

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L.M. 031/1983

BETWEEN	TYRONE MORRISON	PLAINTIFF
A N D	THE ATTORNEY GENERAL OF JAMAICA	FIRST DEFENDANT
A N D	HAROLD MCKENLY	SECOND DEFENDANT

Claim for Negligence

A. G. Gilman instructed by Gilroy English for the Plaintiff.

P. Foster of the Attorney General's Department instructed by
The Director of State Proceedings for both defendants.

Heard: May 12 13: November 18, 1988

JUDGMENT

BINGHAM J:

On Tuesday 9th February, 1982 sometime shortly before 6 a.m. the Plaintiff, a Special Constable and a Process Officer in the Island Constabulary Force was on his way from Elleston Road Police Station riding a Susuki 550 motor cycle and proceeding up Upper Elleston Road in Kingston, travelling in a northerly direction. As he was about to turn right to enter into Victoria Street with the intention of using that route to return to his home at 28 Lacy Road, there was a collision between the motor cycle and a Toyota Crown motor car.

It is common ground that the collision occurred over to the right of the road as one proceeds up Upper Elleston Road.

As a result of this collision the Plaintiff suffered a fracture of the medial malleolus of the right tibia and also a fracture through the junction of the distal and middle third of the right fibula. He also had superficial abrasions over this area.

The nature and extent of these injuries and the resultant effect which they had upon the Plaintiff will be explored ⁱⁿ later on/ this Judgment after the issue of liability which arises

from the Pleadings has been determined.

As the second defendant, a Police Officer, was driving a police vehicle and was on duty at the time of the collision, the first named defendant has been joined as a defendant to the action by virtue of the Crown Proceedings Act.

Both the motor cycle and the motor car, are the property of the Government of Jamaica, although the property is vested in the Commissioner of Police, were damaged as a result of the collision.

The Defence alleged that the collision was due entirely to the Plaintiff's negligence and the particulars of negligence alleged inter alia at paragraph (b) that the plaintiff was "attempting to turn or was turning across the said road without first ascertaining whether it was safe to do so."

From the evidence given by the Plaintiff and the second defendant it is common ground that the motor cycle and the car driven by second named defendant as well as another Toyota Crown motor car driven by one Acting Corporal Carlton Sylvester were the only three vehicles travelling on what was an almost deserted road, on the morning in question.

From the evidence it emerged that Acting Corporal Sylvester has resigned from the Police Force and is reported to be now resident in the United States of America.

It is further common ground that the Plaintiff's motor cycle was at all material times travelling at a slow rate of speed estimated at about 20 miles per hour, and was ahead of the two police cars up to the time of the collision.

What is ⁱⁿ issue was the relative positions of the motor cycle prior to the collision, as well as that of ^{the} two cars. The Plaintiff testified that his motor cycle was travelling to its left until he reached a distance of about a chain further up Upper Elleston Road from Victoria Street at which stage he gave

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a signal indicating an intention on his part to make a right turn, both with the indicator on the motor cycle and with his right hand before proceeding more over to the centre of the road. He also described the vehicle driven by the second defendant as being positioned behind the other car and attributed the collision which took place as due to the second defendant's act of attempting to overtake the lead car, just at the point in time when he was in the final act of turning to his right to enter into Victoria Street.

On the basis of the Plaintiff's account the second defendant would have been solely to blame for the collision as:-

- 1. He was not keeping a proper lookout in relation to the motor cycle which was proceeding ahead of the two cars.
- 2. He failed to observe the Plaintiff's signal to turn right.
- 3. He was attempting the act of overtaking in circumstances in which it was not reasonably safe to do so.

On the account given by the second defendant he sought to place his vehicle as being positioned immediately behind the Plaintiff's motor cycle prior to the collision. He further sought to relate an account of the Plaintiff riding the motor cycle with its hazard lights on and manouevring the motor cycle in a zig zag manner from the extreme left towards the centre of the road for a distance of about ten chains, a manouvre which is commonly referred to as "dollving" and this action on the Plaintiff's part took place while both cars were approaching from behind the Plaintiff's motor cycle. He then sounded his horn indicating his intention to overtake the Plaintiff and positioned his car more to the right of the road and in the act of overtaking the motor cycle the Plaintiff suddenly and without any warning swerved to his right in the

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vicinity of Victoria Street and there was a collision between both vehicles when the motor cycle collided into the left front fender of the car which he was driving.

Based upon his account this would be a factual situation in which the Plaintiff would be solely to be blamed for the collision as he swerved into the path of the second defendant's vehicle without first observing if the manouvre he was making could be completed with safety and without seeing whether the road to his right was clear of any vehicular traffic.

On the basis of the two accounts given and reviewing the evidence of the witnesses and their demeanour as well as the submissions of Counsel, I accept the Plaintiff's account as being the more probable of the two accounts for the following reasons:-

1. It is inconceivable to accept that the Plaintiff at an hour of the morning which not being fully daylight and with the approaching lights of two vehicles such as two Toyota Crown motor cars, hearing the revving of the engines of these cars as they both approached him from behind as well as the horn of the second defendant's car prior to his act of overtaking would have been manouvering his motor cycle in the manner as stated by the second defendant. This evidence I regarded as being so grossly exaggerated on the part of the second defendant as to stamp him as a witness of doubtful credibility.
2. I further accept the Plaintiff's account that the car driven by second named defendant was positioned behind that driven by acting Corporal Sylvester and at a distance close enough to preclude the second defendant from properly observing the signal given by the Plaintiff of his intention to turn right.
3. I accept the Plaintiff's account that he gave a signal of his intention to turn right. It is however, doubtful

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that he gave a signal with the direction indicator on the motor cycle as well as a hand signal. Moreover, given the situation of the two cars approaching from behind the Plaintiff would have been courting death or serious injury to attempt such a manouvre to his right without signalling his intention to do so. As the evidence is that shortly before the second defendant's act of attempting to overtake, all three vehicles were travelling slowly the collision was no doubt brought about by the fact that the second defendant having gone to Elliston Road Police Station was attempting to keep his appointment as he stated in an area some distance from his base of operations at the time in the Dubaney Park area, and was seeking to make up some time without properly observing the position of the motor cycle which was then moving more to the centre of the road.

- 5. Had the second defendant been properly observing the road ahead of him he ought to have seen the motor cycle and manouvered his car back to the left of the road until his act of overtaking could have been attempted with safety.

As the law stands there is a high duty of care on the part of the second defendant as the overtaking motorist to ensure that he could complete such an act with safety. His failure to avoid the collision meant that on the fact that I have found as it was his act of attempting to overtake in these circumstances that caused the collision he was fully liable for the collision which took place.

The injury to the Plaintiff when examined is equally consistent with his account as to how the collision occurred.

I will now turn to the question of Damages. This falls under two heads, namely:-

- 1. Special Damages
- 2. General Damages.

The principles applying to each are by now much too familiar to bear repetition.

The Claim for Special Damages

There is no challenge to the damages recoverable under this head and this sum has been agreed to at an amount of \$245.

The Claim for General Damages

The evidence in this regard is based upon the Plaintiff's account of the injuries he suffered, the treatment he obtained, and the period of time that he was away from work. There is also the question as to his present condition arising from the injury to his right foot.

As the nature and extent of the injuries suffered by the Plaintiff were adverted to at the commencement of this Judgment, no further reference will be made to it at this stage.

The Plaintiff following the injuries he received was taken to the Kingston Public Hospital where he was attended to in the Fracture Clinic. According to the Medical Report of Dr. G. G. Dundas dated 5th October, 1982 (Exhibit 1), "the fracture was treated with a paletta tendon bearing cast and in two weeks he (the plaintiff) was reviewed and a walking heel applied. A window was made in the cast to allow inspection of the abrasions which he had sustained.

After ten weeks of immobilization his plaster was removed and he was allowed to commence weight bearing on the now solidly united ankle. There was evidence of deformity due to malunion of the malleous fragments. Xrays indicated that the fracture had displaced laterally within the case after the initial reduction.

He is now left with a significant deformity which cosmetically is of great significance. He is still experiencing

intermittent swelling when he walks for extended periods, but this does not appear to deter him greatly. I recommended the use of a leather ankle to support when he resumes his normal work.

It is possible that the appearance of Mr. Morrison's ankle may be corrected surgically. However, this does not guarantee any improvement in the function. I estimate that he was totally disabled from the time of the injury and for sixteen weeks thereafter. He has a permanent partial disability rating to the ankle amounting to 10% of the whole man."

The Plaintiff was subsequently seen by Dr. Dundas on 8th October 1987 at his surgery at Orthopaedic Associates, Tangerine Place in Saint Andrew.

The Medical Report resulting from this visit (Exhibit 2) reads as follows:-

"Further to my report of 5th October, 1982, on Mr. Morrison, I re-examined him on 8th October, 1987. He had a severe deformity of the right ankle with obvious instability and angulation. Xrays indicated that he had a 25° tilt in the talus with malunion of the lateral fracture and severe angulation of the medial malleolus. There was evidence of arthritic degeneration on the tibial plafond.

I have recommended that he should have osteotomy performed in an effort to arrest, as far as possible, the progressive degeneration which is likely to occur. The earlier this is performed the better.

His disability has increased since I last saw him and with the element of instability it now amounts to 15% of the whole man."

It is abundantly clear from these two reports that the Plaintiff's condition has worsened since the first occasion when he was examined and treated by Dr. Dundas at the Fracture Clinic at the Kingston Public Hospital. An operation is now recommended as a matter of urgency. The Doctor was not called to testify as to the cost of such an operation but the particulars of Special Damage in the amended Statement of Claim contains an item at subparagraph (b). "Cost of performing osteotomy estimated at \$4,950" No evidence has been lead, however, to prove this area of the Claim but in computing the general damages, I am mindful of the fact that this

operation is a factor which I can take into consideration in arriving at the sum to be awarded under this head. Failure to do so would be unreasonable, as one has to bear in mind that the principle which operates in this area is that the award must in so far as money can do so seek to compensate the Plaintiff for the loss (injury) he had suffered and must seek to put him back in the same position as far as possible as money can do as he was before the injury.

The General Damages to be awarded therefore, will take into consideration the following:-

- 1. The nature and extent of the Plaintiff's present condition based on the medical reports (Exhibits 1 & 2).
- 2. The degree of pain and suffering resulting from the injury received.
- 3. The estimated cost of the osteotomy recommended by the doctor.

Mr. Gilman has submitted that based on the above a reasonable award ought to be \$40,000. He cited in support Sydney Taylor vs. Jamaica American Motoring Company and Murdock reported at page 64 of Volume 2 of Mrs. Ursula Khan's Book on Damages awarded in Personal Injuries Claims.

He further submitted that the injury in this case was far more serious than that in the case referred to. There the award was \$25,000 for an injury which was assessed as being a 5% disability of left lower limb.

Mr. Foster relied upon Donald Johnson vs. Stafford Evelyn reported at page 75. of the same Volume of Mrs. Khan's Book, and Winston Green vs. Joseph Brown reported at page 32 of Volume 1 of the same book.

There the awards in these two cases were:- \$25,000 in February 1984 for injuries in respect of which the Plaintiff's disability was assessed at 12% of the left lower extremity and

\$22,000 in 1981 for a Plaintiff whose disability was assessed at 15% of the lower extremity.

Based upon the medical reports of Dr. Dundas it is abundantly clear that the nature and extent of the injuries suffered by the Plaintiff is far more serious than that contended for by both Counsel. As the disability has been assessed in 1987 at 15% of the whole man which when converted this would amount to a disability of the right lower extremity coming within the range of about 30% of that area of the body.

One needs further to bear in mind that an award for General Damages is a "once and for all" award.

Taking everything into consideration, therefore, I would consider that a reasonable award in this case should fall in the area of between \$60,000 to \$70,000. I would opt for the lower figure of \$60,000 and that is the sum which will be awarded for general damages.

As a consequence, therefore, there will be Judgment for the Plaintiff for \$60,245 being:-

- 1. Special Damages \$ 245
- 2. General Damages \$60,000
- \$60,245

with costs to be agreed or taxed.

As Learned Counsel for the Plaintiff in his final submissions sought an award of interest, there will be interest of 3% on the award for Special Damages as from 9th February, 1982 to 18th November, 1988 and at 3% on the award of General Damages from 4th July, 1983 to 18th November, 1988.