

Filing Cabinet

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. S393 OF 1985

BETWEEN	BRIAN SMITH (bnf. Brian Smith)	
	BRIAN SMITH	PLAINTIFFS
AND	KENNETH SMITH	FIRST DEFENDANT
AND	DONALD MCGREGOR	SECOND DEFENDANT

John Graham for Plaintiffs

Michael Lorne for Second Defendant

First Defendant is absent - not represented.

July 16 & 26, 1990

PATTERSON, J.

Brian Christopher Smith "the infant" is an infant. He was born on the 13th January, 1979. His father is Brian Smith, ("the father") and the infant sues by his father and next friend. The father sues also as a plaintiff in his own right. They seek to recover damages arising out of an accident on the 28th January, 1984 in which the infant was seriously injured. The father's claim is, I think, in respect of moneys expended by him on the infant resulting from the accident.

Judgment in default of defence was entered against both defendants and the matter is before me for assessment of damages.

At the very outset, I must point out that I form the view that the father has no cause of action in negligence against the defendants and accordingly, I shall not be awarding him any damages as plaintiff in this suit.

The infant was just 5 years old at the time of the accident. He suffered irreparable brain damage as a result of a severe head injury. He also suffered a fracture of the right femur. He was rendered unconscious and hospitalized for 129

days. By the 12th May, 1984, when he was seen by Dr. Cheeks, a consultant neurosurgeon, the infant was in a vegetative state - unaware of his surroundings. Dr. Cheeks' diagnosis was that the infant had suffered a very severe diffuse brain injury with widespread brain damage. He suspected that certain complications had also developed, which could be corrected by surgery. His suspicions were confirmed by a C.A.T. Scan done in Florida, U.S.A. which revealed that the infant had developed a delayed blood clot and excess fluid formation inside the brain. Dr. Cheeks performed two surgical operations with the result that the infant improved to the point where he could use his arms purposefully and could now take an interest in the environment. Nevertheless, although he is now considered to have reached maximum medical improvement, he now functions at the level of a child of 18 months; there is a severe intellectual loss. His body grows in the same way as any normal child would. He cannot walk, but he can move about on his knees. He cannot articulate any words although he can make sounds. He uses his hands to feed himself, but is not able to use cutlery. He is able to throw and catch a ball, but there is permanent tremor which effectively prevents discreet actions with the hands.

He suffers from grand mal epilepsy. He is on anti-epileptic medication which he will have to take for the rest of his life. He has emotional and behavioural disturbances resulting from the brain injury. He needs constant care and supervision. He is doubly incontinent.

The infant is now 11½ years old and such is his present condition. No improvement or further deterioration in his condition is predicted.

Hon. Sir John Golding O.J. professor in orthopaedic surgery, operated on the infant with a view of enabling him to walk but this has met with little success. At present, the infant still

crawls around, though the professor says that with assistance, he would probably be able to walk short distances. As for the future, he is expected to live out his normal life span - the injury has not shortened his life expectancy - and Dr. Cheeks expressed the view that the infant should live to 70 years of age. For the next five years, the nursing care, which at present is satisfied by a home helper, would be sufficient, but thereafter, the infant will be best cared for in an institution suitable to his condition. At present, it can be said that such institutional care is not available in Jamaica. The U.S.A. and Canada can provide such care, but the U.S.A. charges are prohibitive. Canada would be a better bet, and in 1987, the cost there was about C\$5,000 per month. (i.e. present Ja.\$30,000 per month). It is not known what such cost is today but I should think it would be much more.

So then is the infant's present and future sorry state. But what was it like before the unfortunate accident. His father says he was a very intelligent boy, attending Vaz Preparatory School and doing quite well. He was sharp. His father attended Kingston College and subsequently studied computer science in the United States of America. His mother attended Holmwood Technical School and worked as a Secretary at an insurance company, Life of Jamaica. It is reasonable to infer that the infant came from the average Jamaican family, (loosely referred to as the middle class) and that he would have taken his place in that class also.

With that background in mind, I shall now proceed to assess the damages claimed in this unfortunate case. I will consider firstly the special damages claimed, and then I will consider general damages under the traditional heads of (1) pain and suffering and loss of amenities. (2) Costs of future care and (3) loss of future earnings.

Special damages:

The first item claimed is "cost of hospitalisation".

The evidence is that the father, who worked with Air Jamaica at the relevant time, had a policy of insurance which covered his family for hospitalization. The father could not say if the hospital sent a bill to his insurance company. The amount of \$7,740.00 claimed has not been proved and consequently, no award is made in respect of this item.

The next item claimed is the "costs of neurological treatment/care and continuing - \$10,291.00". The father said his insurance company paid this amount, and the evidence of Dr. Cheeks supports a figure in that region. I will allow this item as claimed i.e. \$10,291.00.

Item 3, as amended, claimed the cost of orthopaedic care to March 1989 - \$1040.00. The father said that both the Hon. Sir John Golding, and Dr. Dundas treated the infant. Sir John's evidence was somewhat vague as to his charges, but it seems to amount to \$660. There is no evidence as to how much Dr. Dundas was paid. Consequently, I will allow \$660.00 for this item.

Item 4, as amended, is for "costs of physiotherapy. November 1988 - September 1989 - \$7,369.00". The evidence of the father is that from November 1988 to September 1989, a physiotherapist attended on his son 3 times per week at \$50 per visit. Earlier in his evidence he had said that the physiotherapist ceased coming in November, 1989 because of the lack of response from the patient. It seems as if the father is somewhat confused about the dates in this case. He said it was Dr. Cheeks who ordered this treatment. Sir John says that after his operation, the services of a physiotherapist would have been helpful - say 3 times per week for the first month and thereafter once per month. The infant was in plaster up to 6th August, 1988 and so if the treatment started thereafter, it is reasonable to say that 12 visits in November 1988 and thereafter one visit in the months from December 1988 to September 1989 would have been enough. I will allow 22 visits @ \$50 per visit - total \$1,100.00.

Item 5 - "C.A.T. Scan U.S.\$444.00" is allowed at rate claimed i.e. Ja.\$2,442.00.

Item 6. "Cost of X-rays at Medical X-rays Institute \$115.00" allowed".

Item 7. Expenses incurred to Cordis Corporation U.S.\$365 - Ja\$2007.50". This is for the shunt that Dr. Cheeks required and I will allow this amount.

Item 8. as amended: "Costs of Medication up to July, 1990 - \$5,550.00". The evidence is that the father has been buying Dylantin which is the drug prescribed to control the epilepsy. This treatment commenced in 1984 while the infant was still in hospital and has continued ever since and will continue for the rest of his life . For the first 5 years, the cost was \$30 per month, but since April, 1989, it has gone up to \$35 per month. The cost to date would $\$30 \times 60$ months = \$1,800 and $\$35 \times 16 = 560$, making a total of \$2,360.00.

Item 9. as amended "Costs of nursing care up to July, 1990 - \$34,120.00". The evidence is that the father employed helpers after the infant left hospital (i.e. since June 1984), as follows:-

1st. - June 1984 - July 1985 = 60 weeks @ \$100 p.w. =	\$6,000
2nd. - August 1885 - October 1988 = 169 weeks @ 120 p.w. =	\$20,280.00
3rd. - November 1988 - May 1989 = 30 weeks @ \$130 p.w. =	3,900.00
4th. - June, 1989 - July, 1990 = 60 weeks @ 150 p.w. =	9,000.00
	<u>\$39,180.00</u>

The claim, as amended is for \$34,120.00 and I will allow that amount.

The last item claimed is travelling expenses - \$4,500.00. The evidence is that a doctor and a nurse accompanied the infant to Miami when he went for the C.A.T. Scan and the air fare for each was about \$800.00 i.e. a total of \$1,600.00. They hired a car in Miami and that was at a cost of U.S.\$40, Ja.\$220.00. There is no evidence of any further travelling expenses. I will allow \$1,820.00.

The total special damages claimed and allowed will therefore be \$54,915.50.

I come now to the General Damages.

Pain and suffering and loss of amenities

The infant was not able to give evidence, but Dr. Cheeks expressed the view that the infant can still feel pain and register discomforts. Apart from the injury to the head, his right femur was fractured and that leg had to be placed in a cast to facilitate healing. He underwent two operations to the head and one to the heel which again was put in a cast. There is no direct evidence of pain, but it is reasonable to infer that he must have suffered some pain and his discomfort must have been great indeed.

The infant's disability is permanent, but it will not prevent him from living out the normal life span. He will be deprived of all the amenities of life for the rest of his life. He will also suffer great discomfort for the rest of his life. For this item of damages, Mr. Graham has asked the Court to consider a sum in the region of \$700,000.00. In my view, that is far in excess of the appropriate award under this head of damages. The Courts have been assessing such awards on a conventional basis. This is taken to mean:-

"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". (per Lord Scarman in Lin Foh Choo v. Camden and Islington Area Health Authority [1979] 1 All ER. 910 at 920.)

In an unreported 1980 case, Douglas v. K.S.A.C., Smith C.J. thought that \$75,000.00 was too high in circumstances quite similar to this and he awarded \$50,000.00. Possibly that could be considered to be at the lower end of the scale then, and not really a "substantial" sum. Taking into account the value of money today, I would say that it is reasonable to award the highest conventional figure, and so I assess this item of damages at \$200,000.00. In Freeman v. Central Soya of

Jamaica Limited S.C.C.A. 18/84, the Court of Appeal approved a 100% increase over an award 4 years earlier.

Cost of future care

The future care that will be necessary may be divided under two broad heads, namely, (1) medication and (2) nursing care. The infant will suffer from epilepsy for the rest of his life, but it can be controlled by medication. At present the cost of such medication is \$35 per month. I take it that the infant will live to 70 years of age, and so he will be on medication for the next 59 years. I will use a multiplier of 420. Taking into account the fact of a present lump sum payment and the possibility that the infant may accidentally cause himself some injury which would shorten his life, (e.g., pulling something onto himself or falling off a step or the like, because of his child-like mentality and body maturity) and all the other imponderables, I must consider a multiplier that is reasonable at his present age. He will go to an institution at age 16, and medication will be provided there and included in the costs of that institution. I will therefore assess the cost of future medication to be for five years and use a multiplier of 3 i.e. $\$420 \times 3 = \$1,260$ and award that amount.

I accept the evidence that the infant's nursing care can be entrusted to a helper for the next five years. The present cost is \$150 per week i.e. \$7,800.00 per annum and I will use a multiplier of 3 and award $\$7,800.00 \times 3 = \$23,400.00$. The difficulty arises with the institutional care that will be necessary in 5 years time. It could well be that at that time, an appropriate nursing home will be established in Jamaica and I would assume that the cost for nursing care would not be as high as in Canada. But even assuming that he is obliged to go to Canada, the present cost of such care is not known. What has been proved is Ja\$30,000.00 per month for care in Canada in 1987 (approximately). I take it that this amount would include his board and lodgings and all other incidentals,

but not clothing. Probably the same amount of Ja\$30,000.00 would have been enough in 1987 to keep the infant in a nursing home in Jamaica for a whole year, if there was such a home.

In order to arrive at a reasonable multiplicand, I am forced to be speculative. Given the present state of advancement in the field of medical care in Jamaica, I would say that in another 10 years, the infant should find a suitable nursing home in Jamaica, and the cost then should not exceed Ja\$120,000.00 per annum. I will take it that for the first 5 years he will be obliged to go to Canada at say Ja\$360,000.00 per annum and for the next 49 years he will return to Jamaica and spend the rest of his days in a local nursing home at J\$120,000.00 per annum. For the first 5 years in the institution, i.e. from age 16 to 21, I will apply a multiplicand of J\$360,000.00 and a multiplier of 2 and I will award him $360,000 \times 2 = 720,000.00$. For the next 49 years of his life, I will use a multiplicand of \$120,000.00 per annum and a multiplier of 10 i.e. a total of \$1,200,000.00. I should explain that I have used a multiplier of 10 because this lump sum can be invested and remain intact up to 10 years from now i.e. until the infant attains the age of 21 years and hopefully, returns to Jamaica.

It means then that the total cost of future care awarded is as follows:-

Medication	\$1,260.00
Nursing care, at home	23,400.00
Nursing care - Institutional	1,920,000.00
	<u>\$1,944,660.00</u>

This amount appears to be extremely high, but when one considers that the infant may be alive for the next 59 years and the inflation rate by then, it will be seen that the award is moderate indeed.

Loss of future earnings

It is much too late in the day for me to deny the infant an award under this head. I find myself bound by the authorities such as the judgment of their Lordships in Janiel Bin Harun v. Yang Kamsiah Bte. Meur Rasdi & Another [1984] 1 AC. 529. Lord Scarman, at page 537 stated the principle in this way:-

"If damages are to be a fair and adequate compensation for a plaintiff who is expected to live for many years during which time he will be unemployable or his earning capacity substantially reduced, it will be necessary to assess his future loss, difficult though the task may be in cases where the victim is a child. Though difficult, the court must do the best it can upon the evidence".

The evidence of the physical and mental condition of the infant has been fully set out. The Janiel Bin Harun case (supra) is authority for saying that this Court may use its knowledge of Jamaican circumstances and estimate, in today's money, the sort of wages that the infant could reasonably expect, without any special qualifications or skill, to earn. With that in mind, I will take into consideration the family background of the infant and his own early education and I will bear in mind the award made by Smith, C.J., in Douglas v. K.S.A.C. which was based on the national minimum wage.

The present national minimum wage for a 40 hour work week is \$130 per week which works out at \$6,760 per annum. (Vide Jamaica Gazette Supplement P.R.R. dated Friday June 1, 1990), but I do not think that figure to be an appropriate multiplicand in this case. The starting salary of a civil servant in the lowest grade is \$11,919 per annum, and I think that figure is a more realistic one to be used as the multiplicand in this case. The infant would probably have enjoyed a working life of say 42 years - (from age 18 to 60). The multiplier that I intend using is 10. The reason for this is that I am of the view that the infant is receiving compensation to provide

for his future care in an institution, and that fact cannot be overlooked. The cost of the care in the institution is tantamount to what he would have spent in his home for living expenses. The future earnings awarded should bear some relationship to the amount that the infant would have earned over and above his living expenses and the use of what may appear to be a small multiplier will go a far way in achieving this result. The sum that I will award for this item will therefore be $\$11,919 \times 10 = \$119,190.00$.

The general damages itemized will be:-

Pain & suffering & loss of amenities -	\$200,000.00
Cost of future care	1,944,560.00
Loss of future earnings	119,190.00
Total	<u>\$2,263,850.00</u>

Damages assessed in favour of the first plaintiff against both defendants in the sum of \$2,263,850.00, general damages with interest on \$200,000.00 @ 3% p.a. from the date of the service of the writ i.e. 12/11/85 until today, and \$54,915.50 special damages with interest thereon at 3% per annum from the 28/1/84 until today.

No award is made in favour of the second plaintiff.