IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 41/79

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| BETWEEN | ANTHONY ROSE (by Next Friend Yvonne Walker) | 1ST PLAINTIFF |
| A N D | YVONNE WALKER | 2ND PLAINTIFF |
| A N D | THOMAS SMITH | DEFENDANT |

D.A. Scharschmidt instructed by Norman Samuels for the Plaintiffs.

Enos Grant for the Defendant

Heard: 27th May, 1980; 14th July, 1980; 13th November, 1980; 5th November, 1981; 11th March, 1982.

Delivered: 10th March, 1983

ASSESSMENT OF DAMAGES

McKain J:

This is an assessment of damages on a claim in negligence filed on behalf of the first plaintiff, an infant, by his next friend the second plaintiff (his mother) for damages for personal injuries suffered by the first plaintiff through the negligent driving of the defendant on 26th December, 1976, also damages for the consequential loss and damage suffered by the second plaintiff as a result of the injuries to her infant son.

On the 19th October, 1974, the defendant not having filed or delivered any defences to the action filed, the plaintiffs' Attorney signed an Interlocutory Judgment in default of defence, with damages to be assessed. On 24th January, 1980, order to proceed to assessment was made by the Registrar.

When the matter began on 7th May, 1980, the plaintiff called Dr. Elna Evans, a highly qualified Psychologist who at that time had been Clinical Education Psychologist for over nine years at Bellevue Hospital, Kingston.

This witness examined the infant, plaintiff, on the 17th July, 1978, and from his response to the oral test she gave him, concluded his social adjustment had fallen. Based on the test and the information she was supplied in the forms she sent out to his relatives for completion Dr. Evans came to the conclusion the infant was suffering from some brain damage, and he would be severely handicapped.

She did however add that it would be possible for him to have some training and that he was aware of his own lack of ability and was thus frustrated. All this was in reference to an infant nine years old at the time of her test.

I shall refer to her testimony in greater detail later.

Errol Edwards the eye-witness to the accident stated he was at a cross roads made by the main road and a parochial road in Redwood, St. Catherine about 8.30 - 9.00 a.m. on the 26th December, 1976. He saw the infant coming along the main road. A van came along the parochial road and without stopping came on the main road and hit the infant. He ran and took up the infant who was unconscious, and put him in the same van and the boy was taken to Linstead Public General Hospital. He remained two hours at the hospital during which time the infant was lying on a stretcher and bleeding through his nose. He said the infant started to "rock rock like." He called to the infant several times but got no answer. The mother came on and he, Edwards told her what had happened. She talked to the patient but got no answer except some groanings.

The nurse came and they were rocking him but he did not speak. He said a nurse put a band on the patient's foot where it was fractured, but no doctor attended him during the two hours he was present. The plaintiff was still unconscious when he the witness left.

It is apparent the witness based his view of unconsciousness on the fact that he got no response from the patient when he spoke to him. It seems remarkable that he was the one to tell the mother that the infant was unconscious, although he did later say in cross-examination, that she herself could see he was unconscious.

The matter of unconsciousness is of great importance as will later appear from the evidence of the medical experts called.

Yvonne Walker, mother of the infant and the second plaintiff, said she got a message, went to Linstead Public Hospital where she saw her son on a stretcher and he was bleeding from his nose and from one ankle. She spoke to him but got no response. He was rocking, going two sides of the stretcher, groaning and sighing all the time until he was taken into the doctor about 2.30 and she left about 3.30 p.m. She said the infant plaintiff stayed in hospital ten days.

She said when she arrived at hospital she saw the witness Edwards. As she reached the hospital he left. She said she had no argument with him. She was so frightened that she did not even speak to him, and that it was some time afterwards that she got his name to be Edwards.

This is the same person whom Edwards in his evidence said he had told what happened to the boy and that the boy was unconscious. It may well be that the mother was so distraught she was not listening, but she was such a positive witness I cannot see how an important matter like the description of the accident being told by the sole eye-witness could have escaped her memory. Was the infant really unconscious when she saw him or is she too basing her conclusion on the fact he did not fully respond to her questioning him as to what happened to him save as to answer mm.. when she called to him? Walker

said on cross-examination that she would not be surprised if the doctor's report did not mention the infant's loss of consciousness because before he went in to the doctor she had called him "Kay" and he said "Mmm" and kept on moaning. She based her opinion of unconsciousness on experience and what she saw. She did not give the basis for her expert knowledge or what her experience other than the single occasion had been. She said the doctor did not ask the infant "a single word" in her presence, and she had not gone in with the patient when he was being examined by the doctor. (The underlines are mine).

She spoke very forcefully about the fact that as a result of the accident her son was now a vegetable. Again no concrete basis for her conclusion was submitted.

She said prior to the accident he was a pleasant, bright and lovable child. He got on well with his peers and was very popular in school and ran errands for all the teachers. She said he was very bright and was doing the common entrance lessons. He missed one term schooling, having been discharged from hospital 4th January, 1977, but not going back to school until April 1977. Before he went back he started crying for headache, and he had nose bleeds. During this same period he was going to hospital three times weekly for four weeks to dress his ankle which healed up and broke out again.

There was no evidence of any report to the doctor during his visits of the headaches or nose bleeds.

She said after that her son lost interest in school and the common entrance lessons, although he knew how important the common entrance examination was. He was to have taken the examination in January 1977 but could not because of the accident. In April 1977 his behaviour pattern began to change.

He became traunt, noisy, boisterous, would not go back to school, and walked around the village. If and when he did go to school he absented himself from classes, sat in trees and was generally aggressive to the same peers with whom he formerly enjoyed an excellent relationship. He slept in trees and under cellars. She found he did not seem to care about anything and behaved like a five year old (by this I understood her to mean like a disobedient little child). In the days while she was at work teaching the infant was left with her sister who lives 2 - 2½ miles away from her home; she took him to her sister's and fetched him later in the day. She paid her sister a weekly sum for caring him during the days.

Her aunt, now deceased, took the infant to Doctor Evans because of his behaviour. One of her sisters also took the infant to the doctor after the aunt's death. The witness herself never took him to any doctor, (nor, it appears, ever thought it natural or necessary to have questioned Dr. Evans as to her opinion of her son's behaviour). Even when her son was seen by Dr. McNeil-Smith the other specialist who referred him to Dr. Evans she the mother never took him there nor did she ever see t he doctor, McNeil-Smith.

During the examination, with consent, the witness was shown Dr. McNeil-Smith's report and read the line which stated "he had not been unconscious" and the final statement which said "his mother continues to report." The witness said she had never seen the doctor so would not know who told him the patient had not been unconscious. Nor could the last statement referred to relate to her, for the very same reason, that is, she had never seen the doctor. Throughout her son's entire illness not once had she as a mother, personally spoken to any of the doctors.

She was emphatic that the infant behaves now "like a lunatic, a salad, abnormal" and all this as a result of the accident. Much was made of

this report of McNeil-Smith's which was shown to the witness by defence Attorney who maintained that the reference to "old healed ankle wound" was relative to an injury prior to the accident. The mother however, insisted that there was no such prior injury. The report was not put in evidence.

Dr. McHardy the specialist, in his evidence stated that the plaintiff on interview told him he was hit by a van on his leg and his head and knew no more after that.

It seems to me, that while the plaintiff would or could be unconscious of what followed the accident it would be natural for him to be able to say what injury or injuries he felt he had sustained at the time of the impact, and while his intellect might be deteriorating and continues so to do none of the experts as to his mental state has condemned him as a vegetable. Miss Evans herself in her final conclusions as to his future is of the opinion he will be able to lead a useful life though his intellect is impaired irreparably. She says it is possible for him to have some training and he is aware of his lack of ability.

Dr. McHardy attended the plaintiff for the first time on 12th February, 1978 and on this occasion was of the opinion he was slow witted naturally, but in view of the history given to him then of his anti-social behaviour consequent on the accident and out of an abundance of caution, and his field being neuro-surgery, he referred the plaintiff to Dr. Evans the psychologist.

The doctor said his examination was directed to seeing if there were any focal nervous signs. These were neurological signs detected on examination, and would be manifested by large pupils, weak limb or abnormal reflex and which would be useful to localize a lesion. At the time of this examination he had not had details of the accident and having found the infant slow mentally, recommended a psychologist report as to his mental function.

This
/he felt would result in a detailed test of the plaintiff's mental function, and could contribute to the diagnosis, in view of the fact that the test performed by him was a crude one more designed to test the function in the nervous system. The doctor said he was postponing his conclusion finally and said "I felt on first examination that having obtained no history of loss of consciousness at time of accident I had difficulty in seeing how he could have sustained brain injury of sufficient severity to have produced an impairment of his brain function as seemed to exist." (The underlines are mine).

In November 1978 he had examined the plaintiff for the purpose of a written report. He did a brain scan. (This is a task in which radio-active substance is injected into the bloodstream and a machine which measures radio-activity records the radiation from brain to skull during the period of radio-activity. It shows the circulation of the blood in still and if the picture is distorted it can indicate intracranial abnormality like tumor). The x-ray would show the bones of the skull also.

No fracture was seen on x-ray though the plaintiff's /history of bleeding from his nostril would suggest he may have had a fracture of the base of the skull, but this condition was rarely demonstrable by x-ray. He said that /x-ray of the skull, tibia and fibia and brain scan were normal. His report included the information that /he considered that /the plaintiff had sustained a relatively minor brain injury from which he should have made a full and complete recovery in a few weeks. This was his first report on the plaintiff and up /to the time when he made this report he had no report of any loss of consciousness by the plaintiff.

He next saw the plaintiff on the 16th June, 1980. He got further details of the history of the accident from the infant and his mother. The plaintiff reported walking and being hit by a van and thrown against a fence. He hit his left leg and left occipital region of the skull. The next thing he recalled was being in bed in hospital the following morning.

On examination, the doctor found him very slow in responses, answering reluctantly and not able to subtract seven serially from one hundred and said of him "again I found no focal signs in his central nervous system." He further said that, based on the history of loss of memory after the accident as told him by the plaintiff, and the loss of consciousness for some hours, according to the mother, and in view of the poor level of performance and some suggestion of deterioration in the plaintiff's intellect he concluded these factors were consistent with a more severe brain injury than was originally recognized.

He admitted that the history given him played an important part in his diagnosis. He was of the opinion deterioration in intellect will be permanent and at his present level of performance "the plaintiff will unlikely be able to support himself by his own efforts."

In answer to Mr. Grant the witness said that on first examination he had reported that he considered the plaintiff had sustained a relatively minor brain injury from which he should have made a full and complete recovery in a few weeks. That finding was without the aid of history of the plaintiff's accident. When he got this history two years later, that is, 16th June, 1980, that influenced his final diagnosis. He also answered that if the history given him was embellished it would affect the validity of his 1980 diagnosis. He said that if there was such loss of consciousness on the plaintiff's

admission to hospital it would be a very important factor to be noted, but he had not had the Linstead Hospital's notes relative to the plaintiff.

It is quite ovbious that from the very outset, whether it was a natural phenomenon occasioned at birth or as the result of the accident, the plaintiff, when the doctor first examined him, was not of normal intellect. Surely it cannot be said a slow-witted person does not have some mal-functioning or at least non-functioning according to the natural requirements for a normal standard of intelligence. Even assuming that the doctor's final diagnosis was based on coloured history given him, (and that is assuming it was coloured), it was evident that the plaintiff had gone to sub-standard of what he was found to be on the first examination. Such rapid deterioration in two years, especially in one so young, must have been as a result of some impairment in the brain.

It is reasonable to accept that with time, under normal conditions man's intellect tends to diminish instead of intensify but nature has so regulated the operation that this occurs normally as a gradual process. Only a person suffering some trauma can go to bed functioning well and get up next morning less alert than he was the day before and whether such change be temporary, accelerated or permanent it cannot alter the fact something has disturbed the motor mechanism of the brain.

Whatever happened to disturb the plaintiff's motor mechanism to the end that there was a deterioration of the process from better to worse when he had expected it to be the other way, that is, complete recovery in few weeks, disturbed him enough to cause Dr. McHardy to refer the plaintiff to Dr. Evans.

Elna Evans, a Clinical Education Psychologist, specializing in neuro-psychology gave evidence to the effect that she saw the plaintiff twice

but examined him once only, and that on 12th July, 1978. By that time she had obtained information by way of questionaires, in relation to his intelligence before and after the accident. These questionaires had been prepared and sent out by herself to relatives, and teachers who had taught the infant. She said she also got information from his mother (although the mother herself stated she never saw or spoke to Dr. Evans).

Dr. Evans says she gave the plaintiff two basic intelligence tests, and other tests of brain function so as to identify areas where defects were being generated.

She performed one test by looking on how individuals function in certain areas, abstraction of ideas, vocabulary, ability to discriminate visual objects, ability to construct visual objects, basic human skills. The other test was to estimate brain damage in different areas - left temporal, left frontal lobe damages. Left temporal damage causes defect in verbal memory. She illustrated: You tell the patient a story and ask for a recounting. His failure to do so would indicate such defect, and thus left temporal damage. If there is a left frontal damage, the result is failure to recognize and this is referred to as cognative slippage. She gave as example "if I ask about wood" and you tell me "concrete" there is cognative slippage.

On the intelligence tests she concluded that the plaintiff who, at the time, was 13 yrs. 4 mths. and 30 days old had a level of intelligence far below his chronological age and below the average age. His reading age had dropped to a level of a five year old. (This observation is remarkable and more so as the witness later admitted she did not know at what level the plaintiff had been reading before the accident. The doctor is, however entitled to both her opinion and diagnosis and I do not quarrel with her conclusion as to his reading ability).

She said the plaintiff was aware of his own lack of ability and she concluded that his social adjustment had fallen. She said he would be severly handicapped in social adjustment for a long time. There was likelihood of behaviour deterioration and he would need long term personality support, but it was possible for him to have some training. She concluded that the plaintiff had brain damage. Here, I must comment that whereas Dr. McHardy's conclusion to the same effect was based on clinical test, Dr. Evans' was based on the test she gave (as referred to above) coupled with the answers she got from questionaires she had sent out to persons who had had the opportunity to be associated with the plaintiff.

Dr. Evans said the tests she gave the plaintiff were in relevance to the Jamaican Society and relevant to any brain, not plaintiff's alone. Of the one hundred and seventeen (117) questions in the test she asked the plaintiff only two, and some of the 117 were not relevant to the plaintiff in any event as these questions went up to persons of 25 years and over, and the plaintiff was 13 years old. She asked questions up to the age of 18 years and gave an example of a question she asked the plaintiff (and I am still trying to assess the conclusion she arrived at based on his answer). The question: Whether he believed in Santa Claus. His answer, No. Dr. Evans said "no" was not a logical answer, and that children of thirteen are not supposed to believe in Santa Claus. I would have followed the doctor's reasoning if the plaintiff's answer had been a "yes". Yet this is one of the questions the answer to which, added to the responses returned to her on the questionaires she sent to his aunt and teachers, caused her to conclude that the plaintiff had brain damage. No questions were asked of the plaintiff's mother. The nearest relative questioned was his aunt. Dr. Evans stated finally, that the seven tests in all given to the plaintiff, and information from other interested parties led her to conclude that the plaintiff had

brain damage.

The plaintiff called members of the school he had attended prior to the accident to attest to his scholarship. Their collective evidence was unhelpful save to convince me that records had been prepared in anticipation of this action and were not altogether truthful. I say this because in the case of the form reports, for example, two teachers, witnesses in this case, claimed one report as being made by each of them, and one teacher could not remember if, and denied that one report had been completed by her, as she was not even teaching there during the period with respect to which she was purported to have completed the report card, Ex. 3b.

Mrs. Hunter-Dias said she had taught the plaintiff at pre-common entrance level at which time he behaved normally for a child that age - sociable, amiable with his peers and skilfully inclined with his hands in mechanics. He got on well with his peers and was not unpopular in school. Whereas he was a willing errand runner before the accident, after the accident when he was sent on errands he would return like as not, and, she said, he would wander about the district. She admitted she knew the family on a social basis and that what she said about the plaintiff's wandering about had been told to her and she had not personally witnessed this.

Although this witness had not taught the plaintiff after his accident she nonetheless felt herself capable of completing Ex. 3b. I am at a loss as to the basis on which she found herself competent to do so, as she did not say, and this leaves me with the view already expressed, that the records were prepared to bolster the claim that the plaintiff had been so bright and ended up after the accident, to quote his mother, "a vegetable." The witness said the plaintiff after his accident was anti-social with his

peers and when he did go to school complained of belly ache and headache.

I would not have thought that a complaint from any child in or out of school of headache or belly ache anything out of the ordinary. Indeed under cross-examination the witness said other children did make such complaints from time to time but the plaintiff was more constant. It is indeed remarkable in more than one sense. Here is a teacher who has nothing to do with the plaintiff after his accident except perphaps on a social basis, yet she is prepared to testify as to his constant complaint of belly and headaches, and as to his not attending his classes.

Olive Walker the plaintiff's aunt taught him at the pre-common entrance level 1976 and said he was being prepared for 1977 common entrance examination. She could not explain why the school record she completed on behalf of the plaintiff was written in pencil and written over in ink. She explained that records by way of cards were prepared for each pupil. An examination or test was given at the end of each term but there was a continuous assessment of the scholar. Marks were awarded by percent and alphabet. She explained the system of awarding of marks on cards. Letters of the alphabet were given according to percentage A = 100; B+ = 89 - 99%; B = 66 - 84%; C = 44 - 65%; D = 25 - 44%. Grades were given on a cumulative system and the teacher prepared the card for each student in her class that particular year. At the end of the third term a final examination was given and the result written on the card.

She admitted that in 1976 when she taught the plaintiff the continuous assessment system had not yet been introduced to the school and this only came into operation in 1977. Yet for all that she completes a record in 1976 in respect of the plaintiff on the continuous assessment basis.

Although, according to the witness, she would be solely responsible for the plaintiff's marks for 1976 when he got nothing but 100% and A's and B's in his subjects yet she could not explain the different writing on the card for the subjects she taught, and on exaning the exhibit was at a loss to explain the obvious tampering with the marks (a) where there is a scribble over her B+ awarded the plaintiff; (b) pencil mark not her own beside her A also her B awards.

I am constrained to believe that the witness, if she prepared this card, (Ex 1) with respect to the marks awarded by her, awarded them for the purpose of this action. I am of the view the records were written in pencil suggestively, and subsequently written over in ink so as to reflect the standard of performance achieved by the plaintiff at that time.

Melissa Foster taught the plaintiff the 1972 year when she did her internship at Redwood. She left at the end of the school year ending July 1973 and she went to Giddy Hall, St. Elizabeth to teach full time.

This witness was positive about 1972 - 73 because it was her most important year, she had then embarked on her final studentship year. This was her high water mark year. She was positive she was not at Redwood in 1974, and could not explain how the record of the plaintiff had what appeared to be her handwriting on the "achievements" side of the card for 1974.

She did not appear to recognize her writing on the card and even when she saw figures relating to entries purported to have been made by her could not recall, even assuming it was possible, that in 1973 she had written those figures in relation to the 1972 achievement. She looked at the card this way and that, took some time in examining the card , was hesitant about the signature then finally said it resembled hers but did not say positively

it was hers.

The only thing this witness was certain of was that 1974, the year according to the record, when she was supposed to have made the entries with respect to the plaintiff's achievement, she was teaching in St. Elizabeth where she had gone immediately after she left Redwood in Academic Year ended July 1973. She said it was possible that a teacher could leave without completing the record for the year with respect to a student. In that event the teacher could (a) complete the record in the holiday or (b) could be recalled later by the headmaster to return and complete them in which case, "you get the information you have and fix up the record", to quote the witness.

She did not complete any record during the holiday after she left, nor can she recall being sent for by the principal to do so, and she had not been back, once she had left.

It is remarkable to note that both she and Mrs. Hunter-Dias claim the assessment of the plaintiff's 1973 Personality Rating. Indeed this column on the card seems to be the only one the witness Foster is certain of having completed, and this certainly was from looking at the handwriting, and accepting it could be hers.

To me there is no mystery here I am further fortified in my belief that the card has been prepared specifically for this action and to reflect the plaintiff's brillance before his accident instead of to show, as is obvious from the witnesses, that the plaintiff had been a normal average student.

In truth I can well imagine the pressure he was under, headmaster's nephew, son of a teacher, member of a teaching family, and expected to qualify in the 11+. No wonder on his return to school after his accident, he found it too much and rebelled and did not go back to scholarship classes. That is

not to say that the accident might not have somewhat affected his powers of concentration to the end that the regimentation exercised in the preparation of a student for the common entrance examination was more than he felt he could or wanted to cope with.

Nor do I consider his anti-social behaviour complained of by his mother out of the ordinary in a boy of that age whom all his relatives seemed to have begun to treat him with too much sympathy and indulgences because of his accident, and he was astute enough to take advantage of the situation.

Uncle, Stafford Walker, Headmaster of Redwood, did not help. He merely repeated what he had heard, that is, that the plaintiff was running around with the boys in the village. He did say, however, that the plaintiff had lost the enquiring mind he had prior to the accident. It is difficult to know how he knows this since, as he said he hardly saw him after the accident, had nothing to do with him in school, did not know how long he was away from school, whose class he had been in before accident, and whose class after, although he knew it was not the same class as before the accident.

It is quite evident the witness is more than anxious to assist his sister and nephew and cannot constructively offer any useful evidence as to the infant plaintiff's intellectual ability or accomplishment either before or after the accident.

The plaintiff's case rests, I would say, primarily on Dr. Evan's report. Unhappily that report was itself based partly on the responses to the questionaires forwarded by her to the plaintiff's aunt and other witnesses. These replies being suspect, and rather highly coloured in the plaintiff's behalf, have to a great extent weakened the basis of the good

doctor's conclusions in so far as her reliance on them assisted her to assess his pre and post accident brillancy. There is no doubt in my mind, and I accept that the plaintiff suffered some brain trauma. Fortunately, both doctors have stated he is able to function mentally, though not at a standard high enough to fulfil or satisfy the expectations of a naturally biased mother, nor indeed, the infant plaintiff himself.

Sometimes a person, given the skilful use of his hands, fares much better in a highly competitive society where status jobs are few in comparison to the number of those who aspire to them.

The plaintiff may well be aware of his academic disability but he is trainable. The experts say so, and their conclusion is based each on the test applied to the plaintiff personally. I accept that there is an impairment in the normal performance of the plaintiff's brain as far as his academic output is concerned, and that this could further deteriorate with time, that is, more rapidly than normal, since all brain functions tend to deteriorate with time.

It is unfortunate that I had no opportunity of seeing or hearing the plaintiff himself so as to assist myself as to his ability at the time of the hearing, but that cannot be helped now. But this I say, there was nothing to establish that the plaintiff would have succeeded in the 11+ had he taken it, or that he was of anything but the normal average intelligence for his age at the time of the accident. His prospects have however, been somewhat blighted and so have the hopes and aspirations of his mother. But no one can ever to a refinement assess the future accomplishments of an infant based solely on the expectations of a fond parent, and well wishers.

I assess general damages at $18,000 being Pain and Suffering $10,000

Loss of Earnings 8,000

$18,000

Special damages were agreed at $500.

Costs to be agreed or taxed.