IN THE COURT OF APPEAL

GRENADA

Civil Appeal No. 7 of 1972

Between:	DONNA BAILEY (an infant by her father and next friend Vernon Alfred Bailey)	Plaintiff/ Appellant
	and	
	1. CYRIL MOUKRAM 2. RAULDON PHILLIP 3. RUPERT WILLIAMS 4. DUDLEY DUNCAN	Respondents

Before: The Honourable the acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

E.A. Heyliger for appellant
1st respondent in person
2nd respondent not served, not present and not represented
M. Bishop for 3rd and 4th respondents

1972, January 25

JUDGMENT

CECIL LEWIS, C.J. (Ag.)

This is an appeal by the plaintiff/appellant against an award of damages in her favour made by a judge of the High Court in an action against the respondents in which she claimed damages for personal injuries sustained through their alleged negligence.

The plaintiff/appellant's complaint is that the amount of damages is insufficient to compensate her for the injuries which she has suffered. She is also appealing against that part of the trial judge's order whereby he imposed on her liability to pay one third of the taxed costs of the third and fourth respondents, her claim against them having been dismissed.

The facts of the case which need only be briefly referred to are: On November 1, 1971, the appellant, then a school girl aged 16, was a passenger for reward in a bus owned by the third defendant which was being driven along

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Melville Street by the fourth defendant, his servant, when it came into collision with another bus owned by the first respondent and driven by his servant, the second respondent. As a result of the collision, the plaintiff/appellant suffered an injury to her right foot which necessitated excision of the tendons of three toes and an operation for plastic surgery. the trial judge came to the conclusion after an exhaustive examination of the facts that the appellant's injury was caused solely by the negligence of the second respondent, the servant of the first respondent, and he accordingly gave judgment against these two parties, for $2569.50 with costs. Of this amount, $1200 represented general damages and the remainder, special damages.

Neither the judge's finding as to liability nor the quantum of the award has been challenged by either the first or second respondents. The appellant, however, has attacked the award of general damages on the ground that the trial judge acted on wrong principles in the assessment thereof, with the result that the amont which he gave was so very small as to make it an entirely erroneous estimate of the compensation to which she was entitled.

In describing how she received her injuries the appellant said that while on the bus she felt a sudden impact and was thrown forward. She then noticed that her right foot was bleeding on the instep. She was taken to the general hospital where she remained for ten days until the 11th of November when her father took her to a clinic at Richmond Hill called Salus Clinic run by Dr. Friday. Dr. Friday examined her and gave his opinion that "a splinter of wood had pierced the foot between the second and third toes from the sole, from underneath and made a track of about three inches through the tissue". In his report he stated that as a result a deep absess had formed and he "had to lay open the track of the foreign body and debrided sloughing tendons and subcutaneous tissue."

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She went at Dr. Friday's clinic on November 11, on the 12th she had an operation when the surgeon excised the tendons of three toes which was where the absess was located. She was allowed to go home and remained an out patient from November 12 to December 8. She was re-admitted on December 9 and remained there until December 18 during which period a second operation was performed and a skin graft was done to the raw area, i.e. the instep of the right foot. She left the clinic on December 18 and remained as an out patient till January 15 going every other day for treatment. She could not return to school until February. So she spent a period of 20 days as a patient in the hospital and at Dr. Friday's clinic, and was an out patient at the clinic for 54 days.

Dr. Friday, in his report said that the wound would lead to severe scarring of the skin unless a graft was applied, and that was done, but the presence of a scar on that area of the foot would be uncomfortable with ordinary footwear. The excision of the tendons of the three toes meant that she lost the ability to lift these toes. There would also be permanent disability in that she would have a permanent swelling of the injured foot, the scarring would be permanent, and she would not be able to extend the second and third toes. The swelling of the foot, he said, was due to foot strain because of the loss of tendons. The fact that there was a loss of tendons imposed additional strain on the remaining tendons, "and what will probably happen is that her activity will accomodate to suit the strength of the foot." The girl herself said that when she returned to school and started playing rounders she found that she was not active as she was before, that her ballance was affected. It is quite clear that she will suffer permanent disability in the sense that any acitvity which involves running, jumping or skipping will be modified. Any form of work which requires prolonged standing will be denied her. Her

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counsel argued here that the judge erred in failing to give proper weight "to the nature and gravity to the resulting physical disability." This is the second of the considerations which Wooding C.J. laid down in Comillac v. St. Louis 7 W.I.R. 491 at 492 which a judge should bear in mind in assessing damages, and it is clear from the judgment that the trial judge did not take this consideration into account. He further contended that when Dr. Friday said that "her activity will accomodate to suit the strength of the foot" the trial judge misunderstood what the surgeon meant to convey, and used this statement as a means, as he submitted, of mitigating the damages. What the surgeon meant to convey was that she would have to adjust her activities to suit the strength of her foot which had been weakened by the loss of tendons. I think in my opinion that that is an entirely proper submission.

In the light of these injuries, was the sum of $1200 an adequate award in the circumstances? In my opinion, it was not. Counsel had the usual difficulty which most counsel have in these areas in finding cases in which the facts bear a sufficiently reasonable measure of similarity to the instant case to make a comparison between the awards in those cases profitable, but I was able to find a case which may probably help somewhat. It is the case of Brown v. Redpath Brown & Co., 1969 Court of Appeal No. 3 heard on January 14, 1969, and noted in the 10th cumulative supplement to the 3rd edition of Kemp and Kemp, The Quantum of Dmamges, Volume 1, Chapter 39 which deals with injuries to the foot. The facts of this case were : The plaintiff, a man aged 40 who was employed as a steel welder-erector sustained fractures of four toes, but one of these was not of any importance. He suffered a great deal of pain and discomfort and would always have frequent aching and stiffness of the foot. He was fond of dancing and found that since the injury, he got tired and had to sit down after a couple of dances. He was able to continue

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his pre-accident job but he had to use a different method to get about than he had done before the accident, and after about six hours' work his foot began to ache. Donaldson J. awarded him £300 general damages and the Court of Appeal, holding that the award was far too low increased this sum to £750.

I am very clearly of the opinion that the award in this case is wholly inadequate. Everyone knows that the value of money has altered quite materially within the last three years, prices of goods and services have increased, and judges must keep "pace with the times", (as Lord Denning, M.R., said in Senior v. Barker and Allen Ltd., (1965) 1 A.E.R. 818 at 819) in quantifying damages. Bearing these facts in mind I would increase the award of general damages to $5,760.

With regard to the trial judge's order as to costs, the plaintiff/appellant alleged that he "erred in the exercise of his judicial discretion when he ordered the plaintiff to pay a proportion of the costs of the successful defendants as in all the circumstances there was no material on which to exercise a discretion to deprive the plaintiff of a portion of her costs incurred by bringing the successful defendants before the Court". In giving his reasons for making his order that the plaintiff/appellant should pay a third of the taxed costs of the successful respondents, the trial judge said at page 44 of this record as follows:

> "The evidence led in support of the plaintiff's claim revealed - quite unequivocally, in my view - that the plaintiff was in a position to know when the writ was issued that there was no blame being attributed to Dudley Duncan; there was no adverse criticism by the plaintiff or any witness called on behalf of the plaintiff, of the manner in which Dudley Duncan drove Labour Reward. It is also abundantly clear that Dudley Duncan was saying that the injury was caused by the

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> negligent driving of Rauldon Phillip, and Rauldon Phillip was alleging that it was due to negligence by Dudley Duncan in his driving. So then each defendant driver was blaming the other. I have borne in mind these facts and I am satisfied that the costs of the successful defendants ought to be shared by the plaintiff and by the unsuccessful defendants in the proportion of one-third and two-thirds respectively."

There is absolutely nothing on the record to support the judge's conclusion that the claim revealed that the plaintiff was in a position to know when she issued her writ, that there was no blame being attributed to the fourth respondent, Dudley Duncan. No correspondence was produced which was written before issue of the writ, which in any way indicated that the first and second defendants were admitting liability and saying that they were to blame to the exclusion of the third and fourth respondent. In these circumstances it is difficult to understand on what facts the trial judge based his statement that the plaintiff was in a position to know when the writ was issued that no blame was being attached to the fourth respondent. All that the plaintiff/appellant knew when she issued her writ was that she had been injured in a collision between two vehicles. Her position was that she could not know exactly whether her injury arose from the joint act of the drivers of the two vehicles concerned or the sole act of one of them, so she was not able to say specifically who was negligent and she very probably, in my opinion, joined both drivers and their employers. The question is, whether in the circumstances, this was a reasonable thing to do. The appellant alleged in her writ that her injury arose from the joint negligence of the second and fourth respondents, or alternatibely from the sole negligence of the fourth respondent.

The first and second respondents in their defence

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stated that the injury was caused wholly by the negligence of the fourth defendant, the servant or agent of the third defendant, and the third and fourth respondents in their joint defence in turn alleged that the accident was caused wholly by the negligence of the second defendant.

In circumstances such as existed in the present case, the Court of Appeal in England, in the case of Besterman v. British Motor Cab Company Ltd. (1914) 3 K.B. 181, laid down the principle that the power to hold an unsuccessful defendant liable for a successful defendant's costs, and so to make a "Bullock" order, is a question in all cases whether the Court considers it was a reasonable course for the plaintiff to join both the defendants in the action by reason of the doubtfulness of the facts.

Lord Justice Vaughn Williams, in this connection says at page 186 as follows:

> "There had been a collision, and it took place under such circumstances that the injured person would, naturally, not have full information as to whose fault it was, but it took place under such circumstances that it might have well been the fault of one or other or of both of these people. Those being the circumstances of the case, it turns out after the trial that there is only one wrong doer, but that wrong doer was sued and successfully sued. Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong doer to join the other defendant in order that the matter might be thoroughly treshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add as part of the costs in bringing this reasbnable action in which he is reasonably joined this other person the costs of that other person who is found not to be at fault. Of course, the fact that there were two people who upon the face of the transaction might, either of them, have been guilty is what made it reasonable in the plaintiff, when he brought this action, to join both of these defendants, and,

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as it was part of the reasonable course of the action that he properly brought his action against a man who, as it turned out, was a wrong defendant, I agree that, under the circumstances, he ought to get the reasonable costs in that action in which both defendants were reasonably joined, although only one turned out to be the real defendant. I would wish in most emphatic terms to protest against this idea of the right to ask the question, 'are you going to blame your co-defendant?' It cannot be done. The proper way is - do not join any defendant unreasonably; if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who have succeeded in defending himself, should be borne by the man who is to blame. There is no rule in the matter; each case must turn upon its own circumstances and if it is said to me, 'This is a discretion exercised by the judge in chambers and we must not interfere with his discretion," I do not agree at all. It turns on the facts of each case; and, in my judgment, if the facts of the case do not shew any reasonable ground for suing both, then, even though the rule had been cited to him in chambers, and the learned judge made the order that has been made in this case, adding those costs in this way, it seems to me that, without interfering with his discretion at all, in the facts of the case, I should have to overrule that order. In this particular case we really have pretty ample evidence from both defendants that it was reasonable to join them both because each blame the other. I do not say that they gave notice of their blaming; but in fact each, when the trial came off tried to put the blame on the other.

Now, under these circumstances, I think it was a reasonable order, and I do not base this judgment on the ground of any rule referring to the costs."

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In my view, this passage is apt to describe the situation in the instant case, and I adopt it in its entirety. There was abundant justification in my opinion for the joinder of the third and fourth respondents as defendants to the action, and in the circumstances, the trial judge should have made an order requiring their costs to be paid by the first and second respondents.

I would accordingly allow the appeal and vary the order of the trial judge, (by substituting the sum of $7129.50 for the sum of $2569.50 therein and (b) by deleting therefrom the words "as to one-third thereof by the plaintiff and as to the remaining two thirds thereof". The appellant will have the taxed costs of this appeal.

I ought to add one further point and that is this. Under order 56 rule 12 of the Rules of the Supreme Court, the trial judge should have made an order directing that the money recovered on behalf of the appellant be paid into court as she was an infant and a person under disability. This Court now orders that the damages be paid into the High Court to be dealt with in accordance with directions given by that Court.

P. Cecil Lewis
ACTING CHIEF JUSTICE

ST. BERNARD, J.A.

I agree that the appeal should be allowed on both grounds, and I also agree with the order proposed by the Learned President.

E.L. St. Bernard
JUSTICE OF APPEAL

LOUISY, J.A. (Ag.)

I agree.

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JUSTICE OF APPEAL