IN THE SUPREME COURT OF BELIZE, A.D. 1997

(SUMMARY PROCEDURE)

ACTION NO. 77

	(MARILENE AWE	**PLAINTIFF**
	(	
BETWEEN	**(AND**	
	(	
	(JOSE SHOMAN	**DEFENDANT**

BEFORE the Hon. Justice T.J. Gonzalez

Mr. Oscar Sabido for the plaintiff.
Mr. Fred Lumor for the defendant.

1. In this case the plaintiff, Marilene Awe, who was at the time of the accident, the girlfriend of the defendant, Jose Shoman, is seeking damages from the defendant in the amount of $16,000.00 consequent upon the plaintiff's allegation that the defendant drove his motor vehicle, a BMW car, negligently on the Benque Viejo Road on the 7th of July 1996, causing the vehicle to "dive into a ditch then go upwards, colliding into a tree." The collision into the tree caused the plaintiff to suffer serious bodily injury to different parts of her body as confirmed by the evidence of Dr. Pedro Gonzalez.

2. The evidence on which the plaintiff grounds her case is as follows: On the 7th of July, 1996, sometime after 1:30 a.m., the plaintiff and the defendant were at Cahal Pech, a hotel and bar, having drinks. They had one drink each, after which they left the place sometime after 1:00 p.m. on their way to Benque Viejo Town in the Cayo District for a dance. They travelled in the defendant's vehicle driven at the time by him. While travelling to Benque Viejo, they were seated side by side, and the defendant was holding her hand while occasionally he would look at her. As they were travelling, the plaintiff noticed that the speedometer was reading 90 miles per hour. She thought of telling the defendant to slow down, but everything happened so quickly. The vehicle went in a zig-zag motion. She felt like the vehicle lifted. She saw a tree in front of them, and then felt the impact of the vehicle on the tree. The area where the accident took place is by San Francisco which is closer to San Ignacio Town than to Benque Viejo Town. After the crash, the plaintiff went into unconsciousness. When she regained consciousness, she felt a lot of pain on her chest and abdomen. Her instep was dug out and it was

bleeding. She had a large cut to her right thigh, one below her abdomen and one on her back. After the accident, the plaintiff was taken first to the San Ignacio Hospital where she received medical attention and afterwards to the Belize City Hospital for further treatment. As a consequence of these injuries, the plaintiff incurred medical expenses which she itemized in her testimony and it totaled $4,201.06, and Exhibit M.A. XX1X which she exhibited in court also detailed these expenses. The plaintiff further testified that, as a result of the accident, she experienced pain and suffering, disfigurement and residual disabilities. The plaintiff also testified that she lost earnings from her work. For her medical expenses and the damages which she suffered, the plaintiff is claiming a total of $15,000.00.

The plaintiff, in the course of her evidence, tendered a letter in which she had given an account of the accident to Regent Insurance **C**o. Ltd., four days after the accident occurred. In the statement appearing in that letter, the plaintiff gave a different version as to how the accident occurred. That version is in consistent with her testimony, and corroborative of the defendant's evidence as to the cause of the accident.

3. The defendant, Jose Shoman, gave a different version from the plaintiff's testimony as to how the accident took place. He testified that on the night of the accident namely the 7th July, 1996, he and the plaintiff were at Cahal Pech in San Ignacio each having a drink. They both left Cahal Pech around 1:30 a.m. to go to a "fiesta" at Benque Viejo Town. The defendant was driving his vehicle, a BMW. The plaintiff was seated on the passenger seat next to him and she was holding his hand while travelling to Benque Viejo. The defendant testified that he was driving between 45 to 60 mph. On reaching a curve by San Francisco Bar, the defendant said he was blinded by the high beam lights of two vehicles coming in the opposite direction. He dipped his light but the drivers of the two oncoming vehicles were still coming at a high speed with one trying to overtake the other. One of them was on his side of the road and the other was to the other side. The defendant, on seeing this, accelerated quickly and pulled off to the side of the road in an effort to avoid a head-on collision. The acceleration caused his vehicle to go upwards hitting the base of a tree resulting in his vehicle being pushed backwards into a ditch and turning on its side. Both himself and the plaintiff suffered injuries as

a result of the collision or crash.

4. Sgt. Joaquin Sabal also testified as to what he had seen on the Benque Viejo Road shortly after the accident. He testified that, at the scene, he saw a four-door brown in colour BMW car with License Plate No. BZ-C-0111 off the right side of the highway when travelling in the direction of San Ignacio to Benque Viejo. The car was on its right side with its front facing the direction of San Ignacio Town. He noticed that it was extensively damaged at the time he saw it at the scene. He also saw tyre marks on the right side of the highway going off the pavement and ending where the car was. This witness also described in his evidence the damages he observed to the vehicle.

5. On the evidence in this case I find much difficulty in accepting the testimony of the plaintiff which she gave to the court as true after I had heard and seen her testify and after I had perused the statement regarding the accident which she gave to Regent Insurance Company in the form of a letter, Exhibit "M.A.-X1X." The contents of her statement to the insurance company read as follows:

"On Sunday morning about 2:00 a.m. Jose Shoman and myself, Marilene Awe were on our way to Benque Viejo. In the vicinity of San Francisco Farm two vehicles approached us from the opposite direction side by side in which one was trying to overtake the other. Both vehicles had bright lights on and did not lower them. Blinded by the lights we were forced to pull off the road to avoid a head-on collision at which point Jose was unable to control the vehicle and went off the road crashing into a tree …"

I find myself persuaded to accept the written statement as a true representation of what occurred on the 7th July, 1996 on the Benque Viejo Road around 1:30 to 2:00 a.m. This statement was given to the insurance company only four days after the accident had taken place when the details of the accident were fresh in the mind of the plaintiff and, therefore, she was in a better position to give an accurate account of what had taken place on the 7th July, 1996 relative to the accident.

6. The plaintiff also caused the police to withdraw criminal charges arising from the accident, to wit: causing a negligent wound to her and driving without due care and attention. This she did on the 1st of April, 1997, little over three months before she filed the civil suit. In

my view, the withdrawal of these charges of negligent wounding and driving without due care and attention is evidence consistent with her statement to the insurance company that the accident took place as she described it in her statement and consistent with the defendant's evidence to this court. In court it was only as a result of a pointed question put to her by the court that she did say it was the defendant who told her what to say to the insurance company, and that the contents of the letter are not true. I find it strange, indeed, that neither in examination-in-chief, nor in cross-examination did the plaintiff say that the contents of the letter are not true, and that it was the defendant who told her what to say to the company. Further, in her testimony under cross-examination the plaintiff said that she never made a phone call to the defendant after the accident, and that after the accident she only saw the defendant once. The plaintiff did not assist the court as to when after the accident she saw the defendant, nor did she say that it was on that occasion when she saw him that the defendant told her what to say. Furthermore the plaintiff did not say for how long a time she saw the defendant or that they spoke to each other at that time. In my view, therefore, the answer she gave to the court that it was the defendant who told her what to say to the insurance company was a

bald one, and I find it too hard to believe. The defendant, however, though he had heard the plaintiff testify, and must have heard her say in her evidence that she had only spoken to him once, was honest enough to testify that he had several contacts and communications with the defendant after the accident.

In his evidence the defendant testified that he had visited the plaintiff at the Belize Medical Associates Hospital in Belize City either at the end of July orAugust in 1996 when he gave the plaintiff $500.00 which the plaintiff's father received on her behalf. He visited her again before she was discharged, the day after her father had given her the money. He then spoke to her twice. The defendant called the plaintiff once and the plaintiff called the defendant once. The defendant denied, however, that he arrived at any kind of agreement with the plaintiff on any of these occasions. In his own words which was not disputed in cross-examination the defendant said in his evidence that "At no time I reached an agreement with the plaintiff to give a false account of the accident." Further in his evidence the defendant said, "I did not reach a settlement with the plaintiff and asked her to drop charges."

The plaintiff in her testimony said that it was about a month after

she had written the letter to the insurance company that she decided to recant that story to say what she told the court in her testimony regarding the accident. If, indeed, she had decided to recant her statement which she gave to the insurance company one month after she had given it, one wonders why she took eight months to drop the criminal charges of negligent wounding and driving without due care and attention which had been laid against the defendant without giving an explanation why she took so long. Surely as an intelligent and educated person as she described herself in her evidence in court, she must have known that some explanation was required to be given in this regard. Considering the evidence of both the plaintiff and the defendant as it stands, I am persuaded to accept as true the defendant's evidence namely that he did not influence the plaintiff unduly to give the statement to the insurance company. She gave it to the Insurance Company of her own volition. Added to this evidence is the further evidence of the defendant and again this evidence was not tested by cross-examination, that the plaintiff told him that her father had sought legal advise and had instructed her to tell the police that the accident was his fault. The plaintiff, according to him, went on to tell the defendant in a gentle manner that "It was

nothing personal." It was a measure needed to be taken in order for the father to get compensation from the insurance company. The defendant further testified that he told the plaintiff that the accident was not his fault, and that, in fact, the measure he took was probable what had saved their lives. The plaintiff agreed that this was so but answered that she was being pressured by her parents. The defendant told the plaintiff to reconsider, but the plaintiff retorted that, "She will not as she was being pressured by her father." This piece of evidence again convinces me that, indeed, the plaintiff had not advised or told the defendant to say what appears in the letter to Regent Insurance Company, and ergo I find that what the plaintiff told the insurance company in her letter given to Johnny Valdez represent the true facts relative to the accident which occurred on the 7th July, 1996 on the Benque Viejo Road. Indeed from this portion of the defendant's evidence I get the impression that when the plaintiff change her account of the accident, some months later when she testified in this court, she did so on account of undue pressure which her father applied on her.

7. In my view, this evidence combined with other portions of the

evidence gives the lie to her evidence that the statement she gave to the insurance company is not true. I find myself, therefore, persuaded and convinced that the statement the plaintiff gave to the insurance company reflects the true position regarding the accident on the 7th July, 1996 on the Benque Viejo Road. It is, therefore, basically on the evidence of the plaintiff as appears on her statement to the insurance company and the testimony of the defendant that I must determine whether or not the defendant drove his vehicle negligently on the Benque Viejo road on the 7th July, 1996 when the accident occurred.

8. In deciding the outcome of this case, I need to apply the law to the facts of this case. The law as I understand it is that a person having control over a vehicle owes a duty of care, in most cases, to any passenger whom he carries to exercise reasonable skills in his driving of the vehicle vide ***Halsbury Laws of England Vol. 40 p. 26 para. 17.*** If a person does not use reasonable skills in his driving of his vehicle it follows that he is negligent if an accident occurs as a result. Learned Senior Counsel, Mr. Oscar Sabido Counsel for the plaintiff submitted in this regard, and I see eye to eye with him, that the main issue in this case which the court has to address in an effort to

decide whether or not the defendant was negligent in the manner he drove his vehicle on the 7th of July 1996 on the Benque Viejo Road, is whether or not the defendant was speeding at the time. The evidence adduced by the plaintiff in her statement to Regent Insurance Co. Ltd., and the testimony of the defendant suggest that the defendant had indeed used speed in his driving of the vehicle when the crash occurred. The evidence of Sgt. Joaquin Sabal that he saw tyre marks on the right side of the highway going off the pavement and ending where the car was is also some evidence of speed. However, as I understand the law, speed alone in certain circumstances does not constitute negligence. ***In Halsbury Laws of England, Vol. 34 4th Edition page 39 para. 47*** quoted by learned counsel, Mr. Oscar Sabido, under the heading "Speed," the paragraph states that the speed at which a vehicle is driven is material to the question of liability. When a certain speed will be considered dangerous varies with nature, conditions and use of the particular highway and the amount of traffic which actually is or may be expected to be on it. The driver of a vehicle should usually drive at a speed that will permit him to stop well within the distance he can see is clear although it is not conclusive evidence of negligence to exceed that speed. In the instant

case the evidence of both the plaintiff and the defendant, in my opinion, provide an explanation why the defendant was compelled to use speed or to quickly accelerate the speed of his vehicle, as he put it, at the time of the accident. In the statement given to the insurance company the plaintiff said, inter alia, that they were blinded by the lights of two oncoming vehicles which forced the defendant to pull off the road to avoid a head-on collision and as a result the defendant was unable to control the vehicle and he went off the road crashing into a tree. The defendant's evidence relative to the accident and which was unshaken by cross-examination is in similar terms as that of the plaintiff. The defendant said in his testimony to the court that on the night in question he was driving between 45 to 50 miles per hour. On rounding a curve, he was blinded by the high beam of two approaching vehicles. Those vehicles were coming at a high speed trying to overtake the other. He quickly accelerated and pulled off the road to avoid a head-on collision with the result that the vehicle went into a ditch causing it to crash into a tree. This evidence of both the plaintiff and the defendant is pellucid as to the reason the defendant was compelled to use speed or as he testified when giving evidence, "I quickly accelerated." It is clear to me from the evidence, that the

defendant applied or used speed at that time to avoid a head-on collision with either of the two on-coming vehicles. This acceleration of the vehicle I find in the circumstances was justified to avoid a more fatal accident. The defendant in the circumstances as he found himself at the time of the accident cannot be said to be negligent in the manner he drove his vehicle when he accelerated in an effort to avoid what he perceived to be a worst accident.

9. In the circumstances, I find that the defendant was not negligent in the manner in which he drove his vehicle on the 7th July, 1996 on the Benque Viejo Road when the accident occurred. Having decided that the defendant was not negligent and thus not liable, the question of damages and compensation are not issues to be determined by the court and therefore I make no order in this regard.

10. Also I make no order as to costs.

Order accordingly.

DATED this day of September, 2008.

T.J. GONZALEZ
SUPREME COURT JUSTICE