JAMAICA

IN THE COURT OF APPEAL

BEFORE: The Hon. President.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.(Ag.).

SUPREME COURT CIVIL APPEAL No. 14 of 1969

B E T W E E N HUGH GEORGE FORREST - PLAINTIFF/APPELLANT

A N D DAVID CLARKE - DEFENDANT/RESPONDENT

AND ALSO

SUPREME COURT CIVIL APPEAL No. 14A of 1969

B E T W E E N DAVID CLARKE - DEFENDANT/APPELLANT

A N D HUGH GEORGE FORREST - PLAINTIFF/RESPONDENT

J.W. Kirlew and Smart Bryan for Plaintiff/Appellant and Plaintiff/Respondent hereinafter referred to as the Plaintiff

and

R.H. Williams for the Defendant/Respondent and Defendant/Appellant hereinafter referred to as the Defendant.

19th, 20th, 21st July
and 12th November 1971

HERCULES, J.A. (Ag.):

These two appeals derive from an action tried before Mr. Justice Graham-Perkins and a special jury on 10th and 11th March, 1969. The jury awarded the Plaintiff £113 special damages and £250 general damages. They also found the Plaintiff 25% blameworthy and the Defendant 75% blameworthy so that judgment was entered for the Plaintiff in the sum of £272. 5/- with costs.

The Plaintiff appealed on the ground that the award of £250 general damages was inordinately low while the Defendant's appeal was on the ground that he was wrongly found to be 75% blameworthy and that if it could be held that he was blameworthy at all, the liability should be reapportioned. By consent both appeals were heard together and on 21st July, 1971, we dismissed the Defendant's appeal (No. 14A/1969) with costs to the Plaintiff. We also allowed the Plaintiff's appeal (No.14/1969) and by consent we proceeded to vary the award of £250 general

damages to the sum of $1750.00, again with costs to the Plaintiff. In making these orders we promised to put our reasons in writing and this we now do.

The Plaintiff's case in a nutshell was that on 8th January, 1965, he was riding a bicycle out of Elspeth Avenue on to Hagley Park Road. As he came to a stop sign in the intersection he looked right and left, saw nothing, and proceeded to the western side of Hagley Park Road. He reached a point 4 to 5 feet North of Keesing Avenue and after travelling another 5 yards in a northerly direction on Hagley Park Road, Defendant's car, which was travelling south, swerved away from a hole, over to Plaintiff's side of the road, and collided with Plaintiff on the bicycle. Plaintiff felt the car push him backwards and he found himself on the ground.

He was taken to Kingston Public Hospital where he was admitted and remained till 9th April, 1965. Thereafter he attended the Hospital twice a week for physiotherapy treatment until sometime in June, 1965. The right leg had been hoisted in a sling for some time, he had to use crutches and could only resume work about 16 months after the accident.

Dr. G. Fraser, Consultant Surgeon at the Kingston Public Hospital gave evidence that on an examination of Plaintiff on 8th January, 1965, he found:-

(1) ¼" superficial laceration left cheek,
(2) 1" superficial laceration under chin,
(3) Abrasion right forearm,
(4) Abrasion right shoulder,
(5) ½" superficial laceration of right upper arm,
(6) Abrasion back of right hand,
(7) Abrasion right ankle,
(8) Fracture wound on lateral aspect right thigh just above knee joint and abrasion on medial aspect of right thigh at same level - Marked swelling and tenderness right lower thigh,
(9) Abrasion front of right ankle.
Clinical features of a compound fracture at lower end of right femur. Xray confirmed fracture of lower 1/3 with displacement.

The Doctor continued that Plaintiff was given a course of antibiotic injections and underwent an operation under general anaesthesia the same day. A wound excision and suture of all wounds with application of plaster paris cast to the fracture was carried out. Then on 14th January, 1965, a pin was inserted through the upper end of the right tibia for traction in order to

control fracture more effectively. The fracture remained on traction until 26th March, 1965, and Plaintiff was finally discharged on crutches on 9th April, 1965. He returned at intervals for supervision and physiotherapy. From a fracture as he suffered, there is a lot of stiffness, and physiotherapy is needed to mobilise the knee. When the Surgeon last saw the Plaintiff on 9th September, 1965, Plaintiff walked with a slight limp dipping to the right. He suffered a loss of power of all movements of the right lower limb. There was full movement of the right hip with full extension, but flexion was limited by 30° at the knee. There was also a permanent shortening by 1¼" of the right lower limb and 1½" of wasting of right thigh at a point 6" above the patella and ½" of wasting of right lower leg 6" below the patella. When there is a fracture near to the joint with displacement near a joint, altered lines of stress can pass through the joint and below with a tendency to post-rheumatic and osteoarthritic changes. To offset shortening, one can wear a shoe with heel 1" higher and with active use some - not complete - improvement in strength can be anticipated. Initially, Plaintiff would suffer considerable pain and for some time after release of traction.

In addition to the Surgeon, one other witness was called by the Plaintiff. This was Frederick Anderson, whose account of the accident was substantially the same as that given by the Plaintiff and that briefly was the Plaintiff's case.

The Defendant then gave evidence that he came to a bend 4 to 4½ chains North of Elspeth Avenue. He saw no noticeable rut or pothole in the road which he swung away to avoid. As he negotiated the bend and got on to the straight doing 25 to 30 miles per hour, when he was about ½ chain from Elspeth Avenue, he saw Plaintiff come out of Elspeth Avenue. It was a situation of danger and he was excited as he knew it would be difficult to stop. He sounded his horn, applied both brakes and swung to his right to give the cyclist enough room, in case he saw the car, to turn up or down, but the cyclist rode straight across. In cross-examination he agreed with the Plaintiff and the witness Anderson when he stated that the "collision occurred about middle of Hagley Park Road near western side - about 2 yards south of Northern side of Keesing Avenue."

It seems convenient now to deal first with the Plaintiff's Appeal (No. 14A of 1969). The only complaint there is that the award of £250

general damages is inordinately low, since the Plaintiff suffered, among other injuries, a compound fracture at the lower end of the right femur with a resultant 1½ inch shortening of the right lower limb which causes him to walk with a limp and raises a possibility of osteo-arthritic changes.

Mr. Kirlew described the award as the lowest he had ever seen in this type of case and indeed out of all proportion. He referred to several cases in Volume 1 of Kemp and Kemp on the Quantum of Damages in Personal Injury Claims. He submitted that those cases bore many points in common with the instant case and the awards were far more generous. He asked this Court to be guided accordingly.

Mr. Williams on the other hand conceded that the award of general damages was on the low side, but submitted that it ought not to be interfered with as it was not so low as to be considered out of all proportion to the circumstances of the case. He expressed the view that the cases referred to by Mr. Kirlew did not bear the slightest relevance to this case. But he also cited several cases from the same Volume of Kemp and Kemp in support of his contention that the award in this case was not inordinately low. In the course of his submissions he asked the pertinent question: "How much attention does the local Court of Appeal give to cases in Kemp and Kemp?".

On this question, we share the view of Lord Morris of Borth-y-gest, speaking for the Privy Council in Singh (Infant) v. Toong Fong Omnibus Co.Ltd. (1964) 3 All E.R. 925 at page 927:-

> "to the extent to which regard should be had to the range of awards in other cases which are comparable, such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

As Wooding C.J. added in Aziz Ahamad, Ltd. v. Raghubar (1967) 12 W.I.R. 352 at page 357:-

> "This means, therefore, that we ought consciously to set about establishing and following trends of our own. But, until we do, we should pay heed to and take such guidance as we can from awards elsewhere, making such adjustments as may be appropriate having regard to our own prevailing conditions.
>
> Secondly, in looking at past cases it is essential to remember that they serve no more than as a guide. They, so to speak, provide a general standard of judicial consensus, but are nevertheless referable to their own particular facts.

And it must be rare to find the facts in two cases the same."

We do not consider any of the cases cited from Kemp and Kemp by both Counsel on all fours or even reasonably comparable with the instant case. Nor do those cases really reveal any discernible trend. Indeed we find them so wide-ranging that they are quite unhelpful.

The case however from which we derived the greatest assistance was Myers v. Lenan (1964) 8 W.I.R. 121. The facts were that on December 12, 1958, the plaintiff while riding his bicycle was struck down by a motor car driven by the defendant and sustained injuries consisting of a contusion on the left side of his forehead, abrasions of both elbows, a comminuted fracture of the right tibia and a fracture of the right fibula. He was admitted to Hospital on the same day and on December 15 an operation was performed and a steimmans pin was inserted in the region of the right heel, traction was applied and plaster paris put down to the toes. On January 2, 1959, the pin was removed - not causing a great deal of pain - and after that he used crutches and was discharged from hospital on January 8, 1959. He was seen by the doctor every three weeks after that at the fracture clinic and on April 22, 1959, he began to put his foot on the ground and walk. He was last seen by the doctor on May 25, 1959, when the fractures were well united. The doctor said that the plaintiff would need approximately six months from the time of the accident to recover from his injuries. As regards pain, the doctor said that he thought there would have been severe pain the first three days and after that there would be medium sized pain until the steimmans pin was removed and then after that there would just be an ache which would continue until the six months period was up. There was no evidence that the plaintiff would suffer any residual disability. In an action by the plaintiff against the defendant to recover damages for negligence, the jury awarded the plaintiff £800 in respect of general damages. On appeal, it was contended inter alia that the award was out of all proportion to what was warranted on the evidence. The Jamaican Court of Appeal held that the award of £800 as general damages was out of all proportion to the circumstances of the case and should be reduced, and accordingly (by consent) an award of £400 was made as being a reasonable sum.

In the present case the injuries were far more severe than the plaintiff suffered in Myers v. Lenan supra. There would have been greater pain and suffering, a longer period of discomfort and a tendency to post-rheumatic and

osteo-arthritic changes. Moreover there was a loss of power of all movements of the right lower limb and also a 1¼" permanent shortening thereof. Those factors would entitle the Plaintiff herein to consideration for a much more generous award than was made by the Court of Appeal in the case of Myers v. Lenan supra. Accordingly, we uphold the contention that the award of £250 to the Plaintiff was inordinately low and out of all proportion. In keeping with the authorities laying down the circumstances in which the award of a jury may be disturbed by a Court of Appeal (See Bailey v. Gore Bros., Ltd. (1963), 6 W.I.R. 23) and with the consent of the Defendant and the Plaintiff we assessed accordingly the damages. We considered that an award of general damages of $1750.00 would have been a reasonable sum in all the circumstances of the case.

As regards now the Defendant's Appeal No. 14A/1969. This was purely on the question of liability and was based on matters of fact - matters entirely within the competence of the jury. Seven grounds of appeal were argued by Mr. Williams and they can be summarised thus:-

(1) On the evidence the jury should have found that the Plaintiff was solely to blame.

(2) If the jury could have found that the Defendant was blameworthy at all, then the Plaintiff contributed to a far greater degree than the Defendant and the apportionment of 75/25% in favour of the Plaintiff ought not to stand.

The question this Court was concerned with was this: Was there evidence on which the jury could reasonably have come to the conclusions they arrived at? Notwithstanding the various points adverted to by Mr. Williams, we were of the view that there was abundant evidence upon which the jury could reasonably have come to their conclusions.

It was common ground, for instance, that the accident took place near the western side of Hagley Park Road. One has to think of the time it took and the distance the Plaintiff must have covered out of Elspeth Avenue to reach that point. On the Defendant's own showing he came around a bend 4 to 4½ chains north of Elspeth Avenue. The jury must have resolved it heavily against him that he first saw Plaintiff only when he was about 8 to 9 yards from the northern corner of Elspeth Avenue. Was it not open to the jury to find that the Defendant was not keeping a proper look-out? Then there was the matter of the speed of Defendant's car and the evasive action he took. He said that if he had gone straight it would have been an accident, but this would not have

been so, since the accident took place when he swerved right. He was contending that in the agony of the moment he swerved right rather than to the left or proceeding straight. The jury must have rejected this contention and found him blameworthy because of the speed at which he was travelling and his failure to keep a proper look-out. These were all questions of fact and as we said before there was abundant evidence upon which the jury could have found that the Defendant was 75% blameworthy. Therefore we saw no reason to disturb their findings on matters of fact.

In the result we allowed the Plaintiff's appeal in No. 14/1969 and varied the award of general damages from £250 to $1,750.00 with costs to the Plaintiff and we dismissed the Defendant's Appeal in 14A/1969 again with costs to the Plaintiff.