IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV05599/2011 & HCV05602/2011

BETWEEN	**CONSTANTINE HENRY**	**CLAIMANT**
AND	**AUSTIN CARTER**	**1ST DEFENDANT**
AND	**E. PIHL & SONS A.S. LIMITED**	**2ND DEFENDANT**

Tort – Negligence – Trench left uncovered and unmarked on roadway – Whether injury reasonably foreseeable – unless order- whether party in breach for failing to file a witness statement if they intend to call no witness – Damages.

Khadine Dixon instructed by Dixon & Associates for Claimant.
Raymond Samuels instructed by Samuels & Samuels for 1st Defendant.
Kent Gammon instructed by K Gammon & Associates for 2nd Defendant.

Heard: 22nd September 2014, 3rd October 2014.
Batts J

[1] This Judgment was orally delivered on the 3rd day of October 2014.

[2] On the first morning of trial the attorneys for Mr. Constantine Henry submitted that by virtue of an Unless Order made on the 13th June 2014 there should be judgment against E. Pihl & Sons. In reply to that submission Mr. Gammon pointed to the fact that the only aspect of the Order not complied with was as to the filing of a witness statement. However his client had no intention of filing such a statement as they had no witness as to fact.

[3] I ruled that the Unless Order must be understood to mean that witness statements "if any" are to be filed. A party it seems to me cannot be compelled by a court to call witnesses it does not have or had been unable to locate. Mr. Gammon's client is not therefore in breach of the Unless Order. A Defendant still had a right at trial to test

the Claimant's case. Moreso where, as in this case, there is also a Co-Defendant in whom some responsibility may reside.

[4] Although two suits were listed before me, it was indicated to the court that there had been no Order for Consolidation made. The parties indicated a desire to have this done. I made an Order for Consolidation and Ordered further that the matter be henceforth entitled as follows:

> "Suits: 2011 HCV 05599 and 2011 HCV 05602
>
> Constantine Henry — Claimant
>
> Austin Carter — 1st Defendant/Ancillary Claimant
>
> E. Pihl & Sons — 2nd Defendant/Ancillary Defendant"

[5] The following exhibits were admitted by and with the consent of the parties:

Exhibit 1: Medical Report dated 3rd December 2007 (Dr. Wright)

Exhibit 2: Copy receipts dated 3rd December 2007, 24th March 2007, 18th January 2008

Exhibit 3: Medical Report dated 3rd December 2007 (Dr. Wright)

Exhibit 4: Receipt dated 15th January 2008

Exhibit 5: Receipt dated 22nd November 2007

Exhibit 6: Receipt dated 5th April 2007 (Annotto Bay Hospital)

[6] The Claimant (Constantine Henry) was the first to give evidence. He described himself as a Garage Operator and Farmer. His witness statement dated 20th February 2014 stood as his evidence in chief. In that statement he says he was a passenger in a motor vehicle driven by the 1st Defendant on the 24th March 2007. The roadway had been dug up by the 2nd Defendant who was doing some road works. The rain was falling and the vehicle in which he was travelling was proceeding at a moderate speed. It was approximately midnight. The vehicle fell into an open trench. There was no warning or barrier to indicate the presence of the open trench. He received injuries to his head and became unconscious. He also sustained a lower back injury. He described his pain and suffering and loss of income and expenses.

[7] The Claimant was valiantly cross-examined by Mr. Gammon. The witness admitted giving instructions to Mr. Samuels to file a Claim. He admitted that the 1st Defendant was sued on his instructions. He admitted also that the Claim was in negligence. It was suggested to him that therefore he was saying the 1st Defendant drove negligently, this he denied. The following exchange occurred,

> "Q: The Claim against Mr. Carter for negligence is not true.
>
> A: Let me explain. Mr. Carter is driver. I hold him responsible for me. I am not saying he is negligent."

[8] This evidence by the witness is fully borne out by the Particulars of Claim filed by his then attorneys Samuels & Samuels. There are no particulars of negligence pleaded against the 1st Defendant. The pleader being content to say,

> "The Claimant will rely on the Res Ipsa Loquitur doctrine against the 1st Defendant."

[9] The witness in cross-examination stated that there were no warning signs as to the existence of the trench. Nor was there yellow caution tape. Although there were streetlights the trench, he said, was not visible because it was filled with water due to rain.

[10] His evidence was supported by the 1st Defendant. He described himself as a Farmer and Taxi Operator. His witness statement dated 12th February 2014 stood as his evidence in chief. He said the accident occurred at approximately midnight. Whilst driving it was raining. He was not driving fast and was paying attention. His motor vehicle fell into an open trench which the 2nd Defendant had dug. There was no warning about the existence of the open trench. He described the pain and injury he suffered as well as his costs and losses.

[11] Mr. Samuels for the 1st Defendant sought, by way of application, to admit into evidence an estimate for repairs of the 1st Defendant's motor car. That estimate was prepared by the Claimant. I ruled that the document could not be admitted into evidence in that way. Mr. Samuels further submitted that a Notice pursuant to Section 31E of the Evidence Act had been served and that there had been no Counter Notice. He admitted however that he would be unable to satisfy the requirements of Section 31E(4). It would indeed be strange if he could, because the

maker of the document gave evidence in court and was still present. Mr. Samuels eventually indicated he was no longer seeking to have the document admitted.

[12] The point of admissibility where no Counter Notice was served was therefore not fully argued before me and I express no opinion.

[13] Mr. Gammon's cross-examination of this witness was even less effective. When pressed about speeding the witness laughed and said,

> "No Sir, pure stone, nowhere to speed. Couldn't go fast on that road."

When it was suggested to him that he never controlled his vehicle properly, the witness responded with indignation,

> "I am a driver from 1972, and never in accident. The hole trick me, as it full of water."

[14] The close of the 1st Defendant's case meant the close of evidence. The 2nd Defendant had no witnesses. The parties therefore made submissions. Mr. Gammon urged the court to find contributory negligence against the 1st Defendant. All parties made detailed submissions on damages.

[15] I have little difficulty finding the 2nd Defendant entirely to blame for this accident. The creation of a hole or trench on a highway is a dangerous act. It is indeed an act of misfeasance. Such a danger also constitutes a nuisance on a public highway. To leave it uncovered, unmarked without warning signs, barriers or lights is negligent. It certainly is reasonably foreseeable that rain might fall and that at night persons using the highway may in consequence suffer injury. I hold further that the 1st Defendant was not driving too fast in the circumstances and there was nothing which he could reasonably have been expected to do to avoid the accident. There will therefore be judgment against the 2nd Defendant/Respondent to the Ancillary Claim as well as on the Claim.

[16] As regards damages for the Claimant I bear in mind the written submissions filed by the Claimant. Dr. Wright's medical report describes: blunt injury to the head resulting in loss of consciousness and blunt injury to lower back. X-ray revealed no bony injury. He was given analgesics and 14 days sick leave. His recovery was described as good. Counsel for the Claimant relied upon **Paul Jobson v Peter**

Singh(1995/J172)unrpted 3rd July 1997 Khan Vol 4 p. 169; **Bryan v Hoshue(1996/B219) unrpted 30th September 1997 Khan Vol 5 p. 177** and **Simpson v McMohan 1987/S460 unrpted 14th June 1994 Khan Vol 5 p. 206**. In my view all these Claimants suffered more serious injuries than the Claimant in the case before me. Even in the **Simpson case** there were lacerations and abrasions which were not evident in the instant matter. I assess damages for pain and suffering and loss of amenities at $800,000.00.

[17] Insofar as the claim to special damages is concerned I award $7,100.00 in accordance with Exhibits 2(a), (b) and (c). The Claimant gave evidence that he lost $50,000.00 per week for 26 weeks as a garage operator and $12,000.00 per week for 26 weeks as a farmer. No documentary support whatsoever was provided. The witness alleged he had given receipts to his lawyer. Whereas it can be acknowledged that small farmers may not readily have proof of income, this is not true of a garage operator. He at least can be expected to have documentary evidence in the way of receipts for work done in the period prior to the accident. He should at least have a book where entries are made of the vehicles serviced and any expenses or receipts. Mr. Gammon urged me to make no award.

[18] The court can only do the best it can in the circumstances. The doctor gave 14 days sick leave and described the recovery as "good". I do not therefore find that for 26 weeks the Claimant was unable to return to work. I will award 6 weeks. I award $12,000.00 per week for 6 weeks lost earning as a farmer. This totals $72,000.00. With respect to the operation of the garage I award $6,000.00 per week for 6 weeks, that is $36,000.00. A total for lost earnings of $108,000.00.

[19] With regard to the 1st Defendant/Ancillary Claimant, the doctor described his injuries thus (Exhibit 3):

> "Blunt trauma to chest and neck injuries. No bony injuries. No fracture to neck. He was assessed as having a whiplash injury to the neck. 14 days sick leave was ordered and his recovery was described as good."

The 1st Defendant's counsel filed submissions on damages. Cases relied upon were **Stacy Ann Mitchell v Davis(1998/M 315) unrpted 10th May 2000 Khan Vol 4 page 146** and **Lawrence v Warmington(1998/L138)unrpted 12th April 2000 Khan Vol 5**,

page 144. I find the Claimant in the case before me to have suffered less severe injuries than in the cases cited. I award $1.2 million for pain, suffering and loss of amenities.

[20] As regards Special Damages I award $12,100.00 as per Exhibits 4, 5 and 6. Mr. Austin Carter also claimed lost earnings without any attempt to support the claim with documentation. He asserted that he was unable to work for 26 weeks. He claimed $25,000.00 per week as a taxi operator and $10,000.00 per week as a farmer. Again the court is in an invidious position but must do what it can on the evidence.

[21] I find that his period of lost earnings is 10 weeks. I award $10,000.00 per week for 10 weeks as a taxi operator, that is $100,000.00 and $3,000.00 per week for 10 weeks as a farmer, that is $30,000.00. This totals $130,000.00 for lost earnings.

[22] The 1st Defendant/Ancillary Claimant also claimed $57,500.00 being the cost of repair to his motor vehicle. His witness statement does not say that he paid to have the vehicle repaired; nor was a receipt for such repair tendered. The witness merely referenced an "estimate" that was not put in evidence. There is no doubt that his car was damaged. The extent and type of damage has not however been proved. I therefore award $25,000.00 for the damage to the motor vehicle.

[23] In the result there is judgment against the 2nd Defendant/Ancillary Defendant as follows:

Claimant:		
	Pain, Suffering & Loss of Amenities	$800,000.00
Special Damages		
	Medical Costs	$7,100.00
	Lost earnings	$108,000.00
		$115,100.00
	Total	$915,100.00

1st Defendant/Ancillary Claimant:

Pain, Suffering & Loss of Amenities	$1,200,000.00

Special Damages

Medical Costs	$12,100.00
Lost earnings	$130,000.00
Motor vehicle repair	$25,000.00
	$167,000.00
Total	$1,267,100.00

Interest will run on General Damages from 24 March 2007 at 3% per annum and on Special Damages from the 11th October 2011 at 3% per annum.

Costs to be taxed if not agreed.

David Batts
Puisne Judge