IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT No. C.L.G. 164 of 1977

BETWEEN	DERMOT GOODIN	PLAINTIFF
AND	SEYMOUR WEBLEY	DEFENDANT

C.U. Hines, J. Leo Rhynie and J. Crosbie for Plaintiff

C. Miller and Mrs Earle-Brown for Defendant.

Hearing: September 26, 1979
November 22, 23, 1979
February 11 - 13, 1980
May 19 - 22, 1980

Handed down: 3rd July, 1981

Assessment of Damages

On the 4th day of May, 1976 the plaintiff a twenty-seven (27) year old Medical Practitioner of three (3) years standing set out from Kingston in his 1975 Humber Sceptre motor car to visit his parents in the country. He did not make the journey. At some point on that journey he was involved in an accident with a motor car owned and driven by the defendant. Subsequently he woke up in the University Hospital and consulted the day's paper. The date was either the 29th or 30th May, 1976 as he recalls. The intervening days had passed by without his being aware of any of them. His virtually new car was a write-off and it is contended on his behalf that so far as his medical career is concerned he too is a write-off.

The list of injuries in respect of which damages are to be assessed is rather impressive. As set out in the statement of claim they are:-

1. Bilateral orbital bruising.
2. Right eyelid swollen and occluding the eye.
3. Bleeding from both ears.

4. Inverted L-shaped laceration in the left parietal area of scalp about 1½" X ½" in length.

5. Multiple superficial lacerations with extensive abrasions of right forehead over right eye.

6. Multiple superficial lacerations of the lateral aspect of right upper arm.

7. 4" laceration over extensor surface of right forearm.

8. Multiple small jagged lacerations in same area of forearm.

9. Small superficial lacerations on dorsal surface of right arm.

10. Lacerations of the tip of the ring finger of right hand.

11. Laceration 3" in length on right side of chest beneath the axilla.

12. Right plantar response in limp equivocal.

13. Fracture of frontal bone of skull running into the wall of the frontal air sinus.

14. On neurological examination found to be:-

    a) alert though rather slow;

    b) lightheadedness;

    c) tendency to be mono-syllabic;

    d) post-traumatic amnesia extending for over three weeks;

    e) mild dimunition in power of the right hand;

    f) severe head injury;

    g) residual impairment of speech;

    h) residual impairment of power to small muscles of right hand.

15. Disturbance of intellectual function.

16. Level of general information recall less than would be expected from some-one of his educational background.

17. Ability to manipulate numbers equivalent to a fourteen year old child.

18. Some deficiency in interpretative abilities.

It may be relevant to set out, also, the treatment as it appears in the Statement Claim:

Treatment

1) Tetanus toxoid administered to forestall intra-cranial infection.

2) Steroid to reduce and/or prevent cerebral swelling.

3) Carotid arteriography on 7th May, 1976 to exclude any significant intra-cranial haematoma.

4) Original sutures removed on 11th May, 1976 as healing not adequate and wounds required further cleaning.

5) Secondary suture wounds.

6) Attempt to graft raw area of right forearm on 9th June, 1976 - unsuccessful.

While all the injuries listed would not qualify as serious there are included injuries which are undoubtedly serious and the plaintiff's attorneys were unsparing in their efforts to spell out the full effect of these injuries. The defendant on the other hand did not call any witnesses but from the thoroughness of the cross-examination of the plaintiff's witnesses clear notice was given that nothing was being conceded.

At the time of the accident the plaintiff had already been pursuing a post-graduate course leading to the degree of Master in Surgery and eventually it was hoped to Consultancy status. The course lasts six years and is said to be a rigorous one and is divided into two parts. Many who start the course find it too demanding and opt out after a while. The plaintiff had gone one year and four months in Part 1 of the course. He has not been able to continue this course because of the effect of the injuries sustained. Accordingly, his attorneys maintain that damages are to be assessed with reference to the consultancy status which, it is contended, has, as a result of the accident, been put beyond his reach. The defence does not agree with this submission. This question will be dealt with later.

The witnesses who testified on behalf of the plaintiff included four medical practitioners, all specialists, who had to do with the plaintiff before and/or after the accident; as well as a clinical Psychologist who assessed his post-accident capabilities.

At the outset the plaintiff's attorneys expressed great reservation as to whether he would testify having regard to his condition and permission was even obtained for the plaintiff to be absent from court when certain aspects of the evidence were being dealt with. Eventually, on the sixth day of hearing the plaintiff did take the witness stand and I was greatly assisted by having the opportunity to assess his demeanour against the background of the testimony of the witnesses regarding his post-accident condition.

It may be convenient to deal first with the evidence of Mr. R.B. Roper, Headmaster of Munroe College for twenty-five (25) years where the plaintiff was schooled during the period 1960 - 1966 at the end of which time he graduated with five subjects (English Language, Chemistry, Mathematics, Physics and Biology) at the Cambridge School Certificate Level, and Chemistry at "A" Level in the Cambridge Examinations. His Cambridge School Certificate was a Grade 11 and the one subject in which he was successful at the "A" Level was the minimum. The plaintiff's evidence amplified this aspect of the case. He at first passed three "O" Level subjects and then another two. He had sat three subjects at "A"Level and passed one. Mr. Roper contended that in his academic attainment the plaintiff was well above average though not exceptionally brillant. Mr. Roper testified that the plaintiff was very congenial (and he saw him quite often since the plaintiff boarded at school) and active at sports being the Captain for the hockey

and football teams and a very competent one at that. He was of a very quiet disposition and left school with the augury of a bright future.

With this qualification the plaintiff sought admission to the Natural Sciences Faculty of the University of the West Indies but was obliged to do one year to really qualify for the course he intended to pursue. That course was Chemistry. After that year he left the University and worked for one year after which he returned and gained admission to the Faculty of Medicine. During his internship he worked under the supervision of Dr. John McNeil-Smith, noted Orthopaedic Surgeon and Consultant at the Kingston Public Hospital, whose opinion of him at the time is that he was likeable, competent, hardworking and very good with his hands - this latter factor being a very important one in surgery.

After graduating with his M.B., B.S. degrees and gaining acceptance to the post-graduate course he also worked under Dr. McNeil-Smith's supervision. From this doctor evidence was elicited as to the requirements for entering upon this Specialist Course.

These are:-

1. Possession of the M.B., B.S. degrees,

2. Personal references from consultants with whom one has worked as to one's suitability as a person to be trained in a higher degree. Such reference must deal with one's competence, character, patient-responsibility, ability to withstand the rigourous academic programme which is long and frequently interrupted by clinical duties, one's demeanour as a doctor - must be capable of being entrusted with important decision-making above the ordinary medical graduate or General Practitioner.

Dr. McNeil-Smith is a member of the post-graduate board and so knows at first hand the requirements for admission. That the plaintiff gained admission to this course argues that

not only had he overcome whatever academic deficits he had on graduation from Munroe College but in addition had demonstrated to the satisfaction of the Board the admirable qualities required in one so favoured.

During the period immediately preceding the mishap the plaintiff was a member of Dr. McNeil-Smith's Unit and although this was but one aspect of his training his prospects were good. An important factor is that he was very dexterous. Indeed, despite his injuries he has retained his dexterity - so says Dr. McNiel-Smith, who does not regard the plaintiff as being of exceptional brilliance.

It will be necessary to return to this witness' evidence when dealing with the plaintiff's post-accident condition but it may suffice to mention here that after a period of convalescence when it was thought that his recuperation might be helped by his returning to work Dr. McNeil-Smith's Unit was one of the units to which he was sent. The doctor accepted the plaintiff as a contribution to the latter's rehabilitation and not as a competent member of his Unit. His effort in this regard was a charitable one and as he said he would not like to see some-one who was expensively trained drop out due to pressure. This will be a factor to bear in mind when considering this witness' assessment of the plaintiff since the accident.

The other doctor who had to do with the plaintiff both before and after the accident is Dr. Lawson Douglas, Consultant Surgeon at the Kingston Public Hospital and the only Urologist in Jamaica. He first met the plaintiff while the latter was pursuing his post-graduate course for the M.S. degree. As a part of the plaintiff's training he served in Dr. Douglas' Unit and Dr. Douglas confirms that the plaintiff

had a certain degree of surgical aptitude. He further expressed the view that from what he saw of the plaintiff he would expect him to complete the course and to become a good surgeon. It was in fact in Dr. Douglas' Unit that the plaintiff first worked after the accident. At this point it may be appropriate to consider the evidence of Drs Douglas and McNeil-Smith on the condition of the plaintiff as they saw him after the accident.

Dr. Lawson Douglas:

At that stage the plaintiff was unable to pursue the M.S. degree course because -

> " his memory was lacking - he could remember almost nothing of anatomy and surgery. His judgment was faulty - to say the least - and as far as making decisions was concerned he could not make decisions. I never attempted to allow him to operate so I can't say how he would perform. I did not because he knew nothing about anatomy and physiology. It would be like allowing a lay-man to operate. Knowledge of anatomy and physiology are pre-requisites to completing the post-graduate course. The ability to take decisions is extremely important to doing the post-graduate course. Also the ability to make reasonable judgment. He could not perform as a surgeon when he worked with me. From what I saw of him when he came back to me if he had no significant improvement he definitely could not have continued the course. "

Dr. Douglas is a member of the M.S. Board and his evidence is that the plaintiff actually approached him and told him he could not study and asked what could he do to help him. The plaintiff may have spent about three months in this Unit and at the end of that period Dr. Douglas would not have allowed him to carry out any operation at all. Dr. Douglas' speciality is, as he says, complex. Consequently, his evidence must be considered with that factor in mind as well as the fact that this was the initial stage of the plaintiff's effort to continue his post-graduate studies. These factors may well account, at least in part, for apparent differences of opinion in the evidence of

the two doctors whose evidence is now being considered.

To minimize the rather telling effect of this evidence it was suggested in cross-examination that Dr. Douglas' level of attainment requires exceptional ability but the compliment was declined, the addition being made that -

" most surgeons in Jamaica are like me."

I regard the answer as tempered by modesty.

Mr. Miller pitted Dr. McNeil-Smith against Dr. Douglas thus:

Q. " Before the accident Dr. McNeil-Smith said Dr. Goodin was a man of average intelligence. Do you agree?

A. " I disagree. I would say he was a M.S. student of average intelligence."

The full impact of his answer must be seen in the light of another answer he gave. He said that the students selected for the M.S. programme are deemed to have more than average ability - their ability at the outset must be "top of the top, though not exceptional." Having regard to the requirements for the course as stated by Dr. McNeil-Smith the apparent difference in opinions may be a matter of semantics. They both agree that he met the requirements for the course but neither says he was of exceptional brillance, and judged in the light of his attainments at his graduation from Munroe College their opinion that he was not of exceptional brillance seems well-founded. However, both express the view that he had the capacity to complete the course successfully i.e. before the accident. Dr. Douglas did make the concession -

" I would agree that Dr. McNeil-Smith would be in a better position to give a post-accident assessment of him. In the pre-accident period I hold my opinion."

In seeking to reconcile the conflicting opinions of these two eminent Specialists we must consider, in addition to factors already mentioned, the following:-

1. Dr. Douglas had no contact with the plaintiff until after he had completed his internship and had entered upon his post-graduate course whereas Dr. McNeil-Smith's association began immediately after the plaintiff had completed his examination at the University of the West Indies and entered upon his internship.

2. Dr. McNeil-Smith's range of association with the plaintiff is much wider than Dr. Douglas'. Dr. Douglas had him for a period prior to the accident and for the first three months of the resumption of the post-graduate course. On the other hand Dr. McNeil-Smith was associated with the plaintiff from the commencement of his internship, during his post-graduate studies before the accident and since the accident, for a much longer period up to and including the point of maximum recovery and thereafter up to the time Dr. McNeil-Smith gave his evidence.

3. They spoke against the background of their differing specialities, and Dr. Douglas seems highly sensitive to the complexities of his field.

Nonetheless Dr. Douglas' deferring to Dr. McNeil-Smith's post-accident assessment seems not only gracious but honest.

I will now pass on to deal with Dr. McNeil-Smith's assessment. But before doing so brief reference will be made to the Speciality itself. As Dr. McNeil-Smith put it, his Unit - the Orthopaedic at the Kingston Public Hospital - has the largest patient-ward and the smallest staff. The work includes the treatment of all cases of trauma or injury involving the spine or the extremities - fractures - as well as the orthopaedics i.e. the science of correcting deformities, however caused. The plaintiff has been in this setting from

sometime during 1977 up to the time Dr. McNeil-Smith testified (23rd November, 1979) thus affording him an unbroken period of observation and assessment.

Dr. McNeil-Smith:

He roundly condemns the plaintiff's dress pattern as untidy and unbecoming of a doctor even making allowance for the trend toward untidiness so evident in the society.

The next area of default is the plaintiff's attendance at work. Dr. McNeil-Smith says:-

> " He does not show up to work at times, late for ward rounds and without reason at times, late for clinics (which are very heavy) and leaves an extra load on his colleagues. Quite often he does not show up at operations - this is serious because his assistance is important. "

Regarding his work, even in simple matters he consults with his seniors much more than Dr. McNeil-Smith has observed in his dealing with other doctors similarly placed over the years. The plaintiff feels he has lost his self-confidence and Dr. McNeil-Smith thinks so too.

Says he:-

> " I feel so because he will ask about the same type of problem more than once the same day or in the same week. When a question is posed to him by way of reminding him he should have done something he almost goes to pieces - acute girations, movements of the eyes, as if he is trying hard to recall what he is being asked to do or plumbing the depths of his knowledge of medicine. "

In the operating theatre he is a good assistant in that he has retained his dexterity. As a good assistant he makes the surgeon looks good in that he retracts wounds, has to anticipate the surgeon's moves to tie knots at times, help to manipulate bone fragments, cut sutures in the sewing of wounds, putting on plasters. The only difference is, says Dr. McNeil-Smith,

that one hasn't got to be a doctor to so perform. Indeed, nurses, medical students and operating room technicians often do this work.

But when the plaintiff is required to carry out a surgical procedure this becomes extremely difficult. He becomes very scared or nervous and will even opt out of doing an operation even though such operations are routine and Dr. McNeil-Smith makes himself available to bail him out if he felt he couldn't cope. Supervision is necessary because he has demonstrated confusion even when faced with such routine operations - "ones on which you cut your surgical teeth." Since the manifestation of this problem (March 1979) the members of the Unit shelter him so as not to expose his failings to the staff and more importantly, to the patient.

The doctor was asked to assess the plaintiff in these two situations:-

a) Giving him a reference for a job;

b) Employing him to work as a full time member of the Unit.

The answers were:-

a) " I could not in all honesty consider him able to continue in post-graduate training in surgery. I could not in all honesty give him a reference to work in another surgical unit bearing in mind the things which I have mentioned. I couldn't say he is competent to work in a Clinic because he will sometimes walk out leaving the patients even with no other doctor there."

b) " If I were to interview him as a prospective member of my unit with any possibility of selectivity I would not select him in that his appearance, his memory problem and his occular gitations would not allow him to pass an interview. This is the method

organic brain damage. And the extent of such damage seems to be such that, from his knowledge of the system in the U.S.A. and the United Kingdom, if Dr. Goodin did succeed in gaining admission to either of these systems, which seems highly unlikely, he would not be able to survive. Since March, 1979 only minimal improvement has been observed. Whether improvement would be possible outside the witness' field he cannot say.

Under cross-examination it was conceded that the plaintiff anticipated well and does perform very well as an assistant in the operating room. But merely being an assistant in the operating room, as a doctor is not good enough. Then, too, one needs to be well to perform satisfactorily. The opinion was expressed by the witness that in March 1979 it was felt that having regard to the amount of training the plaintiff had with the witness and the amount of surgery to which he had been exposed he should be able to do the simple surgery he was required to do then. But it may be recalled that that was about the time when the plaintiff began to manifest confusion when confronted with such a task. However, although there has been no remarkable recovery he is still allowed to do simple operations with the caveat that he is not allowed to go into the operating room alone - a senior member has to keep an eye on him. But even so these operations are the type which, says Dr. McNeil-Smith, one can do blindfolded - no serious decisions are involved.

The witness, who speaks against the background of twenty eight (28) years of training interns and surgeons confirms that the Casualty Department at the Kingston Public Hospital should have a very heavy work load at nights. He knows that for financial reasons, some trainees elect to work in this department at nights but he is not aware of the plaintiff having worked there during the period January - May 1979 and, accordingly whether, if he/so work, he did
did

> " usually employed for selection almost anywhere in the world. His chances of getting by in an interview are small."

Asked about the plaintiff's career prospects Dr. McNeil-Smith states positively that post-graduate course in surgery is out. However he should be able to fill a niche in other aspects of medical practice which does not put such a strain on his concentration, competence and decision-making (but see Dr. John McHardy to the contrary on this aspect).

It is emphasised that "the ability to make decisions with confidence is mandatory - can't be vacillating." One aspect of the Unit's work is to deal with cases referred from other hospitals or doctors for definitive treatment and it is not always possible for a senior member of the Unit to see every case. The plaintiff has missed cases referred by other doctors whose diagnosis was right i.e. he'd fail to make a correct diagnosis. Consequently, he enjoys a sheltered existence. Dr. McNeil-Smith thinks he could possibly function in situations where he does not come into contact with patients e.g. Blood-Bank and Public Health, where decision-making is not as urgent or critical and where he can get opinion on specimens taken from patients. The plaintiff is assessed as slightly above an intern just passing out.

Then, too, because of his truancy the members of the Unit are resentful towards the plaintiff. They feel imposed upon as they have to carry the extra work load.

One noticeable change recorded by Dr. McNeil-Smith is that although the plaintiff knows him quite well the plaintiff would see him working in the ward with other doctors and yet ignore him as the senior surgeon. Speaking from experience in dealing with patients who suffered from organic brain damage, the doctor expresses the view that functional deficits and the behaviour pattern observed in the plaintiff are consistent with

so under supervision or not. He is aware, though that the plaintiff has been called out at nights to do simple operations eg. sewing up wounds, putting on casts, putting pins through leg braces, but maintains it would be beyond the plaintiff to decide whether to amputate or not.

The witness is not satisfied with the results of his efforts to rehabilitate the plaintiff and expressed the view that if someone else required that place he would have to let the plaintiff go. The plaintiff, he feels, is now below average and is not likely to become the surgeon he had the competence to become, but is more competent than just to be a clerk in a Medical Research Labaratory as suggested by the Clinical Psychologist Dr. Doorbar whose evidence will be dealt with at a later stage.

Professor James N. Cross:

He is Professor in Neuro-surgery at the University of the West Indies. He saw the plaintiff at 12:30 p.m. on the 4th May, 1976 and it is from his findings that the particulars set out in the Statement of Claim derive.

Neurosurgery deals with surgical conditions affecting the central nervous system whether caused by trauma or disease. Of the witnesses who testified, Professor Cross was the first to deal with the plaintiff after the accident. In his testimony he amplified his listed findings.

When he first saw the plaintiff the latter was restless, drowsy and resisted attempts at examination. He responded to his name being called by opening the left eye (the right eye was occluded) and attempting to speak and, in response to stimulation, he had purposeful movements of all limbs. His blood pressure was 150/100, pulse rapid (180 p.m.) but of regular rhythm and respiratory rate raised by 26 per minute but of normal character. The plaintiff was then partially conscious. The alteration in the conscious state indicated damage to the brain. Investigation via

X-Ray pictures revealed the fracture of the frontal bone extending into the wall of the frontal sinus and indications were that he had sustained a severe blow to the head. Because his condition remained stable for the first two days and showed no significant improvement X-Ray studies were done - Carotid Arteriography - to demonstrate whether he had any intra-cranial blood-clot. The procedure is a rather uncomfortable one being painful and is disliked by most patients. It involves injecting a dye in the artery in the neck. Fortunately, the results were negative. It was noticed that on the day following this operation he began to improve and maintained a steady improvement thereafter.

As regards healing Professor Cross said that the scalp wound healed visually but after a week the wounds to his arm required further cleaning and secondary suturing. No assessment of the healing of the damage to the brain could be undertaken at that stage due to lack of co-operation resulting from the depressed mental state of the plaintiff. On the 31st May, 1976 there was sufficient co-operation to facilitate an assessment, which was done and yielded the following result:-

> " He was alert although rather slow in his responses. He complained of lightheadedness occasionally. His replies to questions tended to be mono-syllabic and he appeared to have no memory for a period of three weeks from the time of the accident - three weeks after the accident was for him a blank. There was mild loss of power of the right hand as compared to the left. The lower limbs were equally powerful and the plantar responses were now both normal. I thought he showed evidence of recovery from a severe injury with some impairment of speech and of the small muscles of the right hand. Nothing could be done to accelerate the rate of recovery. The observations were all consistent with the type of brain injury sustained."

Up to June, 1976 the wound of the right fore-arm had not healed. Under general anesthetic an attempt was made to have a skin graft done to the raw area but when the area was checked

eight days later it was discovered that the attempt had failed but the wound had healed in the meantime. He was discharged from hospital on the 12th June, 1976 but was seen at follow-up clinics on three occasions, the last being December 6, 1976 when he was again examined. At that time he had made a very good physical recovery but still showed evidence of intellectual function deficit i.e. his intellectual performance was not at the level one would expect from someone in his position as a graduate of the University of the West Indies as a doctor. He still had some difficulty with his speech particularly in naming common objects and his level of general information was less than one would expect. There was difficulty in abstract thought such as interpreting common proverbs. Added to this was a deficiency in his general professional information and in some respects his performance paralleled that of a fourteen year old - so perceptibly diminished were his intellectual functions. It was assessed that the brain damage was severe enough to induce amnesia for a period over three weeks and that there was evidence of residual damage to the left side of the brain.

The rate of recovery was rapid for the first six months but slowed thereafter for a period of two years. The normal period of recovery for such injuries is two years after which time there is normally no measurable improvement.

By the end of December, 1976 Professor Cross thought the plaintiff should be allowed to resume the practice of his profession only under strict supervision and in a protected situation - where he would not have to initiate any decision. This is how he came to work with Dr. Douglas and Dr. McNeil-Smith.

On the 7th February, 1978 Professor Cross again examined the plaintiff as to the physical and mental condition and found -

" He had lost some physical drive but had no physical disability. Mentally he himself found it difficult to read; his concentration span was about fifteen minutes and he reported poor recall of what he had read during that period. He found his understanding of what he had read less good than in the past. He showed some mild difficulty with heavy objects.
Manipulation of numbers not at the expected level but his general information was much better than it had been at the end of 1976. His short-term memory had improved but he still had gaps in his professional information.. The latter was demonstrated by asking simple questions and seeing how he coped etc......
His performance was not well. His general information had not improved to the expected level. He had intellectual problems in conceptual thought and critical judgment. His responses tended to be very literal e.g. asked to interpret 'the higher the monkey climbs etc.' he replied 'if a person climbs a tree he can be seen better' ".

The witness did not think the plaintiff capable of competently making a critical judgment e.g. as between modes of action and modes of treatment, which is so important in the practice of medicine. The plaintiff, contrary to what would be normally expected, was in no way perturbed about his deficiences though he had a good insight into them. This was interpreted as indicating a lack of emotional affect - the receptive side of his emotional activity was not normal. This condition is thought to be a natural sequelum of the intellectual impairment suffered.

In his assessment of February 2, 1978 Professor Cross formed the view that -

1. It was unlikely that the plaintiff would attain any further significant improvement;

2. It was unlikely that the plaintiff would recover enough to rejoin the post-graduate programme.

3. Having regard to his intellectual problem he would not be able to perform as an autonomous entity in medicine or surgery though it was possible he could function under supervision.

When questioned on the practicability of a doctor functioning under supervision throughout his medical career Professor Cross stated that there are certain employment opportunities for doctors

who wish to work part-time i.e. junior supervised posts and that some doctors do work in such situations indefinitely. However, there is a real prospect that situations will arise requiring the initiation of activity in the absence of the supervisor and while, from the nature of the plaintiff's intellectual problem he may well be able to handle a situation which he had often handled in the past he would have difficulty coping with a new situation - this follows the usual pattern of persons suffering from head injury. The witness' final word on this aspect of the matter was expressed thus:-

> " It outwits my own field of expertise to identify any area in medicine in which Dr. Goodin could function autonomously. It would require an expert in occupational medicine. It depends on what he is doing to be able to say if he could practice under supervision in any branch of medicine ....' He would not be a suitable junior on my Unit. "

In addition to the post-traumatic amnesia which affects the plaintiff he is also exposed to the risk of post-traumatic epilepsy developing as well - a risk rated at twice the risk found for the general public. In order to provide a better prognosis relative to the plaintiff's intellectual deficit Professor Cross recommended an examination by Dr. Ruth Rae Doorbar, a Clinical Psychologist.

A detailed cross-examination of this witness did not yield any significant diminution of the weight of his evidence. He explained that the most painful period would have been during the three weeks immediately after the accident and that this was not related to the post-traumatic amnesia. However, having regard to his depressed consciousness he would be less conscious of his pains than one not so suffering. He also explained that the difficulty in the plaintiff's speech was due to diffused brain damage but that improvement could lead to normalcy of speech being attained.

A measure of the plaintiff's assessment of himself came out in the cross-examination. Contrary to the view of the specialists the plaintiff told Professor Cross that he thought his work at the Kingston Public Hospital was satisfactory. Obviously he was not aware of the judgment of the members of the Unit on which he worked. But the witness was not put off as he thought the plaintiff's opinion of himself was not likely to be very accurate.

The sloppy dress pattern of the plaintiff condemned by Dr. McNeil-Smith, as well as his lethargic attitude and irritability Professor Cross regards as characteristic of brain damage. This opinion confirms the view of Dr. McNeil-Smith.

Dr. Ruth Rae Doorbar:

In keeping with the recommendation of Professor Cross the plaintiff was referred for detailed examination and assessment to Dr. Doorbar a doctor of Clinical Psychology and a graduate of New York University who has been practising since 1949. She has been in practice in Jamaica since 1973. Her work involves the diagnosis and treatment of patients with mental illness or other aberrations as well as undertaking considerable research, her special field dealing with how people are affected by brain damage and like injuries. An idea of her experience in Jamaica may be gained from the fact that she is one of only two such practitioners in the island. She was the first witness called by the plaintiff but because of the demand on her time she could not give her evidence all at one sitting. Indeed, her evidence occupied the better part of three days being interposed between the testimony of other witnesses as she became available. And, undesigned though this was, it turned out to be a boon in that the opportunity was afforded to examine the testimony of the relevant witnesses against her detailed examination.

Dr. Doorbar examined the plaintiff on three occasions- April 13 and 20, 1978 and March 1979: the latter occasion being for re-evaluation. On each occasion she employed the same psychological tests. No physical changes were observed over the period April 1978 - March 1979. The tests were conducted with regard to the plaintiff as -

a) an ordinary person and

b) a professional man.

<u>The tests - nature and function:</u>

Dr. Doorbar testified:-

> " I first administered an intelligence test and the purpose being to determine in eleven (11) different spheres the level and quality of his intellectual functions. I administered four separate Personality Tests - not all on the same day. The tests take 2 - 2½ hours. But in his case I worked four hours the first day and about the same time a week later to do what would normally take 2 - 2½ hours. There were many reasons for this -
>
> 1. His responses were very, very slow e.g. he would take a card for one response and he would spend five minutes without a response and had to be moved to the next card.
>
> 2. His great difficulty in making decisions. He could not decide when given a choice between one thing and another.
>
> 3. He was very confused about very simple materials and exhibited concrete thinking i.e. he could not abstract an idea without seeing the actual item e.g. using a Bible to take the oath - he could not verbalise "Bible" unless he saw the book.
>
> There was definitely dysphasia - difficluty in finding the words and difficulty in constructing the sentence."

I may interpose the observation that these findings are very much in keeping with the verdict of Dr. McNeil-Smith with whom the plaintiff has had the longest post-accident association.

Five tests were conducted in April -

Intelligence - 1 - (W.A.I.S.)
Personality 1 3 - (T.A.T. and Rorscach)
Organic Brain Damage - 1 - (Gestalt)

And these tests, states Dr. Doorbar, are universally and internationally utilized by licenced psychologists to assess intelligence, personality and organicity i.e. the presence of organic brain damage. The integrity of the tests is scientifically assured by universally accepted methods. Two general methods are:-

1. Test of Validity which examines the individual against established norms, and
2. Test of Reliability - this establishes whether the test when repeated will produce the same results.

Dr. Doorbar is satisfied as to the accuracy of the tests in relation to the plaintiff because she had the opportunity not only to test and compare him with the norms but to re-test him a year later. Her opinion is that any expected recovery should materialize in 2 - 3 years, though the period of maximum recovery would depend upon the nature of the damage. However, despite the fact that in cases of organic brain damage the rate of recovery is progressively slower, three years would be sufficient time to expect any improvement because at that stage conditions would have stabilized.

<u>The Intelligence Test (W.A.I.S.)</u>

This test conducted on April 13th and 20th 1978, comprises eleven different sections and measures different aspects of intellectual functions viz:-

1. General information
2. Social comprehension
3. Arithmetical reasoning
4. Abstract reasoning
5. Digits - indicate memory recall
6. Vocabullary
7. Picture completion

8. Picture arrangement
9. Digit symbol
10. Block design
11. Judgment and reasoning

The plaintiff's intelligence was stated as average but for Abstract Reasoning instead of the expected rating of over 120 he scored in the dull-normal range i.e. 80 - 89. Having regard to his previous attainments these ratings are regarded as indicating an obvious impairment of his functioning. Such impairment would adversely affect his function as a medical practitioner, a position which requires the making of diagnosis as well as abstract conclusions having regard to observed symptoms.

As at April 1978 Dr. Doorbar is of the opinion that the plaintiff was not competent to form the type of judgment required of a medical practitioner.

Concerning his work at the Neurology and Surgical Clinics at the Kingston Public Hospital Dr. Doorbar states that the plaintiff complained of great difficulty in remembering facts and memorising information; so he would consult medical books on the spot because he could not remember what he needed to know. He said he enjoyed working at the Orthopaedic Clinic because of the simplicity of the work, but Dr. McNeil-Smith is enamoured neither with the plaintiff's work nor with such a classification of the work in his clinic.

At the time of the re-evaluation in March, 1979 the plaintiff had shown no improvement over his 1978 results. He achieved about the same scores then. If anything there was a slight increase

in the impairment of the memory function, a faculty which is of paramount importance in the practice of medicine. What is even of greater concern is the finding of a significant change in Personality at the time of the test in March, 1979. Dr. Doorbar's opinion is that he will get worse.

Personality Test

There are three sections to this test - Drawing, Rorscharch and T.A.T. - and for each section the primary result was a very marked depression culminating in extensive lethargy, confusion and lack of motivation. These conclusions were confirmed in consultation with the plaintiff. Central to his depressed state is his realization that he cannot practice at the level of his training and, being the most privileged of eight children, there was virtually nothing to show for the opportunities he had had. His work had become a terrible drag - which it wasn't before - and he was so depressed he could not drive himself to work.

The lack of motivation manifested itself in that he hardly did anything apart from eating, sleeping, watching T.V. and playing dominoes occasionally. Prior to the accident he was interested in flying, playing a guitar and tennis. That interest was no more. In appearance -

> " He looked dishevelled and shabby. He looked unkempt and quite pathetic. He just sat sadly and looked hopeless. In March, 1979 his hair had grown a good deal and he intimated he might as well become a Rasta - seems not much hope for him. "

Dr. Doorbar thinks his situation is all the more devastating because he is aware of his condition. He is now prone to considerable irritability which he cannot explain. Resulting from his depression is a lack of interest in social life. She detected no out-door activities.

So far as treatment is concerned drugs and psychotherapy may be employed, but says Dr. Doorbar, there is no assurance there will be any improvement. Consequently, she thinks he will have to learn to accept a lower level of activity which would require less concentration because the areas in which he could function successfully are quite limited. The field of medicine is not one such area. She recommends that he take a vocational test to determine whether he could take a job as a clerk in Medical Research where he would be supervised or whether he would prefer a job in a totally different field where he could forget he had once been a doctor. However, there would have to be an evaluation to ascertain whether he would think he was still making a contribution. But the trauma of being reminded of what he isn't any longer might prevent such employment. On this aspect the witness concluded that without a trial it is difficult for her to identify a field in which he could safely function.

The witness summed up the situation in these words:-

" <u>As an ordinary person:</u>

> Without the trappings of professionality he is greatly depressed, kind of lethargic, sedentary, over-weight and not very active. Apart from irritability he is kind of silly. He gives inappropiate responses and laughs at things that are not funny. Then he suddenly ends. His mood swings are typical of organic brain damage. When asked questions there is usually no response for a time during which he gazes around, at the ceiling and at himself then he gives an almost child-like response - very simplistic.
>
> <u>As a professional man</u>
>
> It is hard to believe he is a doctor. One would assume he works as a labourer. He gives none of the sparkle or brilliance of a physician. He is just a dull plodder - that's the impression he gives. "

Thus concluded Dr. Doorbar's evidence in chief.

When Mr. Miller cross-examined her two months later he plied her with many questions designed at testing her qualification and experience as well as the competence of the tests

administered and the evaluations made. She obliged.

She graduated with her doctorate in 1954 and for ten years was employed to the New Jersey State Diagnostic Centre in various capacities. For the second half of that period she was in charge of the Out-Patients' Department in a supervisory capacity. Up to 1973 when she came to Jamaica she had had private practice in New York and New Jersey, had been consultant to many schools, had been involved in various research projects, had published t three books and though not occupying a professorship had lectured in many universities including the University of the West Indies and is a member of the American Psychological Association. In Jamaica she has been working with the Ministries of Health and Justice.

She did not claim acquaintance with all the authors mentioned to her in cross-examination that betrayed much industry but as regard those whom she thinks are relevant to her field she seemed at home. Also, she did not make all the enquiries suggested but maintains she had sufficient material for the tests and conclusions she drew. As for the tests, again, she did not apply all to which reference was made - some appropiate for testing children - but what she used are universally recognised and are the best. In some of the tests the mental concentration of the plaintiff was more than average and his I.Q. was average.

Dr. Doorbar holds that for acceptance to Medical School students have to be of above average intelligence - this has been the subjects of tests - and from her dealings with Jamaican doctors, though she has never tested medical students in Jamaica, she finds such doctors to be very good - no less than American doctors. Accordingly, the plaintiff must have qualified at a level required of Medical Students but he does not now function at that level.

Mr. Miller's point of reference is the evidence of Dr. McNeil-Smith against which he pitted Dr. Doorbar's. Dr. McNeil-Smi[th] is an eminently qualified medical practitioner boasting such degrees as B.M., B.S., F.R.C.S., F.A.C.S., Consultant in Orthopaedics since 1960 and having twenty eight (28) years association with the Kingston Public Hospital where he has had, and still has, under his supervision graduates from the University of the West Indies and other countries.

Dr. Doorbar knows of his fame as a surgeon but has not met him personally and she concedes that if he had an hour-by-hour supervision of the plaintiff his opinion on the medical competence of the plaintiff would be better than hers. However, although she has not seen the plaintiff in practice she knows that he does not have that sort of supervision. Her background information is the report of Professor Cross who referred the plaintiff to her.

Dr. McNeil-Smith's assessment of the plaintiff given in his evidence in chief was put to the witness:-

Q: Would you be surprised to hear from a senior medical practitioner that Dr. Goodin can function above the level of an intern who has just passed out as such?

A: That would not be surprising since interns function under complete supervision.

The observation is appropiate that that bit of evidence does not epitomise Dr. McNeil-Smith's total assessment of the plaintiff and to regard this as a statement of the medical competence of the plaintiff is to ignore the fact that interns just passing out, whatever their afflictions may be, certainly do not suffer from the trauma and its consequences that plague the plaintiff. Some balance ought to be maintained by bearing in mind that the same witness had testified that the functional defects and the behaviour pattern of the plaintiff are consistent with organic brain damage. Further, that his effort with the plaintiff was a charitable

endeavour at rehabilitation of the plaintiff but that it would be unfair to pursue that course any longer if that space were required for another trainee. In the result Dr. Doorbar is not prepared to yield place to Dr. McNeil-Smith if his views conflict with hers. Her evaluation is based on scientifically conducted tests and her discussion with the plaintiff. And, based on such evaluation she concludes that he cannot function independently in the medical service. In this conclusion she and Dr. McNeil-Smith are ad idem..

Professor Cross' evidence on that point was:-

> " It outwits my field of expertise to identify an area in medicine in which Dr. Goodin could function autonomously "

The task of unseating Dr. Doorbar was of herculean proportions and undaunted though Mr. Miller was in his endeavour, if he did not succeed the fault lies not in himself nor in his stars but in the magnitude of the task.

Against this background of assessment by different and, at times, differing specialists the plaintiff took the witness-stand over four months from commencement of the hearing. And even then my mind had not been disabused of the impression created on the first day. On that day, when I saw no one who might have been the plaintiff I wondered at his absence until he was identified at the back of the court-room. He sat slouched and non-descript looking more like a curious straggler off the streets than like someone interested in the proceedings and certainly not attracting any suspicion he could be a doctor. I was thus alerted and as well by the evidence of the specialists to pay particular attention to him when he testified. I shall, as I proceed record some of my observations of him during his stay in the witness-box. However, at this stage I will disclose that from the very outset of his testimony his speech was slow and evidenced much effort at concentration.

He gave his name, address, occupation, workplace, age and date of birth. When asked about the members of his family he smiled with the innocence of a little child and proceeded to answer the question. He then spoke of his attainments at Munroe College in academics and sports and of his entry into the University of the West Indies, of his eventual graduation and the entry upon the post-graduate course. He had intended completing that course though there was the possibility of his undertaking a 9-12 months Fellowship Course in Scotland leading as well to consultancy status. He spoke of what must have been a trip to the country, as far as he can recall, and waking up in the University Hospital some three weeks later. Asked whether he recognised anyone on awakening he paused for a long time and then responded that he thought he recognised his aunt and his sister. He felt drowsy, weak and glad to be back and seeing things. He spoke of the duration of his sojourn in hospital as he could recall. He felt a little pain but could not appreciate the nature or extent of his injuries. Asked about the treatment he received he shook his head then squinted his eyes a few times and then said he could not recall any of the treatment he received.

His injuries had healed leaving scars on his right upper arm, right lower arm, back of hand, right forehead and right ankle - the latter not being significant. The presence of the scars bothered him very little. His major concern is that his hand function was it should - which he thinks is the case. In that event he would not bother about the cosmetic aspect.

He recalled it took sometime to recover from the physical injuries and that it was eight and a half (8½) months before he returned to work at which time he became aware that his competence as a doctor had been impaired. This how it came home to him:-

1. " My keeping up with progress as regards reading books and papers - at first I could sit and read non-stop for 1½-2 hours.

" Now after 10 -15 minutes I can't cope to sit and read any longer.

2. What I read I am unable to retain as much as I used to prior to the injury.

3. I get a bit more irritable not having the amount of patience I used to have . . merely sitting around and waiting for something to work with or having ~~having~~ to improvise. I wouldn't be aware of this until a nurse who apparently knew me before the accident speak to me. In this state I get angry and, depending on whom I am dealing with, I may go as far as cursing indecent language at my work place. I wasn't like that before the accident. "

Both Dr. Douglas and Dr. Deerbar spoke of this diminution in the plaintiff's concentration span. And, indeed, one does not need to be a specialist in any field to be able to appreciate the significance of the ability to retain.

To ascertain the plaintiff's perception in this regard the following question was put to him:

Q: How important is the ability to retain?

In response he smiled childishly, gesticulated, nodded his head in an apparent endeavour to come up with an answer then replied that he was not too sure what was meant. The question was repeated and evoked the answer that on the M.S. Course the ability to read and retain is very important.

I am satisfied that he was not malingering in dealing with the question. It is his opinion that his return to Dr. ~~Deerbar~~ Douglas after the accident was as a result of his choice when in fact it was a part of the rehabilitative therapy to put him back into a familiar working environment. He also thinks he coped quite well in Dr Dr. Douglas' Unit because the nature of the work there was less demanding on his concentration and ability to retain and in addition Dr. Douglas was very understanding. After two or three weeks Dr. Douglas enquired how he was getting on and he informed him of

his problem with reading and retaining. Dr. Douglas advised him that if he did not feel like doing it he shouldn't - just do a little at a time.

Asked about the M.S.Course he paused for long before venturing the answer: -

> " I have not returned to the M.S. Course since the accident because I still have not been able to do the reading, understanding and r retaining. It is quite a disappointment that I have not been able to return to the course because I wanted to specialize in Surgery. I got hitched up. I feel static - not going anywhere I expected I'd become qualified as M.S. early 1979. "

The significance of the continuing disability is that it is present four years after the injury was sustained - well beyond the period of maximum recovery.

Concerning the plans he had for the future he replied:-

> " Had I obtained the M.S. and/or Fellowship depending on the experience I think I might have got in training I may or may not or would spend another year or two getting the experience, then I suppose continue with Government on my own or part-time with Government and part-time in private practice. "

The obvious uncertainities about his plans may be chargeable to the fact that his plans had not up to the time of his mishap crystallized as well as to his inability to articulate.

After some six months in Dr. Douglas' clinic he went to the General Surgical Department. This aspect of the medical practice he describes as his love. In answer to the question as to how he got along there he said, after some delay, "I think I got along fine. " However, in contrast to his view he was to find that after some eighteen (18) months there Dr. Roper would have none of him. Because General Surgery involves all the body systems as against a lesser number in Urology he found his stint at General Surgery more demanding. However, apparently because this is the field he treasured and aided by official reluctance to see him out of the profession he survived his stay. As he puts it:-

" I coped by giving as much as I could, to my knowledge, and if I became uncertain or unsure I would get my supervisor's help. "

Without his asking or knowing why he was, much to his disappointment, shunted to Orthopaedics under Dr. McNeil-Smith. Here, the work was physically less demanding than at General Surgery becuase a less intense knowledge of physiology and anatomy is required. To come up with that answer he went through a long and manifestly hard try during which he made faces in an apparent effort to articulate and would even point his finger at his head.

A pause intervened between the question "How did you react?" and the answer

" I got along quite alright. I picked up a few things because of the longer stay there this time. I spent twelve (12) months there this time. I still suffered from my disabilities in reading and retaining but not as much as when I was at General Surgery but a bit more than with Dr. Douglas. "

Of the three Specialities to which he had up to then been re-introduced Urology required the less reading. But all along the ability to retain what was read remained diminished.

Confronted with the question :-

" Did Orthopaedics demand less of this ability to retain?"

He sat still for some time biting his lips and then requested that the question be repeated. Upon the question being explained he replied :-

" The demand on this ability I think was greater in the other two departments. "

It was after some delay that he was able to reply "1979" to the question "when did he leave Orthopaedics?" But he thought he left this department because he had done as much as he wished to do there.

Apparently as an act of kindness he was never told why he was being moved from one department to another. There was in fact a rota system by which doctors would move from one field to another and this apparently served as a disguise for the true reason for his removals.

Inasmuch as he was not allowed to return to General Surgery, he wrote to the Ministry of Health and subsequently spoke with Dr. McHardy, the Senior Medical Officer. The five year contract with Government which he had signed in 1974 had expired in June 1979 and he needed to know about his employment prospects. It was then that he became aware of unfavourable reports from Drs Roper and McNeil-Smith in areas where he thought he had done well. Dr. McHardy was unsure as to what to do because of the plaintiff's condition and also because he did not know which department could take him. After Dr. McHardy had conferred with Drs Brathwaite and Moody who operate the Kingston Clinics he advised the plaintiff that they were unwilling to have him. Asked how he interpreted the rejection for the Clinics as well as for General Surgery he replied:-

> " Where do I fit in seeing I was working under supervision and still not acceptable? That told me I don't do anything."

Eventually, and no doubt to give himself a breathing space, Dr. McHardy stationed him temporarily at the Casualty Department at the Kingston Public Hospital with the advice that he could think of it as a probation period which could be for three months after which he would have to be re-assessed on the basis of the reports on his performance over the period. If the results were unsatisfactory then he might lose his job, get one month's salary and could get no further employment with Government. This took place in early December, 1979. How did he react to this grim prospect?

> " To be told that after having graduated seven years ago and to be now told I am being put on probation is as if thirteen (13) years of my life was wasted and to find another form of employment - What else do I do? Run a taxi or sell Gleaner? I don't have no job. "

That was how he responded most pathetically.

How was he faring at the Casualty Department was the next query. Bearing in mind he had been there for a bare two months he needed time to be able to say. He was not unfamiliar with the work in that department. One thing he knew and that he has no choice but to try hard to hold his job. How fruitful are his efforts will be gathered from the evidence of Dr. McHardy. The Casualty Department is really a distribution centre from which the cases are sent to the various Clinics. Generally, there are two or three doctors per shift and nurses help. Accordingly, the pressure on any one doctor is relieved. The plaintiff has done non-major operations there - more or less of a resuscitative nature.

He stresses that he still has the determination to complete what he had started so he has the desire to continue. But it is mere desire unsupported by ability. As he sees it the only remaining part of his will is the will to read.

Amenities

Whereas, before the accident he was quite active in sports this is no longer the case.

Reasons are:-

1. The time available

2. He has no drive to be up and about - he just doesn't feel like it.

3. If occasionally he does get the feeling for some activity he has no company. He has to play with someone whom he knows.

Though he is not a good dancer before the accident he would try and learn something. Now he can't be bothered. If invited he will attend parties but not often and then would have a drink and leave. Formerly he could do with three hours sleep per night. Now, although he has more time on his hands there just isn't the drive to utilize it. As a consequence of his inactivity, he thinks, he has become overweight by about 45 lbs. Twirling his finger at his head and giving that blank smile he expresses the view that the over-weight may have something to do with some cell in his brain.

Regarding his relationship with the opposite sex he states that he has a few girl-friends but not really serious. There are no marriage prospects because the girls with whom he associates, or, as he says, "What I have left" are not the ones he would wish to marry and he has not been able to make any progress with girls whom he would like to marry.

Salary and prospects for promotion

The plaintiff gave his present salary as $18,000 plus (gross). This figure includes allowances. Having graduated seven years ago he reckons that but for the injuries sustained he could now be at the level of a Medical Officer Grade 111.

The process of extracting information from the plaintiff was laborious and time-consuming. Necessarily, therefore the cross-examination was painstaking and slow.

About the damage to the car he could not help very much. He knows the Insurance Company paid him $8,000 odd and disposed of the wreck. He had bought the car new about April or May, 1975 for $9,270 odd.

When he was questioned about the length of time he spent at Munroe College before he sat the 'O' Level Examination the question had to be repeated then he proceeded to count his fingers and look away before replying that he had spent 4½ years before

taking and passing three subjects. Later he took and passed another two subjects.

At the University of the West Indies he had had to acquire additional qualification before gaining admission to the Faculty of Medicine and had graduated in the normal course of events in 1973. He obtained his practitioner's certificate in June 1974.

Asked about the number of those graduated with him who had entered the M.S. Course he closed his eyes and after some time replied 'five'.

Regarding the eighteen (18) months spent in General Surgery with Dr. Roper he still thinks he did fine, though this answer came only after a pause was indulged. The Casualty Department is a busy place requiring the making of quick decisions as to where a a patient should be sent. He had worked there by day and by night and had performed operations such as suturing wounds and inserting catheters. To his knowledge, most of these operations have been successful. But this latter answer came only after he had closed his eyes and hung his head for some time. He had even worked alone on the 10:00 p.m. - 8 a.m. shift at the Casualty Department. This department does not readily attract staff so much so that it became necessary to offer an incentive bonus to induce staff to work there.

At the Orthopaedic Department he had performed operations alone as well as under supervision. The operations which he performed at the Urological Department are of a type done by Nurses eg. inserting catheters - nothing major.

When questioned about the M.S. Course he admitted that it was a rigorous course and that some people for one reason or another including the rigours of the course began but did not complete the course. In addition some had taken the examination and failed. These answers were interspersed with squints and obvious signs of strees.

His salary had moved from a gross of about $7,000 per annum at time of accident to a gross of about $18,000 per annum currently. His current monthly net pay is $1,037.

He had observed some improvement in his concentration but not enough to enable him to read anything but short topics. He would neglect the longer ones and try to get the information from someone else. As regards his confidence there has not been much improvement. When dealing with matters about which he is knowledgeable he feels fine but otherwise he feels a bit stifled. His irritability has shown no change. So far as his dress habits are concerned he does not think they offend the norm of dress adopted by the younger doctors.

In answer to a question he said he could not tell to which department he would go from the Casualty Department. When clarification of his uncertainty was sought he replied:-

> " Because I was on probation January to March and from then my future would depend on the report on my progress in .... (pause) What is the word? .... in the department whether satisfactory or unsatisfactory. So far I don't know if such report has been made. I have made enquiries without ascertaining the position. "

It may be observed that he was testifying almost a year from the expected completion of the probation period.

A question crucial to the quantum of damages to be assessed is whether, having regard to the nature and effects of the injuries sustained by the plaintiff he can reasonably be expected to function acceptably as a Medical Practitioner. It has already been observed that the eminent witnesses whose views were canvassed are not all agreed as to what the prospects are. Worthy of note however is the fact that even where any view was expressed that held out the hope of his continuing in the profession the specialist so favouring continuance does not propose his field of speciality as the area in which the plaintiff may practice. And inasmuch as each spoke

from within the confines of his particular speciality the need for a view not so confined was clearly indicated. The witness whose evidence will next be reviewed was put forward to supply that need.

Dr. John McHardy

Dr. McHardy is a Consultant in Neurosurgery since 1967 and has been acting as Chief Medical Officer in the Ministry of Health and as such is Chief Technical Adviser to the Minister of Health. That post involves the setting up of Medical Boards to examine public servants, vetting and transmitting to the appropriate Authorities the recommendation of such Boards. However his substantive post is that of Principal Medical Officer (Hospital) in which position he is responsible for technical input, recruitment and conditions of service throughout the hospital services. So far as recruitment is concerned he is guided by the relevant criteria for recruitment of Medical Officers. In addition the promotion of medical personnel falls within the general ambit of his job.

After a doctor has been recruited as a Medical Officer his performance is monitored by means of Performance Evaluation Reports, required to be done on an annual basis by the Personnel Division of the Ministry of Health and if his competence is shown to have fallen below the desired standard appropriate procedures are set in motion to determine the cause and, where possible, to ensure the necessary correction. If the cause is related to the officer's health he is examined by a Medical Board on which the witness sits and where unfitness to work is established the officer is 'boarded out' i.e. retired on medical grounds. But even so he may still practice as a doctor unless struck off by the General Medical Council on a formal report.

I must observe that I find this latter aspect not a little disturbing because the unsuspecting public is vertually being imposed upon to pay for services which it has been competently determined that the doctor is not competent to perform. The professional kinship which may be responsible for such a situation is not difficult to appreciate. Indeed Dr. McHardy testified that they are reluctant to 'board out' a doctor. But it would seem that a field of expertise on which the whole nation is so heavily dependent for its welfare needs to be more exact in its priorities.

Dr. McHardy knew the plaintiff both as an intern at the Kingston Public Hospital and subsequently as a post-graduate student in the M.S. Programme. While the plaintiff was hospitalised at the University Hospital Dr. McHardy visited him on many occasions. Eventually he sat with Professor Cross on the Medical Board which examined the plaintiff and recommended that he be allowed to return to work under supervision for one year after which time he would be re-examined by a Medical Board. Up to the time the witness gave evidence - 19th May, 1980 - a Board had not yet sat! The reason given is the difficulty in setting up the Board because of reluctance to 'board out' a doctor.

Dr. McHardy was responsible for the various assignments of the plaintiff in the meanwhile and he received many reports from the plaintiff's supervisors of his unsatisfactory and inadequate performance. The witness has seen and reviewed the most recent Performance Evaluation Report on the plaintiff done by Dr. McNeil-Smith and found it very unsatisfactory. While the plaintiff's job-rotation after the accident was normal there were complainits about his performance and requests for his removal from the various units. Complaints initially had to do with his severe speech disability - there has been considerable improvements in this regard. But there were complaints that he seemed to have

no sense of responsibility - he could not be relied upon to make or carry out decisions. Also, his attendance was erratic, there were frequent absences without explanation.

Dr. McHardy's view is expressed thus:

> " It is very important to be able to make decisions. If he is not capable of making professional decisions I dont see how he can function adequately as a doctor in a clinical situation or for that matter in a Medical Administrative Situation. "

The question, therefore, which comes to the fore is why is this officer allowed to continue in office as a doctor despite the judgments on his competence? The difficulty regarding the Medical Board has already been mentioned. Professor Cross and Dr. McHardy had decided that, having regard to the nature of the injuries and the difficulty in forecasting the degree of recovery, the plaintiff should in order to maximise recovery, be allowed to return to work in a familiar working enviroment for a year after which they would be better able to assess the degree of recovery and arrive at some prognosis and so to decide whether he could continue to perform as a doctor.

This proposal which commends itself as being not only humane and wise became unstuck over the difficulty of assembling the Board. Accordingly, he is without the definitive verdict of such a Board. However, Dr. McHardy, who would be a member of such a two man Board gave his verdict. He said that from the Performance and Evaluation Report, his personal contact with the plaintiff and others -

> " I think he has shown some significant improvement particularly in the earlier period after the injuries because his speech disability although still present has shown great improvement. However, as in neurological injuries two years after the accident is the period generally used as the time during which maximum recovery occurs and as he is now four years past the accident having regard to The Performance and Evaluation Report and the Psychological Report done recently I dont anticipate he will ever recover adequately to function as a doctor. "

As if that were not sufficiently decisive he was asked -

> " Having regard to all the information which you have gathered both from the Performance and Evaluation Report, personal exposure to Dr. Goodin and using your experience including knowledge of the criteria for recruitment what prospect is there for the permanent appointment of Dr. Goodin to a Government post?"

Mr. Miller objected but was overruled and the witness replied -

> " My opinion is that he will not be recommended for permanent appointment. "

Having regard to the available evidence any opinion to the contrary would have been frightening. Further, the witness seemed anxious to have the plaintiff's position clarified because of the complaints about his performance.

On the question of private practice Dr. McHardy said:-

> " Having regard to my position and knowledge of Dr. Goodin it would not be desirable for him to be allowed out in private practice."

The reasons advanced were:-

1. The difficulty in making important decisions.
2. In private practice it would be very important that he be able to decide if a patient eg. needed emergencey surgery and so he should go ahead and make the necessary arrangements to have surgery done. "

There was an excursion into the possibility of his finding employment at the Blood Bank but Dr. McHardy would be unhappy about any such arrangement though he conceded that, having regard to the shortage of medical personnel in the government service, he could possibly be allowed to work there on a temporary basis. But even there he would require close supervision which cannot be assured.

Cross-examination of this witness sought to minimise the weight of the evidence given by the other specialists where such evidence favoured the plaintiff's contention viz, that his

professional career has been irrevocably terminated. It was extracted from this witness that even after one year in the Urology Department (Dr. Douglas') he would not expect a student on the M.S. Programme to do major surgery nor indeed would he expect him to do major surgery after only six months without supervision. Minor surgery such as cystoscopy i.e. looking into the bladder by means of cystoscope is in order at that stage. He also explained that if successful in Part 1 of the M.S. Programme the student then begins his major rotation of one or two years in the field of his choice. The plaintiff was nowhere near this stage which is where he would expect him to even participate in major urological surgery.

As regards General Surgery Dr. McHardy expects that after eighteen (18) months in that discipline an apt student, provided his teacher thinks he is competent, should be able to do major surgery without supervision eg. prostectomy, appendisectomy etc. notwithstanding this however, supervision should be readily available for major surgical operations.

It is Dr. McHardy's view that a person with school-leaving attainments of the plaintiff, though he could not be regarded as being very bright, could cope with the M.S. Programme but it would not be surprising if such a person failed Part 1 of the Programme and even if he passes the Part 1 he may drop out of the Part 11 - generally in favour of the Fellowship Course. The M.S. Programme has a high drop out rate.

From this witness evidence was obtained that not all who succeed at the M.S. Programme become Consultants. In addition to there being a post there is also a time factor. In General Surgery, a popular field, the time period is five years.

Dr, McHardy admitted that the plaintiff has worked without supervision on a night shift at the Casualty Department at the Kingston Public Hospital. The witness was responsible for making the decision to put the plaintiff on that shift. But it was done, he said, with great trepidation. It was due to force of circumstances and there was a pool of doctors to whom the plaintiff could refer. Still Dr. McHardy did not think it a satisfactory situation. At the/time the opportunity was taken to ascertain whether the plaintiff could function in that setting. His work, really, was as a front-line man, to decide if surgery was necessary and then the surgeons would take over. He was allowed to finish his rota. Indeed having regard to the nature of the work involved and the opinions expressed as to the plaintiff's competence this seemed a rather risky assignment and the reason for Dr. McHardy's trepidation is not difficult to understand.

While not detracting from Dr. McNeil-Smith's fame as a surgeon of renown in orthopaedics Dr. McHardy doubts Dr. McNeil-Smith's competence to determine whether the plaintiff is competent to work in any other field outside orthopaedics. So, here, again there is clash of opinions - once a specialist ventures outside his speciality. Dr. McHardy maintains that he has a better over-

all knowledge of the various departments than Dr. McNeil-Smith on whose opinion as to the plaintiff's present level of competence the defence places great reliance. But Dr. McHardy's evidence is that among the doctors who complain and ask him "why dont you remove Dr. Goodin from my firm?" are the supervisors in Surgery and Orthopaedics!

It needs to be emphasized that the purpose of this exercise is not to find an assignment for the plaintiff but rather to ascertain how seriously he has been injured, what are the continuing effects of such injury and to award him appropriate compensation.

In his opening Mr. Hines said the evidence would show an "almost utter destruction of the plaintiff has resulted." It was necessary to consider carefully the voluminous medical and psychological evidence presented in order to discharge the responsibility placed upon the court in what is indeed a rather pathetic situation. I have already alluded to Mr. Miller's industry in seeking to collect bonus points for the defence. There was no less industry displayed by the plaintiff's attorneys in placing before the court factors which they see as relevant to the issues at hand.

The result has been that the issues have been greatly ventilated. I can therefore say that it is beyond doubt that the plaintiff has been very severely damaged and consequently his profession as medical practitioner is very seriously affected. Of great importance in this regard is the evidence that the plaintiff's inability to make and carry out important decisions has

arisen only since the accident and is due to the organic brain damage sustained. Accordingly, the persistence of this problem well beyond the period of maximum recovery seems to be clear indication of non-recovery from this injury. Furthermore, the evidence does not offer any prospect of any further recovery of a degree sufficient to justify the hope that the plaintiff will ever/be able to function autonomously in the profession for which he had qualified. Not only have I seen and heard the witnesses who testified but I was able to assess the plaintiff in the light of such evidence and I am left in no doubt whatsoever that it would be unworthy of the Medical Profession to expose the public to the risk of being dealt with by the plaintiff in his capacity as a doctor functioning autonomously.

Dr. Doorbar's conclusion that the plaintiff has suffered a personality change I accept as competently arrived at and amply demonstrated in Court by the plaintiff himself. It seems beyond any doubt, therefore, that as a person he will never be the same as he was before the accident. Of equal force, too, is the conclusion that as a medical practitioner he will never again be of acceptable competence.

Measure of Damages

As mentioned earlier, the real question of paramount importance in relation to the quantum of damages is whether or not such damages are to be assessed on the basis that the plaintiff has lost-out as a consultant. The plaintiff's attorneys insist

that that is the proper basis and for support rely heavily on Lim Poh Choo vs. Camden and Islington Area Health Authority (1979) 2 All. ER 895. However, on comparing the features of the two cases undeniable differences are evident. Dr. Lim, at the time when she sustained the injury which resulted in irreparable brain damage which rendered her almost totally insentient, was already a senior psychiatric registrar with good prospects of becoming a consultant in five years time. It is not suggested that there was any condition - precedent which she had to fulfil to qualify for the position of a consultant. Here, the contrary obtains. The plaintiff could never be considered for such a position until he had satisfactorily completed the course leading to the degree of Master in Surgery and then await the availability of a post. He had not even completed the first part of the course. Indeed he had done a mere sixteen (16) months in the first part and the preponderance of the evidence is not in favour of the conclusion that he would have gained the degree. Accordingly, while it is true that both cases involve brain damage - in Dr. Lim's case more serious than in the instant case, they part company on the question of the basis on which the damage ought to be assessed. The probabilities are that the plaintiff, with the passage of time, would have gained experience and so increase his earning power but not as a consultant. Hence his loss cannot be calculated with reference to the post as a consultant. Evidence had been adduced from Dr. Lawson Douglas that in Jamaica a good surgeon

could make over $100,000 per annum with a mean of $50,000 - $60,000. Dr. McHardy did not speak of such figures. He gave a figure of about $20,000 with a base figure of $13,000. Apparently, the position differs from one speciality to another. However, the consultant's earnings are no longer relevant to this assessment.

Evidence presented through the Director of Staffing and Pay in the Ministry of the Public Service is to the effect that there are four grades of medical officers in the Government Service. Inclusive of allowances the salary figures for grades effective the 1st October, 1979 were as follows:

Grade 1	-	minimum	$16,984
		maximum	19,144
Grade 11	-	minimum	19,144
		maximum	20,404
Grade 111	-	minimum	21,314
		maximum	22,274
Grade 1V	-	This is the consultant grade.	

It was noted that a Grade 1 officer who has completed Part 1 of the post-graduate course would begin to earn at the Grade 11 level but without such further qualification it would require 4 - 5 years to move from Grade 1 to Grade 11. The time taken to move up from Grade 11 to Grade 111 depends on the particular aspect of medicine involved and the amount of training required. In addition, the availability of a post is always a relevant consideration whether a medical officer moves up to the next grade. A Grade 11 officer pursuing post-graduate studies would have to successfully complete the course and serve five (5) years as a Grade 111 officer before he could be accepted as

a consultant provided he is suitably recommended. Further, without a post-graduate qualification a doctor cannot go beyond Grade 11. So then, the attainment of consultant status having been concluded against the plaintiff what remains with some certainity is that even if he failed or discontinued the course he could by the effluxion of time reach Grade 11. It will be seen, therefore, that at the time when the plaintiff sustained his injuries he was at least ten years away from Grade 1V with success at the post-graduate course as a sine qua non intervening. Also it must be borne in mind that from the evidence, vacancies are few and the field is a highly competetive one.

It must be accepted however, that even if he did not succeed in the post-graduate course his earning capacity would not be limited to what he could earn as a medical officer Grade 11 in the Government Service. Nor must the fact be ignored that from time to time the salaries of Government employees are increased.

The plaintiff's life expectancy has not been affected. Hence, it is argued, the measure of damages will be aggravated. The plaintiff's life expectancy is projected as between 65 and 70 years with his work life at about 65. As a result of the defendant's tort the plaintiff has been deprived of some 38 years of productive professional life.

The award must take into consideration the question of pain and suffering and loss of amenities with reference to this loss of productive years. True, the sensational factor (pain) will not be encountered for this period but the other factors will be there, the suffering made greater by the anguish of not being able to achieve what, at any rate to his mind, he would, but for the tragedy, have achieved. Support for the submission is sought in speech of Lord Reid in H. West & Son Ltd vs. Shepard 2 All. ER 623 at letter E. where he said:-

" The difficulty is in connexion with what is often called loss of amenity and with curtailment of his expectation of life. If there had been no curtailment of his expectation of life, the man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it, for that and for the mental strain and anxiety which results. But I would agree with Sellers L.J., in Wise's case that a brave man who makes light of his disabilities and finds other outlets to replace activities no longer open to him must not receive less compensation on that amount "

At letter F he continues:-

" There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am prevented by authority I would think that the ordinary man, is at least after the first few months far less concerned about his physical injuries than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life. ....If one takes the case of injury to an internal organ, I think that the true view becomes apparent. It is more difficult to say there that the plaintiff is being paid for the physical damage done to his liver or stomach or even his brain and much more reasonable to say that he is being paid for the extent to which that injury will prevent him from living a full and normal life and for what he will suffer from being unable to do so. "

It will be appreciated that that authority supports the proposition for which it was cited when reference is made to the plaintiff's situation. Though seriously injured he is not a vegetable and does appreciate his present position in contrast to what he had hoped to achieve - even if eventually it proved to be beyond his reach. As Dr. Doorbar puts it he is aware of what is

happening to him but is powerless to do anything about it. With no prognosis for any further improvement in his condition the very real nature and extent of the suffering to which he will be subjected is not difficult to envisage. Already, he shuns the company of colleagues because he appreciates he cannot converse with them because of his inability to read as he should plus his concentration and memory deficits. And this is where, as a doctor, he may be expected to find normal association. In this regard his assessment of his job possibilities may well be thought to crystallize the position -

> " .... to find another form of employment - what else do I do? Run a taxi or sell Gleaner? I dont have no job. "

Harris vs. Harris (1973) 1 Lloyd L.R. 445 was a case in which the plaintiff, a girl twelve and a half (12½) years of age who had suffered severe brain damage was awarded the sum of £20,000 for pain and suffering and loss of amenities. It was submitted on behalf of the plaintiff that this award, appropriately updated should be a guide in making the present assessment under corresponding heads of damages. I do not think however, that that award could be indiscriminately applied because the age differential must be a relevant factor though it is somewhat counter-balanced by the realised potential of this plaintiff i.e. to be a doctor. In that case the Court of Appeal did not interfere with the award of £20,000 though as Lord Denning M.R. stated (at p. 447)

> " This case does not appear to be as bad a case as some of those previous cases but having regard to the change in the value of money I think the Judge was quite justified in awarding £20,000 for the loss of amenities. "

The award was for pain and suffering and loss of amenities, and, but for the change in the value of money, may not have been approved by the court.

Giving due consideration to these and other authorities which were cited with particular emphasis on the very considerable change in the value of the Jamaican dollar I award for Pain and Suffering and Loss of Amenities the sum of $90,000. His loss of earning capacity is very real and, from the evidence permanent. An award of $20,000 is made under this head.

Problematic as awarding appropriate compensation is the difficulty is compounded here by the manner in which the authorities have treated this matter, While, complaining about the plaintiff's incompetence they have nonetheless kept him on as a member of Staff and there is no clear indication as to when the situation will change. Sympathy has blurred principle and thrown a problem in the lap of the court. Then again, although evidence was led as to the present salary structure of doctors in the Public Service regard must be had to the realities of the situation which must support the view that those figures, already outdated, are no true indication of what a doctor can earn in the Jamaica of today or the Jamaica in which for his working life the plaintiff could profitably employ his skill whether as a full-time or part-time employee in the Public Service. Settling on a datum figure is not easy but paying due regard to the realities of the situation I adopt the figure of $25,000 and a multiplier of 16. The defence had contended that a multiplier of 12 would be more appropriate and I would have inclined to this view if the plaintiff's life expectancy had been lowered. I think a multiplier of 16 is more in keeping with the justice of the case. A total of $400,000 is the result.

Submissions were made that income-tax should be deducted from this total since such earnings would, in the hands of the plaintiff, be taxable. While I accept the principle as correct and this is borne out by the authorities cited - I do not think that a court can be expected to make any elaborate calculations of income-tax. I will tax the total down by one-third and round it off at .

$266,000.00.

Special Damages

The principal claim under this head is $8,200 for loss of motor car which had a pre-accident value of $8,500. Salvage is said to be worth $300.00. Mr. Miller submitted that a valuation of at least $500.00 should be placed on the wreck but having regard to the nature and extent of the damage to the vehicle I will not disturb the valuation of $300.00. It seems a miracle that anyone survived the crash - so extensive was the damage to the car.

But Mr. Miller's submission went even further. His contention is that, insasmuch as the plaintiff has been paid the sum of $8,200 for the car the plaintiff has not proved any loss and therefore ought not to recover the amount of $8,200 claimed.

It must be obvious that that submission is not supported by reason for it seeks to make the defendant the beneficiary of the policy of insurance by virtue of which the plaintiff received the compensation. The plaintiff had taken out the policy and paid the premiums for his own benefit. The defendant contributed nothing to those payments. By the defendant's negligence the plaintiff's car was destroyed and the defendant has made no reparations in respect thereof. How then can he be heard to contend that he ought not to pay for the loss of the plaintiff's car?

The conclusion seems to require no other authority than reason. And yet the obvious does not always receive unanimous acclaim. For my conclusion, however, I find support in the judgment of the Jamaican Court of Appeal in Cayman Islands Civil Appeal 9/78 - Frank Coleman vs. Donald McDonald and another (unreported). Accordingly, I reject the submission and award the plaintiff the sum of $8,200 for the loss of the car. I allow also the following claims -

1 pair shoe	-	$14.50
Taxi to and from hospital 7 trips	-	32.00
		$46.50

Other items were claimed but proof is wanting. These are accordingly disallowed. Total award for Special Damages therefore is $8,246.50

Interest:

In the submission made on the question of interest there was no accord on the rate to be awarded - the plaintiff's attorneys opting for rates paid by mortgage companies while for the defendant a maximum of 7% was advocated. I think a rate of 8% should meet the justice of the case. The special damages will attract interest at 4% from the 4th May, 1976 to date of judgment. Of the General Damages interest at 8% will be payable on $110,000 from the date of service of the Writ (26/12/77) to date of judgment.

To summarise:

General Damages:

Pain and Suffering and Loss of Amenities	-	$90,000.00
Loss of future earning	-	266,000.00
Loss of earning capacity	-	20,000.00
		$376,000.00

Special Damages

Loss of motor-car	-	$8,200.00
1 pair shoe	-	14.50
Taxi to and from hospital (7 trips)	-	32.00
		$8,246.50

Final judgment of $384,246.50
being General Damages $376,000.00
and Special Damages $8,246.50

Interest on $110,000 @ 8% from 26th December, 1977 to date and interest on $8,246.50 @ 4% from 4th May, 1976 to date.

Costs to be agreed or taxed.