

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. of 1982/F089

BETWEEN	JEROME FARRELL	PLAINTIFF
AND	GORDON TOWNSEND	FIRST DEFENDANT
AND	GORDANN LIMITED	SECOND DEFENDANT

Dennis Morrison for the Plaintiff

Carl Rattray Q.C., Andrew Rattray and Clarke Cousins for the Defendants

Heard: December 16, 17, 18, 1985

Wolfe J.

The Plaintiff claims to recover from the Defendants damages for negligence arising out of a motor vehicle accident involving a motor cycle registered No. E1659 which was being ridden by the Plaintiff and motor car registered No. FS3456 owned by the second-named Defendant and driven by the first-named Defendant. The collision occurred along the main road at Tower Isle in the parish of Saint Ann on the 9th day of January 1982.

The Plaintiff testified that on the day in question he was riding his motor cycle along the main road leading from Ocho Rios to Oracabessa and proceeding towards Ocho Rios. As he travelled along, the Plaintiff intended to turn right along the main road to get to the Villa occupied by him. Upon reaching in the vicinity of the Villa the Plaintiff put on his right indicator and as he did so he heard the sound of a motor vehicle horn behind him. He looked into his rear view mirror and to use the Plaintiff's words "I saw a car coming pretty fast behind me". As a result of what he saw the Plaintiff changed his mind about turning right and pulled off the main road to his left. As he was so doing he was hit from behind. The Plaintiff stated that at the

time he was hit his motor cycle was stationary. The car had almost come to a stop when it hit ^{him.} / To quote the Plaintiff "the car slid into me". He was thrown from the motor cycle for a distance of approximately ten feet and he observed that his right foot was lifeless. He suffered crushed injuries to his right foot, which necessitated some thirty to forty stitches, as well as two broken bones in one of his right toes. He was treated at the St. Ann's Bay Hospital.

Following the accident he returned to Chicago, in the United States of America, where he resides. In Chicago he consulted a doctor and as a result of the consultation he was admitted into hospital and underwent surgery to his right foot on or about the 28th January, 1982. On this occasion he was hospitalized for a period of one week. Sometime about the end of February 1982 he again underwent surgery following which he was hospitalized for a period of three days. From the time of the accident and for a period of about ninety days thereafter he experienced a loss of feelings in the mid region of his foot extending to his toes. He was unable to walk from the date of the accident until about some sixty days after the second surgery. During this period the Plaintiff was unable to work.

During the period of incapcity the Plaintiff, who is a commissioned salesman, received or earned no commission. He estimated his annual earnings as US\$74,000.00.

The medical expenses incurred in Jamaica totalled some J\$300.00. The medical expenses in Chicago totalled between US\$11,000.00 to US\$13,000.00.

The Plaintiff a man of forty six years of age was a semi-professional tennis player at the time he sustained the

injuries. He also played soft ball about three times weekly. As a result of the injuries suffered he has had to give up playing base ball and he can now only play doubles at tennis. His preference is to play singles. He is unable to play singles because his mobility has been affected and he is not as agile, on the Courts, as he was prior to the accident.

The accident has left him with a deformed right foot. Two of his toes are ~~sutured together~~ Mr. Christopher Rose F.R.C.S. and Consultant Orthopaedic Surgeon refers to the condition as syndactylism or webbed toes. When he was examined by Mr. Rose F.R.C.S. on the 15th December 1985 the undermentioned were observed.

1. Loss of sensation on the dorsum of the foot in the region of the scar as well as the dorsum of the second and third toes of the right foot.
2. Cosmetic appearance on the right foot consisting of
 - (a) scar
 - (b) rotation of second toe.
3. Syndactylism between second and third toes of right foot.

The examination revealed a normal gait. There was no limp. When standing the second and third toes of the right foot did not lie flat on the floor but were slightly dorsi-flexed due to contraction of the skin on the dorsum of the right foot. Rotational deformity of the second toe was evidenced. There was a V shaped scar on the dorsum of the right foot extending to the web space between the second and third toes. Restriction of the plantar Flexion of the second and third toes. Plantar Callosities beneath the heads of the first, second, third and 5th metatarsals of the right foot. Dorsalis Pedis pulse of the right foot was present but weak. Plantar callosities are callous formations on the head of the metatarsals and can cause severe pains as well as a disabling effect. With such a condition the wearing of hard sole shoes is unadvisable. Soft sole shoes are encouraged to relieve pressure on the metatarsals.

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Clinically there is a 18% - 20% disability with a strong possibility it will increase. This situation is capable of being reversed by surgical procedure. At the risk of being tedious I have taken time out to set out the medical evidence in detail as it will assist considerably in understanding the monetary awards which have been made herein.

Delroy Donaldson an employee of the Plaintiff testified in support of the Plaintiff 's case. It is important to set out in some detail the evidence of this witness. This is so because the issue to be determined is essentially factual and there are areas in this witness' testimony which conflict or appear to conflict with the Plaintiff's evidence. Further it was suggested to this witness that he was not an eye witness to the collision but that he arrived at the scene after the collision had taken place.

Donaldson stated upon oath that at about 4.30 p.m. on the day in question he was seated at the gate of the Sea Grape Villas - i.e. the Villas owned and occupied by the Plaintiff. As he sat at the gate he was able to see along the road way in the direction of Port Maria to a point where there is a "hill" in the road. Both Plaintiff and Defendant are agreed on the existence of this "hill". The rolling sound of a motor cycle was heard and the witness saw the Plaintiff coming down the road towards the Villas. He observed that the right indicator of the Plaintiff's motor cycle was flashing. Plaintiff's motor cycle was then positioned in the centre of the road. A motor car came over the brow of the hill at a speed estimated to be 65 m.p.h. The car started blowing its horn and the Plaintiff pulled over to the left side of the road. The car commenced braking and while so doing it skidded to the left and collided with the Plaintiff's

motorcycle throwing him on to the left side of the road.

Mr. Donaldson said that after the collision he observed tyre marks on the road surface which were made by the car and which continued for a distance of approximately 50 feet from the point of impact towards Port Maria, the direction from which the car was proceeding.

It is important to note that whereas the Plaintiff stated that the collision occurred just beyond the Villas Donaldson stated that the accident occurred before the Plaintiff reached the gate to the Villas.

The First Defendant the Managing Director of the Second Defendant Company and a resident of the United States of America gave evidence on his own behalf that as he travelled along the Tower Isle to Ocho Rios main road and just as he came over the brow of a hill he saw three persons standing outside the second of the sea grapes cottages. The sea grape cottages are the said Villas referred to by the Plaintiff and his witness. The Defendant was positive that one of the three persons he saw, outside the sea grape cottages, was the Plaintiff who was seated on a motor cycle. Defendant says that as he approached the cottage the Plaintiff rode off the motor cycle and came across the road. At this point the Defendant slowed down and started to blow the horn. During this time the motor cycle swayed from left to right. The Defendant then noticed the right indicator of the Plaintiff's motorcycle began to flash and the Plaintiff moved steadily from the left side of the road. At this stage the Defendant thinking the Plaintiff was intending to turn right positioned the car to the left of the motorcycle with a view to overtaking the motorcycle but the Plaintiff would have none of this, he suddenly and in a very sharp manoeuvre moved back to the left

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side of the road. Again the Plaintiff applied his brakes and blew his horn. As a matter of fact he was blowing his horn intermittently during the display by the Plaintiff. The Plaintiff proceeded to ride along the soft shoulder for some distance and at a slow speed. The Defendant positioned his car in the centre of the road when suddenly the Plaintiff turned right into the road. The Defendant in an effort to avert a collision applied not only his foot brake but his hand brake as well and the car skidded into and collided with the Plaintiff's motor cycle. The Defendant's car was damaged and had to be repaired at a cost of \$910.00. The repairs were completed over a period of twenty days - During the period of the repairs the Defendant rented a car for three days at a cost of \$465.00. The Defendant was unable to work for a period of sixteen days during which time he suffered loss of earnings amounting to \$5,000.00.

That was the evidence adduced by the parties. The first question to which I will address my mind is this. At what point did the Plaintiff enter onto the main road. The Plaintiff contended that he did so at a point which was about one-eighth of a mile from his Villas. The Defendant on the other hand asserted that the Plaintiff entered roadway from in front of the Villas. The Plaintiff is supported on this point by his witness Delroy Donaldson who stated that he was seated at the gate of the sea grapes villas and saw the Plaintiff proceeding down the road towards the Villas. I found the Plaintiff a frank and forthright witness as also his witness Donaldson. It is difficult to accept that an intelligent and responsible adult such as the

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Plaintiff would have set off across the road on his motorcycle when the Defendants' car was only about a distance of 30 yards away and travelling at approximately 25 m.p.h., notwithstanding the Defendants' evidence that the Plaintiff came across the road "like a bat out of hell". Be that as it may on the Defendants' case that was not the effective cause of the collision but that the collision occurred when the Plaintiff moved from the left soft shoulder into the path of the first Defendant's car. To accept the first Defendant's version as to how the collision occurred would be tantamount to finding that the Plaintiff was deliberately courting death.

On a balance of probabilities I am satisfied that the collision occurred in the manner testified to by the Plaintiff and his witness and as a consequence thereof I find the Defendant solely to be blamed. It is patently clear from the evidence that the Defendant came over the hill at a fast rate of speed and on seeing the Plaintiff's motor cycle in the centre of the road intending to turn right the Defendant panicked applied his brakes and was unable to stop before colliding with the Plaintiff. A driver exercising due care and attention in the circumstances would have endeavoured to pass the Plaintiff's vehicle to the left. The Road Traffic Act permits overtaking to the left, where the driver of the vehicle being overtaken indicates that he intends to turn right and provided there is space to overtake on the left. I am satisfied there was enough space to the left of the Plaintiff's vehicle for the Defendant to overtake but instead of so doing the Defendant bore down on the Plaintiff causing him to change his mind about turning right and to seek the safety of the left soft shoulder. It was whilst the Plaintiff's vehicle was so positioned that the Defendant's

car skidded into and collided with the Plaintiff's vehicle.

I am not unmindful of the long line of cases commencing with Wing v London General Omnibus Co. [1909] 2 KB652 through to London Transport Executive v Fay Morgan & Co. 1955 CLY743 in which the view was expressed that a skid is not in itself evidence of negligence. However in the instant case I am of the view that the skid occurred because of the negligent driving of the first named Defendant. Had the first Defendant overtaken on the left there would have been no need to apply the brakes so violently and thus the skid would have been avoided. Secondly, had the Defendant been driving at a slower speed the application of the brakes would not have occasioned a skid of the Defendant's vehicle.

On the question of damages, I was satisfied that the Plaintiff proved the following items of damages and I awarded accordingly.

Special Damages

Costs of Repairing cycle	\$1,500.00
Medical treatment in Jamaica	270.00
Medical treatment in U.S.A. US\$10,721.07	
at conversion rate of US\$1.00 to J\$5.50	58,965.88
Loss of earnings US\$12,857.04 at a conversion rate of US\$1.00 to J\$5.50	<u>70,713.72</u>
	\$131,449.60

General Damages Pain and Suffering
and Loss of Amenities

30,000.00
<u>\$161,449.60</u>

With interest on Special Damages at 3% from 9th January 1982 - 18th December 1985 and interest of General Damages at 3% from 24th November 1982 - 18th December 1985. Costs to be taxed if not agreed. On the Counter Claim Judgment was entered for the Plaintiff with costs to be taxed if not agreed.

Finally on the question of the conversion rate to be applied, I used a rate of exchange which reflected the rate of exchange at the time Judgment was delivered. I took the view

that this was the only sensible approach to be adopted if the Plaintiff were not to be out of pocket. If the rate of exchange to be used was that which obtained at the time the expenses were incurred then clearly the Plaintiff would be recovering less than he actually expended. The case of Dodd Properties v Canterbury C.C. [1980] 1 A.E.R. 928 per Donaldson LJ. at p.938 afforded me guidance in adopting this approach. It is to be readily noted that the instant case and the case cited are not on all fours but the principle enunciated by Donaldson L.J. is in my view applicable.

"The general object underlying the rules of assessment of damages is, so far as is possible by means of monetary award, to place the Plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or breach of contract".