

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1991/E020

BETWEEN
AND

AEON EDWARDS
(who sues by his father and next
friend FRANKLYN EDWARDS)

CALVIN STEER

PLAINTIFF
DEFENDANT

Hector Robinson instructed by Gaynair and Fraser for the Plaintiff.

John Givans instructed by Dunn Cox and Orrett for the Defendant.

Heard on 25th and 26th June; 1st July and 30th October, 1992.

PITTER, J.

The plaintiff Aeon Edwards an infant, was a passenger in the defendant's motor bus which collided with a truck along the Ocho Rios to St. Ann's Bay main road on the 21st July, 1987. At that time he was 10 years old. He suffered injuries as a result of the accident and was admitted to the St. Ann's Bay Hospital for approximately 4 weeks. He arrived there in a state of coma. After his discharge, he returned to the said hospital for further treatment and thereafter to Kingston for follow-up treatment.

Liability in this action is admitted and the matter comes before me for damages to be assessed in favour of the plaintiff.

The particulars of injuries and special damages are as follows:-

PARTICULARS OF INJURIES

- (i) Haematoma and laceration to occiput
- (ii) Comatosed for approximately 96 hours
- (iii) Brain damage as a result of trauma
- (iv) Poor self-esteem
- (v) Lack of concentration
- (vi) Depression
- (vii) Impaired school functioning and poor school performance.

PARTICULARS OF SPECIAL DAMAGES

Travelling expenses

3 trips to St. Ann's Bay Hospital @ \$20 per trip	\$ 60
3 trips to Dr. Leramo at UHWI @ \$800 per trip	\$2400
7 trips to Dr. Reid at Cunningham Avenue @ \$500 per trip	\$4200
2 visits to Mureka Road for Cat Scan @ \$800 per trip	<u>\$1600</u>
	\$7260

Medical expenses

Dr. Leramo	\$ 270	
Dr. Reid	\$2700	
Cat Scan	\$1600	
Blood Test	\$ 200	
ECG at UHWI	\$ 150	
Medical Report (Dr. Betton)	<u>\$ 140</u>	<u>\$5060</u>
		\$12320

The evidence of the plaintiff is that he was travelling in the defendant's bus on the 21st July, 1979, and that he did not remember anything else until he woke up in the St. Ann's Bay Hospital. He does not remember how long he spent there nor when he left. He testifies that before the accident he was brave when playing football, but now he gets cowardly and does not play defence anymore; he does not like school that much because he cannot write fast enough to do his work because when he takes long to do it his teacher would beat him. He has one or two friends in class, they do not get along, and he stays by himself. Before this he used to have friends at school. He could draw but cannot draw that good anymore. Cross-examined he says that he now attends Marcus Garvey Technical School and is currently in Grade 9 having started there in Grade 7. He advances to each succeeding grade each year by means of tests. His subjects include mathematics, (more than the ordinary addition and division, including fractions,) English, social study, agriculture and carpentry. He has already done his test for Grade 10, but does not feel he has passed all the subjects. He plans to learn trade with his father as an auto-mechanic. His activities are swimming, fishing, football cricket and track, watching television and listening to radio.

Dr. Asquith Reid, a clinical psychologist, which discipline is especially developed to measure deficiencies in human behaviour, after having received a referral from Dr. Leramo of the University Hospital of the West Indies, examined the plaintiff on the 21st November, 1990 to assess the level at which he was functioning psychologically. He applied several tests including the Wechler intelligence and memory test; the Bender motor Gashalt, the Vineland Social maturity scale, the Incomplete Sentences blank and the Minnesota multi-phasic personality inventory. From these psychoanalytical tests he found that the plaintiff exhibited shy behaviour at age 13; this he says is demonstrated by his low voice, minimal eye contact and not initiating a conversation; that he appeared sad and looking lost; that he developed clinical depressions, his i/q was in the mildly retarded range of intellectual functions, ie. below average; that there was a significant difference between his verbal score and his performance score which is suggestive of brain disfunction. Under the Bender tests he fell in the range of moderately disturbed brain disfunction which constricted his ability to perform effectively in his normal life. The Vineland social maturity scale test showed him to be below the average which was sociable. Under the Incomplete sentences blank he was unable to express himself fully and was not in touch with some of his feelings, he lacked confidence and had a poor self-esteem which are the characteristics of brain disfunction.

Dr. Reid concludes that the plaintiff demonstrated some amount of brain disfunction which was partially in the performance area but which affected his social adaptive as well as personality function. That something happened at a point in time which caused trauma to the brain hence his depressed functioning. Dr. Reid thinks there is unlikely to be any large degree of recovery as the brain does not heal itself. It is his opinion that the plaintiff is trainable - that he could be taught mechanical but not mental complex situations, that he could perform well as an apprentice mechanic doing repetitive things, but not as an auto-mechanic. Dr. Reid admits that he has had no information as to the type of student the plaintiff was prior to examining him nor does he know what kind of person he was prior to the accident.

Franklyn Edwards the plaintiff's father gave evidence to the effect that the plaintiff was born on the 14th June, 1977, a normal birth and started school at age 4. That he was a very playful, and polite child and could read at age 5-6. That the last test he did prior to the accident he was placed 14 out of a class of 40. That when he visited the plaintiff at the St. Ann's Bay Hospital on the day of the accident the plaintiff had bruises on the arm and a hole to the back of his head, he appeared dazed, could not speak and did not recognise him until four days later.

Mr. Edwards is himself a motor mechanic and employs apprentices at a rate of \$100 per week. He had ambitions for his son to become a Seventh Day Adventist parson.

The evidence is completed by the tendering of a Medical Report of Dr. J.S.R. Golding OJ, KT, FRCS which has been admitted in evidence by consent as an exhibit. Dr. Golding's report contrasted sharply with the evidence of Dr. Reid. I note that Dr. Golding was not presented as a witness hence his report went unchallenged, not being subject to cross-examination. For ease of reference I recite hereunder his report.

"I examined Aeon Edwards for the purpose of writing this report on the 15th April, 1992. I had available to me a copy of a Psychological Report written by Dr. Asquit A. Reid a Consultant Clinical Psychologist dated November 21, 1990. Aeon was complaining of occasional headaches and giddiness. He said that from time to time he had double vision. His father who accompanied him, said that he acted strangely at times, Aeon himself answered question sensibly. He showed no sign of any physical abnormality. There was no exaggerated tone in either of his four extremities. There was a full range of motion of his spine, upper and lower extremities.

I could detect no evidence for any of obvious brain damage. There was no nystagmus present and there was a full range of eye movements.

I am unable to assess his Psychological condition because I am not competent to do so. He did not strike me as particularly slow or backward for a 15 year old boy. He told me that he was learning to be a carpenter. So far he had managed the theoretical lectures well and looked forward to practical training."

He detected no evidence of any obvious brain damage but readily admitted he was not competent to assess his psychological condition.

The only evidence of physical injury to the plaintiff comes from his father Franklyn Edwards who said that when he went to visit the plaintiff at the St. Ann's Bay Hospital he saw bruises on his arm and a "hole" to the back of his head. There is no medical evidence to support this and the court was not benefitted by any medical evidence as to the nature and extent of the injuries

with particular reference to the head. I find on the unchallenged evidence of Franklyn Edwards that the plaintiff whilst in the St. Ann's Bay Hospital "was in a state of comatose for approximately 4 days. It leads me therefore to draw the irrisistable inference that this condition was brought about by trauma to the head as a result of the accident.

The thrust of the plaintiff's case is that he suffered brain damage as a result of the trauma occasioned by the head injury described by Franklyn Edwards as "a hole in the back of his head. There is no denial that the plaintiff was comatose for some time after the accident. Dr. Reid concluded from his tests that the plaintiff suffered trauma to the brain of a physical nature which resulted in brain disfunction. I am impressed by Dr. Reid's evidence which explains the plaintiff's behaviour. On a balance of probabilities I find that the plaintiff did in fact suffer trauma to the brain resulting in brain disfunction and this arose from the injuries he suffered in the accident.

There is however one area of concern and that is the plaintiff's intellectual ability prior to the accident. There is no evidence of this. His father says before the accident he came 14th out of 40 students in his class. The plaintiff himself gave evidence of having sat exams after the accident in order to be promoted to other grades. This to my mind tends to show that he is within the scholastic range of the average school boy. Bearing in mind the evidence of Dr. Reid, the medical report of Dr. Golding and my own assessment of the plaintiff as he gave evidence from the witness box, I did not form the impression that he was particularly slow or backward as he responded to the questions put to him. I note however that he did not remember a number of events which he should have. There is a lack of information as to the plaintiff's academic performance prior to the accident and it leaves me to consider whether in fact there has been a deficiency in his scholastic performance and if so to what extent. I am satisfied however that there is some deficiency resulting from the trauma he suffered, but not to the extent as described by Dr. Reid.

I now turn my attention to the quantum of general damage as it relates to pain and suffering and loss of amenities. I note that the plaintiff was comatose for some 4 days and that his association with friends and family has somewhat changed. Mr. Robinson suggested a figure of \$500,000 - \$600,000 under this head.

Mr. Givans for the defence contends that the pleadings do not indicate the measure of pain suffered and that the unconscious cannot feel pain hence a nominal sum of \$170 should be awarded in the event the court does not hold that view then the sum of \$140,000 - \$150,000 should be the award under this head.

In support of his arguments Mr. Robinson relies on the following authorities reported in Khan's Personal Injury Award Volume II.

1. C.L.1979/M179 Miller v. James page 208 in which an award of \$40,000 was made for pain and suffering and loss of amenities.
2. C.L.1979/R041 M 2/10 Anthony Rose b.n.f. Yvonne Rose v. Thomas Smith, General Damages.
3. C.L.1984/R129 Tashina Henderson b.n.f. Elaine French v. Gerald Ludford \$175,000.00.

In all these cases cited there was evidence of brain damage including loss of memory and as regards the last two, these related to children.

Mr. Givans relies on the following cases to be found in Khan's Personal Injury Awards Volume III.

- (1) Page 215 C.L.1983/K20 Devon Kelly b.n.f. Fay Liston v. Sevens Limited et al where the award was for \$140,000 pain and suffering.
- (2) Page 225 C.L.1984/C437 Henry Carter v. Jamaica International Limited et al when the award for pain and suffering was \$180,000.

The case of Rose v. Thomas (supra) finds favour with this court as I find it compares favourably with the matter before me, save that the injuries in the former are a little more severe. Having taken into account adjustments for inflation, and other relevant consideration, I am prepared in the circumstances to make an award of \$500,000 for pain and suffering and loss of amenities.

In relation to the claim for handicap on the labour market, the evidence discloses that the plaintiff could be taught mechanical things but nothing of mental complexity. It is Dr. Reid's evidence that if the plaintiff wants to be a mechanic or a carpenter he would have a problem. As an apprentice doing repetitive things yes, but as an accomplished auto-mechanic, no. The plaintiff would not therefore be able to pursue his ambition of becoming an auto-mechanic because of his present condition occasioned by the accident. He can however be trained as an apprentice mechanic. It would take possibly four to five years of training to become one.

The wages of auto-mechanics as the plaintiff's father, who operates a garage and is himself an auto-mechanic, indicates, is \$500 per week for the more

advanced. The others are paid \$300 per week and apprentices \$100 per week. After training I would expect the plaintiff to be earning a minimum of \$300 per week and the real handicap to be the difference between this amount and the minimum he could receive as an auto-mechanic. This difference is \$200 per week. By using a multiplier of 16 this would amount to \$166,400.00.

Special Damages

Mr. Robinson asks the court to make an award of \$26,000 for future medical care. This is based on the evidence of Dr. Reid who says that the plaintiff could benefit from clinical therapy with a view to have him cope with the deficiencies that he has. The cost of this treatment would range from a low of \$450 to a high of \$850 per week for a period of 9-12 months. At its lowest that would be \$16,600. This head was challenged by Mr. Givans who argued that this item was not pleaded. He relied on the case of Domsalla and Anor v. Barr (trading as A.B. Construction) et al (1969) 3 AER. Mr. Robinson also cited the said case in reliance of his claim. In this case Lord Edmund Davis it was in his judgment held that -

"where it was proposed to allege that there were any special circumstances which would probably leave the plaintiff to sustain losses in the future, over and above those which in the ordinary way would reasonably be expected to flow from the accident. These special circumstances must be pleaded since the basic object of pleadings was to crystallise the issues so as to enable the parties to prepare for trial and to guide the defendants on the important matter of payment into court"

The case of Parasurillo v. United Paint Company Limited (1969) 3 AER page 485 Lord Donovan observed and I adopt this in respect of the instant case.

"Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court"

The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is special in the sense that fairness to the defendant requires that it be pleaded.

The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendants access to the facts which makes such calculation possible."

Having adopted the rationale in the cases cited above, the claim under this heading fails. The plaintiffs were well aware of the exact amounts that could be claimed for but were not pleaded. The plaintiff's claim crystallised in February 1991 - no claim for continuing medical treatment. Nor was an amendment sought to remedy this. In the circumstances therefore no award will be made for future medical expenses.

The item regarding travelling expenses to St. Ann's Bay Hospital @ \$20 per trip is admitted hence the sum of \$60 will be allowed. I am satisfied that plaintiff's father paid the sums set out in pleadings of Medical Expenses save the item "Medical report of Dr. Botton which was not proven. The plaintiff could produce no receipt to substantiate the payments but gave an explanation that a number of his valuable documents were all eaten up by roaches and this I accept as being true.

Travelling

Mr. Givans complains that the expense of taking taxi rather than a bus was totally unnecessary and that there is no evidence to suggest he could not take a bus thus mitigating the cost, and secondly there are no receipts to substantiate this. He suggests that an award of \$500 should be made for each item of travel.

On this point in cross-examination, plaintiff's father tells the court that the reasons he did not take a bus is that it was difficult to get one from Kingston to St. Ann's Bay and the times he had appointments with doctors in Kingston made it inconvenient and that the appointments were always in the afternoons. That buses do not go to where he lives and that he is not familiar with Kingston but the drivers of the taxis he takes are familiar with the area. Each trip cost \$800 to Kingston save for that to Dr. Reid which is \$600.

I must take judicial notice that the public transport system is in a terrible state. Hardly a day passes without complaints are made - in remote areas little or no public transportation and in areas where they are available the service is deplorable and unreliable. I would not expect him to be producing receipts as evidence of payment. I accept on a balance of probabilities that

plaintiff was transported to Kingston on each occasion by taxi. The figures of \$000 and \$600 seems to be inordinately high. In this regard I would make an award of \$300 per day for each trip from St. Anns Bay to Kingston making a total of \$3,600.00

Damages are assessed as follows:

General Damages -- \$615,400.00

(1) Pain and suffering and loss of amenities	-- \$ 500,000.00
(2) Handicap on the labour market	-- <u>\$ 166,400.00</u>
	\$ 666,400.00

Interest on \$500,000.00 @ 3% per annum from the 8th March, 1991 to the 30th October, 1992.

Special Damages -- \$8,500.00 with interest @ 3% per annum from the 21st July, 1979 to the 30th October, 1992.

Costs to be agreed or taxed.