Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J088 OF 1991

BETWEEN	**LLOYD JOHNSON AND JEANETTE JOHNSON (Lawful father and mother of Jacklyn Johnson late of Stratford, London, England)**	**PLAINTIFF**
AND	**AUDLEY SHAW**	**FIRST DEFENDANT**
AND	**LLOYD TAYLOR**	**SECOND DEFENDANT**

Enoch Blake and Mrs. Neita-Robertson for Plaintiffs

Crafton Miller and Miss Nancy Anderson for Defendants.

HEARD: January 17, 18, 22, 23, 24, 25, 26, 30, 1996 and June 9, 1997.

CHESTER ORR J.

This action was commenced under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The claim under the Law Reform Act was dismissed on a Preliminary objection.

The claim arose out of the death of Jacklyn Johnson who on the 1st January 1990 was a passenger in a motor vehicle, a Land Cruiser driven by her father, the first named plaintiff, Lloyd Johnson, which vehicle was involved in a collision with a Land Rover driven by the second named defendant and owned by the first named defendant. The deceased sustained injury as a result of the collision and died on the 14th January 1990.

The claim against the defendants was for negligence which caused the death of the deceased. The defence denied negligence and averred that the collision was caused and/or contributed to by the negligence of the first named plaintiff. At the trial the defence was amended to plead an allegation of contributory negligence by the deceased herself by -

(1) Failing to take any or any proper precautions for her own safety in view of her disability while travelling in the Land Cruiser and -

(2) Failing to make certain the vehicle she was travelling in had a seat belt to ensure her safety.

The deceased who was born on the 10th April 1971 was the eldest child in the family consisting of the plaintiffs, the parents and three sons and another daughter as follows:-

Neil born 6th December, 1973

Dean born 14th September, 1976

Wayne born 9th August, 1982

Michelle born 2nd November, 1984

The deceased was a paraplegic from birth. She had had excess fluid in the brain which was drained off at surgery as a child. She had a spina bifidia, a spine which was split in two at the bottom end. She had an ileostomy, a bag to collect urine. She used a wheel chair from she was two (2) years of age. Although disabled she was active. From 1983 she had competed in games and paraglegic championships. She was described by a former teacher as an able pupil who took a full part in lessons and extra curricular activities. She had represented her school and the London Borough of Newham on many

occasion in sporting activities. She had won several awards as a member of the school board and as a representative of the Science Club in Regional and National Science and Technology Competitions. She worked as a semi professional singer and was taking driving lessons. She had a regular boyfriend. At the time of her death she was employed by the Shaw Trust.

The family resided in the United Kingdom until 1981 or 1982 when the father returned to live in Jamaica. The other members of the family joined him later except for the deceased who continued to reside in the United Kingdom and the mother who alternated between Jamaica and the United Kingdom. Mrs. Johnson returned to Jamaica in June 1989 and joined the other members of the family who lived at Devon in the parish of Manchester.

In December 1989 the deceased came on a visit to Jamaica for the first time - this visit ended in tragedy. On the 1st January 1990 the family went to the Milk River Bath and on the return journey the accident occurred in which the deceased was injured.

In light of the conduct of the case the following issues arise for decision:-

1. Liability for the collision.
2. Cause of Death. Did the accused die as a result of injury sustained in the accident?
3. The Dependency.

1. LIABILITY

PLAINTIFF'S CASE

The family were travelling in a Toyota Land Cruiser 1975 Model or thereabouts. It was a right hand drive driven by the first named - plaintiff. In the front seated from left to right were Michelle, then the deceased, then Mrs. Johnson and the driver Mr. Johnson in a separate seat. No seat belts were fitted to the vehicle. The three boys were in the back.

At about 6.30 to 6.45 p.m. Mr. Johnson was driving on his left side of the road approaching Kendal from the direction of Mandeville. It was a straight stretch of road towards a right hand curve. As he approached the curve a Land Rover driven by the second appproached from around the curve at a speed of 45 - 50 m.p.h. It came across to his side of the road and collided with his vehicle on the right front door. The right front tyre burst and he lost control of the vehicle which went across the road and stopped on his right side of the road. The Land Rover overturned at the bank on its right side of the road, some 5 yards behind the Land Cruiser. At the time of the collision he had dimmed his lights

Mrs. Johnson testified that the speed of the Land Cruiser was about 30 - 35 m.p.h. The Land Rover approached from around a curve and collided with the Land Cruiser which went across to the opposite side of the road. The Land Rover overturned on its right side of the road some distance behind the Land Rover. The impact caused the deceased to fall forward hit her head on the dashboard and fall to the floor of the vehicle despite her (Mrs. Johnson"s) efforts to hold her. Her forehead was swollen and she had

black eyes. She was unable to estimate the speed of the Land Rover. She was the holder of a Driver's Licence.

Constable Manning investigated the accident. He gave the width of the road as 23 feet. He saw broken glass, debris and strange dirt in the middle of the road. There was no bank but a soft shoulder on either side of the road. From the point where he saw the broken glass and other material to the left edge of the road in the direction of Mandeville was 11 feet and 12 feet to the right edge of the road.

There was a straight for about 20 chains from the direction of Mandeville before reaching the curve. The debris was about 3 chains before reaching the curve. The Land Cruiser was on the left side of the road from the direction of Mandeville and the Land Rover on the left side of the road from the direction of Mandeville and nearer to Mandeville. Each vehicle had extensive damage to the right side.

The second named defendant said he saw a bright light coming and suddenly there was an impact. He did not have the Accident Report Book in Court but had an extract from the Report he had written and sent to the head station.

Under cross-examination he said that the Land Cruiser was on its left side of the road. He also said he could not recall its position. Debris was 12 feet from the left of the road in the direction of Mandeville. There was an unbroken white line and the broken glass was about 1 foot to the right of this line in the direction from Kendal towards Mandeville. He measured this distance as also the width of the road. He did not measure the distance from the curve: The road was level and straight. He was unable to locate the notes he made on the scene. He took a statement from Mr. Johnson.

In his Report he wrote the exact words used by the second named defendant. The Extract from the Report was tendered (Exhibit 8). It states:-

> "It is alleged that driver of Land Rover 8546
> was dazzled by bright light drifted to right
> side of road and collided with 8584 A.H."

The extract did not state the damage to the vehicles which was unusual. Nor was it usual to record the statement of only one of the parties involved.

However he did not prepare the Extract nor was it signed by him but by the Superintendent of Police for Manchester.

In re-examination he said that the Extract did not contain everything that he had written in his Report.

THE CASE FOR THE DEFENCE

The second named defendant Lloyd Taylor gave evidence that he was driving Land Rover 8546 A.H. owned by the first named defendant. He was going from Kendal towards Mandeville. He was on his left side of the road about 1-1 1/2 feet from the soft shoulder which is about 2-3 feet wide. He had driven on that road twice daily for over a year before the accident. He had negotiated a curve and was on a straight stretch of road about 1 1/2 chains from the curve when the collision occurred.

The approaching vehicle had bright lights, he instinctively applied his brakes and suddenly there was an impact on his side of the road. He became unconscious and regained consciousness while being taken to the hospital.

Before the accident his speed was about 30 m.p.h.and at the time of the impact about 20 - 25 m.p.h. The speed of the Land Rover was about 45 m.p.h. It did not stop or

slow down before the impact. There was no white line on the road and there had never been any.

He did not use the words that Constable Manning testified to. What he did say to Constable Manning was "I saw a bright light coming and suddenly there was an impact." But he made an addition.

> " After negotiating the corner and straightening up I saw this pair of bright headlights coming towards me on my side of the road. I was blinded and suddenly out of nowhere there came the impact and I was knocked unconscious."

He received injuries and was hospitalized for 2 weeks, sent home where he remained for 2 - 3 weeks and was again hospitalized for eight days.

In cross-examination he stated that the accident occurred about 1 1/2 chains after he had cleared the curve. The Land Cruiser was on his Taylor's side of the road at the time of the collision.

Michael Taylor, the brother of the second named defendant testified that after their vehicle had negotiated a curve and was a short distance away on a stretch of road he saw a pair of bright lights on their left side of the road and felt an impact to the Land Rover which overturned. Both vehicles were on his left side of the road and about one chain apart after the accident.

FINDINGS

I accept the evidence of the plaintiffs how the accident occurred. Constable Manning did not offer the assistance which is expected from a trained investigator.

I find that the second named defendant negotiated the curve at a speed which was too fast in the circumstances, that he was on his incorrect side of the road and collided with the plaintiffs' vehicle which was on its correct side of the road. I find that the first named plaintiff lost control of his vehicle as a result of the collision which caused the right front tyre to burst, that having lost control the vehicle veered to its right side of the road. I find that the Land Rover overturned on its right side of the road.

I accept the evidence of Constable Manning that the second named defendant said that he was dazzled by the bright light and drifted to the right hand side of the road and collided with the Land Cruiser. I regard this as a futile attempt to exonerate himself from responsibility from the collision. I find that the negligence of the second named defendant was the sole cause of the accident. The first named defendant is vicariously liable.

There remain the allegation of contributory negligence by the deceased. The vehicle a 1975 model or thereabouts was not fitted with seat belts. There is no legislation which requires the use of seat belts. In addition the deceased although disabled was not helpless. She was an active competitor in a wheelchair and she was a learner driver. In the circumstances I find that she was not contributory negligent.

THE CAUSE OF DEATH

Mrs. Johnson stated that after the accident the deceased was taken in a police vehicle to the Mandeville Hospital where she was examined by a doctor and she was advised to return the following day. This she did when X-rays were taken and the deceased was sent home.

A few days later she observed that the deceased was unable to sit upright in her wheelchair. Her breathing was unusual so she took her to Dr. Kerr who examined her and referred her to Dr. Wellington. Dr. Wellington admitted her to the Mandeville Hospital where she died some three days later.

In cross-examination she said that X-rays were taken of the deceased head and she remained at home for two days thereafter and then was taken to Dr. Kerr. The deceased did not complain of pain in her left side when she was taken to Dr. Wellington.

Dr. Wellington first examined the deceased on the 11th January 1990. She complained of headaches, progressive shortness of breath, pain in the left side and part of her history was that she was talking foolishness. She had a spina bifidia i.e. the spine was split in two at the bottom end. She had renal agenesis - no kidney on the left side and had had hydrocephalus, water on the brain - excess fluid in the brain box which is drained off at surgery as a child. She was ill-looking, drowsy and had a right peri-orbital haemotoma, i.e. a black eye, her respirations were quite laboured but she was responding appropriately verbally. She was admitted to hospital, skull X-rays were done and neurological evaluation performed. The X-rays were essentially normal but there was suspicion that there was bleeding into the brain. Her clinical picture deteriorated progressively over the next 48 hours and she died on the 14th January 1990. He came to a clinical conclusion that the cause of her death was a subdural haemotoma. He did not perform the Post Mortem Examination nor was he present when it was done. He said that subdural haemotoma can be a subtle presentation presented sometime after the original injury which might be so trivial as to have been forgotten. Blood leaks from a torn vein

into the brain. This can be a very slow process taking place over days, weeks and sometimes months before the patient is presented for clinical attention. Drowsiness, headaches and alterations in personality might be early signs of this problem. Surgery for hydrocephaly - draining off excess fluid on the brain is relevant. These patients are more susceptible to that injury than the normal population. The basis of headaches, talking foolishness, drowsiness and the history of trauma some days before led to the clinical conclusion.

Hitting the forehead with a subsequent coco or haemotoma could cause bleeding into the brain. He was cross-examined at length by Mr. Miller. He said the deceased had an ileostomy, a bag on the side through which her urine passed. She had the collection of fluid on the brain at birth. In some cases fluid on the brain had to pumped off to relieve the pressure on the brain. If the pumping system is blocked there would be problems over a period of time. If this was not treated properly it could result in death. He was unable to say whether the deceased had received treatment recently for accumulation of fluid nor could he tell the first and last times of such treatment. Patients who have had hydrocephaly are more susceptible to having subdural haemotoma after injury. The problem with subdural haemotoma is that the evidence might not be there when one looks for it upon initial assessment. He likened it to a slowly leaking faucet which drop by drop fills the space in the brain. He had seen patients who had been having leaking for six months before the examination.

Nine times out of ten an X-ray is valueless on initial assessment. He would not see subdural haemotoma on first examination. If a catscan had been done in this case it

would normally have revealed more than an X-ray. In 1990 there was only one functioning catscan in Jamaica.

It was not available in Mandeville. Attempts were made to have the deceased sent to the University Hospital where it could have been done but no beds were available and she was not accepted.

Even if a catscan had been done on the first day it would not necessarily have shown intra cranial bleeding because it is a slow leak, it takes a little time to develop.

The M. R .I. Magnetic Resource Imaging would probably reveal a more detailed image of the brain substance itself than an X-ray thus enabling one to see what is happening to the patient. This was not available in Mandeville.

A catscan would have helped diagnostically. If a clot was diagnosed it would have been removed by a neuro-surgeon. One was contacted on the 12th January 1990 and he gave advice as to the treatment. He was contacted again but no beds were available to have her accepted. Subdural haemotoma has been successfully treated in Jamaica. He could not say with 100% certainly that the subdural haemotoma was due to the injury on the 1st January 1990. He was pretty certain that she had it when she died.

He also outlined the treatment the deceased should have received after examination on the 11th January 1990.

In re-examination he said that by certain he meant 99% certain. There was an area on the deceased's forehead which indicated some sort of trauma. M.R.I. had just arrived in Jamaica within the last few days - January 1996. He said with proper care he

had seen disabled persons like the deceased live to their fifty's and sixties. She would live longer in the United Kingdom than in Jamaica.

No evidence was adduced of the treatment of the deceased prior to 11th January 1990 when Dr. Wellington examined her.

There was also no evidence of the Post Mortem examination.

Mr. Miller submitted that there was insufficient evidence to conclude that the death was caused from the injury received in the accident.

FINDINGS

The unchallenged evidence of Mrs. Johnson which I accept is that the impact caused the deceased to hit her head on the dashboard of the Land Cruiser and thereafter she observed a swelling on her forehead. Dr. Wellington saw an area on her forehead which indicated some sort of trauma. He also said that hitting the forehead with a subsequent coco or haemotoma could cause bleeding into the brain. She was treated on this basis in consultation with a neuro-surgeon but eventually died. He was 99% certain that she had subdural haemotoma which was caused by the injury on the 1st January 1990. Despite the unavailability of the catscan and evidence of the findings of the doctor who performed the post mortem examination, from the available evidence I find on a balance of probabilities that the injury on the 1st January 1990 was the cause of the death of the deceased.

THE DEPENDENCY

The off cited dictum of Lord Wright in ***Davies v Powell Duffryn and Associated Collieries (No. 2) [1942] 1 All E.R. 657 at 665*** is apposite:

" There is no question here of what may be

> called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities..."

The deceased was described by her mother Mrs. Johnson as the financial backing of the family. When the family lived in the United Kingdom she contributed about £500 per month to the household expenses. In June 1989 the family resided in Jamaica except the deceased.

Mrs. Johnson resided both in Jamaica and the United Kingdom. However the contributions changed, between June and December 1989 she sent a total of £500 to her mother in Jamaica.

Dean Johnson stated that while in the United Kingdom the deceased gave him money before she started to work and after she did she gave him weekly amounts ranging from £50 to £10. In Jamaica in 1989 he received an undisclosed amount from her through his mother, a birthday present of £40 and she gave him £30 when she came at Christmas. He attended Knox High School from 1989 to 1992 when he left in the Third Form. He would have expected the deceased to assist with his schooling had she lived.

On the other hand Mr. Johnson stated that Dean left school after the death of the deceased because they could not afford to pay his school fees.

The evidence indicates that at the time of her death the deceased was in receipt of the following monthly income:-

Average salary	-	£331
Mobility allowance	-	£105
Care allowance	-	£209
	Total	£645

Her expenses were -

Electricity £60 per quarter, monthly	-	£20
Gas £80 per quarter, monthly	-	£26
Rent £45 per week , monthly	-	£180
Mrs. Johnson said she spent on £200 herself, monthly	-	£200
		£426

No figures were given for food, clothing and transportation.

The contribution of £500 over a period of seven months from June to December 1989 appears to be all the deceased could afford. This results in a average of £71 monthly.

There is the question of the future earnings of the deceased. The case was conducted on the basis that had she lived she would continue to reside in the United Kingdom. Indeed Mr. Johnson her father stated that it was the intention of the parents that she should so reside and pay visits to the family in Jamaica. This is understandable in light of the benefits available to the deceased in the United Kingdom and the great disparity in the value of the currencies of the respective countries. Mrs. Sarah Martin, herself disabled, testified of the superior facilities for disabled persons in the United Kingdom in comparison with those in Jamaica.

Mr. Blake elicited from Dr. Wellington the fact that the deceased would live longer in the United Kingdom than she would in Jamaica.

The Science Teacher of the deceased stated that her ambition was to undertake an access course to the University of East London with a view to pursuing a degree in Computer Science and he had every confidence in her ability so to do.

In these circumstances it is reasonable to assume that some evidence would be given of the wages in the United Kingdom of a graduate in Compute Science. Instead, Mrs. Martin gave evidence that a graduate in the Science from the University of the West Indies would earn a salary of J$500,000.00 annually. There was no effort to correlate this to the salary payable to a graduate in the United Kingdom

In ***United Dairy Farmers Ltd. and Lascelles McCullum vs Lloyd Goulbourne SCCA No. 65/81 January 27, 1984 (unreported),*** Carberry J.A. said at p. 5.

> "A plaintiff seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however tenuous it may be. In making awards the Courts do their best to measure the incomprehensible or the immeasurable, (e.g. pain and suffering, or loss of amenities) - but there is a stage at which this ends and sheer speculation begins."

Any award for increased earnings subsequent to the death of the deceased would be sheer speculation. In the circumstances I fix the multiplicand at £71 monthly = £852 per annum.

THE MULTIPLIER

The deceased died at the age of 18 years. Dr. Wellington stated that he had seen persons similarly disabled live to an age in the 50's or 60's with proper care and all things going right.

In ***Elaine Russell and Ilene Griffiths vs Bancroft Broomfield S.C. R137/78 (unreported)*** a multiplier of 16 years was given to a female ex-student aged 19 years. (See Volume 2 page 206 of Recent Personal Injury Awards by Mrs. Ursula Khan)

In ***J.011/81 (unreported) Wesley Johnson*** a male student aged 18 years, a multiplier of 16 was used. See P. 251 of Volume 3 of recent Personal Injury Awards by Mrs. Ursula Khan.

I hold that a multiplier of 16 is appropriate in the circumstances of this case. The award is therefore calculated as follows 16 x 852 = Ł13,632.

The apprortionment is as follows:-

Mrs. Johnson	75%	-	Ł10,224
Mr. Johnson	5%	-	681.60
Neil	2%	-	272.64
Dean	3%	-	408.96
Wayne	5%	-	681.60
Michele	10%	-	1,363.20
			Ł13,632.00

FUNERAL EXPENSES

I award the sum of J$13,030.00.

In fine there will be judgment for the plaintiffs against both defendants for £13,632.00 converted at the rate of J$56,448 to £1 Sterling = $770,044.41

Plus Funeral Expenses - 13,030.00

Total - $783,074.41

Interest is awarded at 6% on the pre-trial portion from 14th January 1990 to 9th June 7 -1/2 years @ £812. Converted to J$360.702.72.

There will be costs to the plaintiff to be taxed if not agreed.