

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M. 097/1988

BETWEEN	REGINALD MANNING	PLAINTIFF
A N D	CECIL DESOUZA	DEFENDANT
CLAIM IN NEGLIGENCE		

Ainsworth Campbell and Miss Janet Nesworthy for the Plaintiff.

Norman Davis instructed by Donovan Jackson of Myers, Fletcher and Gordon for the Defendant.

Heard on January 13, 14, and June 4, 1992.

JUDGMENT

BINGHAM, J.

On October 9, 1987 the plaintiff was riding his Suzuki 550c.c. Motor Cycle along the main road from Vernamfield to Gravel Hill in Clarendon proceeding on his way home. After he had negotiated a corner and on a straight estimated by him to be about four chains, there was a collision between the motor cycle and a tractor owned and driven by the defendant.

As a result of the collision the plaintiff suffered serious injuries which resulted in him being hospitalised at the Kingston Public Hospital for three months. Following upon his discharge he was incapacitated for a further period of four months during which time he was unable to pursue his vocation as a Caretaker in Animal Husbandry with the 4H Department. The plaintiff now walks with a limp resulting from a residual disability to the left foot which suffered fractures to the mid-shaft of the left femur as well as to the left tibia and fibula.

The medical evidence of Dr. Young was that the plaintiff suffered the following injuries:-

- (1) A mid-shaft fracture of the left femur.
- (2) A fracture of the tibia and fibula of the left leg.
- (3) A swelling of the right lower limb.

Treatment

The left leg was treated with below knee plaster which extended to above knee when the traction was discontinued. The right lower limb had to be aspirated by a needle and a syringe being placed into the area of the swelling and blood drawn from it. This had to be repeated more than once.

Although the fractures have now healed there is a deformity of the main bone of the left leg. There is limitation of the flexion of the left knee. The plaintiff is not now able to flex it to the same extent as the right knee due to the injury incurred. This was caused by the length of time that his left foot was placed in traction. The one inch shortening to the left foot is due to an overlap in healing at the fracture site.

As a result of these injuries the plaintiff now suffers from a permanent partial disability of the range of 15% to 20% of the left lower limb.

It was resulting from this collision and as a consequence of these injuries that on 20th March, 1988 the plaintiff launched this claim in negligence against the defendant to recover damages.

The defendant in his defence has denied the allegations as set out in the statement of claim. He pleaded negligence on the plaintiff's part or in the alternative contributory negligence.

In this regard the material particulars in the Defence sought at paragraph 3 to aver that:-

"The plaintiff was negligent in that he:-

- (1) Attempted to negotiate a corner on his incorrect side of the road way.
- (v) Riding at an excessive speed in the circumstances."

The issues as identified from the pleadings were:-

- (1) Liability
- (2) Assuming the proof of negligence or contributory negligence on the defendant's part, the question of damages.

1. The Plaintiff's Case

This came mainly from the plaintiff and his two witnesses:- Blossom Manning

and Euton Barclay, the former being his wife and the latter a longtime friend and co-worker of Mrs. Manning.

In his account the plaintiff told of riding his motor cycle along the Vernamfield main road around 5:30p.m. on the day in question. This road he described as being narrow, being about 14 feet wide, asphalted and winding with several corners. It had rained that afternoon and the road was wet. While travelling up a gradient at a speed of about 15m.p.h. and having negotiated a left hand corner he saw the defendant, whom he knew before on his tractor approaching from the opposite direction. The tractor had just then negotiated a corner and was now approaching on a straight estimated to be about 4 chains between the two corners. He described the tractor as zig-zagging from one side of the road to the other as it came down-grade. This manoeuvre caused him to bring his motor cycle to a stop close to the left bank with the bike positioned to move off as soon as the tractor had passed. The tractor, however, continued this manoeuvre and came over to the opposite side of the road where he was positioned and collided into the motor cycle. The force of this impact caused him to fall off the motor cycle. The tractor then ran over the motor cycle. It then mounted the bank before coming to rest. The plaintiff suffered the injuries previously described. His motor cycle was extensively damaged.

The two witnesses called in support of the plaintiff's account did not advance his case to any material extent. His wife who sought from her account to place herself as a passenger on the tractor and whose testimony was no doubt intended to support the plaintiff's version as to the manner in which the tractor was being driven, and how the collision occurred, was unable up to the time of the impact to recognise the plaintiff as he approached on his motor cycle. The plaintiff for his part, equally failed to observe his wife who had described herself as standing upon the side of the tractor, a position which would no doubt have made her presence clearly visible to him as he journeyed up the straight after negotiating the corner.

The other witness Euton Barclay who testified to walking with Mrs. Manning by way of a short-cut to the main road at Gravel Hill when he saw Mrs. Manning

run off towards the road in an effort to obtain a ride on the defendant's tractor which was then approaching from the Gravel Hill square. He then saw the tractor come to a stop and Mrs. Manning get on to it before it drove off in the direction of Vernamfield. He observed nothing unusual in the manner in which the tractor was being driven that afternoon. Nor was he able to assist the court as to the manner in which the collision occurred. He was also unable to assist the court as to whether Mrs. Manning was on the tractor when the collision occurred.

From their respective accounts one is lead to doubt the presence of Mrs. Manning on the tractor on the day in question. I would conclude, however, that in all probability both these persons were in the area that afternoon and upon hearing the impact they went to the scene of the accident after it had taken place.

(2) The defendant's case

He related an account of driving his tractor on his way home about 5p.m. on afternoon in question. It had rained earlier that day but lightly. He had driven through the square at Gravel Hill and was proceeding towards Vernamfield when on approaching a corner he was called to by a woman who turned out to be Mrs. Manning. She requested a ride on the tractor and he refused her request stating his reason. After driving off and as he negotiated a corner, when suddenly and without any warning the plaintiff came around a corner on his motor cycle on the incorrect side of the road at a fast rate of speed and collided into the right front of the tractor. The force of the impact caused the plaintiff to fall off the motor cycle over unto the left side of the road as one proceeds towards Vernamfield. It also resulted in the tractor getting out of control and pushing the motor cycle across the road with both vehicles ending up over on the right side of the road as one proceeds towards Vernamfield. He then saw the injured plaintiff draw himself, balancing on both hands over to the other side of the road where the tractor and the motor cycle had ended up. Shortly after the collision an Alcoa van came on the scene and he assisted in placing the plaintiff in the van which then drove away. The Police later came on the scene and investigated the accident.

The defendant sought to explain the position of the motor cycle in negotiating the corner as partly due to a protruding tree limb at the corner

around which the motor cycle has come, which limb extended unto and occupied about a half of the left side of the road as one proceeds towards Gravel Hill. This situation appears somewhat strange in the light of the veiled suggestion put to the plaintiff that there were some casha trees on the plaintiff's side of the road which extended into the road. When the defendant gave evidence, however, these branches now extended to halfway into the roadway.

(3) Findings of fact and Conclusions

Although both the plaintiff and the defendant contend that each was proceeding at a fast rate of speed, I find this to be exaggerated having regard to the nature of the injuries suffered by the plaintiff and the damages to the motor cycle. Had both or even one of these vehicles been travelling at an excessive speed I would have expected the consequences to have been much worse for the plaintiff. I find that the collision was in all probability caused by the defendant's tractor getting out of control as he negotiated the corner on what was a wet and slippery road while travelling down the gradient. This collision in all probability was brought about by the defendant's application of brakes in a desperate attempt to bring the tractor under control, an act which caused the tractor to swerve across the road and into the motor cycle which was then as the plaintiff stated stationary and positioned in a manner waiting on the tractor to pass.

What the matter resolves itself down to is whether a tribunal of fact taking into consideration all the factual circumstances as related by the parties could conceive of a situation in which given the plaintiff's condition as borne out by the serious injuries he received and the attendant shock which he experienced which would have followed consequent upon the impact; and that while experiencing immense pain as a result of his injuries he could have been possessed of the state of mind, and in the very presence of the defendant and other onlookers, have calmly and calculatingly hauled himself in the manner as related by the defendant across the road from where he had fallen to the opposite side of the road where his wrecked motor cycle and the tractor had come to rest. I found this evidence by the defendant to be not only inconceivable but highly

improbable and testimony which ought to be rejected.

While I am not unmindful of the forceful submissions of Mr. Davis by which he contends renders the defendant's account more probable I hold these submissions to be untenable. In so far as his submissions sought to highlight the medical evidence of Dr. Young as supportive of the manner in which the defendant described the collision as occurring, when the doctor's evidence is weighed and assessed at its highest it is equivocal supporting as it does both versions as to how the injuries to the plaintiff could have been caused.

In the final analysis therefore one is left with two contrasting accounts of which I am minded to accept the plaintiff's as being the more probable. On the basis of the plaintiff's account no question of contributory negligence could arise. Judgment is therefore entered for the plaintiff on the claim.

Damages

I now turn to consider the question of damages. This falls to be considered under two broad heads of 1. Special damages, 2. General damages.

The latter head which is at large for my determination revolves around the area of pain and suffering and loss of amenities. The former has to be specifically alleged and strictly proven.

Special Damages

Most of the items claimed under this head were agreed on during the course of the plaintiff's evidence. These items, that is the claim for travel costs, cost of crutches, loss of shoes, loss of a pair of pants and loss of a shirt which were valued at \$825.00 were all agreed. The two remaining items as set out in the particulars of special damages and which relate to loss of earnings and the cost of repairs to the motor cycle were not agreed.

The plaintiff's evidence in proof of the ~~sum~~ claimed in this regard once it emerged, however, was not challenged in cross examination.

Loss of Earnings

In the particulars of special damages under this head the plaintiff claimed a total sum of \$6,500, being twenty six weeks calculated at \$500 weekly. This claim was in the nature of a continuing one. As his evidence unfolded, however,

he deponed to being out of work for nine months (39 weeks). His wife's testimony was to the effect that he was laid up for about seven months (31 weeks). Exhibit 1 which was a letter from his employers confirmed that he was away from work for the latter period and this supports the account as given by his wife. The total sum awarded is therefore in keeping with her account and is \$7,750.

The repairs to the motor cycle

The sum claimed in the particulars was \$7,000. The unchallenged evidence of the plaintiff which I accept, proved that the total cost of repairs were \$14,350. In this regard the particulars were amended upon an application by learned counsel for the plaintiff to conform with the plaintiff's testimony. The amended sum was the amount awarded.

The total sum awarded for special damages is therefore \$22,925.

General Damages

From the medical evidence resulting from the injuries he received the plaintiff was laid up in hospital for some three months and after his discharge he was incapacitated for a further period of four months before he was able to resume work. Having regard to the serious nature of the injury to his left leg which was fractured in two places Dr. Young formed the opinion that the injuries were very serious. He further opined that the plaintiff who now has a one inch shortening of the left foot has experienced a permanent partial disability of 15% to 20% of the left leg. This for someone who works as a farm manager for the 4H Club and is in charge of cattle and who as a young man 33 years of age, he could be considered as very fortunate in the circumstances to be able to retain his job. One cannot say, however, what will be his situation further on in life. This uncertainty calls for some measure of compensation by way of an award for a potential loss on the labour market.

It cannot be said that the plaintiff in his present condition can now perform with the same efficiency as he was able to with two good lower limbs. I hold that the sum of \$15,000 suggested by counsel for the plaintiff is a reasonable amount to be awarded under this head.

As to the area for pain and suffering and loss of amenities I have examined

the various authorities cited by both counsels. I am minded to follow the award made in S.C.C.A. 45/87 Kelly v Michael Bennett unreported Judgment of the Court of Appeal of Jamaica, delivered on 2.3.88. When this award of \$75,000 is revised to one in the money of the day, a reasonable sum under this head would convert to an amount of \$250,000 and this is the sum awarded.

In fine judgment is entered for the plaintiff in the sum of Two Hundred and Eighty Seven Thousand, Nine Hundred and Twenty Five Dollars (\$287,925.00) being:-

1. Special damages	\$ 22,925.00
2. General damages for pain and suffering and loss of amenities and loss in the labour market.	<u>\$265,000.00</u>
Costs to be agreed or taxed	\$287,925.00

Interest awarded on special damages at 3% as from 9.10.87 to date of judgement and on general damages at 3% as from date of service 29.3.88 to date of judgment.