IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. K.020 OF 1983

BETWEEN	DEVON BERTRAM KELLEY (By next Friend Fay Liston)	PLAINTIFF
A N D	SEVENS LIMITED	FIRST DEFENDANT
A N D	ARTHUR SKYERS	SECOND DEFENDANT

Winston Frankson Q.C., R. S. Pershadsingh Q.C., for Plaintiff

Dennis Goffe for Defendants instructed by Myers Fletcher and Gordon Manton and Hart.

November 22, 1985; June 2, 3, 4, 1986; October 21, 22, 23, 24, 1986; November 16, 17, 18, 1987 and December 17, 1987.

MALCOLM, J:

The hearing of the assessment of damages in this matter was heard on the following days: 22nd November, 1985,; 2nd, 3rd, and 4th June, 1986; 21st, 22nd 23rd and 24th October, 1986; and 16th, 17th and 18th November, 1987, on which last day I reserved my decision, and promised to deliver same in a short time; this is a fulfillment of that promise.

Fay Liston was the first witness who gave evidence on the infant plaintiff's behalf. She was his mother and next friend. She testified that an accident happened to her son on the 21st August 1980, and she afterwards saw him with his head badly injured. She said he was at that time one year and five months old. The infant plaintiff herein was eight years old on his last birthday. She told of his change of personality and behavioural pattern after he left hospital. She testified that he couldn't read and write and was learning nothing at school.

The witness gave evidence as to several items claimed under special damages, and at the conculusion of her evidence-in-chief, and without opposition from the defence, Mr. Pershandsingh sought and was granted leave to "amend all special damges so far as necessary to conform with evidence".

One Lewis Ellis gave evidence as to the accident, and another, Al Stewart, also testified as to the state of the infant plaintiff when he saw him in hospital.

The first expert witness called by the plaintiff was Ruth Rae Doorbar. She stated that she possessed a doctorate in Clinical Psychology, and that she is currently practicing at Oxford Medical Centre. She is a Consultant with the Ministry of Health since 1974, and she said she served five country hospitals. She also gave her other qualifications. She testified that young Devon Kelly attended on her twice, on the 14th of June, 1984, and on the 27th of June of the same year. She made examinations after receiving a history of his condition from his mother. She understood that he was involved in a motor vehicle accident, and that he sustained traumatic blows to the head. She learned that he had been hospitalized in May Pen Hospital and Children's Hospital. She stated that she had no access to medical reports, as the doctors were no longer there. She gave him a series of intelligence and personality tests, the purpose of which was to ascertain his present intellectual functioning, and to determine his potential intelligence endownment. The object was to make a prognosis as to his future.

She told of the various tests that she gave, including the Standford Vinet Test. Among other things, she found that he could not identify pictures of a stove, umbrella, or a cat. She said "When I asked simple questions, like 'Why do we have houses?', he could not help me with an snswer". The test revealed an I.Q. of 49 and a mental age of three years and two months. She calculated his impairment as 51%. She said that he could not remove his own clothing. She was asked the question - 'Having regard to your finding as to basic intelligence of Devon, would you say his potential is severely impaired?' and her answer was"yes". She said she had attributed it to the accident, and it was clear that he had organic brain damage, occasioned very probably by trauma.

She went on to say that it was her belief that he is going to require constant supervision life long, and that she does not see any prospects of improvement. The prognosis, she said, is extremely poor. She didn't know of any schools in this country that could improve his quality of life, and said his family would have to give him one hundred per cent supervision. She was asked the following important question - 'Are these disabilities by themselves life-threatening?' and her answer was 'I expect he would die at a young age'. She said it was full time supervision that she was talking about, that is seven days a week for the rest of his life, and the person taking care of him would have to be someone a little higher in intellect than a household helper.

She said that she could read X-rays, and that she had read those in respect of Devon. To Mr. Goffe, she said that she was not a medical doctor, adding that she however knew something about medicine. She went on to say 'I am not entitled to prescribe for patients. I give advice to medical doctor. He hasn't got to accept it'. She said she had appeared in several cases in the High Court, including one heard by Mr. Justice Ellis, and she was asked whether she recollected that that Judge rejected her opinion as to disability. She said in reply that she may have given an opinion as to combined effect of injury to brain and leg, but she did not agree that she gave an opinion as to disability to leg alone. She said that she did not agree that life expectancy is the province of a doctor of medicine. She said 'We both have a contribution to make. I can contribute to doctor's assessment of life expectancy'.

She went on to say that she noticed Devon was short for his age, underweight, and abnormally slow, and appeared like a three year old. She said that when she saw him last week, he had grown very little. She said she did not think he would ever be self supporting, and she denied that she was being unduly pessimistic about Devon.

Re-examined by Mr. Frankson, she said that she did not think that institutionalising Devon would improve or rehabilitate him.

She testified that whatever the institutions are in Jamaica, they could not furnish the supervision and love and understanding needed to deal with this matter.

The next witness was Dr. Charles Theisegar. He stated he was a Registered Medical Practitioner, Consultant Psychiatrist attached to Psychiatric Department of the University Hospital. He said that the plaintiff Devon Kelly was referred to him on the 21st of September, 1985. He said he got a history at that time from Dr. Doorbar, and that the infant plaintiff was accompanied by his mother. She gave a history of his being involved in a motor vehicle accident in August 1980. Devon was 17 months old. He said that a child should triple his birth weight by the end of year, and that at 18 months, he should be weighing about 28½ pounds, and he stated that the child was underdeveloped. He was asked the question - 'What in your opinion would have caused lack of development?' and he replied, 'I implied his failure to develop as being related to his injury at the time of the accident'. He said he carried out a mental status examination, and it revealed a young lad who was very small in stature, and appeared underdeveloped, height 3 ft. 6 ins., weight 30 pounds, which was abnormal for that age. He got his name out, but was not able to converse at all.

He stated that in his opinion, Devon was mentally subnormal, and judging from his physical state, he was of the opinion that it was due to an organic fault. Diagnosis:- chronic organic brain syndrome. He said - 'Taking into consideration his history up to the accident, and subsequent deterioration, I was of the opinion that the brain syndrome was due to cerebral injury to brain at time of the accident'. Prognosis as to his future was poor, not capable of attaining his full potential as a man. The following question was put - 'Will he be able to care and fend for himself?', answer: 'No, he will not be able to, he will require life long care'.

Cross-examined by Mr. Goffe, he made the admission that he would not claim to be an expert re the brain injury. He would expect

the neurosurgeon to be an expert at that. There were then questions about the pituitary gland, and the doctor said that it is in a little bony pouch, and is like a little plum attached to the rest of the brain by something like a stalk. He said that this gland is at the base of the brain, and just in line with the roof of the mouth. He was asked the following question by Mr. Goffe - 'Can you rule out malnutrition as a cause for his small size?', the answer, 'can't rule it out, but not likely.' He was asked whether he considered the plaintiff's life expectancy would be affected. His answer - 'One would say slightly decreased'. He said that he knew of Dr. Cheeks, and knew of the Psychologist Miss Evans. He was asked whether it would surprise him to know that Dr. Cheeks expressed the view that the child's small size did not result from head injuries, and he said in answer that he would need to know how Dr. Cheeks came to that conclusion, and he said stature is not all that important. Further, he said he did not know what Dr. Cheeks based his opinion on. He gave as his opinion that damage was 'diffused'. He was asked the question -'Would you say that there is a likelihood that damage to the pituitary gland was occasioned by the injury?', and his answer was in the affirmative.

Steven Bryant, a mason of thirty (30) years standing, gave evidence on behalf of the infant plaintiff. He stated that in 1980, the average pay for a mason was $250 to $500 per week. It would now be $400 to $800 per week.

He was followed by Rebecca Thomas, domestic, and Devon's aunt Melvina Kelly. I am mindful of their evidence, but do not consider it sufficiently important to bear recounting.

The defence then called witnesses, but before doing so, Mr. Goffe reminded the Court that this was an assessment of damages, so there had been no necessity to call evidence re liability. Only a question of quantum of damages remained. He posed as one of the questions which the Court would have to answer, the following:- Whether a short physical stature is the result of head injuries,

or due to biochemical or nutritional problems. He said he was not disputing there was brain damage, and consequent impairment, and spoke of the gloomy prognosis of Dr. Doorbar. By consent, two pyschological reports of Miss Janice Evans were tendered as Exhibits 1 and 2.

Mr. Goffe called to the stand, Rudolph Cheeks, Registered Medical Practitioner, and his list of qualifications and achievements were **imposing.** He is a Consultant Neurosurgeon, and F.R.C.S. He had studied at Leeds in England. He was head of the Department of Neurosurgery at the Kingston Public Hospital, Associate Lecturer in Neurosurgery, a Honorary Consultant Neurosurgeon at University Hospital of the West Indies. He was a member of the Society of the British Neurosurgeons and a member of the Caribbean and Latin American Society of Neurosurgeons, an official Jamaican representative to World Conference of Neurosurgeons. He was attached also to Bustamante Children's Hospital, as Consultant Neurosurgeon, and Consultant Neurosurgeon to St. Joseph's Hospital, Nuttall Hospital, and Medical Association Hospital, and he stated that he had a private practice in Kingston.

He stated that on the 26th of February, 1986, at his office, he made a physical and neurological examination of Devon Kelly - On examination, he said the child was fully alert - clear speech - vocabulary equivalent to child of about four years. His concentration, Dr. Cheeks said, was reduced, and his attention span was also reduced. He said he detected a gross defect of recent memory. His examination revealed damage to the parietal lobe on the left side. He came to the conclusion that Devon had suffered a severe head injury. The residual disability was as follows - (i) intellectual loss - gross defect of memory, with reduced attention span; (ii) personality change; and (iii) parietal lobe damage. He was asked the following question - 'It has been suggested that the child had damage to his pituitary gland, as a result of a motor vehicle accident', and his answer is important, and it deserves precise quoting - 'It is not

possible for the pituitary gland to be damaged in a head injury. I have researched this question here in Jamaica. I have conducted research on 783 cases involving head injuries. I gave findings at a symposium two years ago, and in none of those cases was the pituitary gland injured. Something protects the gland from injury. The anatomy of the surrounding structure at the base of the skull protects the skull. The 'stalk' is protected by a diaphragm, which is ligamental'. He further went on to say that there are several reasons why he said the short statute of the child was not caused by brain injury. He said that neurosurgeons recognise three different types of head injuries, (i) the crush type; (ii) the missile injury - low or high velocity; (iii) the diffused type of head injury. He said that the pituitary gland, because of its peculiar anatomy (that is buried in solid bones) is never injured in the diffused type of injury, nor in the crushing type of injury. It can be injured in a gun shot wound to the head, a missile injury, and more importantly, he expressed the opinion that in this case, this child suffered a diffused head injury, and he went on to reiterate that the pituitary gland, being at the base of the skull, would not be damaged by a diffused injury. He said, by way of explanation, that a neurologist is not a surgeon. He does not operate on the brain. He said the neurologist has far less experience about brain trauma than the neurosurgeon.

Cross-examined by Mr. Frankson, the following question was put - " would it be a remarkable coincidence, assuming the correctness of the adults that the child, since the accident has exhibited signs of retardation in its growth immediately following the physical trauma which he experienced, if this retardation was not in some way referrable to the said trauma?". In his answer, he said he would not use the words 'remarkable coincidence'. He said "I think we have to search for an explanation that does not involve his head". And again to Mr. Frankson, he said in answer to one of his queries, that it would be safe to eliminate nutritional factors.

In his view, if growth is retarded, it does not follow that there is a malfunctioning of the pituitary gland. He said he did not accept the view that a diffused injury could cause damage to the stem of the pituitary gland, and testified that he did not agree with Dr. Theisegar's view if he said so. He said he had heard of Dr. Ruth Doorbar, and expressed the view that the injury to the frontal lobe results in impairment of judgment and abstract thinking.

Dr. Robert Grey, whose evidence was interposed during Dr. Cheeks' testimony, stated that he was a Registered Medical Practitioner, Paediatrician, F.R.C.P., Diploma in Child Health, interested in neurological diseases. He was connected to the University Hospital of the West Indies as Associate Lecturer, and has a clinic there for children with neurological disorders.

He recalled examining Devon Kelly, the plaintiff, on the 11th July, 1986. He was small for his age, weight was 31 pounds, well below lower limits. He had good attention span during the interview, gave reasonably quick answers. He said that from history given, he had developed normally until the accident. He said "X-rays to head, and looking at region containing pituitary gland showed that that was quite normal". He stated that in cases of pituitary malfunction, the height is depressed more than the weight. The plaintiff was the opposite.

Cross-examined, he said he didn't form the opinion that Devon had suffered severe brain damage. He was asked, the trauma to which he was subjected, could it have contributed to his growth deficiency? His answer - "I think it very unlikely. I can't offer any other explanation". He gave what I consider a guarded reply when he said "we did not rule out the damage to the pituitary gland as cause of his retardation", and to Mr. Goffe, he said finally, that the commonest cause of retardation is malnutrition.

The defence called Winsome Morrision, who stated that she was the Medical Records officer at the May Pen Hospital. She had searched and found records in connection with this case, and had

brought them along with her. Despite objection by Mr. Pershadsingh, she gave evidence as regards the weight of the infant plaintiff, as disclosed in her records.

Richard Lake gave evidence in this matter, and stated that he was a Contractor and Developer. He had worked with his father, and at the moment had his own firm, which had been in existence for twelve years. He spoke of (and these were tendered in evidence) labour management agreements. His evidence clearly was designed to show the court what pay masons now receive. He stated that there were three grades. He did not agree that in 1980 the pay per week for an average mason would be between $250 and $500. To Mr. Frankson, he said that at $15,000 per annum, the average weekly pay would be a little under $290 per week.

I have already referred to the reports of Miss Evans, B.Sc., M.Sc. The first report ended by saying that damage to Devon's personality is v ery likely, without interaction with other children, because 'This lad must be protected as much as possible from the sense of failure which would become more and more likely as he grows older'. The second report closes thus - 'Devon must be with adults who truly understand the tremendous intellectual frustration and despair that this type of injury stimulates. His youth makes him additionally vulnerable to self-worth, denegration, and loss of hope.

Both attorneys, that is Mr. Goffe ard Mr. Frankson, addressed the court at the conclusion of the evidence. Mr. Goffe expressed the view that when considering the medical evidence, the court should, if there is a conflict between Dr. Theisegar's evidence, and that of Doctors Grey and Cheeks, the latter two would carry more medical weight **than** Dr. Theisegar. He further expressed the view that on the basis of the evidence before the court, the court should hold that it is not satisfied on the balance of probabilities that the under sized state of the infant was caused by the head injuries. He dealt with general damages under three heads -

(i) pain and suffering and loss of amenities;

(ii) future care;

(iii) loss of future earnings.

He cited the case of Anthony Rose v. Thomas Smith, Supreme Court Civil Appeal 32/84, a decision given in May of 1985. It dealt with the question of head injuries, and impairment of memory, and stated that the injuries in that case were more serious than the instant case. He said that on appeal, the sum of $18,000 under this head had been increased by the Court of Appeal to $80,000, and he considered that as a reasonable figure, and mentioned that there was no acceptable medical evidence of fracture of the skull, although there was evidence of injury to the head.

Under the heading 'Future Care', he stated that in his view, an award must be made under this head, but careful analysis was required. He submitted that if adequate facilities are available in Jamaica, one cannot say better ones are available abroad. He cited the case of Johnson v. Browne, 1972, 19 W.I.R. 83/82 and stated that trustees have a duty to mitigate on the infant's behalf. He said there is a family home, and he expressed the view that the plaintiff should live with his mother, and that would satisfy two criteria - it would be in his best interest, and secondly, it would be an act of mitigation of damages.

I have already referred to the comments about Dr. Doorbar's evidence and Mr. Goffe went on to say that in his view, Dr. Doorbar was a person who painted gloomy pictures, and has been known to go outside the field of her competence. Her focus was not so much on what could be done for the child, but rather on what was wrong, and she appeared to be applying American standards to Jamaica. He said that no one had expressed the extreme view that the infant was a vegetable. He went on to submit that the most reasonable thing was for Devon to live with his aunt, as he has done, and for him to get financial means to enable her to make use of the facilities which are locally available. Under the head of 'Future Care', he suggested that an award of $37,400 would be adequate compensation.

Under the heading 'Future loss of earnings', he said evidence had been called re earnings by a mason at the present time, and it was said that it is likely that the infant plaintiff would follow in his father's footsteps, his father being a mason. He said the Court should use the maximum/minimum wage as was done in the case of Hilton Douglas v. K.S.A.C. This case, suit No. C.L. 1976 D. 098, was tried by Smith, C.J. Mr. Goffe said that if $60 per week was used as an appropriate figure, that would give a sum of $3,120 per annum, and using a multiplier of 16, the total would be $49,920, which when scaled down, would be in the region of $25,000. He therefore suggested a figure of $142,400 as being a reasonable award for general damages.

Mr. Frankson, in his address, reminded the Court that most of the evidence was of a medical nature. He said that the infant had suffered physical retardation. He said that from the evidence it should be inferred that there was damage to the pituitary gland. He went on to add that there was evidence of organic brain damage, and expressed the view that the damage to the head was diffused. He stated that both Dr. Cheeks and Dr. Grey were silent about the cause of retardation. He said the retardation could not have been by mere chance, and asked the Court to say that it was not a coincidence. He said on the balance of probabilities, the disabilities suffered by the infant were caused directly by trauma. The Court should hold the view that throughout the rest of the infant plaintiff's life, he will have to depend on others for care and support. He suggested that a sum of $200,000 for pain and suffering and loss of amenities would be a reasonable award. He suggested a multiplier of 20 years, and that using a figure of $250 per week, an award under the head "Loss of Future earnings" should be in the region of $130,000. Under the head "Future Care", he thought that a sum of $130,000 would be a reasonable award, and in conclusion, he expressed the view that a total award for general damages of $460,000 would be reasonable.

This assessment has been marked by highly technical medical evidence, and not unnaturally, the medical views of some of the doctors

did not coincide. I find that the infant plaintiff suffered severe brain damage. I find also that on a balance of probabilities, the retardation of the plaintiff and his under-sized condition, were caused by the head injuies. I find that his retardation was not due to malnutrition. I find, after listening to the medical evidence, that one cannot rule out the possibility that there was damage to the pituitary gland, and I say this despite Dr. Cheeks' evidence on the point. Could it not be that damage to the pituitary gland, despite the anatomical protection, could have been caused by bleeding into the portion of the brain where the gland is located? It is my view, and I am so satisfied, that the infant will need constant care and supervision for the rest of his life, and on careful consideration of all the evidence in this matter, I award general damages of $320,000.00, arrived at as follows:

(i) Pain and suffering and loss of amenities - $140,000;

(ii) Future care - $80,000;

(iii) Loss of prospective future earnings - $100,000.

For Special Damages, I award the sum of - $4,000. So accordingly, there will be a total award of - $324,000. In addition there will be interest at 3% on Special Damages from the date of the accident to the date hereof. Interest at 3% on $140,000 of the General Damages from the date of service of the Writ to the date hereof.

The amount of General Damages awarded is to be held in trust for the infant plaintiff. Appointment of trustees is reserved for hearing in Chambers as also other incidental matters. The amount of Special Damages to be paid to the next friend. Costs to plaintiff to be agreed or taxed. Stay of execution granted for six weeks in excess of the figure of $160,000.