JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 49/90

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	KETESHA CLARKE (by next friend Errol Clarke)	APPELLANT
AND	PATRICK HUGHES THE JAMAICA PUBLIC SERVICE COMPANY LTD	RESPONDENTS

B.J. Scott Q.C. & Norman Harrison for Appellant

Gordon Robinson & David Henry for Respondents

July 15, 16 & 22, 1991

CAREY, P. (AG.)

This was an appeal against an assessment of damages by Langrin J, in the Supreme Court on 9th May 1990 whereby he awarded the infant plaintiff $30,000.00 as general damages and further, against his refusal to allow an amendment to the statement of claim in order to include the psychiatric consequences of the injury suffered by the plaintiff.

The statement of claim particularized the injuries suffered as follows:

"1. Abrasions to the right side of the face and lips.

2. Haematoma to the right side of the forehead.

3. Multiple abrasions to both hands and feet.

4. Abrasions to right eyelids.

"5. Right subconjunctival haemorrhage.

6. Scar measuring four (4) by three (3) centimetres anterior to the hair line.

7. Damages to the optic nerves."

At some time before the date of assessment, the plaintiff's attorney-at-law furnished the defendant's legal representatives with copies of medical reports by Dr. Randolph Cheeks, Consultant Neurosurgeon and Dr. Aggrey B. Irons who is a consultant psychiatrist. The latter's reports were in the following terms:

" December 8, 1988

TO WHOM IT MAY CONCERN
re: Ketisha Clarke, age: 10 years

This serves to certify that Ketisha Clarke was examined by me on the 7th December, 1988, for complaints related to a motor vehicle accident on 13th January, 1988. She complains of poor memory and feelings of nervousness. Her parents and teacher reported that she is fearful and anxious, very agitated and is not performing as well in school as she used to, prior to the accident.

On examination I found her to be suffering from mild motor incordination manifested by difficulty in the drawing and writing tests.

She suffers from slight swelling of the face below the eyes, but shows no evidence of paralysis or gross movement disorder. She also has poor short-term and long-term memory, but is otherwise grossly normal.

There are however, unresolving areas for which I have requested the following:

(1) that she return to Dr. ManGue Chin for further eye testings;

(2) that a report be written by her teacher, and

(3) I have ordered a EEG to be done at the University Hospital as soon as possible to determine any disorder in brain activity that might precipitate any further illness.

"Based on my preliminary findings I estimated that she has sustained a 20% deficit in her overall cognitive functions. However, I expect this deficit to improve over the next five years or so."

"

May 31st, 1989.

TO WHOM IT MAY CONCERN
RE: Ketesha Clarke

This serves to certify that I have completed my assessment of Ketesha Clarke based on a series of mental status examinations and a review of findings of her other doctors. She does indeed suffer from a post traumatic depression which has improved markedly over time. Her disability in this area would be estimated at approximately 15%. More importantly however, she also shows evidence of a post traumatic learning problem.

Her ability to acquire new information since the accident has been impaired by approximately 25%. It is my reasonable opinion that her overall psychiatric disability is somewhere in the region of 20%.

It is very difficult to offer a concrete prognosis, but similar cases have shown marginal improvement depending on the degree of interest and rehabilitation. She is very keen and I expect her not to become worse over time."

The defendants paid into court an amount of $35,000.00 a fact which, of course, would not be communicated to the trial judge.

At the hearing, Dr. Irons gave evidence on behalf of the plaintiff without objection, and was cross-examined. During the final addresses, Mr. Scott Q.C. applied for an amendment to bring the statement of claim in line with the evidence. This was refused. In his reasons, which were helpfully recorded at the end of his notes of evidence the judge, notes as follows:

> "I refused an application to amend the particulars of injuries to include brain injury at the state of proceedings when addresses were taking place. I placed great reliance on the findings of the Consultant Neuro Surgeon who had seen the plaintiff on the day of accident."

We are at a loss to understand the reasons which persuaded the judge to that decision, especially as he had allowed evidence to be adduced, which in the state of the pleadings, would be inadmissible as irrelevant. The reason expressed is plainly without foundation. Section 259 Civil Procedure Code ordains:

> "259. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

We would have thought that having allowed in this additional evidence, which related to findings of a psychiatrist who had examined the injured plaintiff nearer the date of hearing, the judge would have gone on to consider its effect on the damages he was called upon to assess. Support for this approach can be had from a decision of the English Court of Appeal in **Domsalla and Another v. Barr (Trading as A.B. Construction) and Others** [1969] 3 All E.R. at 487. In that case, as in the instant case, evidence was led as to facts not pleaded, without objection.

Edmund Davies L.J. (as he then was) at page 493 said thus:

> "By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleading, and objection might properly have been taken to the leading of such evidence.

> "The objection, however, was not made, and accordingly it is not right, in my judgment, for this court to say now it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves the court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation."

Widgery L.J. at page 495 to the like effect said:

> "If in this case the plaintiff desired to make one of the planks of his claim the proposition that he had hoped to make money as the owner of a steel-erecting business, it was vital, in my judgment, that that matter should have appeared in the pleading, so that the defendants could be apprised that this important factor would appear at the trial. That was not done. Had there been objection to the evidence relating to the plaintiff's future prospects it might well have been that that objection should have been sustained. I agree with Edmund Davies L.J. that in the circumstances of this case, and having regard to the fact that there was no objection, it is right for us to consider such evidence as there was. ...".

We think this is persuasive authority which we should adopt.

Mr. Gordon Robinson however contended that this Court was not entitled to interfere, if the judge had indeed considered the further evidence and concluded that it could not influence the award of damages.

It seems to us that the statement in the note of his reasons for judgment - "I placed great reliance on the findings of the Consultant Neurosurgeon who had seen the plaintiff on the day of accident" causes us some disquiet. We are not entirely satisfied that this evidence was put into the scales and weighed. If it were, then the learned judge misapprehended its significance. This Court is entitled in those circumstances to interfere with findings of fact. It is our clear duty carefully to assess that evidence ourselves having regard to what occurred at the hearing.

We cannot accept the arguments of Mr. Gordon Robinson that the evidence of Dr. Irons was inconsistent with the evidence of Dr. Cheeks who had examined the plaintiff shortly after admission on the day of the accident. So far as relevant, he found the injuries stated in the particulars of claim. He stated in his report as well:

> "I saw her for follow up on 3rd February 1988 and found her to be neurologically well and free from symptoms. I detected no sign of mental status change, no evidence of personality change or loss of intellect and nothing to suggest that brain damage had occured. She does have a scar measuring four by three centimetres which is anterior to the hair line and constiiutes a cosmetic defect."

When the plaintiff was taken to Dr. Irons, it was i relation to the accident in which she had suffered physical injuries. This is made quite clear in both his reports. Accordingly there is no foundation for the argument that the plaintiff could have received some further injury subsequent to her examination by Dr. Cheeks. That suggestion was never put to Dr. Irons in any shape or form. Nor can we agree that Dr. Irons' evidence is inconsistent with Dr. Cheeks' report because the former had said in evidence at page 11 "I found signs of brain damage"and the latter had stated at page 15:

> "... I detected no sign of mental status change, no evidence of personality change or loss of intellect and nothing to suggest that brain damage had occured."

It seems to us that Dr. Cheeks could only be understood as saying that at time of his examination he saw no signs from which he could conclude that there had been brain damage. Necessarily and obviously, "mental status change, personality change, or loss of intellect" are all indicia of brain damage but they are not exhaustive of relevant or appropriate indicia. When Dr. Irons

gave evidence - he stated not just that he found brain damage - but that "I found a deficit in terms of memory - which is an indication of post-traumatic injury."

We understood from Dr. Irons' reports that there was some defect of her pychological functions (20%) which would not worsen and within 3-5 years would improve to the extent of 5% - 10% of normal. We consider, in the light of that evaluation, an additional figure of $30,000.00 as reasonable in the circumstances.

For these reasons, we varied the award in the Court below to that extent. We made no order as to the costs of appeal because we were of opinion that counsel for the appellant ought to have applied for the amendment at a time much earlier than he had, in fact, applied. We however affirmed the order in the Court below as to costs.