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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 280/86

BETWEEN:	EULA FLICIA EBANKS	PLAINTIFF
AND:	FREDERICK CALLENDER	FIRST DEFENDANT
AND:	WILLIAM ANDREW CALLENDER	SECOND DEFENDANT

For the plaintiff: Mr. S. Barrie
No appearance by either defendant

JUDGMENT

This is an action for damages for personal injuries which the plaintiff sustained in a road accident on 5th April 1985. The claim is based on breach of statutory duty by both defendants and the negligence of the second defendant.

On the morning of the trial the attorney for the defendants applied to come off the record, having received their instructions that they did not wish to be further represented.

The plaintiff was a passenger in a car driven by her friend Pearl Daphine Bush. Both these ladies gave evidence to the effect that as they were travelling to work at Santiago's restaurant in George Town, and were passing "Cayman Falls" shopping precinct, a Diahatsu Rocky jeep driven by the second defendant emerged from the entrance of the precinct onto the road and struck the left side of their car, causing it to mount the pavement and swerve back onto the road.

Following the accident the plaintiff complained of pain in her right hip and was transported to the George Town Hospital by ambulance. She

was kept under observation there for some four and a half hours, given pain killers and discharged. Unfortunately that was but the beginning of a long medical history. Before describing that I will conclude my summary of the evidence about the circumstances surrounding the accident.

The first defendant is the second defendant's father. He had hired the jeep under an agreement with a local car rental company in which he had stated that he would be the sole driver. When the accident occurred the vehicle was being driven by his son, the second defendant, and was consequently uninsured. The alleged breach of statutory duty by both defendants is based on section 3 (1) of the Motor Vehicle Insurance (Third Party) Risks Law, 1964 which reads as follows -

> "Subject to the provisions of this law, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road, unless there is in force in relation to the user of a vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this law."

I can deal with the issue of liability quite briefly. Both defendants put in defences. The first defendant said that he did not authorise the use of the vehicle, and was unaware of the use by the second defendant. He pleaded that he was on the beach with friends and family on the evening of April 5th, 1985 and the vehicle was taken by the second defendant without his knowledge. He did not, however, see fit to come to court and give evidence to that effect, and there was evidence to the contrary. Daphine Bush, the driver of the car in which the plaintiff was travelling, said that after the accident the driver of the jeep told her that his name was William Callender. With him in his vehicle was a gentleman in the front seat and, she thought, someone else in the rear. The gentleman said that he was William's father, and asked her if she was the driver. She said that she was and asked him the same question without, as far as she remembers, getting any reply. I accept that as evidence from which I can infer

that the first defendant permitted the second defendant to use the jeep on the road and was in consequence in breach of the statute. The second defendant was driving the jeep, and consequently also in breach of the statute, and was clearly negligent in coming out of Cayman Falls onto the main road in such a manner as to strike the vehicle in which the plaintiff was travelling. There is liability on both defendants in respect of any damage caused: See McLeod (or Houston) v. Buchanan (1940) 2 AC. In his defence, however, the second defendant denies that his negligence caused the injuries, loss and damage as alleged or at all. That issue of causation is one with which I must now deal.

At the time of the accident the plaintiff suffered from a chronic disorder called "systemic lupus erythematosis" and was on steroid therapy. Medical evidence was given orally by Dr. K.C. Sekhar, an orthopaedic surgeon at George Town Hospital and by an affidavit of Dr. Edward Lazzarin, an orthopaedic surgeon practising in Florida. There is also an agreed bundle of medical records and reports and associated correspondence. The evidence of the plaintiff herself is consistent with that of her doctors. She was first seen by Dr. Sekhar on 24th April 1985 when she was complaining of a painful right hip. An X-ray taken then showed avascular necrosis of the head of her femur. Dr. Sekhar described that as a condition of the hip to which patients with lupus who are being treated with steroids over a long period, as the plaintiff was, are particularly prone. A loss of blood supply results in the death of the head of the femur. A previous X-ray taken on the 10th April did not show the condition.

In the case of the plaintiff, flattening of the right femoral head occurred, and this progressed to the point where she had a complete flattening with multiple congenerative changes and was walking on crutches with continual pain. Traction was tried and she was in hospital from 10th October to 4th December 1985 for that purpose. This relieved some pain and muscle spasm but not to the extent of helping the hip to heal and an unfortunate side effect was that the plaintiff developed skin lesions in her ankles which persisted off and

on for years. She remained in constant pain and was advised to consider surgery. On 28th September 1988 a right hip replacement operation was performed. The plaintiff tolerated the procedure well and went on to convalesce at the Doctors' Hospital in Florida before returning to the Cayman Islands. She was in hospital for about a month.

Dr. Lazzarin saw the plaintiff for a follow up on 4th September 1990. His evidence is that on that date X-rays of the prosthesis looked good but she had still not completed her rehabilitation. She still required to strengthen her musculature and complained of getting tired after long walks.

Dr. Lazzarin had this to say about the question of causation –

> "In my view this woman's pre-existing condition of systemic lupus has been exacerbated by the injury she received in the accident. There is no question that the accident also caused the ultimate demise of her right hip. It is safe to say that the injuries to the right hip and its replacement have imposed additional stress on the opposite hip and extremities as well as the other joints in that same leg. These additional stresses will diminish her body's ability to fight the overall effect of the systemic lupus."

Dr. Sekhar was also of the opinion that the avascular necrosis was precipitated by the injury.

In assessing damages there is a distinction to be drawn between the question whether a person could reasonably anticipate a type of injury and the question of whether that person could reasonably anticipate the extent of injury of the type which could be foreseen. A tort-feasor takes his victim as he finds him, and the decision in Overseas Tank Ship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd. (1961) 1 ALL ER 404 – the case which is usually referred to as The Wagon Mound – does not override that principle. See Smith v. Leech Brain & Co. Ltd and anor (1961) 3 ALL ER 1159. I therefore look at the whole course of the plaintiff's medical history since the accident in

relation to her hip injury in making that assessment.

The plaintiff has suffered constant pain which she says is continuing. Dr. Sekhar confirmed that pain in this type of situation does sometimes persist for a very long time. She also suffers a general loss of amenity by reason of a restriction on her activities and pleasures, but there was no evidence of any of these involving sporting or particularly strenuous pursuits. She said that in addition to the pain she still gets very tired if she stands for long or walks any distance, and she still has a limp because her right leg is now shortened. She has had the trauma of major surgery and Dr. Lazzarin's evidence is that it is likely that replacement surgery will be required at some time in the future. The effect of Dr. Sekhar's evidence is the same. He said that this type of surgery needs to be revised after ten to fifteen years in an active patient or after fifteen to twenty years in one who is less active, and that by reason of the nature of the revision procedure it would cost 20-30% more than the original operation.

The award of a pecuniary sum is compensation for pain, suffering and loss of amenities of life has to be made on the basis of the results of comparable cases. Unfortunately most of the guidance is to be found in cases outside the Cayman Islands and it is inappropriate to follow foreign awards by merely undertaking an arithmetical conversion of currencies. The value of money is different in various places and other diverse factors come into play. Of the authorities which were mentioned to me I shall refer to three. The first is Pakes v. Rodge a reference to which is to be found in Kemp & Kemp on The Quantum of Damages at Secton G2-022. In the motor accident with which that case was concerned, the plaintiff's most serious injury was a dislocation of the right hip, the consequences of which were similar in many respects to the present plaintiff's. However, she was 57 years old at the time of the accident whereas the present plaintiff was only 35. In present day terms the amount which she would have been awarded for pain, suffering and loss of amenities would be about £30,000.

The plaintiff in Fish v. Associated Contract Cleaners, (1988) Kemp & Kemp G2-030 suffered a fractured femur, with subsequent increasing symptoms caused by deterioration of a hip due to avascular necrosis. Again the feature which most distinguishes that case from the present one is the age of the plaintiff. She was 60 at the date of the accident, and was awarded L15,000. Taking a multiplier of 1.31 to allow for inflation that would be L19,650 today.

The upper end of the bracket is suggested by Olds v. Grimault, (1988) Current Law Yearbook 1075. In that case the plaintiff suffered other severe injuries as well as a fracture of the right upper femur, and he was awarded L30,000 for pain, suffering and loss of amenity. With a multiplier of 1.3 , todays equivalent would be L39,000.

Taking the plaintiff's age into account, and in particular the high likelihood of the further major surgery which she may have to undergo I award the sum of CI$32,500.00 as general damages for pain and suffering and loss of amenities.

I now turn to questions of pecuniary loss. The amount of medical expenses so far paid has been quantified and is well documented. The total is CI$20,261.69 and that is the amount which I award under that head. Of that total CI$19,483 has been paid by the Cayman Islands Government and the plaintiff has undertaken to repay this and has signed a promissory note to that effect.

I assess future medical expenses at CI$23,111. That is the cost of the plaintiff's treatment in Florida, plus 20%. I have not included any travel expenses in that calculation, on the assumption that at the material time the necessary procedures will be available here.

The question of loss of earnings needs to be addressed next. The plaintiff was working as a waitress at the time of the accident, and she has not worked since. There is some disagreement as to whether she could already have returned to work. Assessing the medical evidence, including the contents of the agreed bundle, as a whole, I

find the proposition that the plaintiff could have mitigated her loss of earnings by a return to some sort of sedentary work from 5th March 1990 to be reasonable.

The plaintiff's evidence was that she earned on average $200 per week as a waitress. That is supported by pay slips, and an affidavit by her employer which estimated her earnings at approximately CI$5 per hour at the time. That affidavit also says that today she would be earning CI$8-10 per hour. The plaintiff invites me to arrive at a figure for total loss of earnings by taking a weekly rate of $200 for the period from 5th April 1985 to 5th March 1989 and $400 per week from 6th March 1989 to 5th March 1990. On the evidence before me I cannot do better than that, and therefore award the figure of CI$59,600 thus reached.

There remains the matter of future loss of wages. In seeking to assess this I adopt the well established multiplier - multiplicand approach. The multiplicand is my assessment of the annual sum which represents the plaintiff's loss of earnings at the date of the trial. There is evidence about this in the form of an affidavit from Joan Watler, the Deputy Director of the Trade and Labour Department of the Cayman Islands Government. The material part reads as follows -

> " I have been asked to express an opinion on what type of employment opportunities would be available to a female Caymanian with no skills or post secondary education and who is unable to walk or stand for any length of time. In my view, the employment opportunities for such a person, would be limited to work as a cashier in a shop or supermarket or possibly with further training as a telephone operator/receptionist.
>
> At present the average pay in Cayman for waiters/waitresses is approximately CI$4.00 per hour, but with gratuities this would double to approximately CI$8.00 per hour.
>
> According to the information available to my department the average wage for a cashier is approximately CI$4.50 per hour."

Taking a working year of 50 weeks and a working week of 40 hours, the difference between an hourly rate of $8.00 and CI$4.50 represents an

annual loss of CI$7000. I take that as the multiplicand. In arriving at the multiplier, I take into account tht I am not dealing with total inability to work but with an enforced change in the plaintff's type of employment. It is a matter of common observation that waitresses in the kind of establishment in Cayman where gratuities substantially supplement income tend to be fairly young people. The likelihood of the plaintiff continuing in that kind of employment until the age of 60 would in my judgment have been negligible in any event. For that reason it would be wrong to arrive at a multiplier based on the opposite assumption.

I also conclude that the point at which I should start the period of partial loss of earnings is 6th March 1990, which is the moment at which I consider that the plaintiff could have reasonably been expected to start some sedentary work. That was nearly 18 months after her operation. Dr. Lazzarin's evidence is that when she saw him for a follow up in September 1990 her complaint was that she was getting tired after long walks. As early as 24th March 1989 Dr. Lazzarin was estimating the plaintiff's disability at 15%.

On 6th March 1990 the plaintiff was 38, and indeed within two weeks of her 39th birthday. I have to take a view as to the length of time she might reasonably have been expected to continue as a waitress or in a similar walking or standing job in the hospitality industry. I think that by age 45 she would probably have begun to do something less physically taxing.

The tables adopted for calculation purposes in England, and which are set out in Kemp & Kemp at 8-029, can be no more than a guide, since one of the factors which is taken into account is population mortality. I will be guided by the table, however, to the extent of taking the mean figure between the top end of the multiplier range for six years of prospective loss, which is 5.6, and the bottom end of the range for seven years, which is 5.8. So the multiplier I choose is 5.7, which gives a figure of $39,900.

So the total damages which I award to the plaintiff are -

	CI$
For pain,suffering and loss of amenities	32,500
Medical expenses so far paid	20,262.69
Future medical expenses	23,111
Loss of earnings from 5th April 1985 to 5th March 1990	59,600
Loss of earnings from 6th March 1990 onwards	39,900

The total of that, to the nearest dollar is CI$175,374 which I award to the plaintiff, together with her costs.

G.E. Harre

Judge

3rd June 1992