IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1975/D117

BETWEEN	KATHLEEN ASHTON DeOWENS	PLAINTIFF
AND	ALFRED YOUNG	
AND	KENNETH BENNETT	
AND	BRUCE BEACROFT BARKER (Administrator of the Estate of Fernandez Rodriques Oliva, deceased)	DEFENDANTS

Mr. Emile George Q.C. and Mr. Edward Ashenheim instructed by Milholland, Ashenheim and Stone for Plaintiff.

Mr. Crafton S. Miller and Mrs. Monica Earle-Brown instructed by Crafton S. Miller and Co. for the First and Second Defendants.

Mr. Alvin Mundell for the Third Defendant.

Heard: September 24, 25 and 26, 1984 and March 7, 1985

J U D G M E N T

WALKER J.:

This action was commenced on December 8, 1975 at which time Fernandez Rodriques Oliva was sued personally as the third defendant. Mr. Oliva having been served with the plaintiff's writ of summons and not having entered an appearance thereto within the prescribed time, interlocutory judgment was entered against him on March 9, 1976. The records disclose that Mr. Oliva died on or about June 15, 1976 and that, subsequent to his death, Mr. Bruce Beacroft Barker was duly appointed administrator of his estate. Thereafter, in his capacity as administrator, Mr. Barker was, by order of the Court dated February 13, 1978, substituted as the third defendant and the action continued in this form. It now comes before me for trial in all respects as between the plaintiff and the first and second defendants and for assessment of damages as against the third defendant.

When the hearing began Mr. Mundell, learned counsel for the third defendant, made certain submissions relative to the question

of diplomatic immunity and the Court's jurisdiction over Mr. Oliva. Mr. Oliva had been the Peruvian Ambassador to Jamaica up to the time of his death. However, Mr. Mundell later abandoned his submissions and thereafter took no further part in the proceedings.

The plaintiff's claim arose out of a motor vehicle accident which occurred on October 31, 1975 along the main highway some distance outside of the town of Falmouth in the parish of Trelawny. The plaintiff, who was at the time Honorary Consul General attached to the Peruvian Embassy in Jamaica, had been travelling as a passenger in a motor car being driven by Mr. Oliva. The plaintiff and Mr. Oliva had been on their way from Kingston to attend a reception at the Half Moon Hotel in Montego Bay later the same evening. The plaintiff had been seated on the right rear seat of Mr. Oliva's car (which was a right hand drive car) immediately behind Mr. Oliva, and had been sitting in a forward position looking straight ahead and engaged in conversation with Mr. Oliva just before the collision occurred. The time was about 7 o'clock in the evening when the plaintiff said that while so positioned in Mr. Oliva's car she observed the bright, dazzling lights of an oncoming vehicle. The lights came suddenly and fast and increased in size as they came nearer. The plaintiff further testified that Mr. Oliva who at this time was not driving "terribly fast" put his foot on the brake pedal of his car after which she heard "a tremendous bang" and was "knocked out" momentarily. In her actual words the plaintiff said "I saw dazzling lights, that's all." Under cross-examination, in describing the circumstances of the accident, the plaintiff gave evidence which I considered to be of the most significant nature. It is, I think, worth quoting in detail. I noted it as follows:-

> "Think car being driven by Mr. Oliva was a Peugeot. Left Kingston 3.00 p.m. - 3.30 p.m. on day of accident. Encountered rain on way. At time of accident it was raining. Accident happened near 7.00 p.m. My driver was using headlights to see as it was dark at time of

accident. I sitting directly behind Mr. Oliva. At time of accident I was sitting up talking to Mr. Oliva. We were all talking in my car. Road not narrow at scene of accident. Two vehicles could have passed each other quite easily. Think we were nearing a bend at time of accident. Don't recollect if our car on straight road at time of accident or if point of impact was in a bend of the road. I was looking straight at driver and following the road. Mr. Oliva overtook a vehicle quite a way back from point of impact. Saw no other vehicles on road apart from vehicle in which I was travelling and oncoming lights. Saw no vehicle ahead of our car.

I have had the experience of vehicle skidding. Agree that just before collision vehicle in which I was travelling began to skid. Heard collision in middle of the skid. I did not see when the collision took place. Lights from oncoming vehicle were so glaring it was just as if floodlights had been put on to me. Saw lights for about 6 - 7 seconds before collision occurred. I was told that my car was nearing a bend at time of accident. Function in Montego Bay was due to start 7.30 p.m. - 8.p.m.

I agree we were running a little late for the function in Montego Bay. Mr. Oliva was not speeding. He had been travelling very slowly. Later he accelerated a bit but when the weather became bad he slowed up again. Mr. Oliva had had chauffeur but he wanted to drive that evening. He did not know his way out of Kingston and had not been accustomed to driving on country road. On coming lights shone into my face and dazzled me. Thereafter I saw nothing else then felt the bang. I had been bending forward in my seat and saw Mr. Oliva put his foot down on the brake.

I couldn't say position in road in which our car was at time of impact.

I don't know that our car was on its incorrect side of road at time of impact."

On his part, the second defendant testified that he was the driver of the vehicle with which Mr. Oliva's motor car collided. The vehicle, a volkswagen mini-van owned by the first defendant, was being used at the time to convey tourists from Montego Bay in the parish of St. James to the Hilton Hotel in the parish of St. Ann. It was raining and the roadway was wet as he drove through the parish of Trelawny. He had been driving on his

correct side of the road with the sea immediately to his left when the collision occurred. Just prior to the collision he had observed a vehicle, which later turned out to be Mr. Oliva's motor car, approaching him from the opposite direction in zig-zig fashion. On seeing this oncoming vehicle he held on tightly to his steering wheel, applied his brakes and brought his vehicle to a complete stop. Thereafter, Mr. Bennett said that Mr. Oliva's motor car continued on its erratic path, spun around in the road and crashed into the mini-van, in actual fact the right hand back door of the motor car striking the right side of the mini-van. Mr. Bennett maintained that the collision occurred on his correct side of the road as proof of which he said that, immediately after the accident, vehicles travelling from Kingston to Montego Bay were able to pass the scene freely on their correct side of the road. Mr. Bennett said that prior to stopping his vehicle he had been driving at a speed of about 30 m.p.h. He strenuously refuted the suggestion put to him by Mr. George, learned counsel for the plaintiff, that it was he who had driven his vehicle onto the incorrect side of the road and into the path of Mr. Oliva's motor car. Mr. Bennett testified that the accident occurred at about 6.45 p.m. and he was adamant that at the time he had been driving with his park lamps turned on and not with his bright head lamps turned on as was suggested to him by learned counsel for the plaintiff. He insisted that the accident occurred at a section of the road which was straight for a distance of about 25 chains and at a point which was about 3½ - 4 chains away from a bend in the road past which Mr. Bennett admitted he had previously driven. It was after negotiating this bend that Mr. Bennett said he first saw Mr. Oliva's motor car which was then at a distance of about 3 chains away from him. Mr. Bennett was, however, quite unable to estimate the speed at which Mr. Oliva's motor car was travelling as it came towards him.

This then was the salient evidence on both sides relative to the vexed question of liability. What emerges from it is that the plaintiff, who was the only witness on her own behalf, was disadvantageously positioned in Mr. Oliva's motor car at the time of the collision. She, obviously, saw very little of the antecedent events and, as a consequence, gave evidence which was woefully lacking in important details concerning those events. In marked contrast, the second defendant, Mr. Bennett, gave a full account of those events as he said he saw them. As a witness Mr. Bennett impressed me greatly. His demeanour in the witness box was flawless and, having subjected his testimony to the closest scrutiny, I adjudge him to be a witness of truth. His testimony was entirely logical and I am altogether convinced that the accident occurred in precisely the way he said it did. In particular I find the following facts :-

1. That the second defendant had brought his vehicle to a complete stop on his correct side of the roadway before the collision occurred;
2. that at the time of the collision the second defendant had been operating his vehicle with his part lamps and not his bright head lamps turned on;
3. that having regard to the prevailing circumstances at the time, there was no necessity for the second defendant to have been driving with his head lamps turned on and he was not negligent in not having turned them on;
4. that it was Mr. Oliva's car which skidded across the roadway and crashed into the second defendant's stationary vehicle.

In my judgment, therefore, Mr. Bennett is blameless in this

matter and, accordingly, insofar as the issue of liability is concerned, I resolve that issue in favour of the first and second defendants.

I turn now to consider the other aspect of this exercise which is the assessment of damages as against the third defendant. The relevant evidence in this regard was given by the plaintiff herself and on her behalf by two medical practitioners, Professor Hugh Wynter and Professor John Golding, both eminently qualified gentlemen in their respective fields. Having been rendered temporarily unconscious by the impact the plaintiff said that the first thing that she remembered afterwards was feeling "terrible pain" in her back and other parts of her body. From the scene of the accident she was taken to Falmouth and thence to the Cornwall Regional Hospital in Montego Bay, where she was admitted and treated over a period of seven days. From the Cornwall Regional Hospital she was later removed by helicopter to Medical Associates Hospital in St. Andrew where she remained for two and one-half weeks. As a consequence of the accident the plaintiff said that she suffered injury to her face which was "bashed in", loosened teeth, fractured bones in her pelvis and several fractured ribs. The plaintiff said that following the accident she suffered severe pain for a period of seven days during which time she was given pain killing injections. She gave evidence that she eventually lost all her lower teeth as a result of the accident. More precisely, the medical evidence in the case established that the plaintiff sustained a fracture of the 12th thoracic vertebra and a slight fracture of the second lumbar vertebra with fractures of the front part of the pelvis. In addition she developed a condition of urinary incontinence. When she gave evidence before me the plaintiff said that she was still slightly deaf in her left ear which was perfectly normal before the accident, and that she also suffered periodically from headaches and backaches.

Professor John Golding, Professor of Orthopaedics at the University College Hospital, also treated the plaintiff. He first saw her towards the end of November, 1975. Then he observed that she was unable to move from side to side or to sit up in bed without experiencing pain. She was unable to take a deep breath because of pain around the lower ribs on the left side and there was tenderness around the front of the pelvis where he saw considerable bruising. Compression of her pelvis was painful and she had a catheter in place at the time. She was experiencing pain over the bladder and further, investigations showed that her hearing was infected. This infection was treated and the catheter removed. The plaintiff was started on a course of physical therapy and shortly afterwards she was able to sit up. Subsequently the plaintiff developed pain and loss of hearing in her left ear. For this condition the plaintiff was referred to an ear specialist, Dr. Gosling, and her hearing loss improved with treatment. Professor Golding gave evidence that the plaintiff was also referred to a neuro-surgeon, Professor Cross, for treatment for headaches of which she had complained when initially seen by him and which had afterwards become more severe. The plaintiff was discharged from hospital in December, 1975 and Professor Golding saw her again later the same month. At this time she was able to walk fairly well using a walking frame and her headaches, although still present, had decreased. The plaintiff complained of difficulty in controlling her urine and for this complaint she was referred to Professor Wynter. Professor Golding next saw the plaintiff in July, 1976 at which time she was walking much better but still needed to use a stick when walking outdoors for any distance. Otherwise, the plaintiff's condition was generally satisfactory. When he measured the plaintiff, the doctor said that he found what appeared to him to have been 1 cm. lengthening of the right lower extremity over the left. Professor Golding last examined the plaintiff on July 20, 1984 when he found that the range of motion of her lower back was normal although she was still

experiencing some pain on flexion. The doctor concluded that the pain then being felt by the plaintiff was due partly to injury to her spine and partly to injury to her pelvis. In Professor Golding's opinion, having regard to her injuries, the plaintiff would have experienced considerable pain for the first four weeks after sustaining her injuries, moderate pain for the next three months with considerable stiffness and after that time decreasing pain and stiffness. He said that the plaintiff's condition of urinary incontinence would have involved, as, indeed, the plaintiff herself said it did, discomfort and embarrassment. He was of the view that it would have been very difficult for the plaintiff to have continued her normal occupation until her problem was cured by surgery. Depression, the doctor testified, would have been a reasonable reaction to the plaintiff's condition. Finally Professor Golding estimated that the plaintiff has suffered permanent disability amounting to approximately 7% of her total bodily function. This estimate, he said, related essentially to orthopaedic abnormalities of which the plaintiff complained when he last saw her.

Professor Hugh Hastings Wynter, Professor of Obstetrics and Gynaecology at the University College Hospital, first saw the plaintiff in February, 1976. At that time she complained of multiple fractures of the pelvis and incontinence of urine. He examined the plaintiff and found that the plaintiff was, indeed, incontinent of urine. On February 19, 1976 he operated on the plaintiff to repair the neck of her bladder and the plaintiff was discharged from hospital on March 2, 1976. This operation was, however, only partially successful as the plaintiff had some residual effects. Consequently, on May 25, 1976, Professor Wynter performed a more extensive abdominal operation on the plaintiff, (called a Marshall - Marchette - Krantz) after which the plaintiff

was discharged from hospital on June 26, 1976. The plaintiff recovered her continence about a year after this latter operation but, unfortunately, developed a complication of the surgery in the form of a bladder stone calculus. This condition necessitated a minor operation (called a cystoscopy) which was performed on the plaintiff on May 24, 1977. It was Professor Wynter's opinion that the plaintiff's condition of urinary incontinence was directly referrable to her accident. The doctor said that the plaintiff remained potentially billable for these three operations, the approximate cost of which was $2,000.00.

I come now to deal specifically with the plaintiff's claim for special damages. Having considered the relevant evidence adduced before me, I award to the plaintiff such damages in a total sum of $25,383.29, the details of which I will set out below in corresponding form with the plaintiff's Statement of Claim -

(a)	Hospital expenses	$2,911.29
(b)	Doctors' fees	4,149.00
(c)	Ambulance etc.	4,000.00
(d)	Extra help	6,200.00
(e)	Taxis etc.	3,800.00
(f)	Postage	200.00
(g)	Telephone calls	500.00
(h)	Cables	300.00
(i)	Replacement of broken suitcase etc.	1,000.00
(j)	Gleaner advertisement	198.00
(k)	Loss of employment allowance (June, 1976 - October, 1977 at US$100.00 monthly computed at rate US$1.00 = J$1.25)	2,125.00
		$25,383.29

The plaintiff's claim for general damages must next be addressed. Undoubtedly, she is entitled to an award of such damages for pain and suffering and loss of amenities of life. At the date of hearing of this matter the plaintiff was just a few days short of her 63rd birthday. As has been previously stated herein she was at the time of the accident Honorary Consul General for Peru. She had also been at one time Dean of the Consular Corps in Jamaica. Her position was a prestigious one and she thoroughly enjoyed her work. For all practical purposes her misfortune effectively brought her diplomatic career to a premature end. In the normal course of events she would have continued in the diplomatic service of her country for another two years before retiring. She had immersed herself to a great extent in the social and cultural life of Jamaica. On the social side she had been accustomed to do a great deal of entertaining and to attend social functions of one kind or another. She was frequently in receiving lines at these functions and enjoyed meeting people of other nations of the world. On the cultural side of things the plaintiff gave lectures on Latin American culture, art and history to school clubs and women's organizations throughout Jamaica. She wrote articles and delivered cultural commentaries on television. She also sang by way of entertainment. In the line of hobbies, the plaintiff enjoyed walking, swimming and horseback riding and used to play tennis occasionally. Since the accident she had not been able to ride or play tennis and, as far as swimming was concerned, now she could only "float and swim a little in the sea." The plaintiff testified that the accident changed her whole life-style. In particular her condition of urinary incontinence, while it lasted, had caused her great humiliation and distress. During that time she had experienced much discomfort and had become depressed and withdrawn, not caring to meet people. She remained in this state

for some nineteen months and had had to undergo two surgical operations in order to cure this most embarrassing problem. However, with all of this, the fact of the matter is that the plaintiff has made an excellent recovery. Taking everything into account, for damages for pain and suffering and loss of amenities of life, I award the plaintiff a sum of $65,000.00. Damages as against the third defendant are, therefore, assessed in a total sum of $90,383.29.

Accordingly, the order of the Court is as follows:-

1. Judgment for the first and second defendants with costs to be agreed or taxed, such costs to be recoverable by the plaintiff from the third defendant.
2. Damages as against the third defendant assessed in the sum of $90,383.29 with costs to the plaintiff to be agreed or taxed.
3. Interest on special damages in the sum of $25,383.29 at the rate of 4% per annum from October 31, 1975 to March 7, 1985.
4. Interest on general damages in the sum of $65,000.00 at the rate of 2% per annum from the date of service of the Writ to the date of judgment.