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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. C.L. 1995/S - 188

BETWEEN	ANN MARIE SINCLAIR	FIRST CLAIMANT
AND	WINSTON JACKSON	SECOND CLAIMANT
AND	GLENROY MASON	FIRST DEFENDANT
AND	MERLE DUNKLEY	SECOND DEFENDANT

IN COURT

Suzette Wolfe instructed by Crafton S. Miller and Company for the claimants

Simone Jarrett instructed by the Kingston Legal Aid Clinic for the second defendant

May 26, 27 and August 5, 2009

NEGLIGENCE - SECTION 31E OF THE EVIDENCE ACT - ASSESSMENT OF DAMAGES

SYKES J.

1. This is a claim brought by the claimants, Miss Ann Marie Sinclair and Mr. Winston Jackson against the defendants, Mr. Glenroy Mason and Mrs. Merle Dunkley, arising from a motor vehicle accident that occurred on June 11, 1996, along the Old Harbour Main Road in the parish of St. Catherine. Both claimants are seeking compensation for personal injuries received in the accident.

2. On July 20, 2005, the claimants sought and obtained judgment in default of acknowledgment of service against Mr. Glenroy Mason, the first defendant. Damages were not assessed against him. The

assessment was delayed pending the outcome of the trial between the claimants and Mrs. Merle Dunkley, the second defendant, who has always resisted the claim.

3. The case against Mrs. Dunkley rests on derivative liability, that is, her liability was vicarious and depended on the claimants being able to prove that at the time of the accident, Mr. Glenroy Mason was Mrs. Dunkley's servant or agent. At the end of the trial, the claim against Mrs. Dunkley was dismissed and judgment entered for her with costs against both claimants. These are the written reasons for dismissing the claim. This judgment also contains the assessment of damages against Mr. Mason.

The evidence

4. This case shows that insufficient regard is had for the rules of evidence since the introduction of the Civil Procedure Rules ("CPR"). It appears that there is a school of thought that believes that witness statements are vehicles on which inadmissible evidence can be transported into court. The hearsay rule subject to the statutory inroad made by the Evidence Act is alive, well and is still an effective border guard of law of evidence.

5. It is my view that had there been sufficient attention to the question of proof of facts to establish the claim, it would have become obvious that the claim against Mrs. Dunkley could not possibly succeed.

6. When a claim is launched, it is the expectation of the court that counsel would have satisfied himself that the claim can be proved by relevant and admissible evidence at the time the claim is filed. Unless this is so, there is no reasonable ground for bringing the claim because it is no longer acceptable that a claim is launched and the resources and time of a defendant is consumed when there is no real prospect of success because the evidence is not available to support the allegations.

7. The pleadings in this case specifically asserted that at the time of the accident Mr. Mason "was at all material times the driver of the motor vehicle registered at 5455 AR and the servant and/or agent of

the 2nd (sic) defendant" (see para. 2 of amended statement of claim). It was further pleaded that "the 2nd (sic) defendant was at all material times the owner of a motor vehicle licensed number 5455 AR" (see para. 3 of amended statement of claim). The pleadings did not identify the specific make of the car allegedly belonging to Mrs. Dunkley.

8. Mrs. Dunkley, in her defence, stated quite unequivocally, that Mr. Mason was not her servant or agent, and in any event, her car was a 1989 blue Lada motor car whereas the car that was allegedly involved bearing the registration plates 5455 AR was a Toyota Corolla motor car.

9. Mr. Winston Jackson, one of the claimants, although asserting in his witness statement, which he proffered as being true and correct, that "the vehicle that collided into the vehicle I was driving was a Lada motor car license # 5455 AR" (see para. 10), admitted under cross examination that he could not say what type of vehicle hit the van in which he was traveling. He had come by his information from a source other than his own observation and recollection.

10. Miss Ann Marie Smith was not able to give any evidence whatsoever about the car that hit the van in which she was traveling with Mr. Jackson.

11. The third witness called by the claimants, Mr. Luther Smith, a passenger in the van, in which Mr. Jackson and Miss Smith were traveling, asserted in his witness statement that the car that struck the van was a Lada motor car. However, he could not identify the driver of the motor car.

12. The upshot of all this was that the claimants, as against Mrs. Dunkley, were not able to prove from the testimony of these three witnesses, (a) the identity of the driver of the car that collided with their vehicle; and (b) that the driver of the car that collided with their vehicle was the servant or agent of Mrs. Dunkley. There was no admissible evidence coming from the claimants to prove the identity of the driver of the car that collided with the van, and neither was

there any evidence, from the claimants, to prove the pleading that Mr. Mason was the servant or agent of Mrs. Dunkley at the time of the accident. Pursuing this case against Mrs. Dunkley has been a thorough and grand waste of the court's resources which could have been spent more profitably on other cases.

13. Miss Wolfe, after the close of the claimants' case, then sought to extract information from Mrs. Dunkley to prove her case. This strategy failed spectacularly. I accept Mrs. Dunkley's evidence that she gave her Lada motor car to Mr. Mason to repair. According to Mrs. Dunkley, Mr. Mason was a mechanic who operated a garage next door to her home and at all times, she was able to stay at her house and see her car in the garage. She testified that the car was there before and after the accident in June 1996. At no time did she give Mr. Mason permission to drive her car, and if he did, he was not doing so as her servant or agent.

14. The next port of refuge for Miss Wolfe was an attempt to rely on a police report of the accident. This report is said to be from the Police Traffic Headquarters. The claimants served notice under section 31E (2) of the Evidence Act of their intention to rely on this report. Mrs. Dunkley objected to the notice and required the maker of the statement to be called as a witness (see section 31E (3)). Once the defendant objects then the claimants have an obligation to call the maker of the statement (not document) on which they intend to rely. They would only be relieved of this duty if they could bring themselves within one of the paragraphs of section 31E (4).

15. The claimants relied on section 31E (1) of the Evidence Act. The notice served by the claimants stated that "the documents are tendered as the makers of them either cannot be found or are unable to attend court on this date." Miss Wolfe seemed to have been labouring under the misapprehension that merely stating the grounds on which the claimants intended to rely to prove their case under section 31E was sufficient without actually adducing evidence to meet the statutory demands. The grounds stated are merely advanced notice to the other parties in the case of what the claimants intend to

do but that does not relieve them of the obligation of calling evidence to establish the statutory grounds.

16. Section 31E reads:

> (1) *Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.*
>
> (2) *Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.*
>
> (3) *Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.*
>
> (4) *The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person -*
>
> > (a) *is dead*
> >
> > (b) *is unfit, by reason of his bodily or mental condition to attend as a witness;*
> >
> > (c) *is outside of Jamaica and it is not reasonably practicable to secure his attendance;*
> >
> > (d) *cannot be found after all reasonable steps have been taken to find him;*

(e) is kept away from the proceedings by threats of bodily harm

(5) ...

(6) The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements of notification as specified in subsection (2).

(7) Where the party intending to tender the statement in evidence has called, as witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court.

17. It is obvious from Miss Wolfe's submissions on this point that she was relying on the entire police report, particularly those parts that speak to the make of the car alleged to have been involved in the accident.

18. It is important to realise that what the provision makes admissible is the statement captured in the document and not the document per se although, in some instances there is no real distinction between the document and the statement. Even if the document and the statement coincide, it is the statement that is made admissible. The statement comes into to evidence as truth of whatever facts the statement contains or admissible for some other purpose. In this case, the claimants were relying on narration in the statements as true.

19. The distinction between the maker of the statement and the maker of the document is vital because a document may contain several statements from different persons.

20. Note as well, that the notice provisions do not refer to the maker of the document but the maker of the statement. The reason for this is that the notified party may object (usually by serving a counter-notice) and require the attendance of the maker of the statement (not the maker of the document) to attend court. If a counter-notice has been served requiring the maker of the statement (as distinct from the maker of the document) to attend, then the party seeking to

rely on the evidence may not produce the maker of the statement, if he establish any of the grounds listed on section 31E (4).

21. The grounds listed in section 31E (4) must be established by evidence called at the trial. Stating the reasons on the notice does not establish the grounds; it merely tells the notified party the grounds that are being relied at the trial. This point is important because it is clear that a number of practitioners at the civil bar are of the firm but erroneous belief that once they state a statutory ground for not calling the maker of the statement, then there is a burden on the notified party to nullify the ground, even if a counter notice is served. This is not so.

22. This is not so and could not be the case because the notice and counter notice provisions are protective provisions designed to protect the notified party from possibly unreliable evidence. This is why he is given the right to demand the attendance of the maker of the statement. This is why the profferor of the evidence is only relieved from producing the witness, once a counter notice is served, if he establishes any of the statutory grounds in section 31E (4). It should be noted that there is a statutory discretion to exclude evidence even if the statutory grounds are met (see section 31L).

23. Section 31E (1) requires the court to decide this question: had the maker of the statement been present in court could he have given the proposed evidence contained in the statement that is itself contained in the document? If no, then the evidence is inadmissible. Needless to say, the evidence would have to be relevant to an issue before the court. This is why the maker of the statement needs to be identified so that this question can be answered.

24. As stated earlier, Miss Wolfe appeared to be relying on the entire police report. She had a number of difficulties, none of which was successfully overcome. First, there was no identification of the maker of the statement in the police report, a fundamental prerequisite to admissibility. The court cannot assume that the maker of the document is also the maker of the statement. Second, there was no evidence that the statements in the documents sought to be adduced

would have been admissible had the maker of the statement been called to give evidence because there was the real possibility, in the context of this case, that he was told by third parties what he included in his statement which was eventually captured in the document. If this is so, then he would not be able to give the evidence contained in the statement because had he come to court he could not repeat what he was told by third parties unless one of the exceptions to the hearsay rule could be invoked. There was no suggestion that any exception to the hearsay rule was being relied on. Third, the ground state is that the witnesses "cannot be found or are unable to attend court on this date." Regrettably, these are not any of the statutory grounds for not producing the witness.

25. Perhaps the claimants had in mind section 31E (4) (c) or (d). It was not clear which ground was in view or whether it was both.

26. The following principles govern the use of section 31E of the Evidence Act.

   1. The statement in the document being relied on must be evidence which the maker of the statement could have given in evidence had he attended court.

   2. The maker of the statement must be identified by the proponent of the evidence because this is necessary information that the notified party must have in order to make an informed decision on whether he should object to the evidence.

   3. If the notified party objects, then the maker of the statement must be produced to give evidence at the trial.

   4. If the maker cannot be produced, the proponent can seek to rely on section 31E (4).

   5. Any statement to be admitted under this provision is subject to the statutory discretion to exclude the statement under section 31L.

27. The claimants having failed to establish a case against Mrs. Dunkley, the trial became an assessment of damages against the first defendant since judgment had been entered against him.

Damages

28. I shall make the assessment in respect of Miss Ann Marie Sinclair first.

Injuries

29. Miss Sinclair suffered from the following injuries for which she received treatment:

    1. bilateral femoral (mid shaft) fractures with bone knee effusions and laceration to the forehead;

    2. she lost consciousness;

    3. skeletal tractions applied to both side.

    4. she received tetanus prophylaxis along with one week of oral antibiotics

27. After being discharged on August 8, 1996, Miss Sinclair was advised not to weight bear and to be on bed rest for six (6) weeks. Before she left the hospital she began complaining of pain. Examination of her revealed that some foreign body was overlying the fifth metatarsal bone. It was removed. She eventually left the hospital on August 10, 1996.

28. She was reviewed on September 12, 1996. The fracture sites were not tender and there was "good callous formation" (report of Dr. Kota dated September 30, 1998). She was advised to take physiotherapy with a view to helping with her mobility.

29. Miss Sinclair was reviewed on December 16, 1996. Her fractures were healed. The range of movement of the left knee was normal. The range

for the right knee was from 0 - 90 degrees. Further physiotherapy was recommended.

30. On April 14, 1997, there was a further review of Miss Sinclair. The range of movement on left knee was full. The range of movement for right knee was still 0 - 90 degrees. Additional physiotherapy was recommended.

31. She was reviewed in June and finally on July 21, 1999, when it was noted that she was able to extend her right knee fully and flex 0 - 100 degrees. There was no joint tenderness. She was discharged from the orthopaedic clinic and advised to "continue physiotherapy until physiotherapist was satisfied enough to discharge her" (Dr. Kota's report). Now comes an important sentence: "She was also advised to return to her work whenever she desires."

32. Miss Sinclair states that she could not work after her accident because of the pain she experienced. She alleges that she needed to employ two helpers. She also testified that even when she began walking she could not stand for any period of time because of extremely severe pain. This caused her to leave her job at Cable and Wireless Jamaica Limited, a telecommunications service provider. In fact, she did not return to any kind of work until 2005, that is to say, nine years after the accident. She began to rear chickens which she is still doing at the time of trial from which she earns $6,000 per week.

Loss of earnings

33. Miss Sinclair is claiming $1,296,000.00 as loss of earnings for nine years beginning in June 1996 to 2005, when she began working again. Miss Jarrett, on behalf of Mrs. Dunkley, points out, quite rightly, that there is no proof of this head of damage. Miss Sinclair alleges that she was employed to Cable and Wireless, a large company operating in Jamaica, and she has not produced even a single pay slip to her contention. Neither is there a letter indicating that she was once employed to the company and what her earnings were. Further, based on the medical report of Dr. Kota, by July 1997, she was advised that she could return to work at any time she chose. Thus it would seem to be that any loss of earning would be for at most one year.

34. Miss Wolfe prays in aid the much abused case of ***Walters v Mitchell*** (1992) 29 J.L.R. 173 (the push cart vendor case) where Wolfe J.A. (as he then was) indicated that in certain circumstances, the court may act on the say so of the witness when he speaks of his loss. That case concerned a push cart vendor and understandably, his Lordship made the comments at page 176D - I. Those comments do not easily apply to a person who was employed to large commercial concern which ought to have some record of Miss Sinclair's employment. There was no explanation or evidence indicating that a request was made for the information from the company and it was refused. Damages must be alleged and proved. Miss Sinclair is not in the push cart vendor socio-economic stratum and so cannot derive assistance from the case. I find it quite curious that despite the allegation of excruciating pain, there is no evidence of a visit to a doctor of any kind in the nine years since the accident other than the visits mentioned above.

35. The particulars of claim only have the expression loss of earnings and continuing. At best, this is an indication that the loss of earnings may increase. The law still requires that by the time of the trial the special damages being claimed must be specifically pleaded and properly proved. Miss Sinclair is claiming loss of earnings from 2005 to the present. This was not pleaded and even if it were, it is not clear how she would succeed because she has not proved satisfactorily what income she lost. She began a chicken farm from which she says that she earned $6,000.00/week. Is this more or less than what she was earning at Cable and Wireless?

36. Even in relation to her earnings from the chicken farm, Miss Sinclair has not produced a single scrap of paper showing that she purchased even a bag of feed to say nothing of a chicken.

Medical expenses and transportation

37. Miss Sinclair alleges that she has been going to physiotherapists. She is claiming that she went to physiotherapists at the Kingston Public Hospital ("KPH"), the Mandeville Hospital and a private physiotherapist. She testified that she visited the KPH physiotherapist on 9 occasions at $300.00 per visit ($2,700.00); the

Mandeville physiotherapist on 12 occasions at $200.00 per visit ($2,400.00) and the private physiotherapist for 30 sessions at $800.00 ($24,000.00).

38. Not a single receipt has been produced from any of the physiotherapists or hospitals. It is difficult to accept that in this day and age, a private physiotherapist would fail to issue any receipt indicating that payment was received. In any event the pleaded case only claims $7,500.00. Since Dr. Kota's report indicated that physiotherapy was recommended I am prepared to accept that Miss Sinclair did attend the physiotherapist. I award $7,500.00.

39. I award $1,600.00 for the cost of the medical report and $10,000.00 for the cost of hospitalization and related expenses. These were sums pleaded. The proof of these sums is not ideal.

40. On the question of transportation, Miss Sinclair claims $80,000.00. She has not produced any receipt for this huge figure. The court must begin to insist that significant claims must be supported by documentation. The mere say so of the witness is not sufficient. Again, this is not a push cart vendor situation. I make no award here.

Household help

41. Miss Sinclair testified that she hired two helpers, after the accident, to assist her and her husband as well as her child. The helpers, bathed the household, prepared meals for them and also accompanied her or Mr. Jackson to the doctor. They were paid $4,000.00 ($2,000.00 each) per week. The claim is for 41 months at $16,000/per month ($656,000.00). I shall delay a decision on this award until after I assess damages for Mr. Jackson.

Loss of property

42. Miss Sinclair alleges that she had "about $25,000.00 in [her] pocket" at the time of the accident which she missed after the accident. I would award $20,000.00 in light of the uncertainty of the sum alleged to be lost.

General damages for pain, suffering and loss of amenities

43. The specific injuries received by Miss Sinclair have already been noted. She was unconscious for some time after the accident. From the authorities cited by both counsel, general damages for injuries of this nature range from a low $947,735 to a high of $1, 181,124.29. The case with the high figure is that of ***Donovan Hunter v Merval Graham*** C.L. 1986/H 53 (delivered July 15, 1993) found in Harrison's at page 321. The claimant in that case had a fractured femur and was discharged after 6 weeks. He had a small residual disability of 5%. In the present case, Miss Sinclair had two broken legs. There is no residual disability reported by the doctor. She was disabled for at least six months. An appropriate award would be $1,300,000.00.

Assessment of Mr. Jackson

44. Mr. Jackson was injured. His right leg had a spinal comminuted fracture of the lower one third of the leg. The left leg had a transverse fracture meta-physeal/diaphyseal junction proximally with lateral displacement of left tibia, fracture fibula, junction of proximal two thirds distal one third.

45. While in hospital, he was given intravenous antibiotics, analgesics, daily dressing, debridement of his wounds, skeletal traction and frequent radiological studies of his injuries.

46. He was discharged on September 12, 1996 with a bilateral above knee plaster of paris cast. He visited the orthopaedic clinic on a regular basis.

47. On February 17, 1997, he was readmitted to the KPH with a diagnosis of non-union of the left leg. He underwent surgery on March 4, 1997. The surgery involved open reduction, internal fixation and bone grafting. He was discharged on April 7, 1997.

48. He was again admitted on July 14, 1997. Had had further surgery. Again, he was discharged on July 27, 1997.

49. The prognosis of Dr. Blidgen was that Mr. Jackson received serious injuries. The injuries have resulted in chronic osteomyelitis of his left

leg which is "a long standing and persistent condition which can result in serious social implications" (see report of Dr. Blidgen). The doctor also says that "Mr. Jackson may also experience long term backache."

Loss of earnings

50. Mr. Jackson claimed $2,460,000.00 for loss of earnings between June 1996 to April 2003. He also claims the sum of $1,632,000.00 for the period from October 2003 to March 2005.

51. No award is made under this head. I cannot accept that a person who claims that he was employed by a company (Island Spice) for seventeen years, cannot produce any evidence to support his claim that he earned $30,000.00 per month as a sales representative. He has not produced any pay slip; no regular deposits into a bank account or account at any financial institution; no job letter; no borrowing from any financial institution where one usually has to provide proof of income. This idea that a person can simply turn up in court and seek over $4,000,000.00 in compensation without any attempt to support the claim by documentation when such documentation ought to be available must now come to an end.

52. It is nothing short of remarkable that Miss Wolfe expected the court to make an award of this magnitude on the mere say so of Mr. Jackson without any attempt at explaining why there is no documentary support for this alleged loss of income. The absence of documentary support, direct or indirect, becomes even more striking when it is being said that Mr. Jackson was injured while driving the company vehicle. There is no evidence that the company was asked to provide proof of Mr. Jackson's income and it refused.

53. This push cart vendor excuse has its limits. Jamaica is now moving into an age where documentation is becoming important. The time has now come to say that citizens have to begin keeping records of their dealings. The age of word of mouth is closing. We must not prolong it longer than necessary. Those claimants who ought to be able to produce documentation must do so or give an adequate explanation for the absence of documentary support.

Medical expenses

54. I award $1,600 for the medical report. I also award the $12,000.00 claimed for hospital expenses.

Transportation

55. Mr. Jackson alleges that he spent $80,000.00 on transportation. Again, not a single receipt from the taxi operator. Huge claims must be supported. The mere say so of the witness is not sufficient. Surely, it is not unreasonable to ask that the greater the sum the greater the expectation that it will be properly proved.

Loss of property

56. Mr. Jackson claims that he lost a car battery and a car radio. These are valued together at $5,500.00. He also says that he lost $1,000.00. The total claim here is $6,500.00. I am prepared to overlook the lack of strict proof and make this award.

Damages for pain, suffering and loss of amenities

57. Mr. Jackson has suffered very serious injuries. He underwent two further hospitalizations and surgeries. The prognosis for Mr. Jackson's long term health is not good. This calls for a substantial award.

58. If Miss Sinclair was awarded $1,300,000.00, then surely Mr. Jackson must be awarded substantially taking into account the surgeries and attendant discomfort. Also he now walks with a limp.

59. Mr. Jackson says that his left foot pains him a lot. He cannot do much driving. Also, if he walks or sits for long periods, his left foot hurts.

60. The closest case to the one at hand is ***Linda Harris v Baron McKenley*** (C.L. 1981/H047) (delivered March 15, 1989). In that case the claimant had fractured both femora. There was swelling of middle and lower third of both thighs; puncture wound of left tibia, shortening of both legs resulting in bowling. There was a 10% - 15% permanent partial disability of the right lower limb and 20% - 25% permanent partial disability of the left lower limb. The present value of the then award of $280,000.00 is $8,339,914.16.

61. In light of the prognosis of long term back ache, the surgeries, the shortening of the left leg, the already developed chronic osteomyelitis and suitable award would be $5,000,000.00.

62. I now return to the claim for domestic assistance. From the injuries received by both claimants it is fair to say that they would have needed domestic assistances. The sum claimed is not excessive and it is in respect of both claimants. Helpers are not usually keepers of receipt books. I therefore make the award of $656,000.00.

Conclusion

63. Mrs. Merle Dunkley is not liable to the claimants because there is no evidence that Mr. Mason was driving her car at the material time, and even if he was, there is no evidence that at the material time he was driving as her servant or agent. The claim against Mrs. Dunkley is dismissed with costs to be agreed or taxed.

64. The damages against Mr. Mason, default judgment having been entered is as follows:

(a) General damages for Miss Sinclair - $1,300,000.00 at 3% interest from the date of service of the claim form to the date of judgment.

(b) Special damages for Miss Sinclair in the sum of $695,100 at 3% interest from the date of the accident to the date of judgment.

(c) General damages for Mr. Jackson - $5,000,000.00 at 3% interest from the date of service of the claim form to the date of judgment.

(d) Special damages of $20,100.00 - 3% interest from the date of the accident to the date of judgment.

(e) Both claimants are awarded costs against the first defendant.

(f) Both claimants are to pay the costs of the second defendant.