IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A181 OF 1985

BETWEEN	NORMA ANDERSON	PLAINTIFF
AND	FEDLAM WILLIAMS	DEFENDANT

Mr. Ainsworth Campbell for Plaintiff

Mr. Alton Morgan for Defendant

HEARD: 23, 24th, 25th, 27th March, 3rd April and 3rd July, 1992.

CORAM: MORRIS J. (Ag.)

This is an action in which the Plaintiff claims damages for negligence arising out of a motor vehicle accident which occurred along the Windward Road on the 20th January, 1985.

The Plaintiff, a 29 year old woman, was a pillion passenger on a motor cycle ridden by one Kenneth Henry. Her account of the accident is as follows:-

At around 11 p.m. the motor cycle on which she was a pillion passenger was being ridden in an easterly direction on the Windward Road towards Harbour View on the left hand side of the road. There was a Yellow Cab motor car going in the same direction coming from behind the motor cycle. As the car was about to overtake the motor cycle a vehicle approached from the opposite direction. In the act of overtaking, the Yellow Cab had to swerve to its left to avoid hitting the oncoming vehicle. This caused the car to hit the motor cycle resulting in the Plaintiff falling to the ground and sustaining serious injuries. She was pushed some distance on the asphalt by the motor car. She denied that the motor cycle swerved into the path of the car or changed direction in any way.

Under cross-examination she said accident occurred a few chains before reaching the Bellevue Hospital and then she stated unequivocally -

> "It is not the two way section but the one way section."

This clearly means that the accident occurred on the dual carriageway. The defendant's version is that at 11 - 11.30 p.m. on Sunday the 20th January, 1985 he was owner and driver of a 1962 Austin Cambridge taxi cab registered NH7036. There had been gas price demonstrations earlier the previous week consequently there was a lot of debris on the roads of the Corporate area. In particular, there was debris on the left hand side of the dual carriageway going easterly along Windward Road towards Harbour View. He was travelling along Windward Road going past Bryden Street towards Paradise Street where the dual carriageway commences. He saw a motor cycle coming up Paradise Street on his right turning right on to Windward Road ahead of him. The entire left hand side of that section of the dual carriageway was impassible, but there was no obstruction on the right hand side. He was driving at a speed of 25 - 30 miles per hour. As he proceeded the road was "clearing up", presumably there was less and less debris. He was 1 - 1½ chains from the motor cyclist when the latter entered the dual carriageway. Speed of motor cycle was 30 - 35 miles per hour. Both vehicles increased speed to 35 - 36 miles per hour. There was a woman on the back of the motor cycle. I now quote this aspect of his evidence.

> "There were two passengers on motor cycle, a man and a woman. I was driving behind the bike on the right hand side of the road. Sometime bike come on the white line to avoid debris on the left. Soon as he find the road clear he proceed on. Approaching Vauxhall School I was about to pass him. There was a road man-hole on the left covered with a lot of broken bottles. I press about to pass him. He shift from the manhole and shift into the car. It shifted to its right. The left fender of car knocked the bike down. The bike and the man drop on the left hand side and the lady drop in front of the car almost to the left. I applied the brakes but it couldn't stop same time. I feel the wheels lock up and the car sliding on something. I end up stop about two car lengths."

Both sides agree that the accident took place on the east-bound section of the dual carriageway and there is no evidence that

the west-bound section was blocked in any way. I therefore reject plaintiff's account and accept that of the defendant.

On the question of liability I accept defendant's evidence that:-

Motor cycle travelled 4 to 5 chains on dual carriageway to point of impact. Defendant's motor car was 1 - 1½ chains from motor cycle when the latter entered dual carriageway.

There were varying amounts of debris on the left hand side of this section of dual carriageway extending almost to white line at different points.

Accident occurred before vehicles reached in front of Vauxhall School gate which has a fairly wide entrance. Obstruction of road by debris continued beyond this point.

Instead of travelling on the right hand side, the motor cyclist rode in a zig-zag manner on the left to avoid the debris.

Defendant had the motor cycle under observation from he entered dual carriageway.

Plaintiff became aware of presence of car when defendant was about to overtake.

In the light of the foregoing I find:-

From car entered dual carriageway it was constantly gaining on the motor cycle.

The road was dry and lit with the usual street lights.

Defendant had motor cyclist under observation from he entered dual carriageway.

Plaintiff became aware of presence of car when defendant was about to overtake. Consequently car came up on motor cycle fairly quickly.

Defendant saw or ought to have seen motor cyclist approaching manhole covered with broken bottles.

Debris from the manhole extended to left curb so that the motor cycle could not swerve to the left of manhole.

The motor cyclist swerved to his right without giving a signal in order to avoid this obstruction.

The defendant failed to observe motor cyclist swerve and therefore took no action to avoid impact, only applying his brakes after collision. It must have been apparent to him that, having regard to his manoeuvres the motor cyclist was going to swerve from the manhole cover. He should therefore, in my opinion, have taken steps to warn the motor cyclist of his presence on the road by either dipping his headlights continuously and/or sounding his horn.

In Charlesworth and Perry on Negligence, paragraph 10 - 134 the following principle is laid down.

> "A driver should use reasonable care not to swerve outwards, so as to get in the way of the vehicle overtaking him. Milliken v Glasgow Corp. 1918 S.C. 857."

The following extract is taken from Bingham's Motor Claims Cases, 8th Ed. page 75.

> "In daylight on a straight road a motor scooter was overtaking a motor van when the van swerved to the offside and the scooter collided with the offside front wing of the van. The van driver had not seen the scooter in spite of having two outside mirrors and an interior mirror. The judge held the van driver was negligent in changing course without warning when it was extremely dangerous to do so, but held the scooter rider one-third to blame for having failed to hoot to show his intention to overtake. The scooter rider appealed.
>
> HELD: There was no ground on which the Court of Appeal should interfere. In the ordinary way if a motor scooter was overtaking another vehicle which was going straight along a road there was no need for the scooter to hoot before overtaking if the scooter was giving reasonable clearance. In this case the judge must have come to the conclusion that the movement of the van was such as to put the scooter rider on enquiry as to what the van was going to do."

Emphasis mine.

Holack v. Bullock Brothers (Electrical) Ltd. 1964 Sol. Jo.681 affirmed 1965 109 Sol. Jo. 238 C.A.

A fortiori where as in the instant case the defendant must have been put on enquiry by the movements of the motor cycle over a distance

of 4 chains and failed to keep a proper lookout at the time of overtaking. This has the consequence of increasing his degree of culpability significantly. In addition the motor cycle was hit from behind. I therefore find that his negligence was the substantial cause of the accident. On the other hand the motor cyclist swerved to his right without giving a signal.

In the circumstances I apportion blameworthiness 30% to motor cyclist and 70% to defendant.

DAMAGES

Plaintiff was hit from pillion seat of motor cycle, fell on the asphalt and was pushed some distance by defendant's motor car. She lost consciousness at the time and regained it in the Kingston Public Hospital on the morning of Thursday the 24th.

On admission she was examined by Dr. Lee Martin, Neurosurgical Registrar at the Kingston Public Hospital. His medical report was tendered in evidence by consent, the material parts of which read as follows:

> "The abovenamed patient was admitted to our hospital on the 20th January 1985 as a result of injuries she allegedly received in a road traffic accident. She was allegedly hit off a motor cycle, on which she was travelling as a pillion rider. She was brought into the hospital unconscious and she vomited and fitted once immediately after the impact. On examination, she was a young lady unconscious, but reacting to deep pain, afebrile, acyanotic, bleeding from both ears and from the nostrils, mucous membranes pink.
>
> Musculo skeletal - Head:
>
> (a) Bleeding from ears and nostrils
> (b) 5 cm. (deep) laceration, transversely above helix of right ear.
> (c) Multiple abrasions to face.
> (d) Superficial burns to face, covering approximately the whole face.
> (e) Superficial burns to chest; and abrasions to chest
> (f) Multiple abrasions to upper limbs.
> (g) Superficial deep burns to sucrum, between natal cleft and the posterior aspect of the right thigh.
> (h) Superficial burns to knees and left calf.
>
> An assessment of (1) Cranio-cerebral trauma was made with (a) mild to moderate cerebral contusion, and (b) base of skull fractures. (2) Multiple abrasions of body. (3) 20% flame burns to skin. She was treated with the appropriate anti-biotics, anticonvulsants, tetanus toxoid and Dexamethasone and approximately twelve hours after admission she became conscious and alert.

> "As a result of the burns she received, her stay in hospital was prolonged and her entire stay was eighty nine days. She was discharged home on the 19th April and advised to continue treatment at home and on an out-patient basis. She has been seen twice in the out-patient department since, and the burns in the natal cleft has (sic) healed, but this has caused the two sides of the buttock to fuse together; and a wound on the left leg has not completely healed as yet. A final assessment of disability cannot be made as patient wounds has (sic) not completely healed."

Her condition is described as follows:

Dentures missing.

Lying on abdomen for two months due to pain and scarring to buttocks.

Scars all over body. Burns right side of head, left side of face, chest, head, across chest, deep, not superficial. Burns and scarring on right arm. Left arm scarred in upper and lower areas. Buttocks healed with scars. Scars on calf of right leg, very long, discolouration.

Able to look after and bathe self after two months

Pain across back when standing for long period.

Significant amount of pain when passing stool as buttocks have been healed close with scars over rectum.

Significant personality changes while staying at parents' home. Due to regular bouts of temper and a generally miserable attitude, stay restricted to six weeks. Before the accident she was quite the opposite, quiet, reasonable, easy to get along with, kind and loving. Her parents had to issue an ultimatum for her to leave if her behaviour did not improve. She then went to live with her niece Cecille Robinson, sharing a room with the latter's 9 year old son. There were no problems as Miss Robinson seemed to have been more understanding.

Before accident plaintiff had a boyfriend with whom she had sex every night if possible and enjoyed it. After accident she experiences much pain in her buttocks when having sex which now takes place about 3 times per week. Her former boyfriend has left her since accident and she goes through the ordeal, for her, of

sexual intercourse to keep her present boyfriend.

She cannot sit to pass her stool but has to stoop. She has to practise personal hygiene in this area in an unusual manner from the front due to the condition of her buttocks.

Before accident plaintiff would go on outings to the beach regularly on Sundays, enjoying swimming and sea bathing. Since accident she cannot put on bath suit due to scars. She has to keep her body covered.

Before accident she was fashion-conscious but is now unable to wear the types of clothes she would like to wear.

Regarding her state of mind she had this to say:

> "Everyone asks what has happened when they see scars. I feel miserable as I have to answer questions over and over."

Whenever she walks in the sun she feels giddy. This condition is continuing.

Dr. John Hall C.D. M.B.B.S. Specialist Neurologist, F.R.C.P. examined plaintiff on 2nd July, 1985. Complaints related to accident. They were headaches, giddiness, backache, pain in buttocks in sitting and during sexual intercourse. Personality changes (Already adverted to). He found her to be a well-nourished young woman who had abnormality relating to:

(1) Her nervous system

(2) Her teeth

(3) Multiple scars on her limbs and torso related to events at the time of accident.

There was significant memory deficit from recent and past events. She was unable to do the Serial Seven Test. This test requires patient to subtract 7 from 100 and to continue down until zero is reached. She was unable to recall nine times table, to name the National Heroes and the date of the Abolition of Slavery.

She had attended Oberlin High School from which she graduated in the fifth form with G.S.C. levels in English, Child Care and Science in 1982.

The gaps in memory and cognative function were inconsistent with the rest of her performance and pointed to some abnormality of function in brain and nervous system. Having seen the report of Dr. Lee Martin, the fracture at base of skull points to quite serious head injury at time of accident. Brain shaken up and traumatised producing abnormality in above Clinical Functions. Plaintiff would be unable to sit or stand for protracted period. She could sometimes forget to carry out orders given to her. Personality changes due to brain damage. Prospect of post-traumatic epilepsy, Parkinson's disease, Alzheimer's.

Under cross-examination Dr. Hall said he never saw any Xrays of her cranium. An ultra sound echostat of brain was conducted and showed no midline shift of brain. He agreed that attempts towards epilepsy can be controlled by use of anti-convulsants. He did not find it necessary to prescribe this course of treatment for plaintiff. The word "fitted" used by Dr. Lee Martin connotes epilepsy. This puts case within the higher ten percent of cases resulting in epilepsy.

I now turn to evidence from members of plaintiff's family.

The first was Sylvester Anderson, a 28 year old brother. He and his sister grew up together and attended the same schools. At Oberlin High School plaintiff was a prefect for about three years. She has a 7 year old child. Before accident she was generous, loved by all, always respectful to her parents and attended church regularly. After accident she has become hostile, uses indecent language and has threatened to kill her own child, chasing her down with a machete. Plaintiff's mother also gave evidence to the same effect.

During the course of the trial Mr. Campbell applied for and was granted leave to make the following amendments:

i) Item - Medical Bill on page 5 of Statement of Claim increasing Loss of earnings from 20th January, 1985 to 31st October, 1991 = $40,000.00.

ii) Adding claim for loss of earnings 1/11/91 to date of trial, 12 weeks @ $300.00 = $3,600.00. Finding the terms used in paragraph (xxviii) too conservative, Mr. Campbell's final

amendment was as follows:

iii) Plaintiff has become an epileptic.

Mr. Morgan objected to the third amendment on the ground that there was no evidence to support it and cited the case of S.C.C.A. 15/90 Black v. Bhalai and Anor. This matter will dealt with below.

Mr. Campbell made written submissions which form part of the record. The suggested figure of $2,000,000.00 for Pain and Suffering and Loss of Amenities is beyond the wildest expectations of a plaintiff in a case of this nature. He cited four cases from Khan's Personal Injuries Awards Volume 2. The first was Ellis v I.C.C. Ltd. C.A.6/84 found on page 165 heard at first instance on 1st March 1985. The injuries were extensive acid burns to 40% of the bodily surface occasioned by the plaintiff being severely burnt by sulphuric acid. The sum awarded on Appeal for Pain and Suffering and Loss of Amenities was $150,000.00. The second was Kawalsingh v. DaCosta Bros. C.L. 1983 S 383 on page 169 decided 7th May, 1985 Plaintiff suffered first and second degree burns to shoulder assessed at 18% - 20% of body area. There the sum awarded was $60,000.00. Here, the plaintiff suffered superficial burns to most of her face, chest, sucrum between natal cleft and the posterior aspect of the right thigh, knees and left calf. These are not dis-similar to those in the Kawalsingh case. The hospitalisation, loss of amenities, the emotional and psychological effect of the injuries on the respective plaintiffs also appear to be quite similar. It is my view, therefore, that the instant case is more in line with the Kawalsingh case than the Ellis case. The third case is Roy Berry v. Paul Fearon and Anthony Fearon Vol. 3 page 170 decided 29th May, 1989. The injuries were chemical burns to forehead, right upper eyelid, right cheek, right shoulder, right upper arm and body. An award of $90,000.00 was made. If one looks closely at this case and the Kawalsingh case taking into account the rate of inflation the similarity in the awards will be readily appreciated.

I now come to the question of epilepsy. Dealing with Mr. Morgan's submission that there was no evidence to support a positive finding in this regard I will mention those material aspects

of the cross-examination of Dr. John Hall not dealt with supra. He did not conduct an awake electroencephalogram test. He also opined that neurogically, no purpose would be served in doing an up-to-date examination. It is common ground that plaintiff suffered an epileptic seizure. Dr. Hall stated emphatically - "There is certainly the prospect of post-traumatic epilepsy". I will now make a comparison of the relevant portions of the respective medical reports in the Black case and the instant case.

1. In the former there was a loss of consciousness for 20 minutes. Here, the period was approximately 12 hours.

On day of accident plaintiff had 3 epileptic seizures. Here the plaintiff had one.

3. Skull Xrays showed a fracture of the right parietal bone. Here there were fractures at the base of skull.

4. In the Black case plaintiff took Dilantin capsules, an anti-convulsant medication for over one year. Here, among other types of medication, plaintiff was also treated with anti-convulsants, tetanus toxoid and Dexamethosone approximately 12 hours after admission.

5. There is no history of vomitting in the Black case while here plaintiff vomitted once after impact.

6. In the former case there was no change in plaintiff's memory or concentration. Here plaintiff has suffered personality changes.

7. In neither case has there been a recurrence of epileptic attacks.

8. In the former case, the doctor, speaking generally had this to say:

> "Late epilepsy, defined as epilepsy occurring more than one week after injury, affects approximately five per cent of victims of a non-missile head injury. About a quarter of this late onset group have their <u>first fit</u> more than four years after their injury."

Emphasis mine. The question therefore poses itself. What is the bottom line? To answer this I quote a passage from the judgment

of Sachs L.J. in the case of Jones v. Griffiths 1969 1 W.L.R. page 798.

> "The width of those brackets is indeed selected in the various cases to which this court has been referred. Epileptic attacks are normally divided broadly into two categories. There are those which involve major convulsions of a highly unpleasant type, and in those cases the person concerned is said to be suffering from grand mal. The other category consists of attacks of lesser degree, the person concerned being often said to be suffering from the petit mal type of epilepsy. Accordingly one has, as regards cases cited, to read the reports somewhat carefully to see which of those two types was under consideration; to note whether the case concerned somebody who was already subject to those attacks; or whether the person concerned was somebody who, despite not having previously had such an attack, would yet in medical experience be at risk in future of having those attacks. It is only from that foundation that one can go on to appraise the award in relation to the risks of further attacks ensuing."

Emphasis mine.

In the light of the foregoing I therefore find that the plaintiff here who did suffer an epileptic attack comes within the category of a person who is subject to attacks of that nature in the future. Risk of post-traumatic epilepsy assessed at 10 per cent to time of trial.

Mr. Campbell's attempt to use the figure of $1,000,000.00 which was the starting point in the Black case is a clear indication that he has overlooked the reasoning of Carey J.A. which involves the discounting necessary to arrive at a figure commensurate with the injuries in a particular case. In that case the figure awarded was $100,000.00. On the question of Loss of Amenities any award is included in the sum awarded for the injuries.

Turning now to Special Damages the following items are allowed.

Loss of pair of shoes	-	$75.00
Loss of pair of jeans	-	75.00
Loss of blouse	-	50.00
Loss of watch	-	150.00
Loss of pair of earrings	-	150.00
Travel up to the 15/5/85		400.00
Medical Bill		850.00

The evidence disclosed that due to her injuries and consequent hospitalisation plaintiff was unable to retain her employment at Mr. Jimmy's Photo Studio where she had been paid $150.00 per week. After her discharge from hospital in June 1986 she visited different photo studios but there were no vacancies. At other places there were vacancies in the area of typing and filing. Between then and 1990 plaintiff did - "a little sewing which provided me with something to help me along." She charged $20.00 to sew a dress. In 1990 she commenced training as a typist and obtained employment at Clark's Park City Ltd. in Kings Plaza, St. Andrew. She worked there from November to December, 1991. She was unable to retain this job due to her disabilities. Her former employer, Mr. Owen Clarke testified that she performed intermittently and was very forgetful. Having regard to her perceived potential he had several discussions with her and then he learnt about the accident and the attendant emotional and psychological instability. There were times during this short period of employment when she performed satisfactorily and Mr. Clarke opined that had she continued at the same stable rate she could have been earning up to $500.00 per week with allowances for food and transportation. However, for the reasons given above, he had to terminate her services. He also testified that she would have been entitled to a food allowance of $50.00 per week and a daily travel allowance of $3.00. Based on this evidence, by 1995 plaintiff would have been earning $931.00, having a 20% annual increase in her salary. These figures have not been contested, indeed Mr. Morgan has described the submissions as well-made but requested that figures be discounted by 50% due to the fact that plaintiff is capable of being self-employed i.e. doing dress-making, working in a Day Care Centre etc. Regarding this question of Loss of Future earnings I accept Mr. Campbell's submission that a 3 year multiplier should be used and his reasons therefor. In the unreported case of S.C.C.A. 74/84 Michael Thomas v. James Arscott & Anor. plaintiff lost his job on account of his

disability, having been injured in a motor vehicle accident. He was in fact made redundant. He was aged 26 and multiplier of 5 years was used.

Regarding the multiplicand to be used, I find the estimates given by Mr. Clarke as such too generous. In all the circumstances the figure will be -- $550.000.00

Using a multiplier of 3 this would come to 85.800.00

Less Income Tax S.C.C.A. 44/88 Darby vs. Jamaica Telephone Company and Another per Carberry J.A. 28,600.00

57,000.00

Finally, the question of Loss of earning capacity or Handicap on the labour market has to be addressed.

In the case of S.C.C.A. No. 65/91 United Dairy Farmer & Anor. v. Lloyd Goulbourne b.n.f. Gloria Williams Campbell J.A. (Ag.) as he then was had this to say.

> "Loss of earning capacity as a head of damage is peculiarly suited to circumstances where though there is no satisfactory evidence to sustain an award for future loss of earnings because for example the pre-accident and post-accident level of earning remains the same, yet there is evidence which satisfies the Court that in consequence of the injury and disability suffered by a plaintiff he is deprived of a special earning capacity which he would have had but for his injury and disability or he is in consequence of such injury and disability at a distinct disadvantage or otherwise handicapped in the labour market."

Here the plaintiff was in the same employment at date of trial.

I also quote a passage from the judgment of Carey J.A. in S.C.C.A. No. 44/85 Noel Gravesandy v. Neville Moore at page 4:

> "The claim for loss of earning capacity is more likely than not to arise in cases where the plaintiff is in employment at the time of trial or assessment, for as Browne L.J. points out, if the plaintiff is earning as much or more than he was earning before he suffered injury, he can have no claim for loss of future earnings capacity if he should ever lose his present job."

In the circumstances I decline to make an award under this head.

In fine there will be judgment for the plaintiff with blame worthiness apportioned 30% to plaintiff and 70% to defendant. Damages are assessed as follows:

Special Damages	-	$1,750.00
Loss of Earnings	-	8,000.00
General Damages		
Pain and suffering and		
Loss of amenities	-	200,000.00
Loss of future earnings	-	57,200.00
Interest at 3% on $1,750.00.		
Interest at 3% on $200,000.00.		

Cost to the Plaintiff to be agreed or taxed.