IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 01410

BETWEEN	**BRENDA ROSEMARIE GRIFFITHS**	**CLAIMANT**
A N D	**GLEN CAMPBELL**	**DEFENDANT**

Ms. Oraina Lawrence and Mrs. Allia Leith-Palmer for the claimant.

Mrs. Nicosie Dummett for the defendant.

Heard: February 28, 2013 & March 1, 2013

PERSONAL INJURY – DAMAGES – MOTOR VEHICLE ACCIDENT – CREDIBILITY OF WITNESSES – CLAIMANT PRESENTING A NUISANCE AND OBSTRUCTION TO THE ROADWAY – CONTRIBUTORY NEGLIGENCE – ROAD CODE

NOTES OF ORAL JUDGMENT

EDWARDS J

[1] In this matter between Brenda Rosemarie Griffiths and Glen Campbell and Another, the claim is for damages arising out of the motor vehicle accident on French Street in Spanish Town in the parish of St. Catherine, which took place on July 24, 2009.

[2] French Street can best be described as a motoring nightmare, with vendors on both sides of the street leaving very little room for the motoring public to proceed unobstructed.

[3] French Street is a one-way street. The accident out of which this claim arises, occurred whilst the 1st defendant was negotiating the street at a time, described by the parties, as a busy market Friday.

[4] The claimant is Brenda Rosemarie Griffiths who was hit by the motor car being driven by the 1st defendant and owned by the 2nd defendant and who suffered injury to her right ankle, described in the medical report as an ankle strain.

[5] Even though the particulars of claim filed by the claimant stated that she was on the sidewalk, she conceded in evidence that she was in fact on the roadway. And even though in the Particulars of Claim she asserted that the defendant was driving fast, it was in fact her evidence that he was driving so slowly that having hit her on her right buttock she was knocked down from behind. She said she started to get up, fell backward, looked and saw the car coming and it ran over her right foot.

[6] She claimed the following injuries as a result: Acute tenderness over the right sacroiliac joints, painful movement to the right hip joint, injury to the right knee and sprain to the right ankle.

[7] All the parties agree that the claimant was hit down by the car driven by the 1st defendant, which is owned by the 2nd defendant. The defendants admitted that the driver, who was the 1st defendant, did not see how the accident occurred and therefore, can give no account of how it occurred.

[8] The passenger in the motor car, who was the 2nd defendant, gave an account that she saw a lady to the right of the car and that when she saw her she heard someone cry out and she saw the woman fall on her buttocks. She said she did not see when she was hit but she looked through the window and saw the car on the woman's foot.

[9] The problem with this case as I find it, is that there is evidence, undisputed, of her being hit by the defendant's motor vehicle, but the only version of how she came to be hit is hers. There is no contrary version credibly put forward by the defendant. However, that is not to say that I found the claimant herself to be entirely truthful.

[10] The passenger, the 2nd defendant, though she saw the claimant standing, did not say the claimant was in the path of the motor car or that she saw the claimant step out into the path of the motor car. She could only say that she saw the lady standing, heard someone cry out and saw her fall on her buttocks and having looked out the window of the car, saw the car on the lady's foot.

[11] Whilst one can make assumptions based on the state of the claimant's evidence; for instance, if the claimant was within the harbour created by two carts, six feet apart, when she was hit, why didn't the car not hit the cart nearest to her or either of them? One assumption could probably be that she must have stepped out of the safe harbour created by these carts into the path of the car. Unfortunately, assumptions are not facts and while it is an inference that may be drawn, it is not an inescapable inference when this is juxtaposed against the clear evidence of the passenger.

[12] The 2nd defendant said she saw the lady standing before the car ran over her foot. I have no choice, in the absence of any other explanation but to accept the claimant's version of how it occurred and I find that the 1st defendant, the driver of the motor car is liable and the passenger as the owner of the motor car, having the driver acting as her agent, her lawful agent on that occasion, vicariously liable.

[13] The defendants raise the issue of contributory negligence and the question the court has to ask itself is this; was the claimant contributory

negligent? We start with the principle that all persons have a right to walk on the road as pedestrians and drivers should exercise reasonable care whilst driving on the road. A special duty may be imposed on a driver in circumstances in relation to the speed and manner in which he travels on the road, the warning which he may give and should give and the part of the road on which he drives the motor vehicle.

[14] The authority I cite for the above proposition is, **Chapman v The Post Office** (1982) RTR 165. A person standing on a curb is not negligent if that person is struck down by a motor car, even if the person is leaning out slightly and even if the person had his or her back to the traffic. Neither are they negligent if that person went out a inch or two into the roadway, because pedestrians have an equal right of access to the roadway as does a motorist.

[15] However, different considerations arise if the pedestrian pose a nuisance to the road or on the road and in this regard nuisance is defined as the unlawful interference with another person's use or enjoyment of land or some right over or in connection with the land. If a person or if a person's right of free passage of a highway or a roadway is subject to interference he has an action just as he would have if he had a private right of way which was obstructed.

[16] Now nuisance to a highway or roadway, and in this case it is a roadway, consists in obstructing it or rendering it unsafe or dangerous. In this particular case it was the claimant's assertion that she was on the roadway, that is, French Street, between two carts, with her back to the oncoming traffic buying produce from the cart nearest to her. Both herself and the cart were on the road way. The cart was described by the defendant as about three and a half feet wide; neither her body or the cart was on the curb or on the sidewalk. She was not leaning slightly off the curb, neither was she a few inches into the roadway. She was several feet onto the roadway and so were the carts.

[17] I find as a fact that she and the cart were out onto the roadway in such a manner as to confine vehicular traffic to a small space within which to drive and maneuver at a slow pace.

[18] I find as a fact that both the claimant and the vendor from whom she was purchasing were obstructing traffic, along with all the other vendors on French Street on that Friday. Both the vendor and the claimant were being a nuisance on the roadway, having left only a narrow path on which the motoring public had to negotiate the street to go about their lawful business. To find otherwise is to place the defendants in the position of being insurers of the safety of all those who act as a nuisance on the roadway and obstruct the roadway.

[19] I find the claimant is liable as being an obstruction and a nuisance on the roadway. I cannot ignore the clear principle that a pedestrian has a duty to use the road with care and to look out for his or her own safety. Counsel for the defendants cited verbatim from the Road Users Guide (the Road Code) and quoted the said principles as I have outlined them.

[20] The only question remaining therefore, is the proportional rate of liability having found the claimant contributory negligent. In the instant case and taking into consideration the onerous duty placed on drivers even in the face of undisciplined and unrepentant pedestrians in this country, the 1st defendant ought to have seen the obstruction and taken some evasive action. There is no evidence that he saw the obstruction and took any evasive action. I, therefore, find the defendant seventy percent liable and the claimant thirty percent liable.

[21] I have taken into consideration the authority cited by the defendants of **Errol McDonald v Zoukie Trucking Services**, HCV 1374 and delivered 6th, 7th and 14th April, 2011, a judgment of the Honourable Mrs. Justice Mangatal and the case of **Rodney Williams v Rohand De Roche** Civil Claim No. 111 of 2008 from the St. Vincent Supreme Court as persuasive authority.

[22] Now on to the question of damages. I begin first with general damages. Having looked at the medical evidence the claimant was treated at the Spanish Town Hospital; she was X-rayed. The X-ray showed no bone injury or fracture. But it appears that she was treated with a plaster of paris and a back slab to the right ankle and was diagnosed with ankle spasm, painful swollen right ankle and was given analgesics. She later went to see Dr. Ravi Prakash Sangappa on July 31, 2009 at the Oasis Health Center in Spanish Town, St. Catherine and she was assessed as having right sacroiliac joint strain and right ankle strain. Again she was treated with analgesics and topical analgesics gel. Physiotherapy was recommended. She was also recommended to see an orthopedic surgeon, on the 18th of August, 2009.

[23] She was seen again by Dr. Sangappa where she complained of pain and swelling to the right leg and ankle. On examination, she was seen to have diffused swelling of three by three centimeters to the right ankle with tenderness. It was found that the range of ankle movement was reduced. She was advised to continue with physiotherapy and was given more analgesics. Her prognosis at that time was a six months to a year recovery. She went back to the Spanish Town Hospital on October 9, 2009 where it was noted that she was feeling better. She was given an appointment for December 2009 which she did not keep. Her explanation to the court for failing to keep that appointment was that she went to see a private doctor.

[24] Following the advice to see an orthopedic surgeon, she went to Dr. Dixon who saw her on August 5, 2009. Dr. Dixon saw her on crutches which she was using to avoid weight bearing and noted that she was in discomfort.

[25] Dr. Dixon found tenderness over the right buttock in the ischial region. At that time her right leg was in a below knee cast and her X-ray showed no fracture to the right ankle. She was assessed by Dr. Dixon as having multiple blunt

trauma with a sprained ankle. She was advised to continue treatment at the Spanish Town Hospital and to return after her cast was removed.

[26] She was seen again by Dr. Dixon. She was also seen at the Spanish Town Hospital on September 30, 2009 where they removed her cast. And when seen by Dr. Dixon in December 2009, her pain in the right ankle was reduced. She complained of swelling after prolonged standing and walking but no abnormality was seen and she was discharged. Dr. Dixon noted incapacity of five months and significant improvement and he found that there was no permanent impairment and none was anticipated.

[27] The claimant in her witness statement said after the accident she was treated at Spanish Town Hospital and sent home with pain killers and antibiotics. She said a week later she was still in pain and she was given stronger pain killers which temporarily eased her pain. She said after the cast was removed she was given more pain killers and she did physiotherapy.

[28] She also claimed she was unable to work since the accident. In evidence she said the first time she started working was January of this year, 2013. She said standing too long made her feel pain and discomfort as well as swelling.

[29] In support of the claim for general damages, counsel cited the cases of **Maureen Golding v Conroy Miller** to be found in Khan, Vol. 6, page 62 and the award given at that time now updates to $1,136,541.96. Counsel also cited **Garfield Scott and Donovan Cheddesingh v Phillip Campbell** and that award in this case now updates to $1,324,373.57.

[30] The submission by the claimant is that a range of awards from $1,000,000.00 to $1,200,000.00 is a reasonable sum in this case. Maureen Golding had a fracture of the left fibula, which is in the ankle region. Garfield Scott had shock, contusion to the right shoulder and right hip, puncture wound to

the left forearm, pain across the shoulder and waist, swollen, painful and tender knee. I find the case of **Garfield Scott** to be unhelpful. I find that the case of **Maureen Golding** though it is similar with the injury to the same region, it was far more serious than in this case.

[31] Counsel for the Defendant submitted for consideration **Lenroy Lee v Commissioner of Police and the A.G.** to be found in Harrison's and that case was an ankle sprain. Counsel also cited the case of **Cynthia Wilks v Lenworth Phillips and Lionel Ricketts** also in Harrison's, which was also a wound to the ankle with bruises to the leg; the case of **Horace Allen v Tekel Barrett and Eastern Banana Estates** to be found in Volume 5 Ursula Khan, where the claimant had severe sprained right ankle, bruises to the right elbow, headache, cerebral concussion. He was placed on bed rest for two weeks with analgesics.

[32] Having considered the medical report, the statement made by the claimant and the cases cited, I find general damages in the sum of $700,000.00 to be reasonable and appropriate in this case. The award in this case therefore is as follows: Special Damages is awarded in the sum of $90,716.00 comprised as follows: $65,716.00 for medical expenses; $5,000.00 for transportation expenses; and $20,000.00 for the cost of the medical report of Dr. Dixon, agreed by the parties even though there are no receipts; total of $90,716.00 with interest at 3 percent from July 24, 2009 to the March 1, 2013.

[33] General Damages awarded in the sum of $700,000.00 with interest at 3 percent from the 23rd of March, 2011 to the 1st of March, 2013 to be apportioned 70/30. Cost is summarily assessed at $228,500.00 comprised as follows: Summarily assessed according to the Table of Basic Costs, basic cost for entry of Final Judgment after trial, two Attorneys-at-Law $94,000.00 for each additional date hearing, which is two additional days; $48,000.00 times two which is $96,000.00. From Table Two, additional fees to be added to the fees in Table One, attendance at Pre-trial Review $24,000.00 plus attendance at hearing in

Chambers for less than two hours, for which I gave $8,000.00 for attendance at the Case Management Hearing.

[34] In addition the cost of photocopying three bundles at $10.00 per page for each bundle times five bundles that is a cost of $6,500.00, all totaling a cost in the sum of $228,000.00 to the claimant.