

*Judgment Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L. S282/93

BETWEEN	MICHAEL SIMPSON	PLAINTIFF
A N D	IVANHOE BAKER	DEFENDANT

Mr. Barry Frankson for the plaintiff  
instructed by Gaynair and Fraser.

Mr. Christopher Dunkley for the defendant  
instructed by Wright, Dunkley & Co.

HEARD: November 30, December 2, 1998 and  
17th February, 2000

JUDGMENT

Reckord, J.

This is an action for negligence. The writ is endorsed  
as follows:

"The plaintiff's claim is against the defendant to recover damages for negligence for that on or about the 4th day of April, 1993, the plaintiff was lawfully riding his motor cycle along the main road from Toll Gate to Porus in the parish of Clarendon when a motor vehicle registered PP3357 owned and/or driven by the defendant came violently into collision with the plaintiff as a consequence whereof the plaintiff sustained serious personal injuries and suffered loss and damages."

Before the trial began counsel for the plaintiff applied to amend the Statement of Claim in terms of the Amended Statement filed. The effect of which was to enlarge the particulars of negligence, particulars of special damages to include loss of earnings as also to amend paragraph three of the statement to read 'pedal' cycle instead of 'motor' cycle. The defence raised no objections and the application was granted as prayed.

Accompanying his defence the defendant filed a counter-claim for negligence against the plaintiff. By consent the medical report of Dr. Appiah of Mandeville Hospital was admitted in evidence.

Mr. Michael Simpson, is a 27 year old mason and carpenter living in Toll Gate, Clarendon. On Sunday, the 4th of April, 1993, he was riding his cycle towards Porus in Manchester about mid-day. On reaching Scotts Pass approaching a corner, he saw the defendant's car overtaking two cars around the corner. He was riding on the left hand side of the road and tried to turn further left into the bank but the defendant's car hit him off the cycle. He landed on the windscreen of the car and fell off on the left bank hitting his head on a stone. He was unconscious for a short while.

On recovering consciousness he cried out for help. A young lady tried to assist him up, but he realized that his right foot was broken - He saw the defendant's car parked on its correct side some 20 - 25 feet away. Persons there asked defendant if he not taking him to the hospital but defendant

said he was "coming from a funeral and was on haste." He was placed in the defendant's car who took him to the Mandeville Hospital where he remained for two months and three weeks. He was on his back, the broken foot was in the air with weights attached. He left the hospital using a crutch and it took about one year to walk properly.

He now walks with a limp, one foot being shorter than the other. His knee was also fractured - it hurts when he works hard. A hole had to be drilled into his foot to hang the weight— It was an-above the knee fracture.

At the time of the accident the plaintiff worked with his step-father Felix Mitchell earning \$500.00 per day. He was not able to work for one year and six months as a result of his injuries.

Mr. Baker the defendant, was charged by the police for careless and reckless driving and the case was tried in the Porus and Mandeville Resident Magistrate Court, but he did not know what was the outcome of the trial.

Under cross-examination, the plaintiff said when he first saw the defendant's car it had overtaken the first car and beside the second one. He denied he was bobbing and weaving - He never swung to other side of the road in the path of the defendant's vehicle. He never had time to jump off the cycle. He felt lots of pain; could not lift heavy weights. He returned to work with his step-father as carpenter and mason. He got financial assistance from his father in the United States of

America and his step-father. He never tried to overtake car in front of him. There was no orange stall where he was hit.

On re-examination the plaintiff said he was riding slowly - Distance from Toll Gate to Porus is about nine miles.

This was the case for the plaintiff.

The defendant was driving from Mandeville going home in Kingston on Easter Sunday the 4th of April, 1993, between 2:45 p.m. - 3:00 p.m. Approaching the district of Scott Pass, he saw a car coming towards him. This pulled up to stop at an orange stall. A bicycle rider swung from behind the car into his right front fender. He was on the left side of the road and stopped immediately. The plaintiff fell on the bonnet and into the windscreen and "pitched off and dropped on the right hand side of his right front fender."

The driver of another car assisted him in putting the plaintiff in his car and he took him to the Mandeville Hospital stopping at Porus Police Station to report the accident.

At no time was he overtaking a motor vehicle - He was driving about 35 miles per hour. He stopped within 12 feet of the point of impact. He claims he was charged with careless driving. Mr. Alfred Offendel gave evidence on his behalf. He was the motorist behind him at the time of the accident.

When cross-examined he said he was convicted for careless driving and fined \$500.00. He did not see the cyclist before Mr. Offendel's car stopped. "Just as I about to pass

Offendel's car I saw the cyclist just flash and came right in my bonnet. Just as I about to pass Offendel who had stopped, I saw the cyclist," I was passing Offendel's car when I saw the cyclist for the first time. Cyclist swung out from behind the car. It happened so fast that all I know is that I saw him on the bonnet. I tried to swing to left to avoid, but could not swing no more or I would crash in the stone on the bank. I applied my brakes when I saw cyclist coming on the bonnet."

There was a slight bend in the road where accident happened. Nothing blocked his view of Offendel's car. He could not say if the cyclist was higher than the car. He denied he was coming from funeral. He never noticed any stone near where the plaintiff fell. When he first observed him he was conscious. He denied overtaking two cars on the bend. In answer to the Court the defendant said the plaintiff fell on ground on the right side on his side of the road - near to the embankment.

In re-examination, the defendant said that Offendel's car blocked his view - that is why he never saw the cyclist before. He was on the left hand side of Offendel's car coming up." He tried to find Offendel to give evidence on his behalf but without success. The road surface was fairly good; asphalted; slight downgrade for the defendant and slightly uphill up for the plaintiff.

This was end of case for the defendant.

SUBMISSIONS

Mr. Frankson asked the Court to accept the plaintiff's version. From the injuries he sustained it was consistent with his evidence. Defendant's evidence in chief in conflict with evidence under cross-examination. On his own evidence he was not keeping a proper look out. The defendant had failed to establish any negligence on the part of the plaintiff. It was unlikely that the plaintiff was travelling fast up a grade. For special damages counsel claimed \$195,000.00 for 78 weeks @ \$2,500.00 per week.

On the question of general damages the plaintiff had suffered from a fracture of the femur - He was now walking with a limp - one leg being shorter than the other. He referred to the case of Floyd Miller vs. Fitzroy Hamilton suit C.L. M349/87 in Harrison's Book on Personal Injuries: The plaintiff had suffered fracture to the left femur - he used crutches for six weeks - and partially incapacitated for three months. On 20th June, 1990, he was awarded \$50,000.00 for pain and suffering. At time of trial this sum was equivalent to \$421,618.00.

In C.L. M396/84 - Wade McKoy vs. Hilda Beckford - plaintiff suffered fracture of the left femur, hospitalized for 25 days - discharged on crutches, patient for five months - one leg shorter than the other; permanent partial disability 14% of the whole man. On the 4/10/90 he was awarded \$60,000.00 for pain and suffering and loss of amenities and \$10,000.00 for handicap on the labour market. Award for pain

and suffering would be equivalent to \$455,184.00. He asked for an award of \$500,000.00.

Mr. Dunkley for the defendant tendered written submissions on the question of liability. The injuries suffered by the plaintiff were more consistent with the evidence of the defendant. The plaintiff has amended his pleadings at the opening of the trial to bring it into the realms of acceptance. Notwithstanding the outcome of the criminal trial, the Court is asked to make its own findings and consequently its own judgment which must place liability, if not completely, on the plaintiff.

On the question of damages counsel for the defendant made oral submissions.

He referred to SCCA NO 10/90 - Harris v Walker.

He suggested award up to \$300,000.

The claim for loss of earnings was excessive - for 1½ years. Plaintiff has duty to mitigate his loss - he suggested award for eight months at the rate of the minimum wage.

#### FINDINGS

The plaintiff's case is that the defendant overtook two cars on a corner and hit him off his bicycle as he came from the opposite direction.

In his evidence in chief the defendant denied overtaking any car. It was the plaintiff who had swung out from behind a car which had stopped at an orange stall, and rode into his vehicle. He had seen the car coming towards him and it pulled up to stop. However, in cross-examination, defendant admitted

that he did not see the cyclist before the car stopped and just as he about to pass Offendel's car he saw the cyclist just flash and came right into his bonnet. Just as he about to pass Offendel who had stopped, he saw cyclist. He was passing Offendel's car when he saw the cyclist for the first time. It happened so fast that all he knew is that he saw him on the bonnet. In further cross-examination he said there was a slight bend in the road where the accident happened and that Offendel's vehicle was about one chain from him when he first saw it. Nothing blocked his view from seeing Offendel's car before. He changed this and said Offendel's car blocked his view of the cyclist.

From the foregoing answers that the defendnat gave in cross-examination it is clear as crystal that he was not keeping a proper lookout and was driving without due care and attention or he could not have failed to see the cyclist in broad day light. On his own evidence the cyclist was going up a slight grade so it is unlikely that he was travelling fast.

In the criminal trial that followed arising out of this same accident, the defendant on his own evidence admitted that he was convicted and fined \$500.00. It is apparent he was charged for dangerous and careless driving and convicted on the lesser charge. The standard of proof being beyond reasonable doubt, whereas in this action the standard is on a balance of probabilities.



On the basis of the evidence before me I accept the plaintiff as a witness of truth and find for the plaintiff. The defence is rejected as being unreliable.

On the question of damages, the claim for \$195,000.00 for loss of earnings has been challenged. The plaintiff has not tendered any evidence in support of his claim for \$500.00 per day. He worked with his step-father - Surely, he could have been called in support. He was not. The claim has "just been thrown at the head of the Court." Heeding the call made by the Court of Appeal, this claim is rejected. However, he was away from work for sometime. He said he was at home for about one year and later said one year and six months. I will assess this claim for one year at the rate of the national minimum wage at the time of accident when he was only twenty two years old - 52 weeks @ \$300.00 per week = \$15,600.00.

Other items of claim for special damages were agreed as follows:

Medication -----	\$1,000.00
Crutch cost -----	220.00
Bicycle lost -----	3,000.00
Transportation - Mandeville to home	500.00
Home to Court	200.00
Attendance on Attorney	150.00
Pants \$500, Shirt \$500 & shoes \$500 destroyed	<u>1,500.00</u>
	<u>\$6,570.00</u>

For pain and suffering, the medical report indicates that the plaintiff's right lower limb was deformed and shorter than the left. Up to the time of trial he still walked with a limp. Based on awards made in similar cases I assess damages for pain and suffering at \$500,000.00.

Judgment is accordingly entered for the plaintiff on the claim and counter-claim. Damages assessed as follows:

Special Damages:-

\$15,600.00 plus \$6,570.00 = \$22,170.00 with interest @ 3% from 11/4/93 to 4/11/98.

General Damages:-

Pain & suffering - \$500,000.00 with interest @ 3% from date of service of writ to 4/11/98.

Costs to the plaintiff to be agreed or taxed.