already been paid on account. Owing to him is only the small amount of disbursement shown on the account rendered. The order will therefore be that the court fixes the remuneration of Mr. Revill at £10,000.

Order accordingly.

[1980–87 Gib LR 297]

DOBSON v. ATTORNEY-GENERAL and RUMBO

SUPREME COURT (Alcantara, A.J.): April 23rd, 1985

Tort—personal injuries—damages—interest—court may award interest on damages under discretion in Contract and Tort Ordinance (cap. 32), s.14—interest on special damages recoverable from start of proceedings because quantifiable at that time—no interest on general damages until quantified by court

The plaintiff brought an action against the defendants to recover damages for personal injury.

The plaintiff, who was riding his motorcycle, was injured in a collision with a Government van driven by the second defendant. The plaintiff suffered a fractured ankle and was taken to hospital, where it was plastered and he was later given physiotherapy. The medical report stated that he had been left with a residual disability in his ankle of about 5% and that the fracture would degenerate into osteoarthritis. The report also acknowledged that the discomfort in the ankle prevented the plaintiff from running and playing sports that he had enjoyed prior to the accident, as well as occasionally causing him to wake in the night.

The plaintiff submitted that (a) the accident was caused by the second defendant; (b) a suitable figure for compensation would be not less than £4,000; and (c) interest should be paid on the award of both general and special damages in conformity with modern English practice. The defendants submitted in reply that the accident had been due to the plaintiff's negligence.

Held, awarding damages to the plaintiff but deducting one-third for contributory negligence:

(1) Both the second defendant and the plaintiff were to blame for the accident as, although the second defendant was negligent in cutting across traffic without ensuring that it was safe to do so, the plaintiff had also overtaken without exercising due care and his contributory negligence was accordingly assessed at one-third. This meant that, while general damages

would be assessed at £2,000 and special damages at £89.35, the overall award of damages (£2,089.39) would be reduced to £1,392.93. In arriving at a suitable figure for compensation, the court was correct to use previous cases as precedents but, in doing so, it was necessary for it to consider previous Gibraltar cases before looking to English cases (paras. 11–12; para. 18).

(2) Interest could be awarded on special damages in the exercise of the court's discretion under s.14 of the Contract and Tort Ordinance (*cap.* 32) since they represented sums which had accrued and been quantified at the start of the proceedings. Interest could not, however, be awarded on the general damages from the same point of time, since they had not been quantified at that time and could only be awarded from the date of judgment. Gibraltar had not followed the English rule that damages could be awarded from the date of service of process in the proceedings (paras. 19–22).

Cases cited:
(1) *Bounoukoue* v. *Wheddon*, 1980–87 Gib LR *N* [6] followed.
(2) *Chan Wai Tong* v. *Li Ping Sum*, [1985] A.C. 446; [1985] 2 W.L.R. 396; [1985] 1 Lloyd's Rep. 87, considered.
(3) *Hollands* v. *Raggio*, Supreme Ct., December 2nd, 1977, unreported, followed.
(4) *Jefford* v. *Gee*, [1970] 2 Q.B. 130; [1970] 2 W.L.R. 702; [1970] 1 All E.R. 1202; [1970] 1 Lloyd's Rep. 107, not followed.
(5) *Worsfold* v. *Howe*, [1980] 1 W.L.R. 1175; [1980] 1 All E.R. 1028, considered.

P. Howell for the plaintiff;
Miss J. McGrowther for the first defendant;
E.C. Ellul for the second defendant.

1 **ALCANTARA, A.J.:** The plaintiff is a 54-year-old school teacher. He is also an experienced driver. On March 17th, 1982, he was riding his motorcycle along Winston Churchill Ave. in a northerly direction to go to his school. The time was 8.50 a.m. and northbound traffic was heavy. In front of him there were two vehicles, a white car and a big Royal Navy bus. In those days there was a pedestrian crossing across the road which at that time was controlled by a policeman to ensure that children on their way to school crossed the road safely.

2 The policeman stopped the vehicular traffic to allow the children to cross. The white vehicle came to a halt just in front of the crossing. The driver of the bus stopped just in front of the approach studs to the crossing. He had noticed a van on his right hand side which wanted to come out of the Jubilee playground, the entrance and exit of which is just between the studs and the crossing.

3 The driver of the van was Mr. Rumbo, an instructor for the Government of Gibraltar at the Construction Industry Training Centre. At the time, he was driving a Government vehicle in the course of his employment. He was not in a hurry but he wanted to cross the road and join the southbound traffic on the other side.

4 The plaintiff, Mr. Dobson, decided to overtake the bus so that when traffic was allowed to proceed, he would be in front of the bus rather than behind it. He could see the white car in front and the gap left by the bus. What he was not aware of, and could not see because of the bus, was the van at the entrance of the Jubilee playground. At the same time, the driver of the van made a decision. He decided to move across the front of the bus and join the southbound traffic on the other side of the road. The driver could not see and was unaware of the motorcyclist behind the bus.

5 Both vehicles moved slowly, unaware of one another, and they met. Neither of the vehicles suffered any damage, but the plaintiff, either because of coming into contact with the van, or being thrown down, or falling, suffered personal injuries. This is how Mr. Rumbo describes the accident: "It was impossible for me to see him. I appeared and he appeared. I do not know whether he collided with me or I collided with him."

6 Both defendants blame the plaintiff for the accident. In the alternative, the second defendant goes as far as blaming Mr. Benyunes, the driver of the bus, for the accident but without bringing him to court as a third party. The second defendant made the following allegation in his defence:

> "The traffic flowing along Winston Churchill Ave. stopped, and a path was made available to him by Richard Benyunes, the driver of a Royal Navy Bus, who signalled with his head and his hand that it was possible and safe for him to come out of the said roadway, and on to Winston Churchill Ave. in order that he could cross the bus's path, turn left and proceed in a southerly direction."

7 Mr. Benyunes gave evidence on oath and denied this allegation. He admits having left a gap between his bus and the white car in front to enable Mr. Rumbo to emerge, if he wanted to, but denies having given any signal as is alleged. This is what Mr. Rumbo said in evidence-in-chief: "I looked at the driver [of the bus]. I do not know whether he signalled with his hand or head. I looked at him. I think he nodded with his head."

8 I find as a fact that Mr. Benyunes did not signal the second defendant as alleged in the defence. What Mr. Benyunes did was to offer an opportunity to Mr. Rumbo to come out on to a major road in front of him, if he wanted, but with no promise or indication that it was safe to do what Mr. Rumbo intended. Mr. Benyunes was unaware of what Mr. Rumbo intended to do in any case. Mr. Benyunes has been attacked both in

cross-examination and in counsel's addresses unjustifiably. He was, in my view, a courteous driver prepared to give way to other drivers. No blame whatsoever attaches to him.

9 I have been referred to the headnote of *Worsfold* v. *Howe* (5) in *The Weekly Law Reports*. It reads ([1980] 1 W.L.R. at 1175):

> "The plaintiff motor cyclist was riding along the main street of a town one evening while it was still daylight. The roads were dry, visibility was good but traffic was heavy. After stopping at a pedestrian crossing controlled by traffic lights, the motor cyclist positioned himself towards the middle of the road in order later to turn to the right. He overtook two stationary tankers waiting at a second set of traffic lights, where he intended to turn right. The defendant car driver was emerging from a station yard on the near side of the stationary tankers, and was attempting to turn right across the main street. The stationary tankers obscured his view so he was unable to see whether the road was clear. The car driver understood from a wave of the tanker driver's hand that the tanker driver would leave a gap through which the car driver could cross the road when it was safe to do so. The car driver moved slowly forward and edged past the leading tanker into the motor cyclist's path. In the ensuing collision the motor cyclist sustained injuries. He brought an action for negligence claiming damages against the car driver. At the trial the judge formed the view on the evidence that each party was 50 per cent. to blame for the collision. He was then referred to *Clarke* v. *Winchurch* . . . and regarded it as a binding precedent requiring him to absolve the car driver from liability and give judgment for him.
>
> On appeal by the motor cyclist:—
>
> *Held*, allowing the appeal, that, *Clarke* v. *Winchurch* laid down no principle of law but was a decision on its own facts so that the judge erred in law in considering himself to be bound by it; that accordingly liability should be apportioned on the basis of the view that the judge originally formed on hearing the evidence, namely, that each party was 50 per cent. to blame."

10 The case is of only limited assistance as the judge found as a fact that the motor cyclist was travelling too fast to stop or avoid a collision. The judge also found that the driver of the tanker waved to the motorcyclist. In the case before me, I have found as a fact that there was no signal and that the plaintiff was driving slowly. I have formed the view that both parties are to blame for the accident.

11 The plaintiff overtook a bus without ensuring that it was safe so to do. The second defendant is also to blame. Equally he cut across traffic, albeit momentarily stationary, without ensuring that it was safe so to do. I

apportion the blame of the second defendant at two-thirds and the plaintiff at one-third. This means that, whatever damages I give to the plaintiff, will be reduced by one-third.

12 Now as to damages. Special damages have been agreed at £89.35. They present no problem, except that they must be reduced by one-third. As to general damages: The plaintiff was taken to hospital. Clinically the right ankle was swollen and painful, and when x-rayed he was found to have a fracture of the tibia and fibula without appreciable displacement. His ankle was immobilized in a plaster-of-Paris cast. There was also a slight swelling on his right knee. He was in hospital for a few days. After the plaster was removed, he was given physiotherapy treatment. There is a report of his present situation by Mr. A.C. Chakraverty, the consultant surgeon, to the following effect:

> "He is still conscious of a slight discomfort in the lateral side of the right ankle, which, at times, wakes him at night. He experiences a slight ache when the weather is damp and cold. The ankle also becomes puffy occasionally. Although he can walk without a limp, he has become somewhat apprehensive to run, and therefore has had to give up tennis and cricket which he used to play, prior to the injury to his ankle,"

followed by an opinion:

> "This patient has now reached the finality of recovery following his injuries sustained in the accident on March 17th, 1982. Although for all practical purposes the outcome of the injury has been satisfactory, it must be accepted that he has a slight degree of residual disability (about 5%) with his ankle."

13 The consultant also gave *viva voce* evidence adding that the plaintiff was now experiencing some stiffness in the ankle in the mornings, and that any fracture would degenerate into osteoarthritis. He last saw the plaintiff on March 14th, 1985 and there was no need to change his report and opinion which is dated January 6th, 1984.

14 The plaintiff has been very sincere in the witness box, stating that what is really keeping him off tennis and cricket is that he is somewhat overweight and older, rather than his ankle, although he is apprehensive in running. He said he had never been a professional or assiduous player. Counsel for the plaintiff has referred me to a number of awards listed in Kemp & Kemp, 2 *The Quantum of Damages* (1975) in relation to injuries to an ankle. He has argued that using them as a basis, and taking into account inflation, the award in this case should be a figure of not less than £4,000.

15 Even before comparing the present case with those listed in *Kemp & Kemp*, I will direct my mind to a recent decision of the Privy Council, on

appeal from Hong Kong, in relation to damages guidelines. The case is *Chan Wai Tong* v. *Li Ping Sum* (2), where Lord Fraser of Tullybelton had this to say ([1985] A.C. at 455):

> "Nevertheless their Lordships think it right to refer to the substantial body of authority, both in the Court of Appeal of Hong Kong and in this Board, to the effect that a court should in general have regard only to awards in the same jurisdiction or in a neighbouring locality where the relevant conditions are similar. In *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* . . . Lord Morris of Borth-y-Gest delivering the advice of the Board said . . .
>
> > 'In deciding this appeal their Lordships think that three considerations may be had in mind: . . . (3) That 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.'"

16 I think that the general rule should be that if comparison with previous awards is going to be used as a guide, then you should first look at similar cases decided in Gibraltar to see whether a pattern exists or is in the process of being formed. This does not mean that awards in England should be totally disregarded or that the awards suggested in *Kemp & Kemp* are useless. In the case of injuries to the ankle, I have been lucky in finding two cases which are most helpful. The most salient is *Bounoukoue* v. *Wheddon* (1). In this case, a 47-year-old man fractured his right ankle and, as a result, had to have a screw inserted into it. He was in hospital for 26 days and spent 2 months as an outpatient. Although he recovered full and free movement of his ankle, he continued to suffer discomfort. His medical report stated that a fracture of this nature was almost certain to develop osteoarthritic changes at a later date which would be painful and disabling. The plaintiff was awarded £1,500 in general damages in respect of pain, suffering and loss of amenities.

17 The next case is *Hollands* v. *Raggio* (3) in which a young person sustained considerable bruising and swelling to her left ankle with a 3 ins. superficial laceration which took considerable time to heal. As a result of the accident, the plaintiff's movement was temporarily restricted but there was no damage to tendons or ligaments. She found that after the accident, if she stood for long periods, her ankle would become inflamed and there was a small possibility that she would develop osteoarthritis. The plaintiff was restricted from partaking in activities which she had previously enjoyed such as long walks as well as swimming and dancing and she claimed damages for loss of amenities. She was awarded £1,750 in general damages in respect of pain, suffering and loss of amenities.

18 In the instant case, and taking into account the factor of inflation, I think that the correct award is £2,000 general damages in respect of pain, suffering and loss of amenities. This sum will be reduced by one-third. Counsel for the plaintiff asked for interest on the general damages and referred me to 1 *The Supreme Court Practice 1985*, para. 6/2/16, at 38, which reads: "(7) On general damages for pain and suffering and loss of amenities, interest should be awarded at the rate of about 2 per cent. per annum from the date of service of the writ until the date of trial."

19 This power is derived from the Administration of Justice Act 1969 and the Supreme Court Act 1981, which do not apply to Gibraltar. This matter was decided by Spry, C.J. in *Hollands* v. *Raggio* (3), which has already been referred to for another purpose. He said in his judgment:

> "Mr. Ellul also asked for interest on the general damages on the basis of the decision in *Jefford* v. *Gee*. That decision was never binding authority in Gibraltar, because it arose out of s.22 of the Administration of Justice Act 1969, which made the giving of interest, within certain principles, obligatory. There is no such provision in the law of Gibraltar."

20 Davis, C.J. also dealt with this same point in *Bounoukoue* v. *Wheddon* (1), to which I have also already referred for another purpose. He came to the same conclusion without reference to the decision of Spry, C.J. which had not been quoted to him. In his judgment, he said: "Gibraltar, however, has not followed England in making mandatory the award of interest on damages in personal injury cases and the case of *Jefford* v. *Gee* is not therefore authoritative in Gibraltar insofar as such cases are concerned."

21 Not only do I intend to follow the previous decisions of *Bounoukoue* v. *Wheddon* (1) and *Hollands* v. *Raggio* (3), but I agree entirely with the reasoning of Davis, C.J. It is unnecessary for me to repeat his considered opinion. As regards special damages, both Chief Justices were of the view that in the exercise of the discretion conferred by s.14 of the Contract and Tort Ordinance (*cap*. 32), interest may be awarded on the quantified sum. I will act accordingly.

22 Judgment will be given for the plaintiff for two-thirds of £2,000 for general damages and two-thirds of £89.35 carrying interest at the rate of 12% per annum from the date of the service of the writ until today.

Order accordingly.