



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CLAIM NO. 2008 HCV 02417

BETWEEN	SHANE COWAN	CLAIMANT
AND	GLENBERT WALKER	1 ST DEFENDANT
AND	MANAGEMENT SERVICES LIMITED	2 ND DEFENDANT

Miss Danielle Archer instructed by Kinghorn & Kinghorn for the Claimant
Mr. Walter Scott and Miss Elizabeth Salmon instructed by Rattray Patterson
Rattray for the Defendants.

Heard: February 22 and March 3, 2011

McDonald, J

The claimant Mr. Shane Cowan has brought an action against the defendants seeking to recover damages for personal injuries and consequential loss.

The particulars of negligence alleged against the defendants are as follows:

- (i) Driving at too fast a rate of speed in all the circumstances.
- (ii) Colliding with motorcycle registration number 9314F.
- (iii) Failing to see motorcycle registration number 9314F within sufficient time or at all.
- (iv) Failing to apply his brake within sufficient time or at all.

- (v) Failing to stop, slow down, swerve or otherwise conduct the operation of the said motor vehicle so as to avoid the said collision.

The claimant also relies on the doctrine of Res Ipsa Loquiter.

The claimant alleges that on August 23, 2007 he was riding his motorcycle in a line of traffic which was almost bumper to bumper on the Old Harbour Road heading to Spanish Town.

Traffic was coming down on the other side of the road. He described the road as straight, one way up, one way down and that one could see straight up the road and straight down the road.

The claimant stated that he had just passed the intersection of Valdez Road and was heading towards Spanish Town when he reached about where the clinic was, he proceeded to overtake.

Before overtaking the vehicle in front of him, he put on the indicator of the bike and blew the horn as well. He begun to pass the vehicle and on reaching a section of the front mirror; the vehicle tried to turn on him and both collided together.

He said that after the collision the bike was about 5 feet away from him.

Mr. Cowan said the collision occurred in the middle of the road, he was on the white line going around. He asserted that when he proceeded to overtake the on coming lane was clear, and no vehicle was coming in

that direction at the time. Further he saw no driver travelling in the opposite direction flashing his lights.

He testified that the vehicle he attempted to overtake gave no indication that it was turning.

He observed after the impact that some of the flares on the motorcycle were broken off and the handle and front fork bent and the gear shift lever was broken off. In cross-examination, Mr. Cowan testified that he was not wearing a helmet at the time of the accident, and it was only that day that he failed to do so.

He said that he had a learner's licence and not a driver's licence to ride the bike.

He described the bumper to bumper traffic as not directly close, not even a car length away and when asked to point out the distance it court, he pointed out 4 yards.

He told the court he saw cars coming in the opposite direction but could not say how fast they were going.

He denied the suggestion that the white car in front driven by the 1st defendant had stopped and had on its right indicator.

He said that at the time the driver said he was turning into the clinic there was no entrance there for any clinic, he had passed it already.

Defendant's Case

There is no dispute that the 1st defendant was acting as the agent and/or servant of the 2nd defendant at the time of the accident.

The particulars of negligence alleged against the claimant are as follows:

- (i) riding his motorcycle too fast in the circumstances.
- (ii) Failing to keep any or any proper lookout or to have any or any sufficient regard for other road users on the said road.
- (iii) Failing to see the 1st defendant's said motor vehicle in sufficient time or at all to avoid the said collision.
- (iv) Attempting to overtake the 1st defendant's said motor vehicle when it was manifestly unsafe to so do.
- (v) Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motorcycle so as to avoid the said collision.

Mr. Glenbert Walker's evidence in chief took the form of his witness statement. In his statement he said that at about 10:20a.m. on the 23rd August 2007 he was travelling alone in the left lane along the Old Harbour Road in a line of slow moving traffic heading easterly towards Spanish Town.

On reaching the vicinity of Valdez Road and Old Harbour Road clinic, he put on his right indicator as he intended to make the right turn to get into the clinic compound. As vehicles were travelling from the opposite

direction, he brought the vehicle to a halt and waited for the traffic to clear so that he could make the right turn. A motorist travelling in the opposite direction flashed his lights and stopped to allow him to turn.

He said that before making the right turn, he looked into his rearview mirror as well as his left and right wing mirrors to ensure that no vehicles were trying to overtake, and observed that there were vehicles lined up behind him in a stationary position.

He heard no horns sounded or any vehicles overtaking. He said that he again looked ahead to ensure that the vehicle coming from the opposite direction that had stopped was still willing to allow him to turn.

Having stratified himself of that, he again glanced in his rear view and right side/wing mirror and saw that no vehicles were overtaking and it was clear for him to turn. He proceeded to make the right turn and no vehicles sounded their horn.

He said as he was half way into the right lane, suddenly and without warning he heard a loud thud and felt an impact to the right front door of the vehicle he was driving.

He immediately stopped the vehicle and observed that it was a motorcycle that had collided into the vehicle.

He said both vehicles were in the centre of the road and were damaged.

Mr. Walker testified that he observed that the 2nd defendant's vehicle had damage to the driver door, running board and fender and the side/wing

mirror was completely ripped from the vehicle and lay on the ground in pieces. The bike also sustained damage.

In cross-examination Mr. Walker said he was travelling less than 30 kilometers the traffic was slow moving not really bumper to bumper.

The windows of the vehicle were down, and he did not hear the sound of a bike.

Mr. Walker said that he positioned the car to alert the vehicle behind that he was turning. He doesn't know where Mr. Cowan came from. He did not see him.

He said that when the collision occurred he was actually in the middle of the road with his 2 left tyres over the white line.

Mr. Walker told the court that after the collision he drove straight into the clinic compound. This evidence is unchallenged.

Analysis

The burden is on the claimant Mr. Cowan to prove that on a balance of probabilities the defendants are liable to him in negligence for the loss and damages suffered.

The court has been given two diametrically opposed versions as to how the accident occurred, and it is a question of fact as to which account is to be believed.

In resolving this, the court has examined the credibility of the witness and the plausibility of the version being advanced. The demeanour of the witness is also another factor the court will later take into consideration.

The claimant's case is that the car driven by the 1st defendant did not come to a stop it was moving when he attempted to overtake it. However, the claimant has given no evidence of the speed which he alleges the car was travelling at that time or before his manoeuvre.

The 1st defendant's evidence is that he was travelling less than 30 kilometers and that he put on his right indicator and brought the vehicle to a halt and waited for the traffic to clear so that he could safely make the right turn into the clinic compound.

There is no evidence before the court as to the length of time the car remained stationary.

I find that there is no evidence before the court to establish that the 1st defendant drove at too fast a rate of speed in all the circumstances.

I find that the 1st defendant did in fact put on his right indicator and stopped the car awaiting free passage to turn right. Such action would I find be a proper indication to other motorists and users of the road that he intended to make a right turn and in compliance with section 57(1) and 57(4) of the Road Traffic Act.

I find that the 1st defendant did not attempt to turn without warning. I also find that his vehicle was so positioned in the road where the claimant could see it.

The claimant alleges that the 1st defendant failed to see the motorcycle within sufficient time or at all.

The 1st defendant's evidence is that he did not see the claimant.

It is undisputed that the road was straight and it was daytime.

Both parties said that they were in a line of traffic. The claimant described the traffic as being bumper to bumper – a distance of 4 yards (as pointed out by him in court) between his motorcycle and the car. The 1st defendant said that he was in a line of slow moving traffic. He gave evidence of looking in his rearview mirror as well as his left and right wing mirrors and again in his rear view and at side/wing mirror and seeing no vehicles overtaking.

I conclude from this that he felt it was safe for him to turn and importantly I accept his evidence that a motorist travelling in the opposite direction had flashed his lights and stopped to allow him to turn.

The 1st defendant's evidence is that he did not see the claimant.

It could be argued that if the 1st defendant had looked as he said, he would have seen the claimant's motor cycle. I find the fact that the 1st defendant looked and did not see the motorcycle does not mean that he was not keeping a proper lookout. This would depend on where the

motorbike was at the time he looked, and the speed at which it was travelling.

I find that the 1st defendant did what was required of him to demonstrate his intention to turn right by putting on his indicator and by stopping.

The claimant who was behind would have been expected to keep a proper lookout and pay due heed to the 1st defendant's vehicle stationary position with right indicator on.

The claimant who was overtaking has a duty to ensure that there was no manouvre being made by any vehicle which would affect his free passage.

In this case, I find that the claimant failed to keep any or any proper lookout.

I reject the claimant's evidence that it was when he begun to pass the vehicle and on reaching a section of the front mirror, the vehicle tired to turn on him and they collided together.

I reject his evidence that he blew his horn when proceeding to overtake.

I find that the claimant attempted to overtake the motor vehicle driven by the 1st defendant when it was manifestly unsafe so to do.

There is no evidence from the 1st defendant as to the rate of speed the claimant was riding before the accident.

Harris JA in **Garfied Hawthorne v Richard Downer SCCA** 12/2003 (July 29, 2005) stated in that case

"The respondent said he could not say whether the vehicle was travelling at a fast rate of speed. Although he was unable to do so this would not in anyway operate against the proof of his claim. The question as to whether or not he was driving at an excessive speed has to be determined within the context of the circumstances. Excessive speed as the cause of an accident may be inferred ... a respondent may prove his case by direct as well as circumstantial evidence."

In the instant case, the claimant has given evidence that he was riding at 50 mph. he maintains that the traffic was bumper to bumper. When asked in cross-examination if he had to speed up to attempt to overtake the car in front of him, he replied "not quite".

I find that it is more probable than not that he did increase his speed to overtake over a short distance and I so find.

I find that the claimant was riding the motorcycle too fast in all the circumstances. I find that the 1st defendant had indicated his intention to turn right in good time and was advanced in doing so when the collision occurred.

I was more impressed by the demeanour of the 1st defendant than the claimant. The 1st defendant appeared to be a more credible and reliable witness than the claimant.

In cross-examination the claimant testified that at the time the 1st defendant said he was turning into the clinic there was no entrance there for any clinic he had passed it already. This is in contradiction to where

the claimant said the accident took place in his evidence-in-chief. I reject his evidence given in cross-examination on this point.

The fact that the claimant could not remember the name of the Insurance Company, nor could he tell the name of the name of the registered owner of motorcycle from whom he bought the bike casts doubts on his credibility, albeit such information does not go the root of the matter.

Defence Counsel raised the issue of the claimant riding without a driver's licence, however section 16 of the Road Traffic Act permits him to ride the motorcycle with a provisional driver's licence.

I find that the primary duty of care in this case lay with the claimant who was overtaking. It is he who could see everything in front of him.

Having found that the claimant was riding too fast in the circumstances, that he failed to keep a proper look out and over took when it was unsafe to do so, I find that the negligence of the claimant was the real and substantial cause of the accident.

Judgment for the defendants with costs to be agreed or taxed.

