JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 36/86

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	CORNEL LEE (by his next friend PAULINE HURD)	PLAINTIFF/APPELLANT
A N D	IVY MAY HIN	DEFENDANT/RESPONDENT

Ernest U. Alcott and Miss Sandra Alcott for Appellant

John Vassell for Respondent

March 12, 13 and 22, 1991

ROWE P.:

Bingham J. after a three day trial between May 19-21, 1986 entered judgment for the defendant. He found that the plaintiff's evidence was at variance with the statement of claim, that the plaintiff did not keep a proper look-out in that he did not look up and down before attempting to cross the road and that his evidence was lacking in credibility and reliability. He found that the defendant's evidence was consistent with her pleadings and that on her account she was not negligent. The trial judge relied upon the test of negligence adumbrated in Moore v. Poyner [~~1976~~ 1975] Road Traffic Reports 177.

Against this judgment the appellant filed and argued eleven grounds of appeal which can all be summarised in the opening words of the first ground, viz., that the learned trial judge's finding that the defendant was not negligent was unreasonable and against the weight of the evidence.

The plaintiff/appellant was 9 years old on December 11, 1981 when he was injured in a motor vehicle accident along Hagley Park Road. He injured his mouth rather severely. There was a 2.5 cm laceration to the lower lip, laceration of the gum, the upper incisors were avulsed, lower incisors were displaced, there was fracture of the upper and lower aeveolus, a permanent loss of four permanent teeth, permanent disfigurement of the mouth and a permanent scar under the chin. Up to the time of trial the appellant had not been fitted with dental prosthesis. After eleven days the appellant was discharged from hospital.

Hagley Park Road in the vicinity of the accident was about thirty feet wide, asphalted, dry and straight. On either side of the roadway was a sidewalk. The respondent was driving a Datsun van south-westerly along Hagley Park Road at between 25-30 m.p.h. about a chain behind a long line of cars. She approached a place known as Becky's garage on the left hand side of the road. She observed a small closed-up van parked hard up against the sidewalk right in front of Becky's garage with the bonnet raised. The respondent said that as she approached the parked van, she tooted her horn and was in the act of over-taking this van when a little boy suddenly ran from in front of the parked van. She swerved hard to the right but the child ran right into the left side of the bonnet. She manoeuvred around him and stopped on her left near side. The boy who turned out to be the plaintiff got up, ran to the right sidewalk, fell again and was transported to the hospital by the respondent. The respondent was an experienced driver, who held a responsible position with the Cultural Development Commission. She had driven accident free for decades and on this day she did not see anyone in the parked van, or on the sidewalk or in the vicinity of the van.

For the appellant to succeed in this appeal it must be shown that on the evidence of the respondent and the reasonable inferenes to be drawn therefrom the respondent was negligent The trial judge was unimpressed by the appellant's testimony, which was rejected, that he had looked in both directions before attempting to cross the road. Inferentially, too, the trial judge rejected his evidence that he had positioned himself some thirty-two feet distant from the parked van.

Mr. Vassell has submitted that the trial judge was correct to follow the reasoning and the decision of the Court in Moore v. Poyner (supra), as the facts in the instant case are on all fours with those in Moore v. Poyner (supra). Miss Alcott sought to distinguish Moore v. Poyner (supra) on the basis that in the earlier case the obstructing vehicle was one of unusual length and the path from which the child emerged was unknown to the driver whereas in this case the vehicle was a small van with a small bonnet and that on the defendant's evidence she had a clear view of the road and sidewalk except immediately ahead of the parked van.

In Moore v. Poyner (supra), Buckley L.J. quoted and guided himself upon the dictum of Lord du Parcq in London Passenger Transport Board v. Upson [1949] A.C. 155 at 176 where that noble Lord said:

> "The correct principle was stated by Lord Dunedin when he said: 'If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions'."

And Lord de Parcq continued:

> "I regard this statement and that of Lord Macmillan in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others."

On the facts of Moore v. Poyner (supra) Buckley L.J. said:

> "It seems to me that this is a case in which there was an appreciable risk that a child might be masked by the coach and that he might run into the path of the defendant's car; but the likelihood of that happening at the precise moment at which he was passing the coach was so slight that it is not a matter which the defendant ought to have considered to require him to slow down to the extent that I have indicated."

The safe speed as found in that case would have been 5 m.p.h.

I think that the instant case is distinguishable from Moore v. Poyner (supra) on the issue of forseeability. The respondent apprehended that a dangerous situation had arisen and apprehended that someone, a mechanic, a distraught owner, a child, or an adult pedestrian might emerge from in front of that disabled vehicle. It was for this reason that the respondent blew her horn. It is now clear that that was not a sufficient warning to avert an accident. The accident is not by itself evidence of negligence so what the appellant must show is that there were other steps which this respondent ought to have taken having apprehended the strong probability of danger.

The respondent was driving on the left of the road and then pulled out to the right to overtake. Did she give the parked vehicle a wide enough berth to ensure that she was in a position to take evasive action in the event that the

apprehended danger materialized? Did she adjust her speed in such a manner as to give her greater control of her vehicle as she over-took this small vehicle? On the evidence she did not. It seems to me that a prudent driver who is keeping a proper look-out and who having observed a disabled vehicle on a busy thoroughfare around which there is no clear vision, and who appreciated that a dangerous situation was thereby created, ought not to rely solely on the sounding of a horn, but ought to reduce the driving speed so as to be able to deal with the anticipated emergency if indeed it materializes.

The respondent failed to reduce her speed or to give the disabled vehicle a wide berth seeing that the roadway was otherwise clear in both directions, and was therefore negligent.

Mr. Vassell submitted that this appellant, a boy of 9 years, had sufficient road sense to be able to use the road intelligently and consequently could be held responsible for not exercising care in crossing Hagley Park Road in front of a parked vehicle without ensuring that it was safe so to do. Bingham J. found that:

> "It is clear that he did not go through any road drill, that he did not look up and down the road. He did what most children of his age do, acted on impulse and darted across the road."

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. I

think this is what Bingham J. meant when he said that the appellant did what most children of his age do, act on impulse and dart across the road. In my view the appellant is not guilty of contributory negligence.

Fortunately, the injuries to the appellant, although severe, were concentrated around his mouth and chin. Cases cited to the trial judge as a basis for assessment of damages were Parry v. Turner at p. 154, Vol. 1 of Khan's Personal Injury Awards and Graham v. Spring Blossom Bus Co. Ltd. p. 155 of the same work. In both cases the injuries were considerably less serious than those suffered by the appellant. Parry (supra) had a broken left mandible and several broken teeth while Graham (supra) suffered a fractured mandible, laceration over left forehead, multiple punctures on left side of jaw and contusion of right mid-thigh. The suggested range of $15,000.00-$9,000.00 for general damages at 1986 figures is too low. Patterson J. awarded $15,000.00 for pain and suffering and loss of amenities and $9,000.00 for bridge replacements to the plaintiff on May 16, 1984 - Merritt v. Jamaica Telephone Co. Ltd. and Another - Khan's Personal Injury Awards, Vol. II p. 194. I think that an award of general damages for this appellant in the sum of $25,000.00 would meet the justice of the case. Special damages were agreed at $580.00.

I would allow the appeal and enter judgment for the appellant in the sum of $25,580.00 with interest at 3% from the date of the accident, i.e. December 11, 1981 to the date of judgment, May 21, 1986. I would award costs to the appellant both here and in the Court below to be agreed or taxed.

DOWNER J.A.:

I agree.

MORGAN J.A.:

I agree