SUPREME COURT LIBRARY
KINGSTON
JAMAICA
J| Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. R-312 OF 1986

BETWEEN	PAMELA RANCE	PLAINTIFF
A N D	JAMAICA PUBLIC SERVICE COMPANY LIMITED	DEFENDANT

Miss Hilary Phillips and Miss Carol Davis instructed by Messrs. Perkins, Grant, Stewart, Phillips and Company for plaintiff.

Mr. Christopher Honeywell and Ms. Joy Donaldson instructed by Messrs. Clinton Hart and Company for defendant.

JANUARY 14 AND 15, 1990
JANUARY 29, JULY 22 AND 23, 1991
DECEMBER 11, 1991

COOKE, J.

In this case, the plaintiff Pamela Rance received injuries when the motor vehicle provided for her use by her defendant employer left the road. She was driving this vehicle at the material time. She contends that she was given a defective vehicle to drive and the defendant was thereby in breach of an implied term of her contract of employment in that the vehicle was not in a suitable state for the purpose of providing her with a safe means of transportation. The defendant does not take issue that the plaintiff was to be provided with a vehicle - nor that it had a responsibility to provide a vehicle fit for the purpose of transporting the plaintiff safely. It contends that these obligations were faultlessly discharged. Pamela Rance was the author of her injuries - for she drove the provided vehicle in such a negligent manner that it left the roadway. She was all to blame - or at least partially.

On the 18th of December, 1985, the plaintiff was at the Sav-la-mar district office of the defendant. She was the acting commercial superintendent and had recently assumed that position. Also working at this office were Jennifer Goodall who was on a visit to this district office in her capacity as chief internal auditor, and Winston DaSilva who was the district manager. It was about 5:00 p.m. and the labours of the day having been completed, all three persons left as a team, each driving their individual vehicles. Their destination was Negril where they had their accommodation. At the material time, the plaintiff was in front; Goodall followed and then DaSilva. The party had been travelling fairly slowly for the condition of the road thus dictated. However, as they reached Sheffield,

the quality of the road surface improved. It was asphalted, wide and smooth. Speed was increased. Rance approached what she described as a slight curve. This is how she described what took place thereafter: "I went around a slight curve at about 40 m.p.h. I reached on the straight part of the road. I felt the steering wheel loose. Vehicle started to go to the right and then to the left. I started to brake and trying to control vehicle. It was going from right to left - left to right. Heard bang - felt head going in circles. Next found myself in the passenger seat - vehicle parked on top of fence. I lifted my head and saw Mr. DaSilva at passenger side of door. Blood flowing from my head. I felt excruciating pain in my back. The fence was on the left side of the road ---- When I felt loose steering I held on to it to keep vehicle on the road. I was a licensed driver for eighteen (18) years. I have never experienced anything like that before. Top-roof on drivers side caved in half way to the seat".

Jennifer Goodall's evidence is as follows: "I was travelling between 45 to 50 m.p.h. I was travelling behind plaintiff. She had just turned a corner - it was a left hand corner. She was actually on the straight. The vehicle started to go two sides of the road. At one stage, the vehicle almost hit a light post. There was a property to the side of the road - vehicle left road and went over into this field. Vehicle spun and sommersaulted into the field. When I say vehicle swerving, it was going from left to right. ----- Prior to swaying, I noticed nothing unusual about the passage of that vehicle. I think - but hazy here - but it sommersaulted twice". DaSilva did not see what happened.

The thrust of the cross-examination of Rance was that she was driving too fast and lost control of the vehicle. This was flatly denied. Rance denied that immediately after the accident, she said to DaSilva, "Is set them set me up". She said she asked, "I wonder if is that I am set up, Winston?" (It would appear that at that time there were irregularities in the district - hence the presence of Goodall.) The plaintiff insisted that there was something wrong with the steering mechanism. She did not know if the car hit the fence which bordered the field in which the vehicle landed. She admitted that on entering the left hand curve there was a slight descent. She said, "as approach corner going 40 m.p.h. Going down descent picked up a little speed. I now say not necessarily so. I did apply brakes to go around". She did not know what caused the bang she heard. It was Goodall's opinion that the descent at the curve

was some 45°. She said, "We were actually on the straight when saw car swerving", and that she did not hear any unusual sounds coming from the plaintiff's vehicle. She did not see any of the rear tyres 'burst'. To the court she estimated with some reluctance as she was not given to estimations that during the swerving, the vehicle covered about 100 feet.

During this trial, a great deal of time was taken up concerning the role that the condition of the rear tyres of the defendant's vehicle may have played in the causation of this accident. Paragraph 9 (d) and (e) of the Particulars of Negligence in the statement of claim reads:

> "9(d) Failing to ensure that the motor car was fitted with roadworthy tyres so as not to be a hazard or danger to the plaintiff.
>
> 9(e) Failing to observe, to inspect, to warn or report to the plaintiff that there were worn tyres on the said motor vehicle."

The plaintiff has endeavoured to show that a defective rear tyre could, on a balance of probability, caused the accident. After much legal submissions on both sides, she succeeded in getting into evidence by way of an affidavit, a report of K.G. Mills who was at the relevant time, acting manager - transport of the defendant. This was the report:-

> "TO: Mr. L. Mordecai, Manager - Insurance
>
> FROM: K.G. Mills, Acting Manager - Transport
>
> DATE: May 20, 1986
>
> SUBJECT: Motor vehicle accident involving vehicle #728 licence #NH 1648 driven by Pamela Ramze.
>
> ---
>
> At your request and based on recent correspondence on the subject, I requested that both rear wheels of the above mentioned vehicle be removed from the vehicle and brought to me for inspection. Both wheels were inspected by me in the presence of Mr. Carney, and the following observations were made.
>
> Right Rear Wheel
>
> (i) This tyre was fitted with a tube - indicating that some repairs were carried out at some time as the other tyre remained tubeless.
>
> (ii) The tube was displaced inside the tyre, but that could have been caused while being handled by the wrecker crew.
>
> (iii) There was one poorly fitted plug in the tyre which is further evidence of previous repairs. The plug was made up of strips of rubber tubing.

" Left Rear Wheel

(i) The tyre fitted without inner tube (tubeless)

(ii) There were four (4) small nails embedded in the surface, any number of which may have penetrated the case.

(iii) Both tyres were deflated

(iv) Both tyres were about 50% worn

(v) Both rims were dented.

Sgd. K. G. Mills

cc: Mr. G. Wilson
Mr. H. Bennett "

The plaintiff then called Victor Lawrence as an expert witness. He described himself as an automotive engineer. His experience of some thirty-three (33) years was wide ranging and not unimpressive. He proferred his opinion as to the inadequacies of a improvised plug made up of strips of rubber tubing (see (iii) of first paragraph of the Mill's report). The danger was that "over time there would have been abrasion on that tube. Eventually would get hole in tube leading to immediate deflation". He further opined that immediate deflation would lead to loss of fraction resulting in the vehicle drifting and ultimate loss of control of that vehicle. The plaintiff is here positing a theory of how and why the accident occured. Is this theory sustainable? I think not. Lawrence in cross-examination said that "as a result of collision a tyre on a car could become deflated. This would depend on impact and what caused impact. A car turning over repeatedly could cause deflation of tyre or tyres". There is no evidence of any deflation before the vehicle sommersaulted. Deflation is consistent with the car overturning having crashed into the fence bordering the field. Both rims were dented. Thus, the theory is punctured. There is another reason for rejection. Mills examined wheels purportedly taken from the plaintiff's vehicle. These were wheels which were sent to him some five months after the date of the accident. Where were these wheels during the five month interval? Are these in fact the wheels which were on the plaintiff's vehicle? There is an evidential hiatus.

The plaintiff has failed in her effort to theorise, and now draws the last arrow to her bow - the doctrine of res ipsa loquitur. The fact that she has sought to tender evidence to attach fault to the defendant does not preclude her from relying on this doctrine. My starting point is to accept and rely on the following

statement of law by Kennedy L.J. as to the meaning of the maxim res ipsa loquitur in his judgment in Russell v. L & S W Ry. (1908) 24 T.L.R. 548, at 551.

> "The meaning as I understand, of that phrase .... is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurence took place without negligence. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the fact shows that what has happened is reasonably, to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances".

Firstly, the plaintiff has to establish that the occurence of the accident is unexplained. This doctrine is dependent on the absence of explanation. In this case the plaintiff says she was driving with due care and attention when the vehicle took onto itself its own course. The defendant pleaded as follows in paragraph 11 of defence:

> "The defendant says the said collision was caused or contributed to by the negligence of the plaintiff.
>
> PARTICULARS OF NEGLIGENCE
>
> (a) Driving at an excessive or improper speed.
>
> (b) Failing to maintain any or any sufficient control of the said motor car.
>
> (c) Failing to take any or any sufficient control of the said motor car.
>
> (d) Failing to stop, slow down, turn aside or otherwise so to manage or control the said motor car as to avoid the said collision."

The defendant does not rely on any direct evidence to substantiate its assertion. Rather, its argument is that the vehicle was in excellent condition therefore its capsizing must be by the doing of the plaintiff. Now, what are the facts which the defendant wishes the court to find proved so that the court can infer the existence of the fact in issue that it was the defendant's fault? There is the evidence of DaSilva obtained through cross-examination. He said, "I looked at the front end of vehicle, I examined ball joints. Saw nothing wrong

ball joints part of steering arrangement". I give no weight to this rather perfunctory opinion. In the first place there is nothing to suggest that DaSilva is competent to give an opinion of this nature. Secondly, this is a mere bald assertion. DaSilva does not tell of the nature of his 'looking'. Thirdly, even if some credence was to be given to his opinion, the court is not in a position to say that it is only defective ball joints that could have produced the phenomenon described by the plaintiff. In any event, DaSilva was quite unimpressive and I could not help but wonder whether he was troubled on the question of where his loyalty lay. Also called by the defendant was Wilbert Reid. He has been an Inspector of Motor Vehicles for twenty-six (26) years as a government employee. He examined the plaintiff's vehicle on December 20, 1985. He said he carried out a "static test" on the steering and he found all "ends" alright. The "static test" was a test whereby he inspected the "ends" while someone else moved the steering wheel. He found the braking system to be in perfect order. Now, Reid did not divulge the nature of his inspection. One would expect that an expert witness, for it is as an expert that he is called, would be more forthcoming and of much more assistance. This court was entitled to expect that he would demonstrate his expertise in describing the total functioning of the steering mechanism - and the mechanical aspects which together contribute to a fully functional vehicle as regards it steering capacity. This he did not do. Is it only the "ends" that matter? I know not. I attach no weight to his evidence. Therefore, there are no proved facts from which the inference sought by the defendant can be drawn.

I now examine the plaintiff's contentions. It is crucial to my assessment of her evidence that I subject her credibility to the closest scrutiny because hers is essentially the only evidence which grounds the proposition that the accident was an unexplained occurence. I formed a most favourable view of her honesty. I accept that she was an experienced driver of some eighteen (18) years. I accept that she was driving at approximately 45 m.p.h. and just before the phenomenon, she had negotiated a gradual curve which had a not too pronounced downward slope. I accept that the motor vehicle went out of control after the vehicle had negotiated the corner and was on the straight. Goodall's testimony supports her in this aspect. The defendant seems to be suggesting that the plaintiff negotiated the curve in such a negligent manner that the vehicle got out of control. Well, the evidence flies in the face on any such suggestion.

If that were so I would expect to find that there was loss of control immediately after completing the curve. This was not so. I accept that at all times the plaintiff was driving carefully. There was no need for any undue haste. They were all travelling as a team. I accept that the plaintiff said to DaSilva immediately after the accident, "I wonder if is that I am set up, Winston?" This query was part of the drama that was unfolding. The query goes to the state of mind of the plaintiff at that material time. As far as she was concerned, there was nothing in her driving which could have caused the mishap. The question posed in those terms demonstrates her consistency. I accept that the driving conditions were excellent and that at all times immediately prior to the events culminating with the vehicle landed in the field the plaintiff was in full control of the vehicle. The occurence is unexplained, the cause is unknown.

A vehicle does not defy the control of the driver unless that vehicle is defective. It is agreed that the defendant had an obligation to provide the plaintiff with a non-defective vehicle. The plaintiff has raised a prima facie inference of negligence on the part of the defendant in providing her with a defective vehicle. As of this point, the evidencial burden shifts. The defendant must now displace the inference raised. I quote and respectfully adopt the following passage from the speech of Lord Pearson in Henderson (Widow and Administratrix of the estate of George Arthur Henderson, deceased v. Henry E. Jenkins & Sons and another [1969] 3 AER 757 at p. 766.

> "In an action for negligence the plaintiff must allege and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not so satisfied the plaintiff's action fails. But if in the course of the trial there is proved a set of facts which raises a prima facie inference on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference".

In Woods v. Duncan [1946] A.C. 401 at p. 419 Viscount Simon said:

> "The case against Lieutenant Woods has been put as an application of the principle known as res ipsa loquitur ... Even so that principle only shifts the onus of proof which is adequately met by showing that he was not negligent. He is not to be held liable because he cannot prove exactly how the accident happened".

With the above stated principles in mind, I now examine whether the defendant has displaced the prima facie inference of negligence. Under cross-examination, DaSilva cliamed to have knowledge of the maintenance procedure in respect of vehicles. He said, "I have knowledge of maintenance procedures for vehicles in my district. Procedure - vehicles normally checked on daily basis - minor checks - oil, water. On weekly basis checked in garage. To the best of my knowledge there is a weekend check - brakes - oil, lubricants - brake lining or anything like that. This is policy". My first comment is that DaSilva has merely outlined as best he could what is supposed to be the policy as regards maintenance procedure. He does not say to what extent if at all this policy is carried into effect. He cannot and does not say that the plaintiff's vehicle, in particular was subject to the policy of the maintenance procedure. There is no evidence that the maintenance procedure accords with any particular standard. It was all so vague. The defendant has not shown that it had taken all reasonable care to provide the plaintiff with a safe vehicle to transport herself. The prima facie inference has not been displaced. There will therefore be judgment for the plaintiff.

I turn to the area of damages. The plaintiff spoke of blood flowing from her head. She felt excruciating pain to her back and to her head. She was taken to the Sav-la-mar hospital where she remained for one week after which she was transferred by helicopter to the hospital of Medical Associates in Kingston. She was there for one week after which she went home. She had to pay a full-time nurse for she was bedridden for six months. The nurse had to do everything for her. She had to learn to walk again - an activity which she said was extremely painful. She complains she cannot any longer play either lawn tennis or badmington for long periods. As regards the latter sport, she had represented her defendant employer. Her sexual activity has been hampered as by nightfall her back becomes sore and tired. She can no longer clean, wash or iron with her hitherto facility.

The quality of her life has been diminished.

Dr. Cyril Grey was called on behalf of the plaintiff. He is a general practitioner. The plaintiff was a patient of his since March, 1987. He by means of X-ray detected a wedge compression fracture to the 12th dorsal vertebra. He recommended that she acquire a back brace and have physiotherapy treatment. There was a loss of vertical height. There was arthritic changes around the 12th dorsal vertebra referred to as traumatic spondylosis. This he said would cause pain. It was his opinion that the plaintiff would suffer from back pains for an indefinite period and to wear a back brace indefinitely. She will have to be on constant medication. She would be handicapped in respect of any physical activity. He assessed her permanent partial disability at 25%. This assessment was hotly contested by the defendant. Dr. Randolph Cheeks was called by the defendant in rebuttal. Under cross-examination, it became obvious that Dr. Grey has limited experience in the assessment of permanent partial disability. He said there were guidelines to assessment but no uniform method. He could not say where the guidelines came from - nor in fact what those guidelines were. Dr. Randolph Cheeks is a consultant neurosurgeon. He is the head of the department of neurosurgery for the Kingston Regional Hospitals and honorary consultant in the department of medicine at our university. He first saw the plaintiff in August of 1986 when he carried out a full neurological examination. He found that the spine was stable, mobile and normal. The spine was tender to coarse percussion over the 12th dorsal vertebra. Through X-rays he saw evidence of an old fracture of the 11th rib. Old, he said, meant that fracture was there for several months. There was also evidence of an old wedge compression fracture to the 12th dorsal vertebra. Both fractures had been solidly healed. She needed to be treated with physiotherapy and medication. He gave her a medical certificate for her to be absent from work for thirty (30) days. Dr. Cheeks last saw the plaintiff on the 2nd of March, 1987. It was his opinion that the plaintiff would suffer from intermittent low back pain as long as she lived. That the presence of the wedge compression predisposed her to the early development of osteo-arthritis of the spine. There would be pain as a result of any heavy physical exertion. He assessed her permanent partial disability at 5%. He arrived at his assessment in this way:

"Normal way of assessing disability from a wedge compression

> "fracture is to examine the lateral X-ray. The ordinary profile of vertebra is rectangular. When a patient has a wedge compression fracture the vertical height of vertebra is crunched downwards resulting in a wedge rather than a rectangle. There is a standard encyclopaedia to evaluate disability. If vertebra loses more than 50% of its height the disability is given at 6%. In this case it was just less than 50% hence the assessment of 5%."

I readily prefer the assessment of Dr. Cheeks whose evidence was characterised by commendable lucidity.

There seems to be a dearth of cases from which assistance may be obtained in assessing damages in the instant case. In Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A. No. 18/84, March 8, 1985, the plaintiff's injuries were as follows:-

(i)(a) fracture of the pelvis.

(b) fracture of the 4th lumbar vertebra.

(ii) blow to lumbar region of the back.

(iii) shock and unconsciousness.

(iv) laceration to the right scrotum

(v) bruises on pelvic area

(vi) swelling of lower back

(vii) short leg gait

(viii) tilting of the pelvis

(vix) decreased forward plexion of the spine

(x) Bony prominence in lower lumbar spine

(xi) Temporary partial impotence

(xii) Increased risk of osteo-arthritis in lumbar spine.

That plaintiff suffered a 5% permanent disability. After his discharge from hospital where he spent three weeks, he sought out-patient treatment for nine months all during which time he suffered pains. The injuries although serious initially would not affect the plaintiff greatly in the future. The award was Forty Thousand Dollars ($40,000.00).

This plaintiff's injuries were not as extensive as those enumerated above. In her case there were:-

(i) blow to the head.

(ii) wedge compression fracture to the 12th dorsal vertebra.

(iii) fracture of the 11th rib.

There is a similarity in respect of the assessment of permanent partial disability. This plaintiff appears to have been immobilised to a much greater extent. She was bedridden for six months and had to learn to walk again. She will suffer intermittent pain for the rest of her life. Her capacity to enjoy the fullness of her being has been diminished. It is my view that the award to this plaintiff ought to be comparable.

It is a fact that in recent times the Jamaican dollar has been subject to massive devaluation. There has been an inflationary trend in the economy. Any award must recognise these two factors. In <u>Hepburn Harris v. Carlton Walker</u> S.C.C.A. No. 40/90, December 10, 1990, Rowe P. said:

> "Absent any evidence of the effect of inflation upon the value of money since 1986, the yardstick of 150% increase upon the 1986 award for a similar injury, which was used in this case represents the upper limit for such an award today."

In that case judgment, Rowe, P. opined that:

> "It is time that a more precise and sophisticated method be devised to find the quantum of the money of the day, taking into account inflationary trends in the economy. This should be a matter of evidence and moreso when substantial sums are being claimed".

In this case the plaintiff has put in evidence statistical price indices. She submitted written arguments based on these indices. The defendant was invited to submit a written reply. This invitation has not been accepted. The situation is therefore that the court has not had the benefit of debate as to the probative value of using the statistical price indices as evidence of inflationary trend. Based on the indices, the plaintiff calculated that an award of Forty Thousand Dollars ($40,000.00) in 1985 should be converted to One Hundred Thousand Dollars ($100,000.00) today. Were I to use a 150% increase as per the Harris case, the figure would also be One Hundred Thousand Dollars ($100,000.00). I would humbly suggest that the changes in the economy since Rowe, P. delivered his judgment has been such that today Rowe, P. might well not consider a 150% increase an "upper limit". The award to this plaintiff under this head of pain and suffering and loss of amenities is One Hundred Thousand Dollars ($100,000.00).

Finally, I turn to special damages. There was scarcely any contest in this area and it was agreed that sum should be Thirty-seven Thousand, Seven Hundred and Thirty-two Dollars ($37,732.00).

To summarise, the award of damages is as follows:

Pain and suffering and loss of amenities	$100,000.00
Special damages	37,732.00

There will be interest on special damages at the rate of 3% from 18th December, 1985 to 11th December, 1991. There will be interest of 3% from the date of the service of the writ until 11th December, 1991 on general damages. Costs to the plaintiff to be agreed or taxed.