Plaint No. 3/88

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

BETWEEN LEE HARMON
Plaintiff

AND PETER KIKORIO
Defendant

AND WILLIAM ESTALL JNR
Third Party

Mr Gibson for Plaintiff
Mr Sceats for Defendant
Mr McKie for Third Party
Dates of hearing: 13 and 14 December 1988
Date of Judgment: 16 December 1988

JUDGMENT OF QUILLIAM J

This action arises out of a collision which occurred on the 1st of January 1987 between a motor cycle ridden by the Second Defendant on which the Plaintiff was a pillion passenger and a station wagon driven by the First Defendant. There was at a relatively late stage an allegation by the Second Defendant of contributory negligence by the Plaintiff in certain respects but there was no evidence to support this and the allegation was duly abandoned. In the result therefore the Plaintiff's claim is that there was negligence causing his injuries by the one driver or the other or perhaps both.

Certain aspects of the evidence are uncontested. At about 6.30 - 7.00 am on the 1st of January 1987 the Second Defendant with the Plaintiff as pillion passenger was riding his motorcycle in an easterly direction along the main road towards Upper Tupapa. At the same time a station wagon was being driven in the opposite direction by the First Defendant. The two vehicles came into collision and the Plaintiff received injuries which required hospital treatment. He claims damages from both Defendants.

Each driver alleges that the accident was the fault of the other.

In outline the Plaintiff's case is that the motorcycle driven by Mr Estall was travelling on its correct side and that the First Defendant's car came across the centre of the road, onto its incorrect side and maintained that course until it collided with the motorcycle. The First Defendant's response is that it was the motorcycle swerving out across the road, perhaps to avoid a large puddle of water which caused the accident and that he was unable to avoid the collision.

I deal first with the allegations of negligence made by the Plaintiff against the First Defendant. It is central to all these allegations that an attempt must be made to fix the point of impact between the two vehicles. There was no eye witness to the accident and it is not possible to say exactly where the impact occurred. There was one witness, Miss Puna, who saw the First Defendant's car immediately after the impact. I will return to her evidence later. In the meantime I prefer to consider the matter on the basis of the other evidence. It is on that evidence possible to say with reasonable accuracy the general area in which the accident occurred. The First Defendant places the point of impact near

the left-hand edge of the road in the direction he was travelling, i.e. close to the inland edge of the road. I am altogether unable to accept that. It is contrary to almost the whole of the evidence in the case. What is undoubted is that the Plaintiff, the Second Defendant and the motorcycle all finished up off the road on the seaward side and in the vicinity of the driveway leading in to the Airport Authority residence. As might be expected, the evidence of the various witnesses has differed in a number of ways as to the exact positions of the Plaintiff, the Second Defendant and the motorcycle but in general terms there is a remarkable degree of agreement. These positions provide the key to this case. Upon the balance of probabilities I do not see how the impact could have occurred anywhere near the spot claimed by the First Defendant. Another significant factor is the damage to the First Defendant's vehicle and the relative lack of damage to the motorcycle. Although the damage to the car has not been precisely established it is clear that it struck the motorcycle with its right front. More accurately perhaps, it should be said that it struck not the motorcycle but the Plaintiff's right leg. The First Defendant says this was merely a glancing blow but I am satisfied it was much more than that. This is clear from the nature of the injuries to the Plaintiff and the fact that he was in all probability thrown backwards from the line of travel of the motorcycle. There must have been a solid and heavy impact.

The important thing however is that the accident happened completely on the First Defendant's incorrect side of the road. This means that what must have happened is altogether inconsistent with the First Defendant's account of it.

I have reached this conclusion without reference to the evidence of Miss Puna. She said that she saw from her home

the First Defendant's car travelling for some distance almost off the road on its incorrect side and so as to pass close to the gate at the entrance to the Puna residence and that it was travelling at a fast speed. I thought I should treat that evidence with some caution but I am satisfied it is consistent with the rest of the evidence and I accept at least in general terms what she says. This puts the issue as to the point of impact beyond any doubt.

While I have not been able to conclude that the First Defendant's evidence was untruthful, I am left with the clear impression that he is mistaken in a number of respects. I think that over the passage of nearly 2 years which have elapsed since the accident his recollection of events as become somewhat coloured. His account of the respective positions of the motorcycle and his car at the time he first saw the motorcycle is plainly incorrect even though that is an understandable error. His evidence that the Second Defendant was carrying a beer can in his hand is also without any foundation. He said that he showed Constable Graham who attended at the scene where the impact had occurred but this is contrary to the evidence given by the Constable. His conduct after the accident is inconsistent with what he now says occurred. Had the motorcycle swerved suddenly out in front of him as he says, then I should have expected that at the scene and certainly to Constable Graham he would have given that account of the matter and probably in very indignant terms. He did not do so. Upon a consideration of all the evidence, I prefer that of the Plaintiff to that of the First Defendant and also in general terms I prefer that of the Second Defendant to that of the First Defendant.

I turn then to the particular allegations of negligence made against the First Defendant. There are several of them but it

is not necessary to deal with all of them. If any one of them is made out then the Plaintiff is entitled to judgment.

As I have already held the accident occurred on the First Defendant's incorrect side of the road. This fact alone is not necessarily an end of the matter but it means that one must look for some explanation other than that of negligence which might account for the First Defendant having been where he was. It must be said at once that there is no suggestion of any consumption of alcohol by the First Defendant and so it cannot be said his judgment was impaired in that way. Nor do I find any support for the suggestion that he may have been so tired as not to have had proper control of his car. There was nothing to indicate any extra stress on him and any appearance which he may have given of tiredness is accounted for by the understandable shock of the accident. He did however drive across the road and over an appreciable distance. I can only conclude that the probability is he was inattentive in his driving. This was broad daylight and on a straight stretch of road. Perhaps he was avoiding potholes or bumpy parts of the road. The reason is not clear but I do not believe he could have driven where he did in the circumstances which existed except by reason of some inattention on his part. Accordingly I find the allegation in paragraph 6(f) of the Statement of Claim namely, "failing to keep to the left side of the road in the direction the larder was travelling" to have been made out and that this amounted to causative negligence. The evidence would seem to establish a number of the other allegations as well and particularly on the basis of Miss Puna's evidence driving at a speed which in the circumstances was excessive but I do not need to specify these other allegations.

I think I should say a brief word upon two other particular aspects of the evidence. There was first the evidence of one witness that she saw the skid marks of two tyres on the road at about the place where the accident must happened. No other witness saw these marks. If they existed then I am unable with any confidence to connect them with the First Defendant's car. There is no suggestion that he saw the motorcycle and the impending collission so as to have applied his breaks before impact. His evidence was to the contrary. I accordingly put this evidence aside.

There is then the question of whether there was a substantial puddle of water covering a good part of the seaward side of the road. This was advanced as providing an explanation for a swerve across the road by the Second Defendant, i.e. a manouvre to avoid the water. There was a considerable conflict of evidence about the puddle but I do not think it important for me to resolve it. In all probability there was a fairly extensive puddle but my finding as to the point of impact means that I am unable to conclude that the motorcycle swerved in the way suggested. Accordingly the presence and extent of the puddle cannot be regarded as having any bearing on the cause of the accident.

I come then to the allegations against the Second Defendant. Both the Plaintiff and the First Defendant say in their pleadings that the Second Defendant was negligent although it is not at all clear why the Plaintiff should have made such an allegation or should have joined the Second Defendant as a party because his evidence was an almost a complete exoneration of the Second Defendant. With one exception I think it better to consider the position of the Second Defendant upon the basis more particularly of the allegations of the First Defendant. These are set out in the Third Party

Notice which was the means by which the Second Defendant was first joined in the action. The allegations are in rather general terms but it seems clear that they are directed mainly to the proposition that the motorcycle swerved across the road in the path of the oncoming car. I have already held that this cannot have occurred. There is however one further allegation against the Second Defendant and rather surprisingly that comes from the Plaintiff although it was pursued in the course of the hearing almost entirely on behalf of the First Defendant. That allegation is that the Second Defendant was negligent in driving the motorcycle when his capabilities had been affected by the consumption of alcohol. A good deal of evidence was directed to the question of consumption of alcohol by the Second Defendant. In outline it appeared that he had worked a normal 8 hour days work on the previous day. He had then in the evening gone to a New Years Eve gathering where there was drinking, singing and general celebration. He had been drinking from about 9.00 - 9.30 pm until about 2.00 - 2.30 am although it was not suggested. He had left this place at about daylight with the Plaintiff as a pillion passenger and gone to a shack at Pue where during about half to three quarters of an hour he had drunk some more. It may well be the case that after such substantial consumption of alcohol and without any sleep for about 24 hours he was unwise to have ridden his motorcycle and if he had been apprehended he may have had difficulty escaping a prosecution. That however is not the point for determination now. The only question with which I am concerned is whether consumption of alcohol by the Second Defendant was an act of negligence by him in the sense that it was the cause or one of the causes of the accident which occurred. I am unable to see any evidence to show that it was. Accepting as I do that the accident happened because the First Defendant's car drove across the road as described there was nothing the Second

Defendant could have done whether he was affected by drink or not to have avoided the accident. As it was the evidence of himself and of the Plaintiff which I accept was that the Second Defendant swerved to his left but was unable to avoid the accident. It may be that the Second Defendant is in the circumstances lucky but I can only make a finding against him if his consumption of alcohol is shown to have been a contrabuting cause of the accident and that is not the case.

I conclude therefore that the Plaintiff is entitled to succeed against the First Defentant but not against the Second Defendant. It follows from this that the First Defendant's claim against the Second Defendant for contribution must also fail.

I am required now to consider the amount of damages to which the Plaintiff is entitled and this is a matter of considerable difficulty. There are first two claims for special damages, namely $2380.00 for loss of earnings, (i.e. 34 weeks at $70.00 nett per week) and $70.00 for property damage. Neither of these sums is contested and so I proceed at once to the general damages. The amount claimed is $50,000.00. This of course does not assist in deciding what is the proper amount because the Plaintiff can name any sum he chooses. He must satisfy the Court as to the amount upon the basis of the evidence given.

It is necessary first to set out the nature of the injuries suffered by the Plaintiff. It must be said at once that these were very serious and no attempt has been made to suggest otherwise. The Plaintiff suffered severe compound fractures of the thigh and of both bones to the lower leg as well as dislocation of the pelvis. After about 8 days in the Rarotonga Hospital he was transferred to Middlemore Hospital

in Auckland where he remained an inpatient for almost 5 months and an outpatient for a further 2 months. He returned to Rarotonga at the end of August 1987.

While in hospital he underwent 7 operations, several of them of a major nature and required skin and bone grafts. He has been left with a number of permanent disabilities resulting from the accident. Apart from the gross disfigurement to his leg from the multiple scarring both from the injuries and from the operative procedures, he has been left with a 3 centimetre shortening of the right leg, a permanent limitation in the movement of the right knee and deformities of the right pelvis. It is likely that in later life because of the shortening of the leg he will suffer some degree of scholiosis or hunch back and he will almost certainly develop arthritis resulting from the injuries.

At the age now of 31 years the future for the Plaintiff must be described as bleak. Further operation may give him some additional movement of the knee and physiotherapy treatment may help to alleviate some of his difficulties. There is a possibility of some improvement in his condition but I conclude from the medical evidence that it is more probable he will get worse rather than better. This is the background against which I must as best I can assess the damages. I do so under the three general headings which apply to such an assessment.

The first is Pain and Suffering. The degree of pain in this case must be regarded as substantial. Although past pain is generally to be treated with care because it is now over and done with, that does not mean it is to be in any sense disregarded or treated lightly. It is clear that the Plaintiff has had to endure a high level of past pain and

suffering and this must be treated as a significant factor. Of more importance however is the fact that he must look forward to a lifetime of continuing pain, particularly in the leg itself at the site of the injuries and also in the back. This may not be constantly acute but it has its acute stages and there must be a limit to which analgesics can help. I do not think I should in any way underrate the extent of pain and suffering in this case.

The second heading is Loss of Enjoyment of Life and Loss of Amenities. Before the accident the Plaintiff led a normally active life. He engaged in sport of various kinds and in social activities. He can no longer do so or at least only to a greatly restricted extent. He experiences embarrassment because of his disfigurement and his general enjoyment of life has been greatly impaired. While he is likely to learn to a certain extent to live with his disabilities and perhaps to engage in non-active pursuits it must be acknowledged that life for him holds a great deal less in prospect than it would otherwise have done. Accordingly this factor also must be regarded as one of considerable significance.

The third heading is Future Economic Loss. Unlike most such cases this is the least significant of the three headings. This is because the Plaintiff before the accident was employed in work of a clerical nature by the Inland Revenue Department. He has been able to return to that employment and there seems no reason why he should not continue in it indefinitely. He is prevented of course from changing to some more active occupation but this cannot be regarded as a major circumstance. The matter of importance is that he has the same employment as before the accident and he can be expected to remain in that employment. It is to be noted that he was able to resume that employment only a week after returning

from Auckland. I do not suggest that there is to be no allowance made for future economic loss but I think it must be regarded as very modest, particularly by comparison with the other heads of damages.

I must then put all these matters together and arrive as best I can at a figure which will reflect in a fair way the compensation to which the Plaintiff is entitled bearing in mind that a proper balance should be preserved. I am mindful that the assessment of damages in this country may be somewha different from what it would be in for example, New Zealand or Australia.

I fix the amount of general damages at $40,000.

There will accordingly be:

1. Judgment for the Plaintiff against the First Defendant for a total of $42,450.00 together with costs, disbursements and witnesses expenses as fixed by the Registrar.

2. Judgment for the Second Defendant against the Plaintiff together with costs, disbursements and witnesses expenses as fixed by the Registrar but those costs should reflect the fact that there was an allegation of contributory negligence against the Plaintiff which was subsequently abandoned.

Judge