



[2016] JMSC Civ. 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV02497

BETWEEN	KRISTOPHE WITTER (b.n.f. Joan Samuels)	CLAIMANT
AND	SHELDON JAMES	1ST DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Mr. Leslie Campbell instructed by Campbell and Campbell for the Claimant

Miss Faith Hall instructed by the Director of State Proceedings for the Defendants

Heard: 29th January 2016

Personal injuries and treatment - Infant-One of Twins - Head injury- Concussion - Bleeding from mouth and nose – Unconsciousness - Local seizures - Hospitalized after urgent air evacuation - Outpatient treatment - Psychological impairment - Marked personality and educational difference from twin.

BERTRAM-LINTON J (Ag.)

Background

[1] Ms. Joan Samuels was travelling in a motor car with her two year old twin boys on December 2, 2008 when the vehicle was hit by a police car overtaking another vehicle, in a head on collision. All of them were injured. The twins were both found on the floor of the car between the seats; but it was Kristophe who suffered the most serious injuries. They were all rushed to the Black River

Hospital and he was subsequently airlifted to the Bustamante Hospital for Children. The defendants did not contest liability and the matter now stands for assessment of damages.

Special damages was agreed in the sum of \$142,000.00

Submissions

[2] The point of departure for the parties is the extent to which the accident is responsible for the developmental issues now being experienced by the claimant. The claimant was seen by various doctors and reports were entered in to evidence from;

-Dr. Colin Abel-Exhibit 1

-Dr. Mark Morgan -Exhibit 2

-Dr. Kai Morgan -Exhibit 3 and

-Dr. Randolph Cheeks Exhibit 4.

[3] It is the Report of Dr. Randolph Cheeks, a Consultant Neurosurgeon, on which the claimant's attorney relies to support his contention that it is the accident that has caused the resultant developmental disparity between the twins. Notably Dr. Cheeks concludes;

"The difference in intellectual functioning between the individual and his twin is unmistakable, And given the fact that they have a similar genetic makeup, lived in the same environment and attended the same school but Kristophe sustained a significant concussion of at least moderate severity whereas his twin sustained a mild injury and was discharged home after overnight observation suggests to me that the present cognitive difference is probably the result of the accident."

And again later he says,

"From a broad functional perspective, the alteration in Kristophe's MSCHIF (Mental Status, Cognitive and Highest Integrative Functions) is such that it interferes with his ability to assume some normal roles or to perform his usual activities of daily living. This corresponds with a class 2 disorder of his mental

status on the Alteration in MISCHIF grid of the AMA guides page331, and is rated at a PPD of 16% of the whole person (range is 11%-20%).”

- [4] The claimant's Lawyer Mr. Leslie Campbell In support of his request for \$7m in general damages, as an appropriate figure for compensation, cites the case of **Anthony Rose and Anor. V Thomas Smith SCCA# 32/84 reported in Harrison's Assessment of damages (2nd Edition) at page 179.** That matter involved a child, who was 9 years old at the time of the accident, who was struck by a van. He was taken to hospital in an unconscious state, and was bleeding from his nose. He also had a fracture of his left ankle and was admitted for some ten days until he was discharged and followed up in the outpatient department.
- [5] The findings of the assessment court in that instance were that the plaintiff suffered some brain trauma with resulting impairment in his academic output and that an award should reflect the fact that his future was “somewhat blighted.” The Appeal court increased the award of general damages to \$80,000, and quite notably Ross JA said at the time in May 1985;

“Any Brain damage is a serious injury, as medical science up to now cannot accurately predict the short term or long term effects of such injury. We are of the view that the prospects of the infant plaintiff were not merely “somewhat blighted” but that on the evidence they have been blighted.”

- [6] Miss Hall in her submissions for the defendants disagreed with the wholesale acceptance of Dr. Cheeks' report as it differed in its conclusions about the claimant from that of Dr. Kai Morgan's. She points to Dr. Morgan's conclusion at page 14 of the report that,

“The background information also suggests that Kristophe has always lagged a bit behind his twin in terms of development, and differences in their levels of alertness, verbal responsiveness and coordination were evident during testing. It is therefore not likely that Kristophe's cognitive abilities have notably decreased since the motor vehicle accident in 2008.”

And at page 15

"Given Kristophe's stage of development at the time of the accident, it is difficult to clearly determine his pre-morbid cognitive functioning. However there is insufficient evidence to suggest that his head injury or trauma of the accident has had a marked impact on his cognitive functioning. His longstanding history of developmental delays points to the presence of cognitive deficits prior to the motor vehicle accident. It must also be noted that Kristophe's injuries during the accident may have resulted in exacerbation of some cognitive deficits and weaknesses and that any such intensification of his challenges has implications for his ability to cope effectively with everyday demands."

And further on that same page;

"Therefore whole person impairment is calculated at approximately 8% and this represents partial disability"

- [7] Miss Hall contends that the differences of, the degree of injury and, the unanimity of the medical opinion with the case cited by Mr. Campbell, are so stark that it is not a good guide for us in an assessment of the case at bar. A more reasonable assessment, she says, would encompass a 40% discount on the figure proposed. The case of **Garrell v Byron Williams C.L.1988** was proposed as a guide to how much should be awarded. In that case a three year old was involved in a motor vehicle accident she suffered various fractures including one to the parietal bone which had healed with a significant depression, and was referred for neurological examination .At the time of the Assessment hearing she was 16 years old and none of the five medical assessments whether neurological or radiological revealed any evidence of brain damage. The court found, largely with reliance on Dr. Cheek's assessment that the damage to the skull was largely cosmetic and was likely to have a psychological effect but did not result in brain injury or intellectual abnormality. She was awarded \$300,000.00 in general damages in 1995 and using the Consumer price Index of 231.8 (figure approved by STATIN up to November 2015) this figure updates to just under \$3m.

[8] **Dudley Burrell v United Protection Limited Suit # C.L.1992 B 072 was also cited** and in this case an 8year old was hit down by a van in August 1990. The trial and assessment of damages was done in 1996 and an award of \$1,865,280.00 was made for general damages. This child was examined by Dr. Mc Hardy and Dr. Cheeks both consultant neurosurgeons and who both concluded that intellectual functions and memory was impaired because of the accident. A clinical psychologist also spoke of the need for remedial education. Quite notably his injuries had included unconsciousness for some two days, periorbital swelling and a skull fracture. He spent about a month in hospital and up to March 1991, he was still being treated for eye pain and headaches. This award Miss Hall updated to \$6, 986,130.00 using CPI issued by STATIN up to November, 2015.Miss Hall contends that a fair discount to take the less serious circumstances into account would be some 40% leaving the claimant here an award of some \$4.1m.

Analysis and Findings

- [9] The central issue to be determined is whether or not the court is prepared to accept that the events of the accident and the resulting injuries either caused or contributed to the developmental deficit now being experienced by the claimant. The court had an opportunity to observe the twins as they were present in court. There was a marked difference in social behavior and attentiveness of both boys. Kristophe was visibly clingy with his mother and physically smaller in structure. They are identical in terms of facial appearance and features but Kristophe seemed far less self assured and in keeping with the observations of the various doctors as lagging behind his twin developmentally.
- [10] Although it is difficult to reconcile the reports of the clinical psychologist, Dr Kai Morgan and the neurosurgeon Dr. Randolph Cheeks. The court accepts that there was a traumatic head injury and at its most conservative, the type of head injury suffered, as Dr. Cheeks says, (at page 3) "... is also known to be associated in some individuals with residual cognitive impairment of which impairment of recent memory function is the most common manifestation. This

has implications for information processing and learning.” This seems consistent with the observation that he is slow in school and generally forgetful. This is in sharp contrast to his twin brother who also started infant school at the age of four but had advanced to one grade higher (grade 3) whereas Kristophe has been left behind in grade 2 and is requiring extra lessons just to “keep up” to the work there.

- [11] I have also considered the issue that was raised in Dr. Kai Morgan’s report, and which has found favour with the defendants, that suggests that the claimant had pre-existing, or as referred to in that report, pre-morbid cognitive functioning deficits. Dr. Morgan says, though (at page 15), “Given Kristophe’s stage of development at the time of the accident it is difficult to clearly determine his pre-morbid cognitive functioning.” And further on the doctor says that even if there were developmental delays prior to the accident, “the accident may have resulted in exacerbation of some cognitive deficits and weaknesses and that any such intensification of his challenges has implications for his ability to cope effectively with everyday demands.”
- [12] The question of whether the claimant already had these issues prior to the accident was adequately addressed in Dr. Cheek’s report which noted that the twins had the same genetic makeup and lived in the same environment, so should have the same broadly similar intellectual prowess. He supports this, in his report based on his acknowledgment of international studies done on twins over the years and in particular makes reference to studies done on their early development (at page 3) which showed that when “They were assessed on their intelligence, academic confidence, personality, well being, home and school environment, health and behavioral problems as well as GCSE grades. Researchers found that the heritability of GCSC scores was 62 per cent, whereas individual traits were between 35per cent and 58 per cent heritable, with intelligence being the highest.”

- [13] Taking all this into account then the court is satisfied that the claimant's pre-morbid cognitive functioning was the same or similar to his twin at the time of the accident, with the claimant, not unusually, lagging behind in terms of some developmental milestones. I accept Dr. Cheek's assessment of the medical evidence and find that the type of head injury suffered either caused or exacerbated the claimant's residual cognitive impairment. This has resulted in a Permanent Partial Disability (PPD) of 16% of the whole person.
- [14] In assessing the general damages, I am guided by the authorities cited by both counsel as well as the evidence from Dr. Cheeks that the level of injuries is such that it interferes with his ability to assume some normal roles or to perform his usual activities. The case at bar compares in many significant aspects with the David Burrell case but the court recognizes that the level of injuries were much more extensive in the Burrell case and that it was the doctor's opinion that the infant's recent memory function was 25% diminished, a much greater level than the 16% that Kristophe was assessed to have been diminished. In the Burrell case as well there was a serious fracture of the base of the skull which was not a feature of the case at bar. The award for general damages at that time was \$1,865,280.00
- [15] Using the CPI (Consumer price index) as at December 2015 of 232.3 that award equates to some \$10,468,280.00, but if we discount the award for the fact that the claimant in that case had more extensive injuries, a much higher level of PPD in terms of the recent memory function and also taking into account that there was no risk of epilepsy in the case at bar an award of \$7m dollars as requested by the claimant's attorney is not unreasonable in all the other circumstances of the comparison in injuries and treatment.
- [16] The court therefore orders as follows:
- Special damages: \$142,000.00
- General damages: \$7,000,000.00

Interest of 3% is awarded on the special damages from the date of the accident December 2, 2008 until the date of judgment February 11, 2016.

Interest of 3% is awarded on the general damages from the date of service of the claim form April 25, 2013 to the date of judgment February 11, 2016.