JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 32/84

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

BETWEEN	ANTHONY ROSE YVONNE WALKER	APPELLANTS
A N D	THOMAS SMITH	RESPONDENT

B. Ward for appellants

E. Grant for the respondent

March 28 & May 20 1985

ROSS J.A.

After hearing counsel for the appellants and the respondent we allowed the appeal, varied the order of the Court below and ordered that the general damages awarded to the appellants be increased from $18,000.00 to $80,000.00. At the time we promised to put in writing our reasons for so doing, and this we now do.

The plaintiff/appellant filed four grounds of appeal which were all to the effect that having regard to the findings of the learned judge the award for general damages was inordinately low.

The infant plaintiff was struck by a van at a cross-roads at Redwood in the parish of St. Catherine on 26th December, 1976, at which time he was nine years old. He was taken in the same van in an unconscious condition to the Linstead Hospital where he remained for some time before he was seen by a doctor and admitted. Apart from being unconscious, he was bleeding

from his nose and his left ankle which was fractured. He remained in hospital for ten days and after that he was seen as an out-patient for continuing treatment of his ankle. In the statement of claim the particulars of his injuries were set out as:

1. Head injury resulting in damage to the brain.
2. Severe nose bleeding
3. Unconsciousness.
4. Injury to the left lower leg resulting in fracture of the medial malleolus.
5. Damage to the left frontal and temporal areas of the brain affecting memory.
6. Significant reduction in social adaptation skills.
7. Significant reduction in literary skills.
8. Marked psychological impairment resulting in:
   (a) Necessity for constant supervision;
   (b) Inability to obtain self-dependence;
   (c) Necessity for strong personality support for the rest of his life.

There was evidence from his mother that prior to the accident the infant plaintiff/appellant was a pleasant, bright and lovable child; after the accident there was a marked personality change and he became truant, noisy, boisterous and behaved like a five year old, "he behaves like a lunatic." Two experts also gave evidence: Dr. Elma Evans, Clinical Education Psychologist at Bellevue Hospital, who saw him in July, 1978 and concluded that the infant had suffered some brain damage and would be severely handicapped; and Dr. John McHardy, consultant neuro-surgeon at the Kingston Public Hospital, who first saw him in February, 1978.

In his evidence Dr. McHardy said (inter alia):

> "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".

But after he learnt that the infant had suffered loss of consciousness at the time of the accident, Dr. McHardy was of the view that, having regard to the infant's poor level of performance and some suggestion of deterioration in his intellect, these factors were "consistent with a more severe brain injury than was originally recognized". He went on to say that in his opinion the 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".

This matter came before McKain, J., for assessment of damages, as interlocutory judgment had been entered in default of defence. In addition to the evidence of the two doctors and the infant plaintiff's mother there was also evidence from teachers at the school at Redwood attended by the plaintiff, whose mother also taught at the school. The learned judge found that the evidence given by the teachers as to the infant's scholastic ability was coloured by their association with his mother and that the school records relating to the infant had been prepared with the aim of bolstering the claim that the infant was a bright pupil before the accident and a "vegetable" afterwards.

In considering this matter we have taken this into account and dealt with it on the basis that the infant was an ordinary average boy of nine years old.

The learned judge having considered the evidence had this to say at p. 14 of her judgment:

> "The plaintiff's case rests, I would say, primarily on Dr. Evans report. Unhappily that report was itself based partly on the responses to the questionnaires 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 brilliancy. 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.
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> 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.
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> 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."

As we understand the findings of the learned judge, she concluded that the evidence of the infant plaintiff's mother and the school staff was coloured by their efforts to bolster the claim that the infant plaintiff was a bright student before the accident. Such efforts were only natural and to be expected in cases of this nature. We would be very surprised if Dr. Evans a distinguished

psychologist, was not aware of this human failing and consequently made allowances for it in her assessment. At the time when Dr. Evans examined the infant plaintiff he was thirteen years old but his reading age, according to the tests she conducted, was 5 years and 7 months. When asked about his ability to learn she said "It is going to be very small, certainly below 331/3% - possible for plaintiff to have some training."

The finding by the learned judge that the infant plaintiff was of "normal average intelligence for his age at the time of the accident," and that "there is an impairment in the normal performance of the plaintiff's brain as far as his academic output is concerned" clearly indicates that there had been significant brain damage, to the extent that the reading age of an average boy of thirteen years was 5 years and 7 months, and his intelligence was estimated at 5 years and 11 months. Any brain damage is a serious injury as medical science up to now cannot accurately predict the short-term or long term effects of such injury. We are of the view that the prospects of the infant plaintiff were not merely "somewhat blighted," but that on the evidence they have been blighted.

We note that the evidence is that it is possible for the infant plaintiff to "have some training," and the learned judge appeared to understand this to mean that he could find gainful occupation requiring the use of his hands. But when this evidence of Dr. Evans is taken together with her statement that his ability to learn will be very small, the quality and extent of the training of which the infant plaintiff will be capable in the future will be severely limited. We bear in mind too Dr. McHardy's opinion that it is unlikely that the plaintiff will be able to support himself by his own efforts.

In our opinion, the eventual award of the learned judge was inconsistent with her findings. From the prognosis the infant plaintiff would never realise any potential whatever. This was so notwithstanding the learned judge's view that certain witnesses exaggerated the child's scholastic ability. Brain damage cannot be treated as otherwise than serious injury calling for substantial rather than low amounts of damages.

In the light of the evidence adduced we concluded that the award for general damages was inordinately low and that the appeal should be allowed.

Counsel for the appellants directed our attention to recent Jamaican and English cases on the question of the quantum of general damages but these cases only gave guidance of very general nature. Among the several cases cited as to the amount of general damages was the recent case of Lim Poh Choo v. Camden and Islington Area Health Authority (1979) 2 All E.R. 910, in which the House of Lords dealt fully with the principles governing awards of damages for personal injuries under the heads of loss of future earnings, pain and suffering and loss of amenities, cost of future care and the effect of inflation. While it is recognized that it is desirable to make awards in these cases under the different headings referred to above, the evidence in this case does not provide the material for an award under all these heads. The infant plaintiff in our judgment is entitled to an award under the head of pain and suffering and loss of amenities. There was no evidence on which an award for loss of earnings could be made.

In Lim's case (above), the plaintiff suffered a cardiac arrest and irreparable brain damage due to the negligence of one of the defendant's staff, and was now a helpless invalid, who was only intermittently sentient and would require total care for the rest of her life. She was awarded £20,000 for pain and suffering and loss of amenities, and one ground of appeal was that this amount

was excessive, as the sum awarded should be comparable with the small conventional awards in fatal cases for loss of expectation of life. In rejecting this argument Lord Scarman at p. 919 of his speech referred to Wise v. Kaye (1962) 1 All E.R. 257 and H. West & Son Ltd v. Shephard (1963) 2 All E.R. 625, and said:

> "The effect of the two cases (Wise v. Kaye being specifically approved in H. West & Son Ltd. v. Shephard) is twofold. First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend on the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation, a substantial loss, whether the plaintiff is aware of it or not. Secondly, they establish that the award in Benham v. Gambling (assessment in fatal cases of damages for loss of expectation of life) is not to be compared with, and has no application to damages to be awarded to a living plaintiff for loss of amenities."

At p. 920 of the same judgment Lord Scarman went on to say:

> "An award for pain, suffering and loss of amenities is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment. It is, therefore dependent only in the most general way on the movement in money values. Like awards for loss of expectation of life, there will be a tendency in time of inflation for awards to increase, if only to prevent the conventional becoming the contemptible. The difference between a 'Benham v. Gambling award' and a 'West v. Shephard award' is that, while both are conventional, the second has been held by the House of Lords to be compensation for a substantial loss. As long, therefore, as the sum awarded is a substantial sum in the context of current money values, the requirement of the law is met."

We have noted that McKain J. accepted the evidence that the infant plaintiff was aware of his academic disability and that to some extent "he is able to function mentally." This case is different from Lim's case above in that the infant plaintiff is aware of his disability whereas Lim was only "intermittently sentient."

Taking all the circumstances into account we came to the conclusion that a fair award for general damages for pain and suffering and loss of amenities would be an amount of $80,000.00 and we ordered accordingly. The costs, taxed or agreed, are to be paid to the appellant.