IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A137/1979

BETWEEN	CARL RICHARDS ARCHIE (By Next Friend Carl William Archie)	PLAINTIFFS
A N D	INTERNATIONAL RENTALS	1ST DEFENDANTS
A N D	LEROY KENNEDY	2ND DEFENDANT

R.S. Pershadsingh Q.C., W.B. Frankson Q.C., and Alvin Mundell for the Plaintiffs.

Andrew Rattray instructed by Bruce Barker of Livingston, Alexander and Levy for Second Defendant.

Hearing on: 21st, 22nd and 23rd November, 1983.

Delivered : 8th June, 1984

JUDGMENT

Bingham J:

In this matter the plaintiff a school boy now fifteen years of age, claims through his next friend and father in negligence for Damages for Personal Injuries resulting from a motor vehicle collision when he was on 20th October, 1977 knocked down by a car driven by the second-named defendant while in the act of crossing the main road leading through Annotto Bay on his way to the Annotto Bay All-Age School which is situated to the right of the main road as one travels through Annotto Bay in the direction of Portland.

The car in which the second-named defendant was travelling was previously owned by the first-named defendants but was on the date of the collision then owned by the second defendant.

The first-named defendants having therefore no insurable interest in the car the Attorneys for the plaintiff announced at the commencement of the

hearing that they were therefore discontinuing their claim against this defendant. The subsequent hearing was conducted on the basis as if the first-named defendant had never been in the Matter.

The evidence of the plaintiff who was then eight years of age at the time of the incident was that he had set out for school sometime in the early hours of the morning of 20th October, 1977 around 8.00 a.m. When nearing the junction which leads to the school he left his books with some friends whom he had been walking with and then crossed the main road by way of a pedestrian crossing which is situated near to the junction road, in order to purchase a pencil at a grocery shop. He was unsuccessful in obtaining the pencil and while on his return journey by way of the same route and in the act of going back by way of the pedestrian crossing he was hit down by the defendant's car which he had seen moments before the impact about two and a half chains away approaching from the direction of the Annotto Bay square.

It was also part of the plaintiff's case that this area in the vicinity of the school is a built up area and that apart from the pedestrian crossing there were, on the date in question, well marked signs indicating not only the presence of the pedestrian crossing, but also a school sign indicating the fact that there was a school situated in the immediate vicinity of the main road as well.

The defendant, for his own part, admitted that he knew as a fact that there was a school situated near to the main road by the junction. There is the further evidence that at the time of the collision, and this fact is not in dispute, there were several school children seen walking on both sides of the main road apparently heading on their way to school.

To continue, the narrative in its proper sequence, however, as result of the impact, the plaintiff suffered injuries and was taken by the second-named defendant in his car to the Annotto Bay Hospital, where both the infant plaintiff's parents were working at the time and from there he was transferred to the Bustamante Children's Hospital in Kingston where he was admitted and underwent treatment for the injuries he received. The plaintiff remained in that institution for some two weeks. He was then transferred back to Annotto Bay and was treated as an outpatient at the Annotto Bay Hospital as also by a Dr. Murthi at Annotto Bay.

The plaintiff was laid up at home for sometime following the impact and actually missed school for some two months.

The defendant for his own part as to be expected, seemed to have been quite concerned about the plaintiff's condition and not only spoke to his parents on a number of occasions following the impact, but visited him while he was a patient at the Bustamante Hospital in Kingston.

Despite the serious injuries which the plaintiff received, however, and although the defendant in the Defence filed is alleging that the plaintiff was solely to blame for the impact in that he ran suddenly across the road while the car was merely ten feet away from him, no attempt was made by the defendant to obtain any statement or information from a number of potential eye-witnesses who were on the scene at the time of the impact. What is even more significant is that, having taken the infant plaintiff to the Annotto Bay Hospital, the defendant went off on his way to work in Port Antonio and did not make a report to the police at Annotto Bay until later down in the afternoon of the same day. This is despite the fact that from the evidence the Police Station was a mere

four and a half chains from the point of impact and about a three quarters of a mile from the Annotto Bay Hospital.

The plaintiff suffered a number of injuries as a result of the collision which laid him up for some two months.

He has made good recovery but now walks with a permanent limp which is caused by an apparent shortening of his right leg which it appears from the evidence was fractured as a result of the impact. Even of a more serious nature was the head injury which the plaintiff suffered as a result of being hit by the second-named defendant's car, an injury which has now left him with some permanent deterioration in the brain function, which is evidenced by a loss of the capacity to concentrate for any reasonable length of time. He has been described by his father as being clumsy in handling objects and now tends to be very forgetful.

As a result of the brain damage it is the unchallenged evidence of Doctor Ruth Doorbar supported by the evidence of Dr. Theisiger that given the evidence of the early promise of high intellectual attainment which the infant plaintiff showed before the brain injury, that he will now never attain quite that capacity for intellectual effort as before the injury. He will now have to settle for being an average person with the prospects for attaining a high enough educational standard to fit him for entry into one of the more select professions now being out of the question. This evidence of intellectual impairment has been assessed by Dr. Doorbar as being of the order of twenty-five percent.

On the question of liability I do not propose to dwell too much on this area as although there is a conflict of evidence as to how the collision took

place the following facts become abundantly clear once the totality of the evidence is looked at:-

1. The area where the collision took place is a built up area.
2. It is common ground that there is a school situated near to the junction road which leads off the Annotto Bay main road.
3. That on a preponderance of probability there was a pedestrian crossing situated on the main road in the area near to the junction road where the school is sited.
4. That there were on a preponderance of probability traffic signs warning motorists to drive with caution because of the presence of the school nearby.
5. It is common ground that it was around the time for school when the impact occurred and further that there were several school children seen by the second-named defendant going up and down and to and fro on the main road.

Despite all this the defendant is contending that he drove his car through that main road at a speed of 25 m.p.h. in circumstances which called for the utmost caution. On his own evidence therefore he failed to exercise that degree of care which is required of a user of the road in looking out for children on or near the highway in event of any of these children as they so often and instinctively do, suddenly darting across the road.

The Law here is very clear and Mr. Frankson's observations in this regard is quite sound. On the evidence of fendant he seemed as the inexperienced driver he was at the time of the impact, having acquired his drivers license for merely a month at the time of the impact, to have been giving little heed to the presence and movements of the children which as a reasonable and prudent motorist he ought to have been doing and was unable to deal successfully with

the conduct of the plaintiff who was in the act of crossing the road.

I am of the view that the evidence when examined on a balance of probabilities, there was a pedestrian crossing in the area where the impact occurred and that the plaintiff was in the actoof crossing the road at that point and this means in effect that the defendant failed in the duty of care required of him and was clearly negligent in the manner in which he approached the crossing and at the speed that he admits that he did. Had he approached the crossing at a slower rate of speed and been keeping a watchful eye out for the presence of the children who, on his own evidence, were near to the main road, as he ought to, he would have seen the plaintiff and been able to avoid colliding into him.

Although there is also a distinct probability that the infant plaintiff as children of that age often do, may not have looked before crossing the road, this is something which is a natural tendency on the part of all children of tender years no matter how well they are taught as to road safety measures, as I have no doubt that this plaintiff may well have been instructed. They tend not to remember these safety measures if something else is uppermost in their minds. This in the case of the plaintiff might well have been the fact of getting back to his friends who were on the opposite side of the road.

So although on the evidence when looked at as a whole there is also the probability that the infant plaintiff may have gone into the pedestrian crossing without looking to see whether any traffic was approaching I would not be minded to find that he was in anyway to be blamed for the impact that took place, as not much care is to be expected of a child especially one who was as in this case merely some eight years old as the plaintiff.

Before parting with the question of liability I wish to comment briefly upon just one small aspect of the evidence insofar as it touched upon the plaintiff's

case. This in my view, however, although detracting from it to some extent, did not affect it materially to such a degree as to destroy it altogether.

There was a witness called in support of the plaintiff's case, one Winston Walsh who testified to having witnessed the impact and to assisting in placing the infant plaintiff in the defendant's car. Having regard to the account given by this witness it is sufficient to say that his performance in the witness box did not advance the plaintiff's case as his account was clearly exaggerated to such an extent as to stamp him as not being a witness of truth. I therefore, rejected the entire account of this witness' testimony as being totally unreliable.

A number of authorities were referred to by Mr. Frankson of which I propose to refer to just two in advancing the well-known principle as to the duty of care to be expected from children of tender years. These authorities go to support the contention that not much care ought to be expected of such children. See Gough vs Thorne /1966/ 3 A.E.R. p.398. This report was not available at the time of writing this judgment but my researches have uncovered a brief reference to this case in 6th Edition of Bingham's Motor Claims Cases at p.57.

The facts in this case were that the plaintiff a child aged 13½ years was waiting with her brothers aged 17 years and 10 years respectively to cross a road. A lorry stopped to allow them to cross. The driver put his right hand out to warn other traffic and beckoned the children to cross. As they got just beyond the lorry a car driven by the defendant drove down and hit the plaintiff. The trial judge held the plaintiff one-third to blame for having advanced past the lorry without looking to see whether any traffic was coming from the right. It was held on appeal that "the plaintiff was not to be blamed at all."

Though there is no age below which it could be said that a child could not be guilty of contributory negligence, age was a most material fact to be considered. The question as to whether the plaintiff could be said to be guilty of contributory negligence depended upon whether any ordinary child of 13½ years could be expected to do anymore than she did. If she had been a good deal older she might have wondered whether a proper signal had been given and then looked to see whether any traffic was coming, but it was quite wrong to suggest that a child of 13½ years should go through that mental process.

This case has been followed by our own Court of Appeal in Civil Appeal 6/1980 Judith Dias vs Linette Josephs (unreported).

On the facts outlined therefore and having regard to the authorities referred to/~~it~~ it clear that no rational basis exists for a finding of contributory negligence on the part of the infant plaintiff in this matter.

I therefore find that the second-named defendant was solely to blame for the collision.

Damages

Before resorting to an examination of the question of General Damages, however, it may be convenient at this stage to dispose of the claim for Special Damages. This was dealt with under three sub-heads as a continuing claim totalling $220. The evidence lead went towards proving $190 under two of the sub-heads, being $172 for transportation expenses and property damage $12.

There was a claim for medical expenses, but although the plaintiff's father and next friend gave evidence of having paid several sums in this area of the claim, no attempt was made by plaintiff's Attorneys to amend the Particulars of Special Damages in the claim to allow for recovery of these sums.

In fact during Mr. Archie's testimony Mr. Pershadsingh following an objection by Mr. Rattray as to any evidence being lead to prove these payments, abandoned this line of questioning and did not pursue the matter any further. In the circumstances the amount of $190 under sub-heads (b) and (c) of the Particulars of the Special Damage is the sum which will be recoverable under this head of the claim being the sums alleged and proved.

I now turn to the question of Damages an area which I must confess has given me no little concern for although the plaintiff on the evidence suffered what could be regarded as serious injuries there is a marked absence of medical evidence brought by the plaintiff's Attorneys to assist me in a proper determination of:

1. The precise nature and extent of the plaintiff's injuries.
2. The degree of disability to which the plaintiff is now subject, as a result of his injuries.

Having regard to the dilemma which the court faces due to the failure on the part of the plaintiff's Attorneys to call any medical evidence, the court has had to fall back on such evidence of the injuries as was received by the plaintiff as may be gleaned from an examination of the plaintiff's evidence supported by that of his father and such reasonable inferences which can be drawn therefrom.

In this regard the evidence of a Neuro-Surgeon and an Orthopedic Surgeon was clearly desirable and having regard to the evidence adduced by the plaintiff's father of he having been examined by several Medical Specialists both in Jamaica and in the United States including Mr. John McNeil-Smith, a well-known resident Orthopedic Surgeon, it is of no little concern to me why in an area where the

court could have benefitted greatly from the expert opinion of these persons one was left to fall back on the evidence which fell from the lips of lay persons.

Having regard to the obvious interest which both the plaintiff and his father have to serve in the matter, the question of their evidence in the area of general damages will have to be approached with some amount of caution.

From the evidence the plaintiff suffered the following injuries:

1. A fracture to the right leg.
2. Lacerations to the right hand.
3. Injury to the head with severe headaches and pain associated with the areas in which the injuries were received.

Following the collision the plaintiff was admitted into the Bustamante Children's Hospital in Kingston where he was treated for his injuries. His head was bandaged, wounds dressed and his foot was placed in plaster of paris and set intraction.

His body was allergic to the plaster of paris . This caused big boils to come out on both legs. The plaster of paris had to be removed. He remained in hospital for some three weeks after which he was transferred to Annotto Bay Hospital where he remained for another five weeks before being discharged. He was then sent back to Children's Hospital for further treatment and also treated by one Doctor Murthi, Annotto Bay. He remained out of school for two months.

He resumed his schooling in January 1978.

The plaintiff's schooling has been uninterrupted since his returning to school in 1978, although his grades have fallen. He was, however, successful

on his second try at the Common Entrance Examinations and gained entry to Saint Mary's High School where he remained before leaving the Island with his parents for Texas in the United States of America in 1981. In Texas he attended two schools at which he pursued the normal courses for children of his age doing subjects such as Art, English, Maths, History and Reading.

He is now enrolled in the North Miami Senior High School. He is now in the 10th Grade. He hopes to graduate in two years time when he will have reached 12th Grade. He also participates in sporting activities. He plays volley ball and for social recreation he attends parties but does not dance because his injured leg still hurts.

Damages fall to be assessed under three broad heads:

1. Pain and suffering and loss of amenities.
2. Residual disability as a result of injuries to the head and right leg.
3. Loss of future earning capacity.

Having regard to the evidence a generous award is called for under the first head as on the evidence the plaintiff was unconscious for several hours following the collision and regained consciousness in the Children's Hospital. He suffered a fractured leg which had to be reset and placed in plaster of parish which his body rejected, as well as serious head injuries. The pain was almost continous during the period of his confinement and for some time thereafter.

Although from all appearances he has made an excellent recovery he still continues to experience headaches from time to time and the leg still causes pain when he exerts it for any length of time.

I would make an award of $50,000 under this head.

In assessing damages in the area of the second head it may be convenient to deal firstly with the injury to the head.

According to the plaintiff he now has difficulty concentrating for any length of time as well as with his memory. He has difficulty remembering the next day what he read the previous night. His father's evidence supports that of the plaintiff as to the latter fact. He also added that the plaintiff was now clumsy and somewhat withdrawn which tended to suggest that he now suffers from an inferiority complex. The injury to his right leg has resulted in a shortening of the right foot causing the plaintiff to walk with a limp.

Dr. Ruth Doorbar a Child Psychologist with over 30 years experience in her chosen field who carried out an assessment of the plaintiff in April 1982 also gave evidence in support of the plaintiff's case. Based upon the history which she had obtained of the plaintiff having achieved reasonable high grades before the collision she came to the conclusion that on his present performance he would not have been able to attain an intellectual standard capable of enabling him to attain University level which on his previous performance he would have been able to attain she therefore assessed his intellectual impairment at twenty-five percent. Although not a Medical Practitioner Dr. Doorbar attempted to assess the degree of disability of the injury to the plaintiff's leg as being in the area of twenty five percent. I attach no weight to this evidence and I dismiss the witnesses' testimony in this area as valueless and being what is no more than an attempt on her part to fill a void in the plaintiff's case in an area entirely outside her competence to canvass any such opinion.

Based upon the evidence of Dr. Charles Theisiger, a Psychiatrist who also examined the plaintiff in June 1983 and whose opinion supports the evidence of Dr. Doorbar as to her assessment in the area of intellectual impairment, it is clear that there is a permanent deterioration in the capacity of the plaintiff to concentrate in all probability the result of the head injury so that the plaintiff will now never attain that capacity for intellectual effort which he would have attained before the collision.

On the performance of the plaintiff in court while giving evidence, however, he has from his demeanour made an excellent recovery from his injuries.

He gave his evidence with an admirable degree of clarity and appeared a quite self assumed and confident young man. This performance on his part seemed to me to be quite contrary to the somewhat gloomy picture of his future potential as painted by the evidence of Dr. Doorbar. In the personality area she sought to describe the plaintiff as having great difficulty making friends, suffering taunts from children who teased him about his injured foot and who appeared to her to be very depressed and anxious about his future potential.

Dr. Theisiger on the other hand was much more optimistic about the plaintiff's chances for attaining a level sufficient to enable him to obtain average employment when he reached manhood.

I would regard Dr. Theisiger's opinion as more in keeping with my own assessment of the plaintiff based upon his demeanour during the trial.

Insofar as the injury to the plaintiff's leg is concerned although he now walks with a limp this is not easily noticeable and it certainly has not hindered him from taking part in games as he plays volley ball which is a sport requiring quick movement on the part of persons engaged in it.

Taking into consideration therefore the evidence of:

1. The intellectual impairment due to the head injury and the likely probability of brain damage which will be of a permanent nature.
2. The injury to the plaintiff's right leg which has now left him with a limp due to a shortening of the leg.

In this area the evidence of Dr. Theisiger is that a prothesis in which special shoes can be fitted to the plaintiff's right foot to enable him to walk properly should not be overlooked.

Applying the following authorities referred to by Mr. Rattray which are of assistance in this area.

1. Jones vs Lawrence /1969/ 2 A.E.R. 267.(This case is almost on all fours with the instant case).
2. Lloyd Goulbourne by Next Friend Gloria Williams and United Dairy Farmers Limited and Another. Page 164 of Mrs. Khans "Recent Personal Injuries Awards in the Suprene Court."
3. Lily Hall vs Barrett, Mills etux page 175 of the same book (referred to supra).

I did not find any of the authorities referred to by Mr. Frankson of much assistance as the injuries incurred by the plaintiffs in those cases bear little or nc similarity to the facts in this case.

Having regard to the excellent recovery made by the plaintiff I would award a sum under this second head of $100,000.

This leaves the third head for consideration. The evidence here is simply this that the plaintiff when he comes to complete on the job market because of the loss of opportunity to gain a University Degree or qualify to one of the recognised professions and the difficulty he has with concentration some loss

of some future money earning capacity will obviously result. I would assess this sum as being in the region of $30,000.

The result is that there will be judgment for the plaintiff on the claim against second-named defendant for $180,190 being computed as follows:

1. Special Damages $190.
2. General Damages assessed under heads of Pain, Suffering and Loss of Amenities, Residual Disability and Loss of prospective earning capacity One Hundred and Eighty Thousand Dollars ($180,000).

Costs to the plaintiff to be agreed or taxed.

Interest on Special Damages at 4% from 20th October, 1977 to date of judgment.

Interest on $150,000 of the General Damages at 8% from 5th December, 1979 to date of judgment. Costs to the plaintiff to be agreed or taxed. Stay of execution for six weeks in relation to 50% of the court's award. The remainder to be paid to trustees appointed.

Judge