IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J. 525/1984

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| BETWEEN | KEVIN JAMES (By his next friend COINETTA JAMES) | PLAINTIFF |
| AND | GRACE FOOD PROCESSORS LTD. (Meat Division) | |
| AND | SYD MOGG | DEFENDANTS |

Ainsworth Campbell, Alvin Mundell and Orrin Tonsingh for the plaintiff.

W.K. Chin See, Q.C., John Vassell and Tracey Barnes for the defendants.

Heard: February 5, 6, and 7, 1990; May 18, 19, 20 and 21, 1992; November 11, 1992, and July 26, 1993

PANTON, J.

The trial of this matter commenced on the 5th February, 1990. However, on the 13th March, 1985 -- that is, 5 years earlier -- the Master had ordered on a summons for directions taken out by the plaintiff that the matter be set down for hearing within thirty days of the order. Notwithstanding that order, the matter did not reach the courtroom until the 30th May, 1988, according to the records available to me. The estimated length of the hearing, based on the submissions of the attorneys-at-law before the Master, was three days. That which was estimated for three days eventually consumed eight days. During the trial itself, there were no less than three adjournments at the request of the plaintiff who seemed to have been in a state of perpetual unreadiness. Eventually, the trial was completed on the 11th November, 1992. These details are mentioned for the sole purpose of preventing any misconception as to the reason for the delivery of a judgment in mid-1993 in relation to an action filed nearly a decade ago. It is perhaps of interest to note also that on the 20th May, 1991, the Court was requested to significantly amend the statement of claim that had been filed seven years earlier. The application was granted with the consequential allowance of an adjournment to the defendants who

were affected by this very late move by the plaintiff. It was not without some degree of humour that I observed that the said application for an amendment of the statement of claim had somehow been placed before the Master while the trial was in progress before me.

Let me now turn to the merits of the case. The amended statement of claim alleges that on or about the 6th day of June, 1984, the plaintiff, who was then about eight years old, and other children were walking in a northerly direction along the Temple Hall main road, St. Andrew, when the second defendant, as an agent of the first defendant, negligently drove a motor vehicle in a southerly direction and collided with the plaintiff. The particulars of negligence include allegations of dangerous overtaking, speeding, failing to keep any sufficient lookout, failing to appreciate the special care to be taken while driving on a road where there are children, and driving on the plaintiff's side of the road. It is further alleged in the statement of claim that the plaintiff has suffered a closed head injury, loss of memory, capricious attention span and that there is a strong likelihood of anti-social and criminal behaviour developing as well as the likely onset of clinical epilepsy.

The defence has denied all the particulars of negligence in the statement of claim and has countered with allegations that the plaintiff suddenly and without warning ran across the road into the path of the motor vehicle.

The evidence

The evidence presented on behalf of the plaintiff may be placed in three categories. Firstly, there is the evidence as to the accident itself; secondly, there is the evidence of the doctor who examined and treated the plaintiff while he was in hospital; thirdly, there is the evidence of a clinical psychologist and a neurologist who examined the plaintiff several years after the accident.

The evidence as to how the accident occurred comes from three witnesses - the plaintiff who was eight years old at the time of the accident, and thirteen years old when he gave his evidence; his friend Samuel Edwards who was a mere four years old at the time of the accident, and aged ten at the time of trial, and George Davis who was twenty-two years old at the time of trial.

The substance of the case for the plaintiff is that the second defendant was driving a van in a line of vehicles and while overtaking a tanker, at a time when it

was unsafe to do so, he collided into the plaintiff who was walking on his correct side of the road in an opposite direction, causing him to be hoisted into the air and eventually fall on the road surface. The plaintiff was walking on the edge of the asphalt with one Peter on the inside to his left. The vehicle was being driven at a speed above the speed limit, that is to say, at about 50 to 55 miles per hour. The accident resulted in the plaintiff being hospitalised for a week. The doctor who was responsible for his treatment in the hospital said that he suffered from superficial abrasions to his face, forehead, right wrist, right knee and right upper part of the abdominal wall. He also had a haematoma at the back of the head. There was no sign of any permanent injury, nor was there any demonstrable physical abnormality. Several years later, the plaintiff was found to be suffering from a closed head injury and damage to his seat of memory. He was also assessed as being below his age level so far as social maturity and intelligence are concerned, to be forgetful and unlikely to attain G.C.E. O' level standard.

The defence called two witnesses. They were the second defendant and one Maurice Lawrence, a sales representative and an officer in the Third Battallion of the Jamaica Defence Force. Their evidence was to the effect that the vehicle driven by the second defendant was not the last in the line of traffic, and that there was no attempt to pass the tanker. The accident, they said, was due to the fact that the plaintiff ran into the path of the van. The speed of the vehicle being driven by the second defendant was no more than thirty miles per hour.

The plaintiff himself was most unhelpful so far as the circumstances of the accident and, indeed, his case were concerned. He talked with Peter his friend as they walked. He saw no vehicle before he was hit. He never saw the vehicle before he was hit. He never kept his eyes on the road as he walked and talked. He put it this way: 'The only thing I know is feeling a blow and waking up in the hospital'. His younger friend, Samuel, who gave evidence, was walking ahead of him. According to Samuel, he (Samuel) kept looking back at the plaintiff. That is how he was able to see the accident. His reason for constantly looking back at the plaintiff and Peter? Because they (the plaintiff and Peter) were talking!! It did not escape the attention of the Court that the witness Samuel was only four years old at the time of the accident.

George Davis attempted to provide the substance of the plaintiff's case. He was, he said, one and a half chains away from the scene of the accident. He said that he saw the plaintiff when he was hit by the van, and immediately ran up to the scene. The van, he said, was at the back of the line of traffic and had started to overtake the tanker. He recalls seeing the van stop but can't say where on the road it had stopped and he does not recall seeing any other vehicle coming to a stop. He doesn't know where the plaintiff was walking, and places Peter and Samuel as walking side by side.

Maurice Lawrence saw the plaintiff run out of a group of children as if to cross the road. He saw the van hit him, then come to a stop. He was driving immediately behind the second defendant. He stopped. Other vehicles stopped. He gave instructions for the plaintiff to be taken to the hospital and he himself reported the accident at the Stony Hill Police Station. He saw no overtaking by the van. In his view, the second defendant could not have avoided the accident.

Findings

I considered the demeanour of the witnesses as they gave their evidence. I have also since the trial reflected further on the substance of what they had to say. The plaintiff did not say much. His younger friend Samuel was, in my view, perhaps a bit too young at the time of the accident for the Court to accept him as a reliable witness. In any event, he was walking ahead of the plaintiff. It seems to me that his evidence was an attempted reconstruction of events based on false assumptions. So far as George Davis is concerned, he may well have been on the road; however, he was, in my view, farther away from the point of impact than he would wish to admit. He was also not as observant as he should or could have been. How is it that he saw no other vehicles stop? How is it that he doesn't know where the plaintiff was walking? If he does not know where the plaintiff was walking, how can he give a reliable account of what occurred to the plaintiff while he was walking?

I found Maurice Lawrence to be a witness on whose evidence the Court could safely rely. He impressed me as being a witness of truth. There is added significance to his evidence in that he and the second defendant did not know each other before the accident. The level of responsibility with which he dealt with the situation at the scene was commendable. I accept his evidence as to how the accident occurred. I find that the second defendant was driving on his correct side of the

road behind the tanker in a line of traffic; that he never attempted to overtake the tanker; and that the plaintiff darted across the road into the path of the vehicle. There was, I find, no avoiding action that the second defendant could have taken to prevent injury to the plaintiff. In the circumstances, I find no negligence on the part of the second defendant. The claim is therefore dismissed. Judgment is entered on behalf of the defendants, with costs to the defendants to be agreed or taxed.