IN THE SUPREME COURT OF BELIZE A.D. 2004

CLAIM NO. 674 OF 2004

BETWEEN: 1.OSCAR CHELL
2. CRECENCIA CHELL — CLAIMANTS

AND

1.EDGAR MEDINA — DEFENDANTS
2.MEDINA'S CONSTRUCTION COMPANY LIMITED

Mr. Earnest Staine for the claimants.
Mr. Michel Chebat for the defendants.

AWICH J.

14.5.2010 J U D G M E N T

1. *Notes: Negligence – claim in negligence based on motor vehicle accident; duty of care of a driver on a highway; the duty of care – to keep to the correct lane, to keep propper lookout and not to travel at excessive speed.*
Vicarious liability. Assessment of damages.
Ground of claim must be pleaded in the statement of claim, it was not enough to state it in a writ of summons (now in a general claim form).

2. This claim was commenced by a writ of summons filed on 28.12.2004. Trial of it commenced on 26.4.2006, when two witnesses testified. The trial was adjourned, and parties attempted settlement which failed. Trial was then resumed only this year on March 23rd.

3. The general endorsement on the writ of summons was a claim of the two plaintiffs, "for damages for injury to the first plaintiff and damage to their vehicle……[caused] by the negligent driving by the first defendant, a servant or agent of the second defendant". In the amended statement of claim the relevant averment was this. "On the 3rd day of September 2004, the first claimant then 21 years of age, was driving a 1995 white Ford Ranger… owned jointly by himself and the second claimant… when by reason of the negligence of the first defendant in driving a blue Toyota Hilux… owned by the second defendant,… a collision occurred between the two vehicles, whereby the plaintiffs suffered loss".

4. The evidence regarding how the accident occurred was really one sided. Both the witnesses for the defendants did not see the accident. The first defendant, the driver of the vehicle said to be the offending

vehicle, testified simply in these words. "I remembered approaching the Haulover Bridge and I don't remember anything else until I woke up on the passenger side of the vehicle I was driving". So he did not remember seeing the other vehicle or the moment of impact. I noted that he was not injured; perhaps he was shocked. The second witness for the defendant was, Mr. Kevin Faber. He testified that he was driving ahead of the vehicle in which the first defendant was driving. If Mr. Faber was truthful, which I doubted, he simply heard a bang and looked in his mirror. So he would have seen the vehicles only after the accident. The evidence for the defendants could not help in deciding the way the accident occurred.

5. The first plaintiff was a witness for the plaintiffs. His account of how the accident occurred was this. It was a clear dry day, about 11a.m. He was driving in a vehicle jointly owned by him and his sister, the second plaintiff. He was driving at about 20 to 25 miles per hour, on the northern highway in the direction of Belize City and on the right handside of the road. Mr. Hermenejildo Ramirez, "the side-man", was in the vehicle with the first plaintiff. On a straight portion of the road, after they had past Halouver Bridge, a vehicle approached from

the opposite direction at a fast speed. It crossed over to the plaintiff's right handside of the road, and hit the vehicle that the first plaintiff was driving.

6. The testimony of the first plaintiff was confirmed by that of Mr. Martinez, the passenger side-man, although he said that he saw the other vehicle only at about 20 metres away because he had been gazing outside the window. He confirmed that the other vehicle crossed over from its lane and the collision took place on their right handside lane.

7. The third witness for the plaintiffs was Raul Garcia, one of the two policemen who attended at the scene of the accident. He testified that the point of impact, that is, what he took for the point of impact, was on the lane for the first plaintiff and his side-man. He also said that the first defendant admitted to the witness that the first defendant drove across to the left handside lane, that is, in the path of the vehicle driven by the first plaintiff, and the collosion occurred there.

8. ***Determination.***

The demeanour of the witnesses for the plaintiffs were good. Given the one sided accounts of the accident, and absent worrisome features of the accounts of what happened, I accepted the testimonies of the witnesses for the plaintiffs as the correct accounts of how the accident occurred.

9. Out of the testimonies of the three witnesses for the plaintiffs the material facts proved were these. The first defendant was driving at excessive speed although the road was straight, dry and good, and visibility was good. His vehicle crossed over from his lane to the lane intended for vehicles coming from the opposite direction, and crashed onto the vehicle driven at the time by the first plaintiff on that lane.

10. The first plaintiff sustained the injuries he enumerated in his testimony, namely: multiple fractures of the right wrist, fracture of left knee, multiple fractures of the left hip, and a cut in the face. He attended various medical treatments which cost him $45,459.97.

11. *The Primary liability.*

The first defendant, a driver on a highway, owed a duty of care to other road users and their property. He had a duty to avoid acts which he could reasonably forsee were likely to cause injury to other road users such as the plaintiffs, and their properties. I concluded that the first defendant did not exercise the standard of care required of an experienced and competent driver. He travelled at a speed which two witnesses described as excessive, and about which he did not offer any other evidence. In my view, the excessive speed explained the fact that his vehicle crossed over from his lane to the lane on which the first plaintiff was driving. The first defendant also failed to exercise proper control of the vehicle as expected of a careful experienced and competent driver. I also take it that he failed to keep proper lookout since he did not remember, that is, he did not see anything from a particular moment when he approached the bridge. There were moments therefore, just before the collision, when he did not see oncoming traffic including the vehicle driven by the first plaintiff. Accordingly, the first defendant is liable in negligence to the plaintiffs.

12. *Vicarious liability.*

Was the second defendant also liable for the negligence of the first defendant? The claim of the plaintiffs against the second defendant was based on the ground of vicarious liability. Was vicarious liability pleaded and proved?

13. In the statement of claim and the amended statement of claim, it was not averred that the first defendant was *an agent or servant of the* second defendant. That averment was necessary to raise the ground of vicarious liability. It was not sufficient to mention the claim only in the endorsement on the writ of summons (now a claim form).

14. Further error occurred. At trial it was not proved by the plaintiffs that the first plaintiff was driving the offending vehicle, *as an agent or servant of the second defendant,* nor was it proved that *the first defendant was on a trip requested by, or for the benefit of the second defendant.* Those are the circumstances in which vicarious liability arises – *see* ***Hewitt v Bonvin [1940] 1KB. 191;*** and ***Morgan v Launchbury [1973] A.C. 127.*** The plaintiffs were faced with the problem that, the second defendant was a company controlled by the father of the first defendant. The information as to any part played by

the first defendant in the second defendant's business was all within the knowledge of the trio, and it was difficult for the plaintiffs to access. I appreciated the difficulty of the plaintiffs, however, court cannot decide a question of fact without evidence.

15. It has not been proved that when the first defendant drove the offending vehicle and crashed onto the plaintiffs' vehicle, he was an agent or servant of the second defendant, acting in the business of the second defendant. My decision in regard to the second defendant is that, the claim against the second defendant, based on vicarious liability is rejected and dismissed.

16. *Damages.*

There has been uncontested proof of loss or destruction of personal belonging, valued at $630.00 (six hundred and thirty). I award that as special damages for loss of the first plaintiff's belonging. The medical expenses, $45,459.97 (forty five thousand four hundred fifty nine dollars, and ninety seven cents) were also not contested. I award that also as special damages to the first plaintiff.

17. Damage to the plaintiffs' vehicle and the replacement value of the vehicle were admitted. I award $10,000.00 (ten thousand) as general damages to be shared by both plaintiffs in the ratio of their ownership of the vehicles.

18. A more difficult assessment is that for pain and suffering resulting from the grave injuries suffered by the first plaintiff, together with the consequent loss of amenity. The first plaintiff permanently limps. Going by past award, I award $160,000.00 (one hundred and sixty thousand) to the first plaintiff as general damages for pain and suffering, and loss of amenity.

19. I decline to make award for loss of wages, and for the cost to the father of the first plaintiff of hiring another driver. The father is not a party in this action.

20. A summary of the awards made is the following:

20.1 To the first plaintiff,

special damages totalling $ 46,089.97

20.2	To the first plaintiff,	
	General damages	$160,000.00 plus a share in $10,000.00 damages for the vehicle.
20.3	To the second plaintiff, general damages:	A share in $10,000.00 damages for the vehicle.

21. Interest at the rate of 6% per annum shall be charged on the awards of damages from the first date of trial, July 11th, 2006, until full payment.

22. It was submitted by learned counsel Mr. Michel Chebat, for the defendants, that the medical reports to prove the injuries were not tendered as exhibits for the treatments and injuries occasioned, although the reports were admitted by the defendants. The

consequence, Mr. Chebat argued, was that court had no medical evidence on which to make assessment of damages.

23. Mr. Chebat was correct that, learned counsel Mr. Earnest Staine, for the plaintiffs, should have tendered the medical reports as exhibits even when they were admitted, so that the reports would be received and marked as exhibits. Indeed that applies to all documents and articles referred to in witness statements. They should be tendered, received and marked as exhibits. In this case the failure though disappointing, was not defeating. The first witness, the first plaintiff himself, outlined in his testimony the injuries in sufficient details, from which to make assessment of damages. Moreover, I would have used the medical reports because the facts therein were admitted by the defendants based on a medical report that they asked another doctor to make.

24. ***Orders made.***

The court makes the following orders. Judgment is entered for the first plaintiff for $46,089.97 (forty six thousand and eighty nine dollars, and ninety seven cents) special damages, and $160,000.00

(one hundred and sixty thousand) plus a share of $10,000.00 in the ratio of his ownership in their vehicle, as general damages. Interest is chargeable at 6% per annum on the sums from 11th July 2006, until payment in full.

25. Judgment is entered for the second plaintiff for a share of $10,000.00 (ten thousand) in the ratio of her ownership in their vehicle as general damages for the vehicle. Interest at 6% per annum is chargeable on the sum from 11th July 2006, until full payment.

26. The claim against the second defendant is dismissed.

27. Costs of the claim against the first defendant are awarded to both plaintiffs in the ratio of the sums awarded to each as damages. The plaintiffs and the second defendant shall bear own costs in respect of the claim against the second defendant. I took into account the evidence about the ownership of the offending vehicle and the ease

with which the first defendant could take it.

28. Delivered this Friday the 14th day of May 2010
At the Supreme Court
Belize City

Sam L Awich
Judge
Supreme Court