



[2013] JMSC CIVIL 159

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 02719**

BETWEEN	HANDEL YOUNG (a minor) by DELPHINE WILLIAMS YOUNG (his mother and next friend)	CLAIMANT
AND	GARTH BRAHAM	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT
AND	THE COMMISSIONER OF POLICE	3RD DEFENDANT

Nigel Jones and Jason Jones instructed by Nigel Jones & Company for the Claimant.

Marlene Chisholm instructed by the Director of State Proceedings for the 1st, 2nd and 3rd Defendants.

Negligence – motor vehicle accident – child attempting to cross road at night – whether driver travelling at excessive speed..

HEARD: 22ND April 2013, 23rd April 2013 and 1st November, 2013

CORAM: THE HON. MR. JUSTICE DAVID BATTS

[1] On the first day of hearing the court was advised that the first Defendant was overseas and was unavailable to give evidence. There was no application to adjourn made by the Defendants.

- [2] The parties agreed a bundle of documents and this was tendered and admitted as exhibit 1.
- [3] The witnesses who gave evidence for the Claimant were Delphine Williams-Young, and Calmen Moreland. Both gave witness statements and Supplemental Witness Statements. Each was extensively cross-examined. Expert Reports were admitted into evidence by consent as Exhibits 2 (a) to (f).
- [4] Charmaine Blake Daniels was the only witness to give viva voce evidence on behalf of the Defence. Her witness statement became her evidence in chief and she was cross examined. Interestingly, the witness statements of Garth Braham and Joseph Scarlett were admitted as part of Exhibit #1, the Bundle which was put in by consent.
- [5] I do not propose to review in detail the evidence of each witness. Rather I will focus on such aspects of the evidence as has affected my findings and determinations in this matter.
- [6] In summary the Claimant's evidence is that the 7 and ½ year old Claimant was on the night of June 7, 2008 with his mother at the Wesley Methodist Church in Mandeville. At approximately 10:55 p.m. the infant Claimant was left with another church member (Miss Grace Kerr) whilst his mother crossed the road to go to her car which was parked in a parking lot in a business complex across the road. The infant unnoticed left the custody of Mrs. Grace Kerr and attempted to cross the road. He did this at the same time that the police vehicle driven by the First Defendant was approaching. It is the case for the Claimant that the police vehicle was travelling at 60 mph without siren or flashing lights.
- [7] The Defendants admit colliding with the infant who ran suddenly into the path of their motor vehicle but deny travelling at an excessive speed at the time.

[8] This court on a balance of probabilities finds that the Defendants are not negligent as alleged. I accept the evidence of Charmaine Blake Daniels. I find that the infant Claimant ran suddenly across the road and into the path of the Defendants' motor vehicle at a time and in a manner which gave the driver of the Defendants motor vehicle little or no opportunity to avert a collision. I find that the vehicle was not travelling at 60 mph. I do not accept the evidence to that effect in the Supplemental Witness Statements of the Claimant's two witnesses. I do not think either witness saw the oncoming police vehicle prior to the accident. At that time of night in a business district on the outskirts of a Jamaican Country town, at a time when the businesses were closed, the driver would not be expected to drive at an excessively slow speed or to anticipate infants on the road. I am fortified in this opinion by the authorities cited by the Claimant's Counsel of **Probert (a child by her litigation friend and mother Joanna Probert) v Moore [2012] EWHC 2324 and Puffett v. Hayfield (2005) EWCA Civ 1760.** In both cases the Defendant was found liable for injury to an infant Claimant. In each case however the court had regard to factors such as: The time of day (or evening), the traffic including pedestrian traffic to be expected at that time of day, the speed of the vehicle, the width of the road and the "foreseeable potential for injury" when regard was had to whether or not it was a residential area.

[9] The following factors have affected my view of the evidence and lead to my findings:

- (a) My observation of the witnesses and view of their demeanor whilst giving evidence. The police officer impressed me as a witness of truth;
- (b) The Claimant's mother Delphine Williams Young said she saw the Claimant "standing in front of the church gate on the opposite side of the road" prior to the accident. Her witness Mr. Colman Moreland says he

saw the young Claimant exit the church gate and cross the road. He does not say the boy stood at any time. Indeed when cross examined he said, "Just as him pass mi him get the hit." Interestingly also, when it was suggested to him that Handel ran across the path of the motor vehicle he said, "I never see that."

- (c) The evidence of Colman Moreland also has a serious internal inconsistency. In his witness statement he said that he saw the police car travelling at a very fast speed coming up the Wesley Road, when cross examined. The following exchange occurred:

Q: "when you saw the police car for the first time look at #14, point out in photo where it was?"

A: I did not see the police vehicle before it hit him. First time I see it is when it stop"

In re-examination Counsel asked him, which was true did he see it before or not and he said,

"I saw the car before it hit Handel coming up the road towards the church."

- (d) Colman Moreland when cross-examined said he was standing by the same gate at which the infant claimant was hit. He said:

"A: I was standing at the middle gate.

Q: Suggest that Handel ran through the small gate?

A: That is the said gate the middle gate."

However in answer to a question by the court:

J: "Why did you not stop him?"

A: I was not nearby him.

J: Where in relation to the gate were you?

A: I was standing like there (indicates 10-15 feet from the gate)"

This is important as the middle gate is described as a small gate by all.

- (e) This witness Colman Moreland also indicated that cars were parked on the side of the road outside the gates. This would have further reduced the

opportunity of the Defendant driver to avoid a collision with a child which suddenly exited the church yard. However given that the evidence was that the concert had ended some time before the accident and that the only persons remaining were performers who were afterwards offered refreshments I do not accept that there were cars parked along the road at the time the accident occurred.

(f) Delphine Williams Young when cross-examined said,

“Q: Suggest he ran across into the path of the police vehicle?

A: I can't really say for sure”

Earlier the same witness had said in answer to her counsel,

“Q: Where was he coming from?

A: From inside the church yard. He came through the gate that is there. The gate where I have the X. He came was standing there. He looked up and down and made his decision to cross.

Q: Where were you standing?

A: On the opposite side not exactly across the road”

Apart from being inconsistent this bit of evidence is incredulous. Particularly as this witness also states that she saw the police car approaching at great speed. One would have thought that had she seen him standing she would have shouted, gesticulated or otherwise attempted to prevent her son from crossing. Further if as she said he looked up and down before crossing he would have seen the oncoming vehicle. I do not find that this witness's recollection was accurate.

(g) I am fortified in my view because this witness (Delphine Williams Young) also stated in cross examination that she first saw the police vehicle when she was crossing the road:

Q: When did you first see the vehicle with lights?

A: I was on my way across the road and I stopped. I glimpsed lights coming from the top of the hill coming in the distance.”

- (h) I also find it curious that Delphine Williams Young, the infant’s mother, chose not to go with the police vehicle which carried her infant son to the hospital. On her account she ran up to him after the accident. She said she drove off behind the vehicle to the hospital, but that Miss Kerr reached the hospital before her and gave all the information. I find the account of the police officer more credible. That is, after the collision and up to the point he put the infant in the vehicle no parent approached them. They rushed the child to the hospital. In this regard it must be borne in mind that after the concert ended refreshments were served to the performers of which Delphine Williams Young was one. The accident occurred at almost 11:00p.m.
- (i) Garth Braham was not present or cross examined but his witness statement dated 11th January 2012 was admitted by agreement and as part of exhibit 1. I accept his account of the accident as truthful. His evidence is supported in all material particulars by the evidence of Charmain Blake-Daniels.
- (j) Charmain Blake-Daniels (a Sergeant of Police) admitted that she was unable to say at what speed Mr. Garth Braham was driving. However in her estimation the car was moving slowly. Contrary to the submission of Counsel I find that this reflects positively on her, as she might easily have made up a speed but chose not to.
- (k) The witness in cross examination indicated that the damage to the vehicle was to the right front close to the centre. This is consistent with Mr. Garth Braham’s statement as to how the accident occurred.
- (l) Interestingly when the Defendant’s witness was being cross-examined and tested about her statement that after the collision the persons she saw standing by the church yard did not respond to Cpl. Bennett’s shouts the following exchange occurred:

“Q: Did you agree it is unusual that they did not appear to hear and did not respond to W/Cons. Bennett’s shouting?”

A: I would not say unusual not to hear accident as it was not that great an impact.”

She was also asked why didn’t someone stay back to locate the child’s parent and she responded:

“A: Intent was to get medical assistance. Miss Bennett was holding child and I drove the car. The first Defendant was in shock, in no condition to drive.”

[10] The court has not been assisted by the opinion of the experts either as to the extent of damage to the police service vehicle and/or its relationship to the injuries to the infant or their relevance to the alleged speed of the vehicle. I bear in mind the severity of the injuries to the infant as stated in the medical reports. It does seem to this court however that had the motor vehicle been travelling at 60 miles per hour the child’s injuries would have been even more severe and likely fatal. It is safe to infer, that the moderate speed resulted in a blow such that the infant suffered the following injuries:

- (i) unconsciousness
- (ii) multiple lacerations to head and face
- (iii) fractured right femur and left clavicle
- (iv) fracture of frontal lobe
- (v) Contusion of frontoparietal area of the brain
- (vi) Traumatic subarachnoid haemorrhage
- (vii) Contusion of the liver.

[11] For the reasons stated above I therefore find that the Defendants are not negligent and are not to be blamed for this accident. The infant behaved in a way to be expected of children of that age, however his sudden entrance into that road at 11p.m on a Saturday night in a closed business district was not reasonably foreseeable. The accident could not have been avoided.

[12] Notwithstanding my decision on liability I will adopt the practice of assessing damages which would have been awarded so that, in the event of a successful appeal, there will be a saving in costs and time. The medical reports admitted into evidence disclose the injuries outlined at paragraph 10 above. Dr. Steve Mullings in his report of the 26th July 2011 [Exhibit 2a] indicates that when seen at the Mandeville Hospital the Claimant was unconscious and had a Glasgow Coma Score of 6/15 and was in shock (secondary to blood loss). He had multiple lacerations and deformity to right thigh and left clavicle. Radiographs revealed a fractured right femur and left clavicle. CT Scan of the brain revealed a fracture of frontal bone, contusion of frontoparietal area of the brain and traumatic subarachnoid haemorrhage. There was a small area of contusion of the liver. He was taken to the University Hospital of the West Indies and taken to the Bustamante Hospital for Children. An endotracheal tube for ventilation was inserted and skin traction commenced on the fractured femur. He was transferred to the UHWI Intensive Care Unit as continuous ventilation was required. He developed seizures and had to be treated for it. On the 18th June 2008 surgery was done to apply percutaneous fixation to the fracture. He was returned to the Intensive Care Unit where intravenous antibiotics were administered. Another CT Scan following further seizures revealed a subdural collection. A burr hole evacuation was done by the neurosurgical team after which the patient showed rapid improvement. He was transferred back to Mandeville Regional Hospital on the 18th July 2008. Examinations revealed a young man who appeared comfortable (in no distress) alert and oriented. Thereafter his treatment progressed; the surgically implanted pins were removed. He was discharged from hospital on the 21 July 2008 and treatment as an outpatient (to remove pins and for orthopaedics) continued until the 15 December 2008.

[13] Dr. Steve Mullings examined the Claimant on the 18th May 2011. He found a young boy who was oriented in time, place and person but who appeared agitated "almost disruptive" with a short attention span. Neurological examination (control and peripheral nerves system) was

normal. He observed several scars to head and forehead, to the thigh, knee and clavicle chest wall posteriorly. There was full range of motion to hip, knee and ankle, left shoulder, right shoulder. The doctor concluded,

"Handel appears to have some deficit as a result of his brain injury and ideally the patient should have psychological assessment. Handel has no musculoskeletal impairment as his fractures have healed well and his foot drop resolved completely."

- [14]. Dr. Tamika Haynes-Robinson is a Clinical psychologist (specializing in Neuropsychology). Her report is exhibit 2(b) and is extremely detailed and she regards his prognosis as good if her recommendations were followed. She says in part:

"Emotionally Handel is experiencing moderate symptoms of depression and anxiety which may stem from his low self esteem. He is also aware of his disability especially in comparison to his previous performance. He is also experiencing great difficulty controlling impulses anger and aggression even though he is aware of his irritability."

Handel 's loss of consciousness post – traumatic amnesia of 30 days, as well as radiological evidence of brain damage qualifies him for the diagnosis of sever traumatic brain injury. His neuropsychological test results are consistent with this diagnosis and suggest that after three years he has a mild to moderate cognitive disability especially in his executive functioning and attention. He has not yet reached maximum medical improvement."

- [15] The other medical reports exhibits 2(c – (f) were reports from the Hospitals at which he had been treated, the content of which was mostly captured by the 2 experts quoted above. Dr. Doreth Garvey a psychiatrist gave several reports the

most recent being the 18 March 2013. His prognosis was not as positive as that by Dr. Tamika Haynes-Robinson. He also declined to assess permanent partial disability. He acknowledged that the Claimant's academic performance was adversely affected, and that he had anger management issues. The Doctor stated,

'He will not be able to be involved in work or activity that will require much writing, quick thinking and meeting critical deadlines.'

- [16] Claimant's Counsel submitted that \$17,500,000 was an appropriate award for pain, suffering and loss of amenities. He relied upon the authority of **Ramon Barton v John Macadam Claim No. CL1996/B110** Judgment delivered 13 March 2008. In that case the nine year old infant suffered unconsciousness, an attack of fits. Upon discharge from hospital he could neither speak nor write. The accident caused his right hand to be folded like a fist and he could not place his right foot flat on the ground. He walked with a limp. Psychologically his reasoning was severely impaired. Dr. Vaughn assessed the Claimant at 39% permanent impairment of the whole person. \$10 million was the award for Pain Suffering and loss of amenities. When updated Counsel computed that to be \$16,000,000 today.
- [17] Claimant's counsel also cited **Dudley Burrell (bnf Margaret Hill v. United Protection Ltd. Khan's Vol. 4 page 182)**. There the Claimant was unconscious for 2 days, had a fracture to the base of the skull, was adversely affected and in school performed well below his cohort. The award for Pain Suffering and loss of amenities was \$1,372,000. Updated by Counsel it amounts to \$6,600,000.
- [18] Counsel also cited **Tanya Reid v. Vandyard Dacres** Khan Vol. 5 p. 242; **Joan Morgan v. Ministry of Health** Khan's Vol. 6 p. 220 j and **Pinnock v AG Khan's Vol. 5 p. 289**.

- [19] The Defendant's Counsel declined to suggest an amount orally or in writing. She was content to cite **Nicholas Segeon (bnf Princess Brown v Livingston Muirhead Khan /Vol. 5 p 182 and Dudley Burrell (bnf Margaret Hill) v United Protection Ltd. & Simpson)** Khan Vol. 4.
- [20] Having considered the authorities as well as the injury and resultant disability to the Claimant I find that \$6 million is an appropriate award for pain suffering and loss of amenities.
- [21] In relation to handicap on the Labour Market I would have made no award. The infant Claimant has a very good prognosis as it relates to his psychological impairment and hence should be able to compete effectively in the job market when the time comes.
- [22] The special damages as vouched by receipts were not contested and total \$1,174,100.39.
- [23] Claimant's Counsel relies on the medical report of Dr. Doreth Garvey (psychiatrist) page 251-of the Bundle of documents agreed as exhibit 1 to support an award of \$1 million for future medical care. There was no challenge to this opinion.
- [24] The award therefore would have been:
- | | |
|---------------------------------------|----------------|
| General | |
| Pain, Suffering and loss of amenities | \$6 million |
| Cost of future medical care | \$1 million |
| Special damages | \$1,174,100.39 |
- [25] In the result however there is judgment for the Defendants with costs to the Defendants to be taxed if not agreed.


David Batts
Puisne Judge