IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P.212 OF 1987

BETWEEN	POGAS DISTRIBUTORS LIMITED	PLAINTIFF
AND	CLINTON GRANT	1ST DEFENDANT
AND	WILLIAM BERNARD	2ND DEFENDANT

Mr. Norman Davis instructed by Myers, Fletcher & Gordon for the Plaintiff.

Mr. Garth McBean instructed by Dunn, Cox & Orrett for Defendants.

CONSOLIDATED WITH

SUIT NO. C.L. F.022 OF 1993

BETWEEN	OSWALD K. FRANCIS	PLAINTIFF
AND	CLINTON GRANT	1ST DEFENDANT
AND	WILLIAM BERNARD	2ND DEFENDANT

Mr. Norman Davis instructed by Myers, Fletcher & Gordon for Plaintiff.

Mr. Garth McBean instructed by Dunn, Cox & Orrett for Defendants.

CONSOLIDATED WITH

SUIT NO. C.L. M.038 OF 1993

BETWEEN	FREDA CLAIRE MCKITTY	PLAINTIFF
AND	POGAS DISTRIBUTOR LTD.	1ST DEFENDANT
AND	O.K. FRANCIS	2ND DEFENDANT
AND	ROBINSON'S CAR RENTAL LTD.	3RD DEFENDANT
AND	DENVE SMITH	4TH DEFENDANT
AND	WILLIAM BERNARD	5TH DEFENDANT
AND	CLINTON GRANT	6TH DEFENDANT

Mr. John Graham & Mr. Hector Robinson instructed by Brederick & Graham for Plaintiff.

Mr. Norman Davis instructed by Myers, Fletcher & Gordon for 1st & 2nd Defendant.

Mr. Patrick Bailey for 3rd & 4th Defendants.

Mr. Garth McBean instructed by Dunn Cox & Orrett for 5th & 6th Defendants.

HEARD: November 23, 24, 25, 26, & December 13, 15, 16, 1993, January 28, 1994

CORAM: LANGRIN, J.

These actions were consolidated: The plaintiff Pogas Distributors Limited is the owner of a Pick-Up which was being driven by Oswald Francis with Freda McKitty as passenger. A motor van owned by William Bernard and driven by Clinton Grant allegedly caused the Pick-Up to enter into a skid and collided with a motor truck owned by Robinson's Car Rental Limited and driven by Denve Smith.

At the outset of the trial Learned Counsel for the plaintiff McKitty announced a discontinuance of the action against the 3rd and 4th defendants.

On the 7th February, 1987 at approximately 2:30 p.m. the plaintiff's Company Lada Pick-Up was being driven by its agent O.K. Francis along the main road between Kingston and Walkers Wood in the parish of St. Ann. Clinton Grant was driving in the opposite direction and was in the process of overtaking a motor truck. The plaintiff being confronted with a situation in which he had no time to avoid a collision, braked his vehicle and it skidded on the wet road onto the truck which was being overtaken. There was a collision as a result of which the plaintiff's Pick-Up was written off. The driver Oswald Francis and his passenger Freda McKitty both suffered injuries. Mr. Francis was the Managing Director of Pogas and because his injuries had left him incapacitated for sometime the business suffered losses.

The defendants denied the claims and more particularly the defendant Oswald Francis counter-claimed for the recovery of medical expenses paid to Freda McKitty on the basis of an oral agreement. It appears that this counterclaim was abandoned since there was no evidence emanating from Mr. Francis to support the claim.

The evidence of the plaintiff Oswald Francis both on behalf of the company and himself was straightforward. On this unfortunate day he was driving his left hand drive Pick-Up with passenger Freda Davidson-McKitty on the Walkers Wood main Road at a speed

of about 25 to 30 m.p.h. It was drizzling at the time of accident and the road was wet. Just as he completed a left hand corner he saw a blue van on his side of the road over-taking a truck. The road was narrow and both vehicles were coming towards him and all he could have done was to apply his brakes. His car swerved and skidded on to the truck which was on the opposite and correct side of the road. His passenger was injured and the Pick-Up was a write-off. He received injuries and as a consequence received medical attention.

Corporal Roy Smith of the St. James C.I.B. who was travelling in a service vehicle behind Mr. Francis's Pick-Up at the material time in the main supported Mr. Francis' account of the accident. He too said the collision took place in a slight bend. It was just as the truck reached a couple yards coming into the bend the van started overtaking. After the accident, the van was 'going through' and he shouted him to stop. Much reliance is placed on Roy Smith's evidence.

The defence as usual contended that Mr. Francis was the sole cause of the accident or alternatively contributed to it. The particulars of negligence on the plaintiff Company's part included driving at an excessive speed, causing or permitting his vehicle to skid or violently swerve into the motor truck which was proceeding from the opposite direction, failing to have any regard for the wet condition of the road, failing to stop, slow down swerve or in any way manoeuvre the said motor vehicle to avoid the said collision, or to give any warning of his approach.

Raymond Bernard, an employee and passenger in the van owned by William Bernard, was the sole witness for the defence. He admitted that he did not own a drivers licence but he could drive. He said the collision happened on a straight and it was when the van had reached one quarter of the length of the truck he saw the Pick-Up coming around a corner. He said the driver of his vehicle

applied his brakes and slowed down to get behind the truck. Grant, the driver braked up while the truck was proceeding. The Pick-Up was then about 60 yards away. The truck travelled for 40 yards and the van returned fully behind the truck.

I accept the evidence that the collision happened in the vicinity of the corner and not on the straight as the defence is trying to make out. There is a reasonable inference that the motor van driven by defendant Grant was trying to overtake the truck before it reached the corner and heading for the winding "up hill stretch" of road.

I agree with the submission of Mr. Davis that if it were safe for the motor van to overtake the truck, why didn't the van driver complete the manouvre he was half-way through and would take less time than retreating. The only conclusion appears to be is that he faced a head-on collision. Further the fact that he braked up shows clearly that he had faced a dilemma. That to my mind is the clue to the main cause of the collision.

One would expect that Messrs. Bernard and Grant would have remained at the scene after the collision and give some of the needed assistance. That was not to be. They both attempted to leave the scene and had to be stopped by Corporal Smith. This conduct seems to me unusual and more consistent with some measure of blame. The credibility of Bernard as a witness is certainly brought into focus.

I make the following finding of fact in respect of the defendant Clinton Grant:

(1) He was overtaking the motor truck in a manner which was manifestly dangerous in the circumstances giving the plaintiff's driver no choice but to instinctively swerve to avoid a head-on collision and causing him to collide with the motor truck. The defence witness' explanation of how he moved behind the truck before the collision is entirely unacceptable.

I find that the following particulars of negligence pleaded by the plaintiff proved.

1. Failure to keep any or any proper look-out for oncoming traffic before overtaking.
2. Failing to have any due regard for other users of the roadway at the material time.
3. I find as a fact that the van was not behind the truck at time of collision.

There is common ground between the parties that the road was wet. Mrs. McKitty deponed that Mr. Francis was driving at about 40 m.p.h. while Mr. Francis himself admitted driving around 25 m.p.h. In view of the wet condition of the road, and that he was driving down a hill, in my judgment Mr. Francis was driving in a manner asking for a skid. See London Transport Executive v. Morgan & Company 1953 L. 1572. Further in my view he was not keeping a proper look-out so that he could have safely steered his vehicle or brought it to a stop without incident. He is therefore partly to blame for the collision.

In my judgment the liability should be apportioned 80% and 20%. This means that Pogas Distributors Limited and Oswald Francis would be liable for 20% of the damages while Clinton Grant and William Bernard would be liable for the remaining 80% of the damage.

On the First Claim the Special Damages is assessed as under:-

Assessor's fee	$85.00
Loss of Unit	20,000.00
Loss of use for 6 weeks @ $1500 per week.	9,000.00
Loss of Profits after tax	30,000.00
	$89,085.00

No award for General Damages

The defendants must pay 80% of this sum.

Regarding the second claim Mr. Francis complained of pain in his chest as well as minor cuts. He had a major sprain to his foot

for which he had to use crutches for a number of weeks. Not until about four weeks after the accident that he was able to move around. He was unable to drive or lift weights. Also had physiotherapy for about 6 to 8 weeks. He still has pain in his right foot which wears badly in shoes. In 1987 Dr. McNeil-Smith opined that Mr. Francis sustained a serious sprain of his intertarsal joints of his foot but should have no permanent disability. I assess damages as under:-

General damages - Pain & Suffering	$40,000.00
Special Damages:	
Loss of earning for 5 weeks at approximately $6,000 per week deduct 1/3 for income tax	20,000.00
Transportation Expenses	5,000.00
Medical Expenses	4,000.00
	$69,000.00

The defendants must pay 80% of the sum.

I now turn to assessing the damages on the Third Claim. This claim is that of Freda McKitty against all the defendants. There was an attempt on the part of the 1st and 2nd as well as 5th and 6th defendants to reduce the claim made by the plaintiff McKitty on the basis that she was contributorily negligent in that she failed to wear her seat belt at the material time and had she done so her injuries would have been prevented or lessened. This attempt failed when the medical evidence clearly stated that the wearing of seat belt may increase the incidence of spinal injury even though it may reduce the incidence of brain injury. It is more probable than not that the risk of cervical injury may be increased with the wearing of seat belt. With the wearing of seat belt the body is prevented from moving but not so with the head and neck. Freda McKitty, is an attractive and intelligent woman. She is now divorced and a masseuse operating her own business. At the time of the accidentshe was 27 years old, unmarried and was employed to Pogas Distributors Limited as an Administrative Assistant and Sales Representative. It was her first week on this job and she was earning a salary of $24,000 per annum.

In her evidence, she said she lost consciousness at time of impact but regained it before she left the scene to the hospital. She experienced numbness in her neck, pains in her upper limbs and difficulty in breathing. She had a dizziness and she was fitted with a collar and cast on her left leg. She was given steroids and for the first month was immobile. Her bed was articulated and a catheta was inserted in her urethra. She never had a bowel movement for about two weeks. Apart from a short term memory her memory in general was being affected. She had to be fed and it was not until three months after the accident she was able to move about unassisted. There was a negative reaction to the steroids resulting in her getting a moon face, rash and hair growing in her face, abdomen distended and cessation of menstural periods. After the collar was removed she experienced an electrical sensation in her spine. Her right side was paralized and she lacked movement on left side immediately after the accident for a period of 2 months. There were problems with motor movements on the left hand. She cannot play musical instruments or do any high impact exercises e.g. aerobics or tennis. She is a masseuse having received training in 1989. Her left hand becomes tired since the muscles atrophy. She is unable to swim because the left arm movements limits her and makes her tire easily. She is unable to take cold showers and during cold weather she has neck pains and the left hand comes up in a fist. Whenever she reads she experiences neck pains from holding down her head. Similarly, when she plays indoor games like checkers, cards and chess. Whenever she takes long walks her knees buckle under. Prior to the accident she enjoyed swimming and badmington. She used to go to the Gym but unable to do so now with one side of her being off balance with the other. She does not go as often and tends to be more irritable. She started working in October 1987.

Let us now look at the medical evidence. Dr. Ivor Crandon, Consultant Neurosurgeon and Lecturer in the Department of Surgery

at University Hospital of the West Indies, first saw the plaintiff on 1st April, 1993 but the medical reports of Dr. Dundas in 1987 were available to him. On examination, her cranial nerves were normal. The significant findings were confined to her limbs. There was slight weakness (Grade 1V power MRC) of the left leg. She also had wasting of the left deltoid and the left leg with a 2cm calf girth difference, the left being smaller than the right. There was sensory loss over the right leg to pinprick and light touch but vibration sense was unimproved and coordination was normal. She had generalized hiper-reflexed with an inverted left supinator jerk, a left extensor plantar and an equivocal right plantar response. There was a full range of motion of the cervical spine. The Doctor opined that there was clinical evidence of a mild myelopathy with a C5 level root lesion, all the result of the injury and consequential damage to the spinal cord and nerve root. A magnetic Resonance Image (MR1) scan was carried out in Florida on 18th May, 1993. The study demonstrated mild foraminal narrowing on the left at C 4/5 and bilaterally at C 5/6. She has suffered a cervical spine injury and has residual neurological deficits as a consequence of damage to the spinal cord. The MR1 findings are not inconsistent this opinion with respect to this patient whose injury occurred 6 years ago. In his view she has a permanent partial whole person disability of 20% (AMA). Further improvement in her neurological function is very unlikely. Finally, he opined that the weakness on left side can affect job of masseuse.

Professor Sir John Golding, Consultant Orthopaedic Specialist at the University Hospital examined Freda McKitty on 19th November, 1993, and in his final report had this to say:-

"From Mr. Dundas' report, it is apparent that Mrs. McKitty's clinical appearance and signs have reduced considerably during the past year. This suggests that she has now reached M.M.I. and can be considered as now having a whole person impairment of about 5% to which must be added a factor for the possibility of late sequelae

development due to the definite damage to her cervical spinal cord. I would consider a total of 10% would be a fair estimate of her whole person impairment."

In October 1992, Dr. G.G. Dundas, Consultant Orthopaedic Surgeon had assessed her as suffering a 25% permanent partial disability relating to the whole person. Dr. Crandon gave evidence and I was particularly impressed with the manner in which he gave his evidence. He was tested under cross-examination and in the end his opinion seemed even more impressive. It follows that I accept his opinion that Freda McKitty has a permanent partial whole person disability of 20%.

I now turn to a consideration of the question of damages.

Special damages awarded are based on the agreement between the parties and the evidence led in support of the items claimed.

The plaintiff claims Loss of Earnings as masseuse for 20 weeks at US$148.50 per week and continuing. At the time of the accident she was an Administrative Assistant earning $2000 per month. In 1989 she started to work as a masseuse.

In looking at the assessment of damages for the loss of future earnings, one way is to concentrate on <u>earning capacity</u> and value this as a capital asset destroyed or diminished by the accident.

The evidence clearly shows that the plaintiff is a very enterprising person and is continually looking for ways and means to enhance her economic welfare. She first embarked on management courses, which followed with a Beauty Salon and Skin Care business in which she employed 2 persons. Then in 1989 she received training as a Masseuse. She now operates Skin Care and Massage business in which she employes 2 persons. Massage involves arms, hands and finger pressure. She depones that the disability to her left hand has affected her in doing massages. Someone else must come in to assist her during the winter tourist season when she has an excessive number of clients. This is because she gets tired easily due to the atrophy of the muscles of the hand. Based on last year's experience she required assistance for about six to seven sessions per week.

The charge is US$55 per session but when there is an assistant, she would be paid 45% of the fee. Under cross-examination by Mr. Davis she was asked whether sub-contract is a function of excess demand and she replied "not necessarily". However, she went on to say that it has nothing to do with natural influx during that period.

It is submitted by Mr. Graham that she would lose 6 sessions per week at US$24.75 per session = US$148.50. Loss for winter season is equivalent to 20 weeks = US2970.00. Net earning would be US$2228 Further given her age a multiplier of 5 would be reasonable and therefore a Loss of Future earnings of US$14850.00 should be awarded. Net earnings would be US$11,138.00. Both Counsel for the defendants have submitted that there is no basis for the claim because it has no connection with the collision since the plaintiff became a masseuse long after the collision. There is therefore no causal connection with the accident.

I cannot accept that submission. To prove the fallacy of the argument, an absurd result would be shown if a plaintiff unemployed at the time of the accident received employment before the date of the trial. Such a person, the argument goes if unable to continue working by reason of the injury would not be entitled to loss of earnings. This could not be so.

In dealing with the evidence adduced in support of earnings, the evidence came from oral testimony unsupported by even a scrap of documentary evidence. As was stated in the judgment of Rowe P. Hepburn Harris v. Walker C.A. 40/90 "Plaintiffs ought not to be encouraged to throw figures at Trial Judges, make no effort to substantiate them by even their books of account and to rely on logical argument to say that specific sums must have been earned. Courts have experience in measuring the unmeasurable ..... but when they have so acted, their determination ought not to be unreasonably attacked."

In view of the above I make no award for loss of earnings or future earnings as a masseuse.

With respect to Handicap on the Labour Market and with reference to Dr. Crandon's evidence that the weakness on the left side can affect her job as a masseuse and taking her own evidence into consideration pertaining to her earnings I make an award of $400,000.00 for Loss of Earning Capacity. It must be borne in mind that although the evidence of the loss of earnings was not challenged, the reliability of the evidence is a matter which I carefully considered. The reason for such a substantial award under this head relates to the foreign exchange earnings in that field of activity. I award Special Damages as under:-

Loss of earnings as Administrative Assistant $2000 per month for 6 months	$12,000.00
Loss of earnings as masseuse for 20 weeks at US$148.50 per week and continuing	No award
Medical Expenses (MRI X-Ray) US$600.00 @ $32.00 = 1 Exchange Rate)	19,200.00
Hospital Bills, Consultation fees Physiotherapy, etc (Agreed)	30,200.00
Travelling Expenses (Agreed)	12,000.00
	$73,400.00

On the issue of general damages there can be no doubt that the plaintiff should be awarded substantial damages. As indicated supra I accept the opinion of Dr. Crandon that the plaintiff suffered a disability of 20% of the whole person. Both counsel for the defendants have asked me to make an award of no more than $400,000.00 and cited Manley Thomas v. Jamaica Public Service & Attorney General Vol.3, Personal Injury Awards at p.195 in support.

Mr. Graham cited the following cases on behalf of the Plaintiff: (1) Millicent Ramsay vs. Clifford Rose C.C. R.105/90 (Unreported), in which the injuries were not as serious with a 4% disability of the whole person. W. James J. in 1993 awarded $400,000.00.

(2) Thompson v. McCalla & Jamaica Omnibus Service Vol.3 - Khans Personal Injury Awards P.152. Here the plaintiff was in hospital

for 6 months but the disability was 15%, hence the injuries were less severe. The award was in 1986 and when updated to the money of today the sum would be $1.2m for Pain & Suffering and Loss of Amenities. In that case Dr. Golding described the infant plaintiff as a 'partial paralized' yet there was much similarity to the injuries in the instant case.

Taking everything into consideration my award under General Damages is as follows:-

Pain & Suffering and Loss of Amenities	$1 million
Loss of Earning Capacity	$400,000.00

Summary

1. Suit No. C.L. P.212 of 1987

General Damages -	No award
Special Damages	
Assessors fee	85.00
Loss of Unit	20,000.00
Loss of Use for 6 weeks @ $1500 per week	9,000.00
Loss of Profits after tax	60,000.00
	$89,085.00

Plaintiff is 20% to blame, Defendants to pay 80% of damages. Judgment for the plaintiff on the claim in the sum of $71,268 with interest at 3% from the relevant date.

Costs to be agreed or taxed.

2. Suit No. C.L. F.022 of 1993

General Damages	
Pain & Suffering -	$40,000.00
Special Damages	
Loss of Net Earnings for 5 weeks @ approximately $4000 per week.	20,000.00
Transportation Expenses	5,000.00
Medical Expenses	4,000.00
Total	$69,000.00

Plaintiff is 20% to blame. Defendants to pay 80% of damages. Judgment for the plaintiff on the claim in the sum of $55,200.00 with interest at 3% from the relevant dates.

Costs to be agreed or taxed awarded to the plaintiff.

3. Suit No. C.L. M.038 of 1993

General Damages

	$) million
Pain & Suffering & Loss of Amenities	
Loss of Earning Capacity	400,000.00
	$1.400,000.00

Special Damages

Loss of Earnings as Administrative Assistant at $2000 per month for 6 months -	12,000.00
Medical Expenses (US$600 @ $32 for 1	19,200.00
Hospital Bills (Agreed)	30,200.00
Travelling Expenses (Agreed)	12,000.00
	$73,400.00

Judgment for the plaintiff on the claim in the sum of $1,400,000.00 as General Damages with interest at 3% from date of service of writ to date of judgment. Special Damages assessed at $73,400 with interest at 3% from 7/2/87 to date of judgment. Counterclaim dismissed. First and Second defendants to pay 20% and 5th and 6th defendants to pay 80% of the damages. Costs awarded to the plaintiff to be agreed or taxed. Defendants to pay costs in proportion to their liability.