

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 02466 OF 2008

BETWEEN RONALD CHANG 1ST CLAIMANT

AND NATASHA CHANG 2ND CLAIMANT

AND FRANCES ROOKWOOD 1ST DEFENDANT

AND NEVADO LISTZ 2ND DEFENDANT

CONSOLIDATED WITH

CLAIM NO HCV 04059 OF 2009

BETWEEN FELECIA VASSELL 1ST CLAIMANT

AND AYESHA MAXWELL 2ND CLAIMANT

AND RONALD CHANG 1ST DEFENDANT

AND NATASHA CHANG- 2ND DEFENDANT

AND FRANCES ROOKWOOD 3RD DEFENDANT

AND NEVADO LISTZ 4TH DEFENDANT

AND BETWEEN FRANCES ROOKWOOD 3RD DEFENDANT/1ST ANCILLARY CLAIMANT

AND NEVADO LISTZ 4TH DEFENDANT/2ND ANCILLARY CLAIMANT

AND RONALD CHANG 1ST DEFENDANT/1ST ANCILLARY DEFENDANT

AND NATASHA CHANG 2ND DEFENDANT/2ND ANCILLARY DEFENDANT

Mr. Kent Gammon for Claimants in HCV 02466/2008, 1st and 2nd Defendants and 1st and 2nd Ancillary Defendants in HCV 04059/2009

Mr. Jack Hinds for Claimants in HCV 04059/2009. Miss Stacia Pinnock and Mrs. Senior Smith for the Defendants in HCV02466/2008, 3rd, 4th Defendants and Ancillary Claimants in HCV 04059/2009.

Heard on July 12, 2010 to July 15, 2010, July 19, 2010, July 23, 2010 and August 15, 2010.

Motor Vehicle accident

Liability – Assessment of Damages

Straw J

Background

On the 22nd day of September 2007 at about 2:00am, Mr. Nevado Listz, the driver of a RAV 4 with licence plate 7796 FB, was proceeding westerly along Hope Road in the vicinity of Ardenne Road, when he collided with a Hyundai Getz with licence plate 4633 DR driven by the 2nd claimant, Natasha Chang. The 1st claimant, Ronald Chang is the owner of the said vehicle. The 1st Defendant, Francis Rookwood is the owner of the RAV 4. There were three passengers in the RAV 4, the claimants in the consolidated claim, Felicia Vassell and Ayesha Maxwell as well as the witness Odane Thomas.

Both Miss Maxwell and Miss Vassell received injuries. They are suing both drivers and the owners of the respective vehicles for loss incurred and injuries sustained.

Mr. Ronald Chang and Miss Natasha Chang are suing Ms. Rookwood and Mr. Listz for negligence and damages sustained as a result of the accident. Miss Rookwood and Mr.

Listz have filed an ancillary claim against the Changs alleging negligence and/or contributory negligence. They are also claiming a contribution and/ or indemnity against the Changs if the claimants, Vassell and Maxwell, are successful in respect of liability against them.

The Issue of Liability

Case for the Changs.

1. Miss Chang stated that she drove up to the stoplights at the intersection of Hope Road and Lady Musgrave Road in the right of the two lanes proceeding to Half Way Tree. She testified that the RAV 4 was already stationary in the left lane. However, she did not stop but merely slowed down as the light had changed to green.
2. She further stated that she drove off ahead of Mr. Listz and that, one second later, she put on her indicator to enter the left lane and did so about 300 feet above the intersection with Ardenne Road.
3. She stated that she saw the head lights of the RAV4 behind her in the left lane. That the RAV 4 was greater than two car lengths away. A few seconds before turning left onto Ardenne Road, she put on her indicator to do so. At this point, she was 4 feet away from the left side walk, that is, her car was positioned as far right as possible in the left lane.
4. She testified that as she began to turn, the RAV 4 crashed into her left rear in the vicinity of her quarter panel and slid along the entire left hand side of her car. She admitted that the most extensive damage was to the left front of the Getz and there was also damage to the left rear from the quarter panel along the entire left

side. There is no evidence to suggest that the right side of her vehicle came in contact with any vehicle or any other object at the time of the impact. The Assessor's report does speak to some damage to *inter alia*, 'front bumper right', 'right head lamp', 'right front fender.'

However the aforementioned report under 'Assessment Summary' reads as follows:

"This vehicle received damages to nearly all panels including damage to the under carriage. The major damage is to the left side where the left front wheel struck an object, pushing the wheel into and beneath the firewall. Other damages to the left side spans from the front fender and door to the rear quarter panel and rear bumper. The left side of the vehicle appears to have come into contact with a flat vertical object to as high as the door handles."

5. Miss Chang stated that after the impact, the RAV4 ended up 75 feet below her car facing towards Liguanea and was closer to the middle of Hope Road. She stated That the Getz was facing the light post at the corner of Ardenne Road.
6. Mr. Marco Miret was called as a witness and on behalf of the Changs. He came on the scene after the accident and has submitted a diagram attached to his witness statement showing the position of the vehicles after impact. This diagram corroborates Miss Chang's evidence on the point and it basically reflects the position of the vehicles used by the Claimant's expert, Mr. Gary Ferguson to prepare a 3D crash test simulation video which was viewed by the Court during the trial.

Claimant's Expert, Mr. Gary Ferguson

7. Mr. Ferguson stated that he prepared a crash test simulation of the accident and that, in order to do so, he read the Particulars of Claim of Ronald and Natasha Chang, the police statement of Natasha Chang and the Amended Defence and Counter Claim. He also reviewed the Motor damage Assessment report in relation to the Hyundai Getz along with the photographs of both motor vehicles. He described the crash test simulation as the Claimant's version.

The video simulation supports the evidence of Miss Chang in relation to both vehicles before the impact, at impact and after impact.

8. Mr. Ferguson has stated that he is not an accident re-construction expert and essentially, the data he used to compile the simulation were the photographs of the vehicles and the police statement of Miss Chang. He explained that he has not limited the simulation by this means that is, the failure to speak to the other driver or witnesses as he was not proceeding from what persons said but that he acted based on the damages seen on the photographs of both vehicles and the evidence as to the position of the cars after impact. According to Mr. Ferguson, he worked backward from these positions to the beginning and believes that the simulation can give an answer to where the vehicles were at the point of impact as the photographs indicated where the impact took place.

Mr. Ferguson explained further that he had to use the sketch in the eye witness report. He then used the photographic evidence of the damage to the vehicles and then programmed back to each stage that is, "where the impact took place and then from there to the beginning when the vehicles were proceeding down Hope Road."

He is maintaining therefore that the simulation is an impartial illustration of what took place.

Challenge to Claimants' Expert

9. Counsel for the defendants, Rookwood and Listz have challenged the evidence of Mr. Ferguson on three limbs. Firstly, it is based on the claimants account of the accident and secondly he has no competence or qualification in the field of accident reconstruction. Thirdly, his evidence as contained in its 3D simulation ought to be rejected as the claimants have not satisfied section 31 G of the Evidence Act.
10. Section 31 G of the above act allows for a statement contained in a document produced by a computer to be admissible in evidence with the caveat that certain conditions listed at 31G (a) (b) (c) and (d) are satisfied.

These conditions speak to evidence being led in relation to the proper functioning of the computer.

Section 31 B of the evidence Act includes in its definition of 'document' the following

- “(a)
- (b)
- (c)
- (d) Any film (including microfilm) negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there from.’

11. In this case, Mr. Ferguson created visual images based on certain factors. It would appear that the 3D illustration ought not to have been allowed in evidence as the claimants certainly led no evidence to satisfy the conditions laid out in section 31 G of the above Act.

However, this Court is of the view that even if these conditions had been satisfied by evidence as to the proper functioning of the computer, the crash test simulation is fundamentally flawed for the following reason.

12. Mr. Ferguson is not an accident reconstruction expert and even if he was, his role as that of Major James (The expert witness of the defendants) would be limited “to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage on whatever it may be” (per **Stuart Smith LJ in Liddel v Middleton 1996 P 1 Q R p 36**).

13. In this case, Mr. Ferguson is not merely furnishing an opinion based on the damage to both vehicles or other scientific criteria in order to assist the court with an evaluation of the evidence. He has clearly stated that he used the statement in the eye witness report, in particularly, the positions of both vehicles after the impact and worked backward from these positions to the beginning.

14. The position of both vehicles after impact is a fact in issue and this is for the court to decide. Based on the evidence of Mr. Ferguson, he would have assumed the accuracy of the positions in which Chang and Miret placed the

vehicles. His working backward from this position would therefore be of no assistance to this court unless the court accepted the positions as so stated.

The 3D Crash Simulation has only served to produce a visual demonstration of the evidence of Natasha Chang and Marco Miret without much objective scientific criteria to undergird it.

Case for the claimants Vassell and Maxwell and defendants Rookwood and Listz

Although the claimants, Ms. Vassell and Ms. Maxwell have sued both the Changs and Rookwood/Listz, their evidence is substantially similar to the evidence of the defendant Listz and the witness ODANE THOMAS. The Court will therefore summarize the evidence of these parties together.

1. On the 22nd September 2007, at about 2:50am, Miss Felicia Vassell, Miss Ayesha Maxwell and Mr. Odane Thomas were passengers in the RAV 4 driven by Mr. Listz.
2. They were on Hope Road travelling to Half Way Tree. Mr. Thomas was seated behind the driver to the right, Ms. Vassell in the left rear seat and Miss Maxwell in left front passenger seat.
3. Mr. Listz arrived at the stoplight at the intersection of Hope Road and Lady Musgrave Road. The lights were on red so he stopped. He was in the left of the two lanes proceeding westerly down Hope Road.

Miss Chang was already at the stoplight in the Hyundai Getz in the right lane proceeding westerly along Hope Road.

4. Mr. Listz moved off his vehicle first when the lights indicated green. The RAV 4 was proceeding at 50 KM. The Getz merged into the left lane ahead of the RAV 4 after passing through the stoplights and then re-entered the right lane.
5. When the vehicles reached the intersection with Ardenne Road on the left, the Getz which was a little ahead of the RAV 4, suddenly put on its left indicator and swerved left to turn onto Ardenne Road. The left side of the Getz collided with the right front of the RAV 4.
6. Mr. Listz lost control of the RAV 4 which then passed the intersection, mounted the sidewalk to the left where it hit a cable box, utility pole and remained in that position. The Getz was on Hope Road facing Ardenne Road somewhere in the vicinity of the intersection of both roads.
7. Major Owen James was called as an expert witness on behalf of the defendants, Rookwood and Listz. He described himself as an Accident Reconstruction Expert based on his years of experience in the Jamaica Defence Force investigating motor vehicle accidents. He has admitted however that he has no degree or diploma in the subject area.

He concluded an investigation into the accident on an assignment from NEM Insurance Company. He visited the scene of the accident, interviewed Mr. Listz, Miss Maxwell, Miss Vassell, Mr. Thomas, Mr. Ronald Chang and Miss Natasha Chang.

He has, however, admitted that he was not able to fully interview Miss Chang and Mr. Ronald Chang as they were not co-operative (this was due to the behaviour of Mr. Chang)

He produced 5 photographs of the scene (exhibit 11), 12 photographs of both vehicles (Exhibit 12) and a diagrammatic layout of the accident (Exhibit 13), Exhibit 13 substantiates the evidence of Listz, Thomas, Vassell and Maxwell. He viewed the crash test simulation prepared by the expert for the Changs, Mr. Gary Ferguson and disagreed with that version of the accident as shown.

He rejected the evidence of Ms. Chang that the initial impact was to the left rear of the Getz. He stated that, based on the damage to both vehicles, the right front of the RAV 4 made contact first with the left front of the Getz.

Major James stated as follows:

“ When you look at the left front (Getz) it was the major point of impact.” Once that contact was made, it was made at a fairly deep angle... Once the contact was made, the Getz was turned clockwise. The impact deflected the RAV 4 to the left. The Getz turned clockwise. The vehicles were still moving while turning, the RAV 4 scratched the left front door to the back. The vehicles were still moving.” Major James however, stated that, in his opinion the RAV 4 would have been going over 30mph to sustain the damage as seen in the photographs. This is in contrast to the evidence of Listz, Vassell, Maxwell and Thomas that the RAV 4 was travelling at 50 km per hour.

10. Major James also disagreed that both the RAV 4 and the Getz could have been moving side by side in the same left lane. He went on to explain that both vehicles could be stationary beside each other based on the width of the left lane, but it was not likely they could be moving in the same left lane.

11. In relation to the position of the vehicles after the accident, Major James stated that if the RAV 4 was travelling over 30 mph, passed the intersection with Ardenne Road and struck the utility pole, it would not have to move away from the utility pole. There were inconsistencies in relation to the witnesses in the RAV 4 as to whether the RAV 4 had hit both the utility pole as well as the cable box on the sidewalk.

Miss Maxwell's and Miss Vassell's witness statement stated that it hit both. In her oral evidence, Miss Vassell stated she did not recall the RAV 4 hitting the utility pole.

Major James stated that based on the photographs, it is his opinion that the RAV 4 hit both the utility pole and the cable or junction box.

The court accepts that the RAV 4 hit both the utility pole and the cable box after the impact with the Getz and finds that any inconsistencies in the evidence of the witnesses on the point is due to recollection.

12. In relation to the position of the Getz after impact, Major James stated that in his opinion, it would have gone on to Hope Road on the right and either facing north or south. He stated that could also be to the left towards Ardenne Road or even turned east. He further stated that it could have been in the middle of the intersection or even slightly beyond the intersection but not too far beyond.

Analysis of Evidence of Witnesses in the RAV 4

There were a few discrepancies in the evidence of the witnesses. Mr. Listz stated that, at one point, both vehicles were nose to nose in the lanes. Mr. Odane Thomas stated they

were never nose to nose at any time. Bearing in mind that both vehicles were in constant motion, the court is not of the view that this is a material discrepancy.

Mr. Listz stated that the right front of the RAV 4 collided with the left front of the Getz, that the impact was first with the Getz's front fender.

Mr. Thomas stated that the RAV 4 hit between the middle and rear of the Getz, that the RAV 4 did not slide along the left side of the Getz.

The court accepts the evidence of Mr. Listz on the point having considered the Assessor's report of the damage to the Getz and the evidence in relation to the movement of the vehicles by Major James.

There was a further discrepancy in relation to the distance of the Getz from the RAV 4 just before the impact.

Miss Vassell stated that the Getz was slightly ahead of the RAV 4.

Miss Maxwell stated that the Getz was in the right lane a little ahead of the RAV 4. She further stated it was not quite a car length and that the front wheel of the Getz was positioned at the front bumper of the RAV 4.

Mr. Listz said that the front of the RAV 4 was lined up with the left front wheel of the Getz.

Mr. Thomas stated that the Getz was less than a car length ahead of the RAV 4. He further stated that most of the Getz was ahead of the RAV 4.

Again, bearing in mind the position of each of these witnesses in the RAV 4, the Court is of the view that this is not a material discrepancy. All the witnesses agree essentially that the Getz was ahead of the RAV 4.

Finally, Mr. Listz was the only witness who stated that he saw the left indicator of the Getz go on just before Miss Chang swerved left.

This discrepancy can be explained in terms of the seating arrangements of the witnesses in the RAV 4 and their respective powers of observation. The court would also expect the driver of the vehicle to be paying keener attention to the other vehicles on the road.

Reasons for Judgment

It is the opinion of this court that Miss Chang's version of the accident lacks credibility.

She places herself in the left lane safely ahead of the RAV 4 before putting on her indicator to turn left onto Ardenne Road. There should have been no impediment to her left turn unless Mr. Listz deliberately came down upon her.

The court further takes note of the fact that she places the Getz to the extreme right of the left lane that is, 4 feet from the left sidewalk. (This is also demonstrated in the crash test simulation.)

The turn onto Ardenne Road is neither a sharp nor narrow bend. One would therefore have to question why she placed the vehicle in such a position in order to take the left turn.

Counsel for the Changs, Mr. Gammon, suggested to Mr. Listz that he attempted to pass Miss Chang on her left while she was in the said left lane and that he actually mounted the sidewalk in an effort to pass her and as a consequence rammed into the left side of the Getz.

Again, the court would have to ask why Mr. Listz would behave in such a manner unless he was drunk or mentally deranged. There was no logical reason for him to do so. It was

after 2:00am. It appears that they were the only vehicles on the road at the time. He could have entered the right lane in order to overtake her. There is no evidence to suggest that he was intoxicated or suffering from any mental impairment at the time.

The Court also rejects the evidence of Miss Chang and Mr. Miret as to the position of both vehicles after the impact. The Court accepts the testimony of Listz, Vassell, Maxwell and Thomas, that the RAV 4 had mounted the sidewalk to the left where it hit a cable box and a utility box. The court was particularly impressed with the evidence of Miss Maxwell who stated that the junction box came in on the RAV 4 and trapped her so that the RAV 4 was positioned by the junction box immediately after the accident. In relation to this same issue, the court is of the view that Mr. Miret is a witness of convenience. It is somewhat incredible that he is able to clearly recall the position of both vehicles one year after the accident. He was not involved in the accident and gave no statement to anyone immediately after. He has given the court no reason for his ability to recollect that particular point.

The photograph and the Assessment report in relation to the Getz clearly speak to a major impact to its left front. This supports the evidence of Mr. Listz in relation to the point of initial impact. Major James testimony in relation to the damage on the Getz assists the court in understanding the damage sustained to the entire left side of the Getz.

Having due regard to all the above, the court accepts the evidence that Miss Chang was in the right lane and suddenly swerved into the left lane in order to turn on to Ardenne Road and collided with the right front of the RAV 4 in the process. The court accepts that the RAV 4 was proceeding in the left lane at the time and that as a result of the

collision, the RAV 4 mounted the sidewalk on its left and collided with the utility pole and cable box and remained in that position.

Finally, while the evidence of Major James does challenge the veracity of Listz, Vassell, Maxwell and Thomas in relation to the speed of Mr. Listz, the Court is not of the view that the speed of the RAV 4 contributed to the impact. The Court accepts the evidence of Mr. Thomas that Mr. Listz could not have stopped, swerved or slowed down as the accident happened in a split second.

Having due regard to all the above, the Court finds that the Claimants Ronald Chang and Natasha Chang have not, on a balance of probabilities, proved negligence against the 1st and 2nd Defendants Rookwood and Listz.

In relation to the Claim HCV 02466/2008 Judgment is granted to 1st and 2nd Defendants.

In relation to HCV 04059/2009, the Court finds that the Claimants have proved on a balance of probabilities that the 2nd Defendant, Miss Chang, failed to keep any or any proper lookout or to observe or heed the presence of other vehicles on the road. Secondly, that she drove without due care and consideration for other users and is liable for the injuries suffered and loss sustained by the said Claimants. The Court finds that they have failed to prove any negligence against the 3rd and 4th defendants and that the 1st and 2nd Defendants are totally liable. The Court therefore grants judgment for the 1st and 2nd Claimants and the 1st and 2nd Ancillary Claimants against both defendants Ronald and Natasha Chang.

Assessment of Damagages

1st Claimant, Felicia Vassell

Special Damages

The above has been agreed by all the parties in the amount of \$95,000.00. The amount is therefore awarded with interest of 3% from September 22, 2007 to August 16, 2010.

General Damages

In assessing general damages, the court has to bear in mind (a) the nature and extent of the injuries sustained; (b) the nature and gravity of the resulting physical disability ; (c) pain and suffering; (d) loss of amenities,

Nature and Extent of the Injuries Sustained

The Claimant Vassell, who was at the material time a student at the University of the West Indies, sustained mild head injuries, loss of consciousness and a dislocated left hip and was admitted to the University Hospital of the West Indies on the 22nd of September 2007 for six days. She was treated by Dr. Phillip Waite. The dislocated left hip was manually reduced within 6 hours. She was then placed on traction for 6 days, then discharged home on bed rest. She was referred for physiotherapy and seen again on the 8th of November 2007 by Dr. Waite. At that time she was complaining of pain to the groin while sitting and walking. She was assessed as having reduced dislocation to the left hip and advised to continue physiotherapy.

She was again seen by Dr. Waite on the 20th of December 2007. There was full ranges of motion except for reduced internal rotation of 30⁰ compared with 40⁰ on the right with pain at the extreme of internal rotation. There was also tenderness to the origin of the hip adductors, flexors and abduction muscles.

She was again assessed by Dr. Waite on April 15, 2008. At that time she complained of pain and weakness in relation to left hip. The pain was brought on by walking and cold temperatures and also on getting up from prolonged sitting in class.

She also complained of left anterior knee pains brought on by walking and climbing stairs, and left groin pain on reaching up on her bed.

The knee pain affected her ability to move around campus and she had to limp when it occurred.

She was assessed as follows:

1. Reduced left hip dislocation (consistent with mechanism of the accident)
2. Tendinitis to the hip flexors, adductors and tensor fascia lata with left greater trochanteric bursitis (result of the hip dislocation.)
3. Chondromalacia left patella. (Also consistent with mechanism of the accident)
4. Subjective left lumbar radiculopathy (This can be considered consistent with the accident and as a consequence of the accident.

At that time he recommended physiotherapy, x-rays of the left knee, MRI and or arthroscopy of the left knee. She was diagnosed her with 6 % and X% whole person impairment.

He next saw her on the 18th of September 2008. At that time she complained of lower back pains, occasional hip pains, paraesthesia and numbness to both feet brought on by walking for over 5 minutes.

He assessed her as having

1. Neurological abnormality either due to cervical myelopathy vs lumbar radiculopathy
2. Mild low back pain
3. Mild neck tenderness

4. Pain to the left hip
5. Chondromalacia to the left patella

He requested radiographs of the spine and left hip and on his examination on 30th September 2008, he referred her for further physiotherapy.

He last saw her on the 11th November 2008. At that time all her pains had improved except for mild low back pains.

The final Assessment was as follows:

1. Reduced left hip dislocation with no evidence of avascular necrosis. This is consistent with the mechanism of the accident.
2. Subjective lumbar radioculopathy with mild chronic mechanical low back pain. This can be considered consistent with the accident and is possibly a consequence of the accident.
3. Resolve Chondromalacia left patella
4. 6% Whole Person Disability

It is to be noted that Dr. Waite stated in the final report firstly, that the radicular symptoms can return and worsen. The timing and extent of which cannot be predicted.

Secondly, that she can develop pains to the left hip due to post traumatic chondromalacia of the joint, the timing and extent of which cannot be predicted.

Thirdly, that the knee pain can return and worsen, the timing and extent of which cannot be predicted

The court will take into consideration therefore the nature of the injuries, the recovery period, the whole person disability rating and possible future complications.

Counsel for the Defendants, Rookwood and Listz has asked that the Court ignore the issue of lower back pains as this was never brought to the doctor's attention until one year after.

Bearing in mind Dr. Waite's report, there is no reasonable basis for the Court to do so.

Counsel for Miss Vassell, Mr. Hinds, has requested an award of \$3.2 million dollars. He cited the case of **Suzette Campbell vs. Wilbert Dillion, Khan 5 pg. 50 as comparable.**

Counsel for the Defendants, Rookwood and Listz, asked the Court to consider the cases of **Mavis Patterson v AG for Jamaica and Gilbert McIntosh, Khan 4 pg 43 and Agnes Jackson v Grace Kennedy and Co. Ltd, Harrison's pg 103.**

In **Suzette Campbell**, (supra) the claimant who was 29 years old sustained *inter alia*, multiple fractures involving right hemi pelvis, fracture of the rami of the ischium, fracture of the pubic bone and fracture of the acetabulum. on the 22nd of August 1998.

She remained in hospital until the 2nd of October 1998 when she was sent home on crutches. At the end of 4 months she complained of pain in her right hip occasionally and at extremes of hip movements. The surgeon thought that she would be prone to long term complications like osteo-arthritis.

On the 2nd of June 1999, Dr. Emran Ali found that there was a 1 ½ shortening of the right limb causing a limp, subluxation of the right sacro – iliac joint with upward shift of the hemi pelvis, dislocation of the pelvis ring. He assessed her PPD as 10% and stated that the distortion of the pelvic ring might affect normal childbirth delivery.

She was awarded \$1,300, 000.00 for pain and suffering and loss of amenities the 5th of June 2000. The updated award using the June CPI is in the amount of \$3,832,501.00.

10% PPD is equivalent to 5% WPD.

In **Mavis Patterson** (supra), the 37 year old claimant suffered a posterior fracture dislocation of the right hip on the 4th of October 1991. She was discharged from hospital bearing on crutches on the 25th of November 1991.

She subsequently complained of pain in the hip. It was the Doctor's opinion that the persistent pain was a result of osteoarthritis – a normal process of aging, on set of which can be accelerated by injury to a joint. However Dr. Blake who examined her on the 10th of March 1994 did not think that the calcification in the hip joint represented early accelerated degenerative arthritis or that her risks form arthritis had been significantly increase. He assessed her permanent disability as 10% of the lower extremity which is equivalent to 5% WPD.

The award for pain and suffering and loss of Amenities on the 14th of July 1997 was in the amount of \$500,000.00.

The updated award is \$1,818,906.60. In this case the court notes firstly, that the WPD is 1% less than in the present case and there is no evidence of potential future medical issues arising.

In **Agnes Jackson**, (supra) the plaintiff's stay in the hospital was of a much longer duration. She suffered dislocation of the hip joint and a fracture of the hip. By consent a global award of \$105,000 inclusive of cost was made on the 3rd of June 1992.

The updated award is \$1022.163.30.

There is no evidence of any permanent disability. There is also no evidence of possible future complications. In all the circumstances, the assessment of the award is not helpful in a proper determination of the case.

The court also considered the case of **Beverly Francis vs Donovan Pagan** et al Khan 4 pg 52.

This claimant suffered a swollen tender left lower thigh with movements diminished due to pain and comminuted supra condylar fracture of left femur on the 3rd of September 1991. She was discharged from hospital on the 24th October 1991 and commenced physiotherapy which continued until 1993. At that time the range of movement at the knee joint was restricted and she walked with a limp. She was assessed with 10% WPD and complained of pains, cramp, stiffness in the leg in rainy and cold weather, as also problems with bending and going down steps.

Dr. Mena stated that osteo-arthritis was almost certain to occur giving it a rating 90% to 95% certainty.

She was awarded the sum of \$350,000 for pain and suffering and loss of Amenities.

The updated award is \$2,146,755.70.

The claimant in **Francis** sustained injuries which were more serious than Miss Vassell. However, Miss Vassell's long term potential complications are more serious than the claimant in Mavis Patterson.

The court will therefore make an award of \$2 million dollars for pain, suffering and loss of Amenities with 3% interest from the 17th of May 2008 to the 16th of August 2010.

The Second Claimant, Ayesha Maxwell

Special Damages

This has been agreed by all parties in the amount of \$269,250.00 with interest of 3% from the 22nd September 2007 to the 16th August 2010.

General Damages

Pain and Suffering and Loss of Amenities

There are three medical reports in relation to the injuries sustained by Miss Maxwell, who is a medical student at the University of the West Indies.

She sustained multiple soft tissue injuries and was treated and sent home. One month later she was still complaining of pain in the left hip. X-rays of her left hip revealed displaced fracture of the left acetabulum. She was placed on bed rest for three months.

On the 25th March 2008, she was reviewed by Dr. Delroy Fray, an Orthopaedic Surgeon who noted that she walked with an antalgic gait and that she had healed abrasions on left anterior knee, right hand, right thigh, left anterior leg and palm of left hip. The range of her left hip was restricted in both internal and external rotation.

Dr. Fray did his final review on the 2nd August 2008. At that time she complained of difficulty climbing stairs and also running. He reported that she still walked with an antalgic gait. His examination revealed mild restriction of movement in the left hip with crepitus. He assessed her with 9% WPD (gait. 7% ostheo-arthritis 2%)

In relation to the latter, his earlier report had indicated that it was almost certain that she would develop ostheo-arthritis of the left hip and that it was possible she would have to retire early due to pain. He has also stated that there was the possibility of left hip replacement.

In relation to the healed abrasions she was referred to a dermatologist Dr. Carol Burrell who saw her on the 31st October 2007. The doctor noted hypertrophic linear scars on the left knee and also on the anterior aspect of her left thigh.

She received injections into the scars on two occasions. When she was last seen on January 24th 2008, the scars were noted to have flattened significantly and were only slightly raised.

It is Dr. Burrell's opinion that she will not recover totally as the scars will remain visible on her skin. The Court noted a few visible scars in the area of the left knee. The left thigh was not seen.

As a result of the injuries, Miss Maxwell was unable to attend classes from September 22nd 2007 to the end of January 2008.

She was admitted into hospital in October 2007 when the fracture of the left acetabulum was discovered until December 22, 2007.

Mr. Hines has cited one authority for comparison. **Suzette Campbell vs Wilbert Dillion**, (supra).

The Claimant, Suzette Campbell suffered several fractures while Miss Maxwell suffered only one. However, the long term prognosis for Miss Maxwell is less favourable than that of Suzette Campbell. However Miss Campbell had 1 ½" shortening of the right limb, causing a limp.

The case of **Lloyd Robinson v Denham Dodd** et al Khan 5 is also a useful guide. This plaintiff suffered a comminuted fracture of the left acetabulum, posterior dislocation of the left hip, blow to head and left hand, chopped away lip, loss of dentures and cut over the right eye on January 24, 1986.

He was discharged from the hospital on crutches on March 1, 1986.

When re-examined on January 27, 1988, he was still complaining of pain, stiffness and cramps in the thigh with tenderness on long standing. He was still limping.

On December 19, 1989, he was assessed by Dr. Herard with a moderate limping gait, weaker left hip with grade 4 strength of flexor muscles; external restriction of hip 25 degrees and flexion at 90 degrees; Advanced osteo-arthritis of hip and acetabulum as well as subluxation of the femoral head); 20% PPD which is 12 % WPD with the possibility that the percentage might increase as he got older.

The updated award of \$650,000 for pain and suffering and loss of Amenities is \$2,432,580.30

While it is impossible to compensate Miss Maxwell, the court has to do its best in terms of a monetary award. The award in the Robinson case, in hindsight, would appear to be moderately low.

Having considered all the circumstances including the slight scarring that has remained, the court will award the sum of \$3 million for pain and suffering and loss of Amenities with interest at 3% from May 17, 2008 to August 16, 2010.

In relation to the 3rd Defendant/ 1st Ancillary Claimant, Francis Rookwood, in HCV 04059/2009, special damages are awarded in the sum of \$528,819.00 with interest at 3% from September 22, 2007 to August 16, 2010.

In relation to HCV 02466/2008, costs to the 1st and 2nd Defendants to be agreed or taxed.

In relation to HCV 04059/2009 costs to the 1st, 2nd claimants against the 1st and 2nd

Defendants to be agreed or taxed and costs to the Ancillary Claimants against 1st and 2nd

Defendants to be agreed or taxed.

Leave to appeal allowed.

A handwritten signature, possibly 'Mort', is written in black ink. A large, thick arrow is drawn from the signature, pointing towards the left side of the page.