JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 117/2000

BEFORE: **THE HON MR. JUSTICE FORTE, P.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE SMITH J.A.

BETWEEN:	**DONOVAN MURRAY**	**1st APPELLANT/DEFENDANT**
AND	**JOHN ROSE**	**2nd APPELLANT/DEFENDANT**
AND	**DWAYNE FLOWERS (by his mother and next friend Sandra England)**	**RESPONDENT/PLAINTIFF**

Christopher Dunkley instructed by Cowan, Dunkley and Cowan for the Appellant.

Dennis Daly, Q.C., instructed by Daly Thwaites and Company For the Respondent

June 3, 4 and November 07, 2002

BINGHAM, J.A:

On June 3 and 4, 2002, we heard arguments from counsel in respect to the above appeal, at the end of which we dismissed the appeal, affirmed the judgment entered below and ordered costs to be paid to the respondent to be taxed if not agreed. At that time we promised to reduce our reasons into writing and this we now do.

The Facts

On the morning of the 27th September 1990, the plaintiff/respondent young Dwayne Flowers a six year old infant boy was sent to school on a bus. He was let off at a bus stop which was in the vicinity of his school in Bull Bay in Saint Andrew. The bus that the plaintiff was travelling on had not yet moved off when another bus arrived and parked behind it. Both vehicles were located very near to a pedestrian crossing so strategically placed in order to assist the children in crossing the road into and from the school. As the plaintiff was crossing the road in front of the two stationary buses to get to his school, another bus being driven by the second defendant, while in the act of overtaking the two buses parked across from the school, struck the plaintiff who was walking across the road to the school. The plaintiff was dragged some distance and received significant degloving injuries to his left heel. Pieces of his clothing were found embedded in the lug nut of the wheel of the bus.

The second defendant the driver of the bus testified that on the morning in question he left at about 4:00 a.m. from Saint Thomas on his way to Kingston and reached the vicinity of the school around 6:45 a.m. He recalled overtaking a parked bus and travelling about five m.p.h., it being in the area of a school, when the conductor called out to him that a boy had run into the side of the bus. He stopped the bus and when he came out he saw the little boy lying down in front of the parked bus. His

left trousers foot was torn and he was bleeding from the left ankle. He denied that he was speeding and that the boy was dragged by the bus for some distance before it came to a stop.

The Findings

The learned trial judge in reviewing the evidence found that the accident took place in a school zone and that the second defendant driver was aware that he was in such a place. The learned judge also found that the second defendant, while overtaking the two buses parked in the road, struck the plaintiff causing him to sustain significant injuries. The learned judge indicated that in so overtaking, the second defendant failed to blow his horn although it was reasonable for him to do so in a school zone. He found that the second defendant failed to keep a proper look out, with the result that he did not see the child in the act of crossing the road. He also found that, notwithstanding the fact that the plaintiff attempted to cross the road without ensuring that it was safe to do so, that a child of six years old in these circumstances was not guilty of contributory negligence.

While accepting certain parts of the evidence of Mr. Raphael Crossdale, the bus conductor, as to how the accident happened, the learned judge accepted the evidence of David Harrison, a security guard, who testified for the plaintiff and who was travelling on the defendant's bus, that the driver had been warned by passengers on the

morning in question prior to the accident about the manner of his driving of the vehicle. It was in these circumstances that the learned trial judge found for the plaintiff and awarded damages, interest and costs in his favour.

Learned counsel for the appellant sought to challenge the judgment of the learned trial judge on the following grounds:

> 1. That the learned trial judge erred in law in finding for the defendants on the facts yet entering judgment for the plaintiff.
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> 2. That the learned trial judge failed to consider that having found for the defendants on the facts, that the plaintiff's case being unproven ought properly to have failed.
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> 3. That the learned trial judge found that there was no evidence that bus sounded its horn but erred in making a finding of fact that the second defendant failed to blow his horn where there was a complete lack of evidence from either side on this issue.
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> 4. That upon the finding of fact by the learned trial judge stated in ground 3, he erred in law in imposing a higher duty of care upon the second defendant than that set out in the prevailing authorities, without any or any sufficient basis in law.
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> 5. That the learned trial judge, in finding that the second defendant and his witness gave no evidence as to the blowing of the second defendant's horn, failed to properly consider that the case to be answered by the defendants was based on an entirely different set of facts, and as such the evidence elicited from them would of necessity be primarily in answer to the plaintiff's case.

6. That the learned trial judge failed to properly consider that having rejected the plaintiff's account on the facts, in the interest of justice, evidence as to whether the second defendant did in fact blow his horn ought to have been solicited, and that as trial judge it was within his competence and authority to pose such a question to the witnesses in the interest of clarity, instead of permitting the question to remain silent and unanswered, but proceed to make a finding adverse to the defendants on that issue.

7. That the learned trial judge erred in law by failing to find that in law a minor, although incapable of contributory negligence can be found wholly liable in negligence, thus incorrectly applying a greater liability on the second defendant than exists in law.

Given the material facts outlined above the central issues falling for determination in this appeal were as follows:

(i) Whether a six year old plaintiff in these circumstances may be guilty of contributory negligence with regards to the accident.

(ii) Whether the mother and next friend of the plaintiff may be held liable for contributory negligence for allowing the six year old plaintiff to traverse open road way in the company of persons who left the plaintiff unaccompanied before the accident.

(iii) Whether the learned trial judge having accepted certain parts of the bus conductor, Mr. Crossdale's evidence about the nature of the accident, was bound to accept the part which excluded the plaintiff's witness Mr. Harrison as being a passenger on the defendant's bus.

(iv) Whether the findings of the learned trial judge that the second defendant failed to blow his horn

> when there was no evidence presented by either side on the issue, was a reasonable inference in the circumstances and is not a ground for vitiating the decision.

As it is common ground that it was the defendant's bus that collided with the infant plaintiff while he was attempting to cross the road in an area which was clearly designated and known to motorists to be a school zone, the duty of care which was placed on the second named defendant was much higher than that to be expected if the pedestrian was an adult or a child of mature age and judgment. As the authorities to be extracted from case law and textual publications clearly indicate, although a child of the age of the infant plaintiff may have been taught the road drill as to the proper manner of crossing a road, (and the evidence was that this plaintiff was so instructed), it is natural for them to be momentarily forgetful and to dart instinctively across a road without looking to see if the roadway is clear of oncoming traffic.

The critical issue therefore, is having regard to the duty of care required of the second defendant, did he discharge the duty placed upon him?

On his own evidence he clearly failed the test. In a situation in which he was approaching a school zone and overtaking parked vehicles, he failed to sound his horn. He could not see whether any of the school children were about to cross the road. Although he said that he was travelling at about 5 miles per hour when the accident occurred, a

speed which could be described as a mere crawl the injuries suffered by the infant plaintiff provides a sound basis for the rejection of this account by the learned judge.

The Law

The question whether a child could be found liable for contributory negligence was considered in **Gough v Thorne** [1966] 3 All E.R. 398. In that case a 13½ year old plaintiff was beckoned across the road by a lorry driver who had stopped to let the plaintiff and her siblings across. Another person in a bubble car overtook the lorry and struck the plaintiff causing her injury. The question as to whether the child was to be held liable for contributory negligence was answered in the negative by the English Court of Appeal. The Court was of the opinion that (per Lord Denning M.R. (p. 399h):

> "A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."

The case of **Gough v Thorne** is distinguishable from the instant case from the point of view that the plaintiff in that case was actually beckoned across the road by the lorry driver while the infant plaintiff in the

instant case received no such beckoning. It is significant however, that the Court expressed the view that:

> "a very young child cannot be guilty of contributory negligence, an older child may be, but it depends on the circumstances."

Although the facts in **Gough v Thorne** differ from those in the instant case, it nevertheless offers useful guidance as it indicates that a remarkably high standard of care is placed on drivers with regard to infant pedestrians.

Jones v Lawrence [1969] 3 All E.R. 267 is a decision in which the facts are more in keeping with those in this case and in which the reasoning adopted by the court supports the conclusion reached by the learned trial judge in the instant case. In that case the rider of a motor bike struck a seven year old plaintiff as he ran from behind a parked van. The defence claimed that the child was guilty of contributory negligence but the Court disagreed. The court saw the speed at which the vehicle was travelling as the factor which materially caused the accident by depriving the defendant of the opportunity which existed of avoiding the infant/plaintiff when he ran out into the road. On the issue of contributory negligence in rejecting the plea the learned trial judge (Cummings-Bruce J.) said this (p. 270, 1):

> "In my view the defendant has failed as a matter of probability to show that the infant/plaintiff was culpable or that his behaviour was anything other than that of a normal child who is

> regretfully momentarily forgetful of the perils of crossing a road"

It is this propensity on the part of very young children to be momentarily forgetful of the perils of crossing roads that places an added duty of care on the drivers of motor vehicles. While the learned trial judge in the instant case made no specific finding as to the speed at which Mr. Rose the driver of the bus was travelling at the time of the collision, the fact that he was aware that he was in a school zone and was travelling at a fast enough speed to inflict degloving injuries to the Infant/plaintiff is indicative of the fact that he was not exercising the duty of care called for in the circumstances.

Cornel Lee v Ivy May Hin [1991] 28 J.L.R. 114, a judgment of this court, on its facts and conclusion also supports the decision in the instant case. The case can also be seen as perhaps more useful in understanding the duty of care expected of motorists with regard to children than the two cases previously cited.

The defendant in that case was overtaking a disabled vehicle which was parked on the left hand side of the road when she struck a child who stepped out from the front of that vehicle. At first instance Bingham, J. found for the defendant driver but this decision was reversed on appeal. This court (per Rowe, P. at p. 116g-h) said:

> "A prudent driver who is keeping a proper lookout and who having observed a disabled vehicle on a busy thoroughfare around which there is no clear vision, and who appreciated that a dangerous situation was thereby created, ought not to rely solely on the sounding of a horn but ought to reduce the driving speed so as to be able to deal with the anticipated emergency if indeed it materialises."

The learned President in considering the question of contributory negligence accepted the reasoning of Cummings-Bruce J. in **Jones v Lawrence** (supra). At page 117 (a-b) he said this:

> "In the absence of evidence of the level of intelligence of the plaintiff and of his exposure to the rules of the road, I am prepared to adopt the reasoning of Cummings-Bruce J. in **Jones v Lawrence** [1969] 3 All 267 and to hold that the respondent has failed to show as a matter of probability that this 9 year old plaintiff was capable of exercising judgment in crossing the road or that his behaviour was anything other than that of a normal child of his age who is regrettfully, momentarily forgetful of the perils of crossing the road. ... the appellant did what most children of his age do, act on impulse and dart across the road. In my view the appellant is not guilty of contributory negligence."

Learned counsel for the appellants sought to rely on **Moore v Poyner** [1975] R.T.R. 127 a judgment of the English Court of Appeal by contending that the learned trial judge erred in law by failing to find that in law a minor, although incapable of contributory negligence can be found wholly liable in negligence. In that case a defendant hit a child that ran from a pathway in front of a parked coach. The learned trial judge found

that the defendant was travelling at 25 to 30 m. p. h. or even faster and that he ought to have reduced his speed or sounded his horn. The plaintiff appealed as to the quantum of damages awarded him. On the defendant's cross appeal against liability, there being no evidence to justify inferring that he was travelling faster than 30 m. p. h., the Court of Appeal in allowing the cross-appeal and dismissing the action (per Buckley, L.J.) was of opinion that:

> "The maximum legal speed of 30 m.p.h. was safe in all the circumstances and the defendant was not negligent in not reducing his speed, that the defendant's duty of care was to be tested not by what the plaintiff actually did, but whether if the defendant had reasonably anticipated that a child might run into the road he should have reduced his speed so as to enable him to stop instantaneously to prevent the accident occurring; that such a speed would have been five m.p.h. which was not a reasonable assessment of his duty of care as the risk of the impact happening at the precise moment he was passing the coach was so slight that it did not require him to slow down to such an extent."

The court in coming to its decision applied the dicta of Lord Uthwatt and Lord du Parcq in **London Passenger Transport Board v Upson** [1949] A.C. 155, 173, 176; [1949] 1 All E.R. 60, H.L. and Lord Dunedin in **Fardon v Harcourt-Rivington** (1932) 146 L.T. 391, 392, H.L. Irrespective of the dictum of Buckley L.J. in **Moore v Poyner** (supra), I am content to rely on the reasoning of Rowe P. in **Cornel Lee v Ivy May Hin** (supra). The learned President sought to distinguish the cited case by referring to the dictum of

Lord du Parcq in **London Transport Board v Upson** [1949] AC 155 at 175 where the learned Law Lord said that:

> "The correct principle was stated by Lord Dunedin when he said:
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> 'If the possibility of danger emerging is reasonably apparent then to take no precaution 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, that there is no negligence in not having taken extraordinary precaution'."

It was this statement of principle that no doubt led Buckley L.J. in **Moore v Poyner** to remark that:

> "It seems to me that this was a case where there was an appreciable risk that a child might be masked by the coach and that he might run into the path of the defendant's car, but the likelihood of that happening at the precise moment at which he was passing the coach was so slight that it is not a matter which the defendant ought to have considered to require him to slow down to the extent that I have indicated."

The court was of the view that the accident could only have been avoided if the defendant was driving at a speed of 5 m.p.h. and as the chance that a child would run out in front of the coach was so slight that it would have been unreasonable to have expected the defendant to adopt this course. The defendant thus escaped liability.

In the instant case the facts are quite different. The defendant/appellant was in a school zone. He was overtaking two

parked vehicles near a bus stop and a pedestrian crossing. The infant plaintiff who was struck was in the habit of crossing the road in the company of an older child and not by himself. As such he could not reasonably be expected to realize the dangers in navigating a busy street. No question of contributory negligence arose as the plaintiff was acting in a manner that could be expected of one his age.

What these cases referred to make clear is the high duty of care owed by motorists to infant pedestrians. In addition to that, they place the burden of proving contributory negligence on the part of the infant squarely on the motorist. In this regard the learned authors of Halsbury's Laws of England 3rd Edition Volume 28 at paragraph 98 state that:

> " A distinction must be drawn between children and adults for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person, the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for himself at all he cannot be said to be guilty of contributory negligence with regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonably be expected of them.
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> Where a child doing an act which contributed to the accident was only following the instincts natural to his age and to the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect the child against his own propensities may afford evidence that the

> defendant was not negligent, and therefore not liable.
>
> The question of whether a child is of sufficient age and intelligence to realize and appreciate the risks he runs so as to be capable of being guilty of contributory negligence is a question of fact for the jury".

The learned trial judge accepted the evidence of Mr. Harrison, the security guard, that the manner of driving exhibited by the defendant on the morning in question was such as to cause passengers on the bus to call to him to be careful. This was a situation, which called for the utmost caution on his part, given the strong likelihood of children crossing the road to get to the school. In those circumstances his omission to take reasonable care and, in failing to take precaution by slowing his speed and blowing his horn amounted to evidence of negligence on his part.

Another question for the court's consideration was whether the learned trial judge erred in law by failing to consider contributory negligence on the part of the plaintiff's mother as stated in ground 7 of the appeal. It is indeed sound law that a parent depending on the circumstances could be held liable for contributory negligence.

This ground however raised an issue which was not expressly pleaded or argued in the court below. It is trite law that this court is only required to consider issues raised on the pleadings. Halsbury's Laws of England 4th Edition Volume 34, Paragraph 14 states that;

> "an allegation of contributory negligence must be distinctly pleaded and will not be found by the court of its own motion."

As the defence pleaded failed to include an allegation of contributory negligence on the part of the plaintiff's mother, therefore, the appellant could not rely on it, nor adduce any evidence to support it at this stage.

On a careful examination of the printed record there is nothing to lead us to any other conclusion than that there was a sufficiency of evidence leading the learned trial judge to the conclusion reached in the matter.

The final question relates to the issue as to whether the finding by the learned judge that the defendant driver failed to blow his horn would have materially affected his decision. In our view even if the appellant had blown his horn, he would not have discharged the duty of care placed on him. As he was in a school zone he was required to be particularly careful, a matter which on the evidence accepted by the learned trial judge was clearly negatived. Moreover as the case of **Cornel Lee v Ivy May Hin** (supra), shows the mere blowing of the horn by the defendant did not absolve her of liability. In the circumstances of the instant case primarily concerned with the existence of a school zone and with its location near a pedestrian crossing, an even greater duty of care is imposed on the defendant driver than that imposed on the defendant

in **Cornel Lee v Ivy May Hin.** Both on the facts and on the law the defendant/appellant failed to discharge that duty.

Conclusion

This was an accident which occurred some ten years before the young plaintiff came to court to testify as to his recall of the incident. He frankly stated that he did not remember all of the events of that morning which resulted in him receiving a serious injury to his left foot. The learned trial judge was left to rely on the accounts of the second defendant driver, the conductor and security guard, in determining liability. He was at liberty as judge of law and fact to accept or reject the whole or part of the testimony of any of the witnesses. In so doing the credibility and weight of their evidence were matters falling entirely within his province. It was in the light of the above reasons that we dismissed the appeal.

FORTE, P:

I agree

Smith, J.A:

I agree