

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. C.L. OF 1997/T-119

BETWEEN	AVENEL TODD	CLAIMANT
AND	MILLER SURGICAL SUPPLIES	1ST DEFENDANT
AND	RUPERT MAXWELL	2ND DEFENDANT

Ainsworth Campbell for the claimant.

Miss Daniella Gentles instructed by Livingston Alexander & Levy for the defendants.

Heard: November 22, 23, 2004 and February 7, 2005

JONES, J:

[1] Avenel Todd was a passenger in a van owned by Miller Surgical Supplies Limited and driven by Rupert Maxwell. She was injured when the van overturned along the Spanish Town Road on March 13, 1997. She says Mr Maxwell was speeding and was the cause of the accident. Mr Maxwell, on the other hand, denies this; he says that he attempted to avoid a dangerous situation by swinging his van away from a truck that turned into his path. His van overturned as a result of this manoeuvre.

[2] On July 15, 1997, Avenel Todd instituted an action in the Supreme Court, claiming that Mr. Maxwell negligently drove the van belonging to Miller Surgical Supplies Limited causing it to overturn from which she sustained injuries. The particulars of negligence claimed by Miss Todd against Mr. Rupert Maxwell were that he was:

- (a) Driving from side to side on the road
- (b) Swinging recklessly from side to side on the road
- (c) Hitting the pavement and causing the vehicle to overturn
- (d) Failing to keep a straight and proper course

- (e) Driving without due care and attention
- (f) Failing to have any or a proper lookout
- (g) Failing to have any sufficient regard for the safety of the claimant
- (h) Failing to brake, stop, slow down, swerve or otherwise manoeuvre to avoid the collision.

[3] Two issues arise:

- a) Were the injuries to Avenel Todd as a result of Mr. Maxwell's negligent operation of the van owned by Miller Surgical or was it as a result of Mr. Maxwell's trying to avoid a dangerous manoeuvre by the driver of another vehicle who is not a party to this action?
- b) If Mr Maxwell and Miller Surgical are found to be liable for Miss Todd's injuries, what general and special damages should she be entitled to?

On the issue of liability

[4] On Mr. Maxwell's account, he was driving along the Spanish Town road on March 13, 1997, at about 4:00 p.m. in a Suzuki van bearing licence number 2618 AF owned by Miller Surgical Supplies. He was accompanied in this van by Miss Avenel Todd, a co-worker. She was the only passenger. While travelling in the left lane in an easterly direction towards Kingston at a speed of 20 mph he says he noticed a truck coming from behind in the middle lane. He estimated the truck was going at about 30 miles an hour.

[5] When he reached in the vicinity of the old AMC Market, the truck suddenly passed him and swerved into the path of his van. He says that the rear of the truck hit his right wing mirror; he attempted to avoid a collision by applying brakes and swinging the van to the left onto an embankment. As his van was turned on its right-hand side, he lay on the driver's

door on the ground and Miss Todd fell on top of him. He says that he was unable to observe any details about the truck as it continued without stopping. A police car travelling behind him gave assistance and took both he and Miss Todd to the hospital. Mr Maxwell denied that he was racing with the truck or with anyone else or that he was driving his van swaying from side to side on the road prior to the accident.

[6] On the other hand, Miss Avenel Todd's account was that on March 13, 1997, she was being driven by Mr. Rupert Maxwell in a van belonging to Miller Surgical Supplies & Equipment Limited. When they reached in the vicinity of the Biscuit Company premises on Spanish Town Road, Rupert Maxwell started to race with another vehicle. Both vehicles were speeding and Mr. Maxwell's van swerved from left to right on the road until it hit the left pavement and turned over.

[7] As a result of the impact, she was flung to the left of the van with her two feet protruding through the driver's window and the right side of her neck hitting on the steering wheel. She was assisted by policemen who took her to the Kingston Public Hospital. While at the hospital she said that she felt pain in her neck, chest and back, and was given tablets and an injection. She was x-rayed and sent home.

[8] Miss Gentles for the defence contended that Mr. Rupert Maxwell took reasonable steps to avoid a dangerous situation and, therefore, cannot be said to be negligent in his driving. In *Parkinson v Liverpool Corporation*¹ an omnibus driver, in order to avoid running over a dog, applied his brakes suddenly and brought the vehicle to an abrupt standstill. The plaintiff, a passenger, at that moment was walking down the gangway with the

¹ [1950] 1 All ER 367

intention of alighting at the next stopping-place. He was thrown to the floor of the vehicle and sustained personal injuries for which he claimed damages on the ground that the driver had been negligent. It was held that the driver, faced with a sudden emergency caused by the dog's appearance in front of the omnibus, acted as an ordinary and careful driver ought to act in such circumstances, and, therefore, he was not guilty of negligence or failure to take due care of his passengers, and the plaintiff was not entitled to recover.

[9] On balance the court accepted the evidence of Avenel Todd as truthful. She was forthright in her evidence and remained unshaken at the end of her cross-examination. Mr. Maxwell on the other hand was more tentative in his answers. He insisted in his evidence that he was travelling at 20 miles per hour at 4:00 pm in a line of traffic on Spanish Town road heading to Kingston. It is more probable that the line of traffic was on the other side of the road heading out of Kingston. I also accept Miss Todd's evidence that Mr Maxwell was speeding and racing with another vehicle. I find as a fact that Mr Maxwell, in the process of speeding, lost control of the van causing it to overturn. It follows, therefore, that I reject the defendants' contention that the accident was caused by Rupert Maxwell attempting to avoid a dangerous situation or sudden emergency on the road. Accordingly, the court finds on a balance of probabilities that he was negligent in the manner in which he drove the van belonging to Miller Surgical Supplies on March 13, 1997.

The claimant's injuries

[10] Miss Todd said that on May 5, 1997, she developed cramps in her left shoulder and she had severe pain in the neck. As a result of this, she visited Dr. Lambert Green who treated her. Dr. Green observed that:

"This lady was seen in my office...six weeks after being involved in a motor vehicle accident, in which she suffered a "whip-lash" injury...On examination, she was wearing the collar and the main finding was tenderness on palpation over the right supraclavicular region and across to the right shoulder. There was limitation of head movement in all directions. She was treated with Scutamil - C and Cataflam tablets (muscle relaxant and analgesic). On review two weeks later, there was not much improvement and X - Rays of the Cervical Spines, Right Shoulder and Clavicle were done. The report showed that there were features of cervical spondylosis only; but because of the persistent neck pain she was referred to Consultant Orthopaedic Surgeon, Dr. Kenneth Vaughn".

[11] Dr. Green referred Miss Todd to Dr. Kenneth Vaughn. At the time of her referral to Dr. Vaughn she said that she developed a swelling in the area of the clavicle and scapula in the left shoulder and also the right shoulder that caused severe cramping in her right hand. She said that she sustained a cut on her right hand at the time of the accident and a cast was put on it. Dr. Vaughn conducted an examination on Miss Todd on May 29, 1997, and observed that she:

"had a decreased range of movement in her cervical spine which was about fifty percent in all ranges. She had full power, tone and reflexes in her upper limb with no neurological findings in the lower limb. She was diagnosed as having a whiplash injury and was advised to continue with the physical therapy; however the prolonged use of the collar was discouraged."

[12] Miss Todd again visited Dr. Vaughn on July 24, 1997, and complained of feeling bad.

On examination Dr. Vaughn found that:

"her neck movement had remained unchanged. She had a weak grip in the right hand however the remainder of her physical examination was normal"

Her next recorded visit was on the 31st March 2000...When examined she was tender along the lower cervical spine extending down into the area between the scapulae. She was tender in the areas above the collarbone and her neck movements had not changed. She had mild swelling over the area above the left collarbone. Neurological examination was normal for the upper limbs; in particular she had no wasting of the muscles of the upper limbs.

Review on the 8th May 2000 saw Ms Todd again complaining that she was not good...Her right shoulder examination showed only mild tenderness, however she had a full range of movement of the joint. Radiographs of the spine showed no degenerative joint disease. She was assessed as having cervical spondylosis and a possible rotator cuff tear to the shoulder and physical therapy was again prescribed. A steroid injection to the right shoulder was also given.

When reviewed on the 23rd June 2000...her clinical examination revealed evidence of nerve irritation in the upper limb and she was referred on for physiotherapy including cervical traction. Other pain relieving medications were also prescribed. When next seen on the 30th November 2001...her physical examination revealed that she again had a restricted range of movement in her cervical spine but she had normal neurological findings. Examination of the wrist revealed that she had developed a ganglion on the back of the wrist. Her cervical spine x-rays showed normal alignment, no joint space narrowing and no evidence of degenerative disc disease. As a result of her injuries, Ms. Todd has developed the chronic painful syndrome. She has impairment due to pain of 5% of the whole man which is permanent."

[13] After Miss Todd completed her visits to Dr. Vaughn, she complained of having pains in her right shoulder and the nape of her neck going into the back. She says that the pain in the shoulder sends a cramp down into her fingers and they become numb. As a result of this, she says that she is unable to work with the hand. She complained of having headaches about two to three times per week, which would last for about two to three days.

She said that when she had the headaches she was unable to function as a medical sales representative.

[14] Miss Avenel Todd said that on April 14, 2003, she was examined by Dr. Ivor Crandon at the request of the defendants. Dr. Crandon diagnosed her with flexion-extension injury of the cervical spine. He said that:

“On examination, she was alert, oriented and had normal speech and memory. Her (sic) was quite cooperative and her affect was normal. The cranial nerves were normal including her pupils, eye movements and fundi. Muscle tone, power and coordination were normal as was her gait and spinal mobility. There was reduced light touch and pain appreciation over the right C5 to C7 dermatomes as well as over the T2 to S2 dermatomes. There was reduced appreciation of vibration over the right upper and lower limbs. Her superficial and deep tendon reflexes were normal. She had tenderness over both trapezii muscles, right more than left and over the vertebra prominens. An MRI scan of the cervical spine showed minimal degenerative change and no evidence of neurological compression. Ms. Todd has had a flexion-extension (whiplash) injury of the cervical spine and has persistent sensory complaints. This is a condition, which is known to be associated with prolonged symptoms, and it is not possible to say how long these are likely to continue. Her present condition is consistent with a 5% impairment of the Whole Person”

[15] At the trial Dr. Kenneth Vaughn was called as a witness. He said in his evidence that he last examined Miss Todd on November 19, 2004. He said that on that visit Miss Todd's complaints had not changed from her last visit to his office.

[16] When he examined her on November 19, 2004, he said that he found that she had mildly restricted range of movement in the neck; touching her head produced a response indicating violent pain. He found that she had no neurological abnormalities and had nor-

mal power in the limbs; her reflexes were normal. He said that the shoulder had full active range with pain at the terminal extreme at the end of the range. He found that there was no wasting of the muscles in her right hand and she had some subtle signs which suggested carpal tunnel syndrome. Dr. Vaughn concluded that Miss Todd's condition would not allow her to do physical labour or work at a computer using her neck. He felt that she could, however, function at another job.

The issue of damages

[17] In relation to general damages, the claimant relied inter alia upon *Ellie Kean v. Bridgette Officer and Leroy Stewart*² a case in which the claimant was injured in a motor vehicle accident. She suffered pain in the neck with cramps in the right upper limb extending to the hand. She was treated with anti-inflammatory and anti-spasmodic medication, given physical therapy, a cervical collar and sent to an orthopaedic surgeon for further treatment. The medical evidence in that case was that the claimant had:

- a) Tenderness on right side of cervical spine and on right supraclavicular fossa
- b) Some pain on full flexion and rotation to left
- c) Pain extending down right upper limb on rotation to right
- d) Swelling of pectorialis major (chest)
- e) Reduced power in right hand
- f) Reduced wrist flexion and elbow extension

² Suit No. CL 1999 K 018 [delivered May 17, 2001] reported in Khan's Vol. 5 page 172

[18] The medical report diagnosed flexion-extension injury of the cervical spine and assessed the claimant's permanent partial disability at 5 % of the whole person. The injuries in this case were comparable to the injuries suffered by Avenel Todd in the instant case. Damages for pain and suffering and loss of amenities were assessed at \$850,000.00, which updated in today's dollars³ amounts to \$1,251,000.00. On the basis of this award I assess pain and suffering and loss of amenities in this case at \$1,251,000.00.

[19] As far as future medical visits are concerned, the evidence of Kay Horsham the physiotherapist who treated Avenel Todd since November 27, 2001, is that she would require treatment twice weekly for some time in the future. The charge per visit is \$800 and she said that Miss Todd would require two visits per week. Miss Todd is now forty-six years old and I considered a multiplier of 7 would be appropriate. I accordingly assess:

- a) Future medical visits at $\$1,600 \times 52 = \$83,200.00 \times 7 = \$582,400.00$
- b) Loss of future earnings using at the sum of $\$7,000.00$ per month $\times 12$ to arrive at a multiplicand of $\$84,000.00$. Applying the appropriate multiplier of 7 this would amount to an award under this head of $\$588,000.00$

[20] Miss Todd gave evidence of special damages in relation to her medical expenses, loss of earnings, extra help and cost of transportation. Miss Gentles for the defendants cited the case of **Lawford Murphy v. Luther Mills**⁴ in which it was held that the onus is on the plaintiff to prove his loss strictly. She submitted that there is no evidence that Miss

³ CPI for December 2004 as reported by STATIN was 2032.1

⁴[1976] 14 JLR 119

Todd's income has dropped or that she cannot work again. I find the following items of special damages proved to my satisfaction:

- a) The average net monthly earnings for Miss Todd while employed to Miller Surgical were \$15,000.00 per month. While employed to ST Enterprises she earned \$5,000.00 per month which would give her a net loss of income of \$10,000.00 per month. Accordingly the loss of earnings for period August 1997 to April 1998 (9 months) @ \$10,000.00 per month is assessed at \$90,000.00
- b) As mentioned before the cost of physiotherapy is \$800.00 per visit and Miss Todd went twice per week during the period November 2001 to February 11, 2004. This is 112 weeks at a cost of \$1,600.00 per week which amounts to \$179,200.00
- c) The claim for medical bills in the amount of \$11,155.00 is proved to my satisfaction.
- d) I also accept the cost of x-rays in the amount of \$2,850.00
- e) I accept that Miss Todd required additional help. The evidence is that she acquired the additional help in 2002. There are no receipts for this, but the claim for \$1,000.00 per week is reasonable and acceptable. Extra help at \$1,000.00 per week for the period January 2002 to February 11, 2004, (106 weeks) this amounts to \$106,000.00
- f) The cost of travel for physiotherapy treatment is \$480.00 per week for a period November 2001 to February 11, 2004, (112 weeks) this amounts to \$53,760.00

[21] In summary then, there shall be a judgment for the claimant Avenel Todd with:

- a) Damages for pain and suffering and loss of amenities assessed in the sum of \$1,251,000.00 with interest at the rate of 3% from July 15, 1997, (the date of filing of the writ) to July 14, 1999, and at 6% from July 15, 1999, to the date of this judgment.
- b) Future medical visits for physiotherapy assessed at \$582,400.00.
- c) Loss of future earnings in the amount of \$588,000.00
- d) Special damages in the sum of \$442,965.00 with interest at the rate of 3 % from March 13, 1997, (the date of the accident) to July 14, 1999, and at 6 % from July 15, 1999, to the date of this judgment.
- e) Cost to the Avenel Todd in accordance with CPR 2002.