IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 5341

BETWEEN	MARLENE GRAHAM	CLAIMANT
AND	ASPHALTING SPECIALIST LIMITED	1ST DEFENDANT
AND	DEVON HENRY	2ND DEFENDANT
AND	THE ADMINISTRATOR GENERAL OF JAMAICA (As agent for the Estate of Edward Russell Deceased)	3RD DEFENDANT

HEARD: March 8 and 12, 2010

Mr. O. Nelson and Ms. Kahie Watson instructed by K. Churchill Neita & Co for the claimant; Ms. Sandra Johnson instructed by Sandra Johnson & Co, for the 1st and 2nd defendants. Ms. Maria Gayle of the Administrator General's Department for 3rd defendant

CORAM: ANDERSON, J.

On July 13, 2003, M. Graham, a bus conductress with the NTCS was a passenger on a Coaster Bus, Licence No. 8760 PP on the Linstead By Pass Road, travelling towards Kingston, when it collided with a Leyland type truck, Licence No. CD 0150, owned by the 1st Defendant, Asphalting Services Ltd. and driven by Devon Henry, 2nd Defendant. The truck which was traveling in the opposite direction, was apparently attempting to make a right turn onto the Rose Hall Main Road leading to Guys Hill. According to the evidence of the Claimant, she was sitting at the front of the bus and noticed that the Leyland truck which was driven by the 2nd Defendant made a "u-turn/right turn towards the Rose Hall Road" without giving any indication and the driver of the bus was unable to avoid the collision although he attempted to make a left turn away from the oncoming truck.

The driver of the Coaster bus, Edward Russell was killed in the accident and his estate, represented by the Administrator General, is in fact the 3rd Defendant.

One of the unique factors of this case is that he Claimant is the only witness of fact in relation to what occurred at the time of the accident. A witness statement was made by

the 2nd Defendant, Devon Henry, but he failed to show up for the trial. Nevertheless, his witness statement was entered as hearsay evidence on the applica

According to the Claimant's Witness Statement, the collision caused the side of the bus to "fold" and pinned her leg causing severe pain in her hips and right arm. She received injuries to her arms and leg. Following her initial treatment at Linstead and Spanish Town Hospitals, she had to have surgery (open reduction and internal fixation) on the arm at the University Hospital of the West Indies, (UHWI) in August 2003. She received treatment to protect her against tetanus and her arm was immobilized in a Plaster of Paris cast. She also had to have follow-up treatment on the arm, receiving anti-fungal cream for the wound on her arm. Subsequently, she received physiotherapy.

According to the particulars of injuries outlined in her "Amended particulars of Claim", the claimant suffered the following as a result of the accident:
Tenderness with marked restriction of range of motion in shoulder and elbow;
Abrasions to right upper limb;
displaced fracture of the right humerus, later mal-united;
swollen and deformed arm;
wound over olecranon;
fungal infection over medial aspect of the arm;
pain in right elbow and shoulder;
15 cm scar at the antero-lateral aspect of the middle of the distal third of the right arm;
muscle tenderness to right side of base of the neck
tenderness to clavicle, biceps tendon and sub-acromial space;
inflation of biceps tendon and rotator cuff tendon of shoulder;
retro-patellar tenderness of right knee and mid-lateral tibio-femoral tenderness, and onset of lateral compartment arthritis of the knee.
At the time of this trial, she says that she is still experiencing severe pain and has some discomfort in her knee, and she remains very self conscious of a scar on her shoulder.

Three medical reports were, by agreement, tendered into evidence. They were reports from consultants. Orthopaedic Surgeon, Dr. Mark Minott, Dr. Don Gilbert, Chief

Resident in the Department of Orthopaedic at the UHWI and Dr. Phillip Waite, also a consultant Orthopedic Surgeon, this last report dated August 9, 2005.

According to this report, the complaints from the Claimant were:
Pain to right shoulder
Difficulty elevating right shoulder and putting her hand behind her back.
Pain to the face and neck on the right.
Occasional numbness of the fingers.
Difficulty bathing and combing her hair.
Inability to lift moderately heavy and heavy objects with right upper limb.
Difficulty performing her occupation as a conductress because she is unable to pull the door of the bus.
Pain to the right knee which is worsened when getting up from the sitting position and when climbing or descending stairs.

On examination, the doctor noted that there was muscle tenderness to the right side of the base of the neck, and she had a 15cm scar to the anterior aspect of the distal 3rd of the arm. Early degenerative disease in the cervical spine was also noted.

The doctor made the following assessment.
Right rotator cuff tendinopathy
Right biceps tendonitis
Chronic neck pain
Chondromalacia patella
Lateral compartment arthritis of right knee.
Maluncted fracture of the right lumercis.

He gave an estimate PPD of 7% with a prognosis that the pains to the right shoulder "may worsen and cause further disability for the patient. These problems already affect my client's ability to perform activities of daily living and her ability to perform her job as a conductress." He further recommended a course of physiotherapy for the neck, shoulder and knee.

Liability

In so far as the question of liability is concerned, as noted above, the only factual evidence available to the Court is that of the Claimant and the admitted hearsay witness statement of the 2nd Defendant. The witness statement of Devon Henry is, of course, only admissible as hearsay and this was done at the instance of the claimant's attorney at law. It was not suggested that any considerable weight should be attached thereto. The 1st defendant was represented at the trial by one of its directors, Mr. Peter Shroeter, who gave evidence of his impression of the site of the accident. However, he clearly could not assist with any information concerning the accident itself. Similarly, Mr. Cleveland Phillips, another employee of the 1st defendant and himself a driver for that company, gave evidence but again his evidence was not as to the fact of what had occurred at the time of the accident but his impressions of the road, having gone to the scene later that day or the next. Therefore, the only eye witness evidence available is that of the Claimant.

Counsel for the 1st and 2nd Defendants pointed out that in her pleadings, the Claimant had set out particulars of negligence against the driver of the bus, Edward Russell, deceased. In the Claimant's particulars of claim, she does allege that the deceased driver was negligent, although nothing in her witness statement provides any evidence thereof. It was submitted by counsel for the defendants that the averments in the pleadings undermined the credibility of the Claimant and that this should cause the Court to find in favour of the 1st and 2nd Defendants.

On the other hand, the Claimant's counsel submitted that it was necessary to include averments of negligence against the driver of the bus, even if they were not subsequently pursued. He submitted that the evidence of the Claimant as to how the accident happened should be accepted and the Claimant should be held to have discharged the burden of proving, on a balance of probabilities, that the 2nd Defendant was responsible for her injuries, loss and damage and the first defendant vicariously liable. It was common ground that the 2nd defendant was the servant or agent of the 1st defendant.

No evidence was filed and no submissions were made on behalf of the 3rd Defendant. However, no evidence was led by the Claimant against that Defendant, nor did the 1st and 2nd Defendants seek to make any ancillary claim against the 3rd Defendant. In those circumstances, the 3rd Defendant must be found not liable and judgment awarded in his favour as against the Claimant.

Given the paucity of the evidence and, the limited effect of any evidence provided by the Mr. Shroeter and Mr. Cleveland Phillips, neither of whom was witness of fact, I find that, on a balance of probabilities, the Claimant has discharged the burden of proof. I accordingly hold that the Claimant has established that the 2nd Defendant was liable for the loss and damages.

Assessment of damages.

a) Special Damages

The parties have agreed certain of the items of special damages pleaded, in the amount of $53,720.00. Counsel for the Defendant challenges the sums claimed for loss of earnings ($192,000.00) being based on earnings of $6,000.00 per week for 32 weeks, during which time she claims she was unable to continue her employment as a conductress. She also challenges the figure of $36,000.00 which is claimed as being the cost of domestic help provided by her relatives at the rate of $1,500.00 per week for six (6) months.

The challenge to the sums for loss of earnings and for domestic help were challenged on the basis that it is trite that special damages must be proved. It was submitted that the Claimant had not submitted proof of these amounts in respect of these items of expenditure and a litigant could not just throw figures at the head of the court and say: "This is what I have lost". Counsel for the Claimant, on the other hand, submitted that the Claimant had made out her case to be compensated for the sums claimed. In that regard, he cited **Walters v Mitchell** 29 J.L.R. 173. That case suggested that the courts are more lenient with respect to the standard of proof when it comes to casual labourers than with organized corporations. However, in **Aston Dennis v The Attorney General and Another**, HCV 1823 of 2003 decided January 30, 2006, Brooks J. held that a labourer who claimed that he worked with a particular employer who lived in the United

States should provide more than his "say-so" in relation to his claim for loss of earnings. He could have provided some more concrete proof. I would hold that the Claimant here could at least have provided a letter from her employer as to what her earnings were and I accordingly deny this head of damage.

On the other hand, where domestic services are provided by relatives of the victim of a tort and those services are provided without a monetary cost, the tortfeasor ought not to benefit from this generosity. In these circumstances, the figure claimed of $36,000.00 for a six month period and based upon what was the minimum wage at the time is in my view, not unreasonable and should be allowed.

Support for this approach is found in "Commonwealth Caribbean Tort Law", where the learned author, Gilbert Kodilinye had this to say.

> Under medical and nursing expenses, the plaintiff is entitled to claim the cost of treatment and care which he reasonably incurs as a result of his injuries. This would include the payment of hospital bills and doctors' fees. Also where the victim is nursed by a member of his family or a friend he is entitled to the reasonable cost of such nursing services (both for the past and for the future) even though he may not be under any legal or moral obligation to pay the person who gives the services. In **Tudor v Cox** (1979) High Court, Barbados # 128 of 1978 (unreported) an 18 year old youth received serious head injuries as a result of the negligence of the defendant. After the plaintiff's discharge from hospital, his mother looked after him at home. Husbands J. held that an award must be made for those services. He said:
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> > On the authority of **Cunningham v Harrison** [1973] 3 All ER 463 some award must be made for the extra domestic attendance his injuries have necessitated and for which there will be a continuing need. Since his discharge from hospital, the plaintiff's mother has waited on him and rendered him domestic service. As was said by my brother Williams J in the Barbados Court of Appeal in **Sandiford v Prescod** {[1977] 12 Barbados LR 55}:
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> > > The task of a mother in bringing her offspring to maturity can be thankless enough as it is without her being expected to spend her advanced years in looking after her grown child. If she is to do so, compensation must be provided. If a handicapped person is committed to her care, she is unlikely to be able to do paid work elsewhere. In any case she is under no obligation to relieve a defendant of the consequences of his negligent act. There is no question of a plaintiff being required to mitigate damages.

> Similarly, in the Trinidadian case of **Grey v John** {(1993) High Court Trinidad and Tobago, #1332 of 1985 (unreported)} where the plaintiff had been seriously injured in a road accident and his daughter had given up her employment for five months to look after him, Ramlogan J held that on the authority of **Donnelly v Joyce** {(1973) 3 All ER 475} the plaintiff was entitled to the proper and reasonable cost of supplying nursing services. 'It is because there is a need for services that there is a loss, and once that loss results from the wrongdoing of the defendant then the plaintiff is entitled to an amount which would compensate him'. Accordingly, the plaintiff was entitled to an amount equivalent to the wages his daughter had lost during the five month period.

With respect to the claim for travelling expenses which was also challenged by the defendant, I find that the sum of $6,000.00 claimed is reasonable in all the circumstances and I will award that sum. Accordingly, special damages will amount to the sum of $95,720.00, and I award that sum with interest at 6% from 13th July 2003 to June 21, 2006 and 3% thereafter to the date of judgment.

b) General damages

The Claimant referred the Court to the case of **Willis v Hamilton and Laidley** C.L. 1987/W244, (Harrisons "Assessment of Damages for Personal Injuries, page 254) as well as **Hinds v Edwards and Jankie,** (C.L. 1990/H025, Khan's Personal Injury Awards Volume 4, p 100). In the former case in which damages were assessed on June 20, 1990, (CPI 5.79) the 15 year old plaintiff suffered a fractured humerus shaft with deformity and tenderness of the right upper arm and other minor injuries. The plaintiff was awarded damages of $40,000.00, a figure which, when updated to the current re-based CPI of 152.6 (January 2010) would be worth $1,054,231.43

In the latter case the plaintiff, a 40 year old higgler on May 16, 1997, was awarded $674,414.12 a figure now worth $2,379,276.00 (approximately). She fell from a taxi and injured her right hand which was totally disabled for three months after the accident in July 1988. She was assessed with a whole person PPD of 6%. It was submitted that the plaintiff's injuries were more serious in the instant case as her the Claimant had a PPD of 7%, and that the Claimant should get an award of $2.8 million. One should always bear in mind, however, the fact that the percentage PPD is a factor but not the determinative one in assessing damages. One must look at the nature and extent of the pain and suffering and the loss of amenities.

For the 1st and 2nd defendants, it was submitted that the case of **Brandolph Ashlev v Delval Nugent** Suit No C.L. 1989 A 181, (damages assessed November 9, 1990), the 37 year old plaintiff had a fracture of the humerus in two places as well as a dislocation of the right elbow. There was a deformity of the humerus and wasting of the muscles around the upper third of the right arm with limited range of movement. The plaintiff was assessed as having a 25% PPD of the right upper limb but there was no whole person PPD assessed. She was awarded $49,846.99 when the re-based CPI was 6.73. Using the January figure of 152.6, that figure would now be worth $1,130,260.36.

I might also have got some help from **Wesley Bonnick and Anor v Leonard Boyd** (Suit C.L. 1997/B234, Harrisons page 251). There the plaintiff suffered a fracture of the mid shaft of the left humerus and abrasions to his right arm and right shin, and tenderness in the right shoulder. However, in that case, by consent, damages were assessed on the 17th October 1991 in the sum of $82,900.00 inclusive of costs. In the absence of a breakdown one is unable to say what could be extrapolated from this case.

Taking into account the authorities cited, and given that the claimant is likely to continue to have pain and discomfort, I believe that an award of $1.9 million is appropriate for general damages, pain and suffering and loss of amenities. I award that sum with interest at 6% from the date of service of the claim or the acknowledgement of service, whichever is earlier, to June 21, 2006 and at 3% from June 22, 2006 to today.
Damages are awarded against the 1st and 2nd defendants jointly and severally and I award costs to the claimant to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
MARCH 12, 2010.