JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

BETWEEN	EARL ALLEN	DEFENDANTS/APPELLANTS
AND	CONLEY SUDDEAL	
AND	LASCELLES WATT (B.W.F. ALICE VERNON)	PLAINTIFF/RESPONDENT

Clark Cousins for appellants

W. B. Frankson, Q.C., and Dr. Bernard Marshall for respondent

February 6, 7, 8 and March 26, 1990

ROWE P.:

Marsh, J., in an oral judgment delivered immediately upon the conclusion of counsel's submissions, made five very short findings of fact:

1. Plaintiff did run across road.
2. Defendant's driver was travelling at very fast speed in area where children were likely to be on the road.
3. Road at impact straight, dry and paved.
4. Find defendants 2/3rds to blame for accident.
5. Accept evidence of plaintiff being epileptic since accident.

He went on to make an award of general damages of $180,000 which when scaled down amounted to $120,000 and an award

of $1,602 for special damages. Both parties appealed. The appellants challenged the judgment on the grounds that the respondent was either wholly to blame for the accident or that his contribution far exceeded one third; that the award of $50,000 for loss of future earnings was not supported by evidence and that the award for pain and suffering was substantially in excess of awards in similar cases. In his Respondent's Notice the respondent contended that he was not guilty of contributory negligence and that the award for general damages was insufficient.

On August 4, 1970, between 5:00 p.m. and 6:00 p.m. the respondent was injured in a motor vehicle accident on the Irwin main road in St. James. His injuries as detailed in the Statement of Claim were:

(a) fracture of the left femur;

(b) compound fracture of left lateral malleous;

(c) badly contaminated irregular laceration to left foot;

(d) head injury with prolonged unconsciousness;

(e) severely deformed left foot;

(f) little toe dorsally displaced and immobile;

(g) complete destruction of the matatarsophalangeal joint of left little toe;

(h) degenerative changes in all bones of the foot;

(i) post-traumatic epilepsy;

(j) modern mental retardation since date of accident;

(k) contracture of left foot;

(l) partial permanent disability of left foot.

A medical certificate from Dr. Bala of the Department of Surgery, Cornwall Regional Hospital tendered in evidence

by consent confirmed that the respondent was admitted to the Cornwall Regional Hospital on August 4, 1978, and underwent surgery on the following day consisting of debridement of left foot wounds and he had steinmann pin insertion. The injuries referred to in the medical certificate were:

(1) fracture of left femur;

(2) compound fracture of left malleous;

(3) badly contaminated irregular laceration to left foot;

(4) head injury with prolonged unconsciousness.

The patient was put on skeletal traction and was put in a Plaster of Paris back slab. Dr. Dala said the respondent recovered from head injuries after prolonged unconsciousness and eventually had skin grafting to the left foot on September 28, 1978. The fractures, said the doctor, healed well and the respondent was discharged from hospital on November 5, 1978 to be followed up in the clinic.

There was some difference between the medical evidence and that given by the respondent's mother who said that the respondent did not walk for eight months after he left the hospital and had to be lifted from one place to another. If the mother spoke truthfully then the cause may have been psychological rather than physiological. She gave some details of the extent of the respondent's injuries. He was unconscious for forty days; his eyes never opened for six days; he could not eat for twenty days during which he was on saline drip. There is some difficulty in reconciling some of these time spans, but what is clear is that there was an extended period of unconsciousness. Prior to the accident, the respondent, said his mother, was a normal child attending primary school. Since then he suffers from frequent attacks of epilepsy which requires

medical treatment. His education has been interrupted. On the advice of a psychiatrist the respondent was sent to the School of Hope (an institution for retarded children) for a time. As this proved wholly impractical, the respondent was transferred to a Special Education Class at his former primary school. However, when he reached age twelve the school could no longer accommodate him and he has been at home with his mother since.

I pause to reflect upon the paucity of evidence available to this Court to properly determine the extent of the injuries suffered by the respondent. The doctor who the respondent's counsel wished to examine at trial did not attend Court. The Court refused to grant an adjournment to give counsel a further opportunity to get hold of his witness. It is always a difficult question for a trial judge as to the manner in which he ought to exercise his discretion on an application for adjournment during the currency of a case. However that may be, it does seem that on the facts of this case, great injustice may have been done to the respondent in not having before the Court all the relevant medical evidence. As I pointed out earlier, both sides are dissatisfied with the quantum of general damages awarded.

LIABILITY

In the Statement of Claim the respondent pleaded that he was crossing the Irwin main road when the appellant's motor vehicle collided with him and knocked him to the ground. At the time of the accident the respondent was six years old. He lived with his mother and two older brothers across the road from a Park known as Tropic Gardens. Children, many of whom live in the area, use the Park as a play-ground. The road in that vicinity has been described thus:

Alice Vernon (Respondent's mother)

"There is a deep corner coming round in direction of Montego Bay. Corner is a left-hand corner going from Adelphi to Montego Bay. I would call it a deep corner. Road signs in area - one at top another at bottom.

Asphalt road. Dry. Van stopped about 100 feet from the corner. Drag marks started about 30 feet from the corner and measured 71 feet."

She said too:

"On approaching Montego Bay on that road, my house is on the right and the Park on the left."

Conley Suddeal (appellant - owner of minibus)

"I think the corner in the road in area is really a double corner - left and then right."

Keith Reeves (witness for appellants)

"I know area of accident. There is a corner with a wall then another little bend, then into a straight. Distance between corner and park - 1½ chains. Corner was almost a double corner. Have to complete corner before you can see gate. It is not a deep corner. Road about 25 feet wide."

There was no sketch plan of the area and no indication as to the nature of the two road signs of which Alice Vernon spoke. On one interpretation of measurements as given by Miss Vernon and Mr. Reeves, there is a marked similarity. Miss Vernon had the vehicle coming to rest 101 feet from the corner. Mr. Reeves estimated that the distance between the corner and the Park is 1½ chains or 99 feet. But as I will show later one of Mr. Reeves' estimate of distance seems to be out of symmetry.

At the time of the accident the light was good. The respondent had gone to the Park and it can be fairly

inferred that he had left the Park for some temporary purpose as his older brothers had stayed behind. His evidence was that he was standing on the bank in front of the Park when the motor vehicle collided with him. If this were true then he would have been on the left side of the road as one travels from Irwin to Montego Bay. Other evidence in the case showed clearly that the minibus did not cross over to the right hand side of the road but travelled in almost a straight line on its left side - vide - the drag marks. The trial judge rightly rejected that assertion of the respondent and in the light of the pleadings which averred that he was crossing the road at the time of the collision, this finding is unassailable. It is true that there was an amendment of paragraph 4 of the Statement of Claim to substitute the word "standing" for the word "walking". This amendment is meaningless as there was no allegation of "walking" in that paragraph.

The driver of the appellant's minibus did not give evidence at trial. A passenger, Mr. Reeves, who held the responsible position of Superintendent of the Montego Bay Fire Brigade said he was sitting in the minibus in the left front seat. There was a bigger "country bus" travelling ahead of his vehicle by about 2-3 bus lengths. When the minibus rounded the corner he saw a boy standing near to an old lady in a gateway to the right hand side of the road. This gateway was a mere ½ chain from the corner. He said that as soon as the "country bus" went by, the little boy ran across the road. Later, he said that the boy had run more than half the road before the minibus hit him. The question arises then, could the boy have run more than 12 feet while the minibus travelled only ½ chain? What was unchallenged was that the boy fell

in front of where the minibus stopped, which was at the end of the drag mark. There was no evidence that the respondent was carried on the bonnet of the minibus or was pushed along the ground for any distance. Indeed, Mr. Reeves recalled that it was "a sudden stop". Bearing in mind the drag mark of 71 feet and the position of the injured respondent I incline to the view that the collision took place just before the minibus came to a stop. This would mean that when Mr. Reeves gave evidence of seeing the boy run from a gate ½ chain from the corner he must have been mistaken. If the boy ran into the road when the oncoming vehicle was 33 feet away, then the speed of the vehicle would be immaterial as for all practical purposes the driver would have had no chance of avoiding an impact. The question is more arguable if the child is 100 feet ahead of the minibus when he commences to scamper across the road. On the above analysis of the evidence, it seems more likely than not, that the appellant had or could have had sight of the respondent when he was at least 100 feet away. Why then did the appellant/driver not take evasive action?

Evidence from the respondent's mother was that she measured drag marks on the left side of the road, indicating that the minibus kept a straight course. This was so notwithstanding that the respondent was running from right to left into the path of the appellant. It is useless, however, to develop an issue that the appellant/driver was not keeping a proper look-out as the trial judge made no finding of negligence on his failure so to do and the Respondent's Notice did not seek to uphold the judgment on this ground.

The single finding of negligence by the trial judge was that the "defendant's driver was travelling at

very fast rate of speed in area where children were likely to be on the road". What evidence of speed was there before the Court. Keith Reeves said the minibus was travelling 25-30 m.p.h. and did not change its speed when coming around the corner. Tables taken from the 8th Edition of Bingham's Motor Claims Cases at page 112 show several braking tests. One table appropriate for vehicles with four-wheel brakes, pneumatic tyres gives the minimum stopping distance on dry asphalted surface as:

"30 feet when driving at 25 m.p.h. and
43 " " " " 30 m.p.h."

The Highway Code gives the following stopping distances in perfect conditions, i.e. good weather, broad daylight - good dry roads:

Speed	Thinking Distance	Braking Distance	Overall Stopping Distance
20 m.p.h.	20 feet	20 feet	40 feet
30 " " "	30 "	45 "	75 "
40 " " "	40 "	80 "	120 "."

If one works backwards from the drag mark of 71 feet measured by the respondent's mother and applies the Highway Code Tables which is the higher of the two quoted above, a braking distance of 71 feet would approximate to a driving speed of 37.5 miles per hour. This actual speed would be much in excess of the estimated minimum speed of the appellant's witness but not remarkable in relation to the estimate of 30 miles per hour. There was no evidence that this was a restricted built-up zone in which a special speed limit was imposed and it was certainly not open to the learned trial judge to draw such an inference from the mere reference to two road signs in the area.

In support of his first ground of appeal, Mr. Cousins raised the questions:

(i) What is the law on contributory negligence regarding children? and

(ii) Does the evidence in the instant case support the findings of negligence made by the trial judge?

A useful starting point is the statement of the law at paragraph 93 Vol. 28 of 3rd Ed. of Hals. Laws of England:

> **"CONTRIBUTORY NEGLIGENCE ON THE PART OF CHILDREN**
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> 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 or to be unable to fend for himself at all, he cannot be said to be guilty of contributory negligence with regard to a 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 risks he runs so as to be capable of being guilty of contributory negligence is a question of fact for the jury."

Mr. Cousins relied upon a number of authorities to show that a child of six years of age can be guilty of contributory negligence and to strengthen his submission that in the instant case the respondent was either wholly or mainly responsible for the injury which he suffered.

In Speirs v. Gorman [1966] N.Z.L.R. 897, Hardie Boys J. had to consider on a motion for a new trial, whether he had given correct directions in law to a jury on the standard of care required of a child of tender years. In his review of the cases, Hardie Boys J. quoted a passage from the judgment of Lord Low in Cass v. Edingburgh and District Tramways Co. Ltd. [1909] 11 S.C. (R) 1068 that:

> "The pursuer's son was four years and eight months old at the time of the accident. It is quite settled that there may be contributory negligence on the part of a child of that tender age. Whether there has or has not been such negligence is a question of circumstances. I do not think that the law on the subject has ever been better stated than by Lord Justice-Clerk Moncreiff in the case of Campbell v. Ord & Maddison (1 R. 149). That was a case in which a child, four years of age, had had his fingers crushed in the teeth of an oil-cake crushing machine which had been left unguarded in the public street. His Lordship said:
>
> > 'It would be as unsound to say as a proposition in law that this child was not capable of negligence as to say that he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or precaution neglected, and that depends to a large degree on the nature of that which is neglected, as well as on the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact in the individual case, as much so as negligence itself, which is always a question of fact'."

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 of responsibility which can be attributed to that particular child, rather than to children of that age as a general class.

Gough v. Thorne [1966] 3 All E.R. 398 is a decision of the Court of Appeal in England. The trial judge had found the plaintiff aged 13½ years to be one-third to blame for the accident in the most questionable circumstances. A lorry driver on seeing the plaintiff and other children on the side of the road waiting to cross, stopped his lorry, held out his right hand to warn traffic coming along in his direction to stop and then with his left hand beckoned the plaintiff's party to come across. Accepting the invitation the plaintiff crossed in front of the lorry and without pausing continued across the road. An oncoming car which was driven at an excessive speed did not observe the lorry driver's hand signal and he ran into and injured the plaintiff. To the question: Was there contributory negligence? The trial judge answered:

> "I think that there was. I think that the plaintiff was careless in advancing past the lorry into the open road without pausing to see whether there was any traffic coming from her right."

Lord Denning M.R. did not agree. He said:

> "I am afraid that I cannot agree with the judge. A very young child cannot be guilty of contributory negligence. An older child may be; 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 reasonably 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 or her elders. He or she is not to be found guilty unless he or she is blameworthy."

An adult would have been expected to verify the lorry driver's signal that the road was clear but a child responding to the courtesy of the lorry driver could not be blamed for not being over-cautious and suspicious in those circumstances. Three years after the decision in Gough v. Thorne (supra), Jones v. Lawrence [1969] 3 All E.R. 267 was decided by Cumming-Bruce J. at Warwickshire Assizes. An infant boy aged 7½ years, ran out from behind a parked van across a road, apparently without looking. There was a collision between the infant and a motor-cycle which was travelling at about 50 miles per hour in a built-up area with a 30 mile per hour limit. The defence was that the motor-cycle was being ridden at 30-35 miles per hour and when the rider was about 10 feet from the point of collision suddenly the infant plaintiff ran out from behind the van behind which he had been concealed from the motor-cycle rider's view. The trial judge said that if the motor-cycle rider's evidence was true he had absolutely no chance to avoid the collision and it would therefore, be wrong to hold that he caused the accident by negligence on his part. But that evidence was rejected and he was found guilty of negligence on reasoning which Mr. Frankson said is apposite in the instant appeal.

When dealing with the issue of contributory negligence Cumming-Bruce J. said:

> "Now I come to contributory negligence. Of course, the infant plaintiff, then aged seven years and three months, should not have run out across the road in the path of a motor bicycle driven down the road at about

> "50 m.p.h. The problem is whether in the case of a boy of seven years and three months the defendant has proved that the boy showed a culpable want of care for his own safety. Of course, it is true that he had been taught road discipline and now aged 11 he described in the witness box with perfect skill what he had been taught and did it very nicely. I do not doubt that he had received that teaching before the date of the accident and that if he had given the matter a thought he would have realised it was his duty, as a matter of taking reasonable care for his own safety, to advance with the utmost caution and look round the corner of the van in order to see whether anything was coming before he walked or ran across the road. The propensity, however, of infants of seven years and three months to forget altogether what they have been taught was sensibly described by his schoolmistress. She made an observation that if a child of that age wants to get anywhere, he will forget all he has been taught. She said such children do not remember if something else is uppermost in their minds. She was only describing what I regard as the normal experience of children of the age of seven years and three months. .....
>
> In my view the defendant has failed as a matter of probability to show that the infant plaintiff 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 a road."

There was a conflict of evidence as to how the accident occurred in Jones v. Lawrence (supra) which conflict was resolved against the motor-cyclist. The Court was of the view that because of the excessive speed of the cyclist, he did not have a proper opportunity to brake or swerve to avoid the emergency created by the movement of the young boy into the road. In addition, the Court

said, he was driving in a built-up area in which he should have realised that there are always risks of unexpected though foreseeable contingencies like children running out into the road. The cyclist was held to be wholly liable for the accident.

Moore (an infant) v. Poyner [1975] Road Traffic Reports 127, concerned an injury to a six year old boy who ran from an entrance concealed by a parked coach into the roadway and into the path of an oncoming motor car. The car was being driven at the maximum speed permissible in that neighbourhood, viz. at about 30 miles per hour. The driver conceded that he knew the area well, that he could have expected children to run into the road, but that he saw no one on the road. He did not reduce his speed in passing the parked coach nor did he sound his horn. The Court of Appeal (U.K.) held that the maximum legal speed was safe in all the circumstances and the defendant was not negligent in not reducing his speed or to have sounded his horn. The defendant's duty of care was extremely stated by Buckley L.J. to be:

> "I think that one must test his duty of care not by reference to what the plaintiff actually did but by what sort of conduct by any child, at any moment of time, the defendant ought reasonably to have anticipated, and to consider what course of action he would have had to take if he was going to make quite certain that no accident would occur."

As the defendant had no real opportunity to avoid the accident he was held not to be negligent. No mention of contributory negligence arose but it is apparent from the decision that not every young child who is injured in a road accident will automatically obtain an award of

damages in negligence.

Davies v. Journeaux [1976] Road Traffic Reports 111 again concerned an infant plaintiff. She was aged 11½ years at the time of the accident. The facts are instructive. The defendant who had an excellent driving record was proceeding along a road 22 feet wide, which he knew well at 4:40 p.m. on a dry surface, at between 20-25 miles per hour. There were pavements three feet wide on either side of the road. A front seat passenger saw the 11½ year old girl momentarily standing on the pavement when the car was 50-60 feet away from her and then she began to dash across the road looking away from the car. The defendant/driver who had not sounded his horn and did not see the plaintiff until she was dashing across the road, applied the brakes heavily but collided with and injured her. The defendant was held liable by the trial judge for negligence in failing to keep a proper look-out, in that, if he had seen the plaintiff as soon as the passenger had, the defendant could and should have taken an averting action by sounding his horn, and that if he had sounded it, the accident could probably have been averted. The trial judge found the plaintiff to be 60% to blame by her contributory negligence. Both sides appealed.

It was held on appeal (Edmund Davies, Megaw and Roskill LL.J) that in the circumstances negligence by the defendant/driver had not been established as the defendant needed to have his eyes switching from one direction to another, looking at oncoming traffic, also being alert to the possibility of something emerging from the road entrance at the off side and consequently lack of proper look-out by him was not established merely because the

passenger saw the plaintiff standing on the pavement momentarily, a split second or so before the defendant saw her dashing across the road. Edmund Davies L.J. who delivered the main judgment disagreed with the finding of the trial judge as to the duty of a driver to sound his horn when he sees a pedestrian on the sidewalk. At page 116A of the judgment he said:

> "I would accordingly be for reversing this judgment, which seems to me to impose upon motorists the duty of sounding a horn virtually whenever they see a pedestrian on the adjoining pavement, and this regardless of whether the pedestrian is manifesting any intention of leaving that pavement and dashing across into the path of the oncoming car, which the pedestrian could not have failed to see had he or she looked."

This case is illustrative of the fact that a motorist is not an insurer for infant plaintiffs and is therefore, required to pay compensatory damages whenever an infant is injured in a motor vehicle accident on the road. The age of the infant did not matter in the case cited above but rather what was material was whether the driver had been negligent in the performance of his duty of care towards that child. The Court of Appeal held that he had behaved in a reasonable manner, he had not failed to keep a proper look-out in the circumstances and consequently he was not guilty of negligence.

In the instant case there was no evidence whatever to indicate whether the infant plaintiff had instruction as to the precautions to be taken in crossing the road. His mother's evidence was that she lived across the road from the Park, "Children from all around play at the Park -

a lot of children in area" - was part of her evidence. The first defendant/appellant who lived within walking distance of the respondent said he knew Tropic Gardens Park, knew that people kept animals there, that parents and children visited the Park, but did not know whether children played there often. Mr. Reeves, had no knowledge that lots of children played in the Park, although he had seen children there, but not lots of children.

I lament the fact that the trial judge failed to ascertain the point of impact or to refer to the issue of paying proper attention to movements on or off the roadway. On my assessment of the evidence the appellant driver had not 33 feet as his witness Reeves stated but at least 100 feet within which to manoeuvre when he saw or ought to have seen the child run across the road. There is no evidence that this six year old boy, although described by his mother as of normal intelligence, behaved in an outrageously unexpected manner, so that the minibus driver could not reasonably avoid the accident. Indeed, had the boy dashed into the road 33 feet ahead of the minibus, Mr. Cousins would be on sure ground in his submission that the driver was not negligent in failing to avoid a collision.

Speed simpliciter is not an indication of negligence. Again a speed of less than 40 miles per hour on a straight dry asphalted surface in good daylight on the open road, i.e. to say, not in a built-up restricted area, cannot be said without more to be a very fast rate of speed. However, the fact that there was a public Park to which children repaired for recreation on one side of the road and houses were on the opposite side of the road from which it might reasonably be expected that children could emerge at any time, would be inhibiting factors in determining

what would be a safe speed at which to travel. There was no evidence of a vehicle travelling in the opposite direction which could cause a dangerous situation if the appellant swerved to his right. Therefore, in my view, continuing in a straight path for 1½ chains after seeing or being able to see the respondent running across the road, amounted to negligence on the part of the minibus driver and his inability to stop the vehicle before the collision is an indication in those circumstances that his speed even at 37.5 miles per hour was too fast.

On the question of general damages, Mr. Cousins submitted that there was absolutely no evidence to support the award of loss of future earnings. No evidence was led that the plaintiff was employed or of the earnings of his parents except that his mother was a cook. He said further that in capitalising the future loss of earnings the trial judge did not properly discount the capital sum so as to arrive at its true present value. Our attention was directed to the decision in Taylor v. Bristol Omnibus Co. Ltd. et al [1975] 2 All E.R. 1107 in which the infant plaintiff aged 3½ years sustained severe brain damage in a car accident, which rendered him permanently disabled in both legs and arms and loss of speech. He had three major epileptic attacks and needed constant supervision and nursing care day and night. In assessing damages for loss of future earnings Lord Denning M.R. had this to say:

> "The judge assumed that Paul would start earning at the age of 19. He took the yardstick of his father's position. He took an average figure of £2,000 a year and used a multiplier of 16. Thus making £32,000 .....
>
> Counsel for the defendants urged us to adopt a new attitude

> "in regard to babies who are injured. He suggested that the loss of future earnings was so speculative that, instead of trying to calculate it, we should award a conventional sum of say £7,500. He suggested that we might follow the advice given by Lord Devlin in H West & Son Ltd. v. Shepherd [1963] 2 All E.R. 625 at 638, that is:
>
> (i) give him such a sum as will ensure that for the rest of his life, this boy will not, within reason, want for anything that money can buy;
>
> (ii) give him, too, compensation for pain and suffering and loss of amenities;
>
> (iii) but do not, in addition, give him a large sum for loss of future earnings.
>
> At a very young age these are speculative in the extreme. Who can say what a baby boy will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or he may be an utter failure. It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or, she may be a career woman, earning high wages. The loss of future earnings for a baby is so speculative that I am much tempted to accept the suggestion of counsel for the defendants.
>
> This suggestion is, however, contrary to present practice. In the children's cases hitherto the courts have made an estimate of loss of future earnings."

Lord Denning gave some examples from decided cases and concluded by saying:

> "I cannot say that the judge was wrong in taking an average of £2,000 a year. ..... I feel that we must follow the accepted practice in these cases."

I have quoted this passage at some length for two reasons. Firstly, a plaintiff is not entitled to ask

the Court for damages for loss of future earnings without bringing some evidence on which that assessment, however speculative, can be made. Secondly, to encourage trial judges to make awards based on some principle rather than upon plucking figures out of the air supported only by submission of counsel.

Already I have adverted to the fact that medical evidence was not placed before the Court to demonstrate the extent of the brain injury suffered by the respondent. Suffice it to say that prima facie the physical injuries together with the brain injury leading to recurring attacks of epilepsy suffered by the respondent were more severe than those suffered by any of the plaintiffs in the cases cited by Mr. Cousins from Khan's Publications. An award of $80-90,000 in 1988 would in his submission be the maximum that ought to be awarded.

Mr. Frankson was hard pressed to support his Respondent's Notice seeking an order that the award of general damages be increased. He had no evidential basis on which to mount any real challenge to the award of $120,000 and gallantly endeavoured to persuade the Court that the judge's award, however flawed in its individual parts, was globally sustainable. With this I agree.

I need only repeat that with greater diligence at trial, a more satisfactory result might have ensued. Although the finding of ocntributory negligence cannot stand, the general damages which the plaintiff has proved does not exceed the sum of $120,000. In the event, therefore, I would dismiss the appeal, allow the Respondent's Notice in part and confirm the award of the trial judge.

WRIGHT, J.A.:

I agree.

FORTE, J.A.:

I have had the privilege of reading the judgment of Rowe, P. in draft and I agree with his reasons and conclusion and there is nothing further I can add.