C.A. Civil — Wolfe J. Negligence/Damages — Motor vehicles — Judgment for Plaintiff — On appeal whether evidence of Pltf and Deft disclosed that Deft was negligent — whether preponderance of evidence in favour of defendant — Whether trial judge wrong in law in not so finding: Whether trial judge wrong in law in allowing plt's claim at conversion rate not pleaded and differing from rate at time when sums paid and claim made — Whether General damages excessive

APPEAL DISMISSED

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 4 of 1986

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	GORDON TOWNSEND	1ST DEFENDANT/APPELLANT
AND	GORDANN LIMITED	2ND DEFENDANT/APPELLANT
AND	JEROME FARRELL	PLAINTIFF/RESPONDENT

Mr. C. Rattray, Q.C. and Mr. Clarke Cousins for appellants

Mr. D. Morrison for respondent

October 8, 9, 12, 13 and December 18, 1987

CAMPBELL, J.A.:

On January 9, 1982 the plaintiff/respondent suffered personal injuries as a result of a motor vehicle accident on the Tower Isle main road in Saint Ann. The appellants were involved in this accident.

The respondent in his evidence said the time was about 4:30 p.m. He was proceeding along the main road towards Ocho Rios intending to visit his Villas which are situated on the right hand side of the said main road when facing towards Ocho Rios. He was riding a motor cycle. The main road in the area relevant to the accident slopes down from a hill. He was about to turn right and gave a right turn signal when he had almost reached his Villas. He heard the horn of a car and looked behind through his rear view mirror. The car which he saw was coming pretty fast behind him. He was then about 220 yards from the

crest of the hill, and about 120 yards from his Villas. He pulled off the main road on to his left. He was struck from behind by the motor car which skidded into him. He said that the reason why he pulled off the road was because the car was coming down on him and he did not want to sit in the road and get run over. He had been travelling on his left or correct side of the road about 6 feet from the left edge until he decided to turn right. Having put on his signal to turn right he was moving to the centre of the road when he heard the horn and saw the car through his rear view mirror and because of its speed, he decided to pull off the road to his left. The road is approximately 24 feet wide with a faded white line in the middle. He was about 1 foot from the faded line when he decided to go back over to his left. He says he became confused by the blowing of the horn and that was the reason why he decided to pull over to his left. The motor vehicle was then 70-80 yards from him. By this evidence the respondent was asserting that he was on his proper side of the road but closer to the middle line. The first defendant was driving in the centre of the road and was bearing down on him at a speed which made him decide to swerve back to the left out of the way of the oncoming car. He had reached the left edge of the road when the oncoming car skidded into him.

The appellants from their suggestions to the respondent in cross-examination do not appear certain as to what their case was. It was first suggested to the respondent that he moved into the road from right to left at his Sea Grape cottages; next it was suggested that he started drifting right, into the road at a left hand bend; later it was suggested to him that the impact occurred as he made a right turn when the first appellant was about to pass his motor cycle. These suggestions were all denied. What is of significance is that it was not suggested to him that the first appellant was not bearing down on him pretty fast or

that it was untrue that the first appellant skidded into him while he was at the extreme left edge of the road.

The respondent's witness Delroy Donaldson gave evidence that he saw the appellant's car coming down from the crest of the hill at about 65 m.p.h. The car was behind the respondent who was then positioned in the centre of the left hand side of the road. The respondent pulled over to his left. The appellant's car braked and skidded to the left and hit the motor cyclist. The car slid into the right hand side of the motor cycle.

It was also suggested to this witness that the respondent was hit by the car when he attempted to turn right. It was equally never suggested to this witness that the appellant was not driving at 65 m.p.h.

The appellants' version given in evidence by the first appellant was that he was driving down the gentle slope of roadway from the brow of the hill at 30 m.p.h. The respondent came across the road from the right to the left. This was in the vicinity of his cottage on the right. The appellant slowed down to approximately 25 m.p.h. and blew his horn. The respondent was then about 30 yards from him and using this appellant's words, the respondent came across the road with a lot of speed "like a bat out of hell". The respondent while now on the left swayed from side to side, put out his right indicator, moved to the centre of the road, slowed down, and then moved back from the centre of the road to the left. He the appellant braked again, blew his horn and reduced his speed to about 20 m.p.h. The respondnnt reached the left soft shoulder and was slowing down as to stop. He the appellant, seeing the respondent on the soft shoulder moved to the centre of the road, started to increase his speed to overtake, when the respondent moved into the road causing the appellant to

apply both his foot brake and hand brake. The motor car slid into the motor cycle. The left fender of the car hit the centre of the motor cycle on the right side and injured the respondent's right leg.

The learned trial judge, Wolfe J, after a careful summing-up of the evidence as highlighted above, found that on the appellants' version the effective cause of the collision was the respondent's moving from the left soft shoulder into the path of the first appellant's car. He rejected this view of the facts in these words:-

> "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".

He found the respondent and his witness frank and forthright and expressed his satisfaction that on a balance of probabilities the collision occurred in the manner testified to by the respondent and his witness. He accordingly found the appellant wholly to blame and gave judgment accordingly.

The appellants have appealed this judgment on the undermentioned grounds relative to liability:

> "1. That the Learned Trial Judge was in error in finding the Defendants wholly to blame for the following reasons:-
>
> (a) The Plaintiff's evidence clearly established negligence on the part of the Plaintiff and no negligence on the part of the Defendants;
>
> (b) The Defendant's evidence also established negligence on the part of the Plaintiff and no negligence on the part of the Defendants;
>
> (c) On this state of the evidence by the parties themselves, the preponderance of evidence was fully in favour of the Defendants and the Learned Trial Judge was wrong in not so finding;

" (d) The evidence of the Plaintiff's witness was in conflict with the Plaintiff's own evidence and, therefore, cannot be relied upon to establish negligence on the part of the Defendants.

2. That the Learned Trial Judge was wrong in law in allowing the Plaintiff's claim at conversion rates not pleaded and different from the rates which existed at the time the sums were paid and the claim made.

3. That the Learned Trial Judge was wrong in not allowing the Counter-claim of the Defendants."

Before us Mr. Rattray submitted that on either view of the evidence as given by the first appellant and the respondent, the latter was fully to blame or alternatively at the least, he was partly to blame. Firstly the respondent by his pleading had averred that the first appellant had collided with the rear of his motor cycle but had to amend his pleading after it had been elicited from him under cross-examination that the motor cycle was hit on its right side. This piece of evidence was more consistent with the first appellant's pleading and evidence that the respondent was swerving from side to side on the road and collided with the car when he the respondent swerved from left to right. Secondly, it was negligence in the respondent in not keeping a proper look out and so failing to observe the state of the traffic on the road behind him when he moved to the centre of the road signalling his intention to turn to his right which necessitated the blowing of the car horn by the first appellant. It was equally negligence for the respondent having seen the car behind him when the horn was blown, to have moved back to his left from the centre of the road, across the path of the first appellant's car when the respondent could easily and safely have completed his right turn as there was no oncoming traffic. On the other hand it was not negligence on the part of the first appellant to have blown his car horn, to the contrary it was the prudent thing to do having regard to the

respondent's manner of riding his motor cycle. Equally as regards the speed at which the first appellant's motor car was travelling the objective facts do not support any finding of excessive speed. He submitted that the respondent's own evidence and that of his witness was inconsistent with any excessive speed because the first appellant's car had almost come to a stop when it collided with him. Further the fact that the motor cycle was not hit from behind, the nature of the damage to it and the fact that there was only 50 feet of dragmarks on a downhill road all indicate singly and together that the first appellant's car was not being driven at any undue speed. There was thus no evidence of negligence on the part of the first appellant.

Mr. Morrison for the respondent submitted that the learned trial jduge was right in rejecting the first appellant's version of how the accident occurred and was equally right in accepting the respondent's version and in particular finding as a fact that the speed at which the first appellant's car was being driven was the operative cause of the accident.

I am in entire agreement with the submission of Mr. Morrison and with the reasoning and conclusion of the learned trial judge. Both the respondent and his witness gave evidence that the first appellant was driving at great speed. The respondent said the first appellant's car was coming "pretty fast" behind him.. The car was "coming down" on him. He pulled off the road as he "did not want to sit in the road and get run over". It was "because of its speed" that he decided to pull off the road to his left. Respondent's witness said that he saw the car "coming down the hill at about 65 m.p.h. approaching fast behind the bike". He said he heard the sound of horn, then brakes, then the "screeching sound of the tyres". The car skidded to the left and hit the motor cycle. The first appellant himself admitted that his car made a screeching sound and that he applied "his hand

brake and foot brake". The correct and irresistable inference to be drawn from the evidence of the respondent and his witness is that because the first appellant's car was bearing down on the respondent, who was then in the centre of the road, he not wanting to get run over, pulled back to the left and mercifully reached the safety of the left edge of the road. Had the first appellant not been driving at this excessive speed and in the centre of the road behind the respondent, there would have been no need for him to apply his foot brake much less his hand and foot brake together. It would have been a simple matter for him to overtake the respondent on respondent's right side. It was the frightening experience of the respondent seeing the first appellant bearing down on him which placed him in a dilemna necessitating his moving back to his left as a reflex action to avoid getting run over.

The learned trial judge concluded that the first appellant was solely to blame. In his judgment he said thus:

> "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. .....
> I am satisfied there was enough space on 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 .....
> 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."

There was, from the evidence herein highlighted, ample basis for the above findings of the learned trial judge. He came to the correct conclusion and such ought not properly to be disturbed.

The appellant also appealed against the award of General Damages for pain, suffering and loss of amenities on the

ground that it was excessive and out of line with existing awards for injuries similar to that suffered by the respondent. Mr. Rattray referred us to the cases of Donald Johnson v. Stafford Evelyn and Noel Falconer v. Alfred Cooke at pages 75 and 92 of Vol. 2 of Ursula Khan's publication on Recent Personal Injury Awards in which awards of $22,000.00 and $25,000.00 were made in February 1984 and November 1985 respectively in respect of injuries to the lower limb which he submitted were far more serious than in the present case. It is to be noted however that in those cases the permanent partial disability resulting from the injuries was 12% and 15% respectively. Further no special loss of amenities was disclosed. In this case the learned trial judge found that there was loss of amenities in that the respondent could no longer play soft ball which he previously enjoyed playing three times per week. He could no longer play singles in tennis as he is not as agile as before. He had to limit himself to playing doubles at tennis. He had a deformed right foot and there was a permanent partial disability of 18% to 20% with a strong possibility that it would increase. Though the oral judgment was delivered in December 1985 within a month of that given in Noel Falconer v. Alfred Cooke wherein an award of $25,000.00 was given for pain, suffering and loss of amenities, the present case in my view highlighted specific instances of serious loss of amenities which tilted the scales in favour of a higher award than in Falconer's case supra. The award of $30,000.00 is not so out of line with that awarded in Falconer's as to be considered inordinate or unreasonable.

For the above reasons the appeal both in relation to liability and quantum of damage ought to be dismissed. The appeal on the issue of applicable conversion rates was not pursued.

CARBERRY, J.A.:

I agree.

BINGHAM, J.A. (Ag.):

I agree.