

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. 1996/G-172

BETWEEN	KADIEN GARWOOD (An infant by her next friend and mother MARGARET GARWOOD)	1 st CLAIMANT
A N D	MARGARET GARWOOD	2 nd CLAIMANT
A N D	OSMOND SMITH	1 st DEFENDANT
A N D	OLIVE SMITH	2 nd DEFENDANT

Herbert Hamilton and Dorothy Lighbourne for Claimants.

David Johnson for Defendants instructed by McGlashan, Robinson and Company.

Heard: January 21, 22, 23, 24, 2002, July 22, 24, 2002, October 28, 2002 and July 27, 2005.

Rattray, J.

On the afternoon of October 3rd, 1990, Kadien Garwood, then aged 6 years old was on her way home from the Dunrobin Primary School. She came off the bus at the bus stop in the vicinity of Brooks Level Road along the Golden Spring main road in the parish of St. Andrew, alighting from the rear door of the bus.

At the time she lived, and still lives at the Golden Meadows Housing Scheme, which is off the Brooks Level Road. The bus stop

at which she alighted is on the opposite side of the road to the Brooks Level Road and she would have had to cross the Golden Spring main road to get to her home.

After stepping from the rear door of the bus, she looked to her right towards the Stony Hill direction from which the bus was travelling and saw no vehicle approaching from that direction. As the bus was still stationary and her view of the Golden Spring direction which was to her left, obstructed, Kadien Garwood's evidence is that she stepped out a little from behind the bus to see if there was any oncoming traffic from the Golden Spring direction.

In looking to her left past the bus, she described there being a blind corner and says she saw no vehicle approaching, neither from the Golden Spring nor Stony Hill directions. She therefore proceeded to walk across the road. That was her last recollection until she awoke sometime later in the University Hospital of the West Indies having sustained severe personal injuries.

These injuries were set out in the Statement of Claim filed on her behalf as follows:-

- (a) Diffuse head injury with loss of consciousness (concussion) and bruising with swelling around the right eye.
- (b) On examination about one hour after the accident, there was depressed consciousness, with response to painful stimuli, but not answering to her name.
- (c) Right peri-orbital contusion.
- (d) Closed mid-shaft fracture to the left femur.

No other witness was called on behalf of Kadien Garwood to testify as to how the accident occurred. However her mother, Margaret Garwood gave evidence that as a result of information she received on the day of the accident, she went on what must have been an agonizing search for her daughter at several hospitals, finally locating her at the Emergency Department of the University Hospital. From what she could observe, her daughter's right eye and left thigh were swollen and she lay in a position as if she were sleeping. The first time Margaret Garwood saw her daughter awake was the following morning when she visited her in the hospital.

Margaret Garwood testified that her daughter remained in hospital from the date of the accident, October 3, 1990, until she was discharged on the 1st November, 1990. Thereafter she returned for follow up treatment and also subsequently saw Doctors Ali and

Cheeks as a result of her injuries. Mrs. Garwood further testified that on the morning following the accident at the Stony Hill Police Station, she saw and spoke with Osmond Smith, the driver of the vehicle which collided with her daughter. She stated that he told her that he was rushing to the airport and did not see Kadien Garwood.

She gave evidence that due to the injuries suffered by her daughter as a result of the accident, she was unable to return to school until January, 1991. She fell behind with her school work and started having terrible headaches and seizures, the latter condition requiring medication for the rest of her life.

The case for Osmond and Olive Smith, the Defendants in this action as outlined in their Defence is a denial of negligence. They also allege that Kadien Garwood was the author of her own misfortune, by suddenly running out into the road from behind a parked bus and into the path of the motor vehicle driven Osmond Smith, at a time when it was unsafe to do so.

As a consequence of an application granted at the start of this trial, the Defendants amended their Defence to deny that on the date the accident occurred, Osmond Smith was the servant or agent of Olive Smith, which allegation had, up to that time been admitted.

In giving his evidence in this matter, Osmond Smith testified that at the material time, he was the registered owner of motor

vehicle licensed number CC 621 K. He further testified that his wife Olive Smith had nothing to do with the said motor vehicle and on the day in question had no interest in the said motor vehicle nor any involvement with the journey to the airport, as she was not in the island at the time.

Osmond Smith gave evidence that he was driving his Chevy 20 left hand drive van at about 2 – 3pm that afternoon coming from Portland and travelling towards Kingston. He was going to the airport to meet a flight arriving at 5:30 pm. There were five (5) other passengers in the motor vehicle with him. Uriah Moxon was seated in the right front seat, while the others, Daniel Fuller, Willel Fuller, Mrs. Harris and another lady who he was giving a ride into town were all seated in the back. The purpose of the journey was to pick up Mr. Fuller's daughter from the airport.

Osmond Smith stated that the Golden Spring main road was a road with which he was familiar as he sometimes travelled that route three (3) times per week. He further stated that as he drove from the Golden Spring direction towards Stony Hill, there is a deep left hand corner. As he drove through and came out of the corner the road "takes an ascent" towards Stony Hill and is straight.

Mr. Smith described seeing a bus parked on the opposite side of the road facing the Golden Spring direction. He was aware of

there being bus stops on both sides of the road almost opposite to each other. He was also aware of the Brooks Level Road which was on his left hand side of the road where it comes out to the main road.

As he proceeded along the main road going towards the Stony Hill direction, Mr. Smith's evidence is that when he reached near to the back of the bus, he saw a little girl run from behind the back of the bus straight into the fender of the van he was driving and then fall into the road. His evidence further is that he did not see her before she ran out into the road, nor did he know that she was behind the bus. He reduced his speed when he saw her but not enough to prevent her from running into the van.

After the accident, Osmond Smith says he stopped as quickly as he could, picked up the little girl, placed her in the lap of one of the ladies in his van and rushed her to the University Hospital of the West Indies, which was the nearest hospital of which he was aware. Later that day, he went to the Stony Hill Police Station where he reported the accident. The following day on returning to the said Police Station, he was introduced to the parents of Kadien Garwood. He stated that he spoke to them and told Mrs. Garwood that the accident took place as he was going to the airport, when the little girl ran

across the road. However, he denied that he ever told her that he was rushing to the airport.

Uriah Moxon gave evidence on behalf of the Smiths. He was the passenger in the right front seat of the Chevy van driven by Osmond Smith on that day. He testified that immediately before the accident Mr. Smith, whom he had known for over 15 years was driving at about 30 – 35 kph. They were travelling from Portland going towards Kingston when on approaching an area which he described as “Grant’s Level”, Mr. Moxon saw a bus parked on the right hand side of the road with its front pointed towards the Portland direction.

Mr. Moxon further testified that as Osmond Smith reached the side of the parked bus going in the opposite direction, he suddenly came to a stop. Mr. Moxon’s evidence is that when he looked, he saw a little girl lying in the road before Mr. Smith’s van. The first time he saw this girl was when the accident happened. At the point where the collision occurred, the front part of the van had passed the back of the bus.

In describing the area in the vicinity of the accident, Mr. Moxon stated that where the accident occurred there was a straight stretch of road. However, before that straight stretch of road coming from

the direction in which he was travelling, you had to come around a turn, which in answer to the Court he identified as a right turn. He further stated that the road was straight for about 80 or so yards before the accident. That was the extent of the oral evidence given in this matter as to the accident.

The obligation lies squarely on the Claimants to prove the case they have raised against the Smiths, on the balance of probabilities, if they are to obtain a Judgment in their favour. With respect to the issue of liability, that burden is two fold.

First they must lead sufficient evidence to satisfy this Court that the injuries sustained and losses incurred were brought about by the negligent driving of Osmond Smith. After clearing that hurdle, the Garwoods must also show that on the day this unfortunate incident took place, Osmond Smith was acting as servant or agent of his wife Olive Smith.

The only viva voce evidence as to the details of this accident came from Osmond Smith and his witness. This Court must however in considering the issue of liability, weigh all the evidence and examine whether there are any conflicts of material importance in the testimony given, as well as assess the demeanour of the witnesses in order to arrive at a reasoned determination of this matter.

On the pleadings in this case, even after the late amendment to their Defence, it is admitted that Olive Smith was the registered owner of the motor vehicle driven by her husband on the day in question. In his evidence in chief however, Osmond Smith testified that he was the registered owner of said vehicle and that his wife had nothing to do with that motor vehicle. This position changed when on being asked under cross-examination whether the registration of the Chevy van was in his name alone at the tax office or his wife's, he replied that the vehicle was registered and insured in his wife's name.

Initially Mr. Smith denied that the Insurance on the said vehicle restricted the permitted drivers to his wife and himself. On being shown the Certificate of Insurance, with their names noted as the persons entitled to drive the vehicle, Mr. Smith then explained that although his wife can drive, she has never driven in Jamaica.

In reviewing Osmond Smith's account of the accident, it is to be noted that he testified that Kadien Garwood ran from behind the back of the bus into the fender of the van he was driving and then fell into the road. It is not beyond the realm of normal expectation, on this evidence, for one to assume that the child collided with the right front section of the van driven by Osmond Smith. But Mr. Smith's own evidence proved this not to be so. In answer to a question by the

Court, he stated that the point of impact to his vehicle was to its left hand front fender. Under cross-examination, Mr. Smith also stated that Kadien Garwood fell to the left side of his van on his side of the road. Although not mentioned in his earlier testimony, Osmond Smith under cross-examination gave evidence that he swerved when the little girl ran across the road, to his right. No evidence of such a manoeuvre was given by the witness Uriah Moxon, who was of little assistance to the Court as to how the accident occurred, as he only saw Kadien Garwood after the collision.

Whilst it is to be expected that evidence presented on behalf of a Claimant is likely to and would normally conflict with that given on a Defendant's behalf, in the present case not only were such conflicts evident, but there also conflicts between the evidence of Osmond Smith and his own witness Uriah Moxon.

Osmond Smith testified that he proceeded around a left hand corner before coming to the straight stretch of road where the accident happened. Uriah Moxon stated that it was a right hand corner that was negotiated before the impact. At the invitation of Counsel, this Court visited the locus in quo and observed that from the direction that Osmond Smith had been travelling, he would have

had to negotiate a right hand corner before coming to the area where Kadien Garwood was hit down.

Osmond Smith also gave evidence that the distance from that corner to the scene of the accident was about 11/2 chains or 99 feet. Uriah Moxon on the other hand testified that the straight stretch of road between between the corner and the point of collision measured approximately 80 yards or 240 feet. Corroboration of Mr. Moxon's evidence is to be found in the testimony of Margaret Garwood, who stated that the distance between the bus stop and the corner was 220 feet, which distance she had checked with her tape measure.

After careful consideration and a close perusal of the evidence, I am satisfied on the balance of probabilities on the material before this Court that the accident was caused by the negligent way in which Osmond Smith was driving his motor vehicle that day and I so find. I do not believe Osmond Smith to be a credible witness and I am therefore not prepared to accept that the accident occurred in the manner contended by him. I am satisfied that Miss Garwood and her mother were frank and truthful witnesses. If this accident had taken place as suggested by Mr. Smith in his evidence in chief, the point of impact ought to have been to the right front side of his vehicle. The fact that Kadien Garwood was hit by his left front fender indicates that she had almost crossed the road when she was struck.

If he had been paying attention while driving, he ought to have seen her before he actually did.

I am of the view and I so find that Osmond Smith was not keeping a proper lookout and that he failed to heed or observe the presence of the infant Claimant in sufficient time to avoid the said collision. The area in which the accident happened was one frequently travelled by Osmond Smith. He admitted in his evidence being alerted to the fact that persons may have come off the parked bus and attempt to cross the road. Yet, although he considered it prudent to reduce his speed, Mr. Smith admitted that he did not do so at that time. I find that in driving as he did at that time of day, Osmond Smith failed to have any or any sufficient regard for pedestrians, especially children who may have been crossing the said road.

In the circumstances, I find the First Defendant Osmond Smith responsible for the collision in which Kadien Garwood sustained personal injuries and her mother and herself incurred loss and expense.

With respect to Olive Smith, the Second Defendant and owner of the said motor vehicle, the uncontradicted evidence before this Court is that she was off the island at the material time and that she had no involvement with nor any interest in her husband's journey to

the airport when the little girl was injured. The law on this issue is clear. Where a Claimant to an action for negligence satisfies the Court that she has suffered injury or loss caused by the Defendant's vehicle, the fact of ownership of the vehicle by itself is prima facie evidence that the vehicle was being driven at the material time by the servant or agent of the owner; see Gilbert Kodilinye, Commonwealth Caribbean Tort Law, page 439. This presumption arises where there is no evidence as to the relationship between the owner and the driver at the material time, but it is a rebuttable presumption.

I am satisfied on the unchallenged evidence of Osmond Smith that he was not acting as servant or agent for his wife, the owner of the motor vehicle at the material time. As such the cloak of liability cannot rest on her shoulders in this matter. There will therefore be Judgment for the Claimants against the First Defendant.

The claim for Special Damages on behalf of Margaret Garwood is set out in some detail on two full pages of the Statement of Claim. The obligation on the Claimants is to specifically identify the terms of loss and lead evidence to prove that such loss has been incurred. As this Court is a Court of pleading, only such loss as has been pleaded and proved is recoverable.

The costs of the following items as indicated by the sums relating thereto are recoverable in light of the evidence both oral and documentary which was presented by Margaret Garwood. In a few instances receipts were tendered reflecting sums in excess of the amounts claimed. As no amendment was applied for, this Court can only award the amounts pleaded, once satisfied that the expense was incurred.

(1)	Cost of X-Rays	\$ 405.00
(2)	Neurological Consultation Dr. Cheeks	\$1,000.00
(3)	Medical report – Dr. Cheeks	\$3,000.00
(4)	Consultation – Dr. Ali	\$ 320.00
(5)	Medical Report – Dr. Ali	\$ 220.00
(6)	Doctor's Fee	\$ 100.00
(7)	Cost of Medication	\$ 5,565.56
(8)	Cost of first Claimant's Uniform	\$ 120.00
(9)	Cost of first Claimant's School Bag	\$ 150.00
(10)	Underwear	\$ 30.00
(11)	Nightgowns	\$ 240.00
(12)	Towel	\$ 120.00
(13)	Wash Rags	\$ 80.00
(14)	Transportation by Taxi	\$ 1,848.00
(15)	Cost of Petrol	\$ 400.00

(16) Lost of Earnings – Margaret Garwood	\$ 4,000.00
(17) Food & Nourishment	\$ 1,500.00
(18) Medical Report – University Hospital	\$ 220.00
(19) Registration Fee	\$ 200.00
(20) X-Ray Fee	<u>\$ 30.00</u>
	\$19,628.56

Special Damages are therefore awarded in the sum of Nineteen Thousand Six Hundred and Twenty-eight Dollars and Fifty-six Cents (\$19,628.00.)

The injuries suffered by Kadien Garwood as a result of the accident were of life a changing nature. She was hospitalized for a thirty (30) day period and placed in a hip spica from October 31, 1990 to November 30, 1990, with respect to the mid-shaft fracture to her left femur. After being discharged from the hospital, she had to seek further medical treatment from Dr. Emran Ali, Consultant Orthopaedic Surgeon and Dr. Randolph Cheeks, Consultant Neurosurgeon.

The medical report of Dr. Ali which was tendered in evidence revealed a solid fracture of the femur and her left lower limb being 1.5cm. shorter than the right. This report indicated that X-Rays showed a well healed fracture at the junction of the upper and middle third of the femur with slight angulation at the fracture site. Kadien

Garwood walks with an obvious limp and suffers a permanent partial disability of ten percent (10%) of the function of her left lower limb.

Dr. Cheeks' report, which was also tendered in evidence as an exhibit in this case spoke to Miss Garwood suffering diffuse head injury, moderate concussion which delayed-onset post traumatic epilepsy. He prescribed anti-convulsant medication which she must take indefinitely with periodic assessment of blood and anti-convulsant levels and EEG's.

Miss Garwood gave evidence that since the accident, she has been experiencing minor and major headaches, suffering seizures and feeling pain occasionally in her left leg at the point where it was broken. She also feels pain in the leg when standing for too long, and when walking, she notices herself limping because of the shorter left leg.

Since the accident, Miss Garwood complains of headaches often, particularly when she studies, but on occasions, they just come on. She has also been having seizures which cause her to become unconscious and when she comes to, she experiences terrible headaches. She gave evidence of four (4) instances that she could recall when she suffered seizures since the accident. As a consequence of these seizures, she has been placed on medication – Dilantin capsules, which she has to take for the rest of her life.

The injuries suffered in the accident have affected Kadien Garwood's life to the extent that she is sometimes afraid to travel by herself, as she does not know when she will have another seizure. As such, she always has to have someone with her. In the event that she has to travel alone, arrangements have to be made for someone to meet her at her destination. She is conscious of her limp and the shortening of her leg when other persons notice it. Although interested in basketball and volleyball, Miss Garwood stated that she does not take part as she is afraid that by jumping or playing those games, she would land too hard on her feet which may cause a problem with her leg.

Cases were cited by Counsel for the respective parties in an attempt to assist the Court in arriving at reasonable compensation for General Damages in this matter. Miss Lightbourne referred to the cases of **Judith Schrouder (b.n.f. Monica Schrouder) and Monica Schrouder vs Walden Walters, Carl Richard Archie (b.n.f. Carl Williams Archie) vs International Rentals and Leroy Kennedy and Oliver Richards (an infant b.n.f. Icylin Richards) vs Derrick Stewart and Jukie Chin.** I find that the injuries mentioned in those cases were far more serious than those suffered by Kadien Garwood and the periods of hospitalization more lengthy. As such, awards made in those cases would be of little assistance to this Court.

Mr. Johnson on the other hand referred to the case of The Attorney General and Woman Sgt. Sylvia Colphon vs Calbert Smith where the injuries sustained were less serious than those suffered by Kadien Garwood and the award lay at the other end of the spectrum. Both sets of cases have however delineated a range, expansive though it may be, from which the Court, in the circumstances of the present case can assess compensation.

I am also guided by the case of Carlton Parkins vs Tennyson Taylor & Others at page 75 of Volume 4 of Mrs. Khan's Book on Damages. There the Plaintiff suffered a compound fracture of the right femur, 1 inch shortening of the right lower limb and 10% permanent partial disability of the right lower limb among other injuries. The sum awarded for Pain and Suffering and Loss of Amenities at today's rate amounts to approximately \$1,300,000.00. I refer to this case being fully aware that Miss Garwood's injuries were more severe and that any amount for compensation under this heading of damages would have to be increased.

Bearing that in mind, I am of the view that a reasonable sum as compensation for Pain and Suffering and Loss of Amenities is \$2,000,000.00.

I am also satisfied that based on the medical evidence from Dr. Cheeks as to the negative impacts that epilepsy can have on a

patient's life, Miss Garwood's testimony of having four epileptic seizures since the accident and Dr. Cheeks' assessment of this condition causing a permanent partial disability of fifteen percent (15%) of the whole person, there appears to be a real likelihood of the risk of future epileptic attacks. I therefore award the sum of \$250,000.00 as compensation in that regard.

On the claim for damages for Loss of Earning Capacity, I find myself in agreement with Counsel, Mr. Johnson where he submitted that there was no evidence before this Court to indicate that Miss Garwood's desire to pursue a career in the Accounting field would be affected by her injuries suffered in this accident. However the possibility of Miss Garwood suffering epileptic attacks in the future cannot be ignored. This Court has to assess her reduced eligibility for employment or the risk of future financial loss due to the injuries sustained in this accident. In those circumstances, I am of the view that she is entitled to compensation under this head of damages. I therefore award the sum of \$200,000.00 for Loss of Earning Capacity.

There will therefore be Judgment for the Claimants against the First Defendant, Osmond Smith in the sum of \$2,469,628.56 being made up as follows;

Special Damages	\$ 19,628.56
General Damages	
Pain and Suffering	
& Loss of Amenities	\$2,000,000.00
Epilepsy	\$ 250,000.00
Loss of Earning Capacity	<u>\$ 200,000.00</u>
	\$2,469,628.56

Interest is awarded on the Special Damages of \$19,628.56 at the rate of three percent (3%) per annum from the 3rd October, 1990 to 14th July, 1999. Thereafter interest on the said sum at the rate of six percent (6%) per annum from 15th July, 1999 to the date hereof.

Interest on General Damages of \$2,000,000.00 at the rate of three percent (3%) per annum from the 8th October, 1996 to 14th July, 1999 and thereafter at rate of six percent (6%) per annum on the said sum from 15th July, 1999 to the date hereof.

Cost to the Claimants against the First Defendant to be taxed if not agreed.