



N.M.C.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. C.L. 2001/C211

BETWEEN JOWAYNE CLARKE 1<sup>ST</sup> CLAIMANT  
(By his next friend Anthony Clarke)

AND ANTHONY CLARKE 2<sup>ND</sup> CLAIMANT

AND DANIEL JANKINE DEFENDANT

Mr. Norman Samuel attorneys-at-Law for the Claimant

Miss Stacia Pinnock Attorney-at-Law for the Defendant

**Heard: March 18, 2009, April 29, 2009, December 18, 2009 and**

**October 15, 2010**

**THOMPSON-JAMES, J**

**Introduction**

On the evening of July 20, 1999, Jowayne Clarke who is now 19 years old, and an 8 year old infant at the time was in the company of his older sister Cameta Clarke. They were amongst a group of people returning from church.

Jowayne was involved in a most tragic accident on Stennett Street, Port Maria St. Mary. The injuries were serious and resulted in permanent

disability. These injuries will affect him and his family for the rest of their lives.

Jowayne was present in court and at the time I could not but observe the crippling effect of his disability.

### **The Claim**

The Claimant was at the time 8 years old and a student at Port Maria Basic School, St. Mary. The 2<sup>nd</sup> Claimant was at the material time the father of the 1<sup>st</sup> Claimant.

The Defendant was at the material time the registered owner of a motor vehicle with registration number 3271BX which the Defendant or his servant or agent was operating at the material time.

On the 20<sup>th</sup> July, 1999 the 1<sup>st</sup> Claimant was lawfully using the main road called Stennett Street in the town of Port Maria in the parish of St. Mary when the Defendant his servant or agent so negligently operated the said motor vehicle that it struck down and injured the Claimant.

In the particulars of negligence set out in the defence it is alleged inter alia that the Defendant was:-

1. Driving in a reckless and dangerous manner.
2. Driving fast or at a rate of speed which was too fast having regards to the nature and condition of the road at the material time.

3. Driving without due consideration for other users of the road and in particular the Claimant at the material time.
4. Driving off the asphalted surface of the road and onto the extreme left hand side of the road on the soft shoulder and there striking down the 1<sup>st</sup> Claimant from behind.
5. Failing to slow down, to swerve, to stop or to operate the said motor vehicle as to avoid hitting down the Claimant.

In his Amended Defence inter alia the Defendant states that this motor vehicle accident occurred at approximately 9.43pm, when the 1<sup>st</sup> Claimant suddenly and without warning crossed into the path of the Defendant's motor vehicle which was lawfully traveling on his correct driving side of the road at approximately 25-30 miles per hours.

The Defendant further states that at no time did he leave his correct driving side of the roadway and he denies the Claimant's claim that the 1<sup>st</sup> Claimant was struck on the soft shoulder from behind and states that it was the 1<sup>st</sup> Claimant who encroached on his driving side of the road, when he dashed across the road way.

That he was traveling within the required speed limit of the built up area and was keeping a proper look out.

That the said accident was caused solely by the negligence of the 1<sup>st</sup> Claimant or by his next friend or further in the alternative the next friend contributed to the accident.

### **The Claimant's Account**

In brief **Cameta Clarke**, sister of the 1<sup>st</sup> Claimant and daughter of the 2<sup>nd</sup> Claimant testifies that on July 20<sup>th</sup> 1999 at about 8:00pm Jowayne Clarke and herself were standing on the soft shoulder of Stennett Street, Port Maria, St. Mary. They were returning from church. A car drove up from behind them on the same soft shoulder, hit Jowayne and dragged him away. The people who were standing on the soft shoulder ran after the driver and shouted at him to stop. He eventually stopped when he was shown Jowayne under the car. He said he felt the hit but thought it was a dog that he had hit down. Jowayne was placed in the car and taken to the Port Maria hospital. She went home and told her parents what had happened.

### **In Cross-examination**

She testifies that light was on the road. It was dark.

The soft shoulder on which they were standing is 2 feet from the road. The car came up from behind. She was not injured. It was only her brother and herself that were on the soft shoulder. They were standing there

waiting to go across, facing Port Maria. A building, Juici-beef is located right behind where she was standing. The people ran from Juici-beef, a little over one yard to where the car stopped.

She denied that her brother ran into the road and maintained that Mr. Jankine drove up onto the soft shoulder.

In brief **Anthony Clarke** testifies that he is the father of Jowayne Clarke.

At the time of the accident he was 8 years old. Exhibit "1" a birth certificate shows that Jowayne was born on November 26, 1991.

At about 9:00pm his daughter came home and made a report to him. He went to the Port Maria Hospital. He saw Jowayne in bed. Jowayne did not speak to him.

The following day Mr. Jankine came to see him and admitted to him that he was driving his car along Stennett Street when he heard a bump on his car. He did not see what caused the sound. He thought that he had hit a dog or run over a card board box so he continued until the people told him to stop.

### **In Cross-examination**

He testifies that he did not see the accident. He knows that church commences at 8:00 o'clock and keeps until 11 o'clock. Cameta came home at something to 7.

He saw Mr. Jankine at the hospital the night and the following day he saw him at his mother's premises at Frontier.

Mr. Jankine told him of the accident whilst at the hospital and wrote down the car registration number and gave it to him. He did not tell him of the licence plate.

He saw no injuries on his daughter and she complained of none.

Exhibit 2"a" and 2"b" are reports of Consultant Psychiatrist Doctor Ottey dated January 31, 2005 and February 24, 2005 respectively.

Retired Consultant Neurosurgeon **Dr. John Allwood McCardy** (now of blessed memory) testifies that whilst at the Bustamante Hospital he examined Jowayne Clarke and on August 14, 2000 he issued a report. He states that young Clarke was seen on July 20, 1999 and on examination on admission when seen by him he gave the nature and extent of the injuries as follows:

1. Brachial plexus injury on the right side with inability to move his right upper limb.
2. Shortening and fracture of his left humerus – left arm (confirmed by x-ray).
3. Fracture of both clavicles
4. Sutured laceration 5cm long of left parietal scalp

5. Sutured laceration 2cm long in the pre-auricular region –[in the region of the left ear].
6. Multiple large abrasions of right shoulder, right forearm, left chest and left foot.

The x-ray of the scalp showed no fracture. A Cat scan done at the time showed no abnormality. An MRI showed that the nerve root from the lower thoracic and upper cervical at that junction was disrupted, that is where the limb came from. He was unable to move his right upper limb. He sustained head injuries from which he recovered. He was discharged from the hospital on August 6.

Jowayne suffered severe avulsion to his right brachial plexus which is irreversible and results in a useless right upper limb. He estimates his neurological disability, to be about 60% of the whole person.

In cross-examination he testifies that Jowayne was discharged from the hospital not because he was “ok” but because there was nothing further that could be done for him. He noted that Jowayne had a paralyzed right upper limb.

At the time he examined him he was concerned about his mental state. Jowayne’s ability to earn his living would be grossly impaired as he is right handed. As far as he knows his left hand is fully functional.

## **The Defendant's Account**

Mr. Daniel Jankine testifies that on July 20, 1999 at approximately 9:43pm he was driving his lada station wagon traveling at about 20 – 25mph.

He recognized the figure of a small individual suddenly appeared to his right fender. He applied his brakes and swerved to the left. He got out of the car and observed a young boy lying on the road under the center region of the right side of the car. A number of persons were standing on the sidewalk in the immediate vicinity of the accident. He transported the child to the Port Maria hospital where he was examined in the outpatient department and later transferred to the Bustamante Hospital.

This injured child is Jowayne Clarke who suddenly appeared to the right of his vehicle. He was given no other option but to swerve and brake. He could do nothing else to avoid the accident.

He later made a report to the Police Station. No damages were done to the car. No defects found upon examination. He was neither charged nor warned for prosecution in the matter.

**In cross-examination** he testifies that it took him about 4 minutes after he picked up the child to get to the hospital which is 1 mile away.

He denied that the accident occurred at about 8:00 o'clock.

He denied that he was driving on the sidewalk but maintained that he was driving on the left hand side of the road going into Town.



The road at the point of the accident is about 14 feet wide but he is not sure. His vehicle was about 5 feet wide.

He agreed that on the other side of the road is Juici-beef. There is a gutter and a sidewalk above the gutter. To get on the sidewalk one would have to step up. He is saying that that is the side that Jowayne was on.

He saw a small individual at the right fender of the car. He was about 1 – 1 ½ feet from the car. At that time he hit the brake. He swerved when he held the brake. He made this swerve by turning the steering wheel at the same time. This maneuver took him to the soft shoulder on the left side.

The left hand front wheel on the soft shoulder and the other parts of the car on the road. When he saw the individual he was not walking or standing maybe he was running. The distance from where he saw the individual to where he retrieved him from under the car is about 5-6 feet.

When he saw the individual and he got hit he knew he was under the car.

From the moment he got hit he was under the car. The accident occurred at a place on the road where there is a little bend which one can see around. Lights were on the road. Maybe the crowd could have seen the accident.

He denied driving a distance of 80 feet with the child under the car. The child was sideways under the car. He denied that members of the public on the sidewalk ran him down to tell him that child was under the car.

People refused to help saying that the child was dead.

He denied driving over onto the right hand side where the people were.

He denied that the right side of the vehicle mounted a portion of the rising where the people were. He denied that after hitting Jowayne he swerved to the left.

He mentioned that he was on his correct side of the road and denied that he thought that he had hit a dog.

### **In Re-examination**

He testifies that there was no light where the accident occurred.

After the accident the car was still positioned on the left hand side of the road more to the left.

### **The main issues I find to be determined are:-**

1. Whether Jowayne or Mr. Jankine were negligent or both.
2. Dependent upon the outcome of the above issue, the question of damages.

### **The Inconsistencies and Discrepancies on the Evidence**

On Cameta Clarke's evidence I find the following inconsistencies

She testified that there was light on the road. She then said that it was dark.

In examination-in-chief she testified that the other persons standing on the soft shoulder chased the driver of the car. In cross-examination she

testified that only her brother and herself were standing on the soft shoulder. When this contradiction was put to her she testified that what is on the paper (her witness statement) is the truth.

### **On Mr. Anthony Clarke's Testimony**

In examination-in-chief he testified that it was about 9:00pm that his daughter returned. In cross-examination he testified that his daughter came home before 8 o'clock that is after 7 o'clock and reported the accident to him. When his evidence in chief was put to him he said he did not check the time. He then went on to say that his daughter came home something to 7:00pm.

In his examination-in-chief he testified that Mr. Jankine told him about driving his motor vehicle numbered and lettered 3271BX. In cross-examination he testified that he did not tell him of the licence plate. He just told him what had happened. He did not go into details of the car. When his evidence-in-chief was put to him he testified that Mr. Jankine wrote it down on a piece of paper and gave it to him.

Cameta's evidence is that the accident happened at 8pm. She ran home to report. Father's testimony is that she came home about 9pm. He then went on to say it was after 7pm she came home.

### **On Mr. Daniel Jankine's Testimony**

Initially Mr. Jankine testified that he saw a little individual at the right fender of the car suddenly. He then said "not at the fender". I saw the small individual at the front of the right fender." Later he said when he saw the small individual he was not standing. He was not walking or standing maybe he was running.

At first he testified that he swerved and applied the brake at the same time. He then testified that he applied the brake first. He swerved when he held the brake by turning the steering wheel at the same time.

At first he testified that when he stopped the car the left hand front wheel was on the soft shoulder the other parts on the road surface. He then testified that when he applied the brakes the car stopped on the road surface. It stayed there until he pulled the boy from under it.

In examination-in-chief he testified that a number of persons were standing on the sidewalk in the immediate vicinity of accident. In cross examination he denied saying that many persons were on the soft shoulder on the other side of the road at the time of he accident.

When this portion of his testimony was put to him he admitted that it is true that a number of persons were standing on the sidewalk in the immediate vicinity of the accident, at Juici-beef. He then went on to explain that this is not where the accident took place. At first he testified

that he did not go underneath the car as the child was not lying long way underneath the car he was sideways, right in line with the right hand side running board of the car, the middle of the running board. His shoulder was not too far under so he pulled him out slowly. He then went on to say that Jowayne was positioned under the right hand side of the vehicle, the middle of the right hand side in the middle of the road.

In cross-examination he testified that where the accident occurred lights were on the street. In re-examination he testified that there was no light where the accident occurred.

**Submissions on behalf of the Claimant (in relation to the Facts)**

Learned counsel for the Claimant Mr. Norman Samuels, after outlining the evidence on both sides, in essence submits that the evidence of the defendant in relation to how he maneuvered his motor vehicle; braking and swerving left then right again must be considered upon the evidence that there was a concrete wall about 3 feet high at the left of the road at that point. The width of the road was 20 feet giving the Defendant a maneuverable space of 10 feet.

The Defendant's evidence of him alone getting the child from under the car seems incredible to believe.

The Defendant does not admit that the child was dragged some considerable distance or at all but the injuries to the child defies this. The

callousness of the crowd he submits could only be attributed to what they actually saw that the little child was hit down and then being dragged along under the car for such a long distance and they had come to the firm conclusion that the child must have died in the circumstances.

**Submission on behalf of the Defendant**

In relation to the facts learned counsel for the Defendant Miss Stacia Pinnock submits that it is the Defendant's position that the Claimant at the time of the accident was not standing on the sidewalk but rather was at the time of the accident running or attempting to run across the road when the collision occurred. Therefore the Defendant denies liability to the Claimant's claim.

A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users ---whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations.

It is a question of fact in each case whether or not the driver had observed the above-stated standard of care required by him. The standard of care required by a driver to a child is greater than that owed to an adult. On the other hand a lower standard of care for its own safety is expected of a

child. The child only has to attain the standard of care expected of a child of his or her age.

There are numerous authorities that speak to young children aged six and older being contributory negligent or completely negligent.

Cases Referred to:

**Moore vs Poyser 1975 RTR 127**

**Davies vs Journeaux 1975 3 Lloyd's Law Report 483**

**James vs Fairley 2002 AER 298**

She urged the court to accept the Defendant's version of the accident that the accident happened on the left side of the road and not on the soft shoulder or the sidewalk. It is more plausible that the Claimant attempted to run or ran into the path of the Defendant's vehicle causing the Defendant very little opportunity to avoid the collision.

The evidence of the witnesses for the Claimant have been very inconsistent and as such they ought not to be considered honest and reliable witnesses.

The Claimant ought to be held to be negligent and thus contributed materially to the occurrence of the accident.

**The Areas that are not in Issue**

1. That on the evening of July 20, 1999 Jowayne Clarke was seriously injured in a motor vehicle accident on Stennett Street, Port Maria, St. Mary.

2. That Mr. Daniel Jankine is the owner and operator of the motor vehicle involved in the accident.
3. That Jowayne was hospitalized for a period of time.

### **The Areas in Issue**

1. On which side of the road did the accident occur?
2. Was Jowayne or Mr. Jankine negligent or both?

### **The Findings of Fact**

I have listened carefully to the evidence on both sides. I have analyzed this case on the basis of the allegations and I have done so with care.

I find as a fact that it is more probable that on the evening of July 20, 1999 Mr. Jankine was traveling on his left side of Stennett Street proceeding towards Port Maria when the collision occurred.

I find as a fact that that accident occurred on the left hand side of the road traveling in the direction of Port Maria, that is on the side of the road on which Mr. Jankine was traveling. It means therefore that I reject the contention of the Claimant's witness Miss Cameta Clarke that the Defendant drove on the right hand side of the road went on the soft shoulder or sidewalk collided with young Jowayne and then drove back to the road surface dragging him along. It follows therefore that I reject her evidence in this respect.



I accept Mr. Jankine's evidence when he testified that on the side of the road where Jowayne was standing, in the area of Juici-beef that side of the road has a gutter and a sidewalk above the gutter and that in order to get to the sidewalk one would have to step up. This to my mind lends support to Miss Pinnock's submission that it would have been virtually impossible for the Defendant to leave the left side of the road, cutting across the roadway of traffic coming in the opposite direction, thereby reaching the right soft shoulder/sidewalk and colliding into the Claimant only.

I find it difficult to appreciate that whilst a group of people were standing on the sidewalk including Jowayne and his sister Cameta and this is on the Claimant's case, Mr. Jankine's car went on to the sidewalk injuring Jowayne and Jowayne alone. It is not denied that the group was standing on an elevated area of the sidewalk.

I accept Mr. Jankine's evidence when he testified that he saw a small individual at the right fender of the car. He was about 1-1 ½ feet from the fender and that is when he hit the brake. I find it more probably that after the collision the child was dragged a distance of 5-6 feet and prefer his evidence in this respect to that of Cameta who proposed a distance of 80 feet.

On a preponderance of probability it seems to me that what transpired that evening is that Jowayne was standing on the right hand side of the road heading in the direction of Port Maria when he separated from the group, went across the road colliding in the right side of Mr. Jankine's car.

Jowayne as Dr. McCardy indicated sustained injuries to the right side, fracture to his left arm and fracture to both clavicle. He had laceration to the left parietal scalp, lacerations in the region of the left ears, multiple large abrasions of right shoulder, right forearm, left chest, and left foot. The evidence is that after the impact Jowayne was dragged some distance by the car.

It is difficult to ascertain the injuries sustained as a result of the impact as distinct from those sustained whilst he was being dragged but it is significant to note that there were more injuries to the left of his body bearing in mind that as he crossed the road his left side would be more likely to be to the right of the car.

On Mr. Jankine's evidence which I accept, he would have had very little time to see Jowayne before the impact and this prevented him from taking steps to avoid the collision entirely.

Based on the evidence on both sides, although there were lights on the street, at the point of impact it was not well lit. Cameta said there was

light, it was dark. Mr. Jankine said at the point of impact it was not well lit.

I appreciate that there are inconsistencies on both sides but I find Mr. Jankine's account more plausible. In the circumstances I cannot say that Mr. Jankine should be held negligent in this case as there is no basis for finding negligence on his part. I do not find that there is any evidence of negligence or contributory negligence on Mr. Jankine's part as based on the evidence the collision that occurred could not in my opinion, have been avoided by any prudent motorist taking all reasonable precaution in the circumstances with which Mr. Jankine was presented.

### **The Relevant Law**

Charlesworth and Percy on Negligence 9<sup>th</sup> Edition page 3

In current forensic speech negligence has three meanings. They are:

1. a state of mind in which it is opposed to intention, 2. careless conduct and 3. the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings.

### **The Application of the Law to the Findings of Fact**

In **Cheryl Sirjue (bnf Adlin Sirjue) vs Attorney General and Derrick Masters**; suit # C.L. S 122 of 1984 (unreported) Bingham J, propounds:  
---on the facts I have found there is in my opinion no special duty of care owed to an infant plaintiff whose

presence the Defendant up to the time of collision is totally unaware and therefore placed in a position where he could have had her in his contemplation at the material time, that is prior and up to the time that collision took place. Such a special duty of care would only arise if the Defendant driver had been afforded on the fact the opportunity of seeing the plaintiff before she set out on her journey to cross the road. This fact would then have afforded him sufficient time and opportunity to pay due regard to the plaintiff's presence and her situation to have taken such reasonable step to guard against any abnormal behaviour such as that to which children of that age are accustomed such as dashing suddenly across roads without first looking out for on coming traffic or playing on or near an highway as the decided cases have made reference to.

I have found that Mr. Jankine should not be held negligent as there is no basis for finding negligence or contributory negligence.

Jowayne is now 19 years. The accident occurred when he was about 8 years old. I know that the injuries he sustained will affect him and his family for the rest of their lives and to echo the words of Ward L.J. in

**James vs Fairley at page 298**

“---and certainly if sympathy was the basis of compensation I would have no hesitation at all in awarding her damages.”

Unfortunate though the injuries and suffering which has been Jowayne's lot, I find no culpability on the part of Mr. Jankine therefore I cannot order compensation. Hence its judgment for the Defendant.

**Order**

Judgment for the Defendant and costs to the agreed or taxed.

