

THE HIGH COURT

2001 No. 15543P

BETWEEN

NORMAN GORDON

PLAINTIFF

AND

LOUTH MOTORCYCLE RACING CLUB

DEFENDANT

Judgment delivered by Ms. Justice Clark on the 13th. day of June 2008

1. This action involves a claim for damages for personal injury sustained by the plaintiff Norman Gordon while a competitor in a motorcycle road race which took place on the 27th June, 1999. The race was one of a series of races which together make up the Motor Cycling Road Race Championship of Ireland. It was organised by the defendants who are experienced road racing organisers and took place on a closed off section of the main Dublin to Belfast road just outside Dundalk in County Louth. The plaintiff suffered injury when his bike lost control and mounted the Ballymascanlan roundabout where he was thrown from the bike hitting his leg against an unguarded kerb on the opposite side of the roundabout.

2. Norman Gordon alleges that his injuries were sustained because of the negligence of the promoters who, in breach of their own rules permitted a support rider confined to riding a 750cc motorcycle to compete on a 1000cc motorcycle. He alleges that this novice road racer did not have the experience to control such a powerful motorcycle and that his lack of experience contributed to his cutting across the plaintiff's path thus causing the plaintiff to crash. He also alleges that the organisers of the course failed to insulate or otherwise protect the kerb of the left side of the roundabout thus creating an unnecessary risk to competitors in the race at a known and anticipated danger point.

3. All matters were in dispute and the case ran over seven days during which time little was agreed between the parties. It was apparent that all witnesses were deeply and passionately involved in the sport of motorcycle road racing. This passion sometimes coloured the evidence creating confusion and discord where none was necessary. At the end of the day, the evidence of some witnesses was more credible than that of others and was more consistent with the evidence of the plaintiff than with the evidence given by some of the defence witnesses.

4. There was no issue of *volenti* or of the plaintiff's entitlement to bring these proceedings and the case was presented as a simple negligence action. An enormous amount of evidence dealt with issues which ultimately were not relevant to the cause of the plaintiff's injury which was the failure to protect an area of kerbing but dealt rather with whether a support rider should have been permitted to ride a 1000cc bike in an open road race.

The evidence

5. Norman Gordon is a motorcycle enthusiast and has been involved in road racing motorcycles for many years. He comes from outside Ballymena and is now approaching his forty fifth birthday. He is a self employed plasterer running a successful business. He was thirty six years old on the day of the accident which occurred on the 27th June, 1999, and was a holder of a Super A licence which is the highest category of road race licence permitting the holder to compete in all international motor cycle road racing events apart from the Isle of Man TT Race.

6. Up to the date of the accident he had been involved in national road racing as a competitor and had won or been well placed in a number of races. Since his injury he has been unable to compete but has maintained his keen interest in the sport by attending road races and has been a clerk of the course in mid Antrim since 2001. It was apparent in hearing the plaintiff that he is knowledgeable and experienced in how road races are organised, how records are kept and how safety is maintained.

7. The plaintiff accepts that motorcycle road racing is a dangerous sport and accepts that in the year 2000 there were several fatalities among competitors at motorcycle racing events. Joey Dunlop the Irish hero of motor biking and Gary Dynes, both of whom competed in the race in which the plaintiff was injured, died in road races that year. It was accepted that there have been no fatalities on the Ballymascanlan course in the twelve years of its life. The plaintiff's evidence was that as bikers take enormous risks in organised races it is up to the organisers to engage in safety measures and to identify areas where accidents are likely to occur and to minimise those risks

8. The rules of motor cycle road racing are governed by the Motorcycle Union of Ireland which covers both parts of Ireland. There is an Ulster Centre and a Southern Centre, but the rules and requirements regarding racing are uniform throughout Ireland. It was apparent that there has been a determined effort in recent years to work towards greater safety in the sport of motor bike racing on roads.

9. The plaintiff gave evidence of a joint meeting of both branches held in the Ballymascanlon Hotel in January, 1999 and convened by Ivan Davidson who gave evidence. There were four representatives from the Ulster branch and four from the Southern branch at the meeting where the Road Race Championship for 1999 was discussed. It was agreed and confirmed by minutes kept by Ivan Davidson and produced at the trial, that the limit to the size of bike to be ridden by a class of novice road racers described as "support riders" would be 750cc. This restriction was introduced in an attempt to minimise an alarming number of serious injuries and fatalities sustained by novice road race riders in the previous year. Ivan Davidson and the plaintiff who were present at the meeting believed that the newly introduced rule as to limiting support riders to 750cc applied immediately.

10. Damien Mulleady, the competitor who the plaintiff blamed for causing his accident was discussed at the meeting. He was one of a significant number of riders who were upgraded through the various levels of grades of riders. Specifically he was upgraded to the 750cc class in the clubman short circuit grade.

11. Most motor bike riders begin their competitive riding on closed tarmac circuits on courses which are purpose built and designed for racing and are not open to ordinary traffic. This racing is known as short circuit racing. A clubman is a level of rider in short circuit racing and it was clear from the minutes presented that in the clubman short circuit grade, there were several classes starting with under 200cc and working up to the 750cc class.

12. The next level of racing is on public roads which are closed off for the duration of the road race. Local committees of the Motor Cycle Union of Ireland assess and upgrade short circuit riders to road race riders. To be eligible for road racing the first requirement is a grade A licence. The first class of upgraded riders in road racing is a support class rider. There are many categories of road race

confined to specific engine capacity limitations and experience of rider. There are open races where very powerful motor bikes with experienced riders compete and there are support class races. Although the defendant's case was that Damien Mulleady was a very experienced open road racer, Mr. Mulleady himself did not make the same case and it became clear that although he owned several very powerful bikes, he had very recently commenced road racing as opposed to short circuit racing. He was therefore not an experienced road racer.

13. Much of the case was taken up with conflicting evidence as to whether the ruling at the Ballymascanlon Hotel in relation to support riders was of binding effect before its ratification at the annual congress and what exactly was meant by the term *support rider*. Mr. Gordon's interpretation of a support rider is a novice rider in road races. His evidence was that experienced riders are not permitted to ride in support races and support riders are not permitted to ride in open races with bikes bigger than 750cc. In order for a support rider to compete in an open race he has first to be accepted as competent and the holder of an A certificate but because of his limited experience he is confined to the lower cc. motorbike which is still a very powerful bike. A support rider is upgraded to a full open class rider when he has successfully competed in a number of races as support rider and when assessed by the safety committee as competent. This interpretation was disputed.

14. On the day in question, the plaintiff applied to enter the fifth race where the late Gary Dynes and the late Joey Dunlop were the big names in the race. He paid the entrance fee and on the day before the race he and the other entrants engaged in a practice run. Each competitor is given a map of the course which has been prepared and approved by the safety committee before they actually compete. The competitors usually engage in a trial run on the evening or early morning before the race where they observe the straights and turns and observe danger points and also their chosen braking positions.

15. The course outside Dundalk was a long triangular circuit of over 3 miles containing a very large roundabout. On the practice run, the plaintiff observed that the kerbs along the left side of the northern left quadrant of the roundabout were not protected by sandbags or bales. He explained that the roundabout is at the end of a very long straight where the bikes achieve speeds well in excess of 150mph. All motor cycle racers who approach the very sharp bend on entering the roundabout slow down in anticipation and then take up what is known as the racing line in order to round the corner in the shortest distance while maintaining speed and balance. A rider would normally approach the bend from the right of the approaching wide straight banking/cranking or leaning heavily to the left to take the right hand curve and then bank to the right to follow the curve. As riders run close to the apex of the roundabout before taking the racing line, this area is the most dangerous part of the course where accidents are likely to occur.

16. The plaintiff's evidence was that following the practice run, he with others including the late Gary Dynes, had a discussion with Ray Douglas, one of the clerks of the course charged with safety issues, complaining of the unprotected high kerb on the left side of the roundabout which they believed should be protected. The evidence was that it is normal practice for riders to express any concerns regarding the circuit to officials after the practice runs and that concerns expressed by riders are normally attended to.

17. It was disputed that either the plaintiff or Gary Dynes had made any comment or complaint to the course officers about the kerb. The plaintiff recalled a sharp retort to the effect that they were only complaining because the course was in the South. Mr. Douglas denied any conversation of any kind with the plaintiff before the race although he recalled a conversation with Gary Dynes regarding relocating sand bags at the apex of the roundabout.

18. One of the marshals/ crew chiefs expressed strong views as to whether it would have been appropriate to place sand bags at this kerb and believed that a decision had been taken not to do so as sandbags placed on the kerb would serve as a ramp propelling the rider into the adjacent block wall. It was accepted however that she had no authority to determine the placement of any protective measures on the course. In any event, on the day of the race, the entire left front of the roundabout was protected by sand bags and straw bales but there was no protection added to the left hand kerb.

19. On the day of the Dundalk Road Races, the plaintiff had been watching earlier races and observed Damien Mulleady competing in a support race. Being aware of the motion relating to support riders which had been passed at the meeting held at the Ballymascanlon Hotel in January, he was surprised to see that he was entered for the open race riding a 1000cc motor bike. He expressed these concerns to Ivan Davidson just before the race began. Ivan Davidson who is on the road racing safety and rules committee of the sport had no recollection of this comment although he was of the view that the rule relating to support riders should have applied.

20. The plaintiff's evidence of the race itself is that he started on the front row of the second group and had completed approximately two thirds of the first lap of the circuit. He had been travelling at high speeds and had slowed down as he was approaching the roundabout. He was about to take up the racing line when a motor bike driven by the support rider Mulleady came up on his left going very fast and overtook him, taking his line. Mulleady was travelling too fast to control the corner and headed towards the roundabout across the plaintiff's path causing the bikes to touch. The plaintiff was caused to "sit up" and lose his balance. Both bikes struck the kerb of the roundabout where they were thrown off their bikes onto the grass. Mr. Mulleady escaped serious injury but Norman Gordon continued moving at considerable speed across the road hitting his foot against the unprotected kerb on the opposite side, sustaining a very nasty fracture to his knee. He had braked hard to avoid the accident but could do nothing else to prevent it.

21. It was his view that if Mr. Mulleady had been driving a 750cc he might have been better at handling it as a heavy bike is more difficult to control when braking into a corner as gravity will force the bike out on a curve. He also believed that had the kerb been protected the likelihood is that the sandbags would have cushioned his injury.

22. On cross examination it was put to the plaintiff that he was the cause of his own accident as he approached the roundabout at too high a speed and lost control and crashed. His injury in being propelled across the road into the left hand kerb was simply a freak accident. It was further put to him that Damian Mulleady had nothing whatever to do with his accident; that two separate and unrelated accidents had occurred with Mulleady crashing well before the plaintiff; that Mulleady had never overtaken him and was ahead of the plaintiff at all times. It was also put to him that at no time had he made any complaint before this race about Mr. Mulleady or about sand bags although it was admitted that Gary Dynes had made a request relating to the sand bags at the front of the roundabout which were subsequently relocated closer to the racing line.

23. Mr. Michael Molloy B.E. examined the scene of the accident on the 20th November, 2000 when he took measurements and photographs. His understanding of the accident when preparing his report was that the support rider had created the emergency, but the insulation of the kerb would have protected the plaintiff from injury. He measured the height of the kerb in question at around 5 inches. He referred to a document prepared by the Health and safety Authority in the UK first published in 1999 and dealing with safety at motor sports events for employers and organisations. This document seems to apply to what in Ireland are referred to as closed circuit events and may not have had road races in mind when being prepared. Apparently no motor cycling events on the mainland UK take place on a public highway. The North of Ireland and the Isle of Man are the exceptions. The recommendations

therefore had limited application to road races although Mr. Molloy's evidence was that the same principles of safety apply and that it was foreseeable that a competitor whose bike glanced off the roundabout kerb would be thrown against the left hand kerb. Had the kerb been protected by baling or sandbags at the 7 to 10 o'clock position, then the speed of a bike or rider striking that kerb would have been minimised by the cushioning effect of the sandbags.

24. His evidence was that on this particular course with a 300 degree acute bend at the roundabout it was foreseeable that a biker could lose traction and would be drawn by centrifugal force towards the left kerb of the roundabout. He believed that had a proper risk assessment been made, that sandbags would have been placed on the left hand side of the road opposite the roundabout and he personally saw no reason why the kerb would not be protected as the area of highest risk to competitors was at the bends. The sandbagging would have reduced the risk of injury although he allowed that sandbags can have a ramping effect. No engineer was called by the defence to gainsay Mr. Molloy's testimony.

25. There was much conflicting evidence as to how the accident occurred, where exactly and when it occurred. Photographs taken on the day of the accident show the plaintiff and Mr. Mulleady in the two places where they came to rest but do not assist as to where each party struck the roundabout. They do however place both the plaintiff and Mulleady on the roundabout at the same time.

26. Some witnesses were observers and some were competitors. I believe that competitors travelling at high speeds have their minds on their immediate space and the road in front and with the best intentions can be quite misled as to their impressions of the location of other riders. The uncontroverted evidence was that Mr. Mulleady was travelling too fast to take the corner when he crashed. Mr. Mulleady confirmed this in evidence although he denied causing Mr. Gordon's crash.

27. I preferred the evidence of the bystander Darren Crawford to that of Nuala McLoughlin or Fergus Guerin. Darren Crawford who was standing at the roundabout observed that Norman Gordon was on the racing line when the race was in its first lap. He was leaned over to take the left hand turn when another motorbike came up on his inside causing Mr. Gordon to sit up and lose control of his bike. His impression was that the other driver was going faster than Mr. Gordon and was overtaking to get the advantage on the racing line which is the quickest way through a corner. His evidence was that there was a five second gap between the two crashes.

28. I reject the evidence of the competitor Fergus Guerin that the plaintiff crashed minutes after Mulleady when he was completing his second lap or that Mulleady was in front of the plaintiff at all times. The photographs taken seconds after the collision show Mr. Mulleady still on the ground being attended to while at the same time the plaintiff is lying on the opposite side of the road holding his leg while his bike is being moved from adjacent shrubbery.

29. I accept the evidence of the marshal/crew chief that the plaintiff was looking over his shoulder and that this caused him to crash. I find that it is very probable that the reason the plaintiff looked over his shoulder was because Mulleady was coming perilously close to him and that this contributed to the crash. I therefore reject the case made by the defence that Mr. Mulleady had nothing to do with the plaintiff's accident or that Mulleady himself crashed first or that he was always in front of Mr. Gordon. I find that both motor bikes crashed within seconds of each other arising out of Mr. Mulleady's miscalculations as to the safe speed to enter the roundabout.

30. The next material witnesses were Ivan Davidson and Ray Douglas. Their evidence on the meaning of a support rider and whether a motion passed a committee meeting was of binding effect differed tremendously. Mr. Davidson gave evidence that Damien Mulleady had not yet been upgraded to compete in an open race and he was therefore bound by the new rule. He was aware of Mr. Mulleady's record from files kept in the Championship Register. It was not recorded that he had ever ridden a 1000cc bike in a road race before. He stressed that he was unaware that Mr. Mulleady was riding a 1000cc bike as he was a late entry.

31. Mr. Ray Douglas is the assistant secretary of the Southern Branch Safety Committee and was Clerk of the course on the days in question. In his view, Mr. Mulleady was perfectly entitled to race on a 1000cc motorbike as the support class rules were not adopted until 26th February, 2000. He explained that an A licence entitles a rider to ride in any race. The word "novice" is not a term used in motorcycle racing but support rider is the usual term. In his view the concept of a support class was to allow bikers of limited means to compete on less powerful bikes. He said that some people retire as support riders and never move up to the bigger bikes. His testimony on support riders was contradictory on this point. While he agreed that the minutes of the meeting of the 9th January 1999 stated that support competitors were not permitted to enter into any open race on bikes more powerful than 750cc, he disagreed that the rule applied from that date. His view was that support riders continued to be permitted to ride in open road races between January 1999 and February 2001 when the inter centre conference approved the proposal. Other witnesses confirmed his belief that the rule did not apply to competitions unless approved at the annual conference.

32. Mr. *Mulleady* struck me as an honest witness and pleasant young person who although passionate about motor cycle racing was less defensive than some other witnesses. His evidence confirmed his lack of experience on big bikes and that this was his first open road race on the 1000cc bike. I have little doubt that his lack of experience contributed to his miscalculation of speed made that day. I am satisfied that the incident at the roundabout was caused or contributed by his inexperienced driving. However I was unable to conclude or infer that the fact that he was riding the 1000cc bike was the cause of the accident as his lack of experience coupled with his youth at the time could have caused him to make the very same mistakes as to speed and braking on the slightly less powerful 750cc bike he owned. In the circumstances, I cannot attribute blame to the race organisers for permitting him to enter a race with a bike which was too powerful for a support rider.

33. I was unable to come to any view on the effect of the motion passed at the Ballymascanlon Hotel meeting as there was such conflicting evidence on this point. It would be difficult to accept that an obligation to apply a recognised safety measure passed by the joint road racing committee could be ignored until formally approved in compliance with the organisation's rules. However, I make no finding on this point.

34. I do not find that the failure to implement the limitation of support riders to 750cc motor bikes in open class races was the reason the plaintiff suffered such serious injury to his left leg. While I accept that motor bike racing is dangerous and accidents occur when even the most experienced of competitors make mistakes, I find that there are certain minimal safety measures which must be taken to protect riders at known danger points. If the high kerb on the left of the roundabout had been sand bagged or insulated in some way, the plaintiff would in all probability have suffered a far less serious injury.

35. I accept the evidence of the engineer Mr. Michael Molloy on this point and find that the kerb opposite the northern right quadrant should have been protected by sandbags or other shock absorbing material. I do not believe that safety measures on a course should be dictated or determined by observations or indeed lack of comment made by entrants following a trial run but rather by conducting a proper risk assessment of hazards and points of danger in an effort to minimise risk of serious injury at those points. I therefore find for the plaintiff.

Injury

36. Norman Gordon suffered a very painful knee injury which required several major operations and reconstruction. Mr. Richard M Nicholas consultant orthopaedic surgeon at the Royal Victoria hospital in Belfast described the injury as *"a comminuted intra-articular fracture of the left knee as well as a dislocation of the left knee joint and fracture of both posterior tibial condyles"*. He had an open reduction and internal fixation of both sides of the tibia with arthroscopic fixation of the anterior cruciate ligament. He remained in hospital until the 9.7.99 when he returned home in a cast brace which remained on his leg for three months. He has had several further arthroscopic procedures on his knee joint and has attended 88 sessions of intensive physiotherapy over the years. He currently has chondrial degeneration of the lateral and medial tibial plateaux with degeneration of the patello-femoral joint and can expect further degeneration.

37. He was out of work for nine months but was able to continue his plastering business with the help of his brother while he himself took on the role of administrator and manager. His knee remained very swollen for a lengthy period and he had a great deal of pain, instability and lack of movement being mobile only on crutches. With physiotherapy he has regained strength and movement and reduced the swelling but he continues to have restriction of movement and he can no longer work as a plasterer. Considering the severity of his initial injury he has made a fair recovery in that he only has pain on an occasional basis with swelling occasionally. He has greatly reduced the amount of analgesics and anti-inflammatory medication as his symptoms have improved and to minimise side affects to his stomach.

38. He still cannot confidently climb ladders or walk on scaffolding. He cannot squat or walk on uneven ground which are all necessary attributes of a plasterer. His biggest life change is that he cannot engage as a participant in water skiing or mountain biking and most of all he has been unable to continue motorcycle racing. He cannot walk any long distances and he has a more or less constant limp. The knee is frequently stiff and he feels a catching and clicking sensation in the joint. He is susceptible to developing early arthritis in the knee joint. Although his injuries prevent him from working as plasterer, his management skills have ensured that he had no loss of income as he has been able to source jobs and employ a team of plasterers.

39. He struck me as being an extremely motivated person who has done his best to minimise his loss and to make the most of his changed circumstances. He will never be able to return to significant plastering or to sport. He maintains his interest in motorcycle racing and is a member of the All Ireland Road Race organisation and is actively involved in a number of committees relating to the sport.

40. During the hearing it became obvious that there was a serious down turn in the building trade both here and in Northern Ireland. To date he had seen no loss of income although he fears such a loss should the building industry enter a recession and he is forced to seek alternative employment. He maintains a general claim of loss of job opportunity in such a situation.

41. I assess his pain and suffering in the past at €70,000 and €40,000 into the future. There is an agreed sum for special damages in the sum of £7,107.50 sterling. Assessing his loss of job opportunity is more problematic. Had he been a self employed plasterer operating on a solo basis, his damages for loss of wages may well have been large indeed. The reality is that he has been able to manage by employing a large team of plasterers in spite of his disability and has maintained his earnings. He comes from a family with connections in the plastering trade having an uncle and two brothers in the trade. It seems to me that these connections will contribute to his capacity to weather a down turn in the business better than others. He is without doubt unlikely to actually earn a living as a plasterer but his know how and skills in pricing jobs remain intact. In the circumstances, I can do no more than assess his loss of job opportunity at 2 years of earnings as a plasterer balanced against a future life time of work as a taxi driver or a motor cycle factor as suggested by the occupational therapist Ms. Susan Tolan. The evidence was that he paid his plasterers up to £85 a day which comes to just over £22,000 per annum. I will allow the sum of £100 per day which with overtime opportunities amounts to a rounded sum of £30,000 a year before deductions. I have little doubt that the plaintiff's personality and determination will permit him to succeed at any new career should the need arise and therefore can do no more than award the sum of €50,000 as a fair sum to represent his loss of employment opportunity.

42. The award therefore will be for €160,000 together with the euro equivalent of the sterling sum of £7107.50 together with the costs of this action.