



NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM # 2006 HCV 00601

BETWEEN LISA HOUSEN CLAIMANT
AND LEON SHACKLEFORD DEFENDANT

FINAL JUDGMENT

Miss Christine Hudson instructed by K. Churchill Neita & Company for Claimant.

Mr. Manley Nicholson and Miss Sherise Gayle instructed by Nicholson Phillips for the Defendant.

**Negligence – Motor Vehicle Accident – Question of liability –
Contributory Negligence**

Heard: 16th & 17th May 2008, and December 3, 2008

Thompson-James, J (Ag.)

Approaching 11:00p.m., on the 1st July 2005 on Slipe Road in the parish of St. Andrew Miss Lisa Housen was knocked to the wet road surface by a motor vehicle driven by Mr. Leon Shackelford.

Miss Housen by way of Claim Form dated and filed on the 15th February 2006 claims against Mr. Shackelford to recover damages for negligence arising out of this motor vehicle accident for that while she was crossing Slipe Road in the vicinity of Modern Furnishing Co. Ltd in the parish of St. Andrew and upon reaching a pedestrian crossing in

the said road, the defendant (Mr. Shackelford) so negligently drove/managed or controlled motor vehicle registered ~~PA4000~~ along the afore said road causing same to collide with the claimant (Miss Housen) upon the pedestrian crossing and knocked her to the ground as a consequence of which she sustained injuries, suffered loss and incurred expenses.

Mr. Shackelford asserts that the collision was caused solely by the negligence of Miss Housen who suddenly and or negligently ran into the path of the defendant's (Mr. Shackelford) vehicle and from behind a stationary bus and thereby causing the collision

Miss Lisa Housen's Account

Miss Lisa Housen, a Cosmetologist who was 31 years old at the time of the collision, testifies that on the 1st July 2005 at about minutes to 11:00p.m., accompanied by her son she alighted from a bus on the Slipe Pen Road.

The bus had stopped at a pedestrian crossing. Her son was about 5 years old at the time. They walked to another pedestrian crossing. As she embarked upon the journey of crossing the road, vehicles that were traveling in both directions stopped to allow her and her son to proceed. On reaching the third to last block of crossing the road she heard a voice and felt an impact to her left side. Miss Housen and her son were taken to the Kingston Public Hospital from whence her son

was transferred to the Bustamante Hospital for Children. She felt pain and was admitted to the Kingston Public Hospital where she spent two (2) weeks.

In Cross-Examination

Miss Housen agreed that the incident took place on Slipe Road.

The visibility was not clear but she could still see a good distance. This road is busy on month-ends and weekends especially Fridays.

She maintained that at the time of the collision it was not drizzlling. She had her handbag and cell phone whilst her son carried an umbrella. Later in her cross examination she said she was not under the umbrella. Her son had the umbrella opened as he approached the pedestrian crossing, although he was not using it and there was no useful purpose to have it opened. To get to the pedestrian crossing that she used she had to walk 105 feet from where she had alighted. Quite a few passengers had alighted from the bus as well.

There was no car parked on the side of the road.

In her attempt to cross the road she first looked up to the Cross Roads direction. She waited for the vehicles coming from that direction to give her the go ahead as well as waiting for vehicles coming in the opposite direction to stop.

There were two (2) lines of cars approaching from the Cross Roads direction and in the outside lane traveling from the opposite direction

that is the downtown direction were three cars in a line. All these vehicles stopped to allow her to cross.

She proceeded to cross the road with her right arm around her son's shoulder. She did not see any vehicle traveling in the lane in which the collision occurred. The collision happened suddenly. If she had seen Mr. Shackelford's vehicle she would have stopped as she was not running. She was just walking fast.

She maintained throughout her evidence that she had crossed the road on the pedestrian crossing.

Mr. Leon Shackelford's Account

Mr. Leon Shackelford testified that he was traveling in his 1991 Mitsubishi Lancer at about 40 KMPH, from the downtown Kingston direction towards Liguanea. On Slipe Road he saw a Jamaica Urban Transit Company bus at a bus stop on the right side heading to Kingston. Immediately, thereafter, he recognized a shadow darting suddenly from behind the bus. It appeared to be a female. The bus had come to a stop on the pedestrian crossing with its lesser portion on the pedestrian crossing. His car collided with the pedestrian as she moved quickly unto the road. He did not have enough time to react but he did everything that he could to prevent the collision.

There were damages to his motor vehicle whilst the pedestrian sustained injuries. At the time of the impact he was traveling on the

inside lane, the road surface was wet as the rain was drizzling. He was adamant that the collision did not take place on the pedestrian crossing.

In Cross-Examination

Mr. Shackleford testifies that, that night the street lights were out however he was able to see the pedestrian crossing by using his car light but not as clearly as if the street lights were on. There was no other vehicle coming from downtown. He went onto to say that using his headlight he could see clearly.

At the time of the collision the bus was still on the pedestrian crossing but drove off immediately after.

He did not see her son traveling with her. He did not see the little lad. It was on the side walk that he saw the child lying down.

Again he stoutly denied that the collision took place on the pedestrian crossing. He denied that vehicles traveling from the Cross Road's direction as well as vehicles traveling in the direction that he was traveling, but in the extreme left lane had stopped to allow Miss Housen to cross.

I find the Following Inconsistencies:

On Miss Housen's Evidence

In cross-examination Miss Housen testified in one instance that she does not cross the road without using the pedestrian crossing and

went on further to say that she never crosses the road without using the pedestrian crossing. She later admitted that it is not true that she always crosses at the pedestrian crossing.

She went on further to say that she did not walk 100 feet before crossing then she recanted by agreeing that she had walked 100 feet before crossing

On Mr. Shackleford's Evidence

Mr. Shackleford said that he recognized a shadow yet he was able to recognize the shadow as that of a female.

He said he would be able to see the pedestrian crossing however, not as clearly with his lights as unfortunately the street lights were out but his headlights were on. He could see clearly with his headlights on as he went up Slipe Road. He did see clearly.

In his examination in chief Mr. Shackleford said that he saw a shadow
In cross examination he said that he saw the shadow with an umbrella.

I find that the following areas are not in issue:

- I. That there was a collision on Slipe Road at about 11:00p.m. on the 1st July 2005 involving Miss Lisa Housen and the vehicle driven by Mr. Leon Shackleford.
- II. That the road surface was wet

III. That this collision occurred in the inside lane coming from the downtown Kingston direction traveling towards Cross Roads.

IV. That Miss Housen received injuries as a result of which she was hospitalized for about two (2) weeks.

The evidence as to the injuries is supported by Mr. Shackleford's testimony as well as the medical reports tendered into evidence.

I find the following areas in issue

- i. The point of impact; Miss Housen asserts that this was on a pedestrian crossing. Mr. Shackleford contends that this is not so, as at the time of the impact he had already passed the pedestrian crossing.
- ii. Miss Housen is saying that the collision occurred as a result of Mr. Shackleford's negligence. Mr. Shackleford contends that it was Miss Housen's negligence that caused the collision.
- iii. The weather condition at the time of the collision. Miss Housen whilst agreeing that the road surface was wet is adamant that it was not raining or drizzling at the time of the collision whilst Mr. Shackleford said it was drizzling.
- iv. Miss Housen asserts that the road on that Friday night was busy referring to pedestrians and vehicular traffic whilst Mr. Shackleford vigorously denies this.

Findings of Facts

The parties gave evidence that could easily be described as diametrically pposed however in the final analysis I find on a balance of probabilities that it is a question of fact as to whose testimony is more cogent, more capable of belief.

I accept Miss Housen's evidence when she said that she alighted from the bus that night and walked for a distance down the road to the pedestrian crossing before she attempted to cross the road.

I reject Mr. Shackleford's evidence in this respect and find that this is not an unusual occurrence.

I accept her evidence when she said that other persons had alighted from the bus that Friday night and that it was a busy Friday night both in terms of pedestrians and vehicular traffic. I reject the defendant's evidence when he said that there were no pedestrians on the road neither any other vehicle apart from his.

I accept her evidence and find as a fact that there were vehicles traveling in both directions that had stopped to allow her to cross the road. I reject Mr. Shackleford's evidence when he said this was not so.

I accept Miss Housen's evidence and find as a fact that she had almost completed her crossing when Mr. Shackleford's vehicle collided with her.

I accept her evidence and reject that of Mr. Shackleford when she said that it was her son who had the open umbrella that night. I do not find it an unusual occurrence for a child to have an open umbrella when there is no useful purpose for doing so.

I reject Mr. Shackleford's evidence when he said that all that he saw was a shadow. It seems to me that Miss Housen and her son with an open umbrella must be of far more substance than a shadow and it was only in cross-examination that he said that he saw the shadow with the umbrella. I find that he is not speaking the truth.

Having found that Miss Housen was crossing the road on the pedestrian crossing along with her son and that other vehicles had come to a stop to allow her to cross, Mr. Shackleford's action, in allowing the vehicle that he was operating to collide with her, was negligent. This I find is buttressed by Mr. Shacklesford's testimony when he said that all that he saw was a shadow with an umbrella. He did not see her son traveling with her. Further I have to question his action of not stopping when he saw the shadow.

Mr. Shackleford went on further in his evidence to say that when he started to slow down I did not see the shadow – I have to question his veracity in this respect as well and question why he would have started to slow down if he had not seen the shadow.

I find as a fact that Mr. Shackleford was not exercising the reasonable care and attention that was necessary bearing in mind the condition of the road referring to its surface, as well as pedestrian and vehicular traffic.

I appreciate that the motorist is not expected to be a perfectionist and all that is required of him is that he shows reasonable care.

In **Consolidated Bakeries and Victor Williams vs Pauline Williams 1968 11 JLR at page 49**: it was held that a motorist was required to exercise reasonable care. He was not required to be a perfectionist.

I find that in not exercising reasonable care in his use of the road, Mr. Shackleford in fact, breached the duty of care that he owed to Miss Housen and is therefore liable to her in damages.

What is Miss Lisa Housen's Position?

Miss Housen testifies that had she seen the vehicle she would have stopped as she was not running across the road but walking fast. She further testifies that all of that time she was not looking for a vehicle in that lane. If she had seen the vehicle that collided with her she would have stopped. Clearly she was not paying the requisite attention. The open umbrella might well have caused a distraction. If she had been more vigilant she probably would have seen Mr.

Shackleford's vehicle and may have been able to avoid or lessen the impact.

In Esso Standard Oil S.A Ltd and Stuart Marsh vs Ivan Tulloch 1991 23 JLR at page 553 it was held that all users of road owe a duty of care to other road users.

In Charlesworth and Perry on Negligence 10th Edition at page 170

Contributory negligence, it is said, means that there been some act or omission on the claimant's part which has materially contributed to the damage caused and it is of such that it may properly be described as negligence. For these purposes "Negligence" is to be taken in the sense of careless conduct rather than in its technical meaning involving breach of duty and other concomitants of the tort".

After considering the evidence as a whole bearing in mind the inconsistencies on the testimonies of Miss Housen and Mr. Shackleford I find Miss Housen's evidence more acceptable, more capable of belief. However I find that Miss Housen regrettably contributed to the collision.

In Victoria ADJE 1 vs Reckord King 2003 EWCA Civil 414 at page 6 paragraph 20 Lord Justice Bill propounded:

"In my judgment whatever precisely the deceased's actions were immediately before the impact, the inevitable conclusion is that he did conduct himself in a manner wholly inconsistent with a reasonable regard for his own safety and tragically and regrettably such a lack of regard contributed to the collision which in fact occurred."

I find that Miss Housen contributed to the accident by her own negligence in a ratio of 30%.

Assessment of Damages

Special Damages

Miss Housen in support of her special damages tendered into evidence receipts as well as reports.

I will allow the following items properly pleaded in her Particulars of Special Damages as strictly proven:-

- (i) Cost to Kingston Public Hospital (admission) \$9,400.00 Exhibit 4
- (ii) Cost to Kingston Public Hospital (out patient)\$1,400.00 Exhibit 5
- (iii) Cost to Dr. Christopher Rose Medical Report\$23,000.00 Exhibit 3
- (iv) Cost to Physiotherapy \$21,500.00Exhibit 6a,6b&6c

I will also allow the amount claimed for traveling to the hospital for two (2) weeks at \$1,200 per round trip and although there were no receipts submitted in evidence in support of this,I accept her evidence

that she did in fact traveled to the hospital and so find as a fact. Further I find that her traveling to the hospital was not successfully contested therefore I will award her the amount of \$9,600.00 as plead. As it relates to the amount for extra help, Miss Housen provided receipts totaling \$96,000.00 claiming for the period 8th July 2005 to the 8th August 2007 - exhibit "7". However I have to disallow the receipts dated the 6th January 2005 - 3rd February 2005 for the obvious reason that the collision occurred on the 1st July 2005.

I will allow the receipts for July 8, 2005 to December 30th 2005 amounting to \$78,000.00.

I appreciate that her mother was the one who gave the extra help as well as a neighbour when her mother is unavailable. In **Michael Thomas vs. James Arscott and another 1986 23 JLR page 144.**

At page 149 following **Donnelley vs. Joyce 1973 3AER page 475** it was pointed out that the defendant was liable to the plaintiff for mother's services i.e. her loss of wages, necessitated by the defendant's wrong doing.

Miss Housen is entitled to recover damages in respect of the fair and reasonable costs of the special attention necessitated by the defendant's wrong doing.

I will also allow her loss of earnings for the period the 1st July 2005 to the 4th November 2005 at \$15,000.00 per week which amounts to

\$270,000.00, as I accept Miss Housen's evidence that she was earning \$15,000.00 net per week as a self – employed cosmetologist. I also find that the period claimed for is reasonable bearing in mind the nature and extent of her injuries as indicated by the medical certificates of Doctors. Sheriff Imou and R.C Rose which in essence outlined fracture of the left humerus, fracture of the left medial malleolus as well as neck pains, with immobilization of both fracture with casts.

At item VII(b) of her special damages, Miss Housen claims as a hairdresser with reduced earnings of \$8,000.00 per week from the 4th November 2005 to the 8th August 2007.

McGregor on Damages 17th Edition at paragraph 35 – 047 at page 1196 states that:

"The claimant is entitled to damages for the loss of his earning capacity resulting from the injury. This generally forms the principal head of damages in a personal injury action. Both earnings already lost by the time of the trial and prospective loss of earnings are included. Whilst the rules of procedure require that the past loss be pleaded as special damages and the prospective loss as general damages (**British Transport Commission vs Gourly 1956 A.C page 185**), there would appear to be no

substantive difference between the two, the dividing line depending purely on the accident of the time that the case comes on for hearing.”

Miss Housen’s evidence is that now in 2008 “I take home less, \$8,000 per month.

She said that she did not have the proof right now but she can tell. I accept her testimony as to her earnings before the accident as well as to the reduction in her earnings thereafter and I am prepared to rely on it because I believe she is speaking the truth in this respect.

In **Desmond Walters vs. Carlene Mitchell SCCA No.64/91** Justice Wolfe at page 5 points out that

“without attempting to lay down any general principle as to what is strict proof, to expect a side wall or a push cart vendor to prove her loss of earnings with the Mathematical precision of a well organized corporation – may well be what Bowen L.J. referred to as “the vainest Pedantry” (**Ratcliffe vs. Evans 1892 2Q.B. 524 C.A.**).

I am not unmindful of how persons in Miss Housen’s position operate the type of business they are involved in as it relates to strict accounting principles.

I therefore award her Special damages in the amount of \$412,000.00 at 6% interest from the 1st July 2005 to the 21st June 2006 and

thereafter at 3% to today's date. For her reduced earnings I will award her \$728,000.00 with no interest awarded.

General Damages

Miss Housen testifies that since returning to work and even up to present she still has problems bending or holding down her neck without feeling pains. Generally the bending down of her neck, to wash, shampoo or braid brings on the pain in her neck which often times goes into her shoulders and cause real discomfort. The long standing affects her ankle where it was broken. If she walks for any length of time the ankle becomes swollen and painful, the same if she stands too long.

I take note of Dr. Rose's evidence contained in exhibit 2 where he said she appeared to walk comfortably in high heeled shoes.

On admission to the Kingston Public Hospital when examined by Dr. Ian Neil Miss Housen was diagnosed with fracture of the left humerus as well as fracture of the left malleolus. Two (2) year later when she was examined by Dr. R.C. Rose the Consultant Orthopedic Surgeon his impression was:

- (1) mild cervical strain,
- (2) mild chronic soft tissue injury to left ankle,
- (3) mild mechanical lower back pains.

Dr. Rose further comments that Miss Housen will be plagued by intermittent swelling around the ankle with prolonged standing and walking. Her permanent partial percentage disability as it relates to the mild cervical strain has been evaluated at 3%.

The attorneys for the parties submitted authorities in the matter and I am grateful to them.

In arriving at an amount for general damages I am guided by the following authorities: In **St. Helen Gordon vs. Royland Gordon suit C.L. 1997 G025** reported at vol. 5 page 152 of Khan Personal Injuries, heard on the 28th November 2000. The claimant had a whiplash injury to her neck – Her PPD was evaluated at 3%. She was awarded the sum of \$400,000.00 at the time. Updated this amounts to \$1,128,798.84.

In **Pauline Willis vs. Fitzroy Hamilton Laidley (b.n.f. James Willis Suit # C.L. 1987, W244** reported at page 254 of in Harrison's Assessment of Damages for personal Injuries. Assessed on the 20th June 1990. The 15 year old plaintiff had fracture of the right humerus and left with deformity and tenderness of the right upper arm. She had minor injuries including tenderness over the right buttock and upper anterior quadrant, a 1cm laceration around the left palm and multiple bruises around the left side of the body. At the time of trial she had recovered fully except for arm pains when she lifts

heavy objects. For general damages pain and suffering she was awarded \$40,000.00 updated this amounts to \$943,005.13.

In **Ivan Clarke vs. Lionel Bayliss & Anor Suit No. C.L. 1990/C232** reported at page 225 of Harrison's Assessment of Damages for Personal Injuries, damages assessed on the 17th October 1991. The claimant had an un-displaced fracture of the greater tuberosity of the left humerus, abrasions to the left palm, elbow and left leg and prepateller with paresthesia of the left knee. For his pain and suffering he was awarded \$40,000.00 updated this amounts to \$338,919,92.

I take into consideration the range of awards as well as the other injuries sustained by Miss Willis and Mr. Clarke and award Miss Housen \$750,000.00 for the injury to her left arm.

In **George Might vs. Ridell Witter Suit No. C.L. 1990/M021** reported at page 374 of Harrison's Assessment of Damages for Personal Injuries. Damages assessed on the 4th June 1991. The claimant sustained fracture of the left malleolus of his ankle; laceration of the medial aspect of the heel. He was awarded \$35,000.00 for his general damages updated this amounts to \$551,674.36. I take into consideration the other injuries sustained by Mr. Might and award Miss Housen \$250,000.00 for the injury to her ankle.

In total for her general damages for pain and suffering I award her the sum of \$2,128,798.84 at

Order

Judgment for the claimant in the following amounts:

- 1) General damages for pain and suffering - \$2,128,798.84 at the rate 3% interest from the 18th July 2006 to the 3rd December 2008.
- 2) Special damages in the amount of \$412,000.00 @ 6% interest from the 1st July 2005 to the 21st June 2006 and thereafter @ 3% interest to the 3rd December 2008.
- 3) Reduced earnings in the sum of - \$\$728,000.00 with no interest awarded.
- 4) Costs to the claimant to be agreed or taxed.
- 5) Leave to appeal is granted.

The claimant is entitled to 70% of the amounts awarded for General Damages, Special Damages and Reduced earnings.