

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T113/1992

BETWEEN	MARGOT THOMPSON	PLAINTIFF
A N D	FOSTERS' TRUCKING CONSTRUCTION COMPANY JAMAICA LIMITED	1ST DEFENDANT
A N D	DAVID DEER	2ND DEFENDANT

Z. Lionel Khan for the Plaintiff

Dennis Morrison instructed by Dunn Cox &
Orrett for the Defendant

Heard: October 4, 7, 1993; September 19, 1994.

Judgment

Theobalds J.

On the 12th March 1992 the plaintiff Margot Thompson, then a school-girl, was the victim of a most unfortunate accident while walking along the sidewalk on Tom Redcam Avenue in the parish of Saint Andrew. She was hit in the face by a piece of steel protruding from a loaded truck which was being driven in the opposite direction along the said avenue. The blow caused her to fall and inflicted on her severe personal injuries with resulting, disability, loss and expense. The truck is owned by the 1st defendant and driven by the 2nd defendant. Liability is not challenged by the defendants but the quantum of damages is. The matter is now before me for assessment.

Dr. Jonathan Calder was the 1st to testify on behalf of the plaintiff. He is a Consultant Ophthalmologist attached to several hospitals and with his own private practice at Tangerine Place here in Kingston. He first saw the plaintiff on 13th March at the Eye Clinic of the Kingston Public Hospital. Hers was an emergency case brought in by some Jamaica Defence Force soldiers who had witnessed the accident. His findings on examination revealed laceration of the nose, corneal laceration of the right eye with iris vitreous prolapse. It is necessary to recall Dr. Calder's evidence almost in its entirety as it is largely on his findings, evaluation and prognosis that any proper assessment can be made.

In his evidence in chief Dr. Calder said that the plaintiff had surgery under general anaesthesia the following day.

Protruding iris was removed and the protruding vitreous was removed - no lens was found in the eye at that time. Lens is part of the focussing apparatus of the eye. It would have been unusual for her not to have had a lens before. Metallic fragments in wound were most of them removed. About two small pieces are still in the eye. Lacerations were sutured - hospitalized - discharged on 2.4.93 for out-patient treatment. She left hospital with a bandaged eye. When next seen her vision was improved from just barely seeing light to part being to make out fingers. On 2nd visit her vision remain similar. The wound was healing nicely and the blood in the vitreous was clearing. She was then on eye drop medication.

I saw her next at hospital. The details of her retina could not be seen because of bleeding into the eye. On 24.4.94 one could then see her retina - this was her 1st private visit to me - the retina was in position but there was still blood blocking total vision of retina. The inferior aspect (bottom) could not be seen.

8th May '92 next seen. Things and vision had improved, but visibility in bottom half of retina was not clear. Now able to see 20/60 with glasses. Targets used what she could see from 20 feet normal person could see from 60 feet. She got glasses much later. Again seen on 29.5.92 one could now see the entire retina - shallow retina detachment and lifting up. She had surgery a few days later on 6.6.92 under local anaesthetic using a freezing probe - retina was frozen at points beyond point of attachment with the objective of creating a scar to prevent the projecting of the detachment. This was successfully done - absolutely successful.

13.6.92 next seen. Retina was still in position.

27.6.92 things going well.

18.7.92 retina doing well but right eye was now drifting slightly outwards. This is a phenomenon in eyes where vision slightly out - not an astigmatism - one eye grossly disturbed and brain gets a distorted vision. It was hoped that with a contact lens eye would come back in.

I prescribed contact lens. I fitted them on 19.9.92. She never gained as well as hoped. Her vision improved but she found she was now having double vision. Two other steps were then contemplated -

- (1) Fitting of prisms i.e. optical devices which move object from where it is to where you think it is. She could not tolerate this.
- (2) Surgery - she was reluctant. She went abroad. Surgery was to re-align the eye. Not one hundred per cent guarantee of success. She had foreign consultation - U.S.A and given new contacts which I examined and found similar. She given exercises to do.

I saw her in November '92 and February '93. 25.8.93 I saw her again. The new contact lens were in and the vision from right eye was now 20/40. Eye still turn out a bit and slight double vision. I foresee she will always have a problem with that eye. Loss of iris and the corneal scar will give her bright light problems. The squint may never be totally corrected. Increase risks of glaucoma and possible retinal detachment. Injury to eye increase risk of glaucoma. Her injury was severe. Right eye assessed at 80% loss. Visual activity and field and movement of eye now. Reading would acquire adjustment as she now has one eye reading. This would not affect the one good eye. On 6.6.92 she was scheduled to have exams. Some individuals have a dominant eye - left or right - function best with that eye - you seem to see better with that eye. Two normal eyes give three dimensional vision. She should wear protective lens to protect her good eye. Possible problems in playing tennis. Will always need medical care. Contacts last maybe one year; she may develop an intolerance to them. You should have an optical test each time you change. You have to keep solutions, for clearing and a storage container. She will have to decide if she needs further surgery. A lens may be put in but loss of her iris makes this more difficult; not a one hundred per cent guarantee of success. Money costs for squint surgery approximately \$30,000.00. Intra ocular lens approximately \$40,000.00 but neither one is guaranteed. I am still seeing her.

His evidence under cross-examination provided a useful balance in arriving at the extent of personal injury and damage to the plaintiff. It also provided some useful insight into the plaintiff's approach to her ambition to become a doctor. She alone can assist herself in solving this problem. It was the doctor's view that in spite of her handicap would expect her not only to get her degree in the Faculty of Natural Science at the University of the West Indies where she is now a student but to eventually qualify in medicine. This was the plaintiff's ambition prior to this accident. It was not to the doctor's knowledge that the plaintiff would be handicapped in any way in entering medical school.

It is against this background that the plaintiff gave evidence as to the events of 12th March 1992. She testified as to walking along Tom Redcam Avenue in the parish of Saint Andrew when she was felled by a piece of steel hitting her across her right eye. She did not lose consciousness. Two soldiers came to her assistance, stopped a taxi and she was taken to the nearby Nuttall Hospital where blood was cleaned from her face and the area bandaged. From Nuttall Hospital she was taken to Kingston Public Hospital where she was admitted. Pain killers were prescribed. Next day she underwent surgery and remained in hospital for almost three weeks during which time the eye was bandaged. She described the pain as intense for the first 1½ weeks. During this period she also suffered from headaches and a swollen left eye for the first day or two. On 2nd April 1992, having been discharged from hospital the bandages remained on while she undertook preparation for her 1st A-Level examination which commenced on 19th May 1992. She described a situation in which her eyes would run water and tire easily compelling her to stop and rest them every now and then. Whenever she tried to study her vision was jumbled. She did not get thru the mock examination in March as she was then hospitalized. In spite of this handicap she was successful in passing some subjects at A'Levels albeit at a lower level than she had expected. In February of '92 she had gained admission to the University of the West Indies based on her O'Level results. She applied for admission to the Faculty of Medicine as she had always wanted to become a doctor.

Instead she was offered admission to the Faculty of Natural Sciences, often regarded as a stepping stone to a degree in Medicine. In September of 1992 she commenced studies in Chemistry, Zoology and Mathematics. It was her case that because of her eye injury she was unable to use a microscope. She dropped Zoology and substituted a course in Beginners French. She could not see the black board and fumes in the Chemistry Laboratory caused her to weep, necessitating that she stop every now and then and take a breathe for five or ten minutes. By the end of 1st semester she passed in French, Mathematics and Economics and was scheduled to do Supplementals in Chemistry in August. She did not do so. Instead she journeyed to Atlanta Georgia to get a second opinion on her eye problem. She consulted one Dr. James Joyner who discovered a drift in the right eye and prescribed contact lenses and exercise. She undertook the exercise course and had contact lenses fitted. The problem with watering of the eyes ceased but a new problem then surfaced. She had pronounced double vision and complained that glare from the sun was affecting her. She even complained of difficulty in walking on the streets. Without the contact lenses she only saw outlines of objects such as on the television and black-boards. With the contacts vision was improved but of course, she would have to rest the eyes from time to time. She did not say how often or for what periods of time.

Under questions from Counsel who appeared for her the plaintiff said that she was unable to say what were her chances of getting into medical school. On this however Dr. Jonathan Calder's view was instructive. It was his opinion that she could get her degree in Natural Sciences and move on from there to qualify in medicine. At the time of ^{the} hearing the plaintiff was no longer doing Practical Chemistry, as laboratory work was involved and for reasons stated earlier she found this a problem. Dr. Calder's opinion was that this problem could be solved by the use of protective goggles but the plaintiff claimed that she had tried the protective goggles given to her but she could not agree that such protective goggles would better protect her eyes. She was familiar with diving goggles but objected to using them because it "sort of pulled her eyes". She even went so far as to disagree with Dr. Calder's view.

She did not think that she could perform adequately in her studies or in the practice of medicine. As a result she was considering working in the industrial field as an alternative. She however ruled this out as it was her view that working in laboratories would be a problem. Although she was now working for her B.Sc (general) and had considered teaching, she had ruled that out too as she did not like teaching. Further all she could see was economic loss to her whether she taught or worked in the industrial sector.

Although the plaintiff stated quite clearly under cross examination that year before last her vision was quite blank and that last year it seemed just lopsided she declined to agree that she was gradually adjusting. It is my view based on Dr. Calder's evidence that she is showing steady improvement and that with proper treatment recovery should be complete. By this time her dismal, forlorn and negative attitude to her future prospects in life was getting to me. I was minded to ask if she were to lie down and die would she refuse to enter the pearly gates if they appeared blurred or lopsided to her. It was with a sigh of relief that I recorded her answer to a somewhat watered down version of this question. Her reply was that "she had enjoyed her visit to Atlanta; it was her second visit and apart from problems with the glare she never felt in any way restricted." The underlining is mine. And a breath of fresh air, a ray of light in the wilderness she went on "I tried to do what I could do".

The question I then asked myself was - If this was her approach to life while in Atlanta why could she not successfully adopt such an approach while here in Jamaica getting on with her life? The plaintiff in her evidence had conceded that if she were to secure 1st class Honours in the B.Sc examination she would be qualified to enter Medical School. She further agreed that with proper application she could do anything she wanted to do. With these admissions it is difficult to follow how the plaintiff could justify such a negative attitude to her future. Guided somewhat by the expert evidence of her own doctor (and she is still his patient) and by my own assessment of her demeanor I am satisfied that she is under an obligation to make whatever effort is required to achieve her ambition.

Legally she is under a duty to mitigate her damage and I am obliged to assess the damage on such a basis. I trust that if and when she reads this judgment she will be further motivated. She should continue her studies in whatever sphere she wishes. If, and she had so stated, Zoology would be an advantage to her then there is no reason to discontinue. If, and she had so stated, "with enclosed goggles fumes never bother me" then get enclosed goggles and re-enter the Chemistry Laboratory with gusto.

In her statement of claim dated 23rd July 1992, the plaintiff provided certain particulars of personal injury. Included among these were that on examination the Doctor found that the visual acuities were right eye perception of light 20/20. Other findings of significance included a right cornea-scleral laceration with iris and vitreous prolapse. The plaintiff underwent surgery to her right eye; this included vitrectomy excision of the prolapsed iris and repair of the corneo-scleral laceration. She remained in hospital from the 10th March to the 2nd April, 1992. The vision in the right eye gradually improved as the haemorrhage cleared. (All underlining is mine.) She had cryotherapy to her right eye to secure an area of retinal detachment. The best corrected visual activity of her right eye is now facial 20/60..... She also had facial scars. Among the plaintiff's present complaints are double vision, a feeling of awkwardness whilst walking especially in traffic, eyes that tire easily and water, inability to stand the glare and to remain in the sunshine, limited reading and television viewing, right eye with very blurred vision (can't see out of it), a feeling of sticking in the right eye." The purpose of quoting from the statement/claim is to show that with the passage of time between July 1992 and the date of hearing there has been steady improvement. There can be no question that this is Dr. Calder's view. The plaintiff herself though not so willing so to concede has herself demonstrated this in her evidence. This Court is now faced with the formidable task of compensating the plaintiff in monetary terms by putting her as nearly as possible in the same position as she would have been if she had not sustained the injury - per Lord Scarman in *Lim Poh Choo v Camden & Islington Area Health Authority* (1980) A.C. 174. In arriving at such a figure one has to be guided not only by what is fair to the plaintiff but is also fair to the defendant.

Learned Counsel for the plaintiff has gone to great pains as well she may do, to paint as hopeless a picture of the future life of the plaintiff as the plaintiff herself sought to do. Indeed all but two of the nine cases cited by her on quantum from Volumes (1), (2) & (3) of Khan's Reports deal with a total loss of vision in one eye. This is certainly not the case with this plaintiff Miss Margot Thompson. Also cited was the well known case of *Kiskimo Ltd. v Deborah Salmon S.C.C.A No. 61/89*. This was an authority for the recommended use of the multiplier/multicand principle which was invoked by the trial court in that case. A suggested multiplier of 18 reduced to 15 and ultimately adjusted downward to no lower than 12 was made. This was of course in relation to the claim under the category of loss of future earnings. Both Margot Thompson and Deborah Salmon were young unemployed persons still of school age. Neither one had ever been gainfully employed. The similarity ends here. Ms. Salmon was very seriously injured in a motor vehicle accident on 21st April, 1982. She was unconscious for 5 weeks thereafter and partially conscious until July 1982. Apart from orthopaedic disability, being unable to walk or use her hands, she suffered severe brain damage epileptic seizures and intellectual impairment. There was absolutely no prospect of recovery. But she had not only ambition but a fighting spirit to support it. Ms. Thompson's injury, though described by Dr. Calder as severe, was slight in comparison. Coincidentally so was her fighting spirit. I have already touched on this. By no manner of means can Ms. Thompson be said to be totally deflected from her ambition to become a doctor. If she does not do so it is more probably because she lacks motivation, places limitations on her own ability, and makes slight obstacles into insurmountable barriers than because of the injury she suffered in this accident. Even allowing for the approach with which I entirely agree, of Lord Reid in *H. West & Sons Ltd. v Shepherd (1964) A.C.* pp 340/341, "the real loss is not so much the physical injury as the loss of those opportunities to lead a full and normal life which are now denied to her by her physical condition - for the multitude of deprivations and even petty annoyances which she must tolerate" I cannot find any basis for using the "arithmetical approach" involved in that case.

To the agreed amounts of \$63,220.00 for special damages and \$200,000.00 for future medical care I would add an amount of \$100,000.00 for handicap in the labour market; and for pain, suffering and loss of amenities the global figure of \$250,000.00. There will be judgment for the plaintiff against both defendants for \$613,220.00 with costs to be taxed if not agreed. Interest of 3% on special damages from 12th March 1992 to 16th September 1994 and on general damages at 3% from 23rd July 1992 to 16th September 1994.