IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CLAIM NO: HCV 02876 OF 2005

BETWEEN	TREVOR BENJAMIN	CLAIMANT
AND	HENRY FORD	1ST DEFENDANT/ANCILLARY CLAIMANT
AND	WILBURN PALMER	2ND DEFENDANT/2ND ANCILLARY CLAIMANT
AND	RICHARD NICHOLAS	3RD DEFENDANT 1ST ANCILLARY DEFENDANT
AND	DEVERTON MEEKS	4TH DEFENDANT/2ND ANCILLARY DEFENDANT

Ms. Christine Mae Hudson instructed by K. Churchill Neita and Co for the Claimant; Mrs. Pauline Brown-Rose for the 1st and 2nd Defendants; Mrs. Andrea Walters-Isaacs for the 3rd and 4th defendants.

Heard: March 22 and 23, 2010.

Personal injuries; credibility of witnesses. Soft tissue injury with no resulting PPD; Award of costs where claimant succeeds against one set of defendants (3rd and 4th) and other set of defendants/ancillary claimants (1st and 2nd defendants/1st and 2nd ancillary claimants) also succeed against same defendants/1st and 2nd ancillary defendants.

Coram: ANDERSON J.

This is a simple personal injury matter in which the critical question is who is to be believed. The Claimant says that, at about 6:00 a.m. on the morning of May 28th 2005, he was a passenger in the back seat of a motor vehicle registered licence # 6064 PP in the Bull Bay area of St. Andrew. The vehicle in which he was travelling was owned by the 3rd defendant and driven by the 4th defendant. It was proceeding from Kingston when it was involved in an accident with another vehicle #9279 EL, owned by the 1st Defendant and driven by the 2nd Defendant, which was coming in the opposite direction. It was the evidence of the claimant that the accident was caused by the approaching vehicle which swung away from a pothole on its side of the road to the lane of oncoming traffic. He said that he sustained injuries which on

the report of the doctor admitted into evidence as Exhibit 1, are properly characterized as soft tissue injuries. There has been some residual pain which persists but certainly no fracture.

The 1st and 2nd defendants, as ancillary claimants, filed an ancillary claim against the 3rd and 4th defendant as ancillary defendants. In that ancillary claim they allege that the 4th defendant, the driver of the vehicle in which the claimant was travelling, was the cause of the accident. It was the case of the 1st defendant that as a result of the collision the 1st defendant suffered the total loss of his own motor car valued at $200,000.00 and had to bear the cost of alternative transport of supplies to his pig farm in St. Thomas to the tune of $35,000.00

The 2nd defendant says that, contrary to the story of the claimant, he had parked his vehicle in front of a cook shop and bar having just come off a bridge at the "Kingston end" and had turned right across the street to stop in front of the cook shop/bar. He said that as he sat awaiting the opening of the cook shop, a truck came off the bridge and came over to the right side of the road (his wrong side) in order to avoid the pothole which was about two chains ahead on the left hand side of the road for traffic proceeding towards Kingston. It was his further evidence that the car driven by the 4th defendant was approaching where he was at a very fast rate and swerved to avoid the truck, colliding with the left side of his vehicle causing severe damage to that side of the vehicle.

It is clear that both accounts cannot be correct.

In the amended particulars of claim, the claimant alleged particulars of negligence against the 4th defendant, the driver of the taxi in which he was travelling and also averred that he was the servant or agent of the 3rd defendant. He made similar allegations against the 2nd defendant, the servant or agent of the 1st defendant.

The Witnesses.

The claimant was not a very convincing witness. He was sure that the vehicle he was travelling in was going at a fast speed but does not know whether it was in excess of the speed limit. He also suggested in his cross examination that the point of impact was the right front of the taxi and the left front of the vehicle of the 2nd defendant. In fact, as he described it, the vehicles kissed. This does not seem consistent with the damage in the estimate given for the repairs of the 1st defendant's vehicle. It is apparent that the entire left side of the 1st defendant's

vehicle and that was consistent with it being broadsided by the vehicle being driven by the 4th defendant.

On the other hand, I was impressed by the clarity and credibility of the 2nd defendant who was only compromised in his evidence by the reference in his witness statement to the pothole being "behind the car" a situation which he insisted in his cross examination was incorrect. The pothole was about 2 chains further along on the way to Kingston and he never waivered from that position.

I accept the evidence of the 2nd defendant as to the respective positions of the vehicles and the pothole. In particular, I accept his evidence that it was the position of the approaching truck and the speed of the taxi coming toward it that was the proximate cause of the collision. In fact, I am reinforced in my view by the description of the roadway, the soft shoulder, the position of the rail from the end of the bridge to the point where the 2nd defendant turned off the main road to the cook shop and in particular, his very good descriptions in terms of measurements.

The 3rd and 4th defendants chose not to give evidence and so I have nothing from either of them to counterbalance the view I have expressed above. In the circumstances, I find that, on a balance of probabilities, the claimant should succeed against the 4th defendant and that as he was the servant and/or agent of the 3rd defendant, the said 3rd defendant is vicariously liable. I hold that the 1st and 2nd defendants are not liable to the claimant in negligence.

In so far as the ancillary claim is concerned, I would also find in favour of the 1st defendant/ancillary claimant against the 3rd and 4th defendants/ancillary defendants. However, special damages must be strictly proven and I am not satisfied with the evidence of the damages purportedly proven by exhibit 2 as well as the claim for the cost of alternative transportation. I therefore make no award for damages for the ancillary claimants.

In so far as the claimant is concerned, I was referred by counsel for the 1st and 2nd defendants to the cases of Peter Marshall v Carlton Cole, Khans Volume 6. There the claimant suffered moderate whiplash, sprain swollen and tender left wrist and hand, and lower back pain and spasm. He was awarded on October 17, 2006 the sum of $350,000.00 a figure now worth approximately $535,000.00.

Mrs. Walters Isaacs did not differ from Mrs. Brown Rose with respect to treating the above case as reasonable authority.

Ms. Hudson for the claimant referred to Williams v Buckley and Another HCV 00247 of 2009. The claimant there had injuries to several parts of his body and suffered strain to the ligaments of the lumbar vertebrae causing moderate back pain. It was mostly soft tissue injuries and a full recovery was expected in eight or so months. He was awarded $750,000.00 for pain and suffering in December 2009. She also referred to Irene Byfield v Ralph Anderson et alios Khan's Volume 5 where the claimant suffered injuries to chest, back and neck, trauma to back resulting in lumbar strain giving rise to severe back pains; abrasions to lower leg and stomach and headaches. The claimant in that case who had been injured in August 1991 was up to October 1995 still feeling the effects in October 1995. She was awarded the sum of $300,000.00 on September 18, 1997, a figure which now translates to $1,014,700.00.
Finally, Ms. Hudson cited Milton Goldson v Buckley and Anor HCV 01260 of 2009, damages assessed December 9, 2009. There the claimant had head, neck and body pains and muscle spasms. He had muscle and ligament damage giving rise to difficulty turning his head to the side, flexing his shoulders and twisting his torso. He had muscular tenderness along the spinal column, and was treated with muscle relaxants and anti-inflammatory drugs. A full recovery was expected. He was awarded $850,000.00. Ms. Hudson felt that the Peter Marshall case was out of congruence with the trends of awards in this type of case and suggested that in light of the other cases cited, an award of $800,000.00 would be appropriate.

With respect to these cases, Mrs. Brown Rose felt that the cases cited by Ms. Hudson were more serious and in each case the period of recovery was considerably longer than the three (3) weeks spoken of in the instant case.
Having taken all things into account, I am of the view that an award for general damages for pain and suffering and loss of amenities should be $700,000.00. There was agreement for special damages up to a figure of $13,250.00. The claimant claimed in addition loss of income from his printing business but it is clear that even he admitted that he was unable to show that he had in fact lost the sum of $20,000.00 which he was claiming. In addition, he was unable to

strictly prove his loss of earnings as a part-time waiter or teacher and these sums are disallowed.

In the result, I give judgment for the claimant against the 3rd and 4th defendants. I award special damages of $13,250.00 with interest at 6% from May 28, 2005 to June 21, 2006 and 3% from June 22, 2006 to today. I also award general damages for pain and suffering and loss of amenities in the sum of $700,000.00 with interest at 6% from the date of service of the claim form to June 21, 2006 and 3% from June 22, 2006 to the present. I also award costs to the claimant against the 3rd and 4th defendants. I further award costs to the 1st and 2nd defendants/ancillary claimants against the claimant, such costs are to be paid by 3rd and 4th defendants. I also award costs to the 1st and 2nd defendants/ancillary claimants in the ancillary claim against the 3rd and 4th defendants/ancillary defendants.

ROY K. ANDERSON
MARCH 23, 2010