

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1995/B120

BETWEEN	LOUISE BROWN	PLAINTIFF
AND	THOMAS CHEN	FIRST DEFENDANT
AND	MICHAEL MENDEZ	SECOND DEFENDANT

Mr. Ainsworth Campbell for Plaintiff
Mrs. J. Brown-Ramanand for Defendants

Heard April 15, 20, July 10, 1998

HARRISON J

CAUSE OF ACTION AND DEFENCE

The plaintiff has brought this action in negligence against the defendants and has alleged that the second defendant on the 4th day of October, 1989 negligently drove and controlled motor vehicle 7643 AD so that it collided with her causing personal injuries. She has alleged inter alia, that the second defendant had overtaken another vehicle when it was dangerous so to do, and had travelled to the opposite side of the road where she stood.

The defence denied negligence and has alleged inter alia, that the plaintiff had alighted from a mini bus and walked from behind it immediately into the path of the motor car driven by the second defendant.

LIABILITY

My first task therefore, is to determine the question of liability, and in doing this, I bear in mind the evidence presented on behalf of the parties.

The Plaintiff's case

The plaintiff testified that she was on her way to work and had taken a Victoria bus at Bellecarris, Clarendon en route to May Pen. The bus reached Denbigh and she alighted from it waiting, until it drove off. She stood on the left side of the road facing May Pen and observed motor vehicles coming from May Pen direction. She described the road ahead as having a slight slope but it was wide and straight. A minibus which was coming from Four Paths direction and going towards

May Pen stopped to pick up a passenger some three chains away from her.

She then saw two vehicles coming from the direction of May Pen and as they reached the slope to come over, the vehicle at the rear "take away from the front one." Then she said:

" I saw the thing coming on before me and I don't know anything else.
The one that take away from the next one is it hit me. I was standing
on road side when it hit me."

She was thoroughly cross-examined. She said that passengers did not disembark from the bus in the road. She contended that it was a white car and a van that were coming from May Pen direction and that it was the van which "took away" from the motor car and came straight at her. She said further under cross-examination that: " the second vehicle was not far from me when it overtake the first one..." She pointed out the distance in Court that the vehicle was from her and this was agreed at approximately three (3) ft.

She did not recall telling anyone that the second vehicle was chocolate in colour and she denied that she told Cpl. Brown that when she turned, the chocolate colour van hit her down. She had given a written statement to the Corporal but it was not true that she told him that it was only one vehicle that was coming from May Pen direction. She has admitted that she did not tell Cpl. Brown about one vehicle overtaking the other and her explanation for this is that he never asked her those questions.

She denied that she alighted from a J.U Mini Van and that she started walking across the road from behind that van. She further denied that she walked into the path of the defendant's motor vehicle. The following suggestion was put to her:

Suggestion - It was a white Toyota Corolla motor car that hit you.

Answer - It was not. When I answer you and say yes, when is not that, Michael will get the case and I will be the loser. I never see that it is a white car hit me...."

The Defendants' case

The second defendant testified that on the morning of the accident, he was on his way to Four Paths and was driving a Toyota Corolla motor car. He was travelling about 25 - 30 m.p.h when he saw a parked J.U Minibus on the left side of the road on the opposite hand. He was then travelling on his left. He said: "a lady just step out from behind the mini van and step out into my car. I applied brakes but it hit her already." He also said that when he first saw her she was coming from behind the mini van and that she had reached the middle of the road. According to him, she "just walked out fast" He further testified that he was not speeding at the time of the accident and no vehicle was ahead of him.

He denied overtaking any motor vehicle. He also denied that he had crossed over to the other side of the road. His first reaction when he saw the lady was to apply brakes and he did nothing else.

He described the area in which the accident occurred as follows:

“The road there is asphalted and there is banking on two sides. There is no concrete pavements. There is no soft shoulders or gravel on the side.”

Under cross-examination he said that when he first saw the lady she was not in the road. She came from behind the mini van and then walked fast out into the road “right into his vehicle”. The mini van was parked at the side of the road and he had “almost pass a part of the mini van” when she stepped out into the road. He had reached in line with the back of it but he did not have “plenty distance” to his left when he saw the plaintiff. He agreed that from the brow of the slope to where the accident happened was a straight piece of road and that the van was about three chains away. He said at first that he did not know if the mini van had moved off when he hit the lady but he subsequently said he did not remember if the mini van had moved off.

He admitted that he did hit the plaintiff that morning but has denied that he was overtaking as he came over the brow. He further denied that he hit the plaintiff as she stood on the right hand side of the road. He did not see her when she alighted from the bus but she came from behind it before he hit her. He admitted that it did occur to him that passengers could be coming off the mini van when he saw it but according to him he was not driving fast. He admitted that the only thing he did was to brake up.

Winchester Brown was called as a witness for the Defendant. He was a Cpl of Police at the time of the accident. He recalled that on the date of the accident at about 8:30 a.m, he saw the second defendant drove a white Toyota motor car to the station. He examined the car and saw damages to the bonnet and front bumper. The front windscreen was also damaged. Investigations led him to the home of the plaintiff and he recorded a statement given by her. He had visited the scene of the accident the said morning and observed that the road was in fact straight from the slope to the point of impact. He took no measurements however.

APPRAISAL OF THE EVIDENCE AND FINDINGS

Let me say from the very outset that credibility is indeed a major issue for my consideration. Which of the two accounts is more credible? There are no independent eye-witnesses to this accident so I will have to scrutinize the evidence of the parties carefully bearing in mind that the burden of proof lies on the plaintiff to prove her case on a balance of probabilities.

The plaintiff maintains that she was hit by a motor van which had overtaken a motor car as it came over the brow of a slope. She has further maintained that it was whilst she was standing on the left and looking in the direction of May Pen that this vehicle came towards her and collided with her. When it was put to her in cross-examination that it was a white car that collided with her as she crossed the road, she said, and I repeat her evidence:

“.....When I answer you and say yes, when is not that, Michael will get the case and I will be the loser. I never see that it is a white car hit me....”

I also bear in mind what she said in chief as she described how the accident occurred. She said:

“ I saw the thing coming on before me and I don't know anything else. The one that take away from the next one is it hit me. I was standing on road side when it hit me.”

The plaintiff was hit down by a motor vehicle on the the morning of the 4th October 1989 and the second defendant has admitted hitting her down. He says however, that this happened as she walked from behind a parked bus into the path of his motor car. He was not the driver of a motor van that morning and no suggestion was ever put to the second defendant that he was driving a mini van. The second defendant also said that there were no vehicles ahead of him as he proceeded towards Four Paths.

The plaintiff admitted under cross-examination that she did not tell Cpl Brown about one vehicle overtaking the other. She has tried to explain herself by saying that Cpl. Brown did not ask her about this, hence, she did not tell him about the vehicle that was overtaking the other.

The plaintiff claimed that she had taken a “big bus” called the Victoria and it was from that bus she had alighted; that it drove off and whilst she was on the left as one faces May Pen she saw the two vehicles approaching from the opposite direction. The second defendant on the other hand has contended that it was a JU Mini van he saw parked on the left facing May Pen and that he saw the lady stepped out from behind this mini van. There is also evidence coming from the plaintiff that a mini bus had stopped to pick up a passenger some three chains away from where she stood.

I have had the opportunity of seeing and hearing the witnesses and I have observed their demeanour. Cross-examination of the second defendant revealed that he was not quite literate and his ability to give precise measurements was very poor but certainly, these are not reasons to say he is responsible for this accident. When all the evidence is taken into consideration however, I do not believe that the second defendant has been very truthful in his account of how this accident happened.

The plaintiff on the other hand has impressed me as a very simple person. I find her to be an honest witness but one who I believe could have been mistaken when she claimed that it was a van which had overtaken the motor car. I think that her evidence clearly supports this conclusion where she described the sequence of events as follows: “ I saw the thing coming on before me and I don't know anything else. The one that take away from the next one is it hit me”. I also accept her account that when this happened the bus from which she alighted was already on its way but there was a parked mini van some three chains down behind her on the same hand on which she stood.

I reject the contention that the plaintiff was coming from behind a parked JU Mini Van and that she walked straight into the path of the second defendant's motor car.

I find that the second defendant overtook a motor car as it came over the brow of the slope and in doing this he travelled to the opposite side of the road and collided with the plaintiff who was standing but a short distance from him at the material time. I bear in mind what she has said about not telling Cpl. Brown about the act of overtaking but I also take into consideration her explanation for not telling him. It is my considered view when all the facts are taken into consideration that the plaintiff has established that the second defendant was indeed negligent in his driving. He had driven without any or any proper look out; he failed in my view to take proper evasive action to avoid colliding with the plaintiff who was lawfully standing on the left side of the road as one faces May Pen.

Let me now deal with the quantum of damages to be awarded.

DAMAGES

General damages

On the plaintiff's account the accident occurred about 7:00 a:m on Wednesday the 4th day of October 1989 and she came to herself in Kingston Public Hospital sometime about 5:00 p:m the Friday. Her right leg was in traction and there was a piece of iron in her leg. There was a cut over her right forehead. She could not raise her neck and she had pains in the neck and chest. There was pain also in the foot. The pain in neck still bothers her and sometimes her head feels dizzy.

She remained in hospital for three months and three weeks. She spent about two months in bed after release from hospital. She received treatment as an out patient at the Kingston Public Hospital. She used crutches in order to ambulate and these crutches were used for ten months.

She complained that if she lifts heavy things she feels pain much harder in the chest. She cannot stand for too long as feels pain in the leg. The pain is greater now than when she was in hospital as she got tablets there. The right leg cannot bend like the left leg and the right knee is stiff.

Dr. Mena an Orthopaedic Surgeon at the Kingston Public Hospital gave evidence at the trial. His records show where the plaintiff was admitted in hospital on the 4th October 1989. She had injuries to the head, chest, left shoulder and both lower limbs. He would say that her injuries were serious. Examination revealed:

1. Head had a 3 cm laceration to the mid forehead and a 1½ cm laceration to the supra orbital area of the eye.
2. The left shoulder was tender on touch and had full range of movement.

3. There was a little pain in the chest on touch but air entry to the lung was normal.
4. The right thigh was painful and swollen over the mid side with no neurovascular deficit. The nerves were intact.
5. The left leg was splintered; it was painful and swollen.

An X-Ray emanation was done. The results reveal that the head was normal, the right femur had a transverse fracture over the mid thigh and the left leg had a transverse fracture over the mid shaft and the fracture was displaced.

She was treated by means of cross manipulation to the left leg and the application of an above knee plaster of Paris. A Steinman pin was inserted in the right upper leg for skeletal traction. Her wounds were cleaned, sutured and dressed. She got painkillers, antibiotics and antitetanus injections.

The skeletal traction and Steinman pin were removed on the 11th December, 1989. She was discharged from hospital on the 19th December 1989.

She had follow up clinical visits on five occasions between 29th January 1990 and 19th September 1990.

The left leg healed but left an obvious varus deformity (a bow deformity). The left lower limb was 1 cm shorter than the right so she walked with a slight limp. She had a 10% permanent partial disability of the whole person. Her knee cap had a clip sound on extension. This was indicative of osteoarthritis taking place in the knee joint and which may get worse. She would feel pain when walking or standing for a period of time. The Doctor was of the view that she would have difficulty standing after three hours. Pain killers and exercise would help with the arthritis.

The Doctor opined that the disability and arthritis would diminish her capacity to work as a domestic helper. He said he would give her 1 - 1½ years for maximum recovery commencing from the time of her injury and that she would be able to perform work as a domestic helper but in a less restricted way.

There is no evidence as to fracture of a skull nor shortening of both limbs. Neither is there evidence of pneumothorax, brain injury, post traumatic amnesia, probability of Alzheimer's and Parkinson's diseases nor of the plaintiff becoming neurotic and mal-adjusted. There is only 10% permanent partial disability and not 25% as pleaded.

Mrs. Ramanand referred to the undermentioned cases:

1. Kelly v Bennett p.74 of Khan's Vol. 3
2. Layne v Dryden p. 71 of Khan's Vol. 3.

3. Edwards v Browning p. 238 Khan's Vol. 3.

4. Dixon v JPSCo p. 240 Khan's Vol. 3

Mr. Campbell on the other hand urged the Court to consider the following cases:

1. Harris v McKenley p. 8 of Khan's Vol. 3.

2. Carter v Ja. Inn Ltd p. 225 Khan's Vol. 3.

3. Dixon v Ja. Tel Co Assessmen of Damages by Harrison & Harrison
p. 310

4. Bennett v Lalor p. 171 Assessment of Damges by Harrison &
Harrison

I have given due consideration to the cases cited by both Counsel and it is my considered view that an award of Eight Hundred Thousand Dollars (\$800,000.00) in respect of pain and suffering and loss of amenities would be reasonable in all the circumstances. I do believe that it would be appropriate also to make a nominal award of Fifty Thousand dollars (\$50,000.00) for handicap on the labour market.

Special damages

The plaintiff was a domestic helper at the time of accident and usually worked \$300 weekly. She went back to work some four years after the accident. She said she tried to work during the four years but due to pain in the waist she could not keep up on the foot.

I pay particular attention to the evidence of Dr. Mena where he states that the plaintiff could have resumed working between 1 - 1 ½ years after the accident. She testified that she did resume working about four months after the accident but had to cease due to pain. Mr. Campbell urged me to allow a period of three (3) years. In all the circumstances, I would allow her claim for loss of earnings for 15 months and I would to use a weekly earning of \$300. The sum awarded under this head would therefore be Nineteen Thousand Five Hundred Dollars (\$19,500.00)

The undermentioned expenses were agreed:

Crutches	\$80.00
Fees to Dr. Mena	\$4,500.00
Transportation	\$3604.00
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	Total \$8,184.00

I therefore make an award totalling \$27,684.00 in respect of special damages.

CONCLUSION

There shall be judgment for the Plaintiff as follows:

GENERAL DAMAGES

Pain and suffering and loss of amenities \$800,000.00

Handicap on the labour market \$50,000.00

With interest thereon at the rate of 6% p.a from the date of service of the Writ of Summons up to today.

SPECIAL DAMAGES

In the sum of \$27,684.00 with interest thereon at the rate of 6% from the 4th day of October 1989 up to today.

There shall be costs to the Plaintiff to be taxed if not agreed.