[2015] JMSC Civ.177

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION

CLAIM NO. 2009HCV 02858

BETWEEN	**TAHJAY ROWE**	
	(a minor, suing by TASHA HOWELL,	
	His mother and next friend)	**CLAIMANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**1ST DEFENDANT**
AND	**THE SOUTH EASTERN REGIONAL**	
	HEALTH AUTHORITY	**2ND DEFENDANT**

Mr. Alexander Williams instructed by Usim, Williams and Co., for the Claimant

Ms. Marlene Chisholm instructed by the Director of State Proceedings for the Defendants

Negligence - Breach of duty of care – Standard of care - Whether claimant given adequate care during and post delivery

Damages- pain and suffering and loss of amenities - Cost of future care – Loss of future earnings

Heard: June 18 and September 10, 2015

LINDO J. (AG.)

[1] This is a claim filed on June 3, 2009, in which the claimant, a minor, suing by his mother, Tasha Howell alleges that the 2nd defendant as the authority responsible for the control of health service provided by the Victoria Jubilee Hospital (VJH) breached its duty of care owed to him from the time of his birth on April 27, 2004 to the time he was discharged, which resulted in him suffering severe injuries, loss and damage.

[2] The particulars of negligence as stated in paragraph 6 of the Particulars of Claim are as follows:

1. Failing to deliver the claimant in an expeditious and timely manner;
2. Inexcusable delay in delivering a post-term baby;
3. Failure to properly monitor the claimant's mother during labour in view of the claimant being a post term infant;
4. Failure to carry out proper management of the claimant after his birth and prior to his transfer to the Bustamante Hospital for children;
5. Inexcusable delay in transferring the claimant to the Bustamante Hospital for Children;
6. Failure to properly care for the claimant after birth.

[3] Ms. Tasha Powell gave evidence that she became pregnant in 2003, attended clinic at Sunshine Clinic on Red Hills Road and there were no complications. She states further that she went to VJH in early 2004, made a number of visits, and that the baby was due on April 15, 2004.

[4] She states that she was admitted on April 25, 2004, was given an injection by a male doctor in the early morning of April 26, 2004 after which she was moved to Ward 2 where she was examined by the said doctor. She states further that "he put me on drip…I was given a pill to induce labour on Tuesday morning. She indicates that at 11:38 am she had the baby and that the baby cried a lot and would not feed and was taken to the nursery and blood tests were ordered. She also states that she was discharged on April 29, 2004 and "the baby was still on drip" and that the baby was discharged two weeks after he was born.

[5] Her evidence further is that two days afterwards she noticed that the baby would shake whenever she bathed him so she took him to the Bustamante Hospital for Children (BHC), an ultra sound was done at Oxford Medical Centre, and the baby was admitted in BCH.

[6] In cross examination she stated that when she was admitted to the VJH on April 25, she was not seen by a doctor or a nurse, she was not in labour and that it was "in the evening hours" on April 26 that she was advised that induction would be commenced.

[7] In support of the claim Ms. Yvonne Beckford, grandmother of the claimant gave evidence that the claimant was born at VJH on April 27, 2004 and that about three weeks after, she accompanied her daughter to BHC and that the baby was crying constantly and "the baby was also having twitches".

[8] She further states that the claimant remained at the BCH for about two weeks and that the claimant is now nine years old. She indicates that it costs about $2,000.00 per day to get someone to care for him, that he cannot eat any solids, is asthmatic and medication is either paid for by herself or her daughter. She states that on June 1, 2004 she wrote a letter to the Personnel Officer at VJH and delivered it but got no response so she reprinted it and left it there again.

[9] The following were tendered and admitted in evidence:

1. Letter dated June 1, 2004 written by Yvonne Beckford
2. Medical report of Dr. Leslie Gabay dated July 5, 2010
3. Medical report of Dr. Roxanne Melbourne- Chambers dated December 13, 2013
4. Medical report of Dr Judy Tapper dated August 20, 2008 and
5. Medical report of Michelle Richards-Denton dated October 21, 2008.

[10] Special damages were agreed in the sum of $21,000.00.

[11] Ms. Natanee Dalhouse, Registered Midwife, gave evidence on behalf of the defendants. Her evidence is that her duties include the care of patients during the ante natal, intra-natal and post natal period as well as the care of neonates and that she was the midwife who conducted the delivery of the claimant.

[12] She states that on the date the claimant was delivered, she was assigned to the delivery room and "based on record, Miss Howell delivered a live male infant at 11:38 am with a birth weight of 3.71kg. and a APGAR score of 8 at one minute, and 9 at five minutes. For the one minute APGAR score of 8, the heart rate, respiratory effort, muscle tone and reflex irritability and colour were scored at 1. For the five minutes APGAR score of 9, the heart rate, respiratory effort, muscle tone and reflex irritability were scored at 2 and colour scored at 1." She also indicates that the claimant was "suctioned and given oxygen, eye prophylaxis and vitamin K was administered. …the claimant passed meconium at birth".

[13] In cross examination she could not recall the particulars in relation to the delivery of the claimant and stated that everyone, including herself, who cared for him, had the responsibility to make entry in relation to the care given to him. She stated however, that she had no responsibility for making any records in relation to investigations as to clotting mechanisms or in relation to the platelets count, which she said was the doctors' responsibility.

[14] She also admitted that she was responsible to measure the circumference of the claimant's head at the time of birth, could not recall if she did so, and added that prior to 2009 measurements "were not routinely done as a protocol". She could not recall if there were any complaints made by Miss Howell in relation to the claimant not feeding or as to any seizures the claimant had.

[15] Ms. Dalhouse admitted that she was a mid-wife for three months at the time of the delivery of the claimant. She could not state if a doctor visited, or how often a doctor visited Ms Howell before delivery. When confronted with paragraphs 7 and 9 of her witness statement which speak to Ms. Howell being seen by a doctor on April 19 and on April 26 when she was transferred to the Labour Ward, she indicated that the information there was from the record. She admitted that her evidence can go no more than in relation to the birth of the claimant.

Claimant's submissions

[16] Counsel for the claimant pointed to the inadequacies in the care given to the claimant according to Dr. Leslie Gabay, and the "deficiencies" in the management of the claimant as stated by Dr. Melbourne-Chambers and noted that neither expert is able to say if there had been proper care and documentation whether this would have reduced the claimant's disabilities. He highlighted the information contained in the report of Dr. Melbourne-Chambers where she stated: *"I am unable to say whether an earlier transfer to the Bustamante Hospital for Children would have produced a better outcome. The reason for this uncertainty is that the timing of the insult to the neonate's brain was not established and could have been intrauterine, that is, prior to labour and delivery. If the insult occurred during the intrauterine period, it is unlikely that the outcome could have been improved had the infant been treated at the Bustamante Hospital for Children*". Counsel therefore questioned how the timing of the insult to the neonate's brain was not established by the hospital.

[17] He noted that the defendant, at paragraph 6 of the defence, contends that the unfavourable outcome of the claimant "most likely resulted from an intracranial bleed as a consequence of hereditary alloimmune thrombocytopenia which is unpredictable and untreatable in the index pregnancy" but Dr. Melbourne-Chambers contradicts this by her opinion that "Tahj Rowe's injuries cannot be attributed to hypoxic ischaemic encephalopathy… The clinical and laboratory findings could be explained by an intracranial bleed but there is no definite evidence of an intracranial bleed. The clinical course is not typical of hereditary alloimmune thrombocytopenic purpura (neonatal alloimmine thrombocytopenia)"

[18] Counsel pointed out that the expert report of Dr. Gabay indicated that intracranial imaging should have been done by the hospital as an early investigation and that correction of thrombocytopenia should have been done urgently. He submitted that the observations of Dr. Gabay and Dr. Melbourne-Chambers prove a failure to carry out proper management of the claimant after his birth and prior to his being taken to the BHC, and a failure to properly care for the claimant after birth.

[19] He expressed the view that the particulars of negligence are therefore proved but further submitted that the doctrine *res ipsa loquitur* also applies so that the onus lies on the defendant to disprove negligence. He cited the case of **Cassidy v The Ministry of Health** [1951] KBD 343, where the plaintiff went into hospital for an operation on his hand which necessitated post operational treatment and at the end of the treatment it was discovered that his hand could not be used and the court held that in those circumstances the doctrine applied and the onus was on the hospital authority to prove that there had been no negligence on its part.

[20] He noted that because of the failure of VJH to conduct certain critical tests, the defendant is unable to explain how the claimant suffers brain damage and that it is obvious that the management of the infant was lacking and the defendant should therefore be found liable.

Defendants' Submissions

[21] Counsel submitted that in order to establish negligence in respect of medical treatment the test that needs to be satisfied in law is stated by McNair J in **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118 thus:

> "…*the test is the standard of the ordinary skilled man exercising and professing to have that special skill…it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art… a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art…"*

[22] Counsel, referring to the explanation by Lord Browne-Wilkinson in **Bolitho** (**administratrix of the estate o**f **Bolitho, deceased**) v **City and Hackney Health Authority** [1997] 4 All ER 771, noted that a defendant does not escape liability merely because there is a body of opinion that would have accepted the practice as proper, it must be able to stand up to logical analysis.

[23] Counsel outlined the information as stated in the hospital records at VJH and indicated that the first issue for consideration was whether the medical staff breached their duty of care to the mother in the management of her labour and claimant's delivery. She indicated that there was no medical evidence as to what is the standard in delivering a "post term" baby, whether there was a failure to deliver the claimant in an expeditious and timely manner; inexcusable delay in delivering a post term baby and that the medical staff failed to properly monitor the claimant's mother during labour so there is no evidence before the court to assess whether it fell below the required treatment.

[24] On the issue of whether there was a breach of care in the management of the claimant following his birth, counsel noted the details of the claimant's treatment as set out in the medical report of Dr. Roxanne Melbourne-Chambers (Exhibit 3) and highlighted the fact that Dr. Gabay indicated that at 23 hours old "the initial appropriate measures were begun, oxygen therapy IV fluids and antibiotic therapy in association with the initial appropriate investigations".

[25] Counsel noted that the defendants' medical staff is faulted by Dr. Melbourne-Chambers to have not fully investigated the cause of anemia, thrombocytopenia (low platelet), hyponatremia and to investigate other clotting abnormalities adding that the doctor opined that the results of the brain imaging may have provided a diagnosis and informed appropriate therapy and that there was a lack of sufficiently close monitoring by the medical staff particularly with regard to the ongoing seizure activity, his neurological status and the assessment of laboratory results within the period of critical illness.

[26] In relation to the lack of documentation, counsel cited the case of **Rhodes v Spokes and Fairbridge** [1996] 7 Med LR 135 where Smith J. said,

> *"…a doctor's contemporaneous record of a consultation should form a reliable base in a case such as this…he rarely recorded her complaints or*

symptoms; he rarely recorded any observations; usually he noted only the drug he prescribed…The failure to take proper note is not evidence of a doctors negligence or of inadequacy of treatment. But a doctor who fails to keep an adequate note of a consultation lays himself open to a finding that his recollection is faulty and someone else's is correct…"

[27] Counsel further submitted that the claimant has relied on the report of Dr. Melbourne-Chambers as the causative factor of his brain damage and that this was due to the negligence of the defendant's servants during his mother's labour and delivery. She noted however that Dr. Melbourne-Chambers explained the meaning of HIE (Hypoxic-ischaemic encephalopathy, brain dysfunction secondary to hypoxia (insufficient oxygen) and ischemia (insufficient blood supply) and went on to identify four criteria that must be met in order to say that an intrapartum event of HIE had occurred severe enough to cause cerebral palsy, indicating the two that have not been established.

[28] Counsel also submitted that Dr Melbourne-Chambers' conclusion that the normal fetal heart rates during the labour period, clear appearance of the amniotic fluid at superficial rupture of membranes during labour and the infant's APGAR scores at birth are not supportive of hypoxia/ischemia during the delivery process and that Dr. Gabay's report supports this conclusion and added that in the circumstances as outlined by Dr. Melbourne-Chambers, the claimant has not proven on a balance of probabilities that the brain damage arose from a hypoxic event during labour or delivery and his claim should fail.

[29] With respect to the claimant's care after delivery, counsel, citing the case of **Joyce v Merton Sutton and Wandsworth Health Authority** (1996) 27 BMLR 124, indicated that the claimant has to prove that his brain damage would on a balance of probabilities have been avoided if proper care had been taken by the medical staff at VJH.

[30] She pointed to Dr. Gabay's conclusion that the claimant had a number of events most likely initiated by an intracranial haemorrhage and significant thrombocytopenia, noted that Dr. Melbourne-Chambers stated that the clinical and laboratory findings could be explained by an intracranial bleed but that there is no definite evidence of an intracranial bleed, and indicated that the defendants' pleaded case is that the intracranial bleed was a consequence of hereditary alloimmune thrombocytopenia, which in the circumstances would have been unpredictable and untreatable during the mother's pregnancy.

[31] Counsel invited the court to find on the objective evidence of multicystic encephalomalacia detected in 23 days of birth, coupled with the finding of macrocephaly (large head) it was more likely than not that the timing of the insult leading to brain damage occurred intrauterine. She therefore submitted that the claimant has not demonstrated that his injury was in fact caused by or materially contributed to by the omission in care as opposed to a number of other competing causes and so his claim should fail on causation.

Law and Application

[32] In order for the claimant to succeed on this claim, he has to establish on a balance of probabilities that the defendants owed him a duty of care, the defendants' breach of duty caused him to suffer the injuries as pleaded and that the damage suffered is not too remote. The particulars of negligence are mainly confined to the alleged lack of care in the treatment of the claimant and for failing to properly monitor his mother during labour.

[33] The existence of a duty of care within the medical professional/ patient relationship is usually taken for granted. This is so as it is a well recognized duty. The court must therefore determine whether there was a breach of this duty.

[34] In assessing this matter, I find that the doctrine of *res ipsa loquitur* is apt. It was defined by Earle CJ in **Scott v London & St Katherine Docks Co**. (1865) 150 ER 665 at 667 as:

"*where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care…When all the facts are known the maxim helps the plaintiff to discharge the onus placed on him to prove negligence".*

[35] In the case of **Clifford Baker v The Attorney General & Det/Cpl Lewis,** CLB 274 of 1983, unreported, delivered October 8, 1986, Smith, J. referring to this doctrine said:

"*By this doctrine where an accident happens which by its nature is more consistent with it being caused by negligence for which the defendant is responsible than by other causes, the burden of proof shifts to the defendant explain and to show that the accident occurred without any fault on his part. The defendant need not prove how and why the accident happened. It is sufficient if he satisfies the court that he personally was not negligent or at fault".*

[36] It is now well established that negligence will be presumed under the doctrine where the incident which occurred is such that would not have normally occurred unless the defendant(s) had been careless, therefore some positive evidence of neglect of duty needs to be shown.

[37] The undisputed evidence is that Ms. Howell went to the VJH where she delivered the claimant, who remained in hospital for two weeks after which he was discharged and two days later, he is taken to BHC, where investigations are carried out. It also not disputed that the claimant suffered irreparable brain damage. It was pleaded that the claimant was, at the time of his birth on April 27, 2004 "apparently a normal healthy

baby but was found to be brain damaged, while under and having been under the management and control of the 2nd defendant, its servant and/or agents."

[38] It is established that a hospital has a primary non-delegable duty of care which can be vicarious and direct. Lord Denning LJ in **Cassidy v The Ministry of Health** [1951] 2 KB 343 expressed the view that:

> *"I take it to be clear law as well as good sense that where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of services or to an independent contractor under a contract for services".*

[39] In **Cassidy**, Lord Denning said that whenever hospital authorities accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment and they must do it by their staff and if the staff are negligent in giving treatment, they are just as liable for their negligence as is anyone else who employs others to do his duties for him.

[40] As Counsel for the claimant submitted, because of the VJH own failure to conduct certain critical tests, the defendant is unable to explain how it is that the claimant suffers brain damage and as the claimant's mother and the witness for the defendant state that the delivery itself was normal, it is obvious that the management of the claimant was sadly lacking.

[41] It is admitted that the 2nd defendant through the VJH and staff which includes Registered midwife Natanee Dalhouse, owed a duty of care to the public including the claimant. This duty of care in my view included a duty to deliver the claimant in an expeditious and timely manner, he being a post term baby, and to properly monitor Ms. Howell during labour and properly care for the claimant after his birth. In assessing the evidence, I find that Ms. Howell's version of the events which took place during the period from when she was admitted to the VJH to the birth of the claimant, his

subsequent placement in the nursery and his later discharge, shows the failure to properly monitor both mother and baby.

[42] The breach in this case is the failure to recognize that the reasonable and responsible approach by the staff who purported to have the ordinary skill for the position held and in whose care the claimant was, would be to carry out investigations into the causes of the claimant's continuous crying and the fact that he was not feeding.

[43] The witness for the defendant was unable to provide evidence as to the immediate care and treatment of the claimant although she indicates that she was the mid-wife on duty at the time and that she assisted in the delivery of the claimant. There is no evidence if the assessment in relation to the Apgar scores noted by the defendants' witness as being recorded, was in fact done at precisely the 1 minute and 5 minutes after birth which is the standard procedure. The defendants contend that the claimant's Apgar scores were 8 and 9 at 1 minute and 5 minutes as recorded, but have failed to note that the record indicate that for the score of 8, the heart rate, respiratory effort and muscle tone were scored at 2 and reflex irritability and colour scored at 1, while for the score of 9 at 5 minutes, the colour again scored at 1.

[44] Neither party placed significance on the Apgar score which is used to measure the baby's general condition at birth. The scores of 8 and 9 were found to be normal by the medical professionals. However, I find that the scores for heart rate, respiratory effort, muscle tone and colour should have prompted the midwife or doctor on duty to take immediate action in carrying out investigations.

[45] According to Lord Browne Wilkinson in **Bolitho (administratrix of the estate of Bolitho (deceased) v City and Hackney health Authority** [1997] 4 All ER 771

> **"**…*but in cases where the breach of duty consists of an omission to do an act which ought to have been done … that factual enquiry is by definition in*

the realm of hypothesis. The question is what would have happened if an event which by definition did not occur had occurred…"

[46] It is therefore within the realm of hypothesis to say that if the investigations had been done early, as outlined by Dr Gabay the claimant would not have had brain damage. However, I find that the claimant, having been delivered as an apparently normal child and to have had to remain in the nursery for two weeks before being discharged and to have been found to have suffered brain damage which occurred while under the management and control of the 2nd defendant is a clear indication that the acts and or omissions of the persons under whose care he was are the are the cause of the injury and damage suffered by him

[47] I am satisfied that there has been a breach of duty of care owed by the 2nd defendant as the employer of the members of staff at the VJH to the claimant and also by the 1st defendant by virtue of the Crown Proceedings Act. This I find, is highlighted by the evidence of the lack of proper management of Ms. Howell when she became a patient at VJH as well as the claimant during and immediately after his birth.

[48] The medical report of Dr. Judy Tapper indicates that the claimant was first seen on May 25, 2008 and reviewed on August 5, 2004. She notes that he was assessed as having "…(HIE) with neurological sequelae which included:

1. Epilepsy
2. hyperexplexia, being jittery with excessive startle response and irritability
3. Global developmental delay, functioning at 0-6 week level, with visual and social inattention and
4. Generalised spasticity? early signs of spastic quadriparetic cerebral palsy…"

[49] The report of Dr. Michelle-Ann Richards-Dawson, prepared subsequent to the report by Dr. Tapper speaks to the referral to Dr. Tapper and indicates that the claimant suffers from brain damage.

[50] The expert reports of Dr Leslie Gabay, Consultant Paediatrician and Paediatric Endocrinologist and Dr. Melbourne-Chambers, Paediatrician and Paediatric neurologist, point to "inadequacies in care" and "deficits in the management…by medical staff at the Victoria Jubilee Hospital"

[51] Dr. Gabay concludes that the claimant had a number of events most likely initiated by an intra cranial haemorrhage, "*which included hypoantremia, acidosis, and possible hypoxia which resulted in significant brain injury and disability, not hypoxic ischaemic encephalopathy which would suggest intrauterine or birth asphyxia*" He expresses the opinion that "*the infant should have had intracranial imaging (cranial ultra sound, CT scan or MRI) as an early investigation*" and that "*correction of thrombocytopenia should have been done urgently".* This I accept as being what ought to have been done according to proper medical practice and procedure.

[52] The expert report of Dr. Roxanne Melbourne-Chambers states *inter alia*, "…*failure to fully investigate the cause of anaemia, thrombocytopenia and hyponatremia, to investigate for other …clotting abnormalities and failure to document a plan to obtain imaging of the neonate's brain, urgently at the time of his initial presentation with seizures, bulging anterior fontanelle, anemia and , thrombocytopenia. Results …may have provided a diagnosis and informed appropriate therapy.".*

[53] It is my view that the inadequacies in care and deficits in the management of Tahjay Rowe by the medical staff at VJH as stated in the evidence of the claimant and highlighted in the expert reports of Drs. Gabay and Melbourne-Chambers, point to a breach of duty by the defendants who would reasonably have been expected to carry out certain investigations which could determine steps to be taken in the proper care and management of the claimant. These omissions by the defendants' servants are in my view sufficient to ground the claim. I therefore find that the injury to the claimant is a reasonably foreseeable result of the action and omission of the defendants' servants.

[54] I have placed reliance on the professional opinions of the two expert witnesses and in particular on the opinion of Dr Gabay. Although neither expert was able to state whether the claimant's disabilities would have been reduced if there had been proper care and documentation showing sufficiently close monitoring of the claimant, I accept the consensus of the experts who are agreed that the management of the claimant during delivery and immediately after birth was lacking.

[55] Applying the principles set out in **Bolam v Friern Hospital Management Committee** (supra), to the facts of this case, I am of the view that the standard of care owed to the claimant was that prior to, and at birth he should have been properly monitored, and at birth and certain investigations done. The absence of documentation to show, for example, if the measurement of his head had been done by the attending midwife and the inability of the defendants' witness to recall what took place at the time of birth, speak volumes of the fact that the staff at VJH who saw Ms. Howell when she was admitted, and dealt with her up to the time of delivery of the claimant and to the time he was discharged from the hospital, were negligent in the treatment to her and to the claimant.

[56] Despite Dr. Gabay's statement that *"…this infant had an intracranial event resulting from a significant thrombocytopenia, however the documentation of his care and management indicate inadequacies in both areas, which if they had not occurred may or may not have resulted in lesser disabilities for this child",* I have concluded from the totality of the medical evidence before me that the procedure(s) adopted in dealing with Ms. Howell and the claimant at birth fell short of what is recognized and accepted procedure for treating what they have recorded as "a post term neonate".

[57] Guided by the decision in the case of **Millen v University Hospital of the West Indies** 44 WIR 274, I find that the VJH and staff were negligent in the post-natal care of the claimant, particularly in ensuring that investigations were done to determine the reasons behind his continuous crying and lack of feeding.

[58] I therefore have no difficulty in accepting that the injury to the claimant was a direct result of the deficient treatment received as I find that the treatment fell below the required standard of reasonably competent mid-wives and paediatricians and find on a balance of probabilities that the VJH staff were negligent in the delivery of the claimant and in his immediate post natal care and that the injury is a reasonably foreseeable result.

There shall therefore be judgment for the claimant against the defendants.

[59] I will now determine the quantum of damages to which the claimant is entitled.

General damages

[60] Counsel for the claimant referred to the following cases:

(1) **Brian Smith (bnf Brian Smith) v Kenneth Smith & Anor** CL1985/S393, Harrisons' Assessment of Damages, 2nd Ed., page 179 in which, on July 26, 1990, the claimant who was 5 years old at the time of the accident, was awarded $200,000.00 for pain and suffering and loss of amenities, having suffered irreparable brain damage as well as fracture of the right femur. This updates to $

(2) **Sherica Young (an infant b.n.f and father Harry Young) v The A.G. of Jamaica & Ors.** Suit No. CL2001/Y 010, a case in which a consent judgment was entered on January 24, 2005 (CPI 84.12.) in respect of a 5 year old (at time of judgment). The claimant suffered seizure disorder, meconium aspiration syndrome, hypoxic ischemic encephalophaty with small intra cranial bleed, cerebral palsy with microcephaly, developmental delay, axial hypotonia and peripheral hypertonicity. At the time of judgment, the claimant demonstrated minimum neurological development, suffered constant seizures and had to undergo constant physiotherapy, could not walk or sit up and had poor head control. General damages which included the consideration of loss of future earnings was agreed at $5m which updates to $13,504,517.35 (CPI 227.2 for July 2015)

(3) **Kiskimo Limited v Deborah Salmon** SCCA No. 61/89, Harrisons' Assessment of Damages, 2nd Ed., page 187 where the respondent a 13 year old schoolgirl suffered severe brain damage as a result of severe trauma to the head. The CA upheld an award of $500,000.00 made on June 23, 1989 (CPI 4.90) for pain and suffering and loss of amenities which is now worth $23,183,673.46.

(4) **Karen Brown (bnf Cynthia McLaughlin) v Richard English & Alfred Jones** CL 1988/B102, Khan Vol. 4. Pg.190 In this case the claimant suffered 60% disability of the brain and had frequent headaches and was awarded $385,000.00 on February 1 ,1991 (CPI 7.10) which updates to $12,320,000.00.

[61] In relation to the general damages to be awarded, Counsel noted that the cases of Brian Smith and Sherica Young are more comparable to the case at bar, but that in this case the claimant's injuries are more serious than Brian Smith and since the settlement in Sherica Young contemplated loss of future earnings, he suggested that the award for general damages should be $11,000,000.00.

[62] It is my view that the cases referred to by counsel for the claimant provide a reasonable guide in relation to the award of general damages. Using the case of Sherica Young as the preferred guide and bearing in mind that the award in that case was made by consent, I believe a reasonable award would be $10,000,000.00.

Loss of future earnings

[63] In relation to loss of future earnings Counsel for the claimant made reference to the **Brian Smith** case as well as the case of **Jamel Bin Harum v Yang/ Kamsiah Bte Meur Rasdi & Anor.** [1984] 1 AC 529 as showing that the claimant should recover under this head of damage. He suggested that a multiplier of 18 be applied as the injury was received at birth unlike the case of Brian Smith, and submitted that as the current minimum wage is $5,600.00 per week that would give an annual multiplicand of $291,200.00, therefore the award for loss of future earning is $5,241,600.00.

[64] Counsel for the defendant expressed the view that the multiplier of 18 submitted by Counsel for the claimant is too high for estimating the costs of future care and loss of future earnings. She noted that there was no evidence before the court on the estimated life expectancy of the claimant and his present condition or prognosis. Relying on **Croke (a minor) and another v Wiseman and Others** [1981] 3 All ER 852 she submitted that a multiplier between 12 and 14 would be appropriate.

[65] The claimant is now nine years old and has a permanent disability and as suggested by counsel for the defendant, there is no medical evidence to assist the court in his likely life span or whether his condition is likely to improve or deteriorate. Determining an award under this head is therefore highly speculative. I agree with Counsel for the defendant that the multiplier of 18 is too high. I am of the view that a more reasonable multiplier would be 14, taking into consideration that the life span of a male in Jamaica is 71 years and there is no evidence as to how long he is likely to live and the fact is that he will be unemployable during his life time.

[66] It is my view that for damages under this head to be adequate and fair compensation to the claimant the current minimum wage of $5,600.00 per week could be applied as the multiplicand as suggested by Counsel for the claimant. This would amount to $4,076,800.00 and taxed down by 25% to take into account the fact that the payment would be made in a lump sum, this would yield a net earning of $3,067,600.00

Cost of future care

[67] Counsel for the claimant also submitted that the evidence shows that the claimant requires and will continue to require special care in the sum of $2,000.00 per day which amounts to $730,000.00 per year; he needs a special syrup to treat his epilepsy at a cost of $4,200.00 every two weeks which amounts to $109,200.00 per year and special foods are required costing $2,000.00 per week amounting to $104,000.00 per year. Using the multiplier of 18, counsel suggested that the amounts would be as follows: Special care, $13,140,000.00; Syrup to treat epilepsy, $1,962,000 and special food, $1,872,000.00.

[68] There can be no dispute that the claimant will need special care for the duration of his life. I accept the evidence that he requires special care as well as “special syrup” which costs $4,200.00 every two weeks to treat his epilepsy and special food which costs approximately $2,000.00 per week as he “can’t eat any solids” and therefore find that the claimant is entitled to compensation under this head.

[69] Applying the multiplier of 14, the sum for special syrup would be $1,528,800.00; special foods would amount to $1,456,000.00 while the cost of special care would amount to $10,220,000.00.

Order:

Judgment for the claimant with damages assessed and awarded as follows:

General damages awarded in the sum of $ 10,000,000.00 with interest at 3% from the date of service of the claim form to today.

Cost of future care: $10,220,000.00 plus $1,528,800.00 for special syrup and $1,456,000.00 for special food. (no interest)

Loss of future earnings awarded in the sum of $3,067,600.00 (no interest)

Special damages awarded in the agreed sum of $21,000.00 with interest at 6% from April 27, 2004 to June 21, 2006 and 3% thereon from June 22, 2006 to today.

Costs to the claimant, to be taxed if not agreed.