83

Judgment Book
SUPREME COURT LIBRARY
KINGSTON
JAMAICA

Scan

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1988/G010

BETWEEN	**LORRAINE GARRELL (b.n.f and Father Aston Garrell)**	**FIRST PLAINTIFF**
A N D	**ASTON GARRELL**	**SECOND PLAINTIFF**
A N D	**BYRON WILLIAMS**	**DEFENDANT**

Mr. Eric Frater instructed by Frater Ennis & Gordon for first Plaintiff.

Miss Dorothy Lightbourne for Defendant.

Heard: March 30, 1995, October 5, 1995.

Assessment of Damages

Harrison J. (Ag.)

The first plaintiff's claim which is the only matter before me for assessment of damages, arises out of a motor vehicle accident which took place on the 8th day of October 1982 when she and her mother were hit down by a motor car whilst they were walking along Glendevon Road in St. James. On the date of the accident she was three years old. She now sues by her next friend, who is her father.

Although this accident occurred some thirteen years ago, interlocutory judgment in default of defence was only entered on the 9th March 1992. The records further disclose that Assessment of Damages had been adjourned on previous occasions but damages were finally assesed in March 1995. It is unfortunate however, that I could not have handed down this award before but this was due to the misplacing of my notebook which contained the notes of evidence. I do apologize for this delay.

The plaintiff sustained injuries to the head, left thigh and right arm with the result that she has been left with a 12cm scar with an underlying bone depression which lies anterior to the hair line and as such constitutes a cosmetic defect. Submissions were made that she has also suffered some brain damage. Five reports (medical and psychological) were agreed to by the parties' Attorneys and they have been put before me. They are careful, full and clear and span from a period dated March 17, 1983 to September 30, 1992.

I

I have also seen the plaintiff and have had the benefit of hearing her in the witness box.

The first report before me was given by Dr. P. Rangachari, Consultant, Orthopedic Surgeon. It shows where the plaintiff was admitted in the Cornwall Regional Hospital on the 8th October 1982. Clinical and radiological examnation revealed that she had a depressed fracture of the left parietal bone, and displaced closed fractures of the shafts of the left femur and right humerus. On the 9th October 1982, under general anaesthesia, closed manipulation reduction of the left femoral and right humeral fractures were done. The femoral fracture was immobilized in plaster spice and the humeral fracture with arm to chest splint. The post reduction checkup skiagram showed satisfactory reduction. She was discharged on 10th October 1982 and advised to attend the orthopaedic out-patient clinic after four weeks.

On 17th November 1982 the fractures were x-rayed and found to gain partial union, so she was advised to keep the splints for four more weeks and to attend the orthopaedic clinic on the 15th December 1982. She attended the clinic, the splints were removed and check skiagram revealed good union of the fractures. She was then referred for physiotherapy.

Dr. M. Sudhakar further examined the plaintiff. His examination revealed thaat the plaintiff had a slight angulation of the right humerus. However, movements at the elbow, wrist and shoulder were good. This examination also revealed that there was no shortening of the left lower limb and there was no permanent disability as regards to her orthopaedic condition. The Doctor was of the view however that she needed to be assessed by a neurosurgeon. This was probably due to the fracture of the parietal bone which had healed with a depression.

Dr. Asquith A. Reid, Clinical Psychologist interviewed and administered certain neurological tests on the plaintiff. His report which was one the agreed documents, is dated 14th February, 1987. He did say

the Wechsler Intelligence Scale for Children-Revised and the Bender Gestalt Psychomotor test. For the Wechsler test, she obtained a verbal IQ (VIQ) in the average range. For the Bender test the score was in the impaired range for gross brain functioning. Dr. Asquith concluded as follows:

> "Lorraine is functioning in the retarded (PIQ and FSIQ) to low average (VIQ) range of intellectual ability. Brain damage is indicated by the differential in performance between verbal (PIQ) and performance (PIQ) as well as inter-subtest variable scores on the WISC-R. In addition the profile of the scores suggests that there was a previously higher level of functioning. This performance on the WISC-R was corroborated by scores on the Bender which indicate gross brain dysfunction. Clinical interview suggests that her ability to communicate socially has been impaired. There are signs of self-esteem issues possibly caused from the residual scars on her forehead as well as the inability to perform at the required level in school-tasks. These effects are long-term in nature. She will require long-term treatment in terms of special education and therapy to assist her in coping with this disability."

Dr. Reid saw the plaintiff on a subsequent occasion and his up-dated report of the 8th February, 1991 which was also agreed will be dealt with later.

Dr. Randolph Cheeks, Consultant Neurosurgeon saw and examined the plaintiff on the 9th November, 1989 for a neurological assessment to be carried out. He concluded that the plaintiff had no clinical or radiological evidence of brain damage. I will deal also with his report in more detail at a later stage as well as his report responding to Dr. Reid's report of the 14th February, 1987 and 8th February, 1991 respectively.

Dr. T. N. Golding, Radiologist at Eureka Medical Centre performed a head CAT scan, and it revealed a normal study. This meant that there was no evidence of brain injury.

In assessing damages I am compelled to act upon these medical opinions but I must also bear in mind the evidence of the plaintiff and her father. It was pleaded in the Statement of Claim that the plaintiff suffered "brain damage, gross brain dysfunction and neurological and psychological trauma." Miss Lightbourne submitted however that the brain injury and gross brain functioning which he found, were as a result of the injuries the plaintiff sustained in this accident. It was further her view that the plaintiff could have been born with this low level

of intelligence if this were so and that it was not necessarily caused from the accident.

The plaintiff's father has testified that since the accident, his daughter is not "behaving right." She is now sixteen years of age. According to him, she had done a number of things out of the way. For example, when she was eight years old she had thrown water in a baby's face; used a broken bottle to cut herself and covered herself with mud. Mr. Garrell further testified that the plaintiff at her present age does things in her school books like smaller children. When he was cross-examined he admitted that the incidents of the mud, water and cutting herself with the broken bottle occurred only once.

The plaintiff testified that she still remembers the accident albeit that it had occurred when she was three years old. However, under further examination she told this court that she does not remember if she felt anything when the accident occurred. Neither does she recall if she had remained at home or in hospital and that she does not remember anything at all. She recalls being seen however by Doctors and receiving treatment but she does not know how she has been feeling since she has received these treatments.

It is unclear from the evidence, when it was that Dr. Reid saw the plaintiff. Exhibit 1, a report headed "Psychological Report" is however dated February 14, 1987. This report states that the plaintiff was referred to him by the Bustamante Children's Hospital to determine her level of competence psychologically and this was subsequent to a motor vehicle accident in which she received "injuries to the head." Dr. Reid concluded that the plaintiff was functioning in the retarded to low average range of intellectual ability. According to Dr. Reid his tests indicated that there was "gross brain dysfunction". The clinical interview he says, suggested that the plaintiff's ability to communicate socially had been impaired. Further, that there were signs of self-esteem issues possibly caused from the residual scars on her forehead as well as the inability to perform at the required level in school tasks. He concluded that these effects were long-term in nature; she would require

long-term treatment in terms of special education and therapy to assit her in coping with this disability.

Dr. Reid's final report is dated 8th February, 1991. The plaintiff would have been then 12 years of age. In his Psychological update he maintained that the results of previous testing had been upheld. This report states inter alia:

> "Current status:....Although she is currently more optimistic and performs at an average level in rote functions she is till limited in abstract reasoning. Her socio-emotional functioning has been negatively affected. She is conscious of the scars on her forehead and feels she is different from other children. This causes her to interact less with other than is normal and to compete only at a minimal level for her age. In addition, her self-esteem has damaged and her potential thus limited. For example, she doubts herself in academic performances and takes more time achieving tasks as well as verifying answers. The trauma of the accident and the loss of mother have not been fully resolved. She has frequent flashbacks and is unable to cope with the resultant emotional load. This further affects her performance negatively in all areas.
>
> The overall level of the damage resulting from the trauma of the accident is in the severe range. This will affect her for life but to a lesser degree in later adulthood if she receives the necessary treatment which will only help to partially alleviate the effects of her traumatic experience. Her treatment should include remedial help in all areas of academic achievment and socio-emotional development. If this fails to improve her academic performance and/or socio-emotional growth then assistance in skill training will be an absolute necessity. Further psychological treatment will be significant in assisting her to cope and to adjust throughout the different phases of her development.
>
> This is particularly so in adolosence when relative appearance and good self-esteem are instrumental in securing a smooth transition into adult life. Parent training to effectthis also will be necessary."

Dr. Randolph Cheeks, Consultant Neurosurgeon first saw the plaintiff on the 9th November, 1989 and as he has pointed out in his Report marked Exhibit 4, it was for the purpose of a neurological assessment to be carried out. His general examination revealed that the plaintiff was of slim but healthy appearance with physiological vital signs and there was no evidence of any general medical or endocrinological disorder. She was initially shy but her responses to questioning livened as they progressed. She participated fully in and cooperated with the interview.

She was able to say which school she attended, and that she was in grade 5. She indicated that she liked Maths and Mental Ability at school and that in recent tests she had scored 26 out of 50 in English and 40 out of 50 in Mental Ability. She also told the Doctor that in Maths. "I sometimes get all my sums right."

Neurologically, he found her to be fully alert, taking an active interest in her environment and though a little shy initially, she soon overcame this. Her speech was normal in form and content. Psychometrically, her attention span and concentration were normal, and in the areas of reasoning ability, abstract thinking, mathematical reasoning, conceptualising picture sequencing and digit span she performed well, whilst her performance in the serial sevens subtraction was a little slow. No defect in memory function was noted.

Dr. Cheeks found further that all twelve pairs of the plaintiff's cranial nerves, one through twelve, tested normally, and in particular the neuro-opthalmic findings were unremarkable, as were the results of cerebellar and parietal testing. Likewise, all four limbs tested normally in respect of muscle tone, power, coordination, sensory modalities and reflexes, and no pathological shortening of any of the previously fractured limbs were evident. Gait posture and spinal flexibility were normal. The doctor concluded that as far as neurological injury was concerned, the plaintiff had suffered a diffuse head injury with a frontal impact resulting in the 12cm frontal laceration and a fracture of the frontal bones of the skull which had healed with a depression across the midline of her forehead anterior to the hair line. Further, he maintained that nothing in her neurological evaluation raised the possibility of intellectual loss or personality abnormality, nor did he detect any defect in memory function. Nevertheless he observed that since the impact to the head had been sufficient to produce a skull fracture he therefore requested a CAT head scan to seek confirmation of his clinical impression that no brain damage was present. This investigation was, after some delay, eventually carried out on 14 September 1990. It confirmed that no brain damage was present.

Dr. Cheeks therefore concluded that the plaintiff had no clinical or radiological evidence of brain damage. However the 12 cm scar with an underlying bone depression which lied anterior to the hair line constituted a cosmetic defect, being easily visible at normal conversational distances. He would not recommend cosmetic surgery to correct the bone contour irregularity owing to the hazard such an enterprise would pose to the subject.

It was also observed by Dr. Cheeks that in the period of seven years which had elapsed since the accident, no post-traumatic epileptic fit had occurred. He opined that that risk was now passed, i.e. the risk of epilepsy now developing as a late sequel was 0%.

Both Doctors Reid and Cheeks observed that the plaintiff was initially shy and slow to respond but as their respective interviews developed according to Dr. Cheeks 'she seemed more at ease.' Dr. Cheeks was of the view that this type of shyness is normal and is anticipated especially in the young female "when she has just arrived into the cold clincical confines of a medical examination room." Dr. Cheeks found unlike Dr. Reid, that the plaintiff's short term recall was well within the normal range, she being able to recall ten of twelve test objects at one minute whereas nine would have sufficed for normality. It was Dr. Cheeks' view that the Bender Gestalt was not a reliable test for organic brain damage having been invented decades ago. He was in favour of the currently used computerised x-ray techniques which he claimed were objective.

It was argued by Mr. Frater that since the impact to the head had caused a skull fracture then it was more probable that this could have caused the intellectual impairment which Dr. Reid found. But it should be recalled where Dr. Cheeks had some concern hence he had requested a CAT Scan of the head. This scan did confirm his clinical impressions that no brain damage was present. On the basis of the evidence before me I would accept the findings by Dr. Cheeks and Golding and hold that the allegations of "brain damage, gross brain dysfunction, and neurological

trauma" have not been proved by the plaintiff. Having had the benefit of seeing and hearing the plaintiff, I would say that she has impressed me as fairly intelligent young Miss who is indeed shy but may be self conscious because of the scar and depression which appear on her forehead. Her testimony, although brief was quite straightforward and she was able to think and respond to the questions asked when she was cross-examined. She could recall that she visited Dr. Reid fourteen times. The evidence also revealed that the plaintiff's grades in school were fairly good. She is at present in High School and is doing Geography, History, Bible Knowledge, Spanish, Mathematics, English Language, English Literature, Integrated Science and Family Life. Before moving on to Harrison Memorial she had graduated from Mt. Salem School in grade 9(1) which was the highest grade. This type of progress is certainly not typical of a child with intellectual abnormality.

There is no doubt however that she will have a permanent cosmetic defect which she will take to her grave. Dr. Cheeks was of the view that cosmetic surgery to correct the bone contour irregularity would not be recommended owing to the hazard which such an enterprise would pose. On a balance of probabilities, it seems to me that the plaintiff's future could be viewed with optimism but for this cosmetic defect. Being a young lady I would have no doubt that this scar and depression in the forehead would have some psychological effect on her. Dr. Cheeks did say that this scar was easily visible at normal conversational distances. It was clearly visible to me as she stood in the witness stand.

I now move on to the issue of General Damages. It does seem to me that in assessing damages due consideration will have to be given to the head of pain and suffering and loss of amenities, cosmetic defect and the effect this scar and depression will have on her psychologically. Both Counsel have advanced arguments as to how heavy should be the right figure. Mr. Frater has suggested a figure of $1.25M which includes a sum for brain damage. Miss Lightbourne on the other hand argued that a sum of $219,000.00 would be appropriate in all the circumstances.

Here we have a young girl who on the evidence of her father was virtually brought back to life. He recalls looking at her lying in a pool of blood whilst she was in hospital and that she had appeared dead. She was wrapped according to him in a plaster of paris cast from top to bottom. Miraculously she has suffered no brain damage. Her fractures have all healed and she is virtually without physical disability apart from the scar and depression in her forehead.

It is always extremely difficult to translate considerations such as these into terms of money, because no such sum of money can or could ever fully compensate the plaintiff. One must therefore do as best as possible which in a way will reasonably compensate the plaintiff and, on the other hand, not do injustice to the defendant by awarding an excessive sum.

Mr. Frater cited and referred to the case of Judine Kitson (B.N.F. L. Kitson) v Everald Kitson C.L. 1987/K037 heard by Langrin J who assessed damages on the 18th May, 1990. In that case the plaintiff who was five years old was involved in an accident and sustained a minor concussion and was unconscious for fifteen minutes. She had bleeding fromthe left ear and ahd abrasions over the right side of her forehead, right shoulder and both knees. Medical evidence revealed that she had a history of low blood sugar and that both the head injury and hypopigmental scar on the right side of her face and a 4 cm hyper tropical scar on the right shoulder. She was awarded $250,000.00 in respect of General Damages. It is my view however that the facts of Kitson's case can be distinguished from the instant case. On my findings, there is no intellectual impairment in Kitson's case was due to the plaintiff's low blood sugar and head injury. Neither has the medical evidence revealed any unconsciousness by the plaintiff in this case. It would be fair to say therefore that the Kitson case was more serious.

Mr. Frater also cited the cases of Patrick Bennett v The Attorney General C.L. 1991/B176, Supreme Court judgment of Cooke J delivered July 7, 1992 and Sheldon Beckford (bnf Cecil Banks) v Noel Willey C.L. 1990/B184, Supreme Court judgment of Pitter J. delivered on the 8th June 1992. In

the former case the plaintiff suffered a fracture of the forearm with swellings, bruises and abrasions to the head, arms and body. By consent judgment was entered for the plaintiff in the sum of $100,000.00. The latter case was one which concerned an infant who sustained a fracture of both bones of the right forearm resulting in a 5% permanent partial disability of the function of the right forearm. By consent a global award of $89,000.00 inclusive of costs was made.

Miss Lightbourne on the other hand referred to the case of Manuel Ferguson v David Walker C.L. 1989/FC39, Supreme Court judgment of Cooke J delivered December 5, 1990. In that case the plaintiff was rendered unconscious as a result of a head injury. He also sustained fractures of the proximal third of the left tibia, compound comminuted fracture over the distal third of the left fibula, fracture of the lateral malleolus and lacerations over the left parietal region of the head and over the distal third of the left leg. Damages were assessed in the sum of $50,000.00 in respect of pain and suffering loss of amenities.

It can be clearly seen that in the Beckford case there was a 5% permanent partial disability whereas in the instant case there is no disability whatsoever. It is my considered view however that the injuries which the plaintiff suffered in this case are more serious than those which the plaintiff in Bennett's case sustained. The Court is at disadvantage however as it does not know from the records how damages were apportioned. A global sum of $100,000.00 inclusive of costs was awarded. I find on the other hand that Ferguson's case could be of some assistance in determining what could be considered a reasonable sum. I do think however that the fracture of the skull in the instant case together with the cosmetic defect (i.e. the 12cm scar and depression of the underlying bone) would place this case in a category which would attract a higher award.

In Donald Henry v Robinson's Car Rentals Ltd and Anor C.L. 1989/H017, Supreme Court judgment of Reckord J. Delivered 29th January 1991 the plaintiff suffered cerebral concussion with closed undepressed fracture of the right frontal bone. He spent ten days in hospital suffering

from head pains and bouts of amnesia. The head pains lasted for one month. After six weeks he had fully recovered without disability. For pain and suffering and loss of amenities he was awarded $25,000.00.

In Harry Sobers Sobram v Ruby Bicknell and Anor C.L. 1984/S397, Supreme Court judgment of Walker J. delivered September 27, 1991 the plaintiff was in shock. His injuries were as follows:

1. 3" laceration over right forehead
2. Closed fracture of the right humeral shaft
3. Comminuted fracture of the right femur
4. Separation of the symphsis pubic
5. Minimal brain damage
6. Abrasions and lacerations

The plaintiff Sobram was admitted in hospital where traction was applied to the arm which healed in approximately eight weeks. Traction was applied to the leg and removed after thirteen weeks. Physiotherapy was finally administered to rebuild the muscles in the arm and leg. He was disabled to the extent of 10% partial disability of the whole person. For pain and suffering and loss of amenities he was awarded $150,000.00.

In this case, the plaintiff had no resulting disability from the fractures of the shafts of the femur and humerus. On my finding there has been no brain injury nor intellectual abnormality. She was hospitalized for two days according to the medical report of Dr. P. Rangachari. I reject the evidence of the plaintiff's father that she was hospitalized for eight weeks or for that matter "more than eight days" according to his evidence under cross-examination. It would seem from the medical reports of Drs. Rangachari and Sudhakar, that the plaintiff's period of physical incapacity did not exceed four months. Her fractures have healed but there had been a slight angulation of the right humerus. There is also this scar and depression in her forehead.

I have given due consideration to the cases referred to me and have come to the conclusion that having regard to the nature of the injuries sustained, and the resulting consequences, a global award of Three hundred Thousand Dollars ($300,000.00) is appropriate.

Special Damages

The following items of special damages were agreed by the parties:

1. Cost of dress destroyed.....$90.00
2. Cost of shoes destroyed.....$70.00
3. Transportation to visit plaintiff in hospital.....$360.00
4. Transportation from hospital to home.....$50.00
5. Tranportation to and from hospital to remove plaster of paris.....$80.00
6. Costs of X-rays.....$60.00
7. Medical Exam. Fee $80.00
8. Cost of test done by dr. Reid.....$450.00
9. Visit to neurosurgeon.....$700.00

Total.....$1940.00

The plaintiff has failed to prove the loss of a silver bangle. I would however, allow the cost of the lost gold necklace in the sum of $250.00. Item 9 being transportation costs amounting to $700.00 to Oxford Medical Centre will also be allowed. Miss Lightbourne has indicated that she has no quarrel with item number 11 as pleaded for other transportation costs. I will therefore allow the sum of $1925.00 under this head.

The amount of Four Thousand Eight Hundred and Fifteen Dollars ($4815.00) will therefore be awarded in respect of Special damages.

Damages are therefore assessed and apportioned as follows:

General damages

Pain and suffering and loss of amenities $300,000.00

With interest thereon at the rate of 3% p.a. from the date of service of the Writ of Summons to today.

Special Damages.....4815.00

With interest thereon at the rate of 3% from October 8, 1982 to today.

Costs to the plaintiff to be taxed if not agreed.