

In the late afternoon of 23rd November, 1971, he was sent out by his father Ezekiel Bailey, and he left his home at Frontier riding his father's bicycle along a track leading onto the main road; before reaching the main road he met another boy-Rude Boy-who also had a bicycle, and he loaned him his bicycle pump; after Rude Boy had pumped up his bicycle tyre they both rode out onto the main road and in the direction of Port Maria. As the infant plaintiff came out onto the main road he saw the truck coming towards him and about 8 chains away. The two boys rode along the road and the infant plaintiff was overtaken by the other who then remained in front.

At the time when the collision occurred the infant plaintiff testified that he was riding in a track on the soft shoulder of the left side of the main road leading to Port Maria, this track or path was about twelve inches wide and was on the soft shoulder of the road, with the asphalt on one side and the banking on the other side - the banking rising gradually to a height of about 20 inches. While riding along this track he felt the truck hit the back of the bicycle and he fell under the left side of the truck, the left front wheel of which ran over his left leg. He was taken to the Port Maria Hospital where he was admitted and his foot was subsequently amputated below the knee. After some months in the hospital he was seen by Dr. Golding at the Mona Rehabilitation Centre and later fitted with an artificial leg which has to be replaced every three to four years, and the cost of which increases every year.

The infant plaintiff further related that as a result of his injury he was now unable to run, to stand on his leg too long, to climb trees or assist his father with the picking of coconuts or to do any hard work such as going to the bush or fetching water; he can only assist around the house with such chores as sweeping the yard, boiling the food for the pigs.

He is not supported in this by Dr. Golding who stated that as the plaintiff get used to his artificial leg he would be able to climb steps or a ladder and help in such activities as weeding the field, in addition to helping around the house generally.

The infant plaintiff was cross-examined at length and extracts of his evidence at an earlier trial were put to him much of which he denied saying; many of these questions related to what he did while under the truck immediately after his foot was crushed and it is not surprising that answers are now different, partly because the earlier trial took place about six years ago, and partly because it is unlikely that anyone in those circumstances would eight years later have a clear recollection of what happened because of shock and because he was then a boy of 12 years; I note, however, that at the previous trial the plaintiff did not say he was unconscious as he has stated at this trial, but rather gave an account of what happened after the truck came to a stop. It seems to me that having regard to the state of shock in which he must been at the time, taken with his age and the passage of nearly eight years since the incident, it is not surprising that he does not now recall and possibly believes that the explanation of his inability to recall is that he was then unconscious.

Although there were discrepancies between his evidence at this trial and at the earlier trial I do not consider that these differences affect materially the credit of this witness as the differences were not of a serious nature or could be explained as I have indicated above.

The infant plaintiff's father, Ezekiel Bailey, also gave evidence and supported generally the evidence of his son-but he was not an eye-witness and so was unable to assist on the question of liability.

Professor Golding gave expert testimony as to his examination,

his findings and the plaintiff's condition to which I will refer later.

Finally, the plaintiffs called one Albert Fisher, who testified that he was an eye-witness to the incident and supported the infant plaintiff as to the manner in which he was injured. This witness did not give evidence at the previous trial, explaining that he left St. Mary and went to St. Ann in 1972 and did not return until 1976.

This witness related that as the truck came up to the infant plaintiff riding along the soft shoulder the truck made a little turn to the left (as drivers sometimes do when they are about to turn right) and that was when the truck hit the bicycle and both the bicycle and its rider were thrown to the right into the path of the truck; as the collision took place about $\frac{1}{2}$ chain from St. Mary Street, and as this witness had seen the truck delivering sand up to that same morning at a training centre being built on St. Mary Street he thought that the truck had made the manoeuvre with a view to turning into St. Mary Street.

This witness was not a very impressive witness, but on the other hand, although he was cross-examined at some length, he was actually unshaken at the end of his evidence.

The defendant gave evidence and called one witness a police Corporal who visited the scene that day.

On that day, Mr. Howell related, he owned an eight ton truck with a tipper body and in the afternoon he was taking a load of sand from a sand bed in Annotto Bay to Wentworth Property at Little Bay near Port Maria; on the way he was stopped and gave a lift to a young lady. He continued on his journey driving about 2 feet from the edge of the asphalt at about 20 miles per hour, and on reaching White Road he saw 2 boys about 4 chains away romping with a bicycle on the low bank on his left side of the road; the boys were pulling a

bicycle from each other.

wards:

Seeing this Mr. Howell pulled over to the right hand side of the road and continued about 5-6 feet from the left edge of the road; he also reduced his speed to about 15 miles per hour. At this time he was about 3 chains from the boys who still continued romping; the bank on which they were was a low bank that went up in a slope from the edge of the asphalt to a height of about 16-20 inches. He continued to approach the boys and blew his horn when he was about $\frac{1}{2}$ chain from them; at this stage he was travelling about 5-6 feet from the left edge of the asphalt surface and had further reduced his speed to about 12 miles per hour; the boys were still romping.

Mr. Howell then went on; "Reaching about 9 feet from the boys one of them take away bicycle and make a quick hop to mount bicycle; the other boy push him and he fell in the path of the truck on the left hand side of the truck, I applied brakes immediately and the truck stopped; the boy and the bicycle were under the truck wheel I feel the left hand front wheel hit something; when I came out I saw the boy's left foot about a foot behind the left wheel; the boy was lying with his face on the asphalt and his head towards the left edge of the asphalt, the bicycle front wheel and front fork were under the left front wheel of the truck".

The defendant further testified that the position of his truck was not moved before the police came; nor was the bicycle moved; there was damage only to the front wheel, front fork and handle of the bicycle, the rest of it being undamaged.

Then in cross-examination he told us that the truck was between 7-8 feet wide and that it was right hand drive; that he did not apply his brakes before the accident took place -(but later said that he did apply his brakes during the accident, i.e. during the push and the fall); in relation to the distance of 9 feet from the boys he further explained:

- (1) The distance of about 9 feet was from the boys to the front of the truck
- (2) The distance of about 9 feet was from the side of the truck
- (3) "He was 9 feet in front of me when he pulled away - he was 9 feet in front, not to the side"
- (4) When he got the cycle free he was on the bank
- (5) He was hopping on to cycle when he was pushed
- (6) "First he took bicycle and run towards truck, secondly, he attempt to mount bicycle - I say that because he began to put his foot over bicycle; third thing that happen is that other boy push him; fourth thing is that he fell"
- (7) He ran onto roadway and hop mount on roadway - it was while "hop-mounting" that he was pushed".
- (8) "The plaintiff fell without any contact being made with the truck and then the truck ran over him".
- (9) The plaintiff was running towards Port Maria and towards the truck, in other words, he wasn't running straight across road but at a slant.
- (10) "I recall saying the infant plaintiff was 9 feet in front, not to the side when he pulled away bicycle-by this I mean that I had not reached him, that I was 9 feet away from him-by "him" I mean the two of them. At this point when the plaintiff pulled away the bicycle, the bicycle was then on my left edge of the road and 9 feet away from me."

I have set out in detail the above statements as it seems to me that on a vital aspect of the defendant's version of what happened we have conflicting statements as to the distance to which the 9 feet relates. At one time the defendant appears to be saying that the boys were 9 feet from

the front of the truck (i.e., if a line were drawn 9 feet ahead of the truck and parallel to the front of it, that line would meet the bank at the spot where the boys then were, which distance would be substantially more than 9 feet, since the left side of the truck was 5-6 feet from the left edge of the asphalt and the boys were on the bank beyond the edge of the asphalt); at another time the defendant appears to be saying the boys were 9 feet from him as he sat in the cab of his truck, and if we bear in mind it was a right hand drive truck, it was about 7-8 feet wide and the left side of the truck was about 5-6 feet from the left edge of the asphalt, then that would put the boys on the asphalt about 2-3 feet from the side of the truck; at still another time the defendant was saying that the distance of nine (9) feet was to be measured from the side of the truck which would put the boys on the bank about 3 feet beyond the edge of the asphalt.

Another point which merits some comment is the defendant's evidence that the nearest part of the left front wheel of the truck to the edge of the asphalt was about 6 feet - the same distance from the left rear wheel to the edge of the asphalt , in other words, the truck was perfectly straight in the road; this was supported by Corporal Spencer who told us that the truck was straight in the road and that the left front wheel was 5 feet 9 inches from the left edge of asphalt. I must confess, however that, I find this piece of evidence rather surprising as I would have thought that in the circumstances related by the defendant the reflex action of the vast majority of drivers would have been to swing hard to the right immediately before or at the same time that he applied his brakes, and that in so doing the truck would be at a slant (even a slight one) in the road when it came to a stop.

Both sides have commented on the importance of the evidence in relation to the position and condition of the bicycle

after the collision; for the plaintiff the evidence was that the whole of the bicycle was run over while the defendant and his witness stated that only the handle, front wheel and front fork were damaged. In the course of the cross-examination of the defendant it was put to him that in an affidavit sworn by him on the 29th November, 1972, and filed in this action he stated that the "Bicycle which was also pushed into the roadway was damaged by my left front wheel and ended up underneath the left side of my truck between the left front and left rear wheels;" the defendant replied that he didn't remember saying so, but that if he did it was a mistake as it was not true, I find this answer very interesting, because the affidavit was made about a year after the incident while the defendant was giving evidence nearly 8 years after the incident; I am therefore left to wonder which is more likely to be true, having regard to the lapse of time; and further, why is it that the defendant is now so anxious to deny this statement; is it because the inference to be drawn from the position of the bicycle between the left front and rear wheels is that the left front wheel would have run over it, if that^{was} its position? It should also be noted that Corporal Spencer also said that the bicycle was between the left front and rear wheels.

Before I leave the bicycle I would refer to another piece of evidence: the defendant told us that the nearest part of the bicycle to the left edge of the asphalt after the accident was about 3 feet. His witness Corporal Spencer at first in cross-examination said that no part of the bicycle was resting on the soft shoulder; then it was put to him that at the previous trial he had said that a portion of the rear wheel of the cycle would be resting on the soft shoulder and a document was shown to him after which he stated that he did recall having said so at the last trial.

What is the significance of this admission made at a time when the details were comparatively fresh or at least fresher in his mind compared with the present? The first thing is that if the handle of the bicycle was under the left front wheel, if the bicycle was between the left front and rear wheel, and if a portion of the rear wheel of the cycle was resting on the soft shoulder, then assuming that this bicycle is just an ordinary bicycle (and there is no evidence that there is anything out of the ordinary about it) the left front wheel of truck could not have been 5 feet 9 inches from the left edge of the asphalt, as Corporal Spencer states was the measurement of the distance. I am therefore beginning to wonder if Corporal Spencer is a reliable witness.

The evidence of this witness strongly supports that of the defendant, if it is credible. But there is another part of the evidence of this witness at which we must look a little more closely.

In cross examination Corporal Spencer testified that he saw bloodstains at the scene of the accident and that these bloodstains were immediately at the left hand front wheel of truck and he demonstrated with a book representing the truck and his finger touching the book to show the proximity of the bloodstains to the left front wheel; he further said that it was not true to say that the bloodstains were $1\frac{1}{2}$ feet behind the left hand front wheel of truck; then his testimony at the earlier trial was put to him and he agreed that he had then said that the bloodstains were $1\frac{1}{2}$ feet behind the left hand front wheel of the truck.

But the matter does not end there: in re-examination he was asked: "Can you remember at what stage of the investigations you saw bloodstains on the road?" and his answer was: "After the truck was removed I saw the bloodstains under the

front wheel". This seemed an amazing answer as the Corporal appears to be saying that he didn't see the bloodstains until after the truck was moved and that from the position in which he saw the bloodstains he came to the conclusion that they were under the front wheel of the truck, or alternatively, that he didn't see the bloodstains until after the truck was moved and because he didn't see them before that he came to the conclusion that they were under the front wheel of the truck. What ever his answer in re-examination may mean it does not explain his earlier evidence that the bloodstains were $1\frac{1}{2}$ feet behind the left front wheel or that the bloodstains were immediately at the left hand front wheel.

We are not dealing here with an illiterate or ignorant witness unfamiliar with the atmosphere of a courtroom but with a police Corporal who has been in the force for about 11 years.

Looking at his evidence generally I would say that his demeanour was rather unimpressive. I must say, with regret, that I do not consider this witness to be a reliable witness or a witness of truth.

Looking generally at the account given by the plaintiff it seems to be quite probable that the bicycle being ridden by the plaintiff could have been struck from behind by the truck and that this could have thrown the plaintiff and the bicycle forward and that the plaintiff could have fallen into the path of the truck and had his left foot run over by the left front wheel of the truck. But it seems to me rather improbable that if the plaintiff were pushed as described in the defendant's account that he could have fallen in such a way that only his left foot was run over by the left front wheel of the truck, it seems to me far more likely that both feet would have been crushed or that his right foot would have been nearer the wheel

and would also have been injured.

In the course of the submissions it was argued that my findings as to the condition of the bicycle after the collision was very important because, if I accept the evidence of the defendant and his witness that only the handle, front wheel and front fork were damaged, then the plaintiff's account of being struck from behind could not be true. I agree that this is so, but the defendant said here that the front wheel and front fork of bicycle were under the left front wheel of the truck and the rest of the bicycle was pointing to the left bank, while, as I have pointed out earlier, a year after the incident he stated in an affidavit that the bicycle ended up underneath the left side of the truck between the left front and left rear wheels. I note further that in cross-examination the defendant's witness Corporal Spencer said the bicycle was between the left front and left rear wheels when he saw it. If that was the position of the bicycle after the truck came to a stop, it seems to me a little difficult to resist the inference that the front wheel of the truck passed over and crushed that portion of the bicycle between the front and back wheels. Now that is what the plaintiff and his witness maintain that the whole bicycle was crushed a total wreck. The evidence for the defendant on this aspect of the case is rather unconvincing.

I note too the evidence of the defendant as to the position of the plaintiff under the truck when the defendant saw him after the collision, but I do not consider this is particularly significant as the plaintiff may well have changed his position after his foot was crushed, and before the defendant came out of the truck.

Looking at the evidence in the case as a whole I am satisfied on a balance of probabilities and I find:-

- (1) that the infant plaintiff was riding his father's bicycle along White Road in the direction of Port Maria on the soft shoulder of the left side of the road, on 23rd November, 1971,
- (2) that the bicycle was struck from behind by the defendant's truck;
- (3) that he was thrown to the ground and that the left front wheel of the truck ran over his left foot and his bicycle,
- (4) that he was taken to the Port Maria hospital where his foot was later amputated below the knee,
- (5) that the injuries to the infant plaintiff were caused by the negligent driving of the truck by the defendant.
- (6) that the defendant is liable in damages to the infant plaintiff

Having settled the question of liability, I turn now to deal with the matter of damages; and I will begin with the special damages: These were not challenged, and the following special damages are allowed:

Medical expenses	
Dr. N. W. Gardner	\$26.30
Professor Golding	30.00
Transportation	50.50
Loss of clothing	6.00
Loss of Bicycle	60.00
Extra nourishment	10.00
Prosthesis	<u>420.00</u>
	\$602.80

I turn next to the more difficult question of general damages.

In the course of his submission on the question of general damages Mr. Muirhead argued as I understood him, that substantial damages should be awarded under the head of loss of future earnings in addition to damages for loss of amenities and pain and suffering and provision for artificial legs in the future. He submitted that as the injury to the infant plaintiff occurred at the age of twelve years he would have had about fifty years of working life ahead of him and that in the circumstances the appropriate multiplier would be about 22 and his loss would be about \$20 per week, but there was no evidence in support of this alleged loss.

As against this, in the course of the evidence the infant plaintiff testified that he was learning the trade of a cabinet-maker and there was no suggestion that in this trade, given a comfortable artificial leg, he would be handicapped in earning as much as any other average cabinet-maker. It is true that there is evidence from the infant plaintiff and his father that he is not now as capable of assisting his father with the various chores to be done as he had been; but on the other hand Professor Golding expressed the view that as the years pass and he got used to the artificial leg he would be able to go up steps, climb a ladder and be generally helpful around the yard.

Mr. Muirhead made the further point that it was presently difficult for the normal young man with two sound legs to get work in the labour market and it would be even more difficult for this young man, handicapped as he is, to obtain employment. I will bear this in mind, but on the other hand no evidence was adduced of the extent, if any, to which he would suffer loss of earnings in the future; if he can find employment as a cabinet-maker it does not seem to me that he would suffer

any loss of earnings as a result of his injury, but having regard to his station in life and to the labour market as it now is, it is not unlikely that he may have to accept employment as an ordinary labour from time to time, and his injury would affect his earning capacity as such. Not only is it the case that no evidence was given of any figures on which an estimate of loss of earnings could be based, but what is more, it seems to me that before a claim for loss of future earnings can succeed there must be a reasonable expectation that the plaintiff would have earned the sums alleged to have been lost rather than a speculative possibility that he would have earned them.

Professor Golding gave evidence that the present cost of an artificial leg is one hundred and fifty dollars (\$150) but the cost of it (like so many other things) goes up every year and that it would need to be changed every three or four years. This cost of the artificial legs which he will require for the rest of his life will therefore have to be taken into account in fixing the amount of general damages.

In addition I must also consider the question of loss of amenities and pain and suffering. Again, Dr. Golding said that the infant plaintiff had suffered a below knee amputation and that provided he was wearing an artificial leg he had a permanent disability of about 40% of the function of the lower limb.

The infant plaintiff testified that prior to the loss of his leg at the age of twelve years he used to play games, he used to run and to walk long distances; he is now unable to do any of these things. While it is preferable to make an award under the separate heads of damages in these cases, it seems to me that in this case I should make a global award to cover the various heads of damages, namely loss of earnings,

costs of artificial legs, loss of amenities and pain and suffering.

Having regard to the submissions and to the cases to which reference has been made, it seems to me that I should in this case award the sum of \$25,000 for general damages.

According, there will be judgment for the plaintiff as follows:- Special damages \$602.80

General damages 25,000.00

Making a total sum of \$25,602.80

The plaintiff will in addition, be paid his costs, taxed or agreed.