IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M 332 of 2000

BETWEEN	MALCOLM MOODY (An infant by his mother and next friend Colene Moody)	CLAIMANT
AND	ANDREA STEPHENSON	1ST DEFENDANT
AND	AUDREY GAYNOR	2ND DEFENDANT

Maurice Manning and Miss Ayana Thomas instructed by Nunes Scholefield & Deleon for claimant.

Alton Morgan and Miss Sharon Morgan instructed by Miss Arlene McLeod of Alton Morgan & Co. for defendants

Heard: March 1 and May 28, 2004

JONES, J.

When referring to a child of tender years, the opposite of "innocent" is "knowing". For adults, the opposite of "innocent" is "guilty". What links these two pairs of ideas is more than a simple pun, for it is often said that drivers have a responsibility to young children on the roads, to exercise special care for their safety. When a young child is injured on the road, the question arises: is this driver guilty, for failing to protect the vulnerable, even from themselves?

Malcolm Moody was six years old when he collided with a car driven by Audrey Gaynor and owned by Andrea Stephenson. As a result of this collision, he suffered extensive abrasions to his leg, and a fracture to his right tibia and

fibula. This happened on February 7, 1998, while he was playing on a secondary road that exits on 37 ½ Barbican Road, in the parish of Saint Andrew.

The disputed factual issues were as follows:

1. On what section of the road did the collision occur?
2. Did Audrey Gaynor use her horn to warn Malcolm and the other children of her approach?
3. What was the speed being driven by Audrey Gaynor and was it excessive given the circumstances?
4. What was the distance of Audrey Gaynor's car left fender from the sidewalk?
5. What was the nature of the injuries to Malcolm Moody?

The following legal issues are to be determined:

1. Are the defendants Audrey Gaynor and Andrea Stephenson liable in negligence for the injury to Malcolm Moody?
2. Given his age, can Malcolm Moody be liable for contributory negligence?
3. What damages are recoverable by Malcolm Moody?

LIABILITY

Where on this road did the collision occur and what was the distance of the car from the sidewalk?

Malcolm Moody's evidence was that he was walking back ways on the sidewalk on a road near to his home in Cedar Valley with his friend Rajive who

was chasing him. He slipped and his right foot went onto the road beside the sidewalk and a car ran over it. He said that his back faced the car and he did not see or hear the car before it ran over his foot.

Audrey Gaynor on the other hand, gave evidence that while driving she went up a slight incline, turned a corner and went on a straight stretch of road which was flat. She said she first saw the children when she turned the corner. At that time there were three children; two girls and a boy standing on the left side of the road on the sidewalk near to her front left fender. As she drove past, the two girls chased the boy. She said she was aware of their presence and drove with even more caution, and went in the centre of the road. The children came alongside her car as they ran, and when the girls were about to catch the boy, he darted off the sidewalk and into the left front side of her car.

She said that there was nothing that she could have done to avoid hitting him. She stopped the car and noticed that the boy sustained injuries to one of his legs. He was lying in the road next to the left side of car. At this time the car was about two yards away from the sidewalk.

In general, the court accepted the account of Audrey Gaynor on this aspect of the case. However, the court took the view that as she was aware of the children playing on the road, she did not take sufficient precautions to guard against their unpredictable behaviour.

Did Miss Gaynor use her horn to warn Malcolm and the other children?

Miss Gaynor said that as she approached the slight incline and corner on the road, she reduced her speed and blew her horn, as it was always her practice upon approaching a corner to blow her horn. At this point, she was unaware of children playing at the side of the road. Malcolm Moody denies this. He says that he did not hear a horn while on the road. I believe him. When children hear the horn of a car it gets their attention instantly. Miss Gaynor may have blown her horn before reaching the corner on the hill; not with an intention to warn the children, but to warn other drivers who may have been around the corner.

At what speed was Audrey Gaynor travelling and was this speed too fast given the circumstances?

The unchallenged evidence of Audrey Gaynor was that she was travelling at twenty miles per hour. She was driving slowly as the road conditions made it difficult to go any faster. The road surface was awful, with pot-holes in the road. It was also narrow; barely two car widths wide, estimated at sixteen feet wide and there was a concrete sidewalk on the left. The court accepted that there were young children playing and running on the road. As a result the court finds that Miss Gaynor should have slowed down even more, even if it meant stopping the car.

What was the nature of the injuries sustained by the Malcolm Moody?

The senior orthopaedic resident who examined Malcolm Moody said that he was conscious, but in obvious pain. His findings in relation to the musculoskeletal system were that:

> *"...he had extensive abrasions to his right knee and leg. He also had a loss of skin over the right medial melleolus with a 0.5 centimetre puncture wound over the middle 1/3 of the right leg. He said the leg was obviously deformed and there was marked tenderness and crepitus on palpation. Radiographs revealed a comininuted fracture of the middle third of the right tibia & fibula with the following diagnosis:*
>
> - *Grade 1 open fracture (R) tibia*
> - *Fracture (R) fibula*
> - *Extensive abrasion (R) leg.*
> - *Full thickness skin loss (R) medial malleolus.*
>
> *Master Moody was subsequently reviewed in the out patient clinic. On 21 May 1998 all of the patients wound had healed he had full range of movement about all joints, and he was allowed to full weight bear. When last reviewed on 23 July 1998, the patient walked with a limp and a large scar could be seen on the leg.*
> *The patient right lower limb was 1.5 cm short and the muscles were a bit wasted. The present impairment is not likely to be permanent and should correct as the child grows."*

Are Audrey Gaynor and Andrea Stephenson liable in negligence for the injury to Malcolm Moody?

Negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff: See **Winfield & Jolowicz on Tort 15th Ed. pg. 91.** There are three elements to establish negligence:

1. That a duty of care was owed to the claimant;
2. Breach of that duty; and

3. Damage to the claimant resulting from the breach.

It is commonplace to say that the driver of a vehicle on the road owes a duty to take proper care not to cause damage to other road users including pedestrians, cyclists and occupiers of premises adjoining the roadway, whom he reasonably foresees are likely to be affected by his driving. In order to satisfy this duty he should keep a proper lookout, avoid excessive speed, and observe traffic rules and regulations.

It is a question of fact in each case whether the driver has observed the standard of care required of him. The standard of care required by the driver to a child is greater than that owed to an adult. On the other hand, a lower standard of care for its own safety is expected of a child. The child only has to attain the standard of care expected of a child of his or her age.

Mr. Alton Morgan contended that each decision will turn on its own facts as to whether or not the standard of care owed to the child was met. He referred the court to the case of ***Saleem v Drake 1993 PIQR 129*** which involved a six year old pedestrian who suddenly ran out into the road and was hit by the defendant's motor vehicle. The defendant had seen the boy playing at the side of the road and had slowed down. The defendant was held not negligent. The boy appealed and the appeal was dismissed. The Court of Appeal held that the defendant had satisfied his duty of care towards the claimant child by slowing down and as the boy had given no indication that he would rush out into the road the defendant was under no duty to blow his horn.

Mr. Morgan then cited the case of Ebanks v Collins & Motor Insurance Bureau *(March 8, 1994)* in which the plaintiff a six year old visited a sweet shop with his uncle aged 14. On leaving the shop the plaintiff separated himself from the older boy, ran between parked cars and out into the road colliding with a car driven by the defendant. The plaintiff had run from the offside pavement while there were children playing on the nearside pavement. The court dismissed the plaintiff's claim at first instance, the only issue being liability. On appeal the court considered:

(a) Whether the defendant was travelling at an excessive speed in the circumstances

(b) Whether the defendant had proper regard for pedestrians, noticed and had kept a proper look out and had driven appropriately

(c) Whether the defendant should have sounded his horn.

In dismissing the appeal the court held that there was nothing to show that the defendant had failed to meet any of the three criteria. The Court of Appeal took the view that the mere fact that the defendant driver was unable to stop in time when the child ran into the road was not in itself a reason for saying that in every case of that sort the driver should have been able to avoid the accident.

Mr. Morgan submitted that it was not reasonably foreseeable that Malcolm Moody would dash out into the path of Miss Gaynor's motor vehicle. When

Audrey Gaynor blew her horn, this was sufficient to alert Malcolm Moody. She discharged her duty of care by alerting him to the presence of her vehicle.

He argued that Audrey Gaynor ought not to be found negligent on the basis that she failed to avoid the accident. Audrey Gaynor satisfied her duty of care by doing all that a prudent motorist could have done in the circumstances. On this basis he said, Audrey Gaynor ought not to be held liable for the injuries sustained by Malcolm Moody.

The truth is the evidence presented by Miss Gaynor was not very convincing on this point. The court found as a fact that she did not blow her horn to alert the children and in particular Malcolm Moody of the imminent danger.

It is a general principle of law that a driver seeing children on a sidewalk running or in the act of horseplay, waiting to cross or attempting to cross the road, owes a duty of care to take reasonable precautions to protect the child against acts expected of children of that age.

In the Jamaican case of **Cheryl Sirjue v. Attorney General & Derrick Masters, *Suit No. CLS.122 of 1984*** the duty was described as a "special" duty of care. Bingham J at page 9 - 10 of the judgment said:

> *"In my opinion there is no special duty of care owed to an infant plaintiff of whose presence the defendant driver was up to the time of the collision totally unaware and therefore placed in a position where he could have had her in his contemplation at the material time, that is prior and up to the time that the collision took place. Such a special duty of care would only arise if the defendant had been afforded on the facts the opportunity of seeing the plaintiff before she set out on her journey across the road. This fact would then have afforded him sufficient time and opportunity to pay due regard to the plaintiff's presence and her situation to have taken*

> *such reasonable steps to guard against any abnormal behaviour such as that to which children of that age are accustomed such as dashing suddenly across roads without first looking out for oncoming traffic or playing on or near a highway as the decided cases have made reference to."*

In **J (A Child) v. Martin James West** ***(1999)*** (unreported) English Court of Appeal decision the claimant was nine and a half years at the time of the collision. He was one of a group of school children larking around on the quite narrow pavement of Hyde Lane. He was larking around with a boy called Rueben. Things got heated and J spat at Rueben. Rueben went as if to hit J when J stepped off the pavement and into the road. The judge at first instance accepted that J stepped backwards a distance of a foot or two off the pathway into the road. The defendant was driving a pickup on the same side as the children. As he drove past his wing mirror hit J who as a consequence suffered serious head injuries.

The Court of Appeal found the defendant exclusively liable as he was driving too fast. The court said:

> *"...he ought to have appreciated the children obviously larking around on the pavement might step off the pavement into the road, and he ought to have given them a much wider berth. There was no traffic coming and he ought to have had no difficulty steering to the middle of the road."*

The court also found the defendant liable for failing to sound his horn, which was not working at the time of the collision.

In **Melleney v. Winwright** ***(1997)*** (unreported) an English Court of Appeal decision, it was said at page 10:

> *"I do not think that it can be overstated, that when motorists are driving near a group of young children, and especially young boys, a very high standard of caution indeed is required. Here were three 11 year old lads, two had crossed the road, their companion, the plaintiff, was left stranded on the side from which they had come. The risk of him doing something silly in order to rejoin them ought to have been foreseen as a very high risk. The precautions the defendant did take were simply not adequate in my view to discharge his duty as the driver of a motor vehicle approaching that situation."*

The court found that the defendant was negligent in travelling at a speed that was faster than the inherent danger of the situation made prudent. The actual speed in the case was 30 mph. The court also found that the defendant failed to sound his horn *"to have made it quite certain that the boy was aware of his presence."*

In **Andrews v. Freeborough** ***[1966]13 WLR 342*** an eight year old girl and her brother, aged four, were standing on the curb edge waiting to cross the road. The defendant was driving her car at 15-20mph close to the curb (because of oncoming traffic) and saw the children when she was about 40 yards away. She thought they were waiting to cross though they did not look in her direction. As the car passed the children the girl's head came into violent contact with the windscreen.

It was held by the trial judge, and confirmed on appeal that the defendant was solely negligent for:

1. not sounding her horn;
2. failing to reduce her speed and if necessary stop on seeing the children;

3. For driving too close to the curb.

There was no finding of contributory negligence. On appeal Willmer L.J at p. 347 stated that even if the trial judge found that the child had stepped off the kerb into the road he:

> *"should have needed a good deal of persuasion before imputing contributory negligence to the child having regard to her tender age."*

In **Shalim Ghanie v Bookers Shipping Demarara Ltd** ***[1969] 15 WIR 399*** it was held that where the driver of a motor vehicle, upon seeing a child of tender years hanging on to the rear end of a cart, appreciated that the situation was fraught with danger, he ought to take such steps as a reasonable man would have taken to avoid the very danger which he contemplated.

The facts were that the plaintiff, who was five years of age at the time of the accident, had sued the defendants by his mother and next friend claiming damages for injuries suffered by him as a result of an accident involving a car owned by the defendants and driven by their servant at the time. The trial judge found that the plaintiff was hanging at the back of a cart which was proceeding in a westerly direction along the street. The car was also proceeding in the same direction and that the driver sounded his horn as the car was about to overtake the cart. When the car was about 4 ft from the rear of the cart the plaintiff jumped off the cart and without looking back dashed across the road. The driver applied his brakes and at the same time swerved towards the north when the plaintiff's left foot came into contact with the left front wheel of the car as a result of which he was severely injured.

Cummings J.A said:

> *"Having foreseen the possibility of an accident, he ought to have acted as if it would have happened and have taken reasonable steps to have avoided it. He was driving at 20 mph. He should have stopped altogether or at least driven very much slower than 15 to 18 mph. Had he done so, this accident would not have occurred. In the circumstances, I consider that the driver of the car was negligent..."*

In the present case Audrey Gaynor breached her duty to Malcolm Moody by failing to:

(a) Stop her vehicle;

(b) Reduce her speed when she saw the children playing;

(c) Put adequate distance between her car and the children;

(d) Use her horn to alert the children of her approach, particularly as Malcolm Moody had his back to her vehicle and appeared to be playing.

What is excessive speed in any given case depends on the surrounding circumstances at the material time: see **Earl Allen & Conley Suddeal v Lascelles Watt *(1990) 27 JLR 134***. In this case, the court took the view that the speed of 20 mph was excessive in the circumstances.

For this and all the above reasons, the court concluded that Miss Gaynor drove her vehicle in a negligent manner when she collided with Malcolm Moody on February 7, 1998.

Was the infant Malcolm Moody liable for contributory negligence?

The law relating to the liability of children for contributory negligence is summarised in the following passage from the learned author of **Halsbury's Laws of England, Volume 28, 3rd Edition at paragraph 98:**

> *"A distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger and or to be unable to fend for himself at all, he cannot be said to be guilty of contributory negligence with regard to matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonably be expected of them. Where a child in doing an act which contributed to the accident was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect a child against his own propensities may afford evidence that the defendant was not negligent and is therefore not liable...the question whether a child is of sufficient age and intelligence to realise and appreciate the risk he runs so as to be capable of being guilty of contributory negligence is a question of fact for a jury."*

In **Gough v. Thorne** ***[1966] 3 A.E.R. 389,*** Lord Denning explained the liability of children for contributory negligence in this way at page 399:

> *"A very young child cannot be guilty of contributory negligence, an older child maybe but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonable to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his elders. He or she is not to be found contributory negligent unless he or she is blameworthy.*

This principle is illustrated in a number of cases. Firstly, in **Turner v. Turner** ***[1931] 3WWR 684; reported also in Vol.36(1) of the Digest***, it was held that in children cases the question of contributory negligence resolves itself into whether, having regard to the plaintiff's age and appreciation of the risk, his conduct was culpable negligence or not. If he showed as much care as a person his age may reasonably be expected to show he cannot be said to have been culpable.

Secondly, in **Jones v. Lawrence** ***[1969] 3 All ER 267*** a boy aged 7 years and three months was held not to be contributory negligent when he ran out from behind a parked van across a road without looking and collided into the defendant on his motor bicycle. It was held that the plaintiff's conduct was only that to be expected of a seven year old child and could not amount to contributory negligence. In giving the judgment of the court Cumming-Bruce J said:

> *"In my view the defendant has failed to show that the infant was culpable or that his behaviour was anything other than that of a normal child who is regretfully, momentarily forgetful of the perils of crossing the road."*

Thirdly, in ***Earl Allen & Conley Suddeal v. Lascelles Watt (By his next friend Alice Vernon)*** (previously cited) the Court of Appeal of Jamaica found that a six year old claimant was not contributory negligent. Rowe P. gave an indication of how the assessment should be made in the following passage taken from the judgment, at page 139:

> *"In this branch of the law it is important to have knowledge of the child whose conduct is called in question so as to be able to assess*

> *or measure the degree or responsibility which can be attributed to that particular child, rather than to children of that age as a general class."*

Fourthly, in **Cornel Lee (by his next friend Pauline Hurd) v. Ivy May Hin** ***SCCA 36/86*** the claimant, a nine year old boy, was hit by the defendant's motor vehicle when he had overtaken a disabled vehicle parked to the left of the road when the child stepped out into the road and was hit. The defendant was held exclusively negligent. The child was not guilty of contributory negligence as his behaviour of darting into the road on impulse was normal for a child of that age who is momentarily forgetful of the perils of crossing the road. Here is what Rowe P. had to say:

> *"In the absence of evidence of the level of intelligence of the plaintiff and of his exposure to the rules of the road, I am prepared to adopt the reasoning of Cumming-Bruce J. in* ***Jones v Lawrence*** *(1969) 3 All E.R. 267 and to hold that the respondent has failed to show as a matter of probability that this 9 year old plaintiff was capable of exercising judgment in crossing the road or that his behaviour was anything other than that of a normal child of his age who is, regretfully, momentarily forgetful of the perils of crossing the road."*

In the present case the claimant was six years old at the time and could not have appreciated that what he was doing was potentially dangerous for him. From the cases considered and the facts found in this case, this court is lured irresistibly to the conclusion that the claimant was not contributory negligent, as playing in the road is what is reasonably expected of a child of his age. Accordingly, the court concluded as a matter of law that Audrey Gaynor's

negligence was the sole cause of the collision with Malcolm Moody on February 7, 1998.

DAMAGES.

On the issue of the amount of damages, Mr. Morgan submitted some cases for consideration. Firstly, in **Michael Dixon v Jamaica Omnibus Services Ltd, Suit No. C.L 1985/D** a young person of 16 years was standing by a bus terminus when a bus tyre ran over his foot. The boy suffered fracture of the left foot, deep irregular lacerated wound spanning full width of the left foot with exposure of bone of subtalar joint and tendons and fracture of the metacarpals and novicular bone. The court in that case awarded general damages in the amount of $50,000.00. This award would yield in today's dollars the sum of $164,016.89.

Secondly, in the case of **Travis Thomas (b.n.f. Stoner) v Shaw, Suit No. C.L. 1998 T-157** the injuries sustained by the infant in that case consisted of abrasions to the knees and degloving of medial border of the left foot exposing the tendons and bone. After young Thomas' wounds healed he was unable to move the metatarsal phalangeal joint of the big toe and his forefoot remained rigid. The court awarded general damages in the amount of $750,000.00 which would yield an award today of $1,098,082.50

Mr Morgan said that when Malcolm Moody's leg was placed in a plaster of paris cast and he was given antibiotics his pain was reduced and his leg healed steadily. He suggested that although Malcolm Moody walks with a slight limp

today, there is no certainty that this will be permanent, as it is possible that he will grow out of it.

Mr. Manning added some additional cases, which he asked that the court consider. First, in **Eric Buchanan v. Elias Blake** Vol. 4 of Khan's Recent Awards on Personal Injuries at page 45, the plaintiff was injured in a motor vehicle accident. Permanent partial disability of the right lower extremity was assessed at 12%. (18% lower than in the present case) There was a high probability of development of osteoarthritis in the joint and lower back which the doctor expected to show up around 45 years old. General damages were awarded in the sum of $400,000 in October of 1992. The present value of this award using today's dollars is $1,755,264.43 (Using March 2004 consumer price index at 1808.8)

Second, in **Berzella Edwards v. Sylvia Sterling and Ingrid Sterling** Vol. 4 of Khan's Recent Personal Injury Awards at page 63, the claimant aged 57, sustained injuries in a motor vehicle accident. She suffered injuries to her right leg; obvious deformity to right leg with abrasions over the medial aspect of the lower leg; severely comminuted fracture of lower and right tibia, and bilateral fracture of mandile. She also sustained:

i. ¾" shortening- with a limp,
ii. midtarsal had about half range of motion
iii. permanent partial impairment of the lower limb was assessed at 30 % which equates to 12% of the whole person as in this case.

General damages for pain and suffering and loss of amenities was assessed in January and February of 1995 at $600,000. The value of this award in present dollars is $1,530,287.65. (Using March 2004 consumer price index at 1808.8)

Mr Manning asked for an award of $2,000,000.00 for general damages. The court took the view that this sum was above the range of awards in similar cases submitted for consideration. Special Damages have been agreed between the parties at $122,905.00.

So then, there shall be judgment for Malcolm Moody on his claim against Audrey Gaynor with damages in the amount of $1,772,905.00 together with interest, broken down as follows:

1. Pain and suffering and loss of amenities in the sum of $1,650.000.00. Interest on the sum of $1,650,000.00 at the rate of 6% from December 1, 2000 to today's date
2. Special damages in the sum of $122,905.00. Interest on the sum of $122,905 at the rate of 3% from February 7, 1998, to July 14, 1999, and 6% from July 15, 1999 to today's date.

Cost to the claimant Malcolm Moody in accordance with Table 1 of Appendix B of the CPR 2002.