JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 50/90

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN	PETRONA BLACK (by her next friend Karen Black)	1ST PLAINTIFF/APPELLANT
AND	KAREN BLACK	2ND PLAINTIFF/APPELLANT
AND	JENNIFER BHALAI	1ST DEFENDANT/RESPONDENT
AND	ENEIL HAMILTON	2ND DEFENDANT/RESPONDENT

Crafton Miller & Miss Nancy Anderson for Appellants

Patrick Foster for Respondents

June 24, 25 & July 15, 1991

CAREY, P. (AG.)

This is an appeal against the assessment of damages by Theobalds J, on the 24th of May, 1990 whereby he awarded the infant plaintiff the sum of $15,000.00 for general damages in respect of pain and suffering. The gravamen of the arguments that counsel put forth is that, that award of $15,000.00 was inordinately low and did not represent a true assessment of the injuries suffered by the infant plaintiff. Specifically, it was being said, that the learned judge ignored altogether the fact that as a result of the accident in this case, the infant plaintiff is subject to epileptic attacks.

We may say at once that Mr. Foster who appeared on behalf of the Respondent conceded, with commendable candour, that the learned judge had fallen into error in misapprehending the significance of the medical evidence in that respect. The only question before this Court, is to award a reasonable sum in respect of those injuries.

It becomes necessary to rehearse a little of the circumstances of the accident which cause these injuries.

On the 15th of March, 1988 the infant plaintiff, then aged 12 years, was on her way home from school, walking on the Spanish Town Bypass when she was hit down by the defendant's truck. The significant injuries which she received were to the head and at the trial by consent two medical reports were tendered. The most important of these was done by Dr. Ivor W. Crandon who is a consultant neurosurgeon at the department of surgery at the University Hospital of the West Indies. So far as is material his report stated:

> "She was allegedly involved in a road traffic accident on 15 March, 1988. She was a pedestrian who was reportedly hit by a truck. There was loss of consciousness for twenty minutes. On the day of the accident, she reportedly had three epileptic seizures. She was admitted to the Spanish Town Hospital where examination reportedly showed a large occipital swelling, three bruises of the face and bruises of the left knee. Skull X-rays also reportedly showed a fracture of the right parietal bone. The period of post-traumatic amnesia was two to four hours. She was subsequently treated by Dr. M.S. Bhaskar, Consultant Neurosurgeon. He prescribed Dilantin capsules, an anti-convulsant medication, which she took for over one year.
> Initially, the headaches were associated with dizziness, but the latter has now settled. The headaches are intermittent, precipitated by noise or any trauma to the head, are located in the occipital region, last two to five hours, and are relieved by sleep or medication such as Tylenol or Aspirin. The headaches were severe in intensity for the first year after her injury but are less so now. In addition she also had diplopia for the same one year period but this has settled. Also for one year, she experienced a shock-like sensation from her neck downwards whenever she flexed her neck. This has spontaneously ceased. There is no history of vomiting. She denied any change in her memory or concentration. She reported that she was able to resume studies four weeks after the injury. The epileptic seizures have

"not recurred since the initial three attacks.
Her past medical history was unremarkable. She has 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 and three siblings.
My impression was that she had suffered a head injury on 15. 3. 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 asymptomatic.
While the headaches may be expected to improve with time, it is no certainty that they will disappear altogether. 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 has had is that the risk of future epilepsy is increased fourfold. Seizures, if they do recur in the future may do so at any time. 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."

The final paragraph of that report is of some significance. There the neurosurgeon said this "The risk of future epilepsy is increased fourfold." We understand that to mean that there is a real possibility of the risk of future attacks of epilepsy. It is quite plain that the learned judge ignored that aspect of the report, and did not take it into consideration in his assessment of the damages. There can be no question of the difficulty in assessing damages under this head. What the court is called upon to do, results in the question: What are the chances after the date of trial of attacks of epilepsy of a serious nature? This was a question debated in **Jones v. Griffiths** [1969] 1 W.L.R. 795. There Sachs L.J. at page 799 in dealing with the question of the chances of a plaintiff sufferring grave attacks for the future, said this:

> "The chances in relation to cases of this type really have to be divided into two questions. First, what are the chances of the plaintiff becoming a person who is subject to major epileptic attacks? Secondly, if a person is so subject, what are the chances of occurrence and of the frequency of attacks in the future?"

In our view, there is no doubt the evidence shows that the plaintiff who did suffer an epileptic attack comes within the category of a person who is subject to attacks of that nature in the future. Once, one is satisfied that there is a chance, the next question is to determine how that realistic figure must be set. Widgery L.J. in admitting the difficulty in assessing damages in all personal injury cases, accepted that it was the more so where the medical evidence discloses some possibility of future complications in the form of a deterioration in the plaintiff's condition or prospect of future attacks, because it could not be said with certainty, whether or not those complications or attacks might occur. The learned Lord Justice continued at page 001:

> "In these cases the trial judge has to fix what is a fair and proper figure to cover two conflicting eventualities one, that the complications may arise, and the other, that they may not. It seems to me that there is only one practical method of approaching this kind of problem and that is to assess the kind of figure which would be appropriate in the extreme and serious case where the complications or future attacks were virtually certain. It then becomes possible to discount that figure according to the degree of optimism which is possible in the light of the medical reports. The discounting is not just a matter of simple arithmetic, and it does not follow, if the doctors say the prospect of recurring attacks is 50/50, that one simply divides the maximum figure by two. There are many other considerations to have in mind, and in particular the trial judge must remember that at the best in these cases the plaintiff faces a period, which may be long or short, in which she is fearful of a recurrence of an attack and in which her whole life may be changed because she feels unable to go about her ordinary

> "affairs in the face of that danger. A plaintiff may be reluctant to marry, may be unable to drive a motor car, and may indeed suffer severe psychological disturbances merely from his or her fear of an attack, although that attack may never materialise. The trial judge must form his own view of the plaintiff and the probable effect of these fears upon him or her and must adjust his discounting process accordingly."

In applying the principles articulated in **Jones v. Griffiths,** we took the view that if this was a case where there was an absolute certainty of the recurrence of an attack, then an award in proportion of one million dollars would be regarded as reasonable. Then we would have to discount that, having regard to the fact that it is wholly uncertain whether in fact there will be a recurrence of the attack. It would of course be wholly unfair to award a large sum which might show, if the attack did not recur, that the amount would be inordinately high and on the other hand, to fix an award that is too low which time would show if there was a recurrence of an attack that the award was too low. Therefore some middle figure has to be set in the light of the peculiar circumstances of the case. This plaintiff is a mere infant. We do not suppose that the question of 'reluctance to marry' or inability to drive a motor car'would arise in a case like this. But there may well be other severe psychological disturbances which may affect her life while she grows up.

Mr. Miller suggested to us that the appropriate figure should be $150,000.00; which Mr. Foster for his part, thought that $55,000.00 would meet the justice of the case. Having given the matter our best consideration, we think that in all the circumstances, an award of $100,000.00 should be made. For these reasons, we increased the award of general damages by that amount. The appeal was allowed. We also awarded costs to the appellants. Costs of the appeal to the appellants to be taxed if not agreed.