49.

Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M.112/1990

BETWEEN	DWAYNE MORGAN (BY NEXT FRIEND PAULA CAVEN)	PLAINTIFF
A N D	DENNIS HOWELL	DEFENDANT

A.W. Campbell and L. Campbell for the Plaintiff

L. Pusey instructed by Perkins, Grant, Stewart, Phillips & Co., for the Defendant.

Claim in Negligence

Hearing on April 19, 20, 21, 1995 and May 31 1995

BINGHAM, J.

On 9th February, 1990, the plaintiff, a school boy then eight years of age and attending George Headley Primary School in Duhaney Park, St. Andrew was on his way home from school when he was hit down on Cassia Park Road by a motor vehicle owned by the defendant and driven by one Derrick Manning. The collision occurred as the plaintiff was attempting to cross the road to go over to the right side where he lived. According to the plaintiff prior to his going across the road he had been walking with two other school boys before leaving them and attempting to cross the road by way of a pedestrian crossing which it is common ground is located in the area where the collision took place. The plaintiff contends that it was while he was walking in the crossing that he was hit by the vehicle driven by Derrick Manning. He did not, however, observed the approach of the vehicle nor was he able to say just how the accident took place. He has a vague recollection of being hit down, lifted up, placed into a motor vehicle and driven to the University Hospital of the West Indies. He also recalls experiencing severe pain to his right upper arm which was fractured, pain

to his right side and to the right temporal region of his forehead.

The driver of the defendant's vehicle, Derrick Manning in his account placed the plaintiff in a group of fifteen school boys walking on the sidewalk as one proceeded up Cassia Park Road from the junction with Molynes Road. He described the plaintiff as being in the company of two other smaller boys playing on the sidewalk, what would appear to have been a game commonly known to most Jamaicans as "last lick". As he approached the group of boys he was travelling at a speed of about 25-30 m.p.h. and about three feet from the left of the road surface. He then suddenly saw an object resembling the figure of a person rushed towards the car from the left. He applied his brakes and swerved to the right of the road but collided with the plaintiff about in the middle of the road. Although he observed the group of boys and the three younger boys playing, he did not attempt to reduce his speed. His speed 25-30 m.p.h. which he maintained up to the time that he sought to apply his brakes and swerved in an attempt to avoid the plaintiff, certainly could not be described as an exercise of caution on his part. He denies, however, that the plaintiff was hit down while he was attempting to cross the road in the pedestrian crossing.

Given the account of the driver of the defendant's vehicle Derrick Manning, although there was support for the plaintiff's account from a young man one Sean Powell in my view of the law there is no necessity to determine which of the two accounts are true as when one examines the evidence of Derrick Manning it is abundantly clear that the duty of care towards young children placed upon motorists using the road in what was a built-up area was not discharged. The presence of fifteen school boys on the left of that road-way as the driver Manning approached with the vehicle on the afternoon in question, a road on which the sidewalk was to his near-side called for extreme caution such as a slowing of the speed of the vehicle almost to a halt. The sounding of the horn was a further precaution which he failed to take. The fact that he saw three of the younger boys among whom was the plaintiff may well have been one playing was notice to him that far from remaining safely on the sidewalk that there was the possibility

that one or more of these playing children might have darted unexpectedly out into the road. The fact that the driver Manning was proceeding through a built-up area he ought to have realised given what he had observed of children playing the risks of the unexpected through forseeable consequences of children running out into the road. Moreover at 4.00 p.m. the time about which the collision took place the driver Manning was under a particular duty of care for keeping an eye open for these children and their movements. What is clear from the evidence of Mr. Manning is that having seen the group of school children in particular some of these playing, a situation which called for the exercise of care and caution on his part, he took his eyes off the group for a moment at a time when the occasion called for even greater alertness on his part. In doing so he lost the opportunity to greatly reduce his speed and so place himself in a position where he could have brought the vehicle under control without the unfortunate consequences for the plaintiff as events turned out to be. The driver Derrick Manning was accordingly negligent. As there is no issue on the question of ownership or agency the defendant is therefore vicariously liable on the claim.

On the issue of contributory negligence, having regard to the young age of the plaintiff eight years and three months at the time of the incident even had the plaintiff been taught how to use the roads (the road drill) and so been made to realise that he ought in so doing to take reasonable care for his own safety, nevertheless one cannot over look

> "the propensity however of infants of (the plaintiff's age) to forget altogether what they have been taught. .....as if a child of that age wants to get anywhere, he will forget all that he has been taught ..... Such children do not remember if something else is uppermost in their minds."
>
> See dictum of Mr. Justice Cummings-Bruce in **Jones v. Lawrence** [1969] 3 All. E.R. 267 at 270 (E - G).

The defendant through his witness Derrick Manning has failed as a matter of probability to show that the infant plaintiff in this case was capable or

that his behaviour was anything other than that of a normal child who was regrettably momentarily forgetful of the perils of crossing a road. He is accordingly not contributorily negligent.

Damages

1. Special Damages

There is no challenge to this area of the claim, as during the closing submissions the Court was informed by learned counsel for the defence that there was an agreement reached in the claim for special damages at $4,510.00.

2. General Damages

This falls to be assessed based upon what would amount to a reasonable award for pain and suffering based upon the nature and extent of the infant plaintiff injuries. He suffered the following injuries:-

1. A displaced fracture of the mid-shaft of the right humerus
2. A injury to the head resulting in loss of consciousness and a linear skull fracture.

Although these injuries were regarded by Dr. Ivor Crandon a Consultant Neuro Surgeon as serious at the time when he first examined the plaintiff on March 5, 1990, by the second examination of the plaintiff on April 5, 1990 he had made a full recovery. The doctor's comment were, however, guarded. He stated:-

> "These injuries were serious but at the time of the last examination he had made a full recovery. There was no deformity, disfigurement or disability at that time. He has however, suffered mild brain damage and compared to the rest of the non-injured population, is at a slightly increased risk of epileptic seizures. A more detailed report would require more recent assessment."
>
> An opinion about his fractured arm should be sought from the orthopaedic surgeon concerned."

Dr. Crandon was not favoured with the opportunity to make a more up-to-date assessment of the infant plaintiff.

Dr. R. C. Rose, an Orthopaedic Surgeon was the next doctor who saw the plainitff. His report which is of relevance as to the nature and extent of the fracture of the plaintiff's right upper arm is as follows:-

"Re: Dwayne Morgan

This nine year old male was referred to me by Dr. John Soas on the 12th February 1990 with a history of having been struck by a vehicle while crossing the road on the 9th February 1990. He apparently sustained transient loss of consciousness.

On examination, he was a healthy looking male in obvious painful distress. He was fully alert and oriented in time, place and person. His significant finding was confined to his right upper arm which was swollen and deformed. The neurovascular status was intact in the right upper limb.

X-rays revealed a displaced fracture of the mid-shaft of the right humerus. He was treated in an above-elbow cast and placed on analgesics.

The cast was changed on subsequent visits in order to maintain proper alignment of the fracture. The cast was removed on the 29th March 1990.

Master Morgan was last evaluated by me on the 18th October 1991. He has no complaints and there is no deformity, no tenderness and there is a full range of motion in both the right shoulder and right elbow. There is no leg length discrepancy in the right upper limb.

This child was disabled from the 9th February 1990 until the 29th March 1990. He will have no permanent disability as a result of this injury.

Sincerely yours,

Sgd. R.C. Rose, F.R.C.S. (C)" "

The plaintiff has suffered no abnormality of the limb and made a complete recovery.

Learned Counsel for the defendant submitted that a reasonable award in this area of the claim for general damages ought to be $100,000.00 to which learned Counsel for the plaintiff Mr. Ainsworth Campbell did not take issue.

I considered this sum as being a reasonable award in the circumstances.

The plaintiff was next seen by Dr. J.A.S. Hall, Consultant Neurologist. This examination was on 25th October 1991 shortly before this action was launched the writ and the statement of claim having been filed on 17th February 1992. From the particulars of injuries it is clear that Dr. Hall's report formed the basis of the claim for general damages. His report revealed the following:

" Re: Dwayne Morgan
Age: 9 years
1 Cymanthia Avenue
Kingston 10.

Thank you for referring this boy who was knocked down by a taxi on 9/2/90 while crossing the street on his way home from school. He lost consciousness and awoke near Papine, which he recognised, while being taken by the taxi to UHWI. His right upper limb was dressed and he was sent home. There he began vomiting and he was taken that night to the Bustamante Children's Hospital. He was not treated. Next day, Saturday 10/2/90, he was taken to the Maxfield Medical Centre when he was sent to the Eureka Centre for orthopaedic consultation. A plaster paris cast was applied to the right upper limb; this was changed twice, the last being in April 1990. I have not been privileged to see a report from any of these institutions.

At consultation the boy had no complaints. He seemed well nourished and well cared for. The blood pressure, heart and general systems were normal. Neurological evaluation revealed no anomaly of cognitive function, cranial nerves, or the long motor and sensory pathways from the brain to the periphery. I concluded that there had been a Concussion at the time of the head injury.

EEG (brain wave) evaluation was abnormal. Multifocal spikes in bursts of 10 to 20 seconds were striking and quite abnormal for a boy of this age. In addition trains of low voltage slow waves (i.e. delta activity) over the right fronto-temporoparietal areas were not compatible with normality. The overall EEG picture is indicative of Post Concussive brain damage with the maximal impact on the right Cerebral hemisphere in a right handed person.

Prognostically this means a high probability of the development of Post Traumatic Epilepsy, which occurs in some 5-10% of closed head injuries. Repeated EEG monitoring every 6 to 9/12 is recommended here to observe the development, or not, of mature, normal EEG patterns in this patient. Should Epilepsy develop the clinical and social consequences are well known and need no elaboration.

Personality changes, compatible with maximum damage to the right Cerebral Hemisphere, as indicated by EEG, will probably occur. This would be of the demotivated, withdrawn, shiftless type: this would be a disaster to this seemingly ambitious boy.

In addition Cerebral Altrophy as a subtle, insidious development is consistent with the EEG findings: such a development would ensure a future of progressive, intellectual, physical and social dysfunction with concurrent family and community consequences.

These considerations will impact meaningfully upon any consideration of damages as a result of the head injury on 9/2/90.

Yours faithfully,

Sgd. J.A.S. Hall, FRCP, FACP
CONSULTANT NEUROLOGIST "

Although Dr. Hall is of the view that the head injury suffered by the infant plaintiff meant a high probability of post Traumatic Epilepsy it is significant that up to the time of the hearing in April 1995, more than five years after the incident there has been no report of any such seizures occurring. Such attacks according to Dr. Randolph Cheeks a Consultant Neuro Surgeon who gave evidence at the hearing, would be expected to occur within 3½ to 4 years following such an injury. He examined the plaintiff in June 1994. He found "no evidence of impairment of cognition (higher mental function) nor any other evidence suggestive of injury to the brain. In this context it is noteworthy that the CAT brain scan, a highly accurate and sophisticated computerised scan of the structure of the brain demonstrated nothing abnormal in the plaintiff." Dr. Cheeks opinion is borne out by the fact the the plaintiff was able to pass the common entrance examinations at his first attempt and gained a free place to Calabar High School which was the school of his first choice. Although his performance there is not out of the ordinary his present grades are above the class average and his marks especially in Agricultural Science in which he scored 90% clearly indicates that the plaintiff has the ability to cope with the curriculum at the High School level and has not suffered any intellectual impairment as a result of the injury he received. Dr. Cheeks based upon certain cogent reasons he has advanced is of the view that the use of the EEG for evaluating the condition of the brain is to be regarded as an unreliable means of testing the normality or abnormality of the brains structure. According to him the current thinking in medical science is that such a test is notorious for giving false information. This is due to tracing changes occurring for example when a patient blinks, swallows, coughs, moves, if he is feeling frightened, depressed or tense any emotional changes, also static electricity in the patient's clothing - any of these conditions could give rise to a false reading.

As much as one needs to have some regard for the opinion canvassed in the report of Dr. Hall one cannot ignore the very cogent evidence given by Dr. Cheeks which is given support based on the medical history of the plaintiff from the time of the incident as well as his academic performance following the accident.

Although there has now been a falling off of his grades at High School this is seen by Dr. Cheeks as due to an adjustment to atmosphere there in the High School environment which most children undergo. The latest school report however demonstrates that the plaintiff has the ability to excel at his present educational level.

Given the overall assessment of the plaintiff's conduct I would not regard the hairline fracture to the plaintiff left temporal region as serious or certainly anything calling for the very high award for general damages suggested by Mr. Campbell. It certainly does not in any way approach that level that lead to the Court of Appeal in **S.C.C.A. 50/90 Petrona Black (by her next friend Karen Black) et al & Jennifer Bhalai et al** to increase the award in the Court below from $15,000.00 to $100,000.00. That approach by the Court was fully justified based upon the fact that the infant plaintiff in that case had suffered serious head injuries followed by loss of consciousness and had experienced three epileptic seizures on the day of the accident. This prompted Dr. Crandon to opine in his report in that case that:

> "The epileptic seizures have not recurred since the initial three attacks.
>
> Her past medical history was unremarkable. She had no other admissions to hospital. She is not asthmatic and is not known to be allergic to any drugs. She is a Grade 10 student at St. Catherine High School and lives at home with her parents amd three siblings. My impression was that she had suffered a head injury on 15/8/88, resulting in post traumatic headaches and post traumatic epilepsy. The history of a shock like sensation from her neck downwards whenever she flexed her neck suggests a cervical spine injury which is now symptomatic.
>
> While the headaches may be expected to improve with time, it is no certainty that they would disappear all together. In any case, they are not a serious handicap at this time. The situation as regards her tendency to have seizures is more complex. The main significance of the attacks which she had is that the risk of future epilepsy is increased fourfold. Seizures if they do recur in the future may do so at anytime. Late epilepsy, defined as epilepsy occurring more than one week after injury, affects approximately five percent of victims of a non-missile head injury. About a quarter of this late onset group have their first fit more than four years after their injury. This may have obvious social and occupational ramifications for the future."

(Emphasis Supplied)

Indeed there is nothing in the plaintiff's medical condition from any of the reports tendered in this case approaching the matter I have just referred to. The other awards relied on by Mr. Campbell on the facts also bear no relationship to this case.

Conclusion

The plaintiff suffered an unfortunate mishap which in all probability occurred while playing on the way home from school. Fortunately he recovered to be well enough to be successful at the Common Entrance Examination held three years later securing a place at the high school of his first choice. At school he has performed academically above the average grade for his form while showing interest in extra curricular activities such as badminton in which he has expressed the desire to one day represent his school. The fact that over five years has now passed without the occurrence of any "post traumatic epileptic attacks" alluded to in Dr. Hall's report in the light of the evidence of Dr. Cheeks, which I accept would at this stage render the fears expressed by both Dr. Hall and Dr. Crandon as being without any proper foundation. The fact that none of these attacks have occurred from the plaintiff suffered this head injury for this prolonged period of over five years would clearly rule out the probability or likelihood of the plaintiff suffering from any such condition.

There is also nothing based on the plaintiff's academic performance to suggest that he has suffered any intellectual impairment of his brain function. The Common Entrance Examination results certainly do not bear out this being the case.

In light of the above I would regard this case as one in which human nature has effected in the plaintiff a complete recovery. He has continued to function as a normal above average child. He did, however, suffer a hair-line fracture of the left temporal lobe for which he ought to receive some compensation. In this regard I did not share the view expressed by learned counsel for the defendant that no award ought to be made in this area of the claim for general damages. I would regard a sum of $50,000.00 as being a reasonable award in the circumstances. The result, therefore is that the award for general

damages will be quantified at a global sum of $150,000.00.

Judgment is accordingly entered for the plaintiff in the sum of $154,510.00 being: -

1.	Special damages - agreed at	$ 4,510.00
2.	General damages	150,000.00
		$ 154,510.00

and costs to be agreed or taxed.

Interest awarded on Special Damages at 3% as from 9/2/90 to 31/5/95 and on General Damages at 3% as from date of entry of appearance (24/9/91) to 31/5/95.