24/82

IN THE PRIVY COUNCIL No. 10 of 1981

ON APPEAL

FROM THE BERMUDA COURT OF APPEAL

BETWEEN:

GABRIEL MARRA	First Appellant (First Plaintiff)
- and -	
SONDRA MARRA	Second Appellant (Second Plaintiff)
- v -	
J.B.ASTWOOD & SON LIMITED	Respondent (Defendant)

RECORD OF PROCEEDINGS

KINGSFORD DORMAN
14 Old Square
Lincoln's Inn
London WC2 3UB

Solicitors for the Appellants

PHILIP CONWAY THOMAS & CO.
61 Catherine Place,
London SW1E 6HB

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. 10 of 1981

ON APPEAL

FROM THE BERMUDA COURT OF APPEAL

BETWEEN:

GABRIEL MARRA — First Appellant (First Plaintiff)

- and -

SONDRA MARRA — Second Appellant (Second Plaintiff)

- v -

J. B. ASTWOOD & SON LIMITED — Respondent (Defendant)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

E X H I B I T S

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

In the Supreme Court
Bond for Security of Costs d/d 3rd October 1980

E X H I B I T S

Exhibit Mark	Description of Document	Date
2	Copy extract from Defendant's Booking Diary	25th June 1977
	Components Parts Manual "Mobylette"	April 1974

IN THE PRIVY COUNCIL No. 10 of 1981

ON APPEAL

FROM THE BERMUDA COURT OF APPEAL

BETWEEN:

GABRIEL MARRA — First Appellant (First Plaintiff)

- and -

SONDRA MARRA — Second Appellant (Second Plaintiff)

-v-

J.B. ASTWOOD & SON LIMITED — Respondent (Defendant)

RECORD OF PROCEEDINGS

No.1

WRIT OF SUMMONS

In the Supreme Court

No.1
Writ of Summons

20th February 1978

IN THE SUMPREME COURT OF BERMUDA

1978 No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

SONDRA MARRA — Second Plaintiff

- and -

J.B. ASTWOOD & SON LIMITED — Defendant

L.S

ELIZABETH II, by the Grace of God of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth Defender of the Faith.

TO J.B.ASTWOOD & SON LIMITED of Front Street, Hamilton.

We COMMAND YOU that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to

to be entered for you in an action at the suit of

GABRIEL MARRA and SONDRA MARRA

and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

WITNESS the Honourable James Rufus Astwood Chief Justice of our said Court, the 20th day of February in the year of our Lord One thousand nine hundred and seventy-eight

N.B. - This Writ is to be served within twelve calendar months from the date thereof, or, of renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The Defendant may appear hereto by entering an appearance, either personally or by attorney, at the office of the Registrar of the Supreme Court at the Sessions House.

THE PLAINTIFFS CLAIM IS

The First Plaintiff and the Second Plaintiff claims against the Defendant are for damages for injury, loss and damage caused by breach of a contract of hire of 25th July 1977, and/or negligence by the Defendant resulting in a traffic collision on the 26th July 1977, on the South Shore Road, Warwick Parish, Bermuda.

(Sgd)

CONYERS, DILL & PEARMAN

This Writ was issued by Conyers, Dill & Pearman, The Bank of Bermuda Building, Hamilton, Attorneys for the Plaintiff, whose address for service is the same.

The Plaintiffs reside at 670 Hickory Street, Washington Township, c/o Westwood Post Office, New Jersey, U.S.A.

No. 2

STATEMENT OF CLAIM

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
1978: No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

- and -

SONDRA MARRA — Second Plaintiff

- and -

J.B.ASTWOOD & SON LIMITED — Defendants

STATEMENT OF CLAIM

1. At all material times the Defendants carried on, from premises in Front Street, Hamilton, Bermuda, the business of renting auxilliary cycles to visitors to Bermuda.

2. On Monday, the 25th day of July 1977, the Defendants agreed to let and the First Plaintiff agreed to hire an auxilliary cycle No.A967, which had a double seat for the purpose of riding the said auxilliary cycle upon the roads of Bermuda together with the Second Plaintiff as pillion passenger on a daily rental basis.

3. It was an implied term of the said contract for the hire of the said cycle that it was reasonably fit for the purpose for which it was hired, that is as an auxilliary cycle for use by two adult visitors on the roads of Bermuda in reasonable safety.

4. It was a further implied term that the said auxilliary cycle was without defect and was in good, proper, and road worthy condition.

5 The said terms and warrantees were implied from the following circumstances, namely from the type of auxilliary cycle being fitted with provision specifically for the carriage of a passenger; from the fact that the Defendants' business was to let auxilliary cycles to visitors to Bermuda on hire; the fact that the Defendants knew or ought to have known that the Plaintiff and his wife were visitors to these Islands and intended to drive and be carried as pillion passenger upon the said auxilliary cycle on the roads of Bermuda.

6. It was further an implied term, by reason of the fact that auxilliary cycles are let by the Defendants to visitors who are frequently inexperienced, that adequate instructions on the use of the said cycles be given to the extent that the Defendants are satisfied that the hirer is capable of properly using and controlling the said auxilliary cycle in reasonable safety.

7. The said auxilliary cycle was not reasonably fit for the said purpose, and insufficient instructions were given.

PARTICULARS

1. The throttle control of the said auxilliary cycle was defective in that it stuck in the open position;

2. The brakes of the said cycle were insufficient for a cycle carrying two persons;

3. The brakes of the said cycle were so inefficient as to be unable to bring the said cycle to a stop when the throttle had stuck in the open position and the brakes were applied;

4. There was no instruction as to what action be taken if the throttle stayed open.

8. Alternatively, the Defendants were negligent in providing for use for hire an auxilliary cycle which was defective as particularised in paragraph 7 above, and/or were negligent in failing to instruct the Plaintiffs adequately or at all.

9. And further and/or in the alternative, the Defendants by their servants or agents, failed to ensure that the First Plaintiff was adequately instructed and conversant with the management and control of the said auxilliary cycle so as to be able to ride it in reasonable safety, and sufficiently conversant with the operation, management and control of the said auxilliary cycle so as to be able to control the said auxilliary cycle when the said defect caused the throttle to stick open.

10. By reason of the aforesaid defects, breaches of implied terms and warranty, and negligence, the First Plaintiff on the 26th day of July 1977, whilst driving the said auxilliary cycle and carrying the Second Plaintiff as passenger along South Shore Road, Warwick Parish, in the

vicinity of Mermaid West, lost control of the said auxilliary cycle when the said auxilliary cycle of its own volition increased speed and resisted all attempts to close the throttle decelerate or stop; and collided with a motor vehicle travelling in the opposite direction, thereby sustaining the injury loss and damage hereinafter set out.

PARTICULARS OF SPECIAL DAMAGE

First Plaintiff -

Bermuda Hospitals Board	3,872.50
Anaesthetic Associates	110.00
Dr. Stubbs	1,577.50
Physiotherapy	9.50
Ambulance	14.00
Jewish Hospital	2,031.70
Anaesthia	260.00
Radiologist	32.00
Ambulance	30.00
Dr. Kleinert	1,002.00
Loss of salary	16,500.00
American Airlines return from Bermuda 1st class	136.00
American Airlines to Kentucky with companions 28/8	357.00
American Airlines to N.J. return trip for escorts 6/9	154.00
American Airlines to N.J. return for Gabriel Marra 6/9	77.00
American Airlines roundtrip Sept. 19-20	154.00
American Airlines roundtrip Oct.27-28 with companion	308.00
Holiday Inn Kentucky 27/10/77	31.44
Holiday Inn Kentucky 19/9/77	32.67
Holiday Inn Kentucky Aug.28 - Sept. 3, 1977	207.87
Phone calls back and forth from Bda. and Kentucky	147.39
Dr. L.Copeland	51.00
Jewish Hospital - telephone service	20.00
Ambulance expense to airport	105.00
Misc. travelling expense to and from airport	18.50

First Plaintiff (cont'd)

Hillsdale Pharmacy .medication	136.67
Medicare	6.00
Frank Arigo, Therapist Sept. - Dec. 1977	706.00
Metpath - laboratory test	11.60
Mail	4.15
Deposit of payment lost for vacation in N.J. for Wildwood Crest	75.00

Second Plaintiff -

Bermuda Hospitals Board	3,308.00
Anaesthetic Associates	60.00
Dr. Stubbs	385.00

and continuing.

PARTICULARS OF INJURIES

First Plaintiff - The right forearm was abducted at the elbow. A gross laceration with extensive muscle damage over the lateral and anterior aspects of the proximal portion of the right arm and elbow. The right elbow joint was exposed, an exposed fracture of the proximal right radius. The radial nerve function was absent, multiple lacerations, and amputation of the distal half of the terminal phalanges of the right long and ring fingers.

He had lower abdominal pain and tenderness. Abrasions of the right knee involving the quadriceps.

He had fractures of the proximal phalanges of the right little and ring fingers.

Second Plaintiff - Laceration above and behind the left ear, bleeding of the left external ear canal, extensive abrasions of the left elbow and dorsum of the left foot, her tendons were exposed.

She sustained concussion, amnesia, disorientation, slight intellectual impairment, recrosis of the wound of the left foot.

And the First and Second Plaintiffs claim damages.

Dated this 14th day of February, 1978.

(Sgd) Conyers, Dill & Pearman

Conyers, Dill & Pearman,
Attorneys for the First and
Second Plaintiffs.

Delivered by Messrs. Conyers, Dill & Pearman,
Bank of Bermuda Building, Front Street,
Hamilton, Bermuda.

No. 3

DEFENCE AND COUNTER-CLAIM

IN THE SUPREME COURT OF BERMUDA

1978: No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

- and -

SONDRA MARRA — Second Plaintiff

- and -

J.B. ASTWOOD & SON LIMITED — Defendant

D E F E N C E

1. The Defendant admits paragraph 1 of the Statement of Claim.

2. The Defendant admits that by an Agreement dated the 25th day of July, 1977 and made between the Defendant of the one part and the First Plaintiff of the other part, the First Plaintiff agreed to hire an auxiliary cycle for one day, and further admits that this contract of hire was on the 26th day of July, 1977 renewed for a further period of one day. The Defendant will refer to the said Agreement at the trial of this matter for its full terms and effect.

3. The Defendant makes no admission with regard to the implied terms alleged to pertain to the said Agreement either as alleged in paragraph 3, 4 and 6 of the Statement of Claim or otherwise.

4. The Defendant makes no admission with regard

to the circumstances and facts alleged in paragraph 5 of the Statement of Claim.

5. The Defendant denies paragraph 7, 8 and 9 of the Statement of Claim.

6. With regard to paragraph 10 of the Statement of Claim, the Defendant admits that the Plaintiff collided with a motor vehicle at the time and place alleged, but denies that this was as a consequence of the matters pleaded. No admission is made as to the alleged or as to any loss and damage.

7. Further or alternatively the matters complained of were caused wholly or in part by the negligence of the First Plaintiff.

P A R T I C U L A R S

(i) Failing to keep any or any proper look-out or to observe or heed the said motor vehicle;

(ii) Driving too fast;

(iii) Driving on the wrong side of the road;

(iv) Failing to give any or any proper warning of his approach;

(v) Failing to apply his brakes in time or at all or so to steer or control the said auxiliary cycle as to avoid the said collision;

(vi) Failing to report to the Defendant the alleged propensity in the auxiliary cycle of the throttle control cable to stick, and to give the Defendant an opportunity of inspecting and/or repairing the said alleged defect, or of supplying an alternative auxiliary cycle to the First Plaintiff;

(vii) Failing to report to the Defendant the alleged failure and/or insufficiency and/or inefficiency of the brakes of the said auxiliary cycle and to give the Defendant an opportunity of inspecting and/or repairing the said alleged defect in the cycle brakes or of supplying an alternative auxiliary cycle to the First Plaintiff.

8. The First Plaintiff is estopped from alleging that insufficient instructions were given to him on the use of the said auxiliary cycle.

P A R T I C U L A R S

By the said Agreement of the 25th day of July, 1977 the First Plaintiff expressly acknowledged that he had received adequate instruction in the operation of the controls, brakes and starting and stopping of the motor of the said auxiliary cycle before signing the said Agreement.

9. The First Plaintiff is estopped from alleging that the said auxiliary cycle was not reasonably fit for the purpose for which it was hired.

P A R T I C U L A R S

By the said Agreement of the 25th day of July, 1977 the First Plaintiff expressly acknowledged that he had examined and assured himself that the brakes of the said auxiliary cycle and the vehicle generally were in good working order before signing the said Agreement.

10. It was an express term of the said Agreement that the First Plaintiff should have no claim whatsoever for any physical, mental and material injury suffered by him as a result of his use of the said auxiliary cycle, either against the Defendant (referred to in the Agreement as the Hirer) or against the Hirer's Insurer.

11. In the premises, if, which is denied, the Defendant was guilty of the alleged or any negligence or if the First Plaintiff has suffered any physical, mental or material injury, the Defendant is not liable to the First Plaintiff in respect thereof.

12. Further, and in the alternative, the Plaintiffs and each of them knew or ought to have known that the riding of an auxiliary cycle upon the roads of Bermuda involved a risk or injury and the First Plaintiff by signing the said Agreement expressly consented to running the said risk and the Second Plaintiff by permitting herself to be carried as a pillion passenger on the said auxiliary cycle impliedly consented to running the said risk.

13. In the premises, the Defendant denies that the Plaintiffs or either of them are entitled to recover against the Defendant the damages alleged in the Statement of Claim or any damages.

14. Save and except as hereinbefore expressly admitted, the Defendant denies each and every allegation made in the Statement of Claim as if the same were set out herein and separately traversed.

In the Supreme Court

No.3
Defence and Counterclaim
3rd April 1978
(continued)

COUNTERCLAIM

15. By the said Agreement of the 25th day of July, 1977 the First Plaintiff agreed to indemnify the Defendant against any claims which might be brought against the Defendant by any pillion passenger.

16. In pursuance of the said indemnity and if the Defendant is held liable to the Second Plaintiff, the Defendant claims against the First Plaintiff the amount of any damages awarded to be paid by the Defendant to the Second Plaintiff including interest if any and costs.

AND the Defendant Counterclaims damages against the First Plaintiff.

Dated this 3rd day of April 1978

DELIVERED this 3rd day of April 1978 by Messrs. Appleby, Spurling & Kempe, Attorneys for the Defendant.

No.4
Reply and Defence to Counterclaim
20th April 1978

No. 4

REPLY AND DEFENCE TO COUNTERCLAIM

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1978: No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

- and -

SONDRA MARRA — Second Plaintiff

- and -

J.B. ASTWOOD & SON LIMITED — Defendants

REPLY AND DEFENCE TO COUNTERCLAIM

1. The First and Second Plaintiffs join issue with the Defendants upon their Defence.

2. The First Plaintiff signed the document dated the 25th day of July 1977 as a form of receipt for the hire of the said auxiliary cycle.

3. The Defendants are in fundamental breach of this Contract to provide for hire a cycle which was fit for the intended purpose of safely carrying the First and Second Plaintiffs upon the roadways of Bermuda.

4. By reason of the said breach of Contract, the Defendants are unable to rely upon the exemption clauses alleged in their Defence.

5. The First Plaintiff avers that at no time was it ever brought to his attention by the Defendants that where a cycle was provided with two seats, that only the driver was covered by an insurance policy.

6. By reason of the aforesaid fundamental breach of Contract, the Defendants are unable to rely upon an exemption clause in the document dated 25th July 1977 purporting to indemnify the Defendants in the event of a claim by a passenger riding pillion with the knowledge and consent of the Defendants.

7. Save as hereinbefore expressly set out, the Plaintiffs deny each and every allegation in the Counterclaim as if the same were set out and traversed seriatim.

DATED this 20th day of April, 1978.

(Sgd) Conyers, Dill & Pearman

CONYERS, DILL & PEARMAN

SERVED by Messrs. Conyers, Dill & Pearman, Bank of Bermuda Building, Front Street, Hamilton.

In the Supreme Court

No.5
Rejoinder
7th July 1978

No. 5

REJOINDER

FILED this 7th day of July, 1978 pursuant to the Order of Mr. Assistant Justice Barcilon dated the 6th day of July, 1978.

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1978: No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

- and -

SONDRA MARRA — Second Plaintiff

- and -

J.B. ASTWOOD & SON LIMITED — Defendant

R E J O I N D E R

1. The Defendants join issue with the First and Second Plaintiffs upon their Reply and Defence to Counterclaim.

2. As to paragraph 3 of the Reply and Defence to Counterclaim the Defendant says that the First Plaintiff is estopped from alleging that at no time was it ever brought to his attention by the Defendant that where a cycle was provided with two seats, only the driver was covered by an insurance policy. By reason of paragraph (j) of the Agreement for Hire dated the 25th day of July, 1977 whereby the First Plaintiff expressly acknowledged that the vehicle was insured for Third Party Risks under the laws of Bermuda and that the First Plaintiff understood that such policy did not provide for cover for any pillion passenger.

Dated the 7th day of July 1978

(Sgd) Appleby Spurling Kempe

SERVED by Messrs. Appleby, Spurling & Kempe of Reid House, Church Street in the City of Hqmilton, Attorneys for the Defendant.

No. 6

JUDGE'S NOTES

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION 1978 No.35

GABRIEL MARRA and
SONDRA MARRA Plaintiffs

- and -

J.B. ASTWOOD & SON LIMITED Defendant

Conyers, Dill & Pearman for the Plaintiff
10 Appleby, Spurling & Kempe for the Defendant

JUDGE'S NOTES

MONDAY 16th JULY, 1979 at 9.30 a.m.

COURT BEFORE THE HONOURABLE MR. JUSTICE ROBINSON

Mr. Gunning for the Plaintiffs
Mr. Bell for the Defendant

Mr. Gunning

Both Plaintiffs represented by me. Bell for Defendant. Hiring of Mobylette 25/7/77. Accident occurring 26/7/77. Plaintiffs tourist in Bermuda
20 for second time.

Defendant - hirers of cycles for profit to visitors principally and local. Main part of business - visitors from United States and Canada. Instant case - United States.

1st Plaintiff particularly injured, lost use of right hand - highly qualified and skilled hairdresser, which occupation he cannot now follow - also skilled trumpet player - not able to do this.

Considerable distress - but 1st Plaintiff not
30 able also to follow his occupation he being 48 years old. Extensive surgery - grafts etc. despite this, left with permanent injuries. Continuing loss of income - loss of amenity, reduced chance in the labour market.

2nd Plaintiff was pillion - which vehicle was adapted to carrying second person in Bermuda though not designed for that purpose.

Wife sustained head injuries, laceration to

scalp - laceration to foot and loss of memory.

Alleged all because throttle stuck in the open position.

On collision - he was not able to return it to the off position. Brakes carrying two people were inadequate - collided with taxi in opposite direction. Taxi being entirely blameless. When taxi saw extent of injury called for assistance - tourniquet. Despite anguish and pain - he then told taxi driver was because the throttle stuck.

On examination by police 5/8/77 by police - it was found there was a fault causing throttle to stick in open position.

Could be closed by turning by hand. Plaintiff says on occasion of accident it could not be closed by turning by hand. Will say trying his best he could not release throttle turning it back.

Despite braking he veered to the incorrect side of the road, went onto grass verge, then bike veered onto road into taxi. Plaintiffs say Defendant owes a duty of care - breach of which caused them injury, therefore entitled to compensation from the Defendant.

Duty was to supply cycle in good condition without defect - failed to do so. Duty also to properly instruct hirer of cycles so tourist could cope with road conditions in the Islands which the Defendant knew existed - not enough just to pop visitor on cycle, run him once around yard and send him out onto the road to see if he can survive and say "I survived the Bermuda motorcycle". To supply the defective cycle is a tort in that it is negligent to put it out on the road in that condition - fundamental breach of contract as well.

Defendant supplied cycle for reward therefore a high standard of care is required. Cycles are insured 3rd party only. Pillion passenger has no third party insurance - known to Defendant they seek to exclude conditions coverage for pillion passenger. There is not even an offer to have them both covered by 3rd Party or Compehensive coverage. Tourist signs a receipt from which certain things are set forth.

(1) Instructions how to go on road

(2)

No exclusion of negligence per se which must be specifically set out and words used.

Defendant sent out defective cycle on crowded roads - with attempt to exclude liability by small print. Comes to Court for decision. Plaintiff has suffered special damage in sum alleged to be $68,759.10.

Also future loss of earnings at rate of $31,045 per annum. Agreed bundle of documents.

(1) Signed receipt for cycle

4 Statements by P.C. Pratt and two witnesses

P.50

Not agreed are a number of airline tickets referring to air traffic between Jersey and Kentucky - not agreed amounts.

(Discharged 7/9/77 see Page 59.)

Page 64 - Medical report of 2nd Defendant

Bundle of not agreed is essentially documents dealing with - insurance claims - in support of special damage claim. Not been available but for few days.

Pleadings

Writ dated 20/2/78 with Statement of Claim. Paras. 1 and 2 admitted agreed

Reads Statement of Claim

Defendant. Reply and Rejoinder.

No. 7

GABRIEL PASQUALE MARRA

P.W.1. GABRIEL PASQUALE MARRA, sworn

670 Hickory Street, Washington Township, New Jersey, U.S.A.

Born 31/3/29. I arrived in Bermuda on 24/7/77 for a week's vacation with wife at White Sands Hotel.

I ordered through Hotel a low double seated Mobylette in the morning of 25/7/77 and it was delivered early in afternoon along with other deliveries to Hotel Guests.

Delivery man unloaded one and brought it

over to confirm it was type I wanted. I had been to Bermuda before in 1974, 3 years before. I had hired cycles before - 2 bikes when previously had 2 children with us.

In 1974 we had lost a gasket at Devils Hole, had to fabricate one out of tin foil and rubber band.

When I took cycle in 1977 I specifically asked about whether if anything went wrong I could get immediate repair, this stemmed from my previous experience in 1974 at Sonesta Beach where I had had difficulty in getting a repair - this was on my mind this time when I got this Mobylette - and I was assured that I could get help on this occasion. We tested the bike outside the Hotel - it took a minute or so just one turnabout. Other guests were also doing same thing at the same time.

I was not given any instructions as to emergencies - bike appeared to be in working order - I did not do any inspection of it but before I put Mrs. Marra on it I rode it around the corner a little to get the "feel" of the cycle.

My son taught me how to ride his cycle, motor cycle. but I rode it only in local areas around my neighbourhood.

After a minute - the gentleman who delivered bike went with me to back of truck where I paid my deposit and got a receipt. I paid about $20.

I cannot recall the hiring charge. I did not know how long I would keep the bike - balance was to my understanding, to be paid when I turned in the bike. I signed the document. I can't remember anyone else signing it. (See original of paper No.1 of Bundle). I see my signature on it - the writing at the top, No. of bike etc. is not mine. Delivery man who wrote something of a receipt - produced this document to me. I saw the typescript - I was familiar with what it was saying. I did not read it all the way down. I had done some reading before coming to Bermuda. I read down about ½ way. Then I signed it.

At the time I did not appreciate the document might have legal consequences for me. I confirm riding cycle in vicinity of Hotel before taking wife on it. It worked normally then. I took cycle out on that Monday afternoon with my wife on it.

One particular incident when we travelled across Lighthouse Hill Road coming to intersection of hill bike would not come to complete stop without using both sets of brakes. I tried back brakes slowed it down but in order to stop at bottom of hill I had to apply front brakes at same time.

On Tuesday morning, going to St.George's, I had a similar experience at Devil's Hole Hill. On way back from St. George's I stopped because of rain showers, waited for roads to dry and then continued on. As we rode on straight stretch of road at Harrington Sound, bicycle seemed to be going of its own accord and seemed to increase in speed but I throttled down and it returned to normal and continued. I had no trouble at that point turning it off.

It turns off turning the throttle towards me and away from me for turning it on. I had no difficulty riding it at this stage. I had no trouble in 1974 accelerating or decelerating - nor in United States when I road in my neighbourhood. Since accident I have not ridden a cycle. I throttled back on Harrington Sound Road and it released. It did not give me concern at the time. It happened again along Harbour Road, a similar incident to Harrington Sound Road and it released when I throttled down.

That afternoon I went for swim at Horseshoe Bay Beach - early evening I was returning toward Hotel with wife as pillion passenger when accident occurred. As I was approaching the turn, which I know as Warwick Bay - we had had a swim there earlier - into the first left hand turn, the bike increased in speed. I was negotiating that turn and trying to throttle down at the same time - the cycle persisted in picking up speed - I did not brake at 1st turn as there was sand there on the left hand side of the road. I made the 1st turn successfully - I did not feel I could negotiate the 2nd turn at the speed I was going I was trying to throttle down with no success. I looked for traffic, I saw no traffic in front of me and none behind me. I decided to cross over the road onto a grass area - starting to ease down on brakes - prior to hitting the grass I had applied both brakes - hoping bike would come to abrupt stop and we should be thrown onto the grass or into the shrubbery. I was trying to negotiate that - but nothing worked with the brakes or throttling down. I just veered off the grass portion - constantly having pressure on both brakes. I saw a vehicle coming towards me. I tried desparately to avoid it. I proceeded straight into him - hit him in the front at an angle.

Next thing I remember I was lying on the ground and a gentleman was tending to me. I heard him calling for help.

I am a hairdresser by profession. I attended school prior to entering service in U S. Army - early 50's when I left Army. I was 23. I had training before Army but when I returned from Army I took advanced training for my profession. I have followed that profession ever since I qualified prior to entering service. Procedure is to attend a formal training school on graduation with diploma required to obtain a state licence - for State of New Jersey. Married - have 3 children. Confirm Education Resume on page 14 of not-agreed documents. Item pages 14 - 17 of unagreed bundle now agreed.

I am also a musician. I play the brass instruments, trumpet, flugel horn and valve trombone. I received payment for musical playing. About $2 - 2,500 per year. Very recently I have tried to learn the instruments using my left hand. I have difficulty holding the instrument. I am not able to use my right hand for playing the trumpet - I have been advised I may never be able to use right hand for this purpose but I have not stopped trying.

I have not been able to perform as a hairdresser - my principal performance as a hair dresser has been as a hair cutter and hair designer - for my remuneration I worked on clients directly and had built up considerable reputation. I am right-handed, that hand is my scissor hand, that's why I'm extremely concerned at the accident - I cannot use scissors with my right hand. I have been asked to be appointed on the New Jersey State Board of Beauty Culture. Pages 18 - 27 letter. I am unable to earn my living any more by cutting or styling hair.

I had as result of injury have to fill out a health claim form. Page 1 of unagreed bundle. Copy of which I now produce. I was in plaster cast from July 1977 and thereafter in a brace until October in Plaster. In February 1978 first surgery which resulted in brace being put on after that. I am now wearing a brace for support - part time.

Page 5 shows brace until 3/3/78 at that time I had no hand function whatsoever. I have exercises prescribed by Dr. Little after recent surgery and I do therapy exercise as prescribed under previous surgery. I have been

rehabilitating myself full time. I hope to retrain in hairdressing, my most advantageous field - I have already taken some management courses related to the industry and I am hoping to get training in use of left-hand to do some cutting - mainly to use in training of my staff.

I have an accountant who is my brother, Michael J. Marra, who looks after my accounting affairs. See page 7.

I have signed income documents myself. I have wage and tax forms - which are sent with proper forms to Inland Revenue forms. In cutting hair we keep record book, we have payment from each person whose hair is cut.

Tax authorities wish to know how much I receive for cutting hair. I sign a tax form when I fill it in. Accountant prepares the tax statement and in our case we have what is called a joint return with wife. I believe I had taken out of the business in the full year of 1976 some $28,000 which I earned. In 1977 my income had been increased to $3,000 monthly but prior to my accident I had only drawn $16,000 balance of $36,000 would have been taken out towards the end of the year.

I cannot anticipate what increase there would have been in 1978 but it would have been at least $36,000 per annum. I am not able to earn at this rate following my accident. Figures I gave are before tax. Tax liability would be about 6,000 on $36,000 - that is only federal tax, there is also a state tax. I receive disability allowance from State Social Security - and from two insurance plans based total disability. I had medical expenses in Bermuda as a result of my accident. I was treated in Louisville Hospital in Kentucky. Dr. Stubbs had advised me he was trying to find most skilful neurosurgeon due to the type of surgery needed by me. I lived in New Jersey initial trip to Louisville was by ambulance from home to La Guardia Airport via American Airlines - fork-lifted into plane and out again at Louisville. We returned from Bermuda in 1st class because leg stiff, not able to bend. Transported by ambulance from Louisville Airport to Jewish Hospital in Louisville. I had to pay difference between original return passage and 1st class to return to U.S.A. $136 - page 30 agreed paid for by credit card.

I was accompanied by someone I needed companionship, I could not walk as well as arm was in cast. I was not in need of space, my daughter, Laura Jean Marra and my niece Alice Garrity went with me. I paid this by cheque -

page 31 - cheque signed $357.00 - agreed by Mr. Bell.

People who accompanied me had accommodation at Ramada Inn, a short distance away. 4th September 1977 Laura and Alice returned to

Mr. Bell agrees all items on page 28

A6. September 19-20 1977 - $154 agreed
A7. October 27-28 1977 - $154 agreed
A8. October 27-28 1977 - $154 agreed

Accompanied by son Jeffrey Marra - still had difficulty walking.

A9. February 9 1978 American Airlines - New York $160 agreed, went from New York to Louisville to see Dr. Mechler.

Page 40 all agreed

$207.87 Hotel)
32.67)
31.44) all agreed
40.41)

I did not keep receipts for food items - I estimate it cost me about $15 per day. I paid for Laura and Alice but my niece Alice would not take money for food.

Mr. Bell agrees $105 of $210 and also page 41 - $35, $35 and $10.00. I started to keep receipts of cab fares and other receipts but cannot verify all the expenditure.

Page 49 agreed.

(Total of telephone calls will be made by Gunning).

Break until 2.30 p.m.

At 2.30 p.m.

MR. MARRA (examination-in-chief cont'd)

Prudential Insurance Company paid majority of medical bills. Insofar as excess is paid by Mr. Marra "would be prepared to agree" Bell says.

I paid the ones in right hand column of page 75 - 77.

Some cases I paid and was reimbursed by Prudential. Prudential has not paid last 3 bills, they were not submitted until current bill $1,485 for Dr. Littler $200 of this I will have to meet myself approximately.

Subject to any right of subrogation all these amounts are in pages subsequent to page 77 in the unagreed bundle of documents.

One of statements total amount put down until hospital bill had been received, Prudential would not pay all the then claims.

I do not know if I reproduced all my personal cheques for all the payments. Total payments I made was $2,105.44 plus there are accounts from Dr. Littler $1,485 from Roosevelt Hospital $1,389 and American Anaesthetist of $235 remaining unpaid = $3,109

2,105.44

Court's computation $5,214.44

cf. p.149

I am on Federal disability - p.149 shows amounts I received to date - still continuing - $25,159.40 Federal Social Security will continue, will until I have re-trained.

Can't say whether it will continue or not.

The Private Insurances are based on total disability likely to stop upon re-training so as to obtain employment. I had no age in sight for retirement. I was going on until I was unable to.

Not too many work until 70 - 80. Normal retirement age is 65. I do know some people who are working at 65 - I know many who are salon owners. (Witness shows his injuries) Removes brace. (Shows badly scarred upper arm at inside elbow).

Elbow has limited motion. Cannot rotate - pronation. I can move fingers as a group. Cannot spread fingers - limited. No feeling in back of hand. No feeling of needles in back of hand, ring finger and long finger of right hand has shortened. Scarring of leg at knee and scarring for removal from ankle of nerve for re-planting in arm.

I cannot stand on it for long period. Cannot jog - but have taken to walking to strengthen it.

Cross-examination

XXN BY MR. BELL

When I arranged for ordering of this cycle I had in mind a cycle of low double seat, based on my seeing other bikes.

A low double seat, what I ordered, wide seat as shown on Page 3 (of agreed bundle).

On previous occasions in 1974 I also took a pillion passenger on a purpose built bike to take 2 people.

Bike in 1977 I believe was built to take 2 people.

I took delivery at White Sands (Identification).

Only name I was given was Bob; man who comes into Court looks familiar to me - in terms of recollection of person who gave me the bike.

I confirm conversation that I could call. I do not remember him saying anything about the telephone. No! Where I could call in case oftrouble was on a sticker on the bike itself.

I don't remember a sticker on the cycle. No one told me the cycle would be automatically replaced if in trouble. I don't recall a conversation to that effect.

I believe the telephone should be on the receipt, I did not specifically look to see.

I don't remember receiving instructions as to use the front or back brakes. I did it from my own knowledge - I had been asked whether I'd ridden before and I answered "yes".

I was shown how to start the cycle on the stand.

I do not remember being shown how to apply the brake on the stand so that the bike did not go running away when taken off the stand. I don't remember being instructed. I was one of the last ones to receive a bike. Before signing a form I took a spin on the bike on my own in front of White Sands.

When I stopped it I did so with the brakes with no difficulty at that point. I know throttle automatically decelerated when I let go of it.

When I signed receipt I started to read then put signature at bottom of 1st page.

See original of hire agreement. Signature appears on the back page of "I accept full responsibility for the cycle and myself and also agree to pay for the loss of this cycle.

Signed Gabriel P. Marra."

I do not think I realized the liability I was undertaking. I was just signing for a bike - I did not know what the Bermuda law was, in U.S.A some such contracts are not binding. Words on back of original document are in larger case than those on the front. I did not relate it to legal consequences but had connection with the preservation of the bike only.

Court

I still say that even though the document says -"the cycle and myself."

XXD cont'd by MR. BELL

On Monday to Lighthouse Hill, Hamilton and back to White Sands Hotel. On Monday it did not come to halt at Lighthouse without using both sets of brakes. I expect bike to stop on one set of brakes if functioning properly. On Monday at that point the brakes were inadequate.

I did not call through to say that the brakes were inadequate because I did not think it was out of order - not necessary as I had been to Hamilton etc. and nothing had happened etc. to show defects or inadequacy of brakes. Following morning had similar experience. I suppose I should have phoned J.B.Astwood but I did not.

Correct throttle seemed to stick on Harrington Sound Road on Tuesday. It did not automatically decelerate but did so without difficulty when hand was applied to it.

Did not cause me concern or difficulty at that point.

To accelerate I would turn the accelerator counter-clockwise.

On many cycle - no automatic deceleration but I've not had any greater experience than these cycles in Bermuda and my son's cycle, the latter of whose accelerator stays in same position if left.

What happened is the same as would happen on my son's bike.

Accident took place at Z bend. My speed was moderate - if I went excessive speed my

wife would nudge me, we went with enough speed to maintain balance - going through 1st turn the bike picked up speed. I don't think I could have throttled down, perhaps I should have done so at that stage but in the circumstances I could not.

After negotiating the left bend, I pulled towards centre as sand on left side. I went across decided to go across to grass on other side.

I knew there was no traffic behind me when I went into the bend. I don't know whether Mrs. Marra turned her head to see if following traffic behind us. I was just approaching the 2nd bend curve, I decided to cross over. I had negotiated the first curve. I could not see if any cars were coming around it. I made a conscious decision to cross over on to the other side on to oncoming traffic. I thought I could spill on grass or bushes if I was to spill.

I don't think it was wrong thing to do, situation called for a decision. I had to make the decision. I did apply brakes - I had to try them. When I said I was afraid to use brakes (in the statement to Police) I was referring to 1st left hand bend where there was some sand in road. I tried to apply brakes just prior to hitting the grass - brakes did not work at that point. I don't remember brakes working at all enough to restrain us - nothing happened, continued heading across the grass.

Bike would not stop - tried to get out onto the road to gain control, car coming round bend the last thing on my mind. I was then trying to gain control of the situation. Accident was not caused by the catalogue of my mistakes. I think I was controlling the bike before that, I tried to get the bike under control conscious of fact of what I was doing try to gain control of a bike (that would not stop) I lost control because the bike did not respond to its proper usage. I've been a successful hairdresser. It is a family business - incorporated. My mother and I and Mrs. Marra own parts of it. In 1948 I owned 48%, Mrs. Marra worked in the business - business has been in existence since 1928 - started as father's barber shop not entirely my proprietorship - I was working manager in 1977 - I had 3 full-time and about 8 or 9 part-time,

besides myself. I was a working manager-operator, most management done by receptionist - so I was free to perform services.

It has lost the growth since the accident. I have almost exactly the same staff with addition of my daughter. I visit the salon from time to time, mostly to see it was open etc. and a goodwill gesture. My pay was not decided by me but on income produced, worked out with brother who handled the books - by my production.

Basic wage plus commission.

Base $150 - $175 plus commission about (sic) $16,00 per year.

I'd expect as much I received when in 1977.

Wife has no separate income from me. $2,000 from my own musical groups on free-lancing in other groups.

I can show specimen contracts. I did not declare the income from musician as I used money to buy equipment etc. There is only one salon in this business. I'm involved in two other salons as a partner. We used to have a number of salons but sold them - no income from other salons. I do not work in either of the two salons in which I have partnership.

Plaster cast by Stubbs remained until Louisville, Kentucky, another put on until surgery then after surgery. Surgery end of August 1977. Visited in December - outrigger was then applied. I wear brace for support - have to do special movement to get brace on. I am taking course in S.B.A. and Salon management.

I thought after surgery recently doctor advised to wait until end of surgery - hope to set up a re-habilitation program. I have only earned in 1978 what I received in Social Security and other injury benefits.

I am considered an employee - I think the business earned some money in 1978 we did pay some taxes. I do not receive dividends - as a stockholder I may have received money as a stockholder as share of profit. Tax return is separate from Company dividend. The figures given are not affected by any dividend. I know when signing tax form what I'm receiving at the time as wages - but I rely on my brother

In the Supreme Court

Plaintiffs' Evidence

No.7
Gabriel Pasquale Marra

Cross-examination

16th July 1979

(continued)

in matter of returns for business as well as personal finances. I have no idea of what State tax would be. Amounts of benefits on p.149 are net after tax.

Federal Security will continue to a point.

Private claims will stop - when I take over receptionist job I will be involved in the business - then these benefits will be curtailed, will discontinue.

I had paid some amounts and Insurance Company has reimbursed me - it is a private health insurance but I have no obligation to repay the insurance company for any.

Loss is amounts paid in 3rd column of schedule. I've shown amounts paid by Prudential. I do not have to repay.

I will pay about 20% of $3,109 left to be paid depending on what coverage is with respect to incidence. Of this I'll have to pay about $600.

End of cross examination.

Re-examination

RE-XXN

Instead of $36,000 income I will receive $125 - 150 plus whatever federal social security will pay -less tax if any. Arm in plaster and then in brace. Shows photos in agreed bundle. I was responsible for a lot of business being brought to business - growth depends on my personal presence. I don't think I could have braked when going around 1st bend - could not negotiate 2nd turn - decided to go on grassy knoll - I applied brakes hoping to spin bike around - it did not happen, great momentum at time. Both brakes applied at Lighthouse Hill, it did stop with a jerky motion, also likewise at Devil's Hole. On South Shore Road brakes did not work, I squeezed them really hard. I signed the reverse of receipt, I did not read it in greater detail. I must have read it because it was in larger print. I don't recall reading it. I do not know what the No.32745 is on the back of the receipt.

Witness is released.

No. 8

REGINALD JOHN MING

TUESDAY 17th JULY, 1979 at 9.30 a.m.

Counsel as before

at 9.30 a.m.

P.W.2 REGINALD JOHN MING, sworn

Taxi driver. Beacon Hill, Sandys. Tuesday 26/7/77 driving T 1231 west along South Shore Road, Warwick West.

Travelling about 20 m.p.h. I rounded a left hand bend opposite Mermaid west. Slight upgrade in road at this point. There is a bend to right hand beyond. I then saw a livery cycle with two people on it travelling eastwards. I notice they were riding and gentleman was trying to get control of the machine on the opposite side of the street. I stopped my car. Cycle hit my car. I then got out of my car, went to driver of the bike, I saw that the gentleman had his arm was pretty well right off I thought. I called for assistance, another man stopped saying he was a doctor. (Ct. Evidence of what Mr. Marra said to this witness when he went to Mr. Marra's aid is not admitted on the basis that it is showing consistency with Mr. Marra's evidence as urged by Mr. Gunning.)

P.W.2 cont'd

He gave me an explanation of what had happened and why he ran into my car. I reported that explanation to the police.

XXN BY MR. BELL

Livery cycle was on grass on left side, my near side, when I first saw it. It started to come down towards the road when I first saw it. I can't describe whether he was trying to stay on grass or not or turn towards the road.

To me it seemed he was just trying to stop the bike.

I did say in my statement it appeared he was trying to get on his correct side of the road. I meant by that, that was my impression. He would have to cross in front of me to get into the road.

In the Supreme Court

Plaintiffs' Evidence

No.8
Reginald John Ming

Re-examination

17th July 1979

Nil.

Court

What I saw him doing with the bike was consistent with what he had me when I went to him first.

Witness released.

Plaintiff's Evidence

No.9
Peter David Counsell

Examination

17th July 1979

No. 9

PETER DAVID COUNSELL

P.W.3 PETER DAVID COUNSELL, sworn

Sgt. 90 at Hamilton Police Station.

Time of accident I was a police constable.

Tuesday 26/7/77 about 7 p.m. I attended an accident at South Shore Road with Constable Bradshaw withwhom I was on Traffic Patrol. When I arrived at scene at junction of Warwickshire Estate Road and South Shore Road I found taxi T 1231 was stopped in the west bound carriage way facing west. Sketch I made shows taxi is 4 feet from near side of road. There was also a livery cycle A 967 lying on its near side in front of the taxi also facing west. Two injured people, Mr. and Mrs. Marra, they were lying in the other carriage way. Mr. Marra's head in line with front offside of the taxi and close to the centre yellow line. Mrs. Marra was lying beside him on western side of him - there were a number of people attending to them - one of whom I understood to be a doctor. I notice they had various injuries. Mr. Marra had an injury to his right arm, had a cut above his right knee. Mrs. Marra had a laceration to left ankle, also noticed blood in her left ear. They were placed in an ambulance and taken to King Edward Memorial Hospital. I found Mr. Ming to be the driver of the taxi - statement was taken from Ming at the scene by Constable Graham. Cycle was extensively damaged at front wheel, buckled, fork were bent, consistent with an impact to the front. Taxi had damage to front offside fender - lighting units were smashed on that side. Cycle was impounded by me and taken to police compound

at Prospect. I took a statement from Mr. Marra at Hospital, Ibelieve on the 4th August 1977.

I saw Mr. Ming on 1st August 1977 took a further statement from him. I asked Sgt. Pratt to examine the bicycle especially the throttle control. I've been in Bermuda Police force for 10 years. I have attended many traffic accidents. I have examined many cycles involved in accidents. Approximately 50-50 number of visitors as against local people involved in accidents, though I've not kept any records. Not aware of any research done. I have not done any research on number of cycle accidents in Bermuda. On this occasion the road was dry.

Cross-examination

XXN BY MR. BELL

I confirm I asked Sgt. Pratt to examine bike - particularly throttle. I did not ask him to pay particular attention to the brakes. I remember Mr. Marra giving evidence to effect when he throttled up the throttle stayed instead of decelerating. From my knowledge this is quite common in auxiliary cycle and motor cycles.

Most local drivers leave the throttle control so that it does stay and does not decelerate.

Nothing dangerous in leaving this control in this stage if one is aware of it. Correction being by turning with one's hand (as Marra described he had done in evidence).

Re-examination

RE-XXN

In Marra's statement he said "I tried to brake." "I used left then right while on grass still nothing happened." If one could not turn throttle back it would be definitely unsafe.

Court

I have experience in riding mobylettes. I have a motorcycle myself which I ride.

No. 10

SONDRA MARRA

Plaintiffs' Evidence

No.10
Sondra Marra

Examination

17th July 1979

P.W.4 SONDRA MARRA, sworn

670 Hickory Street, Washington Township,

New Jersey, U.S.A.

In July 1977 I was in Bermuda on holiday with my husband staying at White Sands Hotel.

I had been here 3 years previously with husband and two of my children.

Monday 25th July 1977 my husband and I arranged to take a Mobylette for hire, he actually arranged it. I had nothing to do with taking the delivery of the cycle. I don't remember everything too clearly. I know we took the bike out. Because of head injuries I had I cannot now remember too clearly.

I do not remember the accident at all.

I only remember being in hospital only after a few days - I realised I was in Hospital why I did not know it was explained to me.

I was told my left foot was open. I did not know I had been in pain because the pain must have been during that 1st week when I did not know what was going on.

The only discomfort I had after I realized was my head injuries. I had a severe concussion and laceration to the scalp.

I went out of Hospital in Bermuda to friends then back to U.S.A. I was not able to live as I normally did when I went back to U.S.A. nor for some time.

My normal function of taking care of family and house I could not do because of my head injuries and the "dilantin" I was on slowed me down in my activity. This persisted for quite some time. Mother was with us until October or November 1977 thereafter she came every day plus rest of family helping out. I was not able to do much up to time mother went away - she came on a daily basis for at least 2 more months I would say. Little by little during this latter period I did more and more. I recovered completely from foot injury. It does not yet feel the same - having a funny sensation to it. I am able to use foot normally as before.

I still have problems with head injury daily. I get confused easily. I forget quite a lot. I have some dizziness and my

balance is not correct.

In the Supreme Court

Plaintiffs' Evidence

No.10
Sondra Marra

Examination

17th July 1979

(continued)

XXN BY MR. BELL

I did say I have severe concussion. This what doctors told me - I knew I had lacerations when they took stitches out. I did not know I had severe concussion from my own knowledge - while I was unaware of it.

Court - Sometimes my memory is bad. If I go shopping I have to sit and think what roads I have to take.

Cross-examination

On this trip we went to Newark Airport. Christmas day is always 25th December. I remember I was married in New Jersey.

End of case for Plaintiffs.

No. 11

Defendant's Evidence

No.11
Robert Blair Johnson

ROBERT BLAIR JOHNSON

Examination

17th July 1979

D.W.1. ROBERT BLAIR JOHNSON, sworn

Middle Road, Devonshire.

Truck driver for J.B.Astwood & Son Ltd. for 12 years, I think.

I truck bicycles, auxiliary cycles. 25/7/77 I do not really remember delivery cycle to White Sands Road - no not really.

On a Monday, Tuesday or Wednesday, we would go to White Sands Road 3 or 4 times a day. I do not remember particularly the hiring to Mr. Marra. I use the document now shown to me. Usually the name at top is usually put in by one of J.B.Astwood's employees when the bike is ordered. Number of bikes would sometimes be put on before delivery sometimes I'd put it on when I get there. Looking at this document I would say the document's top words were put together bike number at same time as "White Sands" etc. First thing we do is show where the controls are - we always do a procedure before having the ticket signed. If a person knows how to ride I still show them the controls, how to use it - then I'll get on bike to show how to start it, show them use of brakes, left brakes first and then apply right, if left does not do its job properly. Then the person hiring is asked to get on bike to start it up - then I get them to

go over the controls with me and I'll have them take a short ride on it. If I were not at this stage satisfied with the person ability I would not let them have the bike - this has happened quite a few times that I've had to take bikes from persons. Usually get the person to take the ride first before taking on two persons where two persons are intended users. Persons have a phone number shown to them on ticket and are told to call us if he has problems. If there is a call with a problem we would take another bike to replace a faulty one or if the problem bike can be fixed we fix it on the spot. In answering such a call we always have a spare bike available if not we pick up the hirer and bring them back and give the hirer another bike. Before delivery we ride bike down the alley to the truck to check the brakes - also would check the throttle.

My procedure is to start bike on stand and make sure throttle is not sticking - when one starts it in slow - then pulling it back it has a tendency to stick.

If it stayed there I'd get a mechanic to check it - if it stays one can push it back anyway.

When delivery is made hirer signs a contract, each cycle has a contract to be signed - I call it a contract. Hirer signs on the front and on the back of the contract form. I do not have any particular recollection of Mr. Marra signing the form on 25/7/77.

Break.

Cross-examination

XXN BY MR. GUNNING

I can't say how many cycles I delivered that day to White Sands. Chances are any number from 5 - 10. Might go there 2 or 3 times per day on Monday, Tuesday or Wednesday with 5 - 10 cycles. White Sands is in Paget.

I would also deliver to other guest houses. On a Monday, Tuesday or Wednesday I would take the White Sands run in the morning anyway. Usually we start 9.30 White Sands would call for bikes, it would take me from 10 a.m. to 12 noon with folks at White Sands teaching them to ride - that would be one trip.

Other trips to White Sands would occur if on returning to shop another couple of

bikes were said to be needed. We might make one or two trips in the afternoon. We also deliver on those days to "Waterloo House", "Oxford House", "Grandview Guest House", "Horizon", "Harmony Hall" and "Mazarine". A fair catalogue of deliveries made on Monday's I could be the one to make these deliveries.

I would deliver to Horizons 2 - 4 bikes at a time - sometimes two trips to Horizons, Waterloo sometimes 4 - 5 bikes, usually trip to Waterloo - Oxford House 2 bikes at a time, maybe 2 trips. Grandview once with 1 or 2 bikes. One trip to Harmony Hotel, 2 bikes Mazarine - one trip - one or 2 bikes. I have a helper only if I have to deliver over 10 bikes at a time.

I work from 7.45 a.m. until 5 p.m. my working day. If a bike breaks down during that time something is done about it, otherwise it has to await next day.

I start loading immediately I arrive at work and take bikes from depot to Front Street Shop. During course of day I have had to deal with as many as 65 bikes - that would be with a helper. I can't remember whether on 25/7/77 I had a helper. I do not recognise the page 2 of the agreed bundle. I do not know if this sheet has on it all deliveries for that day 25/7/77. I would only see a sheet like this if I went back to shop and was told there were deliveries on it to be made which I had not done. I am normally called on radio. Monday would be a busy day. I may have on such a day assistance in loading and unloading - I would not necessarily lift every bike myself. I would take them off the truck, my help would come at White Sands, either I would radio him or dispatch would call him. When I load every bike myself, I try the throttle. I load the White Sands bikes myself. White Sands is where I do most of my deliveries. When I deliver to White Sands I would check the bikes because I'm the only one who checks and delivers to White Sands if there are bikes for Waterloo, I would check them too, if I delivered them. I have no idea how many cycles I delivered to White Sands that day. I'm afraid I have no particular recollection of July 1977 deliveries at all. Times when bikes are required are on page 2 of sheet and I would know times for delivery. We are very busy during the season, every day. Time with each customer depends on how many deliveries to be made.

There are a number of people on the road who are not terribly sure of themselves on the road - that includes locals.

In the Supreme Court

Defendant's Evidence

No.11
Robert Blair Johnson

Cross-Examination

17th July 1979

(continued)

From my observation large number of tourist cycles which are distinctly worrying how to get by them, how they stay on the road.

I have also had to pick up cycles, damaged cycles - I have no idea how often in July I may pick up the odd one - five other drivers involved in picking up bikes also.

I do not know how many cycles are available. We own a few hundred. We take them to do a short run so as to see whether they can balance the bike which is the main thing in riding a bike. I watch them ride around the front of White Sands. If they can balance at 5 - 10 mph they can balance at 20 mph a lot better. I am concerned to see that - and how to brake and use the throttle they are the main points. These throttles can stick - if its been raining a bit they can stick and need a drop of oil. Some stick more than others. Climate we have - we might have this problem right after rain or if it's too dry throttle tends to stick. If we feel bump in sleeve of throttle it would normally be changed - a hazard we recognise. I do not recall if I've seen A967 since I may have picked it up. It could be dangerous if it did stick but with use of brakes the bike could be stopped. If you use the left brake you automatically turn the throttle back.

One tends to apply more force if it sticks. If a person has this problem they are supposed to call us. This sticking can be caused by rain and cable being dried out by heat. Dust could affect it but it would be something that could not be seen by naked eye. I do not have any recollection of A967, it does not mean anything to me. I would not hear about a problem until someone reported it or there was an accident - within 1 week I would not necessarily know what the particular problem was unless I talked to a mechanic - police might still have the bike - if it had been involved in an accident.

Re-examination

RE-XXN

Routine going to various places - all drivers would be assisting in. If I needed assistance I would radio the depot and despatcher would send someone to help - failing that I would call directly to one of the trucks. Helper also driver and trainer of persons how to ride bikes. If

cycle were to break down at Devil's Hole in mid-morning, the hirer would not have to await until next day - half hour at the most is time they'd have to wait. Normally I would on Monday's, Tuesday's or Wednesday's deliver up to 25 bikes maybe 30 bikes on average for entire day. If I did not load for Waterloo House - the despatcher would go and he would also check brakes and throttle. I am instructed by employer to check brakes, lights, throttle and any moving part. It would be dangerous if throttle stayed open. I have never known a throttle to stick so it could not be returned to closed position by hand. If it were to stay open brakes applied would bring bike to a stop. If cable were to break the motor would go back to the idling position.

Mr. Gunning with leave puts other questions

I would not send out a bike on which the throttle was sticking. Up to whoever checks them to make sure they do not stick. Rely on mechanic if I get one and don't think brakes or throttle in order. I take it back for mechanic to check again, depends on me whether bike may or may not go out.

Mr. Bell

Check I do is only one done aside from check which would have already been done by mechanic. I can't touch them unless he had already dealt with them (done them).

Witness released.

No. 12

HAROLD MADEIROS

D.W.2 HAROLD MADEIROS, sworn

Flatt's Hill, Smith's Parish, Workshop Foreman, J.B.Astwood & Son Ltd. For 24 years with Astwood. 14 - 15 years as foreman of workshop. Licensed Mechanic by Public Transportation Board for 14 years.

I have nothing to do with hiring of cycles. My particular job is repairing bikes - there are 6 persons so licensed and repairing bikes at the workshop. These are also licensed mechanics in our branch shops. The mechanics check the cycles all the new cycles are checked before they go out.

Cycles are checked every single time it is let - takes place at the workshop. I do not do all checks personally - I do them and the licensed mechanics do them. No one who is not a licensed mechanic checks bikes - only licensed mechanics. Check is first, fill the bike with gas. Then it is road tested for brakes, tyres, cables, throttle and throttle control belts and drive chains. Throttle control if sticking has to be lubricated.

Some throttles spin back, others have to be pushed back - we would lubricate the latter if we had to push it back, then re-check it. If it did not slip back we would then change the sleeve. Check is done before delivery by the truck driver again.

There is a sticker on the control showing fast and slow and there is a number put on a sticker on the headlight showing where to call if in trouble - some are put on the fender, front or back fender.

I check every time a bike is checked to see that the sticker is still on. Firm has a policy if phoned at Front Street rental department the bike is replaced by another - faulty bike is then re-checked again.

I have never known a throttle to stick and stay stuck in the open position. I have never had knowledge of any complaint made that a throttle stuck in the open position. If a cable broke the motor would go back into idling position, a spring would bring the throttle back to idling position. If throttle jammed in open position bike can be brought to halt by putting brakes on - even if engine was going flat out. We have single-seater and dual seater bikes for rent.

Double-seaters are purpose built machines - not conversion by us. Single, they can be converted to a dual if need be - but our duals come already made as a dual. Brakes are sufficient to stop with two heavy people on bike - even going down a hill. I have personal knowledge, experience of this - I tested one with myself driving and Mr. Gibbons on the back, he weighs over 200 pounds. I tested down Cox's Hill. Bike stopped within a car length going about 25 m.p.h.

Cross-examination

XXN BY MR. GUNNING

I did not measure the distance it took

to stop. I kept the throttle in full blast. while stopping.

I cannot recall off hand the cycle number of the one I tested. I had not checked the cycle. I just took it out of the ready pile. If it did not stop like that I'd say there was something wrong with it. It should not leave the shop unless it could stop like that. I would regard a bike that would not stop as being defective. I would say I look after about 1,000 cycles. I could not say how many pass through shop in which I am concerned. I see $100 per day. I would say I check 30 - 40 per day. I would say I repair from 8 - 10 per day. Each other mechanic is doing about the same. We are very busy. Some mechanics are better than others. I cannot physically check every man's work as they do it. More pressure on us as mechanics during summer than in quieter seasons. I work from 7.45 a.m. until 5 p.m. July is a busy time of the tourist season, I agree. No difference between braking characteristic of dual-seater and single-seater-they are the same.

Cycle carrying weight takes longer to stop than one that is not carrying weight - two people on bike - have to exert more pressure on brake handles which are squeezed towards the bike handles. If it rains or there is dampness there will be throttle problem and sticking. I do not pass a cycle which has a sticking throttle.

When released some throttles will spring back others you have to push back but no great force is necessary. If one has to push it back we then lubricate them to make it freer. Some become freer others not. If still needed to be pushed back it was still okay.

Court

Pushing it back is kind of normal.

Cont'd

If force has to be used that would indicate a defect - yes it would. It should not go off with a defect like that. No Sir! Nor with brakes - if brakes were bad it would not go out.

If it would not stop with Mr. Gibbons and me on it should not go out. If it did go out in that condition it would be a mistake. Certification obtained in Bermuda - from experience. Repairs 8 - 10 per day.

In the Supreme Court

Defendant's Evidence

No.12 Harold Madeiros

Cross-examination

17th July 1979

(continued)

Repairs of all sorts, could be brakes, de-carbonizing, accident damage - accident damage every week, not unusual to have 2 bikes for accident damage in need of repair.

Workship is at Pitt's Bay Road from when bikes are brought to shop in Front Street. I cannot tell whether someone does check bikes at Front Street before they are sent out but driver is supposed to do so - I can't say from my knowledge that he does. If bike had defective brakes and a sticking throttle it would not go out - but if it did go out in that condition it would be wrong. I know a lot of livery cycles are hired to tourists - not familiar as some Bermudian riders - local may pick up defect sooner through sheer experience. I do not expect same from tourists. Duty to see that cycle does not go out in that condition as consequences is serious. I recognise that duty - if not complied with a mistake has been made.

Re-examination

RE-XXN

I would not pass a cycle with sticking throttles. If had to push it back - lubricate if still would not go back accept by pushing - I would have to repair it. If you had to push it back by not using force that would be okay. Some spring back others do not. If you had to use force to get it back, I would not pass the bike for going out.

Defendant's Evidence

No.13 Keith Pratt

Examination

17th July 1979

No. 13

KEITH PRATT

D.W.3 KEITH PRATT, sworn

Police Sergeant 22 in charge of Police Garage at Prospect.

5th August 1977 auxiliary cycle A967 was sent to me for inspection, about 2.30 p.m. I examined cycle completely. I paid particular attention to throttle control which I was asked to check. I checked the throttle and found that it was in fact sticking only to extent that when the throttle was turned it would not return to idling position of its own accord and had to be pulled back manually. I removed the whole thing from the cycle - throttle control cable and carburetor complete. I examined them in the workshop and the cable and the

carburetor were both in good working order. I stripped the control unit and found there was a high spot on the inner sleeve where it had been rubbing against the outer sleeve. The whole unit was well lubricated. No way I could see this throttle could have been stuck and not been pushed back to the closed position. Nothing inherently dangerous in the throttle control as I found it. I think this is a common condition due to weather condition. I use a 90 c.c. Vespa scooter, my throttle control stays in a set position - convenient when I want to signal a right turn.

This particular unit could not have stayed open without being able to be closed in condition I found it. I checked the brakes - I was not able to road test the bike - but brakes appeared to be in good working order, they were properly adjusted. Lever was applied, the brakes prevented the wheels from turning.

Not possible for brakes to have previously failed and then been in condition they were when I found them.

XXN BY MR. GUNNING

I have no idea what stopping distance of a bike is going at 25 m.p.h. I think it would be 25 yards depending on condition - it is almost impossible to judge. If two people I'd expect it to take longer than if one person on bike - I'd guess 5 - 10 yards more but I'm just guessing. Down an incline I'd expect it to take further. Maximum throttle with two people going down hill I expect it would take further. Without being able to road test vehicle I could not say brakes would hold with two people or not. Cycle was in no condition for this sort of test.

In 16/8/77 I said it was sticking in the open position. That meant through the whole range of the open position. Once moved from closed position to any position up to full throttle it would stay in that position. It needed same amount of force to open it from closed position as to close it from open to close. I meant by "sticking" I mean it had to be moved from any position. The high spot was a shining area which raised minutely above the sleeve. I preserved the part but I have disposed of it. Only one high spot (all rest with proper tolerance) which caused it not to move but not that one

would have to use any amount of force to move it. Cycle - it was in Compound for about 1 week before report of some defect, bike would be labelled, but I do not remember whether there was one.

I have no idea whether anyone else examined cycle before I did. Fact that I had to push control shows it was in the open position. I have no idea whether and who could have touched the bike after it came into police possession. Could not happen that a piece of material could be in it so as to stick - as I saw it the facts were such that this could not have happened. Worn spot shows lack of lubrication otherwise there would have been a film over the spot - this not indicated by shiny spot. Grit between two shiny spots could cause "sticking".

Forceful rotation could remove grit then it would work again satisfactorily.

Re-examination

RE-XXN

One piece of grit would not stop winding down by hand - depends on size of grit. If there was a big piece of grit I would expect to see some sign of it.

End of Defence.

At 2.49 p.m.

No.14
Address of Plaintiffs' Counsel

17th July 1979

No. 14

ADDRESS OF PLAINTIFFS' COUNSEL

Mr. Gunning

Claim arises out of use of livery cycle hired to the Plaintiffs by Defendant. Hiring - not a gift. Evidence hiring by Defendant for profit. Within contemplation of Defendant's that cycle would be ridden by 1st Plaintiff towing the 2nd Plaintiff. Court should find duty owed to Plaintiff in tort and in contract to supply a cycle fit for the purpose. Within Defendant contemplation that tourists including Plaintiff should ride these cycles on roads in Bermuda where a significant number of people suffer some calamity.

cf. evidence of Police Officers and

foreman of maintenance shop - within contemplation of Defendant there is a certain element of risk attached to renting of cycles.

Not drawn to Plaintiff's attention any comprehensive insurance for him or his passenger notwithstanding that knowledge and that the Defendant's knowledge that there is 3rd party cover in respect of 1st Plaintiff. Not even that fact is sharply brought to the attention of the hirer - in the small print of hiring ticket, Document 1 and 2 of agreed bundle.

Plaintiff hired bike in afternoon of 25/7/77 - a busy time for cycle liverymen when the person responsible for deliveries to this district may be transporting up to 65 bikes in a single day - he would in busy season have help. Open to Court that on that day he cannot be sure he loaded A967 himself or that he ran it himself, all he gave was his general practice. Significant because a defective cycle was issued - no evidence before Court to refute that - he cannot say "I checked A967 and it was fine". Evidence of that particular cycle which would not been issued except under a mistake according to Johnson - would not have been issued if brakes unsatisfactory or there was a "sticking" throttle, in which term which I do not mean one which freely moves back. Evidence heard that as long as it easily rotates it is not defective. Everything else shows a defective bike on the evidence of all persons having to repair and check bikes. Defendant recognises if a cycle goes out in defective condition it is dangerous - well within duty of care to see that vehicle is not dangerous. Moreover it is a term implied in the contract of hiring that it would not be in a defective condition.

That is fundamental to a contract for hire of a livery cycle in exactly same way as for hire of a boat that boat will not sink or hire of an aeroplane that pylons supporting take off wheels would not break. Contemplated hiring for use a cycle in good condition so that boat may float or aeroplane may fly for example.

Evidence which I urge to accept of the Plaintiff be a truthful and accurate witness as to the facts. He gave evidence that on 25/7/77 afternoon he received a cycle which he asked for low double seat on it - it was brought at the same time as others for hotel guests. There is direct evidence of Plaintiff not met by Robert Johnson who had no recollection of Marra

at all or this cycle or this day. Court should not expect anything else. Not sufficient to say what he normally did to upset the plain specific evidence given by the Plaintiff. Court will recall that Plaintiff confirmed it was the type of cycle he ordered and recalled difficulty about previous difficulty with cycle and enquiring as to whether there would be repetition of previous experience. The exercise of disembarking these cycles from the truck and distributing them to the guests and seeing if they could ride around and whether they could balance, took a short time - and this can be seen by type of work load Mr. Johnson had.

Plaintiff's evidence - he rode cycle for a minute or so - that it appeared to be in working order. There was no fiddling the controls which one might do if testing the machine. Tourist has no mechanic at hand, he takes machine on trust. It appeared to him to be in working order. Plaintiff's allegation is that no training or no sufficient instruction was given at the outset. Defendant's knew by reason of their business and having to repair one or two bikes per week for accident damage as well as known or ought to have known from general knowledge - no emergency training was given at all - what happens when one has to stop.

At Defendant's best nothing like that occurred but it must have been in the Defendant's contemplation that an emergency might arise. One is issued and signs front and back a slip (which page 1 and 2 agreed bundle) for all the world like a receipt further disguised if one starts to read it looks like precepts one may have in the highway code.

"Rule of road is keep left etc." Reads Exhibit 1.

One is led to believe what it is is traffic directives. No one suggest that there is offer of proper insurance coverage. Therefore one is left with document looking like driving directions. Only at the end does one come to exclusion clause. Reads (a), (b), (c), (d) and (e). We have a careful driver here he would not ride after rain. (g) and (h) are read. This is full limit of the instructions. Does not include anything which should be required as

a minimum. (h) not drawn to Plaintiff's attention, not even by Johnson. Hirer has no means of inspection. Unless drawn to person attention it is not effective as a matter of law. Reads (1) exclusion in respect of bike itself - construed strictly specific fitted to person. Reads (j), (k) and (l).

In my submission (l) does not come to tourist notice unless specifically drawn to his attention. There is no evidence that this was drawn specifically to Mr. Marra's attention. Johnson does not mention it. Plaintiff's evidence is that he did not know if it - he accepted this document as a receipt and read half way down.

He signs on inside - unless it is drawn to attention even if there is such a clause (a) not drawn to his attention signed at same time as one pays the money.

Also in construction of that it is not an exclusion of negligence by the Defendant only be construed to exclude negligence of the hirer.

Uncontradicted evidence of Plaintiffs to this point. I say that because no recollection of cycle, man, occasion or the day. Nothing to satisfy the Court that Johnson rode this cycle to truck. Court not satisfied that Robert Johnson had tested this cycle en route to truck - not he "would have done". We also know that Mr. Marra had some experience of cycles - here 3 years prior and had ridden his son's bike around neighbourhood. When he describes acts of 26/7/77 he comes not as a novice but a person with some experience. He says on that occasion he could not throttle back. I ask Court to find this cycle went out in a defective condition. On Monday afternoon it was not braking to standard of the one Madeiros tested with Mr. Gibbons.- it stopped with a jerking movement, not up to the standard in which it should have been but not up where it would worry a person into returning it for another one. It apparently behaved in rest of that day, and on following day at Devil's Hole they had difficulty, brakes were a little weak. If weak it was a defect. Two Plaintiffs, not of size and weight of Messrs. Gibbons and Madeiros. Not sufficient to put off a person hiring for short time but nevertheeless a factor which mechanic would find to be defective and would not send out because if was dangerous. In Harrington Sound Road "sticking" different from a throttle which does not return.

"Sticking" has a resistance meaning ordinary not simply having to rotate it back moving easily. Slight sticking was not enough to demand returning of the cycle to Defendants. That happened twice and rectified both times by throttling back.

Return journey from Horseshoe Bay, later that same afternoon a problem which the Defendant's and their mechanics recognise that they would not let out a bike having it - by Mr.Madeiros' standard - Plaintiff was not a complete novice. When he said "I tried to throttle back" I ask Court to accept that. It was a matter which caused cycles to be taken to Police Headquarters Department to be examined because he said something to Police Officer and taxi driver. Quite different from hindsight view which after thinking about it the person estimates what had happened. Sitting in pain just had a severe accident and collision with his arm practically hanging off as taxi driver thought nevertheless there and then gave the explanation for the collision. It was only after collision and after several days that it was tested. Enormous what collision blow might have done.

Submit Plaintiff is a person, a man of highest respectability whom I invite the Court to say gave an immediate and spontaneous explanation and is properly to be believed. He was examined and maintained that evidence - the object is to test the witness. I say he was tested and I submit evidence holding fast and is entirely acceptable, this is for Court to decide and properly can be made and I invite Court to make this decision. He had good recall - there was sand on the road - why he did not brake at one point.

Account of his going onto the grass is supported by independent witness, Mr. Reginald Ming, who told Court what he saw was consistent with Plaintiff attempting to stop this machine. Add these bits of evidence and it becomes irrefutable that a proper valid finding on that basis may be made.

Plaintiff told Court he tried to brake but nothing happened, he veered onto grass then turned to get back on correct side. It was right there on the ground when he said how accident happens. If Court accepts that it follows that the cycle was defective. The Plaintiff said how the collision occurred

sitting on the floor, there and then. If Court accepts what Plaintiff says about braking etc. - it follows that bike was defective.

Pratt saw bike 5/8/77, his report "sticking" means not freely moving. Pratt's recollection of 5/8/77 is to be preferred. See page 4 of agreed bundle. "Sticking in the open position". Court to bear in mind the statement had been made and cycle had sustained a collision - which might have shaken it loose - these are not enough to disclaim that Plaintiff has not told how this accident happened. Not lubricated where rubbing, this apparently not seen by mechanic because it was a high spot out of the normal. A trapping point between objects no lubricated is bound to mean objects stick. I invite Court to say cycle was defective in those two material defects - it ought not to have left the shop - negligent to allow the bike out of shop with the defects - and a fundamental breach of contract to send out a cycle which is not safe and for the purpose - further Court should find condition printed on documents 1 and 2 not specifically drawn to Plaintiff's attention. Even if there were exclusion clauses they would not apply in these circumstances.

Clerk and Lindsell 14th Edition Para.1624.

Here a cycle which is defective must be taken to be known to be dangerous - they knew or ought to have known. In a contract of a pecuniary nature all the more binding on the Defendant when cf. page 930. cf. Bamfield v Goole (1910) 2 K.B.94 duty to warn. (Reads the headnote).

General Principle of duty to warn. Reads balance of Para. 930. In this case no proper warning given in accordance with this para.930 and authorities there noted.

White and Steadman (1913) 2 K.B. 340.

Defendants ought to have known if they exercised proper care that the cycle was defective.

cf. Whites case at 341 and at 347.

"The next.....independently of contract".

Supply a defective cycle is a dangerous chattel.

Bamfield is authority for saying when

dangerous chattel entrusted to person not competent to deal with it, owner is liable for resulting damage subject only to exceptions to the rule in Rylands and Fletcher.

cf. para. 940 Clerk and Lindsell.

No opportunity for inspection in case at bar.

Oliver vs. Sadlers 1929 A.C.584. Although slips were in hand of porters a brief period - no opportunity to inspect.

Halsburys 4th Edition Vol.9 Page 242 Par. 367.

Modern cases led by Denning say exclusion clauses should be reasonable -

See also para.369.

(1) no actual knowledge

(2) no cause to believe it had contractual terms

(3) nature of receipt, nothing to indicate more

(5) is important - Defendant fully aware of persons not covered under policies

(6) distinguishes ticket cases.

More recent cases.

Harbutt Plasticine case [1970] 1 Q.B. 447 Denning M.R. Widgery and Cross.

Contract terms in this case for someone to do work.

Reads Headnote.

See "Denning" at Letter E, F and G at page 466. Also at Letter G on 471.

Development has been away from exclusion clauses because of serious consequences of breach.

Medical evidence.

Arm virtually useless after being on top of skill in his profession not in consequence of one time loss - but continuing disability, inability to use his skill for best of life.

(1) Pain and suffering

(2) Loss of amenities

(3) Loss of earning capacity

(4) Future loss of earnings

One-handed man is less attractive in the labour market.

Aged 50 now - would expect to be working at least until 65.

Court will recall severity and shock of the injury.

The numerous operations - and resulting outcome.

Not to forget injury to leg - serious requiring many stitches immoblising him for a time, and by reason of nerve graft he is not only able to use it as before.

Damage which he might accidentally do in future.

1977 Current Law Vol.13 under Damages para.59.

Bowen v. Brown Construction, Wien J. male age 37 severe crush arm injury. General damages $6,500, loss of earning capacity $3,000. Special Damages. Total General damage 23,000 in 1971. Multiply this 1.28 in £ then convert to dollars. Bermuda awards are similar to U.K. dissimilar to United States. In addition in instant case there is a leg injury - painful and partially disabling - can't stand on leg for long period.

WEDNESDAY 18th JULY, 1979 at 9.30 a.m. — 18th July 1979

Counsel as before

9.30 a.m.

Mr. Gunning

Yesterday I spoke to you about P.S.Pratt.

Dictionary meaning of stick: "stick" means to fasten or attach by causing to adhere to bring to a standstill, render unable to proceed or go back, to be become fastened, hindered, checked, or stationery by some obstruction to be at a standstill as from some difficulties.

Significant because Sergeant's evidence quite different from 1977 evidence. He admitted throttle could have stuck but ties in with 1st Plaintiff's evidence supported by taxi

driver, Ming's evidence and by Dr.Stubb's report.

On damages - citation in Current Law multiplied by 1.8 is taken from Kempe and Kempe Vol.2 of Kempe page 601. Loose leaf 1948-1978 we are now in 1979. Should also consider leg injury and loss of sensation of the foot, cannot stand or jog on it. Significant leg injury because of change in its use.

Mrs. Marra was less seriously injured. Laceration in head over ear. Bleeding in ear. Ears control balance and she has loss of balance and dizziness. Long time she was not able to remember, amnesia, her mother visited until November, thereafter daily indication of severe concussion.

Harbutt P.

Another case on this

See in Harbutt the cases cited at 449.

Suisse Atlantique 1967 1 A.C. 361. Damage in shipping case. Whether contractual right for less number of voyages.

cf. page 402 quotation from Karsales. No point in keeping contract on foot. Principle arguments on hire purchase cases.

cf. p.421 letter G, P.422 - 423 letter A to D.

Taking out a bike which is defective is fundamental breach. Contract in this case has come to irrevocable end.

1 W.L.R. (1978) 165 Smith v South Wales Switchgear Co.Ltd. In this case insurance matter is drawn to attention that injury is insured against. Reads headnote. Cases cited to be seen.

Cf. Dilhorne at 167 quotation of Lord Morton in Canada Steamship v. King (1952) A.C.192 also 168 - Letters A, B, C, D "very clear words". Exemption clause in document No.1 very wide -

Long case - draw attention to approach in this case - which is further development.

Important where clauses are not drawn to attention of person against whom it is proposed to enforce terms.

Photo Production vs. Securicor Ltd. (1978) 1 W.L.R. 856. Contract exception clause (Reads headnote)

Here we have a breach if plaintiff's evidence accepted which prevent Defendants relying on the indemnity even if terms have been brought to notice of Plaintiff.

It was the object of contract was to send Plaintiff on a safe cycle, safe manner, adequately instructed as to use of cycle. Not intention to send out defective cycle - see Madeiros' evidence re (2) of headnote.

See also headnote of Denning M.R. cf. Letter F and G at page 861, 862 at Letter B. Letter E (provided that it is fair and reasonable for them to do so).

Letters A, B, C, D of p.863. All of page 863.

Present contract ended abruptly on front of a taxi.

Page 864 Presumed intention was to send out cyclist on safe bike and to have him properly instructed. Letter E page 864 is important - on presumed intention. It is the parties both of them "as reasonable men" who must have intended. Was this a receipt or precepts of road traffic, was there any notice of non-insurance in context of knowing the likelihood of accidents.

P.867 Letter C-D could not have been in contemplation that defective bike - throttle would be out on the road.

P.869 Letter D - H quotation from UGS Finance.

P.870 Letter A to C and Letter E.

P. 871 Letter E and F.

P. 872 Letter A.

Appeal was allowed in Photo Production strong case and Court shows how matters of exemption classes of contract are now treated.

I ask Court to accept Marra's evidence as straightforward, lucid witness saying something to taxi driver resulting in that bike being taken to Prospect for inspection. Some 9 days passed between event and examination, so police officers evidence e.g. Pratt possible of juxta position of shining part could have caused stoppage.

Take only a fragment would have stopped.

In the Supreme Court

No.14
Address of Plaintiffs' Counsel

18th July 1979

(continued)

Proper procedure to inspect throttle - whether defect is of manufacture not capable of inspection - neither here.

Improbable that person who has experience in cycling whose arm is hanging off should at the time say the cause was throttle if not true.

Defective throttle - fundamental breach of contract - Plaintiff entitled to be recompensed for injury and disability as a consequence.

Not being safe - no instructions, damages would follow. Special damages arising out of the injury - loss of salary - future loss of earning.

Indemnity clause fails with fundamental breach as does the exclusion - same arguments apply.

Earlier discovery of minor defect in throttle not sufficient that he should have returned the bike. Nothing to say Plaintiff estopped by any of the conditions.

No.15
Address of Defendant's Counsel

18th July 1979

No. 15

ADDRESS OF DEFENDANT'S COUNSEL

Mr. Bell address

Comment on friend's points made.

He has made a number of errors in regard to interpretation of evidence and deductions he has made and one error in law.

Friend opened his address by referring to question of insurance. He said culpability that Defendant had not given Plaintiff an opportunity to insure himself and that no comprehensive insurance was available. Those statements - misapprehension of what 3rd party insurance is and comprehensive insurance is.

Third party - compulsory protecting third parties from negligence of the insured - no complaint was made by - taxi driver would be covered by 3rd party.

All that comprehensive insurance would add would be Marra would be able to recover from his insurance the cost of repair to cycle. A company such as J.B.Astwood has a significant number of licensed mechanics and is dealing with 1,000 bikes is able to deal with repairs instead of comprehensive insurance.

What friend says is that had Plaintiff had comprehensive insurance he could claim against his insurance his damage personal - had the cycle had been insured comprehensive insurance there would not have been recoverable, general damages in respect of himself, such insurance is not available. Friend said 3rd party cover was not available to pillion passenger.

Pillion passenger does not need third party cover.

Friend said even provisions for insurance were not brought adequately to attention of Marra - because of small print. He is wrong in law submitted by me the doctrine of non est factum is well established. Not open to one who has signed both sides of a document to say that contents have not been brought to his attention.

Law - Chitty 24th Edition at page 142 para.300.

"The doctrine of mistake..... reads or understand or not"

"If a party has been misled..... against him".

In the absence of fraud the party who signs document whether he read it or not is bound by the terms thereof. Halsburys 4th Edition Vol.9 para.369. Reads Para.369 cf. Para.6.

L'Estrage v Graucob 1934 2 K.B. Cannot say not brought to attention when he has signed the document. Friend on facts placed bearing reliance on defective cycle had been issued - he said no evidence to refute that - there is also no evidence to support it.

Plaintiff has to prove that there is evidence to support allegation of defective cycle. There is evidence to refute the contention that the cycle was defective - that evidence is of the 1st Plaintiff himself and there is further evidence from Madeiros and Johnson.

In the Supreme Court

No.15
Address of Defendant's Counsel

18th July 1979

(continued)

First Plaintiff says he did check the bike himself and that the brakes worked - he also said the throttle control went back to idle position when released. When contract was entered into the cycle was not defective. Evidence of Madeiros as to checks made every time a cycle goes out to hire.

Johnson's evidence - he also checks these bikes before hire. Although he did not recall this specific bike A967 what he did say he did on Monday's Tuesday's and Wednesday's do the White Sands run - he must have checked all the bike himself.

Even if he had not checked someone else would have checked at warehouse to truck.

Friend has said defective delivered. What more could Defendants have done when the last they saw the cycle, all their check procedures had been exhausted.

When Marra says cycle was not performing properly he did not choose to tell Defendant of these defects - he had opportunity to do so.

Not as if something happened and then 100 yards further on he had a serious accident - he had returned to the Hotel on Monday after he had seen brakes perform inadequately at Lighthouse Hill.

It was on Tuesday morning he also found brakes inadequate approaching Devil's Hole - again Tuesday morning throttle control stuck on Harrington Sound Road and Harbour Road.

He had the Defendant's phone number both on the receipt and on the sticker on the cycle.

Mr. Marra's own evidence that he could call if anything went wrong. Defendants not expected to be psychic.

Friend said a cycle which according to Johnson and Madeiros would not have been issued except made a mistake i.e. with brakes unsure and a "sticking" throttle.

Sticking throttle is at nub of case.

When referred to by Johnson, Madeiros

and Pratt they all mean one which will remain in the position to which it was last turned and which will not automatically close to the idle position.

If you open it fully and leave it fully open the cycle will accelerate but it is not right to say that Sgt. Pratt's evidence - critical in this case - was any different yesterday that it was in statement of 16/7/77. Statement is in the agreed bundle (reads)

"On examination.....position. With a fault of this nature.....close position".

That is what he means by sticking when using word sticking or any word one must judge what the witness meant by it. Dictionary definition by friend shows some 28 different definitions of the word "sticking". Mr.Marra's contention of what happened in accident is something wholly different from sticking, he says he was not able to close the throttle by turning as Sgt. Pratt turned it. Sgt. Pratt says it is not possible for Mr. Marra to be right in what Marra says from the examination by Pratt of the throttle control delivered to him.

Sgt. Pratt asked whether it was difficult or easy to control throttle, said it was easy.

Inescapable conclusion from Sgt. Pratt's evidence that Mr. Marra must have been doing something very wrong - perhaps trying to turn the throttle the wrong way - in which case no matter how hard he pulled it toward him it would not decelerate.

My understanding was that Mr. Marra had the direction the wrong way around. The same happened with throttle control is alleged by Marra as to the brakes - he tried them, they did not work, they had worked previously albeit not quite as well he would have liked on two occasions - and they worked subsequently. Sgt. Pratt tested cycle, he said brakes were adjusted to the correct tension and when he applied them he was unable to turn the wheel. He said something about brakes. He said not possible for brakes to have failed at the time of accident and be working properly at time of examination. On basis of Pratt's evidence I invite Court to say Court cannot accept that Marra's evidence of what happened was accurate.

(Break for 10 minutes)

At 11.40 a.m.

In the Supreme Court

No15
Address of Defendant's Counsel

18th July 1979

(continued)

Mr. Bell continues address

Refer again to mannerism which throttle control operated - to go faster or slower.

In his evidence in chief Marra said towards him to turn it off and away from him to turn it on. In fact this is as good a means as any of describing it.

But Mr. Marra has it the wrong - bike operates in the very opposite manner. Friend said in term "sticking" he did not include freely moving back without effort and that anything else is defective or evidence of those repairing and despatching.

If in fact the sticking was what Pratt found or what Johnson and Madeiros said happens from time to time this accident would not have occurred - with that sort of sticking one can turn it by hand quite easily.

Friend said evidence relied on that of Plaintiff - I do not suggest Plaintiff was a dishonest witness - endeavoured to be truthful - but he was inaccurate and mistaken as to the cause of the accident.

Friend described time Marra accepted delivery - no real conflict between Johnson and Marra's evidence. Marra says he rode cycle for minute or so and it appeared to be in order. Although friend alleges no adequate instruction was given on Mr. Marra's evidence alone he has shown himself to be competent.

Friend then moved to question of document which exclusions contained - saying all like a receipt etc.

I referred to law of non est factum. I will come in due course to law on issue of receipts.

Leading case Chapelton vs. Barry UDC. If one came exclusion in end only effective if attention drawn - even so on the reverse page of document which Johnson referred to as a contract - it has in capital letter "I accept responsibility etc. Mr. Marra signed immediately below that. Apart from telephone number and branch address of Defendant there is nothing on the back and in these circumstances Plaintiff cannot claim he did not know of the exclusion.

That is not precepts of Highway Code -

it is a phrase which on any basis has legal meaning and significance.

Friend says page 2 was not drawn to attention but that cannot be maintained when he signed it. Friend turned then to pre accident. Difficulties of Marra - ingenious argument that little difficulties experienced by Marra were not sufficient for someone hiring a cycle should seek rectifying but were sufficient that the cycle should not go out.

That submission emphasises there were no defects at the time of hire which the Defendant knew or ought to know. Plaintiff did not know of any and he had checked.

If these were serious matters the Plaintiff should have informed the defendants and given the Defendant opportunity to repair or replace.

If they were not serious matters Plaintiff cannot rely on them as evidence of defect.

Friend said there were defects which would not pass the scrutiny of Defendant's employees - I take exception to that contention because there is no evidence to show there were any problems when the cycle was delivered - indeed the evidence is to the contrary.

Friend asked heavily to rely on the fact that Plaintiff had said something to taxi driver at accident - Sgt. Counsell in his evidence said that he saw Ming on 1st August and took a further statement and that it was after that he asked Pratt to look at the throttle control. Contention friend asks Court to accept is that if Marra made some complaint it follows that throttle control was defective - this is fallacious as well as having made the complaint the complainant must be right.

Sg. Pratt's evidence shows that the complaint was not right. Friend asked Court to ignore Pratt's evidence saying it was insufficient to counter the Plaintiff's evidence - I ask careful reading of Pratt's evidence - independent witness with many years of experience of these matters.

Friend made much of the "high spot" and question of lubrication of throttle control. Sgt. Pratt in his evidence said he was talking about something 3/4 inch square 4 or 5 thousandth of an inch - that the inner sleeve was well lubricated in general terms.

From that friend asks Court to say cycle was defective when it left premises - should not have left the shop.

No evidence that it left the shop with those or any other defects.

What we come to in essence is that Marra has to satisfy the Court that the accident happened as he says it did.

Not just the way he crossed the road on to grass and onto oncoming traffic; he has to satisfy the Court on a balance of probability that the brakes failed entirely and the throttle control became fixed on full revs (revolutions). You have to find that in the face of Sgt. Pratt's evidence - just the first step.

If which is not admitted that cycle was defective Court must be satisfied that that defectiveness was as a consequence of the Defendant's negligence - that in itself is a huge jump from the defect itself.

Court has heard evidence as to the checks the employees of Defendant company carry out.

2 separate checks by mechanic and delivery man every time the bike goes out - each covering the matters claimed to be defective. If Court satisfied it was a proper system of checks - even if is notadmitted the cycle slipped through the net, Court cannot find negligence charged against Defendant. What Court can say is Plaintiff himself was at fault for having failed to notify the Defendant when problems first arose albeit more minor problems than those ultimately alleged. If Plaintiff gets that far he still has to set aside the exception clauses he has signed.

It is a contract which he has signed and a term of contract does exclude the liability of the Defendant.

In opening friend said unless negligence was specifically mentioned exemption clause is of no effect - that is not the law - law is that it must be clear if it is to cover negligence. Major test as to whether negligence is covered is to ask what form of liability the Defendant would otherwise be excluding.

The answer can only be negligence in this case and the First Plaintiff having agreed to the terms of the contract is bound

by them. That applies also to the question of indemnity which is a matter also covered by the contract.

Question of Quantum

Special Damages - in fact details in evidence did not resemble those in the Statement of Claim. Particularly medical expenses. In an early part I said I would agree medical expenses upon production of receipts but ultimately it transpired claim in respect of medical expenses was restricted to those amounts paid by Mr. Marra himself either in respect of his own bills or his wife's bills.

Page 75 - 76 - 77.

We have agreed $2,105.44 together with amount of his recent billing of $600 but $16,270.89 paid by Prudential effectively withdrawn by friend because Mr. Marra has no obligation to repay that either to Insurance Company.

Mr. Gunning - Mr. Marra only claiming $2,700 = $2,105.44 plus $600 estimate of proportion to be borne by him in respect of remaining bill.

See Page 77.

No claim is being maintained in respect of part paid by Prudential Insurance Company.

Various other items upon which agreement has been reached which Court has noted.

Law

Cases - Suisse Atlantique (1966) 2 A.E.R.6, deals with all authorities up to this time, House of Lords case. Top of headnote "There is law Page 62 Letter C-D.

Whether having regard to breach performance has been something totally different from what was contemplated"

Instant case not totally something outside contemplation of hiring a cycle. Cf. p.68 Letter C and E from character of breach whether performance totally different from that contemplated. P.71 Letter H Lord Reid. Applying a strict consturcion. Page 73 Letter Lord Reid makes a criticism of Court of Appeal as relying on its own dicta and expanding therefrom. Page 76 Letter G of particular merit as judgment of House of Lords.

Denning goes in Photo Production case goes

In the Supreme Court

No.15
Address of Defendant's Counsel

18th July 1979

(continued)

further than he should have gone influenced by U.K. Statute not Bermuda enacted

Stresses there is no rule of law superimposed on law of contract and that fundamental breach has to be decided on each contract.

P.88 Letter F Upjohn Lord - strong and clear - not a rule of law matter of construction of the contract.

Photo Production (1978) 3 A.E.R.146. Leave granted to appeal to House of Lords - no report yet through. Case is distinguishable very strongly in that

One reasons 'act of lighting factory so extraneous that parties could not have intended'.

Letter B page 147.

M.R.Denning has gone further than confines of Suisse Atlantique case.

P.153 Letter G and H

"Thus we reach.....term" refers to U.K. Statute, clear Lord Denning is leaning heavily on it.

For purpose of Bermuda contract "fair and reasonable" should therefor be excluded from consideration with respect to exemption clauses.

Letter D p.160 "In my opinion at common law (e)..... employee."

Harbutts Plasticine case (1970) 1 A.E.R.

Case to be strongly distinguished. P.231 Letter H and J of Denning J. Shows very strong language in very different circumstances.

P.235 Letter E.

"Before leaving..... for the beach."

P.235 Letter F is relevant in view of failure by Marra to notify defects.

In considering whether exemption clause applies it is a factor to be considered.

Smith v South Wales (1979 1 A.E.R. 18 House of Lords.

Dealing with question of extent to which exemption clause excludes negligence Smith does not take matter further than Suisse Atlantique in Smith exemption was held not

to apply to negligence because there was no express reference to negligence on the construction of clause words in ordinary meaning were not made enough to cover negligence. Only word preference could hang case on was "whatsoever", House of Lords said not sufficient.

Instant case is distinguishable by applying tests in Smith. Those tests are as Lord Morton in Canada Steamship 1952 1 A.E.R. B I O whose judgment is repeated with approval in Smith.

Page 22 Letter C - D

In Lord Keither at p.30 Letter F

"The matter is essential.....knowledge."

Strongest factor to include exemption clause is that it could only have been negligence that the parties contemplated.

(Break for lunch).

At 2.30 p.m.

Mr. Bell continues

Next case Canada Steamship case (1952) 1 A.E.R. 305 P.C. case only one judgment given. Passage at 310 Lord Morton Letter A - D. "Their Lordships.....against it."

What is involved not what friend said in opening - he said if negligence is not specifically mentioned itwas not covered by exemption clause. Case says it must either be specifically mentioned or to be construed by using the words of clause in their ordinary meaning thereafter (iii) on Page 310 applies.

No other ground on which Astwood could claim exemption except negligence.

Burnett v Waterworks Board 1973 2 A.E.R. 631.

Rope snap, personal injury, liability excluded by a different from a case here where something was signed.

632 Letter F

The Plaintiff had no choice.....to

Page 635 letter A Denning M.R.

"The third question is whether the notice....."

In this case there is a contract between J.B.Astwood and Mr. Marra. Burnett case a case of negligence. Notice makes no specific reference to negligence.

In the Supreme Court

No.15
Address of Defendant's Counsel

18th July 1979

(continued)

Conclusion if Burnett entered a contract exemption clause would have applied notwithstanding no reference to negligence and not expressly provided for in the exemption clause.

Burnett case followed.

Birch v. Thomas (1972) 1 A.E.R. 905 relating to a motor car, involving negligence.

Same principles as Burnett's case.

Wording of stickers in van

"Passenger ride at own risk - on condition that no claims shall be made against the driver or owner". Driver was negligent, overtaking negligibly in which passenger injured - Defendant was exempted from liability on basis of that notice.

Headnote - driving dangerously was not conduct outside the notice - Within what was on the minds of the parties.

Presumed intention of parties in case at bar would be to cover a defect if there was one certainly bearing in mind Defendant's checks. If defendant's employers had maliciously interfere with it.

Photo case

Where Defendant making sure that defects would be discovered that is within contemplation - beyond the contemplation of the parties in Securior case.

Astley Industrial Time - Gaunley (1963) 2 A.E.R. 33 Upjohn L.J. at Letter I on page 34. P.35 Letter A. See pages 46 Letters B and H Page 47 Letters E and G.

Defines duty of care to make vehicle fit for purpose my clients can rely on the exemption clause.

Chapelton v Barry U.D.C. 1940 1 K.B. p.532.

I've added this case when friend said terms had not been brought to attention of Marra.

Short Judgment of MacKinnon at 538 - 539.

No question of signing in Chapelton case.

See this for simple things by which person can be bound even without signing.

Contract we are concerned with is stronger than cloak room tickets or railway tickets.

Summary Chitty 24th Edition majority at 367 para. 824 where majority of cases.

"The limits of its operation have view..... root of it"

Para. 831 page 372 2nd para.

"It therefore.....in the contract"

Para. 839

Before the Suisse case..... recklessness.

Finally turning to Vol.9 of Halsburys 4th Edition para. 373 "Where a contracting party"

I stress again those matters in respect of which Court has to be satisfied

(1) brakes and throttle control failed in the way he said they did

(2) that the failure was negligence on the part of the Defendant - systems of checking was negligent.

(3) that Mr. Marra not at fault by his failure to report defects when first noticed

(4) that the Defendants were indeed in fundamental breach going to root of Court such as to nullify the effect of exemption

(5) there must be fundamental breach at the time he took delivery because

(6) nothing else required of Astwoods after the hiring - nor were they required to do anything else.

Whilst always tragic for Marra to have sustained his injury I ask Court to say they were sustained through no fault of the Defendants (at 3.11 p.m)

No. 16

REPLY OF PLAINTIFF'S COUNSEL

No.16
Reply of Plaintiff's Counsel

18th July 1979

Mr. Gunning replies

Court must find whether throttle (defective). Vol. 9 para. 373 of Halsbury. (Reads) I stress "general words". There are two or more kinds of negligence.

Construing exclusion clause against the

In the Supreme Court

No.16
Reply of Plaintiff's Counsel

18th July 1979

(continued)

proferens.

Back of card refers to negligence of myself not of Astwoods. Not case of negligence howsoever caused.

Clause in Burnett case

"No liability attaching from whatever cause!" that is far from clauses in Astwood's case as also in Birch and Thompson passengers at their own risk, nothing against or driver or owner as opposed -

On pure canons of construction exemption here fails on necessity for clear words and on necessity for real notice.

Whether one takes document as receipt or sort of document in South Wales Switch Gear Case.

Barry U.D.C. - 1940 case deck chair - document treated as a receipt. So easy to pick up document as receipt rather than anything else.

Law in text books frequently overtaken by decision by cases by Judges of very considerable experience and persuasion - difference between Barry case and instant case one has signature - one doesn't.

In cases one is dealing with particular form of contract, hire-purchase - warranties etc. do not go to root of contract. Page 43 of Astley v. Grumley (1963) 2 A.E.R. 43 depends on facts - breaches of condition or taken en masse disentitling party from hiding behind exemption clauses. Exactly that is here sticky throttle and defective brakes.

Photo case at 861 Denning M.R. says it does not make any difference, responsibility of Securicor makes no difference whether deliberate act or not.

Birch v Thomas - no clause against owner or driver.

Man knew notice brought to his attention - and is specific. Instant case I am responsible for cycle and myself.

Other side of document precepts of Road Traffic camouflages the rest of it.

Signing not sufficient when taking the circumstances as a whole. In Burnett v British Railway 1973 2 A.E.R. Reads notice

at 434. Canada Steamship 1952 A.C. 205 words at 211. Test not based on statute law but by common law reproduced in statute law.

Contention in this case between Crown and Plaintiff - was exclusion clause court found for Plaintiff that clause could not provide protection for Crown - must limit liability in clear term. Clear words necessary otherwise construed as not based on negligence. Even words as used would not exclude negligence of the Defendants, Smith and South Wales House of Lords - up to date page 165 in Headnote recognises this.

In Harbutts case 1970 1 Q.B. 447 it was a mistake using a plastic pipe - both cases mistake is negligence in my submission and fundamental breach - court held margin of error is too small.

Likewise margin of error in breaks and throttle is small but produced very serious consequences which Court takes into account. Photo Production case 865 at Letter D and E. See this and Para. F P.864 construction of contract

C, D & E

Development of common law not a creature of U.K. STATUTE

Suisse Atlantique 1967 A.C. 399

In the shipping case where charter party there was breach if one deviated even if not far.

399 B and C, E and F.

What Lord Reid was saying there is recent authority for existence of the rule - ties in with wording of Fundamental breach found on 869 of Photo Production case (1978) 1 W.L.R. at 863 Letter B cf. and letter E fundamental breach.

406 of Suisse Atlantique

Letter C.

Exemption.....bargaining where a Company lets articles on hire no equal bargaining power. See letter C to G page 406. Page 426 Letter B.

"In many cases

distinction between this case and hire purchase case most of which turned on whether

In the Supreme Court

No.16
Reply of Plaintiff's Counsel

18th July 1979

(continued)

Damages Medicals	$2,705.44	
Specials	4,455.59	
Made up	2,705.44	
	1,500.00	page 29 unagreed
	85.50	45 unagreed
	164.65	63 unagreed
	$4,455.59	

on basis of no claim no repayment to insurance company.

Page 149 unagreed bundle.

Receipt to date of insurance benefit of $25,159.40.

Taking that and that he would earn $36,000 that $72,000 for 2 years less $25,000 further amount of $12,000 for tax over two years. $36,000 would be assessed loss of wages.

Future loss $150 per week.

$78,000 per annum as opposed to $36,000 - $28,200 deficit less $36,000 per year for tax = $22,200 loss per year, multiplier 15 is maximum in case I cited 37 years old man, 13 years was multiplier. This man is 50 multiplier of 9 would be appropriate.

Bowen 1977 Current Law para.59.

Wrist - heading

In addition pain and suffering and loss of amenity.

Wife

I have not found anything about amnesia for amnesia for a period. Pain and suffering. Loss of amenity - length of time necessary to recover and loss of memory.

Rest of friend's address was on fact.

No.17
Judge's Notes

18th July 1979

No. 17

JUDGE'S NOTES

Mr. Bell

I refer to Plaintiff's evidence that he hopes to re-train, already taken some management courses.

Cutting with left hand possible though mainly for training staff. $150 is what

he will get when he gets back.

So not a figure upon which multiplier should be effective - big shortfall if $150 is used. Friend refers to exclusion clause - he refers to back - but it is clause 10 Pleadings in front of document in (1)

C.A.V.

TUESDAY 9th OCTOBER, 1979 at 12.00 p.m.

9th October 1979

Judgment delivered.

Mr. Kessaram

I ask matter of costs be adjourned to chambers. I had only been advised about this matter about 2 hours ago. I would like time. If Court is minded to deal with costs I would say costs to follow the event.

Mr. Bell

I think details should be agreed by Counsel.

Award is for Court's discretion.

W.N.H.R.

No. 18

JUDGMENT ROBINSON A.C.J.

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION 1978 No. 35

GABRIEL MARRA and
SONDRA MARRA — Plaintiffs

- and -

J.B. ASTWOOD & SON LTD. — Defendant

Mr. A.Gunning for the Plaintiffs
Mr. G. Bell for the Defendants

Before: The Honourable Mr. Justice Robinson

J U D G M E N T

1. On the 24th July 1977 the First Plaintiff, Gabriel Marra and the Second Plaintiff, his wife,

Sondra Marra came to Bermuda from the State of New Jersey in the United States for a week's holiday at White Sands Hotel in Paget Parish.

2. On the morning of the 25th July 1977 the First Plaintiff ordered through the Hotel a low double-seated Mobylette auxiliary cycle for hire from the Defendant, J.B.Astwood and Son Limited, which carries on the business of renting such cycles to the public of whom a great portion are visitors to these Islands.

3. The cycle was delivered by Robert Johnson an employee of the Defendant to the First Plaintiff in the early afternoon of the 25th July 1977; Johnson had confirmed with the First Plaintiff at the time of such delivery that the cycle was of the type requested.

4. Because the First Plaintiff had visited Bermuda previously in 1974 with his family and had hired cycles in respect of one of which he had had some difficulty because of a lost gasket, he was assured, upon his enquiry, by Johnson that in case of any difficulty or any thing going awry, immediate repair service was available by telephoning the Defendant's business offices.

5. The First Plaintiff said in evidence "we tested the bike outside the Hotel - it took a minute or so - just one turnabout ..... I was not given any instructions as to emergencies - (the) bike appeared to be in working order - I did not do any inspection of it - before I put Mrs. Marra on it, I rode it around the corner a little to get the feel of the bicycle..... After a minute the gentleman who delivered (the) bike went with me to the back of the truck where I paid my deposit and got a receipt. I paid about $20."

6. Not only did the First Plaintiff receive what he described as a "receipt" but he signed the document which has been exhibited as "Exhibit 1" at the trial.

7. This document Exhibit 1 is the Defendant's invoice No. 50271 and it had written on it the particulars of the transaction as to date, the registration number of the cycle (in this case A 967) and its description as a dual cycle, the time it was hired and the number of days it was to be on hire together with the amount of the payment therefor; which particulars together

with the name "Marra" and the place of residence of the First Plaintiff, "White Sands" appear to have been inserted on Exhibit 1 by the deliveryman Johnson.

8. There follows after the above mentioned particulars space for the customers name and place of residence which are intended to be part of further printed matter which is on the document, and in the case of invoice No. 50271 these spaces have been filled in so that the documents reads

"I Marra residing at White Sands do declare that I have hired livery auxiliary bicycle, Licence No. as above on the terms set out below and I am of the opinion that I am capable of riding it. I note that an approved safety helmet is included in the rental; I am not under 16 years of age and I understand and confirm that :-

(a) the rule of the road in Bermuda is "KEEP LEFT".

(b) a cyclist should not look backwards whilst riding as it is a common cause of accidents.

(c) stopping as "STOP" signs is compulsory for all road users in Bermuda and for my own safety I must actually stop as other road users will expect me to do so.

(d) the legal speed limit in Bermuda is 21.7 m.p.h. or 35 km and it is unsafe to exceed it.

(e) road corners and curves should be taken carefully as many are sharper than they appear to be and likely to be very slippery when the road surface is wet.

(f) the approved safety helmet, issued to me as part of the rental agreement, must be worn for my protection.

(g) I am capable of riding a pedal cycle.

(h) I have received adequate instructions in the operation of the controls, brakes, starting and stopping of the motor, that I have examined and assured myself that the brakes and the vehicle generally are in good working order before signing this declaration.

(i) I accept full responsibility for the

vehicle and hereby agree to pay for any loss in respect thereof howsoever caused.

(j) the vehicle is insured for third party risks under the laws of Bermuda. I understand that such policy does not provide for cover for any pillion passenger. As I am the only person who is insured against Third Party risks whilst riding the vehicle and as it is illegal for anyone else to ride the vehicle, I agree to refrain from lending it to anyone.

(k) I understand that the Hirer is required to give notice to his Insurance Company as soon as possible after any accident which may give rise to a claim, and I undertake to inform him of any accident in which I am involved immediately and in any event prior to the end of my period of hire.

(l) I further understand that I shall have no claim whatsoever for any physical, mental and material injury suffered by me as the result of my use of the aforementioned vehicle either against the Hirer or the Insurer. As any pillion passenger is also not insured, I agree to indemnify the Hirer against any claims which may be brought against him by any such passenger.

Signature (Sgd) Gabriel Marra

WEAR HELMET LOCK BIKE KEEP LEFT"

9. The entirety of the paragraphs (all except "Marra" and "White Sands")of Exhibit 1 are in fine print of which the First Plaintiff only read about one half and in respect of which the First Plaintiff has testified that he was familiar with what it was saying though he did not appreciate that the document might have legal consequences for him.

10. On the reverse side of Exhibit 1 there are written the words

"I accept full responsibility for the cycle and myself and also agree to pay for loss of this cycle
Signature Gabriel P.Marra"

the words (with the exception of Gabriel P. Marra which is the First Plaintiff's signature) being stamped or printed.

11. Having ridden the cycle to a limited extent in the vicinity of the Hotel when it worked normally, the First Plaintiff then took to the highway with the Second Plaintiff as pillion passenger and they travelled to the town of St. George's.

12. On the way back from St. George's as they drove along a straight stretch of road at Harrington Sound, the cycle commenced accelerating of its own accord; the First Plaintiff was able to throttle down and the cycle returned to normal speed and there was no difficulty.

13. Later that same day while driving across Lighthouse Hill in Southampton Parish and approaching an intersection where there was an obligation to stop before proceeding further, the cycle's automatic acceleration recurred and was such that only with great difficulty was the First Plaintiff able to stop by applying with force both sets of brakes.

14. Prior to the last mentioned incident when the cycle was being ridden along Harbour Road in Paget or Warwick Parish a similar acceleration had occurred, but the throttle was successfully returned by the First Plaintiff and the cycle slowed accordingly.

15. The Plaintiffs on the afternoon of 26/7/77 went to Horseshoe Bay in Southampton Parish and it was upon their returning to the Hotel along the South Shore Road as they approached the S-bend near the entrance to Warwickshire Estates close to Long Bay, that the cycle again increased in speed, and, as there was some loose sand in the road the First Plaintiff did not apply his brakes at the first bend in the road which he successfully negotiated.

16. At the same time as he was negotiating the first bend the First Plaintiff was attempting to throttle down, but his efforts at turning back the throttle control had no effect and according to him it had stuck in a fixed position; because of his speed at the time he did not think he could successfully negotiate the second bend in the road, so, there being no traffic immediately before or behind him, he decided to cross over to the grassy verge on the opposite side of the South Shore Road.

17. Prior to reaching the grassy verge the First Plaintiff applied both brakes hoping that an abrupt stop would throw the Plaintiffs both onto

the grass verge or into the shrubbery nearby; but the brakes did not stop the cycle and the First Plaintiff then veered off the grassy verge at the same trying to gain full control of the cycle and applying the brakes, and as a result of his inability to stop or gain control of the cycle the cycle was in collision with a motor taxi, being driven on its correct side the southern lane of the South Shore Road, by Mr. Reginald Ming, who seeing the collision about to take place had by this time brought his taxi to a halt.

18. As a result of the collision and impact at speed both Plaintiffs were thrown onto the tarmac on the east-bound lane of the road and were injured, the First Plaintiff seriously.

19. From what appears in the medical reports which have been agreed between the parties the First Plaintiff suffered an open displaced fracture of the right capitellum and lateral epicondyle, as well as an open fracture of the proximal right radius of his right arm; his ring and long fingers of his right hand were injured requiring amputation of the distal phalanges, multiple lacerations to the forearm and multiple lacerations of the right distal anterior quadriceps all of his right arm and an intra articular laceration into the right knee joint.

20. These injures required reduction of the capitellar fracture to the shaft of the humerus and a fixation of the two K-wires and a gross reduction of the right radial fracture.

21. In addition the radial nerve was in discontinuity due to the crushed state and the extensive trauma in the region of the injuries.

22. The First Plaintiff has undergone numerous surgical operations, in Bermuda and at the Jewish Hospital in Louisville Kentucky and at the Roosevelt Hospital in New York City, but the result has been that the fracture of the distal humerus and proximal radius with soft tissue damage and loss of radial nerve continuity has left his right upper arm disabled and he is unable even after a nerve graft as yet to regain active wrist and digital extension.

23. A major disability has persisted in respect of his right arm and hand in that

there is limited rotation of the former and his grip strength and use of his right hand has been reduced with loss of independent thumb and finger extension. This is complicated further by loss of sensibility over the radio-dorsal aspect of the hand and also there has been loss of tips of fingers as a result of amputations above mentioned.

24. The First Plaintiff is, as a result of his injuries, unable to carry on as before his occupation as a hairdresser, in which his special metier was the cutting and styling of hair, and his demonstrations in Court of the limitations which have been set by his injuries to the rotating of his forearm appear to justify the assessment by Dr.Littler of New York who performed the latest surgery, that these disabilities are permanent.

25. The injuries sustained by the Second Plaintiff were not as serious as those suffered by her husband.

26. The Second Plaintiff had a laceration above and behind her left ear and extensive abrasions of her left elbow and a laceration of the dorsum of her left foot. When seen by Dr. Stubbs in the early evening of the day of the accident she was drowsy, disoriented and amnesiac, but without positive neurological signs; and her amnesia persisted for about 4 days after the post-injury closing of her lacerations; she thereafter had some slight intellectual impairment. She appears to have recovered satisfactorily though her memory has suffered; she was unable for some time after her discharge from Hospital on the 13th August 1977 to carry out her household duties without help from her mother who came to reside with her until some time in November 1977.

27. The First Plaintiff has by the Statement of Claim claimed against the Defendant Special Damages amounting to some $26,625.49, and the Second Plaintiff has claimed Special Damages in the sum of $3,753.00 and both have claimed General Damages.

28. The Plaintiffs allege that the Defendant is in breach of the contract of hiring of the auxiliary cycle to the First Plaintiff for his and the Second Plaintiff's use in that the Defendant supplied to the Plaintiffs an auxiliary cycle which was defective as a result of which the Plaintiffs have suffered injury and damage.

29. The Plaintiffs allege that there was to be implied in the contract of hiring of the said auxiliary cycle a term that the cycle was

reasonably fit for the purpose for which it was hired, namely for use by the Plaintiffs on the roads of Bermuda with reasonable safety and free from defects and in good roadworthy condition.

30. The Plaintiffs also allege that there was also to be implied in the contract of hiring a term under which the Defendant should be satisfied that the Plaintiffs as users of the auxiliary cycle were capable of properly using and controlling the said cycle in reasonable safety that the Defendant in breach of the contract of hiring

(1) supplied a cycle which was defective in that

(a) the throttle control stuck in the open position

(b) the brakes were inadequate or insufficient to stop the cycle carrying two persons intending to use the same, when the throttle control stuck in the open position

(2) failed to instruct the Plaintiffs as to what should be done if the throttle stuck or stayed in the open position.

31. The Plaintiffs further allege that the Defendant negligently failed to give adequate instructions to the Plaintiffs or to see that the Plaintiffs, especially the First Plaintiff, were adequately instructed so as to ride the auxiliary cycle reasonably safely and sufficiently conversant with its proper operation when the said defect caused the throttle control to stick in the open position, by reason of which the Plaintiffs say they were involved in the collision which is the subject of this case to their detriment, injury and damage.

32. In its Defence the Defendant denies that the cycle was not reasonably fit for the purpose for which it was hired and also that there was negligence on the part of the Defendant its agents or servants in respect of any of the matters alleged by the Plaintiffs, saying that the accident was caused by the negligence either wholly or in part of the Plaintiffs and that in any event the Defendant was exempt from liability under the terms of the hiring contract as expressed in Exhibit 1.

33. There has been pleaded by the Defendant

not only a Defence but a Counterclaim against the First Plaintiff for indemnity of the Defendant in respect of any damages for which the Defendant may be found by the Court to be liable to pay to the Second Plaintiff, which counterclaim is based upon the provision in paragraph (1) of Exhibit 1 aforesaid.

34. The Plaintiffs have, in a Reply and Defence to counterclaim pleaded that the Defendant having broken the contract of hiring cannot have the advantage of the clauses in Exhibit 1 which would exempt the Defendant from liability if the Defendant were not in breach of the contract.

35. Leave was given to file a Rejoinder when Directions for Trial were ordered but in my judgment the effect of the pleading in the Rejoinder was not of great assistance in arriving at the issues which are to be decided in this case.

36. The evidence shows that the First Plaintiff having read only a portion of Exhibit 1, he says the first few lines, which he took to be concerned with such matters as directions with respect to the Traffic Code and a number of "do's" and "don'ts" which he did not investigate further nor in detail because he had previously ridden auxiliary cycles in Bermuda in 1974 and was familiar with such rules of the road.

37. Certainly it cannot be said that the Defendant's deliveryman Robert Johnson at any time made it unmistakably clear that what the First Plaintiff signed as a "receipt" contained clauses exempting the Defendant from liability for negligence or in respect of anything else.

38. Mr. Johnson appears to have been far too busy to explain (and I suspect he was hardly capable in the few minutes he took to make the delivery of explaining) in any detail the fine print on Exhibit 1, and I seriously doubt whether he could have explained it in terms of what responsibilities lay on either of the parties by virtue of what was contained in Exhibit 1. So that there is no evidence that these paragraphs in Exhibit 1 containing exclusions of liability were even brought to the First Plaintiff's attention by Johnson.

39. The First Defendant's evidence includes an account of his signing the document, Exhibit 1 which is as follows :

"I signed the document. I can't remember anyone else signing it. (Sees original of paper No.1 of bundle (Exhibit 1) I see my signature on it - the writing at the top, No. of bike etc. is not mine. Delivery man who wrote something of a receipt produced the document to me. I saw the typescript - I was familiar with what it was saying. I did not read it all the way down - I had done some reading before coming to Bermuda. I read down about half-way. Then I signed it. At the time I did not appreciate the document might have legal consequences for me."

40. Under cross-examination the First Plaintiff admitted that when he signed the "receipt" he started to read it then put his signature at the bottom of the first page, and while admitting that he also signed the reverse of the document (Exhibit 1) he said he did not think that he was undertaking any liability but that he was merely signing for an auxiliary cycle and he did not relate this to any legal consequences beyond the need to preserve the cycle.

41. For the Defence, Robert Johnson gave evidence of his being employed by the Defendant to deliver auxiliary cycles and he described his having on Monday's Tuesday's and Wednesday's to carry cycles on a truck to a number of Hotels and Guest Houses including White Sands Hotel, sometimes delivery as many as 65 cycles in a single morning.

42. Mr. Johnson said he did not remember particularly the hiring or delivery of an auxiliary cycle to the First Plaintiff on the 25th July 1977; he described in fairly detailed terms the routine which he normally followed when such cycles were rented by his employer and delivered by him, and how if the prospective user of the cycle knows how to ride it he nevertheless would show the user the controls of the cycle and how to start it and the use of the brakes He would then ask the prospective user to get on the cycle and to start the motor; thereafter the controls are gone over for a second time with Johnson who would then have the prospective user take a short ride.

43. Mr.Johnson apparently is kept very busy

and any one delivery to him appears to be much the same as another and he said with regard to deliveries at White Sands and to the delivery of the auxiliary cycle to the First Plaintiff on the 25th July 1977

> "I have no idea how many cycles I delivered to White Sands that day. I have no particular recollection of July 1977 deliveries at all" and "I do not have any recollection of A 967 - it does not mean anything to me."

44. So that Mr. Johnson is unable to say whether and if so what inspection if any had been made of this particular auxiliary cycle before its delivery to the First Plaintiff on the 25th July 1977 - he can only say what his usual practice would be. There is therefore no evidence upon which a finding even on the balance of probabilities can be made that the auxiliary in question was inspected by or on behalf of the Defendant before delivery.

45. Nor is the evidence of Mr. Harold Madeiros the workshop foreman having charge of repairs of the Defendant's auxiliary cycles, of any assistance to the Court with respect to whether the delivered auxiliary cycle had been tested or inspected for faults of one kind or another. Again the evidence of this witness was as to what procedures are normally taken.

46. Mr.Madeiros did say however that he had tested another double-seated auxiliary cycle chosen at random from the Defendant's stock, with himself and a Mr. Gibbons on it and the brakes on that cycle had performed satisfactorily when the cycle was going at the rate of 25 miles per hour down Cox's Hill in Pembroke. He readily admitted that any cycle which did not stop when the brakes were applied would be regarded by him as defective and referring to the test he made with Mr. Gibbons as pillion passenger he said :

> "If it did not stop like that I'd say there was something wrong with it."

47. As regards the throttle control Mr.Madeiros readily conceded that if force had to be used to return the throttle control to the closed position that would also indicate a defect and that a cycle in this condition or one whose brakes were bad should not go out on hire and

it would be a mistake if it were allowed to be used.

48. Mr. Madeiros also said that he understood that there was a duty to see that cycles do not go out on hire in such defective condition, he himself as chief mechanic for the Defendant would not pass a cycle which had a sticking or defective throttle control which required extra force to move it.

49. There was evidence for the Defendant by Sergeant Keith Pratt of the Bermuda Police Service who at the behest of Sergeant Counsell on the 5th August 1977, 9 days after the accident, examined the auxiliary cycle A 967 after it had been impounded by the Police.

50. Sergeant Pratt stated that he paid particular attention to the throttle control which he in fact found was "sticking" to the extent that when the throttle control was turned to the open position it would not return of its own to the idling position - it would not spin back as some throttles have been known to do according to Mr. Madeiros.

51. When Sergeant Pratt had removed the throttle control and had dissembled it, he found that there was a high spot on the inner sleeve which rubbed against the outer sleeve. However, he did not consider that the high spot could have prevented the control from being pushed back manually to the closed position, at least not in the condition he found it 9 days after the accident on 5th August 1977.

52. A test was also made by Sergeant Pratt of the brakes which, although he was unable to test the vehicle on the road he said were in working order and properly adjusted and which when applied prevented the wheels from turning.

53. It may forever remain a mystery as to how Sergeant Pratt could come to such a conclusion in respect of the brakes applicable to the front wheels of the auxiliary cycle if as has been attested to by his colleague Sergeant Counsell the front forks and the front wheel were respectively bent and buckled as part of extensive damage of the cycle upon impact.

54. I have been concerned in weighing the evidence in this case that Sergeant Pratt's evidence as to the condition of the throttle control and brakes of the auxiliary cycle when he inspected them tended to substantiate

that there might be some cause other than defective control or brakes which accounted for the events that took place just prior to and at the time of the accident, but I am unable to reconcile his report of the condition of the brakes with the evidence of Sergeant Counsell as to the damage done to the front wheel of the auxiliary cycle.

55. If Sergeant Counsell is correct in saying that the front forks and the front wheel of the cycle were respectively bent and buckled it is inconceivable that Sergeant Pratt could have tested the brakes particularly of the front wheel in any way which would justify his conclusion that it was not possible for the brakes to have failed previously and yet be in the condition he found them.

56. When I consider in addition to the contradiction represented by Sergeant Counsell's description of the auxiliary cycle as extensively damaged at the front wheel which was buckled and its forks bent and the evidence of Sergeant Pratt to the effect that he was able to test the brakes on the 5th August 1977, that Sergeant Pratt was not able to road test the cycle so as to test the validity of his conclusions about the brakes, I feel I cannot rely on Sergeant Pratt's evidence as being more than speculative.

57. The First Plaintiff impressed me as being a reliable and honest witness who was not given to exaggerating his case and having heard and seen him and the other witnesses in this case and having considered the entirety of the evidence which is before me I find on the balance of probabilities that the auxiliary cycle supplied to the Plaintiffs by the Defendant did not function properly, in that the manipulation of its throttle control did not effectively control the acceleration or deceleration of the cycle; nor was the cycle in the best condition which the Defendant's available skill could put it, and it was therefore defective. The defects had shown themselves to be present when, during the previous use of the cycle on the day before the accident when there had been automatic acceleration at Harrington Sound Road and later at Lighthouse Hill and before the latter on Harbour Road, when in addition to the throttle control mechanism's showing itself to be temperamental the brakes had on at least one of these occasions almost failed to stop the auxiliary cycle.

58. It follows that the Defendant in supplying such an auxiliary cycle to the First Plaintiff

intending it to be used by him and the Second Plaintiff has failed in a material particular to fulfill its obligations under the contract and is in breach of the same for there must of necessity be implied in any such hiring of a vehicle in the circumstances of this case a term that the vehicle is not defective, that it is as free from defects as the Defendants available skill can make it or else the purpose of the hiring would be nullified.

59. I also find that no proper instruction had been given to the Plaintiffs or either of them so as to make them fully acquainted with the operation of the auxiliary cycle on the roads of Bermuda and so as to cope with the sort of emergency which did in fact arise.

60. I conceive that anyone whose business it is to supply on hire auxiliary cycles to the public and especially to visitors whose skills and reflexes and knowledge of the roads in Bermuda are likely to be questionable, owes a duty to the rider and/or the user of such a cycle to instruct the rider adequately if it is desired that the person so supplying the cycle is to escape liability for failing to do so in a case where such instruction would reasonably be required as a matter of common sense. I do not consider that there can be implied in a contract of hiring such as the one which is now being considered, a term amounting to a condition the breach of which would give rise to a right to terminate the contract, that the Defendant was under an obligation to give proper instructions to the Plaintiffs, because the business efficacy of the contract could not be impaired by its omission or nor enhanced by its conclusion.

61. Nevertheless that duty of care remains apart from any contractual obligation and independently from it. cf. Vide WHITE -v- STEADMAN 1913 3 K.B. 340 the Judgment LUSH J. at pages 347 - 348, the learned judge says such a duty, is "owed not only to the person who contracts to hire.....but to all those persons for whose use it is supplied." and at pages 349 - 350 "I do not think it matters that the Plaintiffs in that case (referring to ELLIOTT -v- HALL 15 Q.B.D. 315) was a person who would necessarily to the Defendant's knowledge use the truck. The duty lies towards the persons or class of persons who the owner must be taken to contemplate may use the dangerous chattel or towards

persons who are permitted or invited to use it by the owner or his authorised agent."

62. Having concluded that the auxiliary cycle in the instant case was defective it follows that I hold that the Defendant has failed in a material particular to fulfill its obligations under the contract of hiring and is in such breach thereof as to entitled the Plaintiff to repudiate it and in fact the contract, in my judgment, came to an abrupt end when the collision took place as a result of the said defects.

63. The question then arises as to whether the Defendant can rely on the clauses in Exhibit 1 particularly clauses (h) to (l), which have in them acknowledgments of adequate instruction, acceptance of responsibility for the auxiliary cycle and a stipulation that the First Plaintiff should have no claim for any injury suffered by him as a result of his use of the said auxiliary cycle and an agreement to indemnify the Defendant against claims which may be brought on behalf of the pillion passenger all of which matters appear on Exhibit 1 over the signature of the First Plaintiff.

64. Counsel for the Plaintiffs has urged that there has been in the supplying of the defective cycle such fundamental breach of the contract of hiring as to disentitle the Defendant from relying on the exemptions represented by the above mentioned clauses in Exhibit 1.

65. Further it has been submitted on behalf of the Plaintiffs that the First Plaintiff has been lured into a trap for the unwary by having had presented to him a document looking in all the world like "precepts" of the traffic code of which the specific exemptions apart from being ambiguous and unclear, were never brought to the mind of the First Plaintiff as being contractual terms having consequences at law for the Plaintiffs.

66. In support of his contentions Counsel for the Plaintiffs has cited a number of authorites including SUISSE ATLANTIQUE SOCIETE d'ARMEMENT MARITIME S.A. vs N.V. ROTTERDAMSCHE KILEN CENTRAL (1967) AC 361 where at page 392 Letter B Viscount DILHORNE said:

> "Where there has been a fundamental breach.....or a breach of a fundamental term, the party guilty of the breach cannot successfully rely on the provision in the

contract designed for his protection in the performance of the contract"

and at Letter D

"Exempting clauses, no matter how widely they are drawn only avail a party when he is carrying out the contract in its essential respects".

67. There also has been cited the case HARBUTTS PLASTICINE LIMITED vs. WAYNE TANK AND PUMP COMPANY LIMITED (1970) 1 A.C. where at page 464 Letter D, DENNING M.R. has said that Defendants

"cannot by a printed clause like this exclude their liability unless the words are clear and unambiguous".

68. In HARLING vs EDDY (1951) 2 K.B. page 739 the same judge (then Denning L.J.) had said at page 748

"if a person wishes to exempt himself from a liability which the common law imposes upon hin, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract the party who is liable at law cannot escape liability by simply putting up a printed notice or issuing a printed catalogue containing exemption conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected".

See also OLLEY vs MARLBOROUGH COURT LIMITED (1949) 1 K.B. 532 where SINGLETON L.J. at page 547 ruled that

"if the defendants who would prima facie be liable for their own negligence seek to exempt themselves by words of some kind they must show first that those words form part of the contract between the parties and secondly that those words are so clear that they must be understood by the parties in the circumstances as absolving the defendants from the result of their own negligence".

69. It would appear from the above quoted dicta that assent and acceptance of the relevant exempting clauses by both parties, are fundamental to their inclusion as terms of

the contract to which such terms are relevant otherwise one of the basic ingredients necessary for the assuming of contractual obligations and the coming into being of a contractual relationship does not come into existence, namely that the parties should be ad idem.

70. Certainly it cannot be said on the evidence of this case that the Plaintiffs were made aware of the exemption clauses which were printed on Exhibit 1 nor even that the Defendant by its servant or agent, Robert Johnson, went as far a showing affirmatively that the document was a contractual document and accepted as such and assented to by the Plaintiffs in all its terms.

71. In additon I find that the words of the document Exhibit 1 are not clear as to whose liability was being excluded nor in particular, that the Defendant's liability for negligence was the subject of exemption. Clause (1) for example states that the Plaintiffs shall have no claim whatsoever against the Hirer or its Insurer which results from the Plaintiff's use of the aforementioned vehicle. In my judgment that is not sufficient to deprive the Plaintiffs of an action against the Defendant for its negligence resulting in a breach of the contract of hiring in a material respect. Any such exclusion of negligence to be effectual "must be clearly and unambiguously expressed as is always necessary in cases where a well-known common law liability issought to be avoided" per Lord Dunedin POLLOCK & CO. vs MCRAE (1922) SC (HL) at page 199.

72. Counsel for the Defendant has pleaded and has urged upon the Court that the Plaintiff cannot rely on the doctrine of non est factum, saying that the First Defendant having signed Exhibit 1 with all the stipulations thereon cannot now resile therefrom particularly when it appears that the First Plaintiff did not bother to read all of Exhibit 1 but was content in saying he understood what it was saying.

73. In assessing how a plea of non est factum ought to succeed Viscount Dilhorne in the case GALLIE v. LEE 1970 3 W.L.R. at pages 1080 - 1091 (Letters H and A and B respectively) said

> "a document should be held to be void as opposed to voidable only when the element of consent to it is totally lacking, that is more concretely, when the transaction which the document purports to effect is

essentially different in substance or in mind from the transaction intended"

and at page 1091 Letters B, C and D

"To this test it is necessary to add certain amplifications. First there is the case of fraud - a signature obtained by fraud is invalid not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature.....In other words it is the lack of consent that matters, not the means by which the result was brought about..... Secondly a man cannot escape the consequences as regards an innocent third party, of signing a document if being a man of ordinary education and competence he choose to sign it without informing himself of its purpose and effect..... Thirdly there is the case where the signer being careless is not taking ordinary precautions against being deceived".

74. In GALLIE v LEE (supra) the Plaintiff had pleaded non est factum against a third party, who subsequent to the Plaintiff's signing away her property, had acquired an interest without notice that the Plaintiff's signature had been obtained by devious means.

75. In the Court of Appeal below in the same case DENNING M.R. formulating the principle of law governing the plea of non est factum used the words (at 1969 2 Ch.. pp.36 - 37) :

"Whenever a man of full age and understanding who can read and write signs a legal document which is put before him for signature - by which I mean a document which, it is apparent on the fact of it is intended to have legal consequences - then if he does not take the trouble to read it, but signs it as it is he cannot be heard to say that it is not his document. By his conduct in signing it he has represented to all those into whose hands it may come that it is his document and once they act upon it as being his document, he cannot go back on it and say it was a nullity from the beginning."

76. Lord Denning's formulation of the above

principle has been criticised as being too absolute and rigid and in need of some amplification yet

> "it rightly prevents the plea from being successful in the normal case of a man who however he may have been misinformed about the nature of a deed or document, could easily have ascertained its true nature by reading it and has taken upon himself the risk of not reading it"
> per Lord Pearson (1970) 3 W.L.R. at page 1098 Letter D.

77. I have dealt with the principles which enable a plea of non est factum to be successfully pleaded or not, because Counsel for the Defendant appeared strongly to suggest that what the First Plaintiff's evidence aimed at was a denial that the latter's signature on Exhibit 1 was effective to protect the Defendant on the facts of the case.

78. It is a fact that the First Plaintiff has said that he did not think the document Exhibit 1 had legal consequences for him, he thought it was a receipt, but he has readily admitted that he signed it and in his pleading he does not put the case that he should not be held to his signature or non est factum, that is not the issue he puts before the Court.

79. The issue on the Plaintiff's pleadings which is put forth is that, because of the Defendant's breach of the contract of hiring by negligence, the Defendant cannot hide behind the exemptions and exclusions and indemnity which are contained in the clauses (h) to (l) of Exhibit 1, that issue is reinforced in the Reply and Defence to counterclaim which is pleaded, and in my judgment is the overriding issue in this case.

80. As I understand the Plaintiff's case, it is that, even assuming that a plea of 'non est factum' could not succeed, the Defendant cannot in the face of its own deliquency rely on those exemptions which would be available to the Defendant for its protection in the usual circumstances of its carrying out of the contract of hiring in its essential respects.

81. In my judgment the Defendant in this case is guilty of negligence which has nullified the contract by destroying its business efficacy by a breach of an essentially implied term, namely that the auxiliary cycle should be free from defects, which without doubt appears to be

a proposition acceptable to Mr. Madeiros the Defendant's foreman mechanic.

82. I therefore hold that the exemptions and protections contained in Clauses (h) to (l) of Exhibit 1 are of no avail and that the Defendant cannot, on the authorites which have been cited, and on the facts of this case, rely on them, and that also applies to the clause which purports to indemnify the Defendant against any damages or injury suffered by the Second Plaintiff.

83. But it is said by the Defendant and Counsel for the Defendant has submitted that the First Plaintiff has been guilty also of negligence which caused or contributed to the injuries and damage suffered by the Plaintiffs as a result of the collision, and a number of particulars of that negligence has been pleaded in the Defence.

84. On the evidence before me that the First Plaintiff having experienced difficulties with the auxiliary cycle at Harrington Sound Road, Smith's Parish, at Harbour Road, Paget or Warwick Parish and at Lighthouse Hill, Southampton Parish had good reason to vindicate his enquiry made when hiring the auxiliary cycle as to whether immediate help was available incase of difficulty or faulty operation, by reporting the matter to the Defendant and/or asking for a replacement. To continue further riding himself with the Second Plaintiff as pillion passenger on an auxiliary cycle which showed an early propensity towards self-acceleration in my view amounted to an almost inexcusable disregard by the First Plaintiff for his own safety and that of the Second Plaintiff which I hold to be negligence on his part. No evidence has been given as to negligence on the part of the Second Plaintiff nor has there been any claim against her in respect thereof.

85. Turning to the matter of damages the Counsel for the Plaintiffs has indicated that the Plaintiffs no longer claim the amounts which have been paid to the Plaintiffs by the Prudential Insurance Company of Newark, New Jersey so that the Special Damages claimed are now the following items :

(1)	Bda.Hospitals Board	572.07
	Anaesthetic Associates	50.00
	Dr. John Stubbs	137.60
	Jewish Hospital	322.34
	Dr. L. Copeland	18.00
	Washington Township Ambulance	75.00
	Dr. Kleinert	44.00

Dr. Mechler	50.00	
Dr.Littler	336.00	
Roosevelt Hospital	294.60	
Roosevelt Anaesthesia	45.00	
Hilldale Pharmacy	9.23	
Physical Therapy Mr. Aorigo	151.60	
		$2,105.44

(2) To this subtotal must be added the following figures which the parties have agreed

American Airlines	136.00	
" "	357.00	
" "	154.00	
" "	77.00	
" "	154.00	
" "	154.00	
" ""	154.00	
" "	154.00	
" "	160.00	
Holiday Inn	207.87	
" "	32.67	
" "	31.44	
" "	40.41	
Expenses for food ($\frac{1}{2}$ of $210) while in Louisville etc. 28/8/77 to 3/9/77 (agreed)	105.00	
Expenses for food September lith 1977 to October 1977 to February 1978	80.00	
Miscellaneous travel expenses taxis and tolls etc.	85.50	
Telephone calls to hospitals, doctors and Bermuda attorney	164.65	
Estimated other loss (balance of pending bill most of which will be paid by Prudential Insurance Company)	600.00	
		$2,847.64
		$4,953.08

(3) To which is also to be added

Loss of salary in 1977 ($19,250 less tax estimated 1,900	$17,350

Loss of salary 1st January 1978 to 31st July 1979 $55,500 less estimated tax $8,100	$47,400
	$64,750

86. Taking the evidence and doing the best I can, I have estimated the loss of earnings by taking the First Plaintiff's earnings at his salary rate for 1977 at $36,000 per annum and deducted therefrom the estimated amount of the taxes for which he would be liable, which tax rate appears to vary from 16% to 17½% of the First Plaintiff's gross income. So that for the period up to the approximate date of the trial (July 1979) I would award to the First Plaintiff as his loss of earnings before apportionment by reason of his contributory negligence the total sum of $64,750.00.

87. In assessing general damages for pain and suffering and loss of earnings I remind myself that the First Plaintiff was a successful hairdresser and hair stylist whose chief skills were exercised in the cutting and shaping of hair styles, for which he appears to have had a considerable custom which enabled him to earn a substantial annual income.

88. As a consequence of his injuries the First Plaintiff can no longer be engaged in this occupation fully, in which he was capable of earning $36,000 (before tax) per annum. He has been obliged since the accident to take employment in his firm at the rate of $150 per week or $7,800 per annum; and taking the figure as a deduction from his annualsalary, after a tax deduction of $6,200 approximately, his annual loss of earnings in my judgment is some $22,000.

89. For the purpose of his continuing in his business he will have to retrain to the extent of learning to cut hair with his left hand and he will train in management and use his skill and knowledge to train others.

90. For the First Plaintiff there is a considerable loss of amenities in that use of his right hand is severely restricted and for some purposes almost useless, and this situation appears to be permanent, so that his prospects of earning substantial annual income in the future by use of his right hand are somewhat remote.

91. The First Plaintiff is aged about 50 years and should normally be expected to maintain his occupation for another 12 years at least but I am of opinion that in assessing damages for loss of future earnings a multiplier of 8 would set a fair standard of compensation to the First Plaintiff under this head.

92. I therefore assess general damages for the First Plaintiff as follows :

For pain and suffering	3,500
For loss of amenities (loss of finger tips, of pronation of right hand, loss of digital extension, loss of grip force, nerve damage - sensitivity impaired)	20,000
Loss of future earnings	176,000
Total General Damages	$199,500

93. The Second Plaintiff was not as severely injured and her special damages were as follows:

Bermuda Hospitals Board	3,308.00
Anaesthetic Associates	60.00
Dr. John Stubbs	385.00

all of which with the exception of $426.56 (which the First Plaintiff paid and is included in his Special Damages above) were paid by the Prudential Insurance Company and are no longer the subject of claim as Special Damages for the Second Plaintiff. I make the following award to the Second Plaintiff :

For pain and suffering	800.00
Loss of amenities (i.e. decreased concentration, diminished memory)	1,200.00

94. Summarising the above the First Plaintiff is awarded

Special Damages	4,953.08
Loss of earnings	64,750.00
General Damages	199,500.00
	$269,203.08

The Second Plaintiff is awarded :

General Damages	2,000.00

95. I apportion liability under my finding that there was contributory negligence as to 70% to be ascribed to the Defendant and as to 30% to be

In the Supreme Court

No.18
Judgment
Robinson A.C.J.

9th October 1979

(continued)

ascribed to the First Plaintiff.

96. There will therefore be judgment for the First Plaintiff in the sum of $188,442.15 and for the Second Plaintiff in the sum of $1,400 with interest for the First Plaintiff on the Special Damages and loss of earnings at one half the statutory rate from the 26th July 1977, and interest on the damages for pain and suffering and loss of amenities ($23,500) and the Second Plaintiff is to have interest on her award, at the full statutory rate from the date of the writ 20th February 1978 until the date of trial 16th July 1979. The Defendant's counterclaim is dismissed. I will hear Counsel on the matter of costs. Defendant to pay 50% of Plaintiffs' taxed costs so as to avoid double taxation.

Signed Walter N.H.Robinson

9/10 WALTER N.H. ROBINSON A.C.J.

In the Court of Appeal

No.19
Notice of Appeal

19th November 1979

No. 19

NOTICE OF APPEAL

IN THE COURT OF APPEAL OF BERMUDA

CIVIL JURISDICTION

1979 : No. 28

B E T W E E N :

J.B. ASTWOOD & SON LIMITED — Appellant

- and -

GABRIEL MARRA and SONDRA MARRA — Respondents

NOTICE OF APPEAL
(Order II, Rule 2)

TAKE NOTICE that the Appellant being dissatisfied with the Decision of the Supreme Court contained in the Judgment of the Supreme Court dated the 9th day of October, 1979, DOTH HEREBY APPEAL to the Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the Appeal seek the relief set out in paragraph 4.

AND the Appellant further states that

the names and addresses of the persons directly affected by the Appeal are those set out in paragraph 5.

2. Part of the Decision of the Supreme Court complained of:

The whole decision.

3. Grounds of Appeal

1.(A) That the Learned Judge was wrong, and misdirected himself in law, in holding (paragraph 58 of the Judgment) that there is to be implied in a hiring of an auxiliary cycle in the circumstances of this case a term that the vehicle is not defective and/or is as free from defects as the Defendant's available skill can make it and/or should be free from defects (paragraph 81 of the Judgment).

(B) The Learned Judge ought to have directed himself that (subject to exclusion) there is to be implied in a hiring of an auxiliary cycle in the circumstances of this case a term that the vehicle is as reasonably fit for the purpose for which the Plaintiff is to use it, namely to ride it on the roads of Bermuda with a pillion passenger, as reasonable care and skill on the part of the Defendant can make it.

2. (A) That the Learned Judge was wrong in failing to direct himself, fully or correctly or at all, as to the nature and extent of any extra-contractual duty of care owed by the Defendant to the Plaintiffs or either of them.

(B) The Learned Judge ought to have directed himself that (subject to exclusion) there may be created by the delivery of an auxiliary cycle in the circumstances of this case a duty owed by the Defendant to the Plaintiffs and each of them to take reasonable care to see that the vehicle is not in such condition that is a danger to the Plaintiffs and each of them when ridden on the roads of Bermuda ~~but that in the circumstances of this case such duty did not arise because of the examination by the First Plaintiff of the controls, brakes, starting and stopping of the motor of the said cycle, before accepting delivery of the said cycle.~~

3. That the Learned Judge was wrong and misdirected himself in law in that he found

(paragraphs 12, 13, 14 and 84 of the Judgment) that the said auxiliary cycle would accelerate automatically, when such automatic acceleration had not been pleaded by the Plaintiffs as a defect, and the Defendant was given no or no proper opportunity to deal with the point, and when such finding was in any event against the weight of the evidence.

4. That the Learned Judge was wrong and misdirected himself in law in failing (paragraphs 53 to 56 of the Judgment) to give full weight to the evidence of Sergeant Pratt, on grounds which were not put to Sergeant Pratt at the hearing and with which the Defendant had no opportunity to deal, and which grounds would have been shown to be misconceived had they been put to Sergeant Pratt at the hearing.

5 (A) That the Learned Judge was wrong and misdirected himself in law in finding (paragraph 57 of the Judgment) that the said auxiliary cycle was defective, and/or in failing to direct himself to consider whether, if defects existed in the said auxiliary cycle, those defects made the said auxiliary cycle unroadworthy or a danger to the Plaintiffs, and further that the Learned Judge's findings in paragraph 57 and 58 of the Judgment were wrong and contrary to the weight of the evidence.

(B) That the Learned Judge ought to have found, on the evidence, that the only defect in the said auxiliary cycle at the time of the accident was a failure of the throttle to return to the idling position of its own accord, that the said throttle could be closed normally without the use of any more force than had been necessary to open it, that there was no evidence that the said defect was present at the time of delivery or before the day following delivery or that the said defect could have been detected by the Defendant with reasonable skill and care, and that in any event there was nothing dangerous in the said defect, or which would be likely to cause danger to the Plaintiffs.

6. (A) That the Learned Judge was wrong and misdirected himself in law in concluding (paragraphs 42 to 45 of the Judgment) in effect, that there was no evidence that the Defendant had tested or inspected the said auxiliary cycle before delivery, and further that such conclusion was against the weight

of the evidence.

(B) That the Learned Judge was wrong and misdirected himself in law, in failing to find on the evidence that the Defendant had used reasonable skill and care to see that the said auxiliary cycle was fit for the said purpose and/or not in such a condition as to cause danger to the Plaintiffs when ridden on the roads of Bermuda.

7. That the Learned Judge was wrong and misdirected himself in law, in concluding (paragraphs 59 to 60 of the Judgment) that the Defendant had any duty, whether in contract or at common law, in the circumstances of this case to instruct the Plaintiffs or either of them so as to make them or either of them fully acquainted with the operation of the said auxiliary cycle on the roads of Bermuda and/or so as to cope with the sort of emergency which in fact arose (which the Learned Judge ought to have held was, by the Statement of Claim, limited to the throttle staying open), or any duty to instruct the Plaintiffs or either of them at all in the management and control of the said cycle.

8. That the finding of the Learned Judge that the Defendant was in breach of the contract of hire of the said auxiliary cycle and/or was in breach of any common law duty of care to the Plaintiffs or either of them was wrong and contrary to the weight of evidence.

9. That the Learned Judge ought on the evidence to have found that the accident was caused by the First Plaintiff's own negligent riding of the said auxiliary cycle in respects set out in paragraph 7 of the Defence, alternatively, was contributed to by the said neglient riding and/or by the First Plaintiff continuing to ride the said auxiliary cycle in the knowledge of the said defective throttle notwithstanding the opportunity before the accident of reporting the said defect to the Defendant, and that the said negligence contributed to the accident in a far higher proportion than the 30% found by the Learned Judge.

10. (A) That the Learned Judge was wrong and misdirected himself in law in failing to find on the evidence that the Defendant did in fact give to the First Plaintiff adequate instructions in the operation of controls, brakes, starting and stopping of the motor, and further in failing to find on the evidence that the First Plaintiff had examined and assured himself that the brakes and the vechile generally were in good working

order, before signing the declaration Exhibit 1.

(B) Further or alternatively, the Learned Judge was wrong and misdirected himself in law in failing to find, on the evidence, that the First Plaintiff was estopped in the respects set out in paragraphs 8 and 9 of the Defence.

11. That the Learned Judge was wrong and misdirected himself in law, in failing to find, on the evidence, that the injury loss and damage claimed by the First Plaintiff in the action was suffered by him, to the extent proved or agreed, as a result of his use of the said auxiliary cycle, and further in failing to find that in the circumstances there was an express term of the said hiring, set out in (F) on Exhibit 1, which exempted the Defendant from any liability it might otherwise have to the First Plaintiff and further in failing to find that the Defendant was in the circumstances entitled to be indemnified by the First Plaintiff against any claim by the Second Plaintiff as pillion passenger on the said cycle.

12. That the Learned Judge was wrong and misdirected himself in law in holding (paragraph 70 of the Judgment) that the document Exhibit 1 was not a contractual document, and in failing to hold that the First Plaintiff was, in the circumstances, bound by its terms whether or not he had read all of it or understood its legal consequences.

13. That the Learned Judge was wrong and misdirected himself in law in holding (paragraphs 80 and 81 of the Judgment) that the Defendant could not rely upon the provisions of (H) to (I) of Exhibit 1, and/or in holding (paragraph 62 of the Judgment) that the Defendant was in such breach of contract of hiring as to entitle the First Plaintiff to repudiate it.

14. That the Learned Judge was wrong and misdirected himself in assessing the multiplier and for the First Plaintiff's annual loss of future earnings $22,000 (paragraph 88 of the Judgment) which figure is, on the evidence too high, and further that the Learned Judge was wrong, and misdirected himself in assessing the multiplier for the said loss of future earnings at eight years, which figure is also on the evidence, too high.

4. Relief sought from the Court of Appeal:

1. Judgment reversing or setting aside the Judgment (wholly or in part) of the Honourable Mr. Justice Robinson.

2. Alternatively, an Order directing a new trial.

3. Such further or other Order as this Court may appear just.

4. An Order that the Respondents do pay the costs of and occasioned by the hearing of this matter before the Honourable Mr. Justice Robinson in the Supreme Court and of this appeal.

5. Persons directly affected by the Appeal:

The Respondents, Gabriel Marra and Sondra Marra, whose address for service in each case is Messrs. Conyers, Dill & Pearman, of The Bank of Bermuda Building, Front Street, Hamilton, Bermuda.

Dated this 19th day of November, 1979

Signed. Appleby, Spurling & Kempe

Appleby, Spurling & Kempe
Attorneys for the Appellant
whose address for service is
Reid House, Church Street,
Hamilton, Bermuda.

In the Court of Appeal

No.20
Notice of Cross Appeal
27th November 1979

No. 20

NOTICE OF CROSS APPEAL

IN THE COURT OF APPEAL OF BERMUDA
CIVIL JURISDICTION
1979 : No.28

B E T W E E N :

J.B. ASTWOOD & SON LIMITED
Appellant

- and -

GABRIEL MARRA
and
SONDRA MARRA
Respondents

NOTICE OF CROSS APPEAL
Order 2, Rule 13(1)

TAKE NOTICE that the Respondents intend upon the hearing of the Appeal under the Appellant's Notice of Appeal dated the 19th day of November 1979 from the Judgment of the Honourable Mr.Justice Robinson given on the 9th day of October 1979, to contend that the said Judgment should be varied as is hereinafter set out :-

The Learned Judge ought to have made an Order -

(a) That interest at Seven Percent be awarded in respect of Special Damage from the date it was incurred and that interest on General Damages ought to have been Ordered at Seven Percent from the date of the Writ;

(b) That the Respondents were entitled to their costs to be agreed or taxed.

The Relief Sought from the Court of Appeal :-

1. An Order in respect of interest as set out herein;

2. An Order in respect of costs as set out herein;

3. An Order that the Appellants do pay the whole costs of and occasioned by the hearing of this matter before the Honourable Mr. Justice Robinson and of

this Cross Appeal;

4. Such further or other Order as to this Court may appear just.

The persons directly affected by this Notice of Cross Appeal are :-

The Appellant - J.B.Astwood & Son Limited
c/o Messrs. Appleby,
Spurling & Kempe
Church Street,
Hamilton.

Attorneys for the Appellant.

DATED this 27th day of November, 1979

Signed. Conyers, Dill & Pearman

Conyers, Dill & Pearman

No. 21

JUDGMENT OF BLAIR-KERR P.

IN THE COURT OF APPEAL FOR BERMUDA
CIVIL APPEAL NO. 28 of 1979

J.B.ASTWOOD & SON LIMITED — Appellant (Defendant)

- and -

GABRIEL MARRA and SONDRA MARRA — First Respondent (First Plaintiff), Second Respondent (Second Plaintiff)

J U D G M E N T

BLAIR-KERR, P.

On 24th July, 1977 the respondents (husband and wife) came to Bermuda from the United States for a week's holiday at White Sands Hotel. On 25th July 1977 the first respondent ordered, through the Hotel, a low double-seated Mobylette auxiliary motor cycle for hire from the appellant

company. The cycle, number A967, was delivered to him in the early afternoon of 25th July. At the time of delivery, the first respondent paid a deposit and signed a document (referred to in the Court below as Exhibit 1) the printed part of which read as follows :-

"Invoice No. 50271

J.B.Astwood and Son Limited
Motorised Bicycles for hire by hour, day, week, or month

Dated this day of 19 Helmet Dep.
Cycle Reg.Nos. Lock Dep.
Time Out Ret. Cycle Dep.
Period of time Days Hrs. R/Waiver
Rental

I
Residing at
do declare that I have hired anxiliary cycle, Licence No. as above on the terms set out below and I am of the opinion that I am capable of riding it. I note that an approved safety helmet is included in the rental. I am not under 16 years of age and I understand and confirm that :-

(a) the rule of the road in Bermuda is "KEEP LEFT".
(b) a cyclist should not look backwards whilst riding as it is a common cause of accidents.
(c) stopping at 'STOP' signs is compulsory for all road users in Bermuda and for my own safety I must actually stop as other road users will expect me to do so.
(d) the legal speed limit in Bermuda is 21.7 m.p.h. or 35 k.p.h. and it is unsafe to exceed it.
(e) road corners and curves should be taken carefully as many are sharper than they appear to be and likely to be very slippery when the road surface is wet.
(f) the approved safety helmet, as part of the rental agreement, must be worn for my protection.
(g) I am capable of riding a pedal cycle.
(h) I have received adequate instructions in the operation of the controls, brakes, starting and stopping of the motor, that I have examined and assured myself that the brakes and the vehicle generally are in good

working order before signing this declaration

(i) I accept full responsibility for the vehicle and hereby agree to pay for any loss in respect thereof howsoever caused

(j) the vehicle is insured for third party risks under the laws of Bermuda. I understand that such policy does not provide for cover for any pillion passenger. As I am the only person who is insured against Third Party risks whilst riding the vehicle and as it is illegal for anyone else to ride the vehicle, I agree to refrain from lending it to anyone.

(k) I understand that the Hirer is required to give notice to his Insurance Company as soon as possible after any accident which may give rise to a claim, and I undertake to inform him of any accident in which I am involved immediately and in any event prior to the end of my period of hire.

(l) I further understand that I shall have no claim whatsoever for any physical, mental and material injury suffered by me as the result of my use of the aforementioned vehicle either against the Hirer or the Insurer. As any pillion passenger is also not insured, I agree to indemnify the Hirer against any claims which may be brought against him by any such passenger.

Signature
WEAR HELMET LOCK BIKE KEEP LEFT".

The particulars of the transactions had been written on the document in ink so that the first part of it read:

"Dated this 25 day of 7 1977 Helmet Dep. $20
Dual Cycle Re.No.A967 Lock Dep.
Time out 10 Ret. Cycle Dep.
Period of hire 1 day hrs. R/Waiver $3

(Illegible) $20 for hire Rental
(Illegible)

I, Marra
residing at White Sands....." etc.

The first respondent signed his name after the word "signature" below paragraph (1).

On the reverse side of the document there were the following printed words :

"I accept full responsibility for the cycle and myself and also agree to pay for loss of this cycle."

The first respondent also signed his name below these words.

About 7 p.m. on 26th July 1977, whilst riding the cycle in an easterly direction along South Shore Road (with the second respondent as pillion passenger) the first respondent was involved in an accident. The cycle collided with a taxi which had been proceeding in the opposite direction but which was stationary on the west bound carriageway at the moment of impact. As a result of the collision, both respondents were injured, the first respondent seriously.

The respondents' claim for damages was based both in contract and in tort. They pleaded that there were the following implied terms of the contract for the hire of the said cycle:

(a) that the cycle was reasonably fit for the purpose for which it was hired;

(b) that it was without defect and was in good, proper and roadworthy condition;

(c) that adequate instruction on the use of the cycle be given "to the extent that the defendants are satisfied that the hirer is capable of properly using and controlling the said auxiliary cycle in reasonable safety"

The respondents' averred that the cycle was "not reasonably fit for the said purpose" and that "insufficient instructions were given". Particulars of the alleged breaches of the alleged implied terms of the contract and/or negligence on the part of the appellant company were stated to be the following :-

(1) that the throttle control of the cycle hired to the respondents was defective in that it stuck in the open position;

(2) that the brakes were insufficient and were unable to bring the cycle to a stop when the throttle had stuck in the open position; and

(3) that the brakes were insufficient

and were unable to bring the cycle to a stop when the throttle had stuck in the open position; and

(4) that the appellant company failed to ensure that the first respondent was adequately instructed and conversant with the management and control of the cycle so as to be able to ride it in reasonable safety, and sufficiently conversant with the operation, management and control of the cycle so as to be able to control it when "the said defect caused the throttle to stick open."

The version of the accident pleaded in the statement of claim read thus :-

> "By reason of the aforesaid defects, breaches of implied terms and warranty and negligence, the first plaintiff..... lost control of the said auxiliary cycle when the said auxiliary cycle of its own volition increased speed and resisted all attempts to close the throttle decelerate or stop and collided with a motor vehicle travelling in the opposite direction...."

By their defence, the appellant company made no admission with regard to the alleged implied terms, denied that there had been any breach of contract or negligence on their part, alleged that the accident was caused by the negligence of the first respondent, and that in any event the respondents were estopped from alleging that the cycle was not reasonably fit for the purpose for which it was hired, etc. because of the exemption clauses in the contract. The appellant company also counterclaimed against the first respondent for indemnity in respect of any damages for which they might be found to be liable to pay to the second respondent.

By their Reply, the respondents pleaded that the appellant company was in "fundamental breach" of the contract of hire of the cycle and that consequently the company could not rely upon the exemption clauses.

The action came on for hearing before Mr. Justice Robinson on 16th and 17th July 1979. In support of their claim, the respondents gave evidence, and called two other witnesses - the driver of the other vehicle involved in the accident (as Mr. Ming) and a police officer (Sergeant Counsell) who was called to the scene. The appellant company called an employee (a Mr. Johnson) who was probably the person who delivered the cycle to the first respondent on 25th July 1977

(although he had no actual recollection of having done so), their workshop foreman (a Mr.Madeiros) and Sergeant Pratt, the officer in charge of the police garage at Prospect, who examined the cycle on 5th August 1977.

The first respondent said that his son taught him to ride his (the son's) motor cycle, and that he rode it "only in local areas around his neighbourhood". He said that on his previous visit to Bermuda in 1974, when he was accompanied by his wife and two children, he had hired two cycles on that occasion. That, according to his evidence, was the sum total of his experience in riding motor cycles.

The evidence relating to the delivery of the cycle on 25th July 1977 and its condition at that time was given by the first respondent, Johnson and Madeiros. The judge's note of the first respondent's evidence-in-chief reads:-

> "I specifically asked about whether if anything went wrong I could get immediate repair.....and I was assured I could get help..... We tested the bike outside the hotel - it took a minute or so just one turn about..... I was not given instructions as to emergencies - bike appeared to be in working order - I did not do any inspection of it but before I put Mrs. Marra on it I rode it around the corner a little to get the 'feel' of the bicycle..... after a minute the gentleman who delivered bike went with me to back of truck where I paid my deposit and got a receipt..... I confirm riding cycle in vicinity of hotel before taking wife on it. It worked normally then."

When questioned about his signing invoice 50271, he said :-

> "I signed the document. I saw the typescript. I was familiar with what it was saying. I did not read it all the way down. I had done some reading before coming to Bermuda. I read down about half way. Then I signed it. At the time I did not appreciate the document might have legal consequences for me."

The judge's note of the witness's answers in cross-examination reads :-

> "I don't remember receiving instructions as to use the front or back brakes. I did it from my own knowlege. I had been

> asked whether I'd ridden before and I answered 'yes'. I was shown how to start the cycle on the stand. I do not remember being shown how to apply the brake..... I don't remember being instructed..... Before signing a form I took a spin on the bike on my own in front of White Sands. When I stopped it I did so with the brakes with no difficulty at that point. I know throttle automatically decelerated when I let go of it. When I signed receipt I started to read, then put signature at bottom of first page ..... I do not think I realised the liability I was undertaking. I was just signing for a bike."

Johnson had no clear recollection of delivering the cycle to the first respondent, and he could only say what his standard practice is on such occasions. He said :

> "First thing we do is show where the controls are..... If a person knows how to ride I still show them the controls, how to use it. Then I'll get on bike to show how to start it, show them use of brakes..... Then the person hiring is asked to get on bike to start it up. Then I get them to go over the controls with me and I'll have them take a short ride on it..... Usually get the person to take the ride first before taking the person where two persons are intended users..... Before delivery we ride bike down the alley to the truck to check the brakes.....Also would check the throttle. My procedure is to start bike on stand to make sure throttle is not sticking."

In answer to questions in cross-examination, Johnson said :-

> "During course of day I have had to deal with as many as 65 bikes.... When I load every bike myself, I try the throttle. I load the White Sands bikes myself. White Sands is where I do most of my deliveries. When I deliver to White Sands I would check the bikes because I am the only one who checks and delivers to White Sands."

Madeiros is the appellant company's workshop foreman. He said that "every single time" a cycle is let it is checked either by himself or by one of the licensed mechanics; and that it is tested for brakes, tyres, cables, throttle control, belts and drive chains.

Therefore, although Johnson had no recollection

of dealing with the first respondent on 25th July 1977, the court had his evidence relating to his modus operandi, the general evidence of Madeiros regarding the system of checking all vehicles prior to letting them out on hire, and the first respondent's own evidence that when he rode the cycle A967 at the time of delivery, the vehicle "worked normally", in particular that the brakes operated normally and the throttle control "automatically decelerated when (he) let go of it."

The judge's note of the first respondent's evidence-in-chief relating to his use of the cycle during the afternoon of 25th July and the forenoon of 26th July reads as follows :-

> "I took cycle out on that Monday afternoon with my wife on it..... when we travelled across Lighthouse Hill Road coming to intersection of hill bike would not come to complete stop without using both sets of brakes. I tried back brakes. Slowed it down, but in order to stop at bottom of hill I had to apply front brakes at same time.
>
> On Tuesday morning, going to St. George's, I had a similar experience at Devil's Hole Hill. On way back from St.George's I stopped because of rain showers, waited for roads to dry and then continued on. As we rode on straight stretch of road at Harrington Sound, bicycle seemed to be going of its own accord and seemed to increase in speed but I throttled down and it returned to normal and continued. I had no trouble at that point turning it off.
>
> It turns off turning the throttle towards me and away from me for turning it on. I had no difficulty riding it at this stage..... I throttled back on Harrington Sound Road and it released. It did not give me concern at the time. It happened again along Harbour Road, a similar incident to Harrington Sound Road and it released when I throttled down."

This part of the first respondent's evidence may be summarised as follows :-

(1) During the afternoon of 25th July, he had to apply both front and back brakes to stop the cycle on a hill on Lighthouse Hill Road.

(2) Before noon on 26th July, he had to apply both front and back brakes to stop the cycle on Devil's Hole Hill.

(3) Before noon on 26th July, at Harrington Sound the cycle "seemed to be going of its own accord and seemed to increase in speed", but he had no trouble throttling down.

(4) Before noon on 26th July, " a similar incident to Harrington Sound Road" happened in Harbour Road, but he had no difficulty throttling down.

Cross-examined in regard to what he said relating to the throttle, the first respondent said :-

> "It did not automatically decelerate but did so without difficulty when hand was applied to it. Did not cause me concern or difficulty at that point. To accelerate I would turn the accelerator counter-clockwise. On many cycles no automatic deceleration but I've not had any greater experience than these cycles in Bermuda and my son's cycle, the latter of whose accelerator stays in same position if left. What happened is the same as would happen on my son's bike."

Cross-examined as to his evidence relating to the brakes, and as to why he did not communicate with the appellant company if he considered the brakes to be inadequate, he said :-

> "I did not call through to say that the brakes were inadequate because I did not think it was out of order - not necessary as I had been to Hamilton etc. and nothing had happened etc. to show defects or inadequacy of brakes."

The accident took place at about 7 p.m. on 26th July as the first respondent was travelling eastwards along South Shore Road when he was negotiating an S-bend near the entrance to Warwickshire Estates close to Long Bay. A taxi, driven by a Mr. Ming, was travelling westwards. From the point of view of each driver, the so-called S-bend involved first a left turn followed by a right turn. Mr. Ming said in evidence that after he rounded the left hand bend opposite Mermaid West, he saw the cycle on the grass on his near side (i.e. the off-side of the road from the first respondent's point of view) and that it was coming down towards the road. Mr. Ming said that his impression was that the driver was "trying to get control of the machine",

"was just trying to stop the bike". At any rate, Mr. Ming's reaction to what he saw was to stop his taxi, and his vehicle was stationary when the first respondent collided with it on the west bound carriageway.

The judge's note of the first respondent's version of what happened reads as follows :-

> "As I was approaching.....the first left hand turn, the bike increased in speed. I was negotiating that turn and trying to throttle down at the same time. The cycle persisted in picking up speed. I did not brake at first turn as there was sand there on the left hand side of the road. I made the first turn successfully. I did not feel I could negotiate the second turn at the speed I was going. I was trying to throttle down with no success. I looked for traffic. I saw no traffic in front of me and none behind me. I decided to cross over the road onto a grass area starting to ease down on brakes. Prior to hitting the grass I had applied both brakes hoping bike would come to abrupt stop and we should be thrown onto the grass or into the shrubbery. I was trying to negotiate that, but nothing worked with the brakes or throttling down. I just veered off the grass portion constantly having pressure on both brakes. I saw a vehicle coming towards me. I tried desperately to avoid it. I proceeded straight into him.....!"

The judge's note of some of the first respondent's answers to questions in cross-examination read :-

> "My speed was moderate.....going through the first turn the bike picked up speed. I don't think I could have throttled down. Perhaps I should have done so at that stage; but in the circumstances I could not. After negotiating the left bend I pulled towards centre as sand on left side ..... I made a conscious decision to cross over on to the other side on to oncoming traffic..... brakes did not work at that point..... accident was not caused by the catalogue of my mistakes."

Sergeant Counsell, who attended the scene of the accident said that the front wheel of the cycle was buckled and the forks

were bent; that the cycle was impounded and taken to the police compound in Prospect; and that he asked Sergeant Pratt to examine the cycle, "especially the throttle control".

Under cross-examination he said that throttles can stick if it has been raining or if the climate is too dry, but that if the left brake is used this automatically turns the throttle back.

In re-examination he said :-

"I have never known a throttle to stick so it could not be returned to closed position by hand If it were to stay open brakes applied would bring bike to stop. If cable were to break the motor would go back to the idling position."

In examination-in-chief, Madeiros said:-

"Some throttles spin back, others have to be pushed back..... I have never known a throttle to stick and stay stuck in the open position. I have never had knowledge of any complaint made that a throttle stuck in the open position..... if throttle jammed in open position bike can be brought to halt by putting brakes on, even if engine was going flat out."

Sergeant Pratt said that on 5th August 1977 he examined cycle A.967 "completely", paying particular attention to the throttle control. The judge's note of his answers in examination-in-chief reads :-

"I checked the throttle and found that it was sticking only to extent that when the throttle was turned it would not return to idling position of its own accord and had to be pulled back manually. I removed the whole thing from the cycle - throttle control cable and carburettor complete. I examined them in the workshop and the cable and the carburettor were both in good working order. I stripped the control unit and found there was a high spot on the inner sleeve where it had been rubbing against the outer sleeve. The whole unit was well lubricated. No way I could see this throttle could have been stuck and not been pushed back to the closed position. Nothing inherently dangerous in the throttle control as I found it. I think this is a common condition due to weather conditions ..... This particular unit could not have stayed open without being able to be closed in condition I found it."

As regards the brakes, Sergeant Pratt is recorded as saying :-

> "I checked the brakes. I was not able to road test the bike, but brakes appeared to be in good working order. They were properly adjusted. Lever was applied, the brakes prevented the wheels from turning. Not possible for brakes to have previously failed and then been in condition they were when I found them ..... Without being able to road test vehicle I could not say brakes would hold with two people or not. Cycle was in no condition for this sort of test."

The learned judge dismissed the evidence of "system" given by Johnson and Madeiros as of no value. Because these witnesses were not in a position to say that on 25th July 1977 they had personally inspected cycle A967 prior to its delivery to the first respondent, the learned judge said :-

> "There is therefore no evidence upon which a finding even on the balance of probabilities can be made that the auxiliary in question was inspected by or on behalf of the Defendant before delivery.
>
> Nor is the evidence of Mr. Harold Madeiros..... of any assistance to the court with respect to whether the delivered auxiliary cycle had been tested or inspected for faults of one kind or another. Again, the evidence of this witness was to what procedures are normally taken."

Having referred to the evidence of Sergeant Pratt that the brakes of the cycle were in good working order and properly adjusted, the learned judge said this :-

> "It may forever remain a mystery as to how Sergeant Pratt could come to such a conclusion in respect of the brakes applicable to the front wheel of the auxiliary cycle if, as has been attested to by his colleague Sergeant Counsell the front forks and the front wheel were respectively bent and buckled as part of extensive damage of the cycle upon impact..... I am unable to reconcile his report of the condition of the brakes with the evidence of Sergeant Counsell as to the damage done to the front wheel of the cycle.

If Sergeant Counsell is correct in saying that the front forks and the front wheel of the cycle were respectively bent and buckled it is inconceivable that Sergeant Pratt could have tested the brakes particularly of the front wheel in any way which would justify the conclusion that it was not possible for the brakes to have failed previously and yet be in the condition he found them. When I consider in addition to the contradiction represented by Sergeant Counsell's description of the auxiliary cycle as extensively damaged at the front wheel which was buckled and its forks bent and the evidence of Sergeant Pratt to the effect that he was able to test the brakes on the 5th August 1977, that Sergeant Pratt was not able to road test the cycle so as to test the validity of his conclusions about the brakes, I feel I cannot rely on Sergeant Pratt's evidence as being more than speculative."

In regard to the evidence of the first respondent, the learned judge said :-

"The first plaintiff impressed me as being a reliable and honest witness who was not given to exaggerating his case and having heard and seen him and the other witnesses in this case and having considered the entirety of the evidence which is before me, I find on the balance of probabilities that the auxiliary cycle supplied to the plaintiffs by the defendant did not function properly, in that the manipulation of the throttle control did not effectively control the acceleration and deceleration of the cycle; nor was the cycle in the best condition which the defendant's available skill could put it, and it was therefore defective. The defects had shown themselves to be present when, during the previous use of the cycle on the day before the accident when there had been automatic acceleration at Harrington Sound and later at Lighthouse Hill and before the latter on Harbour Road, when in addition to the throttle control mechanism showing itself to be temperamental the brakes had, on at least one of these occasions, almost failed to stop the auxiliary cycle.

It follows that the Defendant in supplying such an auxiliary cycle to the first plaintiff intending it to be used by him and the Second Plaintiff has failed in a material particular

to fulfil the obligations under the contract and is in breach of the same for there must of necessity be implied in any such hiring of a vehicle in the circumstances of this case a term that the vehicle is not defective; that it is as free from defects as the defendant's available skill can make it or else the purpose of the hiring would be nullified.

I also find that no proper instruction had been given to the plaintiffs or either of them so as to make them fully acquainted with the operation of the auxiliary cycle on the roads of Bermuda and so as to cope with the sort of emergency which did in fact arise.

I conceive that anyone whose business it is to supply on hire auxiliary cycles to the public and especially to visitors whose skills and reflexes and knowledge of the roads in Bermuda are likely to be questionable, owes a duty to the rider and/or the user of such a cycle to instruct the rider adequately if it is desired that the person so supplying the cycle is to escape liability for failing to do so in a case where such instruction would reasonably be required as a matter of common sense."

The learned judge then turned to the question whether the appellant company could rely on the exemption clauses in Exhibit 1; and, having considered a number of authorities including Suisse Atlantique Societe d'Armament Maritime S.A. v. N.V.Rotterdamsche Kilen Control (1), Harbutts Plasticine Limited v. Wayne Tank and Pump Co.Ltd. (2), Harling v. Eddy (3), Olley v. Marlborough Court Ltd. (4) and Gallie v. Lee (5), he said :-

"As I understand the plaintiffs' case, it is that, even assuming that a plea of 'non est factum' could not succeed the defendant cannot in the face of its own delinquency rely on those exemptions which wouldbe available to the defendant for its protection in the usual circumstances of its carrying out of the

(1) (1967) A.C. 361
(2) (1970) 1 QB 447
(3) (1951) 2 QB at p.739
(4) (1949) 1 KB 532
(5) (1970) 3 W.L.R. at p.1080

contract of hiring in its essential respects.

In my judgment, the defendant in this case is guilty of negligence which has nullified the contract by destroying its business efficacy by a breach of an essentially implied term, namely that the auxiliary cycle should be free from defects..... I therefore hold that the exemptions and protections contained in clauses (h) to (l) ..... are of no avail and that the defendant cannot, on the authorities which had been cited, and on the facts of this case, rely on them, and that also applies to the clause which purports to indemnify the defendant against any damages or injury suffered by the second plaintiff."

However, the learned judge held that the first respondent had been guilty of contributory negligence. He said, that, having experienced "difficulties" with the cycle on 25th July and during the morning of 26th July,

"to continue further riding himself with the second plaintiff as pillion passenger on an auxiliary cycle which showed an early propensity towards self-acceleration in my view amounted to an almost inexcusable disregard by the first plaintiff for his own safety and that of the second plaintiff which I hold to be negligence on his part."

Damages were assessed at $269,203.00 in the case of the first respondent and at $2000 in the case of the second respondent. The judge apportioned liability as to 70% to be ascribed to the appellant company and 30% to be ascribed to the first respondent. Judgment was given in favour of the first respondent in the sum of $188,442.15, (70% of $269,203.08) and although there was no finding of contributory negligence on the part of the second respondent, judgment was given in her favour for $1400 only (70% of $2000). The learned judge's order as regards costs reads :-

"Defendant to pay 50% of plaintiffs' costs so as to avoid double taxation."

This is an appeal against that decision. The respondents filed a notice of cross appeal their contentions being that the learned judge erred in finding that the first respondent was negligent; that they should therefore recover the whole of the damages as assessed by the judge and that they should have the whole of their costs to be agreed or taxed.

At the commencement of the hearing, Mr.Burke-Gaffney, counsel for the appellant company, indicated that he would not be pursuing the appeal as regards quantum of damages; and towards the end of his admissions, he agreed that, in any event, on the judge's findings, there was no basis for reducing the second respondent's award of damages of $2000 to $1400 or, having found in favour of the respondents, for depriving them of the whole of their taxed costs. Mr. Burke-Gaffney submitted that the learned judge's findings that the appellant company was in breach of contract and negligent should be reversed and that judgment should be entered in favour of the appellant company with costs here and in the court below.

Dealing first with the question whether the respondents were given "instruction" by Johnson. The respondents' complaints are expressed in different ways in the statement of claim. Paragraph 6 reads :-

> "It was further an implicit term, by reason of the fact that auxiliary cycles are let by the defendants to visitors who are frequently inexperienced, that adequate instruction on the use of the cycles be given to the extent that the defendants are satisfied that the hirer is capable of properly using and controlling the said auxiliary cycle in reasonable safety".

The complaints in paragraph 7 are that "insufficient instructions were given", and "there was no instruction as to what action be taken if the throttle stayed open". In paragraph 8 it is alleged that the defendants were negligent "in failing to instruct the plaintiffs adequately or at all". In paragraph 9, the allegation is that the defendants

> "..... failed to ensure that the first plaintiff was adequately instructed and conversant with the management and control of the said auxiliary cycle so as to be able to ride it in reasonable safety, and sufficiently conversant with the operation, management and control of the said auxiliary cycle so as to be able to control the said auxiliary cycle when the said defect caused the throttle to stick open".

From the phraseology used in these passages, there would appear to be a tacit

admission that the first respondent is, or at least may be, an inexperienced motor cycle rider; and the contention appears to be not only that he should have been given some sort of course of instruction to enable him to ride at all in reasonable safety but that he should also have been told, or instructed, as to what to do if the throttle should open, and remain stuck in the open position.

The learned judge does not say that he disbelieved Johnson's evidence regarding his practice when delivery motor cycles on hire to visitors. I repeat the learned judge's finding in this regard :-

> "I also find that no proper instruction had been given to the plaintiffs or either of them so as to make them fully acquainted with the operation of the auxiliary cycle on the roads of Bermuda and to cope with the sort of emergency which did in fact arise.
>
> I conceive that anyone whose business it is to supply on hire auxiliary cycles to the public and especially visitors whose skills and reflexes and knowledge of the roads of Bermuda are likely to be questionable, owes a duty to the rider and/or the user of such a cycle to instruct the rider adequately if it is desired that the person so supplying the cycle is where such instruction would reasonably be required as a matter of common sense".

In other words, the appellant company should operate on the assumption that visitors, such as the first respondent, are "likely" to be persons who do not know how to ride a motor cycle in reasonable safety, and that their reflexes as wellas their knowledge of the Bermuda roads, are "likely"to be "questionable".

As it seems to me, if a person's reflexes are other than normal, he should not be riding a motor cycle at all - either in Bermuda or elsewhere.

I am far from clear as to what is meant by the phrase "proper instruction"; but what seems to be implicit in the learned judge's findings is that the staff of the appellant company should, whenever necessary, perform the functions of driving instructors who, before allowing a visitor to take delivery of a cycle, should put the prospective hirer through some sort of driving test. As the skill of every visitor varies, it follows that the amount of instruction would necessarily vary; and, of course, there would have

to be some sort of scale of charges which depended not only on the duration of the hire but also on the number of minutes, or if necessary, hours, of instruction.

We may presume, I think, that no company whose business is the hiring of cycles, would wish to see the wholesale destruction of their stock-in trade; and, as a matter of common sense, it would be surprising if they permitted cycles to be hired by persons who obviously were unfit to ride them with care and in reasonable safety. Not only would it be against their own commercial interests to do so, but it might also be argued that they were aiding and abetting the hirers of the vehicles to commit breaches of the traffic law. That is one thing. It is quite another to hold that, although visitors to Bermuda are not required by law to take a driving test, it is nevertheless the duty of companies, from whom visitors hire motor cycles, virtually to check the driving competence of visitors as driving instructors and officials carrying out driving tests necessarily have to do.

In my view, the boot is squarely on the other foot. It does not follow from the fact that visitors do not have to take a driving test in Bermuda that they are exempt from the general law regulating the use of motor vehicles on the roads of Bermuda. A visitor may drive dangerously or carelessly like any citizen. No visitor should use a motor cycle on a road in Bermuda or elsewhere unless he is reasonably skilled in driving such a vehicle and unless he has taken the trouble to familiarise himself with the controls of the particular vehicle. In my view there is no substance in the respondents' averments on this aspect of the case.

Mr. Hursey-Harris's main submission on behalf of the respondents was that only in the most exceptional circumstances is it open to an appellate court to reverse findings of fact made by a trial judge who has seen and heard the witnesses; and of course, we were reminded of what was said in Watt v. Thomas (6). Counsel said :

> "The lynch-pin of our case is that the first respondent's evidence was accepted by the trial judge..... An appeal court cannot reject the first respondent as a witness of truth and

(6) (1947) A.C. 484

accuracy. The accident happened as the first respondent said it did. The rest of the evidence must fall in with this primary finding".

Mr. Hursey-Harris then referred to Hyman v. Nye (7) and The West Cock (8), and, on the authority of those two cases, he submitted as follows :

"When an accident happens through some "errant behaviour" on the part of the hired vehicle, the onus shifts to the owner of the vehicle. In this case, all the plaintiff had to do was to show that something went wrong and the ball is then in the defendant's court. They had to show that it was a pure accident and not a breach of an implicit term of the contract and not due to any negligence on their part".

I have referred (supra) to the learned judge's findings as regardsthe evidence of Johnson and Madeiros on this topic; and Mr. Hursey-Harris submitted that the learned judge was correct in finding that there was no evidence that the cycle was inspected by or on behalf of the appellant company before delivery to the first respondent; that the appellant company did not discharge the onus upon them merely by showing that there was no apparent defect at the time of delivery; that their duty to provide a safe cycle continued throughout the whole period of hiring; and that if the cycle behaved as the first respondent said it did at 7 p.m. on 26th July, it was not a cycle as fit for the purpose for which it was hired as reasonable care and skill on the part of the appellant company could have made it.

Turning then to the exemption clauses in Exhibit 1, Mr. Hursey-Harris said that the learned judge appears to have given three reasons why these clauses do not assist the defendant company :-

(1) that the appellant company were in breach of a fundamental term of the contract in that they supplied a cycle which was not as fit for the purpose for which it was hired as reasonable care and skill could have made it;

(2) that the appellant company had not proved that Ex.1 was a contractual document; and

(7) (1881) 6 Q.B.D. 685
(8) (1911) p. 208

(3) that the words used in Ex.1 are not clear as to what liability is excluded.

In view of the recent decision of the House of Lords in Photo Production Ltd. v. Securicor Transport Ltd. (9) Mr. Hursey-Harris did not rely on the first of these reasons (fundamental breach), and he very properly did not press the second reason. Clearly there was an agreement of hire under which the first respondent agreed to hire the cycle. Johnson produced Ex.1 for the first respondent's signature. According to the first respondent, he read half of the printed clauses on Ex.1 (thereby implying that he did not read the exemption clauses). Nevertheless, he is bound by the terms of the contract whether he read them or not. As Lord Denning M.R. said in Gallie v. Lee (5):-

> "Whenever a man of full age and understanding who can read and write signs a legal document which is put before him for signature - by which I mean a document which, it is apparent on the face of it is intended to have legal consequences - then if he does not take the trouble to read it, but signs it as it is, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented to all those into whose hands it may come that it is his document....."

As regards the third reason (supra) which the learned judge gave for his conclusion that the exemption clauses were of no assistance to the appellant company, what the learned judge said was this :-

> "..... I find that the words of the document Ex.1 are not clear as to whose liability was being excluded nor, in particular, that the defendant's liability for negligence was the subject of exemption".

Mr. Hursey-Harris's submission ran thus :-

> "General words in an exemption clause will not exempt from liability for negligence unless negligence is the only liability to which the words could apply, and only if the word "negligence", or some synonym thereof, is used in the

(9) (1980) 2 W.L.R. 283
(5) (1969) 2 Ch. 36/37

clause. The judge found that the appellant company were in breach of an implied term of the contract of hire and also were negligent. Therefore, the exemption clauses do not protect them as regards their liability in tort."

Counsel cited a number of authorities on this aspect of the appeal, including the following :-

Rutter v. Palmer (10)

Alderslade v. Hendon Laundry Ltd. (11)

Canada Steamship Lines Ltd. v. The King (12)

White v. John Warwick & Co.Ltd. (13)

Hollier v. Rambler Motors (A.M.C.)Ltd.(14)

Gillespie Bros. & Co.Ltd. v. Roy Bowles Transport Ltd. Rennie Hogg Ltd. (Third Party) (15)

Smith v. South Wales Switchgear Ltd. (16)

In Rutter v. Palmer the owner of a motor-car deposited the car for sale on commission with the keeper of a garage upon the terms of a printed document containing this clause: "Customers cars are driven by your staff at customers' sole risk". The car was sent out by the garage keeper in charge of one of his drivers to be shown to a prospective customer. It was damaged owing to the negligence of the driver. In an action by the owner of the car against the keeper of the garage, it was held that the clause protected the defendant from liability for the negligence of his servants.

Scrutton L.J. said (p.92) :-

"In construing an exemption clause certain general rules may be applied: First the Defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then

(10) (1922) 2 K.B. 87
(11) (1945) 1 K.B. 189
(12) (1952) A.C. 192
(13) (1953) 1 W.L.R. 1285
(14) (1972) 2 Q.B. 71
(15) (1973) 1 Q.B. 400
(16) (1978) 1 W.L.R. 165

the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him".

The headnote to the report of the Alderslade case, reads :-

"Articles were sent by the plaintiff to the defendants' laundry to be washed and were lost. In an action by the plaintiff against the defendants for damages the defendants relied on the following condition to limit their liability: 'The maximum amount allowed for lost or damaged articles is twenty times the charge made for laundering'.

Held that as no liability could arise for loss of articles except through the defendants' negligence, the condition applied to limit their liability in cases of negligence and applied, therefore, to limit the plaintiff's damages.

In a case where loss might arise from causes other than negligence, such a condition would not apply to limit liability for loss through negligence, unless it was expressly made applicable in clear terms".

Lord Greene M.R. said (p.192) :-

"..... Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confirmed in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence".

The Canada Steamship case was a decision of the Privy Council on appeal from the

Supreme Court of Canada. The passage (supra) from the judgment of Lord Greene in the Alderslade case was cited with approval by Lord Morton of Henryton, who continued thus: (p.208) :-

> "Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarised as follows :-
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequences of the negligence of his own servants, effect must be given to that provision.....
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens.....
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence', to quote again in the Alderslade case. The other 'ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants".

White v. Warwick was a decision of the English Court of Appeal. The facts in that case were as follows: The Plaintiff hired a tradesman's cycle from the defendants. While the plaintiff was riding the cycle the saddle tilted forward, and he was thrown and injured. When the saddle was examined, it was found that the nut which should have held the saddle firmly was rusted and could not be tightened.

In his claim the plaintiff alleged two alternative causes of action: (1) Breach of

warranty in that the defendants were under a duty by the terms of the agreement to supply a cycle which was reasonably fit for the purpose for which it was required; and (2) negligence.

The exempting clause in the agreement on which the defendants relied read:

> "Nothing in this agreement shall render owners liable for any personal injuries to the riders....."

Parker J. (without deciding whether there had been negligence) held that this clause in the contract protected the defendants. Having so held, he added :-

> "..... in the present case there is, as it seems to me, no room for an alternative claim at common law".

On appeal, counsel for the plaintiff conceded that the clause would prevent the plaintiff from succeeding on a claim based on breach of contract, but he submitted that, in the circumstances proved, the defendants were negligent and that the clause was no bar to an action for damages for negligence.

Counsel for the defendants submitted that if there was negligence, it was negligence in connection with the performance of the contract; that the machine which was supplied was supplied in performance of the obligation arising under the contract, and that that which was done was something done under the agreement; that, consequently, the cause of action, if there was one, arose out of the agreement, and that whether there was negligence or not, the clause prevented the plaintiff from succeeding in an action of this nature.

Singleton L.J. said (p.1290) :-

> "That gives rise to a question of some nicety".

And, after referring to the comment of Parker J. (namely that there was "no room for an alternative claim at common law)," he said (p. 12000) :-

> "I am not sure that that is right".

The submission of counsel for the defendants did not find favour with the court. After citing, inter alia, the passage (supra) from the judgment of Lord Greene in the Alderslade

case, Singleton L.J. said (p.1292) :-

> "In the circumstances of the present case, the primary object of the clause, one would think, is to relieve the defendants from liability for breach of contract or for breach of warranty. Unless then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the defendants if negligence is proved against them".

I find the judgment of Denning L.J. difficult to follow. In the third paragraph of his judgment, he says :

> "The defendants may be liable in contract for supplying a defective machine even though they were not negligent (see Hyman v. Nye)".

With respect, I do not read the decision in Hyman v.Nye for that proposition. At any rate, Denning L.J. said that, in his view, the claim for negligence was founded in tort and not on contract; and he agreed with Singelton L.J. that there should be a new trial to decide whether the defendants were negligent.

Morris L.J. said (p.1295) :-

> "The far more difficult part of the case concerns the interpretation of clause 11 so as to decide whether it does, or does not, provide an exemption from liability in all circumstances. During the course of the argument I entertained some doubt in regard to this matter, but on consideration I have reach the clear conclusion that clause 11 does not provide an exemption if negligence is alleged and proved".

And, having referred to Rutter and Alderslade he said (p.1296) :-

> "Applying those principles to the words in clause 11, it seems to me that (counsel for the plaintiff) is right when he says that the words in the clause may refer to other matters than matters based upon an allegation of negligence. The opening words of clause 2 are: 'In consideration of such sum the owners agree to maintain the machines in working order and condition'. Clause 11, as an exempting clause, might operate upon such a provision as is set out in those opening words of clause 2; and doubtless there are other provisions upon

which clause 11 might operate. The clause can apply to some injury occurring without negligence..... I have reached the conclusion that clause 11 is not clear so as to exempt from liability if negligence is proved".

The Hollier case concerned the liability of the owners of a garage who agreed to repair the plaintiff's car. The words which the courts were asked to construe were:

"The company is not responsible for damage caused by fire to customers' cars on the premises".

It was held by the English Court of Appeal that the language of that condition was not so plain that it clearly excluded liability for the defendants' negligence.

Salmon L.J. said (p.79) :-

"..... in every case it comes down to a question of construing the alleged exemption clause which is then before the court".

And, having analysed the Rutter and Alderslade decisions in considerable detail, Salmon L.J. said (pp.80/81) :-

"In these two cases, any ordinary man or woman reading the conditions would have known that all that was being excluded was the negligence of the laundry, in the one case, and the garage in the other. But here I think the ordinary man or woman would be equally surprised and horrified to learn that if the garage was so negligent that a fire was caused which damaged their car, they would be without remedy because of the words of the condition..... If the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used".

Referring to the judgment of Scrutton L.J. in Rutter, Salmon L.J. said :

"Scrutton L.J..... does not say that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will necessarily exempt him'."

And, an regards the use of the word "must"

by Lord Greene M.R. in Alderslade, Salmon L.J. said (p.80) :-

> "..... we are not here construing a statute..... I do not think that Lord Greene M.R. was intending to extend the law..... If it were so extended, it would make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means".

The facts in Gillespie Bros. & Co.Ltd. v. Roy Bowles Transport Ltd. Rennie Hogg Ltd. (Third Party) were as follows :-

Gillespie (the owners) imported watches from Switzerland for resale to buyers in Jamaica. The watches were placed in the customs warehouse at Heathrow. The owners asked Rennie Hogg (forwarding agents) to arrange the trans-shipment. The forwarding agents did not have their own vans and drivers. They hired them from Roy Bowles Transport Ltd. (the carriers). Although the driver was engaged in work for the forwarding agents, he remained the servant of the carriers.

The contract between the carriers and the forwarding agents incorporated the Road Haulage Association's Conditions of Carriage. The forwarding agents were within the definition of "trader". Clause 3(4) provided that :

> "The trader shall keep the carrier indemnified against all claims or demands whatsoever by whomsoever made in excess of the liability of the carrier under these conditions".

The parcel of watches was stolen from the van while the driver was signing for it in the customs warehouse. The driver was negligent. The owners brought an action against the carriers claiming damages for breach of duty and/or negligence and/or detinue and/or conversion arising out of the failure of the carriers and their servant to deliver the watches. Browne J. gave judgment in favour of the owners.

The carriers brought third party proceedings claiming to be indemnified by the forwarding agents under clause 3(4). It would appear that the trial judge did not construe the words of clause 3(4) at all. He considered that he was bound by the judgment of Lord Morton in the Canada Steamship case. Having held that clause

3(4) did not expressly or by implication indemnify the carriers against their own negligence or that of their servant, he then went on to consider whether there were other possible subject matters on which this indemnity clause could bite; and he held that there were four other possible heads of damage, other than negligence. Accordingly, applying Lord Morton's ruling, the trial judge held that the existence of these other possible heads of damage was "fatal" to the claim for indemnity.

The trial judge's decision as regards the third party proceedings was reversed on appeal to the Court of Appeal (Lord Denning M.R., Buckley and Orr L.JJ.)

Lord Denning M.R. criticised the Privy Council ruling in the Canada Steamship case. He said (p.4.4):-

> "It was based on the words of Lord Greene M.R. in Alderslade..... But those words have recently come under review in Hollier.....and this court then issued a warning against taking Lord Greene's words au pied de la lettre. It actually overruled two of the cases on which he relied. I would issue a like warning about the Privy Council ruling. Taken at its face value, it assumes that the words of an exempting clause are wide enough, in their ordinary meaning, to cover negligence; but then lays down an artificial rule by which the court is compelled to depart from their ordinary meaning. It says: 'The existence of a possible head of damage, other than that of negligence is fatal'. Such compulsion is not a rule of construction. It is a rule of law. I would quote against it the words of Salmon L.J. in Hollier.....
>
> > 'If it were so extended, it would make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means'."

At page 415, Lord Denning said :-

> "This indemnity clause, in its ordinary meaning, is wide enough to cover the negligence of the carrier himself. Why should not effect be given to it? What

> is the justification for the courts, in this or any other case, departing from the ordinary meaning of the words? If you examine all the cases, you will, I think find that at bottom it is because the clause (relieving a man from his own negligence) is unreasonable, or is being applied unreasonably, in the circumstances of the particular case. The judges have, then, time after time, sanctioned a departure from the ordinary meaning. They have done it under the guise of "construing" the clause. They assume that the party cannot have intended anything so unreasonable.....They cut down the ordinary meaning of the words..... Even when the words are clear enough to ordinary mortals, they have made firm distinctions between the kind of loss and the cause of loss; so that if a clause exempts from 'any loss' it is not sufficient; but if the magic words 'however caused' are added, it is."

At page 416, the Master of the Rolls, said :

> "..... this clause..... when given its ordinary meaning, is perfectly fair and reasonable..... such a clause (be it an exemption clause, or a limitation clause or an indemnity clause) should be construed in the same way as any other clause. It should be given its ordinary meaning, that is, the meaning which the parties understood by the clause and must be presumed to have intended".

Buckley L.J. said :

> "It is clearly settled that liability for negligence can be effectively excluded by contract..... provided that the language or the circumstances are such as to make it perfectly clear that this was the intention of the parties..... It is, however, a fundamental consideration in the construction of contracts of this kind that it is inherently improbable that one party to the contract should intend to absolve the other party from the consequence of the latter's own negligence. The intention to do so must therefore be made perfectly clear, for otherwise the court will conclude that the exempted party was only intended to be free from liability in respect of damage occasioned by causes other than negligence for which he is answerable.

The principles of construction applicable have been lucidly stated by Lord Morton of Henryton in (the Canada Steamship case)."

At pages 420/1, Buckley L.J. said :-

"The contention of the respondent has been that these words relate to the nature of the claim, not to its cause, and so are insufficient to demonstrate that the indemnity is to extend to claims howsoever caused. I cannot accept this distinction. When the expression used is 'any loss' or 'all claims and demands', it is legitimate ..... to construe it as subject to a silent and implied exemption of losses claims or demands due to the negligence of the party occasioning the loss claim, or demand; but if the word 'whatsoever' be added the proper interpretation may very well be different. 'Whatsoever' is a word which is prime facie inconsistent with any exception from the class of objects referred to ..... it signifies that the indemnity is intended to extend to all claims and demands of whatsoever kind, that is to say, without exception..... The nature of any claim is essentially linked with and dependent on the cause from which it arises, and any indemnity extending in express terms to all claims and demands of whatsoever kind must, in my opinion, extend to all claims and demands however caused. The expression is one which cannot sensibly be construed as subject to an implied qualification. I accordingly reach the conclusion that upon its true construction clause 3(4) does contain an agreement in express terms that the trader shall indemnify the carrier against all claims and demands including any arising from the negligence of the carrier or its servants. So the second and third questions (i.e. in Lord Morton's ruling) "do not, in my opinion, arise".

Orr L.J. agreed. He said (p.421) :-

"The distinction between the two lines of cases with which we have been concerned, rightly described as a fine one, has been said..... to be that if you say 'any loss' you are directing attention to the kind of losses and not to their cause or origin and therefore you have not brought it home to the

person entrusted with the goods that you are not going to be responsible for your servants exercising due care for them, but if you direct attention to the causes of any loss you give sufficient warning and it is not necessary to say in express terms 'whether or not caused by my servants' negligence."

For my part I do not find it possible to apply this reasoning where, as in the present case, a word is used ('whatsoever') which is itself plainly inconsistent with any exception or qualification, and on this part of the case, I am in entire agreement with the reasoning of Buckley L.J. It must equally follow, in my judgment, that Reynolds v. Boston Deep Sea Fishing and Ice Co.Ltd. (1922) 38 TLR 429, which was much discussed in argument before us and where the wording used was 'no liability whatever', satified the first as well as the second and third tests in the Canada Steamship case".

The approach of Buckley and Orr L.JJ. was criticised by Lords Wilberforce and Fraser in Smith v. South Wales Switchgear Co.Ltd. Lord Wilberforce said that he dissented from the view that Lord Morton's first test was satisfied by a clause whereby one party undertook to keep the other party indemnified against all claims or demands whatsoever; and he said that to satisfy the first test there must be a "clear and unmistakable reference to such negligence" in the exempting clause.

Referring to the words to be construed in the Smith case, Lord Fraser said (pp.172/3) :-

"The argument was that the words 'any liability, loss, claim or proceedings whatsoever' amounted to an express reference to such negligence because they covered any liability however caused. The argument was supported by reference to the opinions of Buckley and Orr L.JJ. in (the Gillespie case)..... where great emphasis was placed on the word 'whatsoever' occurring in an indemnity clause as showing that the indemnity was intended to apply to all claims and demands however caused including claims for negligence. I agree with the decision in (the Gillespie case) and with the statement by Buckley L.J. at p.421 that the clause (i.e. the clause in the Gillespie case) 'was one which cannot sensibly be construed

> as subject to an implied qualification', but I am unable to agree with the learned Lord Justice's conclusion that the clause contained 'an agreement in express terms' to indemnify the proferens. I do not see how a clause can 'expressly' exempt or indemnify the proferens against his negligence unless it contains the word 'negligence' or some synonym for it.....The word 'whatsoever'..... is no more than a word of emphasis and it cannot be read as equivalent to an express reference to negligence".

Mr.Burke-Gaffney's submission was that these observations of Lords Wilberforce and Fraser were obiter. I am inclined to agree. The House expressly approved of the decision in the Gillespie case. Lord Fraser said (p.173) :

> "I agree with the decision in (the Gillespie) case and with the statement by Buckley L.J.....that the clause was one 'which cannot sensibly be construed as subject to an implied qualification'."

As regards Lord Morton's "tests", Lord Wilberforce said (p.168) :

> "..... while the tests formulated by Lord Morton are a useful aid to construing such clauses, they must not be interpreted as if they were provisions in a statute."

Lord Fraser said (p.178) :-

> "It is to be stressed that they (that is, the 3 tests) do not represent rules of law, but simply particular applications of wider general principles of construction, the rule that express language must receive due effect and the rule omnia praesumuntur contra profe entem".

We invariably come back to the basic rule that an indemnity or exemption clause should be construed in the same way as any other clause. Words should be given their ordinary meaning, as Lord Denning said "the meaning which the parties understood by the clause and must be presumed to have intended". The clause should not be looked at in isolation, but in relation to the whole contract, and the circumstances obtaining at the time the contract was entered into.

Mr. Burke-Gaffney submitted that Smith v. Warwick could be distinguished from this case; alternatively that the case was wrongly decided. With respect, I think that the Smith case was wrongly decided. As in the instant case, the plaintiff (Smith) set up two causes of action (1) breach of warranty in that the defendants failed to supply a cycle which was reasonably fit for the purpose for which it was required; and (2) that the accident was caused by the defendant negligence. Singleton L.J. said (P.1289) :-

> "The second claim of the plaintiff was therefore to this effect: You, the persons from whom I had this cycle, owed a duty to take reasonable care; that is, to take that care which a reasonably careful cycle owner would take on the letting to another of a cycle for his use, and you failed in that duty. If you had examined the cycle you would have found that the nuts were rusty and that the saddle was loose; I used the cycle in the way in which it was intended that I should use it, and I sustained an accident because you had not fulfilled your duty; you had not taken reasonable care; you were negligent".

But isn't that simply an elaborate way of saying that the defendants were under a duty to supply a cycle which was reasonably fit for the purpose for which it was required and that they failed in that duty? Or as their counsel said: if there was negligence it was negligence in connection with the performance of the contract.

I agree that Parker J. was probably in error in ruling that there was "no room for an alternative claim at common law". Clearly, the defendants were negligent; but, on the facts, any distinction between contractual and tortious liability was wholly artificial.

Similarly, in the instant case, the appellant company was under a duty to supply a cycle which was as reasonably fit for the purpose for which they knew it was required (namely to be driven on the roads of Bermuda) as reasonable skill and care could make it. A cycle which accelerates of its own accord, the brakes of which also fail at the same moment, is not such a cycle as the appellant company were under a duty to supply; and such defects should have been discovered if the appellant company had taken reasonable care to examine, test and, if need be, repair the cycle before delivery, that is to say, if they had exercised reasonable care, I am, of course, assuming

for the moment, that the learned judge's findings of fact are allowed to stand. But, on those facts, I see nothing inherently wrong in both causes of action succeeding. Any distinction between contractural and tortious liability in the circumstances of this case is wholly artificial.

The onus, of course, is on the appellant company to show that the exemption clauses are valid so as to relieve them of their liability.

What then is the background to the signing of this contract? Visitors to these Islands require some mode of transport. The appellant company's business is the hiring of motor cycles to visitors. They may hire many cycles in one day. From the nature of things, they do not have an opportunity to assess fully each person's driving ability and experience, or to assess the character of each visitor. For all the appellant company knows, a person from the United States who hires one of their cycles may have a long record of convictions for breaches of the United States traffic law.

The appellant company have a system whereby cycles are checked before delivery, but, as has frequently been said, no system is perfect. And so, having declared in Ex. 1 that he is capable of driving a motor cycle, and that he is hiring the cycle "on the terms set out below", by clause (h), the visitor is asked to confirm that he has received adequate instruction in operating the controls of the cycle and that he has examined and assured himself that "the brakes and the vehicle generally are in good working order".

I see nothing unfair in requiring a visitor to sign such a declaration. It is up to him to familiarise himself with the vehicle, with the help of such instruction as he seeks and/or receives, and, so far as possible, to satisfy himself that the vehicle is in good working order.

The learned editors of the 24th ed. of Chitty on Contract Vol. 1 para. 817 say :-

> "Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehended within the exemption, or which throw the risk upon the plaintiff. If the defendant merely says 'any loss' he is directing attention to the kinds of loss, but not to their cause or origin; so liability for negligence will not necessarily be excluded. But if he says 'however arising', or 'any cause whatsoever', these words will cover losses by negligence. Thus, the words 'however caused', 'from whatever other cause arising', 'howsoever arising', 'arising from any cause whatsoever ..... have

been held to be effective".

The framers of clause (1) of Ex.1 may well have had that paragraph in mind. The clause reads :

> "I accept full responsibility for the vehicle and hereby agree to pay for any loss in respect thereof howsoever caused".

In my view that clause is wide enough to cover negligence on the part of the appellant company's servants.

In clause (j) the visitor is warned that the vehicle is insured for third party risks but that any pillion rider is not covered. He is thereby put on notice that he should, if he so desires, arrange for further insurance cover.

The clause goes on to say that he is the only person covered by third party risks and that he agrees to refrain from lending the cycle to anyone.

Clause (k) calls for no particular comment. But clause (l) reads :-

> "I further understand that I shall have no claim whatsoever for any physical, mental, and material injury suffered by me as a result of my use of the aforementioned vehicle either against the hirer or the insurer. As any pillion passenger is also not insured, I agree to indemnify the hirer against any claims which may be brought against him by any such passenger".

The visitor had previously been asked to accept responsibility for loss in respect of the cycle "howsoever caused"; and now, as regards injuries to himself as the result of his use of the cycle, he says he understands that he shall have "no claim whatsoever". On the authorities, in my view, those words cover injury directly attributable to negligence on the part of the appellant company's servants.

Finally, the visitor is warned for the second time that his pillion passenger is not insured and he agrees to indemnify the appellant company in respect of any claim by such passenger.

In my view, even if the learned judge's findings are allowed to stand - that is to say that a defective cycle was delivered to the first respondent, and that as he was rounding a corner, the cycle automatically accelerated, the throttle stuck and the brakes failed - clauses

(h) (i) and (l) of Ex.1 are effective to relieve the appellant company of both contractual and tortious liability.

But, I do not think that his appeal should be decided on this relatively narrow ground. This court, in my view, should seriously consider whether the learned judge's findings of fact should be allowed to stand. Naturally, the principles enunciated by Lord Thankerton in Watt v. Thomas (supra) must be borne in mind. He said (pp.487) :-

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either cause the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court".

The first respondent's story was that, as he approached the first left hand bend, the cycle "increased in speed" and that, as he was negotiating that bend, it "persisted in picking up speed". Although, according to him, he negotiated the first bend "successfully" he did not feel that he could negotiate the second right hand bend at the speed at which he was going. Nevertheless, he decided, he said, to cross over to the right hand side of the road and perform some manoeuvre whereby he and his wife would be thrown onto the grass and into the shrubbery on that side of the road.

This court is undoubtedly at a disadvantage in that we did not see and hear the first respondent testify; but we are quite entitled, looking at the printed evidence, to

say: "This story is inherently improbable", because crossing over to the right hand side of the road must have involved making a much sharper right hand turn than would have been necessary if he had simply negotiated the right hand bend keeping to his own side of the road; and, speaking for myself, I would certainly not have been surprised if the learned trial judge had found that, far from negotiating the first left hand bend successfully, the first respondent was unable to do so because of the speed at which he was travelling, with the result that he crossed to the right hand side of the road, struck the grass bank, and veered off it into the path of the oncoming taxi.

As it seems to me, one of the most important questions in this appeal is whether the learned trial judge erred in rejecting the evidence of Sergeant Pratt. Obviously the police were under a duty to examine the cycle carefully so that evidence would be available as to its condition in the event of the taxi driver or the first respondent being prosecuted for, say, careless or dangerous driving; and, in that eventuality, Sergeant Pratt would have been a witness for the prosecution. Naturally, he was not called by the respondents because his evidence cut clean across that of the first respondent in a number of material respects. His evidence was of the greatest assistance to the case for the appellant company because here was an indepenent public official, who had nothing to gain or lose, testifying that when he examined the cycle (which had been in police custody since the accident) he found that the brakes were properly adjusted and in good working order, and that the throttle did not return to the idling position automatically; that it had to be pulled back manually in order to decelerate, but that there was nothing inherently dangerous in the throttle control being in that condition and that there was "no way" he could see how the throttle could have stuck so that it could not have been pushed back. Moreover, he said that having removed the throttle control and the carburettor from the cycle and having examined them in the workshop, he found them both in good working order.

This evidence, of course, was vital when assessing the truth of the first respondent's allegations that on a number of occasions during the two days (25th and 26th July), including the few seconds involved in negotiating the S-bend at 7 p.m. on 26th July, the cycle seemed to increase in speed of its own accord or, as expressed in the statement of claim, "of its own volition".

Pratt'sevidence that he found the brakes properly adjusted and in good working order was not challenged at all by counsel for the respondents nor did he refer to it in his closing address, and therefore Counsel for the appellant company had some cause for thinking that this part of the witness's evidence was accepted by his opponent.

Prior to the hearing of this appeal, the appellant company's attorneys filed a notice of the company's intention to apply for the admission in evidence of an affidavit by Pratt in which he detailed his extensive qualifications and precisely the action which he took before reaching his conclusions that the brakes of the cycle were in good working order and properly adjusted - in the alternative that Pratt be called to give the evidence set out in his affidavit.

At the close of his submissions, Mr. Burke-Gaffney did so apply, but we refused his application. For myself, I felt that this question could be dealt with on the record as it stands.

There is nothing in the record to suggest that the learned judge did not accept Pratt as an expert, and no expert evidence contra was called by the respondents; and, as I have said, his evidence regarding the condition of the brakes was not challenged, or even referred to in his closing address, by counsel for the respondents.

The learned judge's reasoning, as it seems to me, may be paraphrased thus :

> As the front wheel was buckled and the forks were bent, there was no way in which Pratt could have tested the brakes of the front wheel at all, and as the cycle could not be road-tested, any testing of the brakes of the rear wheel could not have justified Pratt in reaching the conclusion that the brakes could not have failed previously; therefore Pratt's evidence regarding the brakes, the throttle control and the carburettor is "speculative" and is rejected.

With respect to the learned judge, in my view he erred in rejecting Sergeant Pratt's evidence. This evidence should have been carefully considered when assessing the credibility of the first respondent as regards his allegation that when negotiating the

S-bend just prior to the collision, the cycle "increased in speed", "persisted in picking up speed", and that he tried "to throttle down with no success", and "nothing worked with the brakes or throttling down."

The next question which seems to call for consideration is the learned judge's conclusion that there was no evidence that the cycle was tested or inspected for faults prior to being delivered.

True, on 17th July 1979 the appellant company did not call a witness to say that just prior to delivering cycle No. A967 to the first respondent on 26th July 1977, he subjected it to a thorough test and found no fault with the brakes, the throttle control or the carburettor. It would have been surprising - indeed it might well have aroused one's suspicion of their bona fides - if the company had called a witness to give evidence of that nature. Having regard to the nature of their business and the large number of cycles hired daily, all the company could do was to inform the court what their practice was. Madeiros' evidence was that "every single time" a cycle is hired, it is road-tested for brakes, tyres, cables, throttle control, belts and drive chains; and Johnson, who was able to say that he is "the only one who checks and delivers (cycles) to White Sands Hotel", gave evidence of his practice when delivering cycles to persons who hire them. In my view, it cannot be said that there was no evidence that the cycle was tested or inspected for faults prior to being delivered to the first respondent.

The first respondent himself said that when riding the cycle at the time of delivery it "worked normally", that the brakes operated normally and that the throttle control "automatically decelerated when (he) let go of it".

Therefore, the evidence was that the appellant company's practice is that every hired cycle is tested thoroughly before delivery, that cycle A967 (according to the first respondent himself) was in good working order when he accepted it on 25th July 1977, and that when this cycle was examined by the police after the accident, the brakes, the throttle cable and the carburettor were in good working order. The throttle control did not return to the idling position automatically but it could be moved back manually.

In cross-examination the first respondent admitted that in many cycles there is no automatic deceleration and that, in the case of his son's bike, the "accelerator stays in the same position if left".

With respect I do not agree with the submission of counsel for the respondents that all the respondents had to do was to show that "something went wrong" and "the ball is then in the defendants' court"; that it is then for the owners of the vehicle to show that "it was pure accident and not a breach of an implied term of the contract and not due to any negligence on their part". Hyman v. Nye and The West Cock (supra) do support those propositions. In Hyman v. Nye, the cause of the action was the fact that a bolt in the underpart of the carriage broke. That was the cause of the accident. In The West Cock the cause of the damage sustained by the plaintiffs vessel was the defective condition of the rivets attaching the towing gear of the tug to the bunker casing. The cause was known. It was for the defendants to show that the defective condition of the rivets was not discoverable by reasonable care and skill on their part.

In the instant case, all we have is the first respondent's allegation that when negotiating the S-bend the cycle accelerated (that is to say without any conscious act on his part); that, having done so, the throttle then stuck in the open position (not simply stayed in the open position), and also that at that very moment the brakes also failed - allegations which could not possibly stand against the evidence of Sergeant Pratt. His examination of the carburettor and throttle cable revealed nothing to support the first respondent's story of "automatic acceleration" and the throttle then sticking in the open position. Similarly, as regard the allegation of brake failure.

On the hearing of this appeal, Mr.Burke-Gaffney mentioned that, on this particular cycle, to accelerate one turns the throttle clockwise, i.e. towards the driver, and to decelerate one turns it anti-clockwise, i.e. away from the driver. Mr. Hursey-Harris did not disagree. Counsel noted that the first respondent is recorded as saying in examination-in-chief:

> "It turns off turning the throttle towards me and away from me for turning it on".

and in cross-examination, he is recorded as saying :

> "To accelerate I would turn the accelerator counter-clockwise".

The point was not taken in the court below, and it is certainly not one which can be taken at this stage. Be that as it may, on the whole of the evidence (apart altogether from these two statements apparently made by the first respondent), and having regard to the reasons given by the learned judge, I am clearly of the opinion that the learned judge's findings of fact should not be allowed to stand. In my view, the accident was caused, not by any "errant behaviour" of the throttle control coupled with brake failure but by either the negligent manner in which the first respondent rode the cycle or, putting it at its lowest, an error of judgment on his part occasioned by his limited skill and experience in riding motor cycles.

I would allow the appeal, set aside the judgment appealed and enter judgment in favour of the appellant company with costs here and in the court below.

Liberty to apply on the question of costs.

Signed. A. Blair-Kerr

SIR ALASTAIR BLAIR-KERR, P.

Dated: 30th June 1980

I agree.

Signed. William Duffus

SIR WILLIAM DUFFUS, J.A.

I also agree.

Signed. J. Summerfield

SIR JOHN SUMMERFIELD, J.A.

Dated

In the Court of Appeal

No.22
Notice of Motion for Leave to Appeal
1st July 1980

No. 22

NOTICE OF MOTION FOR LEAVE TO APPEAL

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL

1979 : No. 28

B E T W E E N :

J.B. ASTWOOD AND SON LTD.

Appellants

- and -

GABRIEL MARRA First Respondent

- and -

SANDRA MARRA Second Respondent

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE that the Court of Appeal will be moved on Thursday the 3rd day of July 1980 at 10 o'clock in the forenoon or so soon thereafter as Counsel on behalf of the above-named First and Second Respondents can be heard for an Order that the First and the Second Respondents have leave pursuant to Section 2(c) of the Appeals Act 1911 to appeal from the Judgment of this Honourable Court dated the 30th day of June, 1980 to Her Majesty in Council on the grounds that the question or questions involved in the proposed Appeal are by reason of their great general or public importance, or otherwise, questions which ought to be submitted to Her Majesty in Council for decision and in particular involve questions to be determined by Her Majesty in Council touching upon the interpretation of law of contract and tort and in particular its application to the hire of auxiliary motor cycles to the general public carried out extensively in the Islands of Bermuda.

AND for all necessary further and consequential directions including a direction under Section 6 of the Appeals Act 1911, that if this application be allowed, a Judge of the Supreme Court be appointed in the absence of the President of this Honourable Court to supervise the preparation of the Record, and to provide for costs.

Dated the 1st day of July 1980

Signed. Conyers Dill & Pearman

Conyers, Dill and Pearman,
Attorneys for the First
and Second Respondents

TO: The Appellants or their attorneys,
Messrs. Appleby, Spurling and Kempe,
Reid House,
Church Street,
HAMILTON.

TO: The Registrar of the Supreme Court,
Sessions House,
Parliament Street,
HAMILTON.

No. 23

No.23
Order granting Conditional Leave to Appeal to Her Majesty in Council
3rd July 1980

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL

1979 : No. 28

B E T W E E N :

J.B. ASTWOOD & SON LIMITED — Appellants

- and -

GABRIEL MARRA and SANDRA MARRA — Respondents

O R D E R

UPON HEARING COUNSEL for the Respondents and Counsel for the Appellants AND UPON HEARING of the Respondents' Notice of Motion for Leave to Appeal dated the 1st day of July, 1980, IT IS NOW ORDERED

THAT the Respondent do have leave to appeal pursuant to Section 2(a) of The Appeals Act, 1911, to appeal the Judgment

In the Court of Appeal

No.23
Order granting Conditional Leave to Appeal to Her Majesty in Council

3rd July 1980

(continued)

of this Court dated the 30th day of June 1980 to Her Majesty in Council

AND IT IS FURTHER ORDERED AND DIRECTED THAT

(a) the Appellants, within a period of three (3) months enter into good and sufficient security in the sum of $2,400.00 for the prosecution of the appeal and for the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an Order granting final leave to appeal or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the appeal as the case may be; and

(b) pursuant to Section 6 of the Appeal Act, 1911, that a Judge of The Supreme Court supervise the preparation of the record and make such Orders and Directions as may be necessary under Section 5 of the aforesaid Appeals Act.

DATED this 3rd day of July, 1980

No.24
Order granting Final Leave to Appeal to Her Majesty in Council

15th December 1980

No. 24

ORDER GRANTING FINAL LEAVE TO APPEAL

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL JURISDICTION

1979 : No. 28

B E T W E E N :

J.B. ASTWOOD AND SON LIMITED — Appellants

- and -

GABRIEL MARRA and SONDRA MARRA (his wife) — Respondents

O R D E R

UPON HEARING Counsel for the Appellants and the Respondents, IT IS HEREBY ORDERED that the Respondent do have final leave pursuant to Section 17 of Appeals Act 1911 to appeal the Judgment of this Court dated the 30th

of June 1980 to Her Majesty in Council.

Dated this 15th day of December 1980

Signed. J.R.Atwood
CHIEF JUSTICE

TO: Appleby, Spurling and Kempe
Reid House,
Church Street,
Hamilton, Bermuda.

Attorneys for the Respondents

INVOICE NO. 50271

J. B. ASTWOOD & SON LIMITED

Motorized Bicycles for hire by hour, day, week or month

DATED THIS 25 DAY OF 7 1977 HELMET DEP. $20

CYCLE REG. NOS. A967. LOCK DEP.

TIME OUT 10 RET. CYCLE DEP.

PERIOD OF HIRE 1 DAYS HRS. R/WAIVER $3.

RENTAL 1/3 1 7

I Marra

Residing at White Sands

do declare that I have hired livery auxiliary bicycle, Licence No. as above on the terms set-out below and I am of the opinion that I am capable of riding it. I note that an approved safety helmet is included in the rental; I am not under 16 years of age and I understand and confirm that:—

(a) the rule of the road in Bermuda is "KEEP LEFT."

(b) a cyclist should not look backwards whilst riding as it is a common cause of accidents.

(c) stopping at "STOP" signs is compulsory for all road users in Bermuda and for my own safety I must actually stop as other road users will expect me to do so.

(d) the legal speed limit in Bermuda is 21.7 m.p.h. or 35 kph and it is unsafe to exceed it.

(e) road corners and curves should be taken carefully as many are sharper than they appear to be and likely to be very slippery when the road surface is wet.

(f) the approved safety helmet, issued to me as part of the rental agreement, must be worn for my protection.

(g) I am capable of riding a pedal cycle.

(h) I have received adequate instructions in the operation of the controls, brakes, starting and stopping of the motor, that I have examined and assured myself that the brakes and the vehicle generally are in good working order before signing this declaration.

(i) I accept full responsibility for the vehicle and hereby agree to pay for any loss in respect thereof howsoever caused.

(j) the vehicle is insured for third party risks under the laws of Bermuda. I understand that such policy does not provide for cover for any pillion passenger. As I am the only person who is insured against Third Party risks whilst riding the vehicle and as it is illegal for anyone else to ride the vehicle, I agree to refrain from lending it to anyone.

(k) I understand that the Hirer is required to give notice to his Insurance Company as soon as possible after any accident which may give rise to a claim, and I undertake to inform him of any accident in which I am involved immediately and in any event prior to the end of my period of hire.

(l) I further understand that I shall have no claim whatsoever for any physical, mental and material injury suffered by me as the result of my use of the aforementioned vehicle either against the Hirer or the Insurer. As any pillion passenger is also not insured, I agree to indemnify the Hirer against any claims which may be brought against him by any such passenger.

Signature Gabriel F. Marra

WEAR HELMET LOCK BIKE KEEP LEFT

HELMET DEPOSIT

HELMET DEPOSIT $20.00

TOTAL CASH	TOTAL CHARGE

32745

I ACCEPT FULL RESPONSIBILITY FOR THE CYCLE AND MYSELF AND ALSO AGREE TO PAY FOR LOSS OF THIS CYCLE.

SIGNATURE Robert P. Mann

25 JL 72 852 00 23.00

25 JL 72 852 00 23.00

EXHIBIT 2

Bundle of Agreed Documents

EXHIBIT 2

BUNDLE OF AGREED DOCUMENTS

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
1978 : No.35

B E T W E E N :

GABRIEL MARRA — First Plaintiff

- and -

SONDRA MARRA — Second Plaintiff

- and -

J.B.ASTWOOD AND SON LIMITED — Defendants

BUNDLE OF AGREED DOCUMENTS

Number	Description of Document	Date	Page No.
1	Copy J.B.Astwood & Son Ltd. Contract of Hire	25/7/77	143
2	Copy Bermuda Police Statement Form PS.22 Pratt	16/8/77	145
3	Cycle Accident Police Report and Declaration	8/11/77	146
4	Medical Report John D.Stubbs re: Gabriel Marra	17/8/77	153
5	Medical Report Dr. S.Gibbons re: Gabriel Marra	29/8/77	156
6	Medical Report Dr.Kavolus re: Gabriel Marra	30/8/77	159
7	Medical Report Dr. Joseph Lenehan re: Gabriel Marra	7/9/77	162
8	Medical Report Dr. Thomas Wolff re: Gabriel Marra	23/1/78	163

Number	Description of Document	Date	Page No.
9	Medical Report Dr. Roy Meckler re: Gabriel Marra	9/2/78	164
10	Medical Report J. William Littler re: Gabriel Marra	26/2/79	165
11	Medical Report J.William Littler re: Gabriel Marra		167
12	Medical Report Dr. John Stubbs re: Sondra Marra	17/8/77	169
13	Medical Report Dr. Copeland re: Sondra Marra	31/7/78	171

EXHIBIT 2
Bundle of Agreed Documents (continued)

EXHIBIT 2 (1)

COPY OF J.B.ASTWOOD & SON LTD. CONTRACT OF HIRE

EXHIBIT 2(1)
Copy of J.B. Astwood & Son Ltd. Contract of Hire
25th July 1977

LIMITED

Motorised Bicycles for hire by hour, day, week or month

DATED THIS 25 DAY OF 7 1977 HELMET DEP.$

CYCLE REG.NOS. A967 LOCK DEP.

TIME OUT RET. CYCLE DEP.

PERIOD OF HIRE DAYS HRS. R/WAIVER $3

RENTAL

I MARRA RESIDING AT White Sands do declare that I have hired livery auxiliary bicycle, Licence No. as above on the terms set out below and I am of the opinion that I am capable of riding it. I note that an approved safety helmet is included in the rental; I am not under 16 years of age and I understand and confirm that :-

(a) the rule of the road in Bermuda is "KEEP LEFT"

(b) a cyclist should not look backwards whilst riding as it is a common cause

EXHIBIT 2(1)

Copy of J.B. Astwood & Son Ltd. Contract of Hire

25th July 1977

(continued)

of accidents.

(c) stopping at "STOP" signs is compulsory for all road users in Bermuda and for my own safety I must actually stop as other road users will expect me to do so.

(d) the legal speed limit in Bermuda is 21.7 m.p.h. or 35 km and it is unsafe to exceed it.

(e) road corners and curves should be taken carefully as many are sharper than they appear to be and likely to be very slippery when the road surface is wet.

(f) the approved safety helmet issued to me as part of the rental agreement, must be worn for my protection.

(g) I am capable of riding a pedal cycle.

(h) I have received adequate instructions in the operation of the controls, brakes, starting and stopping of the motor, that I have examined and assured myself that the brakes and the vehicle generally are in good working order before signing this declaration.

(i) I accept full responsibility for the vehicle and hereby agree to pay for any loss in respect thereof howsoever caused.

(j) the vehicle is insured for third party risks under the laws of Bermuda. I understand that such policy does not provide for cover for any pillion passenger. As I am the only person who is insured against Third Party risks whilst riding the vehicle and as it is illegal for anyone else to ride the vehicle, I agree to refrain from lending it to anyone.

(k) I understand that the Hirer is required to give notice to his insurance company as soon aspossible after any accident which may give rise to a claim, and I undertake to inform him of any accident in which I am involved immediately and in any event prior to the end of my period of hire.

(l) I further understand that I shall have no claim whatsoever for any physical, mental and material injury suffered by me as the result of my use of the aforementioned vehicle either against the Hirer or the Insurer. As any pillion passenger is also not insured, I agree to Indemnify the Hirer against any claims which may be brought against him by any such passenger

Signature Gabriel P. Marra

WEAR HELMET LOCK BIKE KEEP LEFT

EXHIBIT 2(1)
Copy of J.B. Astwood & Son Ltd. Contract of Hire
25th July 1977
(continued)

EXHIBIT 2(2)

COPY BERMUDA POLICE
STATEMENT FORM PS.22
PRATT

EXHIBIT 2(2)
Copy Bermuda Police Statement Form PS.22 Pratt
16th August 1977

BERMUDA POLICE

Date August 16, 1977 DIVISION OPERATIONS GARAGE

Time Commenced STATION TRAFFIC

STATEMENT FORM

P.S.22 Pratt will state that :

A 967

SIR,

On Friday the 5th of August, 1977, at about 2.30 p.m. at the Police Garage, I examined the above cycle, a Mobylette. The rider having alleged that a sticking throttle had been the cause of a Road Traffic Accident.

On examination I found that the throttle control on the handle bar was sticking in the open position. I removed the carburettor and control cable and found they were both in good working order; and that the fault was in the handle bar control. I stripped the control and you could see where the inner sleeve had been rubbing on the outer sleeve. With a fault of this nature the rider after accelerating would have to twist the control back to the close position, it would not close correctly of its own accord.

There were no other defects, the cycle had otherwise been in good working order.

P.S.22 K. Pratt

EXHIBIT 2(3)

Cycle Accident Police Report and declaration

8th November 1977

EXHIBIT 2(3)

CYCLE ACCIDENT POLICE REPORT AND DECLARATION

With the Compliments
of the
Commissioner of Police

(Stamped BERMUDA
POLICE
AUG 24 1977

ADMINISTRATION)

Police Headquarters
Prospect Bermuda.

XY No. 96472

RECEIPT

BERMUDA GOVERNMENT

DEPARTMENT Police

19th August 1977

RECEIVED FROM Conyers, Dill & Pearman
THE SUM OF Four dollars & eighty cents
ON ACCOUNT OF Traffic Abstract
Ref. 132/77

Signed. C.Trott
For ACCOUNTANT GENERAL

District WESTERN Parish Filing No.WAR. 10
Parish WARWICK Report No.

BERMUDA POLICE

ACCIDENT REPORT BOOK

OFFICER REPORTING

Name COUNSELL Rank P.C.
Station OPERATIONS If Witness Yes No

Assisted by

Name BRADSHAW Rank P.C. No.
Station CENTRAL If Witness Yes No

Accident Involving T 1231 and Livery A 967

Exact Location South Rd, War, junction Warwickshire Estates Rd.

Time 1850 Date 26/7/77 Injured Persons (Total) 2

Was it lighting up time? ☐ Yes ☒ No

By whom reported (Name & Address) Driver of taxi

Reginald Ming Telephone No. 40322

To whom reported OPS Time & Date 1850

Photographs taken ☒ Yes ☐ No

Was any offence committed? (☐ Yes ☐ No)

Ambulance called by OPS

Were Names and Addresses exchanged? ☐ Yes ☒ No

FULL PARTICULARS OF INJURED PERSONS

(1) Name & Address (Mr., Mrs. or Miss) Gabriel Pasquale [illegible] MARRA [illegible] New Jersey [illegible]

Age 48 Colour white Sex M

Whether Pedestrian, Driver or Passenger (if latter give vehicle)

Rider of A 967

Apparent Injury Serious laceration to right arm and right leg. ☒ Serious ☐ Slight

Wearing Crash Helmet ☒ Yes ☐ No

Conveyed to KEMH ☒ Detained ☐ Not Detained

If attending School, give name of school and Parish:—

FULL PARTICULARS OF INJURED PERSONS (Continued)

(2) Name & Address (Mr., Mrs. or Miss) Sondra

MARRA

Age 43 Colour white Sex F

Whether Pedestrian, Driver or Passenger (if latter give vehicle)

Pillion on A 967

Apparent Injury Laceration to left foot, head injury. ☒ Serious ☐ Slight

Wearing Crash Helmet ☒ Yes ☐ No

Conveyed to KEMH ☒ Detained ☐ Not Detained

If attending School, give name of school and Parish:—

7

DETAILS OF VEHICLES INVOLVED
VEHICLE 'A'

Class of vehicle LIGHT Make HOBYLITE

Registered Number A 967

Owner J. R. Sherwood

Address Front St
Hamilton

Driver Gabriel Samuel MARRA Age 42

Address c/o White Sands
Paget

Drivers Licence No..... Learners Permit No.....

D/L Correct?..... V/L Correct?.....

Insurance:— No..... Coy. Alliance

If not, give particulars .....

Produce Licences at .....Police Station

Vehicle examined Yes ☐ No ☐ By whom.....

.....

Direction of vehicle EAST Speed before Accident 20

Damage to vehicle Extensive bending to front

8

DETAILS OF VEHICLES INVOLVED
VEHICLE 'B'

Class of vehicle Estate Make Simca

Registered Number T 1231

Owner Reg Sims

Address St. John's Rd
Pembroke

Driver Reginald John Mine Age 42

Address Alexandra Cottage Berm...
Hill Rd Sandys

Drivers Licence No. 7281 Learners Permit No.....

D/L Correct? Yes V/L Correct?.....

Insurance:— No..... Coy. BF & M

If not, give particulars.....

Produce Licences at ..... Police Station

Vehicle examined Yes ☐ No ☒ By whom.....

.....

Direction of vehicle WEST Speed before Accident 0

Damage to vehicle Front offside wing
[illegible]

12

CONDITION OF ROAD

Road Surface ☒ Dry ☐ Wet ☐ Not known

Width of Road 23 ft. Is footpath available for Pedestrians? Yes

Character of Road
☐ Straight ☐ Not known
☒ Sharp Bend ☐ Blind Bend
☐ Slight Bend ☐ No Hill
☐ Hill top or hump back

Type of Junction
☒ 'T' Junction
☐ 'Y' Junction
☐ Cross Roads ☐ Roundabout
☐ Other Junction

Remarks (Any noticeable characteristics on the road which may have been a contributory cause of the accident).

Light ☒ Daylight ☐ Darkness

Weather ☐ Heavy Rain ☐ Light Rain
☒ Fine ☐ Not known

15

STATEMENT

NAME Reginald John Mine (BLOCK LETTERS) AGE 42

COLOUR Black OCCUPATION Taxi Driver

EMPLOYED BY Reg Sims

ADDRESS Beacon Hill Somerset

Tel. No. 4 0322 Driving Licence No. 7281

Vehicle No. T 1231 Insured by [illegible]

From..... To .....

States:— 9th Tuesday 26th July 1949

Alone (6.35 p.m.) was driving Simca Taxi T 1231 west along Southshore Road ~~Somba~~ Warwick West. I was accompanied by

14

STATEMENT

my wife Valerie who was sitting in the front passengers seat. I was travelling about 20 mPH. as I rounded a left hand bend opposite Mermaid West I saw the traffic on a living cycle. We were travelling East but were on the westbound lane. The cycle appeared to

15

STATEMENT

be out of control and was being ridden very erratically. I saw the cycle coming towards me and I came to a complete stop. It appeared as though the cyclist was trying to get back onto his correct side of the road. The cycle then left coming towards me and collided with

STATEMENT

the front offside of my Taxi. I was was stopped when he struck me. The cycle overturned and both riders fell to the ground. I got out of my Taxi to help and assist them. I noticed that the person riding the bike had a serious injury to his right arm. I immediately got

17

STATEMENT

on the Taxi radio and called for the Ambulance and the Police.

Recorded & me at scene 1845hrs 26/7/77 read over to maker and signed as true

David Graham Perry

Further statement made at the Police Headquarters at 1225 hrs 1/8/77
Reginald John [illegible] [illegible]
When I first saw the couple on the cycle they were on the [illegible] verge, in the same way as my vehicle. They left the verge and came onto the road in front of me. The rider seemed to

be trying to get control of the cycle. I spoke to the rider and he said "the throttle stuck. I tied a [illegible] tourniquet on his right arm to stop the bleeding. [illegible] [illegible] came by and said he was a doctor. He told me to tighten the tourniquet and the bleeding stopped.

Made by:- Gabriel Pasquale MARRA. Age:- 45 yrs
610, Hickory Street,
Washington Township. N.J
Occupation:- Cosmetologist
Time:- 1015 Date:- 4/8/77.

States:- My wife and I arrived in Bermuda on Sunday 24th July, 1977, for a weeks vacation. We hired a livery cycle on the Monday

through White Sands Hotel. It was an orange Mobylette No A967 with a double seat. I have ridden one in Bermuda three years ago also with my wife riding pillion. I hold a licence to drive a car in the States.

On Tuesday, 26th July, 1977, we were returning from Horseshoe Beach in

STATEMENT

[redacted] early evening my wife was riding pillion and I was driving. We had been driving around all day. I had noticed the throttle sticking about twice during the day, but I was able to throttle down while still on the straight part of the road.

Just prior to going into the first left hand bend I remember trying to throttle down, but it did not respond. I was forced to use the brakes, because I was on the bend. I tried to steer out of trouble. My wife was screaming "slow down, slow down". Instead of following to curve I went across the road onto the grass. There was no traffic

STATEMENT

ATTENDING OFFICERS REPORT

[redacted] in front of me or behind me at this point. Before I got onto the grass I tried to brake. I used both my left and then both together when I was on the grass. Still nothing happened. I was hoping I could dump the bike on the grass, but I could not do it. I came off the grass onto the right

ATTENDING OFFICERS REPORT

hand bend. As I came back onto the road I saw the car and I was heading ~~straight~~ towards it. I was unable to avoid hitting the front of the car. I hit it at an angle on the left side. I remember lying on the road with my wife on my left. Somebody was attending to my injured right arm. I remember being put in

the ambulance and taken to the hospital. We were both wearing our crash helmets at the time of the accident. My wife cannot remember anything about the accident.

The man who delivered the cycle to Mrs Reid, showed her how to ride them. He watched me ride it

before he left.

Gabriel P. Marra

Above statement was recorded by me at 10.15 hrs 4/8/77 at Cooper Ward, K.E.M.H. It was read over by the maker and signed as correct

D. Kennedy 1640

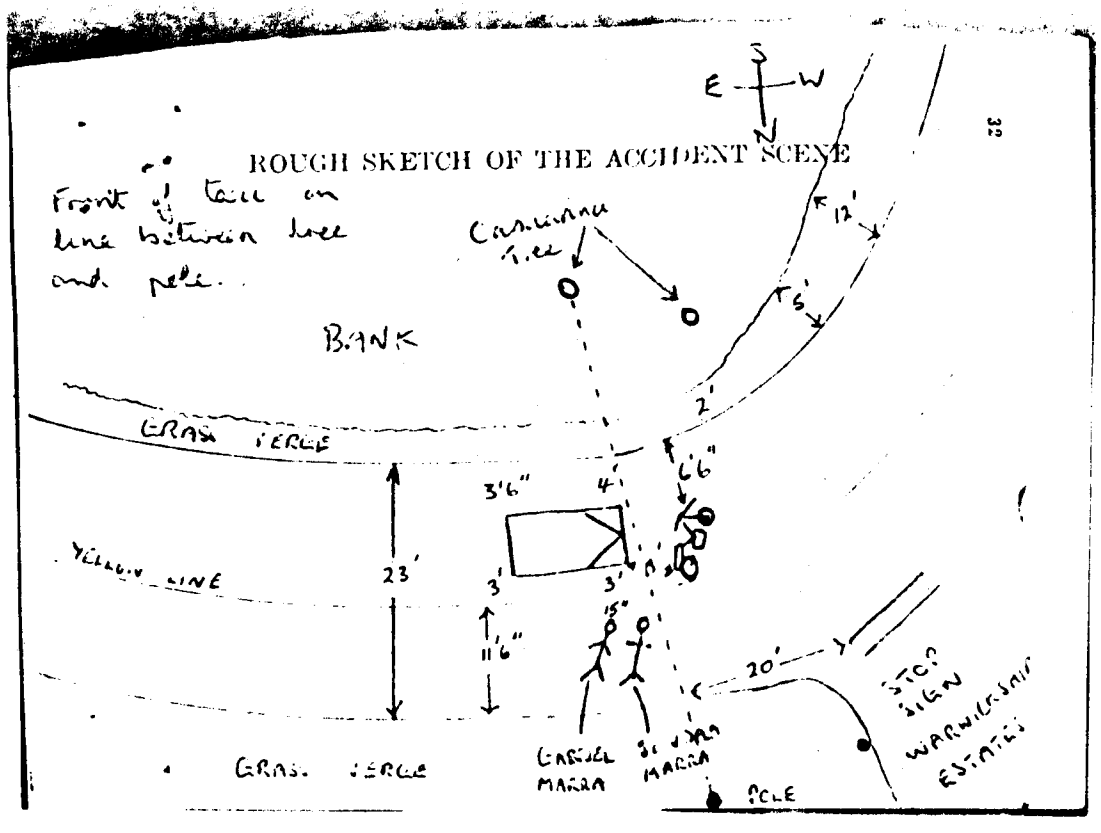

EXHIBIT 2 (4)

EXHIBIT 2(4)

Medical Report John D.Stubbs re: Gabriel Marra

17th August 1977

MEDICAL REPORT JOHN D. STUBBS RE: GABRIEL MARRA

JOHN D. STUBBS, M.D.(McGILL) B.SC.(OXON)
F.R.C.S. (CANADA) F.A.C.S.,
M.SC. MANAGEMENT (M.I.T.)
CONSULTANT SURGEON

WOODBOURNE HALL
GORHAM ROAD
PEMBROKE 5-32 BERMUDA
TEL: 809 (29) 5-1383

17 August 1977

Dr. Copeland
Central Avenue
Hillsdale, New Jersey
07642

Re: Mr. Gabriel Marra - Age: 48 yrs.
670 Hickory Street, Washington Township, N.J. 07675

Dear Dr. Copeland,

Gabriel was much more seriously injured than his wife, Sondra, in their road traffic accident on the 26th of July 1977. He was first seen by me shortly after 7.00 pm in the Emergency Department of the King Edward VII Memorial Hospital. He was alert and orientated and realistically concerned about salvage of his right upper limb. The right forearm was abducted at the elbow and there was a gross laceration with extensive muscle damage over the lateral and anterior aspects of the proximal portion of the right forearm and elbow. The right elbow joint was exposed and there was an exposed fracture of the proximal right radius some 3 cms distal to the radial tuberosity. He had intact median and ulnar nerve function but there was no radial nerve function distal to the site of injury. In addition to the major y-shaped laceration, there were multiple smaller cuts of the right forearm and there was amputation of the distal half of the terminal phalanges of the right long and ring fingers.

He had no evidence of neck or thoracic injuries but he did complain of some lower abdominal pain and tenderness. His right knee was bandaged and I was told that this covered "abrasions".

EXHIBIT 2(4)

Medical Report John D.Stubbs re: Gabriel Marra

17th August 1977

(continued)

An intravenous drip of normal saline was started and he was cross-matched for three units of blood. He proved to be O rh negative. His hematocrit on arrival was 41%, hemoglobin 14.3 grams.

X-rays of the chest showed no abnormality. X-rays of the abdomen in the supine projection showed both psoas shadows clearly and the intestinal gas pattern was unremarkable. X-ray of the pelvis was negative for fracture. X-ray of the right elbow demonstrated considerable soft tissue injury. There was a fracture-dislocation. The lateral epicondyle of the humerus was avulsed together with the capitellum and displaced 3.5 cms distally. The head of the radius appeared to maintain its articulation with the avulsed capitellum but there was an associated fracture through the proximal third of the shaft of the radius.

He was given morphine, 10 mgs, Maxalon, 10 mgs., premedication and taken to the operating room where his right elbow and forearm wound was excised and debrided. Extensive amounts of the proximal portion of the extensor muscles were devitalized and had to be excised in what proved to be a tedious and extensive debridement.

His final general anaesthetic was on the 12th of August when all his forearm, elbow and right thigh sutures were removed. Under the same anaesthetic a stove-pipe plaster of Paris cast was applied to the right lower limb and a dynamic splint was constructed for extension of the right wrist and digits.

A small supplementary laceration near the primary one on the right forearm was sutured secondarily under this anaesthetic with 4-0 Dermalon sutures.

He was discharged from hospital on the 16th of August and returned as an out-patient the following day for removal of his stove-pipe cast. He had an effusion. He had excellent right quadricepts function and full extension with flexion to 35°. He was instructed by our physiotherapist in right quadriceps drill and told slowly to mobilize his right knee but to avoid any acute flexion strain.

Arrangements have been made for his continuing care by Dr. Harold Kleinert in Louisville, Kentucky. I feel he will probably require a nerve graft and at the same procedure his right radial fracture can be reduced and fixed internally.

EXHIBIT 2(4)

Medical Report John D.Stubbs re: Gabrial Marra

17th August 1977

(continued)

Please let me know how he gets on.

Yours sincerely,

Sgd. John Stubbs

John D.Stubbs M.D., F.A.C.S.

JDS:sm

P.S. I failed to mention that he has closed fractures of the proximal phalanges of the right little and ring fingers. These have presented no problems but he has had remarkable pain on extension of his right little finger.

I have been in touch with Dr. Tom Wolff who is an Associate of Dr. Harold Kleinert. Dr. Kleinert will be away on holiday until 22 August 1977. Their telephone number in Louisville, Kentucky, is 502-582-1634 and their address is 350 E. Liberty Street, Suite 1001, Louisville, Kentucky 40202.

I will call again to bring Dr. Wolff up to date and obtain from him the time he wants to see Mr. Marra in Louisville.

Written note: See Dr. Tom Wolff on 29 August 1977 (Monday) 2.30 pm.

Prepare for operation 30 Aug. '77.

EXHIBIT 2(5)

Medical Report Dr.S.Gibbons re: Gabriel Marra

29th August 1977

EXHIBIT 2(5)

MEDICAL REPORT DR. S. GIBBONS RE: GABRIEL MARRA

JEWISH HOSPITAL
Louisville, Kentucky 40202

n/P

Marra, Gabriel

ADMITTED 8-28-77

CHIEF COMPLAINT: Status post open fractures of right radius and radial nerve injury.

HISTORY OF PRESENT ILLNESS: Mr. Marra is a 48 year old right handed trumpet player and hairdresser from New Jersey who was vacationing in Bermuda last month when he had a rented motorcycle lock in the accelerated state and was involved in a traffic accident on 7-26-77. He was seen thereafter and cared for by Dr. John Stubbs. The initial injuries included an open displaced fracture of the right capitellum and lateral epicondyle, as well as an open fracture of the proximal right radius and radial nerve laceration, probably in the region of the arcalde of Froshe. He also had amputation of the distal phalanges of the ring and long fingers of his right hand, multiple lacerations of the right forearm and multiple lacerations of the right distal anterior quadriceps and in intra-articular laceration into the right knee joint, without fractures. He was treated initially with irrigation and debridement, reduction of the capitellar fracture to the shaft of the humerus and fixation with two K-wires. He also underwent extensive debridement of some of the proximal forearm extensor musculature and gross reduction of the right radial fracture. It was noted at that time that the radial nerve was in discontinuity, due to the crushed state and the extensive trauma in the region. Primary anastomosis was not felt to be feasible. The nerve ends were approximated with 6-0 nylon and hemiclips were applied to the nerve ends for future reference. The other wounds of the forearm and hand were debrided and closed primarily. The stumps of the amputated phalanges of the ring and long fingers were closed. The lacerations of the right leg were debrided. The knee joint was irrigated copiously and closed. The patient, thereafter, was placed in Intensive Care, where he remained for a number of days. He convalesced without significant consequence. He underwent numerous anaesthetic operative returns in the immediate post trauma period for dressing changes and attempts at reduction of his right radius,

EXHIBIT 2(5)

Medical Report Dr. S.Gibbons re: Gabriel Marra

29th August 1977

(continued)

although it is noted that it was understood from the first that open reduction and internal fixation would be required at some point. He was discharged from the Bermuda Hospital on August 16 and returned to this Country for future care by our personnel. It was the impression of the original physician that open reduction and probable plating of the radius, as well as radial nerve grafting or secondary repair would be necessary. The patient was transferred to us with a long-arm cast in place, with outriggers for dynamic extension of the fingers and thumb in place. He was also actively participating in a physical therapy program to rehabilitate the right lower extremity injury, where he had developed significant tightness.

PAST MEDICAL HISTORY: The patient has been essentially in good health. He has had a history of "gout" involving his spine and legs, but has had no acute flare-up of this arthritic pain in a number of years. He has been maintained on Allopurinol and Zyloprim in the recent past, but has not had his uric acid level checked in quite some time. He also gives a history of having taken something to keep his cholesterol in check, but does not recall what the medication was. He has not taken it in a long period of time. The patient denies any history of hospitalizations in the past, except for operative repair of bilateral inguinal hernias approximately two years ago. He gives no history of allergies to any medications. He has been given blood transfusions on several occasions, most recently with the last accident, and has had no reactions.

FAMILY HISTORY: Essentially unremarkable.

REVIEW OF SYSTEMS: Negative. The patient states he is having little, if any, pain at the present time. He is presently ambulatory.

PHYSICAL EXAMINATION: The patient is a fairly well developed, well nourished white male who is alert and cooperative, and a good historian, and in no acute distress.

HEENT EXAM: Reveals a normocephalic cranium. The eye exam is within normal limits. The ears are clear. The mouth is within normal limits.

NECK EXAM: Reveals the neck to be supple. No limitation or pain is noted on extremes. There is no spasm noted.

CHEST: Symmetrical in expansion and clear to percussion and auscultation.

EXHIBIT 2(5)

Medical Report Dr.S.Gibbons re: Gabriel Marra

29th August 1977

(continued)

HEART: Regular rate and rhythm, without murmurs, rubs or gallops noted.

ABDOMEN: Essentially within normal limits, although there is distinct fullness in the right lower quadrant, compatible with cecal faces. There is no tenderness or rebound. Bowel sounds are physiologic.

BACK EXAM: Reveals no tenderness to palpation. There is no diastasis or sinus processes at any point. Range of motion is good.

EXTREMITIES: The left upper and lower extremities are within normal limits. The right lower extremity has multiple well healed jagged lacerations about the right distal quadriceps region. There is no tenderness or swelling in the joint itself. The right quadriceps had good active extension to zero degrees. Flexion is possible to 60 to 65 degrees, with tightness in the quadriceps at that point. Distal neurovascular status in the right lower extremity is within normal limits. The right upper extremity reveals well healed lacerations about the lateral aspect of the distal humerus over the capitellum and down over the forearm in the region of the proximal radius. There is a palpable K-wire in the lateral epicondyle of the humerus. Elbow flexion and extension can be carried out actively and passively without significant pain. There is a well healed amputation stump at the PIP level of the right ring and long fingers. As far as motor exam is concerned, biceps and triceps musculature are intact. There appears to be active brachial radialis, extensor carpi radialis longus and probably brevis present. There is no active thumb extension or finger extension possible no ulmar wrist extansor is present. There is numbness to sensation in the first web space dorsally. Ulnar and median nerve testing is within normal limits.

INITIAL IMPRESSION: 1. Status post multiple trauma, with radial nerve injury and fracture of proximal right radius.

2. Radial nerve laceration.

PLAN: X-ray evaluation at the present time, probable OR next week for open reduction and internal fixation of right radius and radial nerve exploration, with possible nerve grafting. ? Tendon transfers in the future.

Dr. Steve Gibbons

SG: mdd
D & T: 3-29-77N

DRS.KLEINERT, K/A/L/W

EXHIBIT 2(6)

MECICAL REPORT DR.
KAVOLUS RE: GABRIEL MARRA

EXHIBIT
2(6)
Medical Report
Dr. Kavolus
re: Gabriel
Marra

JEWISH HOSPITAL
Louisville, Kentucky 40202

30th August
1977

G/R MARRAH, Gabriel

DATE OF SURGERY: 8/30/77

SURGEON: Wolf ASSISTANT: Kavolus

PREOPERATIVE STATUS & DIAGNOSIS: The patient is a 46-year-old white male who is now approximately one month status post motorcycle automobile accident. Sustained multiple trauma, specific injuries include: 1) Open comminuted fracture of the right distal humerus (capitulum and lateral epicondyle). 2) Open fracture, right proximal radius. 3) Extensive, untidy laceration of the anterior elbow. 4) Division of the radial nerve just proximal to the arcade of Froshe. The patient is status post multiple debridements. Status post ORIF comminuted fracture of the right distal humerus using two smooth K wires.

POSTOPERATIVE STATUS & DIAGNOSIS: 1) Same. 2) Status post ORIF of the right proximal radius, plate and screw fixation. 3) Status post nerve graft to right radial nerve (sensory and motor fascicles). Donor - left seral nerve.

INDICATIONS: This 46-year-old male, status post multiple trauma to right upper extremity. The patient has manifest false motion, proximal right radius. X-ray revealed displaced fracture of the proximal radius. Absent radial nerve function, secondary to laceration just proximal to the arcade of Froshe. The patient manifested absent thumb extension and abduction, finger extension. The patient has present weak wrist extension, brachial radialis motion is intact, as demonstrated by supination and elbow flexion, brachial radialis contracts on flexion against resistance.

OPERATION PERFORMED: ORIF right proximal radius, plate (Semitibular) and screw fixation. Autogenous nerve graft to right radial nerve. Donor site - left seral nerve. Application of posterior plaster splint with elbow in flexion and forearm in supination.

OPERATION: Under satisfactory auxillary block anesthesia, the right upper extremity was prepped and draped in the usual sterile manner. Due to the

EXHIBIT 2(6)

Medical Report Dr. Kavolus re: Gabriel Marra

30th August 1977

(continued)

fact that inscision was anticipated to be quite high on the arm, a sterile tourniquet and webril were applied following draping of the patient. Following this, the arm was exsenquinated and the tourniquet inflated to 250 mm. of mercury pressure. A longitudinal lazy S incision was made over the anterolateral aspect of the right distal arm and proximal forearm, following the old incision. Skin and subcutaneous tissue were incised sharply, developing medial and interal flaps. Immediately beneath the subcutaneous tissue, dense (illegible) tissue was encountered, this was dissected very cautiously,(illegible) branch of the radial nerve being identified within the mass of scar tissue. The extensor mobile wad was mobilized, lying directly below was the displaced fracture of the radius. The radius was noted to be rather well advanced and healing (one month post) and a significant amount of callous was encountered. With careful dissection, what was believed to be the deep branch of the radial artery was identified lying within a fibrous tunnel. Due to the fact that the patient had previous and extensive debridement, it is reasonable to suppose that a good portion of the supinator and mobile extensor wad was excised. Hence, no definitive supinator was ever identified positively. Following this, dissection was continued proximally, lying within a mass of scar tissue of the radial nerve and its branches proximal to the arcade of Froshe were identified tentatively. These nerve branches as well as the radial nerve proper were immobilized.

Attention was then directed to the radius, the periosteum was incised longitudinally and immobilized using a periosteal elevator. We encountered the proximal radial fracture, devoid of motion, and the fragments approximated each other in a side to side attitude. The healing fracture site was taken down using rongeur and a curette. Both fracture ends were freshened up, with distal traction and supination of the forearm (distal radius) reduction was accomplished. Several plates were tried and placed, it was apparent that the semitibular plate provided the best fit. Hence a 5-0 tibular plate was chosen, applied to the radial fracture fragments and held with baby Lane clamps. Using a 3M drill, holes were placed and the reduced fracture was fixed using a 5-0 sideplate and screws ranging from 22 to 24 mm. in length.

At this juncture, the wound was irrigated and then packed, tourniquet time nearing two hours,

accordingly it was released. Attention was then turned to the left seral nerve which had been sterilely prepped and draped in the usual manner. Through multiple small transverse incisions along the posteriolateral aspect of the left calf, approximately 25 cm of seral nerve was harvested for later use as autogenous graft. These wounds were subsequently irrigated and closed with 6-0 interrupted nylon suture. Sterile dressing was applied to the left lower extermity, followed by an Ace wrap bandage.

Following approximately 30 minutes of unimpeded aterial flow to the right upper extremity, tourniquet was reinflated after hemostasis was obtained. Under the operating microscope, autogenous nerve grafts were placed in position. Three seral caval grafts were placed, roughly 8 to 10 cm. in length. Motor and sensory branches of the radial nerve were tantatively identified and reanastomosed using seral nerve graft, position via 10-0 interrupted nylon suture (approximately one, occasionally two sutures) per anastomosis. In addition, the lateral anti-brachial cuteneous nerve was tentatively identified and reanastomosed using a saral nerve caval graft.

Following this, the wound was irrigated with Saline and Neomycia solution. The deep fascia was reapproximated as far as possible using 5-0 interrupted Dexon. The skin was closed utilizing 6-0 interrupted nylon suture. At this time the tourniquet was again released and anastomosis obtained. Sterile compressive dressing was applied, followed by the application of a posterior plaster splint, secured with an Ace bandage. The patient tolerated the procedure well and was taken to the Holding Room in satisfactory condition.

One Hemovac drain was placed in the right forearm, this was due to rather impressive bleeding from our initial dissection. The Hemovac drain was sutured in place using 6-0 interrupted nylon.

MK/tr
DT: 8/30/77
DD: 8/30/77 N

MICHAEL KAVOLUS, M.D.

KLEINERT, KUTZ, ATASOY,
LISTER, WOLFF

EXHIBIT 2(7)

Medical Report Dr. Joseph Lenehan re: Gabriel Marra

7th September 1977

EXHIBIT 2(7)

MEDICAL REPORT DR. JOSEPH LENEHAN RE: GABRIEL MARRA

JEWISH HOSPITAL
Louisville, Kentucky 40202

d/s MARRA, GABRIEL

DISCHARGE DIAGNOSIS: Status post multiple trauma with radial nerve injury and fracture of proximal right radius. Radial nerve laceration.

OPERATIONS: Open reduction, internal fixation, right radius with nerve graft to right radial nerve, using left sural nerve as a donor.

HISTORY: 48-year old male who was involved in an automobile accident on 7-26-77 in Bermuda, resulted in multiple injuries to the right arm with right radial nerve and right radius fracture. After initial treatment, the patient was transferred here for evaluation and examination. He was found to have fractured radius which needed open reduction, internal fixation and radial nerve deficit.

LABORATORY DATA: Included normal chest x-ray Right forearm indicated fracture of the proximal right radius over-riding the fracture element. Elbow x-ray was unremarkable, except for the above findings. SMA 13 was negative. CBC normal.

HOSPITAL COURSE: The patient was taken to the Operating Room on 8-30-77 at which time, open reduction, internal fixation right proximal radius with a simitubular plate and screw fixation autogenous nerve graft to the right radial nerve was performed used left sural nerve as a donor site.

Postoperatively, the patient was immobilized in a plaster of Paris splint and remained afebrile throughout the hospital course. He had an outrigger applied on 9-2-77 and began active motion. He was discharged 9-7-77 with appointment for follow-up care.

JL:PE
D: 9/7
T: 9/7 N

JOSEPH LENEHAN, M.D.

DRS. KLEINERT, KUTZ, ATASOY, LISTER & WOLFF

EXHIBIT 2(8)

MEDICAL REPORT DR. THOMAS WOLFF RE: GABRIEL MARRA

EXHIBIT 2(8) Medical Report Dr. Thomas Wolff re: Gabriel Marra 23rd January 1978

DOCTORS KLEINERT, KUTZ, ATASOY & LISTER
SURGERY OF THE HAND

Harold E.Kleinert, M.D.
Joseph E.Kutz, M.D.
C.Atasoy, M.D.
Graham D.Lister, M.D.

1001 DOCTORS OFFICE BUILDING,
250 EAST LIBERTY STREET
LOUISVILLE, KENTUCKY
40202
PHONE: (502) 582-1634

23rd January 1978

Eric H.Wolf, M.D.,
State of New Jersey,
Department of Labor and Industry,
Division of Disability Determination,
P.O. Box 649
Newark, NJ 07101

Re: Gabriel P. Marra, 670 Hickory Street
Washington Township, N.J.
A/N: 135-24-7963

Dear Doctor Wolf:

Please find enclosed the history and physical, operative note and the discharge summary on Mr. Gabriel Marra. We last saw Mr. Marra on 10-27-77 at which time he was seven weeks post-open reduction and internal fixation of his right proximal radius fracture and nerve graft to his radial nerve. At that time elbow range of motion was 45^{o} of flexion to 120^{o} of flexion. His x-ray revealed the radius fracture to be well healed and pronation was limited to the neutral position. At that time he was considered for a possible tendon transfers in approximately three to four months at which time a ENG would be obtained to determine the quantity of the re-innervation of the radial nerve graft. He is maintained in a radial nerve splint and was continued on vigorous physical therapy for pronation elbow motion.

We subsequently have been notified that Mr. Marra is now a patient of Doctor William Littler in New York who is contemplating tendon transfer surgery at the present time. We would refer you at this time to Doctor Littler for the further care of this patient.

Sincerely yours,

TWW:lg
Enclosures

(Sgd) Thomas W. Wolff
Thomas W.Wolff, M.D.

EXHIBIT 2(9)
Medical Report Dr. Roy Meckler re: Gabriel Marra
9th February 1978

EXHIBIT 2(9)

MEDICAL REPORT DR. ROY MECKLER RE: GABRIEL MARRA

ROY J. MECKLER, M.D.
NEUROLOGY AND ELECTROMYOGRAPH
SUITE 016
THE DOCTOR'S OFFICE BLDG.
250 E. LIBERTY ST.
LOUISVILLE, KY. 40202
Telephone: 569 - 6177

#3957-78

Gabriel Marra
48 year old male February 9, 1978

The patient was referred in order to evaluate right radial nerve lesion. An EMG examination was obtained of the right upper extremity.

The following muscles were sampled :

Muscle	Insertional Activity	Fibs.	Fascic.	Interference Pattern
Triceps	Normal	0	0	Full with normal motor unit.
1st dorsal interosseous	Normal	0	0	"
Abductor pollicis brevis	Normal	0	0	"
Finger extensors	Normal	0	0	Question of a single voluntary unit vs. recording of units at a distance
Brachioradial	Normal	0	0	Absent
Wrist extensors	Normal	0	0	Absent

Impression: The absence of voluntary units in brachioradial and wrist extensor groups would be compatible with complete denervation in partial radial distribution. There was a question of single voluntary units maintained in finger extensor group. Needle insertion was performed in wrist extensor group with stimulation at supraclavicular fossa and radial groove with evoked motor units recorded. However,

it should be noted that stimulation of alnar nerve at the elbow also resulted in recordable units of higher potential in wrist extensor group and thus may represent technical artefact.

(Sgd) R.J. Meckler

Roy J. Meckler, M.D.

RJM:dgh

CC: Harold Kleinert, M.D.

EXHIBIT 2(9)

Medical Report Dr. Roy Meckler re: Gabriel Marra

9th February 1978

(continued)

EXHIBIT 2(10)

EXHIBIT 2(10)

MEDICAL REPORT J. WILLIAM LITTLER RE: GABRIEL MARRA

Medical Report J.William Littler re: Gabriel Marra

26th February 1979

J. WILLIAM LITTLER, M.D.
14 East 90th Street
New York, N.Y. 10028

212 ATwater 9-1121

February 26, 1979

Conyers, Dill & Pearman
Bank of Bermuda Building
Hamilton 5-31, Bermuda

Attn: Mr. Paul D. Danks

Re: Mr. Gabriel P. Marra
Ref: PDD/jm/71 228 X

Dear Mr. Danks:

On the 16th of December of 1977 at the request of Dr. Lois Copeland, I saw Mr. Gabriel Marra who suffered a severe traffic accident on the 26th of July of 1977 while in Bermuda. A fracture of the distal humerus and proximal radius with soft tissue damage and a loss of radial nerve continuity severely disabled his right upper limb.

At the time of my seeing him, the fractures were healed and a nerve graft had been done by Dr. Kleinert's service in Louisville, Ky on the 30th of August of 1977. This graft was done in an effort to restore radial nerve continuity and to regain active wrist and digital extension. The hand was being supported by a splint, at the time of my seeing him. The basal finger joints were somewhat stiffened in extension and there was

EXHIBIT 2(10)

Medical Report J. William Littler re: Gabriel Marra

26th February 1979

(continued)

no active wrist or thumb or finger extension.

I saw him again on the 13th of January. There had been some improvement in the flexibility of the basal joints of the fingers but it seemed to me that little evidence of regeneration was within the nerve graft. It was my opinion that appropriate muscle-tendon transfers would in all probability be needed to restore useful function to the hand. I suggested that he return to Louisville for an appraisal of the nerve surgery and following this the consensus was that tendon transfers should be done.

Mr. Marra was admitted to the Roosevelt Hospital on the 2nd of March of 1978 where on the following day the pronator teres was mobilized with some difficulty in the proximal portion of the forearm and transferred to the major extensor tendon of the wrist. The flexor carpi ulnaris was also mobilized and transferred to the dorsum of the distal forearm where it was united to the thumb and finger extensors. These two procedures were delegated to restore active wrist and digital extension. His postoperative course was uncomplicated and on the 29th of March immobilization was removed and all sutures were removed from nicely healed incisions. He was seen again on the 12th and 26th of April, the 24th of May when hand function was considerably improved. On the 19th of July, he was doing well considering the extent of his injury. However, major disabilities persisted manifested by limited rotation of the forearm and with a grip strength of but 10 pounds in the right hand compared to 60 on the left. However, the fingers could be extended reasonably well and the wrist no longer dropped into flexion.

Mr. Marra was last seen on the 12th of December of 1978. Although the hand has been greatly improved, the residual disability is a major one and this will be permanent This disability is manifested by limited rotation of the forearm, limited wrist stability resulting in a weakened grasp, loss of independent thumb and finger extension and sensory impairment over the dorso-radial aspect of the hand all secondary to the fractures and soft tissue losses and specifically the destruction of the radial nerve which normally provides extensor force for the wrist and digits.

I have asked that he return for a follow up examination in approximately three months.

Yours very sincerely,
Sgd. Wm. Littler, M.D.
J. William Littler, M.D.

JWL/fh
Enc.

EXHIBIT 2(11)

MEDICAL REPORT J. WILLIAM LITTLER RE: GABRIEL MARRA

EXHIBIT 2(11) Medical Report J. William Littler re: Gabriel Marra 10th July 1979

J. WILLIAM LITTLER, M.D.
14 East 90th Street
New York N.Y. 10028

212 ATwater 9-1121

July 10, 1979

Conyers, Dill & Pearman
Bank of Bermuda Building
Hamilton, 5-31, Bermuda

Re: Mr.Gabriel P. Marra
Ref: PDD/Jm/711228 x

Gentlemen:

Mr. Gabriel P. Marra was referred to me on the 16th of September of 1977 for elective surgical help following a traffic accident in July of 1977 when he suffered a severe fracture of his right humerus and radius with soft tissue destruction of the arm, elbow and proximal forearm which also involved an extensive loss of the radial nerve. You have the details of the primary surgery and later Mr. Marra was seen by Dr. Harold Kleinert because of a complete paralysis of the musculature responsible for the extension of the wrist and digits. An attempt was made to recover function through an intercolated nerve graft but it was ultimately necessary to transfer muscle tendon units to compensate for the paralytic problem.

I first operated on Mr. Marra on the 3rd of March of 1978 and at that time with some difficulty because of the local destructive wound, the pronator tarres was isolated and sutured into the major wrist extensor. At the same operation, the flexor carpi ulnaris was transferred into the thumb and finger extensors. His postoperative course was uncomplicated and a much improvement in hand function resulted. Subsequently, it was my opinion that further improvement could be gained through additional work. On the 15th of May, Mr. Marra was readmitted to the Roosevelt Hospital where on the following day, the superficial flexor of his partially amputated ring finger was detached and transferred in an appropriate fashion to reinforce wrist extension. The transferred tendon was firmly united into the base of the third metacarpal in line with the major wrist extensor. Another transfer was done whereby the palmaris longus muscle

EXHIBIT 2(11)

Medical Report J.William Littler re: Gabriel Marra

10th July 1979

(continued)

tendon unit was detached and transferred into the short extensor of the thumb to provide better lateral control. A troublesome nail fragment at the stump of the partially amputated long finger was excised.

Again, his postoperative course was uncomplicated and on the 13th of June, all sutures were removed from nicely healed incisions. He was last seen on the 29th of June when instructions were given for the exercising of the transferred muscle tendon units. In addition to the substantial injury in the region of the right arm, elbow and forearm which has resulted in some limitation of elbow flexion extension and forearm rotation, the total paralysis of the extensor musculature for control of the wrist, thumb and fingers despite the limited functional restoration made through the tendon transfers, a major hand disability persists. This is complicated further by a loss of sensibility over the radio-dorsal aspect of the hand and subtotal amputations of the long and ring fingers.

The nature of this injury has deprived Mr. Marra of the refined and essential movement so necessary to his profession. He does have a severe permanent partial disability of his right upper limb with a major functional loss reflected in the hand. However, it is my opinion that no further major surgical work will contribute significantly to further functional gains.

Yours very sincerely,

Sgd. J.Wm.Littler, M.D.

J. William Littler, M.D.

JWl/fh

EXHIBIT 2(12)

MEDICAL REPORT DR. JOHN STUBBS RE: SONDRA MARRA

EXHIBIT 2(12)
Medical Report Dr. John Stubbs re: Sondra Marra
17th August 1977

JOHN D. STUBBS, M.D. (McGILL) D.SC.(OXON)F.R.C.S. (CANADA) F.A.C.S., M.SC. MANAGEMENT (M.I.T.)

CONSULTANT SURGEON

WOODBOURNE HALL
GORHAM ROAD
PEMBROKE 5-32,BERMUDA
TEL: 809 (29) 5-1383

17 August 1977

Dr. Copeland,
Central Avenue,
Hillsdale
New Jersey 07642

Re: Mrs. Sondra Marra - Age: 43 yrs.
670 Hickory Street, Washington Township, N.J. 07675

Dr. Copeland:

Your patient, Sondra Marra, was involved, with her husband, in a road traffic accident in the early evening of 26 July while vacationing here in Bermuda. When first seen by me in the Emergency Department of the King Edward VII Memorial Hospital shortly after her arrival, she was drowsy but was quite alert when roused but was totally disoriented as to time and place. She had a bleeding laceration above and behind the left ear and there was blood in the left external ear canal. She had extensive abrasions of the left elbow and a laceration of the dorsum of the left foot. There was a v-shaped flap based distally and laterally. Beneath this flap the tendons were exposed but none were severed. There was no evidence of neck or trunk injury.

Her blood pressure was 100/60 and her pulse 76 and regular. X-rays of the skull, left knee, left tibia and fibula and left ankle showed no fracture. X-rays of the chest showed no abnormality. Her hemoglobin was 14.3 grams, hematocrit 41%.

Apart from her drowsiness, disorientation and amnesia, there were no positive neurological signs.

After a brief period of observation during which all her vital signs remained stable, she was taken to the operating room and under a brief general anaesthetic her lacerations were debrided and washed with copious amounts of saline and sutured. The left foot

EXHIBIT 2(12)

Medical Report Dr. John Stubbs re: Sondra Marra

17th August 1977

(continued)

laceration was closed with interrupted subcuticular 5-0 Dexon and the left parietal scalp laceration was closed with interrupted 4-0 Dermalon.

She was put on Dilantin 300 mgs. daily and for the next few days was nursed with her left foot elevated. She was given aspirin, 600 mgs. twice daily to reduce the risk of thromboembolism.

Her subsequent course has been entirely satisfactory but her amnesia and disorientation persisted for approximately four days post-injury. She still has some slight intellectual impairment but this is now only revealed on formal testing such as the 100-7 test where, in spite of repeated explanation she insisted that the first answer was 103. She only really got started with the aid of pen and paper.

There was some slight necrosis in the wound margin on her left foot and a swab taken on the 9th of August provided a very scanty growth of staph aureus. As there was no obvious clinical infection, antiobiotics were withheld.

Her scalp sutures had been removed on the 5th of August and on the 13th of August she was discharged to continue her convalescence in the private home of a friend.

She returned to my office on the 16th of August when she was bright-eyed and smiling and only complained of being easily fatigued and occasionally suffering some very transient light-headedness.

Her left foot wound was healing slowly but satisfactorily.

I suggested she continue her Dilantin 300 mgs. daily, that she not drive a car on her return home and that she get in touch with you with this letter soon thereafter.

The unusual feature in her case was the profound disorientation in spite of being so bright-eyed and alert when roused soon after her injury.

Thank you for taking on her continuing care.

Yours sincerely,
Sgd. John Stubbs
John D.Stubbs, M.D., F.A.C.S.

JDS:sm

EXHIBIT 2(13)

MEDICAL REPORT DR. COPELAND
RE: SONDRA MARRA

EXHIBIT 2(13)
Medical Report Dr. Copeland re: Sondra Marra
31st July 1978

LOIS J. COPELAND, M. D.
47 Central Avenue
Hillsdale, New Jersey 07642

Telephone: 664-1212

July 31, 1978

TO WHOM IT MAY CONCERN

This is to inform you that I have followed Mrs. Sondra Marra during her at-home convalescence following her accident in Bermuda on July 26, 1977. Upon her return home she was noted to have diminished memory, diminished attentiveness and easy fatigue. She was on Dilantin 300 mgs daily for seizure prophylaxis. Because of the severity of her head injury, she underwent Brain Scanning on 8.4.1977, which was normal. Skull films taken on 9/2/77 were also normal. She has undergone a slow recovery process and as of this date still suffers from diminished memory, decreased concentration ability and easy fatigubility. She had had no seizure activity and is no longer on Dilantin. Her symptoms are less severe than they were initially, but they appear to be resolving at a very slow rate.

Sincerely,

Sgd. Lois J. Copeland M.D.

Lois J. Copeland, MD.

IN THE PRIVY COUNCIL No. 10 of 1981

ON APPEAL

FROM THE BERMUDA COURT OF APPEAL

BETWEEN:

GABRIEL MARRA	First Appellant (First Plaintiff)
- and -	
SONDRA MARRA	Second Appellant (Second Plaintiff)
- v -	
J.B.ASTWOOD & SON LIMITED	Respondent (Defendant)

RECORD OF PROCEEDINGS

KINGSFORD DORMAN
14 Old Square
Lincoln's Inn
London WC2 3UB

Solicitors for the Appellants

PHILIP CONWAY THOMAS & CO.
61 Catherine Place,
London SW1E 6HB

Solicitors for the Respondent