IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. 1997/N-164

BETWEEN	WILFRED NELSON	PLAINTIFF
AND	JOHN ROYAL	DEFENDANT

Maurice Frankson instructed by Gaynair and Fraser for the Plaintiff.

Kent Gammon instructed by Dunn Cox Orrett & Ashenheim for the Defendant.

Heard: 2nd and 3rd December 2002 and 1st July 2003

Campbell J.

On the 27th June 1997, the Plaintiff filed a statement of Claim, alleging that on or about the 24th day of June 1995 the Defendant negligently drove his motor vehicle which collided with the Plaintiff's motorcycle, as a result the Plaintiff suffered injury. The Defence admitted a collision between the Defendant's motor vehicle and the Plaintiff's motorcycle, but contends that the collision was caused wholly or materially by the negligence of the Plaintiff. The Defence particularized, the Plaintiff's negligence is inter alia:

(1) Riding on the wrong side of the road and there colliding with the left front of the Defendant's motor vehicle.

(2) Failing to stop, to swerve, to slow down or so to manage or control his motorcycle so as to avoid the said collision.

The plaintiff, Wilfred Nelson, 47 years old mason of Cavaliers District, testified that on the 24th June 1995 at about 6:30am he was riding his motorcycle, along Shortcut Road, he was 'coming from Burnt Shop and headed towards Red Ground. He was travelling on his left-hand side of the road. He estimated the length of this road as about one mile and that at its narrowest it was approximately seven feet wide. Mr. Royal, who was called by the Defendant, states that at the area of the accident the road was about eight feet wide, this estimate accords with that of the plaintiff. Hudson said that he was entering a slight right-hand curve "one that could be seen around." He denied that it was a left hand turn. It was agreed that there was a gully to the plaintiff's right side, and an embankment to his left. He said he was travelling at 35 m.p.h. before he had come to a stop. The Defendant's approaching car was about six feet away when he first saw it. He said that the motorcar was travelling about 40 m.p.h. The plaintiff said he drew close to his left-hand bank and stopped. He next felt the motorcar hit his right leg below the knee. He fell to the ground "on the same left hand". His leg was bleeding. The car stopped.

He denied that he had collided with the left front of the motorcar. He denied that he had no control of the bike and that he was riding in a dangerous and reckless manner. He states that if he had not been keeping a proper lookout he could not have stopped in anticipation of the accident. He denied that immediately before the accident he had swung the bike to the left and, as a result, the bike's right side had "faced" (was turned) to the car. He denied that whilst executing that maneuver the rear tyre of the bike had hit the left bumper of the Defendant's car.

The defendant, John Royal, a 44 years old Carpenter of Cavaliers District, testified that on the day in question he was coming from his home at Shortcut. He describes the road as winding and states that on reaching a left hand corner, "I saw a bike coming towards me. I stopped my vehicle." The Defendant said that the Plaintiff's motorcycle was unable to stop; he (the Plaintiff) tried to swerve in order to avoid hitting head-on. The motorbike swung around, its rear wheel hitting the motorcar's headlight. The Defendant claims that his side of the road was smoother than the (Defendant's) "bumpy" right side. He said the motorbike ended up two feet from his left side. He said the Plaintiff wore no helmet and after the accident admitted having no insurance coverage. In cross-examination the Defendant testified that the Plaintiff, after falling from his motorcycle,

crawled backwards on the ground for some twelve to fifteen feet. He admitted that he had not sounded his horn, and claimed that prior to the accident he had been travelling at about 5 m.p.h. He said that the Plaintiff accused him of being the cause of the accident some three to four (3 – 4) weeks after the accident. He admitted that he gave the Plaintiff $500.00 after the accident to buy sugar.

The Defendant's brother-in-law gave evidence that at about 8 o'clock that day, he saw the Defendant's car with some persons around it. There was a motorcycle in front of the car. The Defendant was sitting on the ground a little distance from the motorcar and motorcycle. He said that car was about eighteen inches from its left side of the roadway

Both versions are diametrically opposed. The parties both claimed to have stopped very close to their correct left side and the other party proceeded to hit their parked vehicle.

The position of the injury, the damage to the motor vehicle and the dimensions of the roadway are facts from which reasonable inferences may lead us as to the point of impact.

The injury to the Plaintiff's right leg is more consistent with the Plaintiff's version. On the Defendant's version, the rear wheel of the Plaintiff's bike impacted with the Defendant's car. There is no evidence to

suggest that there was any collision with the Plaintiff's leg. The Defendant's evidence-in-chief said, "When the bike hit the car, the bike fell on its left side." In cross-examination, the Defendant says, "He fell back ways...he fell on his hands." On this account, the injury to the Plaintiff is unexplained. There is no evidence of any impact of the Plaintiff's right leg with either the Defendant's car or the ground.

On the other hand, the Plaintiff states, "I got hit and I fell off my bike.... I got hit on my right leg below the knee."

The damage to the motor vehicles also appears to be more consistent with the Plaintiff's version. The Plaintiff testified that the bike's headlamp was broken and the muffler bent, the brake pedal was out of use. If the rear wheel had collided with the stationary car, would damage to the rear wheel be expected?

The Defendant's witness, Alexander Royal, testified that the road was about 8 feet across (wide) in the area of the accident. The Defendant claims it was about 10 to 11 feet wide and the Plaintiff estimate is that the road's width at the part of accident is eight feet wide, and that where the accident occurred, two cars cannot pass. In addition, the roadway width is even more diminished by a ditch at the side of the embankment, and the steep gully that

borders the road on the Defendant's left which would discourage vehicular traffic operating too closely to that bank.

The Defendant testified that at the time of the accident the motorcar was about two feet from its left bank. The Defendant's motor vehicle was about four feet three inches wide. On the estimate of the width agreed by the parties, the Defendant's motor vehicle would have been projecting across on imaginary line down the center of the road. On the Defendant's estimate it would project over one foot into the plaintiff's side of the road. On the estimate of the Plaintiff, it would project about two feet into the Plaintiff's side of that imaginary white line. The bike's width span of two feet would completely use the remaining width of the road as estimated by the Plaintiff. On the Defendant's estimate there would be a space of less than two feet remaining to allow the vehicles to maneuver.

I reject the Defendant's evidence that the damage was to the left side of the car. I accept that the colour of the bike was above the right headlamp of the car, as a result of the collision. Of the damage to the bike, both witnesses of the Defendant observed no damage.

I find that the winding and narrow state of that "dirt road" placed a duty on the Defendant to proceed cautiously, because of the width of his vehicle. The fact that even with the most careful operation the motorcar

would have intruded on the Plaintiff's side of the road, to my mind, placed a burden on the Defendant. On the other hand, the Defendant admitted speed of 35 m.p.h. which I find was excessive in all the circumstances. The Defendant ought reasonably to have foreseen that, if he proceeded at 35 m.p.h. in that narrow windy road, it would be difficult to avoid an encroaching motorist. The burden of proving contributing negligence is on the Defendant. This does not mean that the Plaintiff has committed a breach of duty owed to the Defendant. In Alladat Khan v. Kanhai Bhairoo & John de Castro; Kanhai Bhairoo & John de Castro v. Alladat Khan 17 W.I.R. 192 at page 196, Bollers, C. said:

> "In Davies v Swan Motor Co., Ltd. (1949) 1 ALL E.R. 620, it was made clear that contributory negligence does not mean breach of duty by the plaintiff, and in order to make a plaintiff guilty of contributory negligence a defendant does not have to show any breach of duty to him. What it means is that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning."

I accept that the Plaintiff speed of thirty-five miles per hour was excessive. The Defendant's liability is apportioned at twenty per cent.

The Plaintiff suffered a displaced fracture of the right tibia and fibula in the middle third of the right leg. An above knee plaster of paris split was

applied. The leg was manipulated formally under anesthesia, he was discharged on 3rd July 1995. In his opinion dated 18th April 1997, Dr. M. Minott, Senior orthopaedic Resident at University Hospital of the West Indies, stated, "The fracture was clinically unstable and required frequent cast changes to maintain alignment. The Plaintiff was readmitted on 30th August 1995 because the fibula had healed before the tibia, which causes the tibia to malunite. On the 1st September 1995 he had a fibula osteotomy and closed reduction on the right tibia.

On 9th October 1995 he was allowed to partially bear weight. Dr. Minott opined that the Plaintiff had a residual mal-alignment of his tibial shaft fracture of 12°. He had a 20% permanent disability of the lower extremity or 8% of the whole person.

The Plaintiff says he has to be careful when he walks because of pain, he avoids sleeping on his right side, as it results in stiffness of the toes.

Khan & Khans' Personal Injury Awards Vol. 5, Barrington McKenzie vs Christopher Fletcher and Joseph Taylor, at page assessed on 31st March 1998. The Plaintiff suffered (1) pain, swelling and tenderness of the right leg, (b) comminuted fracture of middle third tibia (c) transverse fracture of middle of right fibula. Advised to use clutches and not bear weight for three

weeks. Leg was in plaster for further six weeks. There was no permanent impairment. General Damages $420,000.00 updated $579,320.

Vincent George Lewis vs The Attorney General, tried before Mr. Justice Theobalds on 1st February 2001. Market vender, 65, injured when struck by a motorcycle whilst standing on the sidewalk on 14th February 1995. Suffered (a) abrasion to right abdominal wall and left elbow (b) compound comminuted fracture of the left tibia. On the 13th March 1996, Dr. Rose examined him and noted, among his findings, (i) a painful lump (ii) swelling of the left leg and foot ..... (iii) left lower limb was 1.5cm smaller than the right (iv) range of motion of both knees limited (v) scar along on left upper tibia (vi) induration of left ankle (vii) periostitis and xenostasis, which would be permanent. He assessed the Plaintiff's permanent partial disability as 14% of the lower extremity equivalent to 6% of whole person disability. Awarded General Damages of $500,000 with interest at 6%, updated, that award amounts to $568,768.

The instant Plaintiff suffered more severe injuries than the Plaintiffs, McKenzie and Lewis. McKenzie could not bear weight and had to rely on crutches for a period of nine weeks. The instant Plaintiff was non weight bearing on crutches for approximately five months, that is until 20th November 1995. He was in plaster of paris for four months. His permanent

disability was 8% of the whole person, with a scar in the middle third of his right leg. Lewis' injuries were aggravated by his diabetic condition, which the trial judge did not find was a consequence of his accident.

I would asses the instant Plaintiff's Pain and Suffering and Loss of Amenities $850,000.00.

The Plaintiff's damage will therefore be reduced by twenty per cent in keeping with the claimant's share in the responsibility for the damage. $850,000 - $170,000 = $680,000.00.

General Damages

Pain and Suffering = $680,000.00.

Interest at 6% from the 23rd July 1997 to the 1st July 2003.

Special Damages

The application for amendment to plead 'Loss of Income' was granted an award for Loss of Income, for $800 per day for five days per week for the period 24th June 1995 to 20th November 1995 = $84,000.00.

Medical Expenses $22,931.00; Report $1,500.00; Damage to motorcycle 5,000.00; Destruction of pants $1,500.00; Destruction of shoes $2,500.00; Total $33,431.00. $84,000.00 + $33,431.00 = $117,431.00 reduced by 20% in keeping with the Claimant's share of responsibility for damage, totals $93,944.80.

Interest at 6% from the 24th June 1995 until 1st July 2003.

Costs to the Plaintiff to be agreed or taxed.