

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M.109 OF 1988

BETWEEN SIMONE MOORE (an infant suing by  
her mother and next friend  
Anita Evans) PLAINTIFF

A N D ANSLE TULSIE

A N D MICHAEL GRANT DEFENDANTS

Mrs. Sandra Minott-Phillips and Miss Nicole Lambert  
instructed by Myers, Fletcher & Gordon for Plaintiff

Mr. David Johnson instructed by Piper & Samuda for  
Defendants.

Heard: 22.2.96, 23.2.96, 18.3.96, 20.3.96  
and 4.10.96

JUDGMENT

McCalla J. (Ag)

This action was commenced by writ of summons on the 25th of January 1988 and arose as a result of a motor vehicle accident which occurred on the 3rd of March, 1987 along Rose Street, Savanna-la-mar in the parish of Westmoreland. The Plaintiff who sues by her mother and next friend Anita Evans is alleging by paragraph 3 of her amended statement of claim that:

"the second Defendant so negligently managed and/or operated Isusu minibus licensed PP0919 owned by the First Defendant that he caused and/or permitted same to collide with the Plaintiff who was a pedestrian along the said road as a result of which she has suffered personal injury and has incurred loss and damage."

A defence was filed on the 17th of July, 1992 paragraphs 3 and 4 of which states as follows:

"The Defendants admit that the second Defendant was the servant and/or agent of the first Defendant but denies that he was negligent whether as alleged in paragraph 3 of the statement of claim or at all."

Para 4. "The Defendants aver that the said collision was caused solely or alternately contributed to by the negligence of the Plaintiff."

After the commencement of the trial, the Court on an application/<sup>made</sup>by the defence pursuant to a notice of intention to amend, granted an amendment for paragraph 3 of the defence to read as follows:

"The Defendants do not admit that the second Defendant was the servant and/or agent of the first Defendant and denies that he was negligent whether as alleged or at all."

Simone Moore gave evidence that on the 3rd of March, 1987 whilst she was on her way to school walking on the right hand side of the road along with two other children one of whom was her brother, she heard loud music playing and was hit from behind by a minibus. Her leg was caught underneath a wheel of this bus and as a result she sustained injuries. She was taken up, put inside the bus by the driver and thereafter taken to the Savanna-la-mar Hospital where she remained for some time. As a result of this accident her left leg was amputated below the knee.

At the point where the accident occurred the road was straight, she was not then attempting to cross it as she had already crossed it earlier on.

As a result of her leg being amputated she has had to travel abroad for surgery and the fitting of a prosthesis which has subsequently been replaced as her increased growth had caused her to walk with a limp. Simone gave evidence that the experience has made her sad as she can't play certain games or wear certain types of clothes; she can no longer move around as she used to do and children "trouble" her at school. She now has to wear a special type of shoes.

She denied under cross examination, that what she remembers of the accident is what she has been told by other persons. She remembers a tractor being parked on the right hand side of the road but she had already passed it when the accident occurred. She was walking straight to school, nearest to the road surface, on the edge of a drain.

She denied that she ran out in the middle of the road from behind the tractor and in doing so collided with the bus being driven by the second Defendant, in the middle of the road. She denied that she was then playing with her brother.

Anita Evans gave evidence that Simone was hospitalized for six weeks and two days. She was unable to work during the period of Simone's hospitalization as she had to be present to comfort and take care of her. She gave evidence of the loss of certain items for which special damages have been claimed. She accompanied Simone on a trip to New York. Miss Evans identified Michael Grant as the person who introduced himself to her as the driver of the minibus which was involved in the accident. He informed her of the incident, took her to the scene of the accident and then to the Savannah-la-mar Hospital. Her evidence further is that Mr. Grant told her that the owner of the bus was off the island, but as soon as he got back he would take him to her home. Mr. Grant subsequently returned to her home along with the first defendant Mr. Ansle Tulsie and another man. Mr. Tulsie declared himself to be the owner of the bus. Nobody else came to visit her home in connection with Simone's accident. She denied a suggestion that neither Mr. Grant nor Mr. Tulsie had come to her home. She testified that Mr. Tulsie said he was the owner of the bus and even offered to compensate her for her daughter's injuries.

Dr. E. Ali a consultant orthopaedic surgeon gave evidence that he examined the Plaintiff on the 26th March, 1989 and found as follows:

- a) a well healed amputation stump 5 inches long with full range of movement at the knee joint.
- b) A puncture scar on the right cheek as well as a 3½ inches long lineal scar.

He assessed her for partial permanent disability of 40% of the function of the left lower limb and 5% cosmetic disability for the scars on her face. He again saw her on the 7th February, 1996 for re-assessment.

Her total disability has been assessed at 10 - 12½% of the whole person.

As she gets older the length of her prosthesis will have to be varied and changed depending on wear and tear due to use, weight gain and other factors.

The second Defendant gave evidence that whilst driving minibus licensed No. PP0919 on the left hand side of the road on Rose Street he saw something run from in front of a parked tractor and heard a hit on the right hand side of the bus. He was travelling in line with the tractor which was the only thing he saw on the road. He brought his vehicle to a stop, came out and saw a little girl whose left foot was underneath one of the wheels of the bus. He took her up and eventually took her to the Savanna-la-mar Hospital. He subsequently made a report to the police then went and spoke to Mr. Errol Tulsie who was his employer and the owner of the bus. He also saw and spoke to the first Defendant.

Under cross-examination he maintained that he was employed to Errol not Anslé. He denied being served with any papers in connection with the Suit or signing any Court papers before a Justice of the Peace. A document was shown to him. He denied affixing his signature to the document. He denied receiving any papers in connection with this Suit. The document shown to him was tendered and admitted in evidence as exhibit 4. and is an affidavit purporting to be sworn to by him on the 8th June, 1992 and is a part of the Court's record. Paragraph 2 reads as follows:

"That upon receiving the Writ of Summons and statement of claim I immediately caused the same documents to be delivered to the first Defendant's insurers, United General Insurance Company Limited, to whom I gave a full report of the accident in March, 1987 and who advised me at that time and I verily believed that the matter would be dealt with and that Attorneys-at-Law would be retained therefor."

Para. 6 "That I had no reason to doubt the advice of the said insurers and I continually communicated with the first Defendant in respect of the progress of the suit who informed me and I verily believed that he, pursuant to enquiries made by him, was advised by the said insurers that the matter was receiving attention."

The second Defendant also denied that he went to Anita Evans' house after the accident and told her that the owner of the vehicle was off the island. He denied returning to her home with Anslie Tulsie and denied Plaintiff's version as to how the accident occurred.

The first Defendant gave evidence that his brother Errol owned the minibus licenced No. PP0919. He had no interest in it at all and had nothing to do with neither before nor after the accident save and except that he sometimes assisted with certain administrative matters on his brother's behalf. He denied visiting Anita Evans' house and telling her that he was the owner of the minibus, as also her evidence that he offered her compensation. He denied that at the time of the accident Mr. Grant was driving for his purpose or business. Mr. Grant was not then employed to him nor did he tell anyone he was the owner of the minibus. In March of 1987 he was operating a minibus business. All six brothers operated separate businesses. Mr. Grant had been in continuous contact with him about the Suit.

He recognized his signature on an affidavit which was sworn to by him and tendered in evidence as exhibit 5.

The relevant paragraphs read as follows:

"Para. 5. that upon being served with the writ of summons and statement of claim in this Suit I immediately took the documents to my insurers, United General Insurance Company Limited (hereafter referred to as "my said insurers) who I advised that it was my wish to contest the matter on its merit as I was fully acquainted with the circumstances of the accident and verily believed that the second Defendant Michael Grant was not all negligent."

- Para. 3. "That my said insurers informed me and I verily believed that they would investigate the matter and retain an Attorney-at-Law to deal with the same on the second Defendant's and on my behalf".
- Para. 4. "That thereafter I continually made inquiries at the office of my said insurers and on each occasion I was further informed and I verily believed that the matter was receiving attention and that they would communicate with me if the need arose."
- Para. 6. "That the second Defendant Michael Grant immediately after the accident gave me a full report of the circumstances of the accident and accompanied me in March 1987 to the office of my said insurers to give a full report of the accident to them."
- Para. 8. "That I exhibit herewith a copy of the Proposed Defence marked "At - 1" for identification and hereby adopt and verify same as being an accurate and true pleading of the circumstances of the accident as related personally to me by the second Defendant."

Errol Tulsie gave evidence on behalf of the defence. He swore that in March 1987 the Defendant Michael Grant was employed to him as the driver of minibus PP0919. This bus was solely owned by him. He paid for everything in connection with it and all income accrued to him. Anslc assisted him with certain matter when necessary.

A witness was called from the Collectorate at Savenna-la-mar. She produced from her records a document which was admitted in evidence stating that on the 11th February, 1986 Licence plates numbered PP0919 were owned by Errol Tulsie. It is in these circumstances that it falls to be decided whether the accident occurred as a result of the negligence of the first Defendant.

Counsel for the Defendants has submitted that none of the particulars of negligence has been proved, that no evidence has been adduced from the two persons with whom the Plaintiff was walking and she was at the material time only five years old and had the accident occurred in the manner stated by her then it is more probable than not that:

- a) she would have suffered more serious injuries
- b) other children with whom she was then walking would have been injured.

In considering the above submissions the Court had to decide on the evidence presented whether the accident could have occurred without negligence on the second Defendant's part. I do not accept the explanation given by the Defendant Grant as to how the accident occurred. I reject his evidence that the Plaintiff ran across the road into the path of the minibus.

I find that the Plaintiff was indeed walking on the right hand side of the road. I accept her evidence that she had already crossed the road and was proceeding to school which was then visible to her from the point where the accident occurred. I accept her evidence that she was hit from behind while walking on the right side of the road. There is no credible explanation from the second Defendant as to how the Plaintiff came to be hit whilst in that position.

The next question which arises for determination is whether Michael Grant was the servant and/or agent of Anslie Tulsie.

The accident occurred in 1987 and the Plaintiff filed Suit in 1988 and subsequently entered interlocutory judgment against the Defendants. The affidavits which were admitted into evidence as exhibits 4 and 5 were filed by the Defendants in support of a summons to set aside the interlocutory judgment which had been obtained by the Plaintiff. In the defence which was subsequently filed the second Defendant admitted that Michael Grant was at the material time his servant and/or agent. The Court was urged to say that having regard to the evidence adduced by the defence in respect of the ownership of the Licence plates, in the absence of evidence by the Plaintiff to the contrary, the Court ought to accept that those plates were placed on a vehicle owned by Errol Tulsie.

I find that the evidence given by Ansle Tulsie in his affidavit (exhibit 5) is inconsistent with his evidence in Court in respect of ownership of the minibus. I find Michael Grant to be untruthful in his denial of the contents of exhibit 4.

I accept the evidence of Anita Evans that Michael Grant came to her house and identified himself as being the driver of the minibus which was involved in an accident with her daughter. I accept her evidence that he told her that the owner of the bus was off the island. I believed her when she said he returned to her home along with Ansle Tulsie and another man and that Mr. Tulsie told her he was the owner of the minibus and offered to compensate her for the injuries suffered by her daughter. Mr. Tulsie has denied going to her home but I find that he did. Why then would Mr. Tulsie hold himself out as being the owner of a vehicle which belonged to his brother Errol? In his affidavit admitted as exhibit 4 he swore he was the owner. In the defence filed and served it is not denied that Michael Grant was his servant or agent. Yet his evidence in Court is that his brother Errol owned the said vehicle from 1986 and Michael Grant was not employed to him; nor was he then acting on his behalf.

The evidence of Anita Evans that Ansle Tulsie told her that he was the owner of the minibus is consistent with the Pleadings prior to the defence being amended at trial. It is also consistent with the affidavit evidence adduced at trial. When the notice of intention to amend the defence was filed the Plaintiff was at that time barred by statute from joining Errol Tulsie to the Action.

The contents of exhibit 6 notwithstanding, I find that Ansle Tulsie was at the material time the owner of the minibus and that Errol Grant was then his servant and his agent.

I find on a preponderance of probabilities that the Plaintiff has proved her case.

Having resolved the issues of Liability in favour of the Plaintiff I now deal with the question of damages. As regards special damages the Court awards the sum of \$34,401.00 as the amount which has been incurred by the Plaintiff, comprised as follows:

Plane fare to New York	-	\$8,541.00
Loss of lunch kit	-	55.00
Loss of watch	-	60.00
Cost of crutches	-	45.00
Cost of two prosthesis	-	22,000.00
Loss of income (mother)	-	3,200.00
Transportation	-	500.00
Cost of medical report and office attendance on		2,000.00
<b>Total:</b>	-	<u>\$34,401.00</u>

Dealing now with the question of general damages and the Plaintiff's entitlement to an award for pain and suffering and loss of amenities of life, I accept the submission of Plaintiff's counsel that the case of Delroy Barrett vs Attorney General C.L. 1989 B134 is relevant. Based on the award made in that case when converted to the money of today I find the sum of \$1.1 Million to be an appropriate award under this head.

I find that the Plaintiff is also entitled to an award for future medical expenses and I reject the submission by Defendant's counsel that the doctor's evidence is too speculative for any such award to be made. Using a multiplier of 15 I award the sum of \$50,000.00 for replacement of prosthesis, one every three years at a cost of \$10,000.00. However I accept his submission that the evidence is insufficient to support a claim for future expenses in connection with visits to the doctor. Similarly the evidence adduced by Plaintiff is insufficient to ground an award for handicap on the labour market.

In sum there will be judgment for the Plaintiff in the sum of \$1,174,401.00 for general damages comprised as follows:

Special damages	-	\$34,401.00
Future medical expenses (prosthesis replacement)	-	50,000.00
Pain and suffering and loss of amenities of life	-	<u>1,100,000.00</u>
<b>Total:</b>	-	<u>\$1,174,401.00</u>

Interest is granted on the sum of \$34,401.00 at the rate of 3% per annum from 3rd March, 1987 to today and on the sum of \$1,100,000.00 from the date of service of the writ of summons to today with cost awarded to the Plaintiff to be agreed or taxed.