

In this case liability is not in dispute. What is in issue is the medical condition of the plaintiff and whether or not that condiditon has a causal connection with the injuries she sustained in a motor vehicle accident.

The plaintiff seeks to link these injuries to the onset of lupus or one of the mixed connective tissue diseases. In this regard she seeks to recover substantial damages. The defendant on the other hand contends that there is no sufficient medical evidence to establish such a causal relationship and contends that even if causation was established the consequences were not foreseeable.

The plaintiff was injured in a motor vehicle accident on the 23rd March, 1989. She was hospitalized as a result of the injuries. She sustained no fractures. She suffered injuries to the knees, ankles, great toes and hip, and contusion to the chest caused by the steering wheel of the car she was driving. She was seen by Dr. Ethon Lowe and sent home on bed rest. On the following day she collapsed due to pain in both feet. She said both feet and ankles were swollen. Dr. Lowe whon she saw diagnosed sprained joints in both great toes.

The treatment comprised analgesics and anti-inflammatory drugs. She continued to have pain in the hip and in both right and left toes. The medical evidence indicates that the plaintiff reported no particular problems between March and July, 1989 when she experienced pains in both forearms and upper arms and legs.

The plaintiff was seen by at least four doctors. The medical opinions seem to vary. She was referred to Dr. Dundas, a Consultant Orthopaedic Surgeon, by Dr. Lowe. Dr. Dundas saw her in January of 1990. His diagnosis was that post injury muscle contusion was the source of her pain. She was referred for physiotherapy.

He reviewed her on the 2nd November, 1990. She complained of ongoing back pain and muscle pain and inability to drive with the liberty with which she drove prior to accident. She also complained of muscle spasms, and Dyspareunia with post-coital pain and weakness in her knees. Examination revealed anxiety and agitation as well as spasms in her back, swollen tender lower extremities especially the calves and spaces between the toes. There was diffused tenderness in her muscle groups.

Blood investigations done revealed a pattern suggestive of chronic inflammatory reaction with diffused muscle damage resulting in an elevation of the Creative Phosphokinase levels. Repeat blood studies done on the 13th December, 1990 revealed a continued elevation of her CPK, Sedimentation Rate and a relative lymphocytosis. Dr. Dundas was of the impression at that stage that she was revealing a mild manifestation of one of the auto-immune disorders, possibly polymyositis or lupus phenomenon possibly exacerbated by stress.

In a later correspondence Dr. Dundas said: "The diagnoses which were entertained, i.e. Polymyositis, Polymyalgia Rheumatica and Lupus Erythematosus, all belong to a group of disorders referred to as 'Collagen Vascular Disorders' which probably have a common aetiology or set of aetioligies and prognoses which are not vastly dissimilar."

Dr. Dundas last saw her in September of 1992. She was not in remission, the condition was still active. He suspected that development of lupus was taking place. This is terminal, he said. He testified that her present derangement is as a result of the injury she received which had gone to a state of chronicity.

Dr. DeCeulaer a Consultant Rheumatologist since 1982, first saw the plaintiff in June of 1994. She was referred to him by Dr. Dundas. She complained of muscle pain and weakness in the upper arm and thighs. Many tests were done. Dr. DeCeulaer said that he believed that Mrs. Gidden-Blake has a mixed connective tissue disease. The mixture of the features in the plaintiff is inflamation of the muscles and tendency to thrombosis. He testified that this disease looks very much like polymyositis. It is a rare disease he said - it is not popular. In this case there has not been a positive test for SLE this test does not rule out lupus.

He refrained from saying she has SLE and concluded that she had the mixed connective tissue disease. There are three mixed connective tissue disease viz systemic lupus, systemic polymyositis and schleraderma. Any one of these he said would be life threatening.

In a report received in evidence as Exhibit 9, Dr. DeCeulaer certified that Mrs. Gidden-Blake, the plaintiff, has a connective tissue disease with features of the anti-phospholipod antibody syndrome. It is important to note that he went on to say "it is not improbable that this disorder is directly related to the accident." I will return to this later.

Doctor Forrester a Consultant Physician examined the plaintiff at the instance of the defendant on the 12th January, 1994. In a report dated 23rd February, 1994 he stated that the test results relating to question of systemic lupus are negative. He concluded that she either had polymyositis or polymyalgia rheumatica. Thus, as said before, the medical opinions with respect to her disorder vary. Dr. DeCeulaer believes she has a mixed connective tissue disease with features of anti-phospholipod antibody syndrome. Dr. Dundas thinks she has lupus erythematosus and Dr. Forrester diagnosed her condition to be polymyositis or polymeyalgia rheumatica. These diseases according to the medical evidence before me all belong to a group of disorders known as "Collagen Vascular Disorders."

Of these eminent doctors who saw and examined the plaintiff, Dr. DeCeulaer is the Consultant Rheumatologist. He has been practising rheumatology since he graduated in 1973. It is more probable than not that his diagnosis of the plaintiff's condition is correct.

The important question however is whether or not the plaintiff's condition was caused by the motor vehicle accident.

For the plaintiff, Mr. Blake argues that "a new phenomenon untraced, undetected and non-existent at the time of the accident came into being at the time of the accident and therefore as a result of the accident." He relied on the medical evidence and in particular the evidence of Dr. DeCeulaer who in his report dated 8th August, 1994 said "It is not improbable that this disorder is directly related to the accident." In his evidence given viva voce the Consultant Rheumatologist said the symptom occurred somewhere in July of 1989 i.e. within three months of the accident. "The disease occurs when there are symptoms," he said. He went on to say that it is difficult to determine the exact occurrence of a connective tissue disease. The aetiology i.e. the origin of the disease is not known, he said.

Dr. DeCeulaer stated "It is the symptoms that bring the patient to the Doctor. It is philisophical to say that the disease occurs when there are symptoms." He said that there was no evidence that the disease was there before the accident but was dormant.

He agrees that Mrs. Blake does not fall in a group particularly proned to mixed connective tissue disease. He could not say with certainity that she would nto have had the disease but for the accident. However he went on to say "if a rare event occurs, after an incident, that disrupts muscles to a certain extent it has to be a probability that there is a causal relationship."

Dr. Dundas was of the opinion that the present condition of the plaintiff was as a result of the injury suffered. Dr. Forrester in this respect stated: "The aetiology of these diseases is ill understood and I am unable to say whether there is a causal relationship between Mrs. Gidden-Blake's motor vehicle accident and her current clinical problems."

Mr. Blake also relied on Smith v. Leech Brain & Co. (1961) 3 All E.R. 1159; Robinson v. Post Office (1974) 2 All E.R. 737 and the American case of Miss Corrie Collins, see Wall Street Journal, July 12, 1990.

Mr. Sykes for the defendant submitted that it is abundantly clear on the evidence that the doctors do not know what causes connective tissue disease. Because the aetiology is unknown the doctors could not specifically identify the exact occurrence or onset of the disease, he pointed out. He refers to the evidence of the doctors and submitted that the more cautious opinion of Dr. Forrester should be preferred.

The submissions of counsel for the defendant may be summed up as follows:

(1) The evidence does not establish clearly the nature of Mrs. Blake's disease.

(2) There is no acceptable medical evidence establishing causal relationship between the accident and the onset of the disease.

(3) Assuming there is this causal relationship the plaintiff has not proved that the onset of the disease was foreseeable as a possible result of the accident. For this he relied on the Wagonmound No. 2 1967 A.C. 617 and Tremaine v. Pike (1969) 3 All E.R. 1303.

CAUSATION

Did the accident cause the plaintiff's condition?

Doctor Dundas is of the opinion that it did. Hesaid in evidence "The present derangement which Mrs. Blake suffered is as a result of the injury which she received which had gone on to a state of chronicity." He gave this evidence in September, 1992. Unfortunately when Doctor Dundas testified counsel for the defendant was not present thus the doctor was not cross-examined. At the adjounred hearing Doctor Dundas was not

available. Medical reports signed by him were received in evidence with the consent of Counsel for the defendant. However the doctor was not available for cross-examination. Doctor Dundas did not give the reason for his conclusion that the plaintiff's condition was caused by the accident.

Dr. DeCeulaer, the Specialist in his report dated 8th August, 1994 states:

> "It is not improbable that this disorder is directly related to the accident."

He gave evidence in court on the 30th August, 1994. He testified as follows:

> "I personally feel that the rare disorder occurring after an incident with stressful events such as an accident that the two might be related. Rheumatologists know of cases of arthritis and connective tissue disease starting after accident."

In this regard he referred to what is known as the "Kirkners Phenomenon" and gave three examples of this:

(i) A needle stick to the finger could induce arthritis to the point where amputation is necessary.

(ii) A lady developed rheumatoid arthritis after her husband was shot dead.

(iii) A carpenter slammed a hammer on his finger and developed arthritis.

In this regard he went on to mention the case of Corrie Collins in the U.S.A. who developed SLE after an accident.

Under cross-examination he said the symptoms occurred somewhere in July 89 i.e. 3-4 months after the accident. "The disease occurs when there are symptoms" he said. He conceded that it is difficult to determine the exact occurrence of a connective tissue disease. In his view the one thing that hampers most in this respect is the fact that its aetiology i.e. what causes the disease, is not known.

Dr. Forrester the defendant's witness, in his report dated 23rd February, 1994 stated his view thus:

> "The aetiology of these diseases are ill understood and I am not able to say whether there is a causal relationship between Mrs. Gidden-Blake's motor vehicle accident and her current clinical problem."

Thus in so far as causation is concerned one gets the distinct impression from Doctor Forrester that because the aetiology of the mixed connective tissue disease is unknown one cannot say that it is more probable than not, that it was caused by the trauma resulting from the accident.

As said before Dr. DeCeulaer is the expert Rheumatologist and because of this fact I will give his evidence preference over the others.

Let me deal with the case of the American Corrie Collins on which counsel for the plaintiff relied and to which Dr. DeCeulaer referred. The allegation in that case was that the accident aggravated Mrs. Collins' lupus condition which has previously been quiescent.

The following is gleaned from an article in the Wall Street Journal, July 12, 1990. The accident happened in 1981. Shortly aftereard Mrs. Collins developed a facial rash, a symptom of lupus. She also developed swelling of the eyes. She was only diagnosed with a form of the disease, systemic lupus erythematosus, in 1981. The jury found that the car accident caused her "sufficient stress to trigger the symptoms of lupus."

Two of the five judges on the State Supreme Court Appellate Division dissented from the decision arguing that "there is no medical proof that the plaintiff's accident made her alleged lupus any worse than it would have been from any other precipitating cause." That case may be distinguished from the instant one in that it was not there alleged that the accident caused the disease as in the instant case.

Here Dr. DeCeulaer testified that there is no evidence that the disease was there before the accident but was dormant. We do not know the state of the medical evidence in the Collins case. It is doubtful whether this case can be of much assistance.

The examples given by Dr. DeCeulaer indicate the development of <u>arthritis</u> after trauma. There seems to be no case history of the development of polymyositis or any of the mixed connective tissue diseases after trauma. Dr. DeCeulaer spoke of tests run on rats and that these tests indicated that trauma can produce mixed connective tissue diseases. These tests have not, he said, been carried out in human beings. These tests are the experimental data up to now, he informed. Thus at the moment it would seem that the medical experts cannot say with any degree of certainty that the mixed connective diseases and in particular polymyositis can be trauma induced.

However Dr. DeCeulaer said it is not improbable that this disorder is directly related to the accident. We must therefore examine the basis for this opinion which was mentioned before. He gave his personal criteria for this opinion as: "If a rare event occurs after an incident that disrupts the muscles there must be a probability

that a causal relationship exists."

In law is this good enough?

Mr. Sykes submitted that the court should be careful not to follow the proposition post hoc ergo propter hoc. He relied on the Canadian case of Rothwell et al v. Raes et al 54 D.L.R. (4th) 193 and Kay v. Ayrshire and Arran Health Board (1987) 2 All E.R. 417.

In Rothwell v. Raes an infant plaintiff developed brain damage a little over a month after he had received immunization doses of a multi-purpose vaccine.

In dismissing the actions brought on behalf of the infant, Osler, J. of the Ontario High Court of Justice at P.194 said "It is easy to fall into the error of believing that because there is a temporal association between brain damage and vaccine administration, the one is the cause of the other (the logical fallacy reflected in the proposition post hoc ergo propter hoc). Temporal association gives rise to a hypothesis that should be tested, no more. Some children are born with neurological deficiencies that go undetected until the age of six months because the deficiency relates to the type of complicated behavioural development which normally takes place at and after that age. Or defects may not show up until illness or an exterior stimulus such as vaccine brings them out ..... Thus temporal association could be coincidental. In the absence of a specific pathological condition or clynical syndrome that is associated only with the vaccine, the possibility of another cause cannot be ruled out."

I am inclined to accept the view that temporal association aline is not good enought to establish on a balance of probabilities that there is a causal connection between the motor vehicle accident and the disease which the plaintiff has. As was said in the Rothwell v. Raes case temporal association can only give rise to a hypothetical case. This hypothesis must be tested. The hypothesis of a trauma induced mixed connective tissue disease has been tested but only in rats.

There is no evidence of "epidemiological studies" showing the frequency or otherwise of occurrence of the onset of mixed connective tissue disease as a result of trauma.

I do not think the case of Kay v. Ayrshire and Arran Health Board (Supra) is of much assistance save that it seems to support Mr. Sykes' submission that the plaintiff must adduce medical evidence of recorded cases to show the causal connection.

Mr. Blake placed much reliance on the decision in Smith v. Leecn Brain (supra). But in that case causation was not in issue. The plaintiff had a pre-malignant condition. The burn promoted cancer in tissues which had that condition. The issue was remoteness of damage. That case is not of much assistance in so far as causation is concerned.

The upshot is that I agree with Mr. Sykes that the medical evidence is not sufficient to establish a causal connectionbetween the plaintiff's disease and the accident. The aetiology of the disease which afflicts the plaintiff is not known. I cannot say that such causal relationship is more probable than not.

Foreseeability

In light of the conclusion I have come to as regards causation, it is not necessary for me to deal with foreseeability. However I feel constrained to look very briefly on this aspect of the case.

Mr. Sykes relies on Wagon Mound No. 2 (1967) 1 A.C 617 and Hughes v. Lord Advocate (1963) A.C.837. The burden of his submission is that the foreseeability test has not been satisfied in that the injury which Mrs. Blake complains of i.e. the mixed connective tissue disease could not reasonably have been foreseen by the first defendant as resulting from the accident.

Mr. Blake relies on Smith v. Leech Brain and submitted that the defendant is liable for any damage which he can reasonably foresee may happen as a result of his negligence however unlikely it may be, unless it can be brushed aside as far-fetched.

In Charlesworth and Percy on Negligence 7th Edition at P.243 paragraph 4-17 it is stated that the "reasonable foreseeability" test has no application to the extent of the damage. Once the kind of damage, viz physical injury to person, could have been foreseen in a general way, the defendant is liable for the full extent of the harm, even though that extent was unforeseeable.

There is a long line of authorities which clerly establish that the Wagon Mound case does not affect the principle that a tort feasor takes his victim as he finds him. It has been stated, and I accept it to be a correct statement of the law, that in cases of especially susceptible plaintiffs the court must decide whether the initial injury is of a kind, type or character, which ought reasonably to have been foreseen and if it were, the defendant were liable for the eventual consequences which were directly caused by it.

Consequently if on the balance of probabilities I were satisfied that the plaintiff's disease had a causal connection with the accident, the defendant would be liable for the consequences. However as said before I am not so satisfied.

Damages

The upshot of my findings is that on the balance of probabilities there were two events - the motor vehicle accident resulting in injury to the plaintiff and the onset of mixed connective tissue disease. These two events occurred one after the other and on the evidence I am not satisfied that there was a causal connection. The question is how does the court go about assessing damages where a plaintiff has been injured by another's tort but before his action comes on for trial, the plaintiff sustains further injury as a result of an independent and non-tortious event?

Must the court endeavour to assess damages which flow from the first event only i.e. the accident in March 1989? According to the medical evidence the symptoms of the second event manifested themselves in July of 1989 - merely 3-4 months after the first. One event was overtaken by the other. It would be fair to say that the original accident seemed to have been submerged and obliterated by the supervening event. As would be expected in those circumstances most of the evidence given by the plaintiff and the doctors as to damages both special and general related to the latter supervening event. Dr. Ethon Lowe, it would seem, saw the plaintiff before the symptoms of the supervening disease occurred. Dr. Dundas, Dr. DeCeulaer and Dr. Dorrester first saw her in June 1990, June, 1994 and January , 1994 respectively.

Mr. Sykes submitted that the defendant is obliged to compensate for the loss caused by his wrongful act and no more. He relied on the House of Lords' decision in Jobling v. Associated Dairies Limited (1982) A.C.794.

I have no doubt that in many cases this principle can be applied without much difficulty. But on the facts of this case where the consequences of the defendant's tortious act are wholly submerged by the intervening event it is in my view difficult if not impossible to apply this principle. Lord Wilberforce may well have had such a case as this in mind when he said:

> "The courts can only deal with each case in a manner so as to provide just and sufficient but not excessive compensation taking all factors into account" ibid at 804B.

Lord Edmund-Davies at p.808H had this to say:

> "My Lords it is a truism that cases of cumulative causation of damage can present problems of great complexity."

I must bear in mind "the principle enuciated in innumerable cases that, among the contingencies and vicissitudes of life relevant to the assessment of damages for tort is that the victims expectation of both natural and working life may be reduced or terminated by the future development of illness or infirmity."

I must therefore endeavour to make an award that will provide a "just and sufficient compensation" in all the circumstances. As said before the evidence as per medical reports is that the plaintiff was seen byDr. Lowe and sent home on bed rest. On the day after the accident she collapsed due to pain in both feet. The doctor she then saw diagnosed sprained joints in both great toes. There were no fractures.

The plaintiff in her evidence said that after the impact she had to be assisted from her car. She could not stand becuase her legs were injured and could not support her. She said the knee, ankle, two big toes and chest were injured. She felt excruciating pain from the hip down, she testified. She had to see Dr. Lowe in Linstead, every week from March up to when she was referred to Dr. Dundas.

To Dr. Dundas she complained of multiple joint and muscle pains and discomfort in her body. Dr. Dundas diagnosed post traumatic myalgia and recommended that she had a programme of physiotherapy. This was in January, 1990.

The plaintiff said that becuase of the injury she could not dance as before. Although the mixed connective tissue disease was not yet diagnosed it must be remembered that according to Dr. DeCeulaer the symptoms occurred in July, 1989. Thus, as already mentioned, we have a situation of "culmulative causation of damages" or in other words a case of concurrent causes of damages.

In an effort to assist the court Mr. Sykes referred to four cases and suggested an award of $85,000 for pain and suffereing and loss of amenities.

Mr. Blake on the other hand, before the statement of claim was amended to include the mixed connective tissue disease, had suggested $768,000.00. I must hasten to say that Mr. Blake's suggestion was made in March of 1994 before an appearance was entered on behalf of the defendant.

After the amendment of the Statement of Claim as referred to above and the reception of the medical reports and the evidence of Dr. DeCeulaer, Mr. Blake revised

his suggestion to $5M-$10M. In light of my finding this suggestion is of course untenable. None of the cases cited is in my view helpful in that they do not involve "concurrent causes of damage."

It might not be fair, in my view, to hold that in assessing general damages the court can only take into consideration the period from the accident to the time of the occurrence of the second event. If this were the case then a partially incapacitated plaintiff would become worse off in terms of damages through the occurrence of a supervening illness which causes a greater degree of incapacity.

This court is untrammeled by precedent. I must therefore look at all the circumstances already referred to, and arrive at an appropriate award. It is my view that an award of $700,000.00 as damages for pain and suffering and loss of amenities would be a just and sufficient compensation.

Future Loss of Earnings

The evidence clearly links the future loss of earnings to the emergence of the disease. In the Jobling v. Associated Dairies Limited case it was said that the court must not speculate when it knows the facts and must therefore have regard to relevant events which have occurred before trial.

Liability for future loss of earnings cannot in the circumstances of this case be imposed on the defendant, since the defendant must compensate for the loss caused by his wrongful act - no more.

Special Damages

These must be confined to expenses incurred and pecuniary loss suffered as a result of the motor vehicle accident. Mrs. Blake testified that the vehicle she was driving was written off. This car she said belonged to her husband Joseph Blake.

Mr. Sykes submitted that the plaintiff cannot recover the value of the motor car, the assessor's fees and wrecker's fees because the car did not belong to her. This contention is, without doubt, misconceived. "As against a wrongdoer possession is title" - see The Winkfield 1902 P.42 at 60. In that case it was stated that as between bailee and a stranger possession gives title. The bailee was entitled to recover a complete equivalent for the whole loss of the thing itself. Of course the bailee would be accountable to the bailor. In this regard, it is my view, that the plaintiff is entitled to recover these claims provided they have been substantiated by her evidence.

1. Assessor's fees - her evidence supports her claim — $ 270.00

   Value for motor car as per Statement of Claim — 3,200.00

   Wrecker's fees — 450.00

   Loss of use of motor car — 4,000.00

2. Loss of Earnings

   (i) The plaintiff's net earnig at G.C. Foster College was $1,400 per month. Her evidence does indicate the period during which she was not ablee to work as a result of the accident. However it is reasonable, in my view, to take into account the period from 23rd March, 1980 to July, 1989 in this regard. That would be four months at $1,400 per month ..... — 5,600.00

   (ii) As an I.C.I. she said she earned an average of $800 p.w. She would therefore be entitled to an award for 16 weeks at $800 p.w. — 12,800.00

3. Transportation

   The evidence of the plaintiff as to expenses incurred under this heading is imprecise. The number of trips the plaintiff made to Dr. Lowe is not stated. The number of occasions on which she took taxi to work is also not stated. According to her evidence she can no longer drive. She has to take taxi to get around if her husband cannot take her. However the medical evidence in my view links this incapacity with the disease and not the accident.

   Her evidence is that she had to travel to Kingston every Friday to see the doctor. For the most time she would take taxi. The round trip cost her $850.00. It is my view that it would be reasonable to compensate her for trips made from the last week of March to end of July, 1989 i.e. 17 weeks. She would have therefore made 17 trips and paid $850.00 per trip. I will award her — 14,450.00

   It is also her evidence that she took taxi to work. None of the receipts tendered in evidence relates to the period from March to July, 1989. These receipts refer to dates in 1993 and 1994. Indeed she testified that she had been taking taxi from home to work for the past two years (she was giving evidence in August, 1994).

   It follows that the expenses incurred in this regard cannot reasonably be attributed to the motor vehicle accident but rather to the disease. She cannot be compensated for this expenditure.

4. Medical Expenses

Apart from Dr. Lowe, the other doctors saw the plaintiff from January, 1990 onwards. In light of my finding it cannot be said that the expenses incurred consequent on her visits to these "other doctors" were as a result of the injuries suffered from the car accident. The plaintiff may only recover medical expenses directly attributable to the injury sustained as a result of the motor vehicle accident. To quote Mr. Blake, the plaintiff's attorney the progression of the mixed connective tissue disease condition of the plaintiff and the need for quick response and careful management necessitated an " undending stream of amendments to the plaintiff's special damages." It is therefore fair to conclude that the Original Statement of Claim and and not the Further Amended one would indicate the medical expenses which resulted from the accident.

In the original Statement of Claim the plaintiff claims $750 for medical expenses her evidence is that she paid $700. She may therefore be awarded	700.00
For X-ray she claims $520 and this is supported by her evidence	520.00
For lab fees her claim for $70 is supported by her evidence	70.00
For medication she claims $420.00	420.00
The total special damages awarded	$1,710.00

Conclusion

Special damages assessed at $42,480.00 with interest at 4% from 23rd March, 1989 to date of judgment. General Damages assessed at $700,000 with interest at 4% from 22nd August, 1990 to date of judgment. Costs to the plaintiff to be taxed if not agreed.