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NOTICE TO PARTIES OF THE COURT'S MEMORANDUM OF REASONS FOR DECISION

SUPREME COURT CIVIL APPEAL NO 105/2013

BETWEEN	**HANDEL YOUNG (a minor) by Delphine Williams Young (his mother & next friend)**	**APPELLANT**
AND	**GARTH BRAHAM**	**1st RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**THE COMMISSIONER OF POLICE**	**3RD RESPONDENT**

TAKE NOTICE that this matter was heard by the Hon Miss Justice Edwards, the Hon Mrs Dunbar-Green, and the Hon Mr Justice Brown JJA on the 30th day of October and 2nd day of November 2023, with Miss Kashina Moore and Miss Rykel Chong instructed by Nigel Jones and company for the appellant, and Miss Kristina Whyte instructed by the Director of State Proceedings for the respondents.

TAKE FURTHER NOTICE that the court's memorandum of reasons, as delivered orally in open court by the Hon Miss Justice Edwards JA, is as follows:

[1] In this matter, the appellant lost his claim in negligence brought against the respondents in the Supreme Court when Batts J ('the learned judge'), on 1st November 2013, having heard evidence, gave judgment in favour of the respondents, with costs.

[2] The claim arose out of an accident in which a police vehicle collided with the appellant. The accident occurred on the night of 7 June 2008, in the vicinity of the Wesley Methodist Church in Mandeville, in the parish of Manchester. The 1st respondent was driving a police vehicle when, on reaching the vicinity of the church and nearing an intersection, the appellant, who was a minor of seven and a half years old, ran from the premises of the church into the path of the police vehicle. The learned judge found that the 1st respondent was not driving negligently when the vehicle collided with the appellant.

[3] Counsel for the appellant filed several grounds of appeal before this court, most of which challenged the learned judge's findings on liability.

[4] The learned judge made several primary findings of fact, based on the view he took of the evidence and the credibility of the witnesses he accepted as reliable, taking into account their demeanour and how impressed he was with them. The learned judge rejected the evidence of the appellant's mother which he found to be "incredulous", and that of the appellant's other supporting witnesses, who he found to be inconsistent and not credible. He accepted the 1st respondent's account as truthful (notwithstanding the fact that the 1st respondent's statement went into evidence by agreement and he did not give oral evidence nor was he cross-examined), and as being supported in all material particulars by the evidence of the witness Charmaine Blake-Daniels, who was a passenger in the front of the police vehicle.

[5] Having assessed the evidence and having borne in mind his observations of the witnesses, and being guided by the reasoning in the case of **Probert (a child by her litigation friend and mother Joanna Probert) v Moore** [2012] EWHC 2324 (QB), which was cited to him by counsel for the appellant in the court below, the learned judge found on a balance of probabilities that the 1st respondent was not negligent in his manner of driving when he collided with the appellant.

[6] An appellate court is slow to interfere with a judge's findings of fact based on his assessment of the credibility and demeanour of the witnesses, unless he can be shown to have clearly erred in arriving at his conclusions by taking account of irrelevant material, or by failing to take account of relevant factors, or is otherwise plainly and palpably wrong (see **Watt (or Thomas) v Thomas** [1947] AC 484).

[7] Counsel for the appellant maintained that the learned judge erred in not recognising that there was a higher duty of care owed to children of tender years, as well as in his failure to properly assess the evidence and to find that, having hit the appellant, the 1st respondent driver must have failed to keep a proper look out. She also maintained that in taking evasive action only by hitting his brake but not swerving, the 1st respondent failed to do all that was to be expected of a reasonable driver, in all the circumstances which were known to him, and which presented themselves that night.

[8] The sole issue before this court is whether the learned judge failed to apply the law to the facts of this case correctly, and as a result, was plainly wrong to have found that the 1st respondent was not negligent.

[9] Counsel for the appellant was not able to urge anything on this court which could persuade that this was a case in which the learned judge's decision should be disturbed. The learned judge's finding that the minor appellant ran suddenly across the road at approximately 11:00 pm on a Saturday night, in a manner which gave the 1st respondent, who was driving at a moderate speed, little or no opportunity to avoid the collision, was one he was entitled to make on the evidence before him. There is nothing in the learned judge's decision which would indicate a lack of understanding of the nature of the duty of care owed to a child, particularly one of tender years.

[10] Furthermore, the fact that the 1st respondent chose to apply his brakes rather than swerve, in the agony of the moment, and the difficult position in

which he was placed on seeing the child run across the road into the path of the vehicle, is not evidence of negligence, nor is it evidence of a failure to keep a proper look out. The question that arises is, what would have been the reasonable standard of care to be expected, in all the circumstances? The standard is that of a reasonably careful driver. The burden of proof would have been on the appellant to show that the 1st respondent's manner of driving fell below that standard. The test to be applied in this case is whether it would have been apparent to the 1st respondent, as a reasonable man armed with the knowledge he had of the area, his common-sense, and his knowledge of the ways of pedestrians, especially young children, that on his approach to the church, he ought to be aware that a child might dart from the church into his path, and, therefore, he should slow to a crawl to avoid an accident (see **Moore (Infant) v Poyner** [1975] RTR 127 CA per Buckley LJ considered with approval in this court in **Cornel Lee (by his next friend Pauline Hurd) v Ivy May Hin** (unreported), Jamaica, Court of Appeal, Supreme Court Civil Appeal No 36/1986, judgment delivered 22 March 1991).

[11] Despite the presence of the church in the area where the collision took place, and despite counsel's submissions that the 1st respondent ought to have known that activities take place at the church and that parents may take their children there, the real risk of danger that this may have presented must have been that which would have been reasonably apparent to a competent driver. If such a risk is reasonably apparent, the reasonably careful driver must take precaution. However, if the risk of emerging danger is only a mere possibility which would not have occurred to a reasonably careful driver, no extraordinary precaution is required to be taken in such circumstances (see **London Passenger Transport Board v Upson and Another** [1949] AC 155 at 176, which was later applied in **Foskett v Mistry** [1984] 1 RTR 1 per May LJ).

[12] The learned judge found that the accident took place in an area which was a business district, on the outskirts of a Jamaican country town, late at night and at a time when businesses were closed, so that the driver would not have

been expected to drive at an excessively slow speed, nor would he be expected to anticipate that a child would be on that road at that time. The learned judge also found that the appellant had behaved in a manner that is to be expected of children his age, but that his foray into the road at 11:00 pm, on a Saturday night, in a closed business district, was not reasonably foreseeable. The learned judge cannot be faulted for so finding.

[13] A driver is required to take all reasonable care in all the circumstances of the case, but is not required to be a perfect driver. A driver is not to be judged by such standards, nor should the benefit of "20/20 hindsight" be applied to the circumstances (see **Stewart (protected party by his litigation friend Ramwell) v Glaze** [2009] EWHC 704 (QB), per Coulson J).

[14] In the instant case, the learned trial judge found on the facts before him that the 1st respondent did take all reasonable care expected of him, in all the circumstances. There is no reason to interfere with those findings.

[15] The appeal is, therefore, dismissed, but in the circumstances of the case, having heard both sides on costs, the court orders that each party bears its own costs.

[16] This court also recommends, respectfully, that, although negligence has not been proved against the respondents, in the circumstances of this case, where the appellant is a minor who suffered serious life changing injuries which required, and still requires treatment at a high cost, the State offers a reasonable *ex-gratia* payment to the appellant.