

TAYLOR v. WILDING

SUPREME COURT (Harwood, A.J.): May 5th, 1995

Tort—personal injuries—damages—ankle—compression fracture—39-year-old policeman suffering osteo-arthritis, continual pain and loss of mobility—quantum

Tort—personal injuries—damages—loss of earning capacity—policeman facing real and substantial risk of future loss of employment and disadvantage in obtaining comparable income—12 year multiplier

The plaintiff brought an action against the defendant to recover damages for pain, suffering, loss of amenity and future loss of earnings resulting from injuries sustained in a road accident caused by the defendant's negligence.

The plaintiff, when riding his motorcycle, was struck by the defendant's car and suffered injuries to his left ankle involving an intra-articular fracture of the medial malleolus and a compression fracture of the lower tibia which distorted most of the weight-bearing surface of the joint. He underwent surgery and received physiotherapy for three months; he did not work for five months.

In the six years following the accident, the plaintiff, now 39, suffered continuous pain and swelling and developed osteo-arthritis in his ankle, which medical experts agreed would continue and lead to further deterioration in mobility. Within the next five years he would need further surgery to eliminate movement in the joint and alleviate the pain. Nevertheless, additional stress on the bones of his foot would probably result in the degeneration of other joints with accompanying pain and loss of amenity after a number of years.

The plaintiff was a regular leisure runner and skier and a qualified diving instructor but was now unable to pursue any of those activities. The only remaining sport in which he could participate was motorcycling, albeit not on the trail bike he had previously used. He had been a policeman for 10 years at the time of the accident, but was now unable to perform some of his operational duties, particularly those involved in his role as an ambulance crew member. Such duties would certainly be beyond his capabilities if the planned arthrodesis of the ankle were performed in future.

On the question of general damages, the plaintiff submitted that (a) since his continuing pain and loss of mobility were likely, within a few years, to render him unable to carry out the duties required of him as a policeman, and since the number of opportunities for him to undertake more sedentary duties within the police force were limited, his prospects

of remaining in the police until retirement were minimal; (b) in view of the depressed state of the Gibraltar employment market and his own lack of academic qualifications and professional skills unconnected with physical training, he would be unlikely to find work of a sedentary nature outside the police force which would produce the equivalent of his present salary; and (c) accordingly, in addition to damages for pain and suffering and loss of amenity, he should be awarded substantial damages for the disadvantage he would suffer in finding future employment.

The defendant submitted in reply that (a) since the police force had shown no indication that it wished to discharge the plaintiff, there was no reason why, if a sedentary job could be found for him, he should not remain employed by the force until retirement; (b) suitable work which he might undertake outside the police force included security work or clerical work in the magistrates' court, which need not necessarily be less well paid; and (c) whilst he had undoubtedly suffered pain and loss of amenity, in practice, the disadvantage he would suffer in the labour market would be minimal.

Held, awarding damages for pain and suffering, loss of amenity and handicap in the labour market:

(1) As a result of his accident, the plaintiff had suffered the pain of two operations and was likely to undergo a third in future. He had also experienced continuing pain and resultant depression and sleeplessness in the six years since the accident. This pain was unlikely to diminish and indeed was likely to spread as a result of consequential wear and tear on other parts of his left foot. Loss of amenity caused by his injuries had deprived him of the pleasure of leisure pursuits, principally running, in which he had previously participated and would probably lead to weight gain which would exacerbate the situation. Accordingly, there would be an award of £17,750 for pain, suffering and loss of amenity (page 63, lines 1–20; page 64, lines 12–34).

(2) It was virtually certain that the plaintiff would be forced to seek alternative employment at some future date due to his deteriorating condition. The likelihood that an arthrodesis of his left ankle in the next few years would end all mobility in the joint meant that he would be unable to continue as an ambulance crew member with the police force. Moreover, although it was quite possible that he would find suitable work outside the police force, there was a real and substantial risk, given the state of the labour market and his lack of formal qualifications, that it would be less well paid. The expertise he had acquired in his youth in the field of physical training would be of little use to him. There would therefore be an award of £47,000 in respect of the handicap which he would suffer in the labour market, reflecting the potential £5,000 per annum drop in salary he was likely to sustain during the 12-year period between the ages of 43 (when the arthrodesis was likely to be performed) and 55 (the standard police retirement age),

taking account of appropriate deductions for the immediate receipt of a lump sum, income tax and social security contributions (page 65, lines 5–19; lines 26–44; page 66, lines 9–28).

Case cited:

(1) *Smith v. Manchester Corp.* (1974), 17 K.I.R. 1, *sub nom. Smith v. Manchester City Council* (1974), 118 Sol. Jo. 597, applied.

Legislation construed:

Contract and Tort Ordinance (1984 Edition), s.14: The relevant terms of this section are set out at page 66, lines 37–39.

J.D.J. Rosado for the plaintiff;
M.W. Isola for the defendant.

HARWOOD, A.J.: On November 29th, 1989 the plaintiff suffered personal injuries in a road accident. He was riding his motorcycle along Main Street when a motor car driven by the defendant collided with him. The defendant was entirely to blame and was later convicted by the magistrates of careless driving. The plaintiff claimed damages for pain, suffering and pecuniary loss by a writ which, for some reason, was not issued until November 26th, 1992. On February 22nd, 1993 judgment was entered for the plaintiff on liability with damages to be assessed. This judgment concerns the assessment of general damages for pain, suffering and loss of amenity, handicap in the labour market and interest thereon. Special damages have been agreed in the sum of £1250.

After the accident the plaintiff remained fully conscious. He was taken to hospital by ambulance where he was examined and then X-rayed. There was grazing over the lower third of his left leg and bruising over the lower half of his left shin. Movements of the left foot were painful. There was a minor injury to his left ring finger. X-rays of his left ankle showed an intra-articular fracture of the medial malleolus and also a compression fracture of the anterior fifth of the tibial plafond with some concertina effect along the anterior cortex of the lower end of the tibia. It was a painful, unusual and serious injury with consequences that will affect the plaintiff for the rest of his life. Apart from the fracture of the medial malleolus it was, in simpler terms, a compression fracture of the lower end of the tibia affecting the weight-bearing surface of the ankle joint to the extent of probably more than two-thirds of its surface such that the weight-bearing surface has now become distorted.

The medical evidence is contained in two reports, dated August 10th, 1992 and August 15th, 1994, by Mr. Riyaz Ahmad Malik, M.Ch. Orth., FRCS, and one report, dated August 16th, 1993, by Group Capt. Amaresh Chandra Chakraverty, M.Ch. Orth., FRCS, both being highly qualified consultant orthopaedic surgeons. They gave oral evidence, as also did the plaintiff, and all three were cross-examined.

The prognosis

Both specialists concluded at an early stage and are agreed that the crushing injury to the ankle, as above described, is one that has resulted in osteo-arthritis of the ankle joint. In consequence, the plaintiff has experienced and will continue to endure increasing pain and deterioration of ankle mobility. The pain alone will be such that in time to come he will almost certainly be advised to undergo further major surgery in the form of arthrodesis which will not only alleviate the pain but also eliminate all movement of the ankle. Mr. Malik and Group Capt. Chakraverty are both now of the firm opinion that this further surgery will become virtually inevitable within four to five years from now. It will be an operation requiring more than three months of non-weight-bearing on the left leg with an approximate likelihood of success in the region of 90%. But even so and probably in any event, the extra stress being placed on the subtalar joint and the mid-tarsal joint may well lead to wear and subsequent degeneration of those joints with accompanying pain after a further number of years—possibly 15 years from now. All in all, the future is a gloomy prospect for the plaintiff who is 39 years of age at the present time. Mr. Malik expects that the plaintiff will be his or some other specialist's patient for the rest of his life.

Pain, suffering and loss of amenity

The plaintiff appeared to me to be a good witness. He was articulate and described these features with substantial accuracy. He did not, I believe, exaggerate his symptoms, nor has any tendency to exaggeration or "compensation neurosis" been detected by either of the medical experts. In his evidence, he did not seek to overstate the effects that his injury has had, and is likely to have, on his life.

He remained in hospital for three weeks after the accident during which period he underwent surgery under general anaesthetic. The medial malleolar fracture was reduced and internally fixed using a screw. His leg remained in a below-knee plaster of Paris cast for two weeks after his discharge from hospital. Two further weeks after removal of the plaster he underwent another operation under general anaesthetic for the removal of the screw, and thereafter received physiotherapy as an out-patient for three months. He remained off work for a total of five months. His external leg injuries healed well, leaving a $2\frac{1}{2}$ in. linear surgical scar on the medial aspect of the ankle. Ever since the accident he has experienced pain to some degree at the fracture site, whether walking or at rest, and swelling of the ankle. He described the pain as constant—for the first five months or so like a "severe toothache that won't go away"—mainly in front of the ankle. This was a symptom noted on each occasion of examination in August 1992, 1993 and 1994 and which, after lessening, he now says seems to be becoming progressively worse, such that he becomes depressed and agitated at times and has occasional difficulty in

sleeping. This is all entirely compatible with the expert opinions expressed.

I have no doubt whatsoever that from a young age up to the date of the accident he was a fit and active individual whose principal interest lay in running, but who also enjoyed periodic leisure pursuits such as diving and skiing. He has been unable to run since the accident and will never again be able to do so. He pursued an army career for more than five years before joining the Royal Gibraltar Police Force in 1979 at the age of 23. He was proficient in all the physical activities in which he took part before his accident, but in the 10 years between marrying and leaving the army in 1979 and the date of the accident in 1989 he had been skiing in Sierra Nevada only three times (for one week on each occasion). During his army service the plaintiff had qualified as a diving instructor after gaining a good deal of experience when in charge of the diving section of the Adventure Training Centre while posted in Belize.

To the fairly small extent to which he appears to have indulged in diving in Gibraltar after joining the police force, this pleasure is now denied him. He has given up diving completely, as he has skiing, having tried but failed because of his ankle disability. He is still able to ride a motorcycle—albeit a different, lower model than the “trail bike” he was using on the day of the accident—and I assume that his ability to do so will remain substantially unaffected in the years to come. I regard the total eclipse of his capability to run as his most significant handicap under this head. He was always a keen runner from his mid-teens and told me that he had achieved regimental colours for running whilst in the regular army. Before the accident I am satisfied that he enjoyed running or jogging two or three times a week in Gibraltar if only in order to keep fit. He said that, if anything, this form of activity was on the increase because of the tendency to become overweight at the age of 35 onwards. That is not difficult to understand! The ankle injury is such that the plaintiff cannot and will not run again, and no doubt any further weight increase will have a detrimental effect upon the condition of his ankle as time progresses, whether or not an arthrodesis operation were to be performed.

Handicap in the labour market

The plaintiff’s future prospects under this head give cause for concern and are not at all easy to assess. He now wishes to leave the police force if possible but, understandably, not unless he is either allowed to retire with benefits or is officially found to be medically unfit for further service. This desire seems to be due to a mixture of frustration and depression after hoping for some 18 months to recover from his injury but finding that there had been no improvement—indeed only a deterioration—in his condition and no glimmer of optimism in the following medical reports.

Since joining the police force in 1979 he has not achieved promotion to higher rank and there is no evidence to suggest any likelihood of promotion before his normal retirement age. I conclude that he would in any event have wished to remain in the force even without promotion until retirement at the age of 55 if the accident had not occurred. The accident has already resulted in a reduction of his efficiency as an active member of the force such that (a) he cannot perform the full operational duties that every police constable may from time to time be called upon to perform; (b) his ability to carry out some of the tasks which, in the normal course of his work for some years as a member of the crew of an ambulance, ought to be within his capability, is reduced; and (c), as a consequence of (a) and (b) above, it is likely that his retention in the force will be foreshortened unless there can be found for him some sedentary occupation either in or out of uniform.

It is, I find, certain that he will not be able to carry out any of the tasks referred to in (b) above sufficiently to justify his retention in his present job as a crew member after an arthrodesis of his left ankle in four or five years from now and, even without arthrodesis, I am satisfied that this is a consequence that must be virtually inevitable. Mr. Isola contended that if a sedentary job were to be found for the plaintiff, he might remain in the force up to, or almost up to, the age of 55, and that since no one has yet tried to get rid of him from the force, I ought to conclude that the risk of his being thrown on the labour market is slight. He points out that there is no evidence of any kind from the police regarding his future prospects in the force. That of course is true and makes the task of the court more difficult. But I believe that the continuing deterioration of the left ankle, in the nature of increasing pain and loss of mobility, leading up to arthrodesis, will almost certainly have the result that after an absolute maximum of five years his employment in the force will have been completely terminated whether he likes it or not. He himself expressed doubt that he would be able to carry on with the job even for that period of time and it is probably for that reason also that he has now formed a clear intention to leave the force when he reasonably can—though without yet inquiring about alternative employment opportunities.

There is no evidence to assist the court as to what alternative employment might be forthcoming. It is a fact of which I may take judicial notice that the employment market in Gibraltar in general terms is acutely depressed at the present time. He has no academic qualifications, having left school at the age of 15. His qualifications as an instructor in various fields of physical activity are unlikely to be of much avail to him due to his physical inability to participate in those activities himself—even assuming that an opportunity of employment as an instructor were to arise. Certainly, if he were in competition for such employment, his condition would place him at a distinct disadvantage. Both medical specialists appear to be certain that his ability to work will

be restricted to a sedentary job of some kind. According to Mr. Taylor, the prospect of some administrative work within the force is minimal because most of such work is now being, or has already been, transferred to the civilian sector and because, as he says, members of the force howsoever employed are expected to be sufficiently fit to respond to any situation of emergency if it arises. Clerical work in connection with the criminal jurisdiction of the magistrates' court or with some security organization would possibly prove suitable for him if opportunity arises.

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The duty of this court is to assess the damages under this head as best it can on the *Smith v. Manchester Corp.* (1) principles. No mathematical computation is possible. The likelihood that Mr. Taylor will, before the end of his working life, be thrown on the labour market is not “fanciful” or “speculative.” It is a virtual certainty but there is no “real” or “substantial” likelihood, in my judgment, of his failure to obtain suitable further employment thereafter. It is, I believe, inevitable that such further employment, whether of a temporary nature or permanent, will be less well paid. If he were to obtain temporary employment, I think Gibraltar is a place where he would not find it at all easy to move directly from one job to another.

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All in all, I consider it to be more probable than not that Mr. Taylor's prospects of obtaining continuous and suitable employment are fairly good but not certain. He will be 43 years of age in 4 years' time. At the time of the accident he was earning approximately £12,700 net per annum including housing. In any future employment, it was submitted that he is unlikely to achieve a net annual salary in excess of about £7,000 at current rates. These figures are net of income tax and social security contributions. I make the usual discounts for the immediate receipt of a lump sum and for the general chances of life.

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Conclusion

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Taking into account all the foregoing considerations, I award to the plaintiff the following sums by way of damages:

For pain, suffering and loss of amenity	£17,750
For handicap in the labour market	£47,000
Agreed special damages	£1,250

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Interest is payable on the above sums under s.14 of the Contract and Tort Ordinance at such rate as the court thinks fit “on the whole or any part of the period between the date when the cause of action arose and the date of the judgment.” I award interest of 8% on the sum of £19,000 from November 26th, 1992 when the writ was issued up to the date of this judgment, to be calculated and agreed by counsel for the parties. Interest will also be payable, from the time this judgment is entered until it is satisfied, on the total sum of £66,000, at the statutory rate of 15%, under s.36 of the Supreme Court Ordinance and para. 2 of the Judgment Debts (Rate of Interest) Order made thereunder, as amended.

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5 From the award of £17,750 plus interest calculated as above there falls to be deducted the payment ordered by consent on November 9th, 1993 of £9,000 by way of interim damages plus interest thereon at 8% from the date of payment on November 24th, 1993 up to the date of judgment, to be calculated and agreed by counsel for the parties.

Orders accordingly.
