Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1987 M 358A

BETWEEN	FEONIA MITCHELL (an infant by ROSE DILLON her mother and next friend)	
	AND	
	ROSE DILLON	PLAINTIFFS
A N D	DANIEL BAJOO	FIRST DEFENDANT
A N D	FRANKLYN STEWART	SECOND DEFENDANT

Mrs. Ursula Khan for the Defendant.

Clifton Daley, Clinton Hines and Miss Carol Vassall instructed by Daley, Walker and Lee Hing for the Defendants.

Hearing on February 6, 7, 10, 11 and June 26, 1992

JUDGMENT

BINGHAM, J.

The plaintiff now a young lady, aged 18 years was as a thirteen year old school girl then attending the Saint Johns Primary School on Saint Johns Road in Saint Catherine when on 20th June 1986 she was hit down by a motor car owned by the first named defendant and driven by the second named defendant.

This collision occurred while the plaintiff was attempting to cross the main road which leads from Spanish Town in a north westernly direction along Saint Johns Road.

Following a hearing of her claim founded in negligence for personal injuries and which hearing engaged the attention of the Court for five days I reserved my decision.

The question of ownership and agency not being in issue on the pleadings, the two questions left to be determined were liability and assuming a determination in the plaintiff's favour the secondary issue of damages.

The Facts

This fact of the plaintiff being in the act of crossing the road when hit down was not challenged either on the pleadings or on the evidence. What was being contended by the defence in the light of the cross examination of the plaintiff was that she was running across the main road when she was hit down, a fact which was denied by her. She placed herself as walking across the road by way of a pedestrian crossing by the school at the time of the incident.

The second named defendant who was the driver of the car involved in the accident did not give evidence. The defence called a witness one Desmond Francis a Labourer who testified to being on the scene when the plaintiff was hit down by the car. As it emerged from his evidence, under cross examination by learned Counsel for the plaintiff he was unable to assist the Court as to the circumstances leading up to the accident. From his account he was positioned to the left of the main road as one proceeds in a westernly direction. He placed himself at the edge of the asphalt surface with his back to the Saint Johns Primary School gate from which the plaintiff emerged before entering the road from the direction of the school gate.

The witness called by the defence Desmond Francis, however, sought to deny the presence of a pedestrian crossing by the school at the time of the incident. Given the unchallenged evidence emanating from the witness Francis of the presence of some two thousand children attending the Primary School as well as the presence of other children at a Basic School within close proximity to the Primary School, and the children at Saint Catherine Secondary High School not far away in the direction from which the car was approaching, all rendered it more probable than not that there was a pedestrian crossing by which route the plaintiff was proceeding across the road at the time of the accident. Irrespective of the presence or absence of such a crossing, however, the admitted presence of what would have been hoards of school children in uniform during the luncheon break- the time of the incident, both in the school yards and within the environs all this ought to have clearly brought home forcibly to any reasonable and prudent motorist the need to exercise extreme caution in proceeding on a highway which traversed this area.

Much emphasis has been placed by learned counsel for the defendants on the knowledge by the plaintiff of the road drill which he contends placed some duty on her to exercise reasonable care for her own safety in crossing the highway in question. This fact has, however, to be examined against the back ground of the circumstances as related by her that it was after she had taken the precautionary measures in looking to both sides of the road that she commenced to cross the highway and this evidence has not been destroyed in cross examination nor contradicted by any credible evidence coming from the defence.

The witness Desmond Francis from his account negatived any question of he being in a position to describe how the accident happened, having positioned himself at the edge of the asphalt surface with his back to the school gate through which the plaintiff emerged as she made her way to cross the road to purchase her lunch. Under examination of Francis by learned Defence Counsel Mr. Hines the following dialogue ensued:-

> "Q. What is the next thing that happened while you were out there waiting to cross?
>
> A. While there waiting there come this little girl from through the school gate and run right out in the street. She came "up running.
>
> Q. About how far back up from the road is the school gate?
>
> A. About 40 feet. (witness points out distance).
>
> Q. Where were your daughter and yourself standing?
>
> A. We were at the roadway. To the Court we were at the edge of the asphalt".

Under cross examination the witnesses' evidence now made it clear that he did not see the plaintiff until the accident was about to take place. He then stated:-

> "I was standing down at the asphalt facing the road. The school gate was behind me.
>
> Q. You didn't see the child when she

come out of the gate?

A. No, maam.

Q. You don't know whether the girl was running when she came to you?

A. No, maam".

(Underlines for emphasis)

At this stage one needs to recall to mind the dictum of Cumming Bruce J. in Jones v Lawrence [1969] 3 ALL E.R. at 267 whose opinion I adopt as opposite, that in all probability the plaintiff contrary to what she said did not go through any road drill and look up and down Saint Johns Road but did what most children of her age would have done in darting across the road. Even this, however, would not absolve the defendant driver of the primary duty of care placed upon him to exercise extreme caution having regard to the situation with which he was confronted on the day in question. Having regard to the evidence of Desmond Francis as to the relative speed of the car being between 30 - 35 (miles per hour), this clearly was given the circumstances negligent driving on the defendant's driver's part. On facts even more favourable to the Defence's contention this view is supported by Jones v Lawrence (supra) which decision was relied upon by Rowe P. in S.C.C.A. 36/86 Cornel Lee (by n.f Pauline Hind v Ivy Mayhin unreported judgment of the Court of Appeal delivered on 22nd March, 1991. The learned President in that case cited with approval from the dictum of Lord Du Parcq in London Passenger Transport Board v Upson [1949] A.C. 153 at 176 where the Noble Lord said:-

> "The correct principle was stated by Lord Dunedin when he said - If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".
>
> (emphasis supplied)

Applying the above principle, in my view given the facts here of so many young children playing both in the school yards and using the highway at lunch time, this ought to have presented to the mind of any reasonable and prudent motorist using that thorough fare the real and apparent possibility that a child (or children) may have attempted suddenly and without warning to cross that road. For the defendant driver given his estimated speed to have taken no such precautions was therefore negligence on his part.

Although it was being contended by the defence that the presence of a motor car parked to the left of the road by the school gate facing west which vehicle may have impeded the view of the defendant driver, even had this been so it would not exonerate him from his duty to approach this area at a speed which would have enable him to stop within a safe distance in an emergency.

To summarise therefore, the matter resolves itself to a case in which the plaintiff's evidence, which was not shaken in cross examination, related an account in which she was crossing a highway by way of a pedestrian crossing after having taken the necessary precautions when she was hit down by a car owned by the first defendant and driven by the second defendant. The witness called by the defence was from his account only able to say that he saw the impact at the time when the plaintiff came in contact with the motor car.

In accepting the account as related by the plaintiff therefore, I would in all the circumstances hold that the defendant driver failed in the duty of care placed on him and was therefore negligent and that on these facts he was solely to blame for the collision. On the question of liability therefore, I find in favour of the plaintiff.

Damages

I turn now to the question of damages. In considering this question there is no issue as to the sum claimed for special damages as this has been agreed at the amount claimed in the particulars of $1,320.

It is in the area of general damages that issue has been joined. This calls for a proper evaluation and assessment of the evidence of the plaintiff,

her mother and the two experts Dr. Asquith Reid and Dr. Ellen Buchignani. The latter who attended to the plaintiff at the Spanish Town Hospital did not testify at the trial. A medical report prepared by her was admitted into evidence as exhibit 1.

When the plaintiff was admitted to the hospital on 20th June, 1986 the following injuries were noted:-

1. Head injuries with loss of consciousness.
2. 2" laceration to right upper arm.
3. 2" X 2" jagged laceration of right arm.
4. Two 1cm lacerations to left upper arm near the elbow.
5. Three 1cm puncture wounds to the left side of the posterior chest.

Treatment

The plaintiff's treatment consisted of suturing and dressing to wounds, intravenous fluids until she was able to eat, and frequent neurologic checks. On the day after the incident she was conscious but drowsy. She slowly improved over the next few days and by 23rd June she was fully awake but still lethargic at times. By 26th June she was up and about and was discharged. The wounds on her back had still not healed and she was instructed to return for dressings.

The plaintiff returned to school in September 1986 and her attendance was regular. She had occassional headaches but these were not severe enough to keep her home from school or to interfere with her studying.

Given the report of Dr. Buchignani one would have been left with the impression that certainly by September 1986 the plaintiff had recovered sufficiently to enable her to return to school and that apart from the occassional headaches she had by then recovered from the effects of her injuries to be able to continue her schooling without any interruption. According to the plaintiff and her mother, however, the extent of the recovery was not complete but was marked by a falling off in the plaintiff's grades.

This situation caused the plaintiff to be referred to Dr. Asquith Reid a Clinical Psychologist who saw and examined her on two occassions, the first

being in July 1987.

Dr. Reid's examination and assessment

He interviewed the plaintiff whom he found to be withdrawn (shy). Her memory was depressed particularly in the short term process. The plaintiff was subjected by Dr. Reid to certain psychological tests among which the Bender Test was one designed to determine the extent of her brain function. According to Dr. Reid where neurological tests sometimes fail to pick up signs of brain disorder this test will be able to do so. As a result of the plaintiff's performances Dr. Reid concluded that she had suffered brain injury. He based this conclusion on the sub-tests scores which she received.

The second examination was conducted in March 1991. This confirmed his earlier diagnosis.

Dr. Reid assessed the degree of brain disfunction at 17%. He was also of the opinion that this condition will be permanent.

Dr. Reid was, however, of the view that despite her coudition the plaintiff could be trained to perform at some simple craft although her work - out-put would be more than likely affected. Using the variability in the scores which the plaintiff obtained in the intelligence tests she was given, this suggested that prior to the injury she had the ability to gain and properly access information.

Dr. Reid's assessment supported the evidence of both the plaintiff and her mother as to her (plaintiff's) performance before and after the accident. Dr. Buchignani's report although not confirming Dr. Reid's assessment does not rule it out. It is of some significance that the medical report (exhibit I) revealed at (I) the following:-

"Head injury with loss of consciousness"

(emphasis mine)

On the totality of all the evidence therefore I would conclude that the plaintiff Feonia Mitchell suffered a very serious head injury which one could properly infer was caused by the accident and which injury resulted in brain

damage and that this condition, in the absence of any evidence to the contrary will in all probability be of a permanent nature. From her demeanour in the witness box the plaintiff did not impress me as one who had fully recovered from the traumatic experiences of that fateful day in June 1986, an incident which has now resulted in her being unable to cope with the challenges of a high school curriculum and domestic life and may continue to do so for a long time to come.

It was against this background that learned Counsel for the defendants Mr. Hines relied on the following authorities:-

1. C.L. 1978/R137 Elaine Russell (by n.f. Eileen Griffiths v. Bencroft Bloomfield per Gordon J (as he then was) reported at volume 2, pg 206 of Mrs. Khans Personal Injury awards.
2. Carl Richard Archie v. International Car Rentals volume 2 of the same work at pg 202.
3. C.L. 1979/R 41 Anthony Rose by n.f. Yvonne Rose v. Thomas Smith per McKain J reported at volume 2 of the same work at pg 210.

In the above mentioned cases the awards for general damages were as follows:-

(1) $108,200 of which $83,200 was for loss of future earnings;

(2) $180,000 of which $30,000 was for loss of future earnings and;

(3) $18,000 which sum was increased on appeal by The Court of Appeal to $80,000.

This last case of Rose v Smith etal bears some similarity to the instant case in that the plaintiff was within the age grouping of the present plaintiff and his injuries were somewhat similar. They were, however, more serious including as such a fracture to the left lower leg (ankle). Using this case as 'a string for his bow' Mr. Hines submitted that a sum of $50,000 ought to be a reasonable award in the circumstances. This award made in 1983, when converted to the money of the day as Mrs. Khan was very careful to point out it would result in an award of $489,000. Using Mr. Hines' figure as a base she submitted that a reasonable award when this sum was scaled down ought therefore to be in the range

of $350,00 - $400,000. Mrs. Khan has frankly conceded that the injuries in this case when compared to Anthony Rose's case (supra) were superficial. There was however, the head injury and the brain damage which has affected the plaintiff's memory in the short term. She is now mildly retarded. It is for this condition that the plaintiff now has to be compensated.

There can be no doubt that when Rose's case, which I am minded to follow is scaled down proportionately, a reasonable award for general damages would amount to $325,000. I would, however, reduce this sum even further in view of the failure on the plaintiff's part to make a full disclosure to Dr. Reid as to her educational history in having attended Saint Jago High School between 1989 and 1991 and even more importantly of her educational performance while attending that institution. Dr. Reid's reaction in Court on being told of this fact was one of surprise bordering on shock. He admitted that such information would have affected his assessment of the plaintiff. He also admitted that given the plaintiff's performance based on her class marks in at least four subject areas, that had these facts been known to him at the time of the second interview in 1991 it would have had some effect on his overall assessment of the plaintiff. Regrettably learned Counsel for the defence did not seek to ascertain from Dr. Reid to what extent this non-disclosure by the plaintiff would have affected the assessment of 17% brain disfunction to which he came. Justice in such circumstances, however, demands that this matter does not pass unnoticed. I would, therefore, in all the circumstances, reduce the amount of$325,000 by one-fifth and this would result in the sum awarded for general damages being $260,000.

The result in that judgment is entered for the plaintiff for $261,320 and costs to be agreed or taxed being:-

1.	Special damages	$ 1,320
2.	General damages	$260,000
	for pain and suffering and loss of amenities and costs to be agreed or taxed.	$261,320

Interest awarded on special damages at 3% as from 20/6/86 to 26/6/92, and on general damages at 3% as from date of service of writ 6/11/87 to 26/6/92.