IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 2005/HCV 03081

BETWEEN	SCHAASA GRANT	CLAIMANT
AND	SALVA DALWOOD	1ST DEFENDANT
AND	JAMAICA URBAN TRANSIT COMPANY LTD.	2ND DEFENDANT

Mr. Kinghorn instructed by Kinghorn & Kinghorn for the claimant.

Mr. Donovan Williams instructed by Donovan St. L. Williams & Co. for the defendant.

Heard: 29th May and 16th June 2008

Campbell, J.

Negligence – Employers' Liability
Conductress on Bus Supplied with Seatbelt
Injured in fall on Moving Vehicle – Seatbelt not Utilized
Wether Employer has a duty to ensure that Seatbelt used
Whether Employer provided a Safe System of Work

1. On the 3rd day of February 2005, Schaasa Grant was the conductress on a JUTC number 21a bus, which plies the route from Cross Roads to Spanish Town via New Kingston. The bus was being driven by Salva Dalwood. The two had been working that particular route for about one year. Ms. Grant alleges that whilst seated in the conductress' seat, the driver applied his brakes suddenly and she was flung from her seat. She states that she was "pitched into the passengers' seats that are in front of where the conductress is supposed to sit." She claims that she had to be assisted "out of the seat" into which she had been flung. Sometime later in the journey she started experiencing "some serious back pains". She informed the driver of her inability to complete her tour of duty and the bus was driven to the depot.

2. At the depot, she completed an incident report form and spoke to the Human Resource Manager of the 2nd defendant, who referred her to Dr. Lisa Hoad. Her back was then swollen and she was given an injection for the pain and 10 days sick leave. She said that on leaving the doctor's surgery, the pain was so intense that she had to seek private transportation to return home. On her return to work, the travelling caused her extreme pain and following a further report to the company, she was again sent to Dr. Hoad, who referred her to Dr. Philip Waite. She saw several doctors including Dr. Murray, a pain management specialist and Dr. Bruce, a

neurologist. Based on recommendations made by Dr. Bruce, she was placed on a four hour shift in the office.

3. An attempt to resume work as a conductress caused her great pain and discomfort. Further treatment of physiotherapy followed and she was referred to Dr. Christopher Rose, an orthopaedic surgeon. She sought further treatment from Dr. Dawson, pain Management specialist, whose treatment would sometimes involve 10 injections in her back. She was unable to attend her sister's wedding and her cousin's funeral because of the pains she was experiencing. She complains that her social and sexual life has been handicapped. She was made redundant by JUTC on the 2nd February 2008.

4. On the 8th October 2007, the claimant filed an amended claim form. She claimed against the1st defendant for negligence and against the 2nd defendant for negligence as an employer. That the seat provided for the conductress did not have a seatbelt nor did the 2nd defendant provide any other form of safety restraint for the claimant.

The particulars of negligence of the 2nd defendant were listed as follows:

(a) Failing to have or to maintain a safe system of work.

(b) Exposing the claimant to an unreasonable and unforeseeable risk of harm.

(c) Failing to provide a seatbelt or other form of restraint for the claimant whilst the claimant was lawfully carrying out her duties as a conductress.

The 1st defendant denied the particulars of negligence and averred that at all material times, he drove with due care and attention.

5. The Particulars of Negligence in respect of the 1st defendant alleged, inter alia;

b) Operated the vehicle at a speed which was unreasonable in the circumstances.

The 2nd defendant averred that at all material times, the bus was equipped with the requisite seatbelt and alleged that the claimant was negligent.

(a) Failing to use the seatbelt that was provided for her in the bus.

(b) Failing to hold firmly to the rails that were provided in the bus.

(c) Failing to have any or any sufficient regard for her own safety.

6. **Was the first defendant negligent**?

Ms. Grant had said she did not know why the driver suddenly applied his brake and admitted that the driver was not going extremely fast. The defendant, in his witness statement does not deny that he applied the brakes suddenly, but gives as the reason, a taxi driving out suddenly in his path. He admitted that the conductress spoke to him about her injury, and later, another conductress relieved her of her duties. In cross-examination, she admitted she had said in her accident report that a taxi driver had stopped suddenly in front of the driver. She also admitted that she had said in her evidence-in-chief that she did not know why the driver had braked, and that was not true. She testified that for the most part, her job requires her to be seated. There is no barrier separating her from the passenger seat into which she was flung.

7. The driver testified that it was not the first time he was aware of a conductress falling in the bus. The claimant was the only person on the bus who had fallen that day. The driver testified that he is required to do a daily inspection of the bus. He said he had been driving that particular bus for about three and a half years. He had been working with the claimant a year prior to the accident. There is no device on the bus to indicate to the driver if the conductress' seatbelt is engaged.

8. The unchallenged evidence of the driver is that he was travelling between 10 - 20 m.p.h. There is no evidence to support the claimant's contention that the bus was being driven too fast. It was agreed on both sides that the bus had just moved off from the bus stop. It is therefore most unlikely that it would have been going too fast. There was no opportunity for the driver to alert the passengers that he would be braking suddenly. There was no suggestion that the bus was being operated recklessly and violently. The claimant's evidence is to the effect that he was a careful driver with whom she was comfortable working. The uncontradicted evidence is that the taxi, (if that is what PA3698 is) darted off the side of the road and into the path of the bus. There was no evidence of any collision with any vehicle as alleged. That was not pursued at trial. The claimant has failed to prove that the 1st defendant was negligent.

Was a seatbelt provided?

9. The claimant said there was no seatbelt provided. It is agreed on both sides that the bus was a Johnkheere Volvo Bus. She says that she doesn't recall ever having seen any seatbelts in a Johnkheere bus. She admitted that she had not stated in the accident report that there was no seatbelt. She also admitted that there was no mention of there being no seatbelt in the claim

form filed on the 8th October 2007. She said she cannot remember a seatbelt being there on the bus. She said she had never seen a bus with a seatbelt for the conductress and that the use of seatbelts was never a part of any course or training programme she had attended. No colleague of hers has ever raised the question of availability of a seatbelt. She said there was no seatbelt on the bus on which she worked after returning from her sick leave.

10. The defendants totally contradicted the claimant on the question of provision of seatbelt. The driver testified that all of Johnkheere buses are equipped with seatbelts. He says that he is aware that there are buses on which the seatbelts are unserviceable, and some on which the seatbelts are missing. He says there are no signs that alert the conductress that seatbelts must be worn. Neither is there a sign that the driver must wear seatbelt. John Percy, the defendants' accident investigator says he has seen JUTC buses without seatbelts. Kevin Blake, maintenance supervisor commenced working with JUTC in November 1999. At the time of the incident, he was a maintenance planner, whose duties involved scheduling buses for servicing and repairs. He stated that all Johnkheere Volvo buses had manufacturer's seatbelts attached to both driver and the conductress' seating area. He testified that, Company policy is, if there is a defective seatbelt, it should be reported to the maintenance department. Under cross-examination, he admitted that there are buses in which the seats have been replaced and the replacement does not carry the seatbelt.

11. I was impressed that the driver of the bus was aware of a seatbelt being on that bus; he had worked for a year with the claimant and would have no reason to state a seatbelt was there when in fact none was present. I also accept the defendant's witnesses on this point. I accept there were no signs or warnings mandating the use of seatbelts by the bus crew. I accept that the use and identification of the seatbelt was not a part of the defendant's training programme or of any refresher courses she may have attended. It is quite clear that the company has buses that have had conductress seats replaced and such seats have not been consistently provided with a seatbelt. There are others that have seatbelts that are inoperable.

12. The employer's liability, although it is derived from the general law of negligence, gives rise to a special duty owed by an employer to his employee. The duty is owed by the employer to each employee as an individual. Therefore each employee has an individual right of action against his employer for breach of duty. Further, the duty will vary according to the individual nature of the employee. Thus, in **Paris v Stephney Bourough Council** (1951) 1 All ER 42 at 44

G, the plaintiff, a garage hand, whose duties involved manual work in preparing cars for service, had previously lost the sight in one of his eyes. Whilst working, he hit a bolt causing a metal splinter to fly and hit him in his good eye. He became totally blind. It was not the practice to provide such workmen with goggles. The plaintiff alleged that his employer breached the duty owed to him in failing to provide him with a pair of goggles. The Court agreed with plaintiff's contention. Lord Simmonds said;

> "I will say at once that I do not dissent from the view that an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee and it is clear that, if so, all the circumstances relevant to that employee must be taken into consideration"

13. The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation. In setting the stage for a conductress to properly fulfil her responsibilities, the employer should, as a part of the provision of a safe system of work, take steps to ensure that there are the necessary equipment and procedures in place to ensure the employee's safety. The procedures should ensure that use be made of equipment provided in a public passenger transport, signs will be effective because members of the travelling public, by their mere presence, will have the effect of causing compliance by the employee with the mandates of the sign or warnings. It is not to be assumed that even a usually reliable employee will heed directives given for the employee's own safety. In **Woods v Durable Suites Ltd.**, the employee appealed an order in which judgment had been given for the employer in an action claiming damages for breach of statutory duty and negligence in not providing a safe system of work. It had been held in the court below that the workman had been made aware of the danger inherent in getting glue on his hand and of the precautionary measures which the employers required to be observed. That the precautionary measures, if observed, would have prevented injury and that the plaintiff had been specifically instructed of the preventative steps he should take.

Morris L.J. said at pg. 396:

> If an employer allows safety precautions to lapse and to fade away into desuetude it may well be that on the facts of a particular case, there may be proof that there has been a failure to exercise due care and skill and to

> provide a proper system of work, but each case must depend on its own exact facts. The duty to exercise due care to provide effective supervision does not involve that an employer must provide a corps of overseers to ensure that some process, in regard to which there has been faithful and ample coaching, is at all times properly carried out."

The evidence in the case before this court reveals that other than the provision of the seat belt, there has been an absence of faithful and ample coaching or any coaching or supervision in the use of the seat belt.

In **Walter Dunn v Glencore Alumina Jamaica Ltd. (t/a West Indies Alumina Company (Windalco))** SC CC 2005 HCV 1810 delivered on 9th April 2008, Mr. Justice Brooks, in finding that the employer was liable for not providing a safe system of work, said of the employer's supervisor;

> "Had Mr. Ledgister (the employer's supervisor) enforced compliance with the rule, Mr. Dunn (the employee/claimant would not have developed a casual attitude to the wearing of the correct footwear in this area which Windalco designated a 'wet area'.
>
> I find that Windalco did provide the proper equipment, adequate explanation of the requirement to wear it and general supervision of compliance, but adopted a sub-standard approach in respect of Mr. Dunn. Mr. Dunn though poignantly aware of the danger which he faced going into the Ball Mill as he did, nonetheless he took the route which he did, because of a lax standard."

14. In **Speed v Thomas Swift and Co. Ltd** (1943) K.B. 557 at page 567, Lord Greene;

> "The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organize a system which itself reduces the risk of injury from the workmen foreseeable carelessness."

I find that although the defendant did provide the equipment for the safety of the worker, the 2nd defendant failed to discharge its duty to institute a system, whether through notices, reminders, training sessions, warnings, to ensure the use of the equipment. In the circumstances of this case, this is a duty cast upon the employer.

General Damages

15. The claimant was 29 years, she testified that her social life was wrecked and her sex life ruined. Her injuries have affected her daily life severely. She has been seen by several doctors and physiotherapists. She had started driving lessons prior to sustaining her fall; she has had to cease that activity because of the serious pain that it causes. In Court, she carried her pillows and appeared quite distressed at times. Dr. Philip Waite, Consultant Orthopaedic Surgeon, had been seeing her from the 16th February 2005, when she reported having mid to lower back pains. On examination, he noted marked swellings, spasms and tenderness to the paravertebra muscles bilaterally. He assessed her as having severe mechanical thoraco-lumbar back pain secondary to a severe injury of the thoracolumbar spine. She was referred to Dr. Murray for pain management

16. In August 2005, she was assessed as having objective right sided lumbar radiculopathy secondary to prolapsed intervertebral disk; severe mechanical low back pain; mechanical mid back pain. Subsequently, her nerve pain medication was increased because she was having severe pain in both feet. She reported muscular spasms in her right shoulder and neck. Assessed in January 2006, she was having reflex sympathetic dystrophy to the right shoulder. She was referred to Dr. Christopher Rose. Dr. Rose agreed with her course of treatment and recommended further rest. She was referred to Dr. Dawson for pain management. Assessed in July, it was noted that there was a re-aggravation of the neck pain, back pain, right lumbar radiculopathy. Her final assessment was;

1. Chronic cervicothoraic pain with subjective cervical radiculopathy.

2. Chronic mechanical low back pain with subjective lumbar radiculopathy.

Her permanent disability was assessed at 10% whole person. The prognosis was that her problem was expected to continue to affect activities of daily living, her social life and her ability to carry out her profession. She has been advised against working on a bus and also advised regarding a career change.

17. The court was referred to **Marie Jackson v Glenroy Charlton and George Harriot**, suit no. C.L. J113/1999, Khan & Khan vol. 5. Customer Service Representative, 24, passenger injured in a motor vehicle accident on 26th November 1998. Pains in neck, back, left rib cage and left elbow, severe pains persisting to neck and lower back. She was referred to Dr. Dundas, on examination it was found

(a) Significant tenderness in areas of left sacro -liac joint with spasm in the sacro-spinolis muscles bilaterally.

(b) Limited forward and lateral flexion of the cervical spine, that extension of the cervical spine aggravated her back pain. He diagnosed whiplash with sequelae and left sacro-liliac contusion.

X-rays indicated loss of cervical lordosis and left hemi-lumbarization of first sacral vertebra which was a congenital anomaly contributing nothing to her symptomatology per se. Her Permanent Partial Disability was assessed at 8% whole person. On 8th January 2001 and 4th May 2001, was assessed at $1,800,000.00 for pain and suffering, Loss of earning Capacity $200,000.00. Future Care $560,000.00.

The updated sum for pain and suffering is $3,914,270.78. In Jackson's case, she had developed dysesthesia in the lower left extremity which caused her to limp. She developed a 2cm deficit in the left thigh circumference and 1cm in left calf. She had a L4/5 lumbar disc prolapsed. I considered Jackson's injuries more serious. We were also referred to **Barbara Brady v Barlig Investment Co. Ltd. and Anor.** (CL 1996/B081) Khan Vol. V 252 ....McPherson, in which an award of $766,898.00 for pain and suffering was made. Updated that is $1,200,000.00. I would take an award for pain and suffering of $3,000,000.00. Interest at 6% from the 14th September 2006 until 16th June 2008.

Loss of Earning Capacity

18. The claimant is presently unemployed, having been made redundant from her job at JUTC. She had been reassigned duties in the office, after returning from sick leave and finding herself unable to continue her regular duty. She complained that she would at times not be assigned any work and had frequently to request that she be allowed to go home because of the intensity of her pains. She is 29 years old and is engaged in a course of study in accounts to qualify her for a new career path which is more suitable for her illness. Dr. Philip Waite has advised against working on a bus and also advised regarding a career change. She can no longer function as a conductress, she experiences great discomfort from being driven by what she regards as "careless drivers". It is clear that the stress of public transportation was beyond what her body could stand. It appears that the earning capacity that is being lost is the period for which she will be involved in preparing herself for new employment as have been indicated. The compensation ought properly to be for the period of this preparation. As Carey, J. pointed out in **Noel**

Gravesandy v Neville Moore SCCA 44/85, that loss of earning capacity is an item of General Damages co –terminus with pain and suffering. I would make an award of $500,000.00.

Loss of Future Earnings

There is no evidence that there is likely to be a diminution in her future earning capacity once her training period is over. I would make no award under this head.

Special Damages $417,560.00 as agreed. Interest at 6% from the 3rd February 2005 until 21st June 2006; at 3% from 22nd June 2006 to 16th June 2008.

Costs to the claimant to be agreed or taxed.