

**Clothilde v Henry
(2003) SLR 88**

Frank ELIZABETH for the Plaintiff
France BONTE for the Defendant

Judgment delivered on 19 September 2003 by:

PERERA J: The Plaintiff, a boy aged 6 years at the time of a Defendant, the owner and driver of motor car bearing no. S respect of personal injuries suffered by him on 12 May 1998 liability, and avers that "he saw two children running on the road Plaintiff, recklessly and carelessly rushed on the road and vehicle".

In terms of Article 1384 (2) of the Civil Code a presumption of a moving vehicle, that he is at fault and hence liable, unless that the damage was caused solely due to the injured party.

The Plaintiff, who is now 12 years of age was permitted to t Court being satisfied that he understood the nature of the c around 3.30 p.m. that day, he was standing on the edge of t road at Anse Aux Pins. A bus stopped on the opposite Defendant's car, which came behind the bus, overtook it. Defendant's car crossing to the mountain side where, the boy him and threw him to the main road. Consequently, he had a t his ear and neck, several bruises and a bleeding nose. On b denied that he was running on the road with another boy.

Wilson Esparon (Pw2) was standing by the sea at the time of the sound of brakes being applied, and when he went towards t lying on the road. Before that he saw a boy standing on the r He also saw a bus stopped on the sea side bus stop and other it. After hearing the brakes he no longer saw the boy standing boys running.

The Defendant in his testimony stated that he was not drivir Anse Royale on the sea side of the road, but towards the opp stated that the accident occurred between 4.30 p.m. and 5 p.m.

According to him, the road was straight for about 15 metres a not much traffic. He was driving at a speed of about 30-35 k.p.h. when he heard a noise as if a coconut had fallen on the car. He then applied the brakes. This is consistent with the averment in paragraph 2 of the defence that the Plaintiff running along the road "rushed on the road and hit himself against the vehicle."

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accident. He heard ad, saw the Plaintiff in side of the road. cles moving behind denied seeing two

m Victoria towards direction. He also at day.

The Defendant also stated in his testimony that he saw two boys running and the Plaintiff crossed the road without stopping and he was hit by the car. The other boy who was about 5 metres behind him ran away on seeing the accident. He further stated that the front wheel and the bonnet of his car was slightly damaged by the impact. On being questioned by Court he stated that the damage to the bonnet was towards its middle.

Liability

There are several inconsistencies in the Defendant's case as regards the accident. The most material is that, while the Plaintiff and his witness categorically stated that the Defendant was driving towards Anse Royale and that the accident occurred when he overtook a stationary bus, the Defendant stated that he was driving in the opposite direction. Unfortunately, the Police sketch of the accident was not produced by either party as the file is said to be lost. In any event, the Defendant testified that he saw two boys running along the road and the Plaintiff crossing suddenly. That contradicts his own version that he did not see anything until he heard something like a coconut falling on the car. If the Plaintiff hit the car, as he claimed, he would have hit it sideways and not towards the middle of the bonnet. For the Plaintiff to hit the middle of the bonnet, he would have been in front of the car and probably been run over. Further, if he saw the boys running, he, as a prudent driver, ought to have been more vigilant and anticipated any irrational movement by them. However, on a balance of probabilities I accept the version of the accident as testified by the Plaintiff and his witness. I find that the accident occurred when the Defendant overtook the stationary bus, and hence in the circumstances not even contributory negligence can be attributed to the Plaintiff. Hence the Defendant having failed to rebut the presumption in Article 1384(2) of the Civil Code, he is held liable for the accident.

Damages

According to the medical report (*exhibit D1*) the Plaintiff received the following injuries-

1. Brain concussion and loss of consciousness for 3 - 5 minutes.
2. Multiple bruises over left knee and both arms.
3. Bleeding laceration of right pinna (that is, the part of the ear formed of cartilage and skin.)
4. Fracture of the right clavicle (that is, the bone which runs from the upper end of the breast bone towards the tip of the shoulder across the root of the neck).

He was treated by suturing the laceration, and cleaning the abrasions. The clavicular fracture was strapped and a neck collar fitted. He was also given analgesics and antibiotics.

He was discharged from hospital on 20 May 1998, that is, 12 days after the accident. After follow-up treatment in the Surgical Outpatients Clinic, the final assessment on 9th September 1998 confirmed that the fracture of the right clavicle was healed and so also the lacerations and abrasions. There was also no complication to his head injury. It was recommended that he resumed school, and he could lead a normal life.

In the case of *James Hoareau v Frankv Aglae* (CS 109 of 1990), a 10 year old boy was injured in a similar accident. He suffered bruises on the face, and abrasions on the chest. There were however no fractures. It was averred that the boy had "intellectual deterioration" as a result of trauma. That aspect was not medically established. On a consideration of all the circumstances of the injuries I awarded a sum of Rs.35,000 for pain, suffering, shock and loss of amenities. In *Wyne Gendron v Joyce Lame* (CS 84 of 2001) a boy 13 years old was injured by a motor car while he was standing on the grass verge near the edge of a road. He had a fracture of the shaft on the left femur requiring intomedullary nailing and skin grafting. He also had injuries to his teeth, chin and the mouth. The Plaintiff claimed R50,000 in respect of pain, suffering, distress discomfort and anxiety. I awarded a sum of R35,000 under that head of damages, and a further R5000 in respect of a permanent scar on the leg, making a total award of R40,000.

In the present case, the Plaintiff claims R100 for damage to clothing. Although that was not proved, yet due to the nature of the bleeding injuries he suffered, it is reasonable that his bloodstained and torn clothes could not be used again. Hence R100 is awarded under that head. He also claims R75,000 as moral damages for extreme pain, suffering, anxiety and discomfort. On a consideration of *James Hoareau* (supra) and *Wvne Gendron* (supra), I award a sum of R30,000. The Plaintiff also claims R50,000 for loss of amenities and R25,000 for loss of enjoyment of life. He testified that he could not run as usual, had severe headaches and often the eyes become red. The medical report does not support these claims. However as he was immobilised in hospital for 12 days during which period he, as a playful boy of 6 years, could not enjoy life and was deprived of basic amenities, I award a sum of R1,000. The medical report tendered to Court as the exhibit had been issued by the hospital to the Police. Hence as it had been issued for official purposes free of charge, no payment in reimbursement is due to the Plaintiff. Accordingly, the claim of R200 for medical report is disallowed.

Judgment is accordingly entered in favour of the Plaintiff in a total sum of R31,000, together with interest and costs.

Record: Civil Side No 15 of 2001