



][2016] JMSC Civ.114

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 00837

| | | |
|----------------|---------------------------|---------------------------------|
| BETWEEN | RICHARD REYNOLDS | CLAIMANT |
| AND | LINVAL CARL HARRIS | 1st DEFENDANT |
| AND | JERMAINE HARRIS | 2ND DEFENDANT |

Kimberly Facey instructed by Bignal Law for the claimant

Michelle Shand Forbes for the defendants

Heard: June 13 and 14, 2016

Negligence – Duty of the motorist - Duty of the pedestrian

TIE, J (AG)

[1] The claim

The claim as set out in the claim form and particulars of claim form as amended, seeks damages against the defendants in negligence for an incident in which the 2nd defendant, whilst driving the vehicle of the 1st defendant collided into the claimant, who was a pedestrian at the time.

[2] The defence

The defence contends that the claimant suddenly ran from between vehicles on the opposite side of the road into the path of the defendant's vehicle thereby causing the collision.

[3] The evidence

The claimant's evidence as contained in his witness statement was that on October 9, 2012, at 6 p.m., he was walking along Molyne's Road, having left a plaza. He was on the left hand side of the road when facing Washington Boulevard. He states that on one side of the road the traffic was bumper to bumper and almost at a standstill. The other side of the road which accommodates traffic moving from Washington Boulevard to Half Way Tree was free flowing with cars passing every 5 – 10 seconds. He indicates that he crossed that section of the road where the traffic was at a standstill, stopped, looked up and down the other side of the road and saw a motor vehicle 30 - 40 metres away from him. He determined that he had sufficient time to complete crossing the road and proceeded to do so. As he was about to step up onto the side walk, he went blank. He woke up in the hospital and was discharged the same day but subsequently sought further medical treatment. In support thereof, he presented medical reports and receipts.

[4] Under cross-examination, he made it clear that on the side of the road where the incident happened, there were hardly any cars. He said that he saw the defendant's car and based on where he (the claimant) was, and where the defendant was and given the defendant's speed, (which the claimant described as being relatively fast), he was satisfied that he could cross by walking. He suggested that when he was about one to two feet from the sidewalk, he went blank. He did not see the defendant's vehicle hit him.

[5] The court then heard from the second defendant who presented a contrary version of events. His evidence was that he was driving along Molyne's Road

towards Half Way Tree at a speed of about 35 – 40 km.p.h. His portrayal of the traffic going in the opposite direction accords with the claimant. The traffic in the direction in which he was travelling was not heavy. His evidence was that he saw a man run from between the stationary cars in the opposite lane and into his path. When he first saw him, he was less than a car length away. He swerved and the man tried to jump out of the way, but the left front bumper hit him. The man landed on the bonnet, his hand hit the windscreen, and he then fell to the ground. He immediately stopped the vehicle and assisted him.

[6] Under cross-examination, the focus was on when the defendant first saw the claimant and the place of impact. The defendant insisted that he was travelling at 35 – 40 km.p.h. and indicated that he first saw the claimant upon impact. He explained that he saw him “In a split second, when I collided with him.” He said he ran into the side of the vehicle and he saw him in a split second before impact. He denied that he hit him when he had almost completed his crossing of the road. He stated that he fell on the roadway to the side. He says that his vehicle stopped right above where the impact happened, not far away. The court estimated the distance, as pointed out by the second defendant, to be 12 – 15 feet away. He denied that this was due to speeding on his part.

[7] **Analysis of the evidence and relevant legal principles**

There is no dispute that there was a collision between the claimant and defendant on the date, at the time and place in issue. There is also no dispute as to the nature of the roadway or as to the state of the traffic. The issue is whether the incident occurred as the claimant has put forward or did it occur as the defendant maintains.

[8] I firstly examined the claimant’s account, that having crossed the stationary traffic, he stopped, looked both ways, saw the defendant around 30 – 40 metres away travelling at a relative fast speed; that he found it safe to walk across, and

just as he was nearing the pavement, he went blank, presumably hit by the defendant, as he did not see the defendant's car hit him.

- [9]** This raises a number of issues that the court must consider. Was it reasonable for the claimant, having seen the defendant 30 – 40 metres away, travelling at what he describes as a relatively fast speed, to proceed to walk across the road.
- [10]** It must be appreciated that the defendant's vehicle, on the claimant's account, was a relatively short distance away. To put things in context, many of our professional male athletes cover 100 metres in under ten seconds. This was less than half of that distance. Nonetheless, he proceeds to cross the road, by walking, in the face of this vehicle which he says was speeding. The court must ask itself if this is believable.
- [11]** It is also apparent to the court that he did not keep his eye on this vehicle which he says was approaching at a relatively fast rate of speed. He did not give any evidence as regards the manner in which the vehicle approached him nor did he see the vehicle hit him. This is most unusual. Most pedestrians whilst crossing the road in the face of an oncoming vehicle tend to monitor the vehicle as it approaches so as to adjust their own movement as they cross. He, however, inexplicably did not do this.
- [12]** Given his assessment that it was safe to cross the road, it begs the question, what went wrong? The claimant is unable to assist the court. There is no evidence for instance to suggest that the defendant accelerated.
- [13]** But let us examine the defendant's case. The defendant is essentially saying that he was caught unaware by the claimant dashing from the direction of the stationary vehicles. There was some confusion as regards when he first saw the claimant. In his statement, he says he saw him when he was a car length away. In cross-examination, he said upon impact and explained that it was a split second before impact. It is evident from his account, that the incident happened quickly and that he saw him just before impact.

- [14] Counsel for the claimant zeroed in on his speed and the point where his vehicle stopped. The defendant has denied speeding. There is no indication from the claimant, himself a driver, as to the estimated speed of the defendant. In any event there is no evidence as to the speed limit for that area.
- [15] The issue for the court is not whether the defendant was exceeding the speed limit. Indeed, exceeding the speed limit, though an offence, is not, in itself, indicative of negligence imposing civil liability. **Barna v Hudes Merchandising Corpn. (1962) 106 Sol Jo 194..**
- [16] As it relates to the claimant's assertion that the defendant was negligent, the issue is whether the defendant's rate of speed was reasonable in all of the circumstances. Given the claimant's own evidence as regards the proximity of the defendant to him and his satisfaction that he would have been able to cross by walking, there is nothing to suggest that the speed was inappropriate in all of the circumstances.
- [17] The court must also ask, what of the defendant stopping where he did after the collision? The defendant says that he stopped immediately, right above where the impact happened. He also said that he stopped around 12 – 15 feet away (as estimated by the court from the distance pointed out by the defendant). Whilst this may be indicative that he may have been going above his stated speed, it is not a conclusion that can be drawn, given the evidence. In cross examination, it was suggested to him that he stopped 12 - 15 feet away because of speed. This, he denied and he was never asked the reason for so stopping at this distance. In any event, the court must return to the fact that it is the claimant's own evidence that he found it safe to cross with the defendant's vehicle travelling at the speed it was at a distance of 30 -40 meters away.
- [18] I must also consider the issue of the point of collision. The claimant says that he was one to two feet away from the sidewalk. The defendant refutes this and states that the claimant fell to the side of the roadway after impact. The position

of the claimant after impact is not an indication of where he was hit, given that he fell on the bonnet of the vehicle and rolled off.

[19] Having analysed the evidence of the parties, I am not satisfied that the defendant was negligent.

[20] It is clear that all road users, both motorists and pedestrians have a duty of care when so doing. As per Lord du Parc in **Searle .v Wallbank** [1947] AC 341, 371 “an underlying principle of the law of the highway is that all those lawfully using the highway or land adjacent to it must show mutual respect and forbearance.” Also, as Lord MacMillian noted in **Bourhill v Young** [1943] AC 92, 104, “The duty of a person who drives a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. In this connection, reasonable care means the care which an ordinary skilled driver or rider would have exercised under all the circumstances and connotes an avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on.”

[21] As regards pedestrians, a pedestrian owes a duty to other highway users to move with proper care. As per Lord Simon in **Nance v British Columbia Electric Rly Co Ltd** [1951] AC 601. “When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him without risk of collision to exercise due care.”

[22] I am of the view that the claimant failed to exercise that degree of care expected of a pedestrian crossing the road way. I am satisfied that the incident could not have occurred in the manner the claimant says, given the distance of the defendant and his speed as described by the claimant. It is further not believable that the claimant would not have kept an eye on this fast approaching vehicle. His evidence is deficient. There is no evidence as to how this vehicle approached. There is no explanation as to why the claimant was not able to complete crossing safely as he believed he was able to do when he started that manoeuvre.

- [23] I do not find it believable that the collision took place because the defendant failed to keep a proper lookout. It is unlikely that the defendant would have been so oblivious as to the presence of others for the distance stated by the claimant without causing damage to the many vehicles in the adjoining lane on his approach. I find the defendant's version of events more believable, that the claimant dashed out unexpectedly.
- [24] As was noted in the case of **Nolan v Marsh Motors and Holzberger (1965) Q.L.R. 490**, the driver of a motorcar does not have to drive in the constant expectation that a pedestrian may, at any moment, project himself into the path of his car from behind a vehicle in a line of traffic on his right, which is moving in the opposite direction.
- [25] In arriving at this conclusion, I applied the test set out in **Moore v Payner 1975 RTR 127 CA** and asked whether it would have been apparent to the reasonable man armed with common sense and experience of the way pedestrians are likely to behave, to anticipate that a pedestrian would dash out into his pathway. I do not find that the defendant saw the claimant or could have seen him or ought to have seen him given my findings of fact as to the conduct of the claimant. I also find that he could not reasonably have anticipated his behaviour.
- [26] I cannot find the principle of *res ipsa loquitur*, as was pleaded by the claimant therefore to be applicable.
- [27] Judgment is entered for the defendant with cost to be agreed or taxed.

