BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2005

BETWEEN:

LEANNE FORBES

Appellant

and

ULBANA MORILLO

Respondent

Before:

The Hon. Brian Alleyne S.C. — Chief Justice [Ag.]
The Hon. Hugh Rawlins — Justice of Appeal
The Hon. Indra Hariprashad-Charles — Justice of Appeal [Ag.]

Appearances:

Mrs. Lorna Shelly-Williams for the Appellant
Mr. John Carrington for the Respondent

2005: September 23;
2006: February 20.

JUDGMENT

[1] ALLEYNE, C.J. [Ag.]: On the 3rd December 2001 the respondent Ulbana Morillo was a passenger riding in the back seat of a car, number PV0330, on the Francis Drake Highway, Tortola. That car came to a stop in a line of traffic, when car number PV7777, driven by Leanne Forbes, the appellant, collided with the back of car number PV0330, causing the said car to collide with a third car stopped in the line of stationary traffic ahead of it.

[2] Ms. Morillo was not wearing a seat belt. She lost consciousness as a result of the collision, and suffered injuries described as contusions to the head, neck, upper back, right knee, and ankle. There was tenderness in the right knee and ankle

and in the costo-chondral joint of the chest, inflammation in the left shoulder, biceps, tendon and rotator cuff. She had muscle spasms in her cervical, thoracic and lumbo-sacral spine, numbness in the upper left extremity, par aesthesia and pain. She was suffering from a posterior subligamentous disc protrusion at the L5S1 level associated with radial annulus tear posteriorly and adhesive capuliitis of her left shoulder, and she complained of hearing loss in her left ear. She will require intermittent oral, intra-muscular and intra-articular medications and continuous physical therapy. Her prognosis was fair to poor, and her overall impairment as a result of her injuries was assessed at 19% whole body impairment.

[3] The doctor's opinion was that Ms. Morillo would have suffered progressive dull aching pain that would increase in intensity to be stabbing, excruciating and incapacitating. She was of the opinion that as a result of the injuries Ms. Morillo would have difficulty in doing overhead activities and reaching outwards with her left shoulder joint. Her ability to do homemaking activities, dressing, grooming, prolonged sitting and standing, ambulation and job-related chores would all be affected.

[4] Ms. Morillo complained that she suffered severe pain for about two months, and after some months of therapy she was able to move her neck again, but with pain. She had to wear a cervical collar for 5 months. She experienced occasional dizziness and imbalance, and tingling of her tongue. She takes medication every day to manage the pain in her neck, left shoulder and upper back, and her right knee and ankle hurt occasionally.

[5] She says she has severe pain in her left shoulder, upper back and neck every day. She has lost hearing in the left ear, in which she also suffers periodic pain.

[6] Ms. Murillo is employed as a caregiver to a blind, diabetic person. As a result of her injuries she is unable to perform many of the activities involved in her

employment. She cannot raise or extend her left arm, lift moderately heavy objects, or do certain types of housework, such as mopping, and can only do others, such as dishwashing, with difficulty. She cannot sit or stand for long periods, and her employer, with whom she has been employed for about four years, has kept her on as a supervisor, employing another person to perform some of the functions formerly performed by her.

[7] The appellant admitted liability at the commencement of the trial, and the issue at trial was limited to quantum. After considering the evidence and the authorities relied upon by both sides, the learned trial judge awarded damages for injuries, pain and suffering and loss of amenities in the sum of $40,000.00. He awarded the respondent the sum of $30,000.00 in respect of loss of earning capacity, and $66,250.50 for cost of future medical care including medication and procedures. He awarded as special damages the sum of $9,344.79 for loss of income and medical expenses, interest on the award for pain and suffering and loss of amenities at the rate of 5% per annum for 2 years, and interest on the award in respect of loss of income and medical expenses at the rate of 2.5% per annum for 2 years. The learned trial judge declined to reduce the award of damages for contributory negligence arising from the admitted failure of the respondent to be wearing seat belts on the occasion of the collision.

[8] The appellant has appealed against the award for future medical expenses, in so far as this award relates to the global sum of $20,000.00 for the costs of treatments set out in paragraph 37 of the judgment. In her skeleton arguments learned counsel indicated that the sum of $4,100.00 was accounted for by medical bills, with the result that the sum in issue is actually $15,900.00. She has also appealed against the finding of fact that the respondent may lose her job and the consequential award of $30,000.00 for loss of earning capacity. Further, the appellant has appealed against the award of $40,000.00 for pain and suffering, which she argues is excessive having regard to the nature of the injuries

sustained. The appeal also challenges the learned judge's finding against the claim of contributory negligence.

Future medical expenses

[9] The basis of the appellant's objection to the award for future medical expenses at the trial was that the witness Dr. Alicea was not a specialist in the areas of medicine within which the particular treatments fall. Counsel contended that the referrals to the specialists had not occurred, and there is no evidence otherwise that these treatments are necessary.

[10] Dr Alicea is a Diplomate of the American Board of Physical Medicine and Rehabilitation and a Fellow of the American Academy of Physical Medicine and Rehabilitation. She completed her specialty Board in Physical Medicine and Rehabilitation in 1993, and was re-certified in 2003. She provided a witness statement and was examined and cross-examined at trial. In her examination in chief, the doctor spoke to the respondent's loss of motion in the shoulder joint for all movements, and opined that the manipulation under anesthesia would have to be done by a sub-specialist. She explained in some detail the steps which an orthopedic surgeon would take to remedy the situation, and her estimate of the cost involved. There were a number of elements of cost to which the doctor was unable to put a figure. Indeed she did not venture an opinion on the cost.

[11] Doctor Alicea, in her witness statement at page 26 of the record, states categorically that the respondent will require continuous physical therapy. She recommends this therapy for the rest of her life. She recommends referral to determine whether the respondent is a possible candidate for a neuro-epidermal nerve block, orthopedic consultations to determine whether her left shoulder joint should be manipulated under surgery, and neuro-surgery services to see if she is a candidate for decompression of the L5-S1 disc in the future. Her prognosis was fair to poor. She explained what she meant by a prognosis of fair to poor. In

either case, further medical treatment and evaluation would be likely to be necessary.

[12] Clearly her recommendations for referral and further evaluation were not casual and were based on her expert evaluation, well within her field of expertise, but recognising that the further evaluation was beyond her personal expertise. The learned trial judge so found at paragraph 36 of his judgment. He commented on the absence of contrary expert evidence, and concluded that there was reliable expert evidence that led him to conclude that it is distinctly more probable than not that the procedures were necessary. I see no reason to differ.

[13] In the absence of evidence of the costs of the various treatments which the learned trial judge found would be necessary, he relied on the case of Greer v Alstons Engineering Sales and Services Ltd.[1] to make an award of a nominal amount of $20,000.00 including the sum of $4,100.00 to which no objection is taken. In Greer, a Privy Council appeal from the Court of Appeal of Trinidad and Tobago, Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from McGregor on Damages[2]:

> "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but of absence of evidence of the amount of loss."

[14] At paragraph 9 of their Lordships' opinion, Sir Andrew Leggatt spoke of the duty of the court to 'recognise (the loss) by an award that is not out of scale.' In this case the learned trial judge got a sense of scale from the case of Dawson v Claxton [3], a decision of this court emanating from the British Virgin Islands.

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[1] [2003] UKPC 46
[2] 13th Edition paragraph 295
[3] Civil Appeal No. 23 of 2004.

[15] Learned counsel for the appellant submitted that this case is distinguishable from Greer, in that there is no evidence that the respondent will require future medical procedures. I do not agree. In my view, the learned trial judge was entirely justified in accepting Dr. Alicea's prognosis and expert opinion as to the need for future evaluation and medical intervention. This ground of appeal is dismissed.

Loss of earning capacity

[16] Learned counsel for the appellant submitted that no award should be made for loss of earning capacity. Counsel submitted that the applicable test is whether there is a risk that the claimant may lose her employment at some time in the future and may then, as a result of her injury, be at a disadvantage in obtaining other or equally well-paid employment. Counsel cited in support the dictum of Brown L.J. in Moeliker v A Reyrolle & Co. Ltd.[4]. In that case his Lordship pointed to the issue of the risk that the claimant will, at some time before the end of his working life, lose his job and be thrown on the labour market; whether that is a substantial risk or a speculative or fanciful risk. The learned Law Lord recognised the infinite range of factors which may arise in considering that question.

[17] In reply the respondent cited the case of Alphonso and Others v Deodat Ramnath[5], a decision of this Court, to the same effect. There is no dispute between the parties on the principles of law to be applied.

[18] At paragraph 30 of his judgment the learned trial judge cited the passage in Moeliker[6] relied on by learned counsel for the appellant/defendant with the addition of those portions of the passage omitted by counsel, being examples of the factors which may arise. He contrasted the circumstances of this case with those operating in Moeliker, applied the legal pinciples, and came to the

[4] (1977) 1 All E.R. 9 at 12.
[5] (1997) 56 WIR 183.
[6] *Supra* footnote 4.

conclusion of fact that 'there is a real or substantial risk that the claimant will be thrown on the labour market', 'that there is a risk that the claimant will not, or is less likely to, get another job on account of her disability should she lose the present job.' The learned judge followed the guidance of Lloyd L.J. in Foster v Tyne and Wear County Council[7] in considering the relevant factors, and in my view he cannot be faulted in his application of principle, his assessment of the risk, or of the value of the compensation to be awarded. This ground of appeal fails.

Pain and suffering

[19] The appellant challenges the learned judge's award of $40,000.00 under this head of damages, contending that it is 'quite excessive'.

[20] In particular, the appellant contends that the learned trial judge was wrong to take into account the respondent's loss of hearing, on the basis that the medical evidence was that the cause of the loss of hearing was not determined. The Ear, Nose and Throat specialist who examined the respondent did not give evidence, and Dr. Alicea deposed in cross-examination that there was no evidence that an audiology examination or a head MRI was done.

[21] The learned trial judge, at paragraph [14] of his judgment, found as a 'virtually unchallenged' fact that, beginning upon her regaining consciousness after the accident, the respondent heard a buzzing sound in her left ear. The learned judge referred to the respondent's oral testimony that her ear aches a lot and sometimes she feels a little sound in her ear and it hurts. At paragraph [22] the learned judge included the respondent's 'problem with her hearing and …. problem with balance' as among the main features of the respondent's condition. He cited the doctor's testimony that the hearing loss could have been caused by the whiplash injury (pages 35 and 36 of record), and said that he accepts the respondent's evidence that she suffered the hearing loss as a result of the accident.

[7] (1986) 1 All ER 567, 570.

[22] It seems to me that in light of the evidence of the doctor that the whiplash injury could have resulted in hearing loss, and the coincidence of the hearing loss with the immediate aftermath of the accident, and notwithstanding the absence of expert evidence that the hearing loss *was* caused by the accident, it was open to the judge to find as a fact, as he did, that the hearing loss was a result of the accident[8].

[23] This finding of fact, which learned counsel for the appellant challenges, is the principal ground on which the complaint in regard to quantum of damages for pain and suffering and loss of amenities is based. However, learned counsel argued the general ground that the award is in any event excessive taking into account authority, in particular Alphonso v Ramnath[9]. The learned trial judge considered the authorities cited by counsel for the appellant on the quantum, including Alphonso v Ramnath, and commented that they were decided in 1961, 1968 and 1997 (Alphonso). He declared that these cases, without being adjusted to take account of the time elapsed since they were decided, were 'of no assistance'. He preferred to be guided by two English cases Butler v Langdon and Stone v Metropolitan Police Commissioner[10]. The trial judge cited the recent decision of the High Court in the British Virgin Islands, in Claxton v Dawson[11] in which the judgment is dated November 1, 2004, but chose not to rely on it as at that time it was under appeal to this court. The appeal has since been determined[12] and the Court of Appeal upheld the award of the learned trial judge of general damages for pain, suffering and loss of amenities of $36,000.00. In fact this award was not challenged and was not made the subject of a ground of appeal in that case. The injuries suffered by the claimant in that case were not as extensive as in this appeal, and the award of $36,000.00 affords reasonable guidance for an award of general damages in this appeal.

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[8] See Grant v Motilal Moonan Ltd. and another (1988) 43 WIR 372, 377.
[9] *Supra* at footnote 5.
[10] Cited in Butterworths Personal Injuries Litigation Supplement
[11] BVIHCV 2002/0180 (unreported)
[12] BVI Civil Appeal No. 23 of 2004, judgment of Gordon, J.A. delivered May 23, 2005.

[24] In Alphonso v Ramnath[13] Singh JA had this to say:

> In appeals, comparable in nature to the present one, it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses, especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award.

[25] I would dismiss the appeal under this ground.

Contributory negligence

[26] The final ground of appeal argued by the appellant was that the learned trial judge erred in not reducing the general damages due to the contributory negligence (of the respondent/claimant). The test for contributory negligence is not disputed in this case, and was accepted to be as laid down in Alphonso v Ramnath[14],

> Whether the respondent by his acts or omissions contributed to his injuries, in the sense that he failed to take reasonable care for his own safety taking into account, as he must, that other users of the road are likely to be negligent. It is also a very salutary principle that, when one man by his negligence puts another in a position of difficulty, the court ought to be slow to find that other man negligent merely because he may (have) failed to do something which, looking back on it afterwards, might possibly have reduced the amount of damage. Contributory negligence does not depend on a breach of duty to the first appellant but on lack of care by the respondent for his own safety. Although contributory negligence does not depend on duty of care, it does depend on foreseeability. Just as actionable negligence requires foreseeability of

[13] *Supra* at footnote 5

[14] *Supra* at footnote 5, at page 187.

harm to others, so contributory negligence requires foreseeability (of harm) to oneself.

[27] The factual basis for the appellant's plea in relation to contributory negligence is the undisputed evidence that the respondent, while riding as a back-seat passenger in a car on the Francis Drake Highway, Road Town, Tortola, was not wearing a seat belt. Learned counsel relies on the evidence of the expert witness, Dr. Alicea, who, in the course of cross-examination, agreed that if a person riding in a vehicle does not have any physical restraint, she could have 'more excessive movement in the lateral position, like lateral bending and some degree of major trunk rotation.' The doctor affirmed that with the use of a seat belt, movement would be minimised. However, the doctor went on to say that the effect is unpredictable, as to whether a disc herniation would occur, whether or not a seat belt or other restraint were used. Learned counsel submitted that the doctor's evidence clearly shows the respondent's lack of care for her own safety. She adds that the consequences were clearly foreseeable, and that the damages should be reduced by 10 to 15% following Capps v Miller[15].

[28] In Froom v Butcher[16] Lord Denning MR ruled that insofar as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share, and that consideration should be given, not only to the causative potency of a particular factor, but also its blameworthiness, without prolonging this question by an expensive enquiry into the degree of blameworthiness on either side. The approach is to a share of responsibility which will be just and equitable.

[29] On the other hand, as is seen in Charlesworth and Percy on Negligence[17], the burden of proof of contributory negligence falls on the person asserting it, i.e. the defendant/appellant. It is a question of fact. In the present case, the learned trial judge found that the appellant had failed to discharge that burden. I can find no ground for disturbing that finding of fact.

[15] [1989] 2 All ER 333.
[16] [1975] 3 All ER 520 at 527.
[17] 18th Edition at page 185, paragraph 3-14

[30] I would dismiss the appeal with costs to the respondent on the basis of rule 65.13(b). In the circumstances it is unnecessary to address the respondent's counternotice.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh Rawlins
Justice of Appeal

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]