Nov 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 50/2000

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE PANTON, J.A.
THE HON MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEN:	**IVANHOE BAKER**	**APPELLANT/DEFENDANT**
AND	**MICHAEL SIMPSON**	**RESPONDENT/PLAINTIFF**

Christopher Dunkley for the appellant instructed by Cowan, Dunkley and Cowan

Maurice Frankson for the respondent instructed by Gaynair and Fraser

November 13, 14, and December 20, 2001

DOWNER, J.A.

I have read in draft the judgment of Smith, J.A. (Ag.) and I entirely agree and have nothing further to add.

PANTON, J.A.

I have read the draft of the judgment of Smith, J.A. (Ag.) I agree with it and have nothing to add.

SMITH, J.A. (Ag.)

This is an appeal from the judgment of Reckord, J in the trial of an action arising out of a collision between a motor car driven by the appellant and the respondent whilst riding a bicycle on the 4th April, 1993.

In his amended Statement of Claim the respondent avers that on the 4th April 1993, he was riding his bicycle along the main road leading from Toll Gate to Porus in the parish of Clarendon when motor vehicle registered PP 3357 driven by the appellant collided with the respondent.

The Particulars of Negligence:

(i) Driving at too fast a rate of speed having regard to all the circumstances.

(ii) Driving at or into the plaintiff.

(iii) Failing to keep a safe and/or straight course.

(iv) Failing to stop, slow down, turn aside or in any other way so to manage and/or manoeuvre the said motor vehicle so as to avoid the collision.

(v) Failing to keep any or any sufficient and proper look out.

(vi) Driving without due care and attention and without due consideration for other users of the roadway.

(vii) Driving in a dangerous and/or reckless manner.

(viii) Failing to heed the presence of the plaintiff's bicycle along the said roadway.

(ix) Failing to apply his brakes in sufficient time or at all.

(x) Overtaking and/or attempting to overtake when it was manifestly unsafe so to do.

(xi) Overtaking and/or attempting to overtake at a corner of the said road.

(xii) Driving at or onto the incorrect side of the roadway.

The appellant filed a defence and counterclaim alleging negligence on the part of the respondent. According to the appellant, the respondent who was riding behind a car going in the opposite direction swung from behind the car into the appellant's path. The learned trial judge gave judgment for the respondent on both the claim and the counterclaim.

Before this Court Mr. Dunkley argued 7 grounds. Grounds 1 and 2 concern the alleged failure of the learned trial judge to make certain important findings of fact. In Grounds 3, 4 and 5, counsel for the appellant complains that the learned trial judge rejected the respondent's case and nevertheless went on to use the appellant's evidence to find the appellant liable. Ground 6 concerns the relevance of the appellant's conviction for careless driving. Ground 7 complains of an inconsistency between a finding of fact and the evidence.

Usually I find it helpful to state at the outset the principle upon which this Court will interfere with the judgment of a trial judge. It is this:

> "An Appellate Court will only interfere if the trial judge had been guilty of some error of law or misapplied some principle of law, or so misdirected himself on the facts as would entitle this Court to say that it would be manifestly unjust to allow the judgment of the trial judge to stand."

See ***Clarke v Edwards*** 12 JLR 133 which was applied recently in ***Tucker v Lascelles Chin et al*** SCCA 30/2000 delivered on May 21, 2001.

Grounds 1 and 2

Counsel complained that the learned trial judge did not make any finding as to which account and as to which facts he relied on. I see no merit in this complaint. The learned trial judge examined the accounts given by the parties and stated in his written judgment (p. 9):

> "On the basis of the evidence before me, I accept the plaintiff as a witness of truth and find for the plaintiff. The defence is rejected as being unreliable."

Further, counsel complained that the learned trial judge failed to make a finding as to whether or not there was a motor vehicle "present and driven by one Mr. Alfred Offendel." The respondent in his evidence during cross-examination said (p. 26 of record): "just before the accident no vehicle was in front of me travelling in the direction that I was going." Later he said (at p. 27): "I don't know the name Offendel – not true that vehicle was driving in front of me." This evidence contradicts the appellant's version. The judge accepted the respondent's evidence and rejected the appellant's. This is sufficient. There is no legal requirement for the judge to say specifically "I find that Mr Offendel's car was not there at the material time." In any event it would seem that the judge did not attach much significance to the presence or absence of this car in so far as the ability of the appellant to see the respondent was concerned. I can see no merit at all in this complaint. Accordingly, in my view these grounds fail.

Grounds 3, 4 and 5

The gist of the complaints in these grounds is that the learned trial judge placed the burden on the appellant to prove that he was not negligent. Counsel's contention here is based on the following statement of the judge:

> "The plaintiff's case is that the defendant overtook two cars on a corner and hit him off his bicycle as he came from the opposite direction.
>
> In his evidence in chief the defendant denied overtaking any car. It was the plaintiff who had swung out from behind a car which had stopped at an orange stall, and rode into his vehicle. He had seen the car coming towards him and it pulled up to stop. However, in cross-examination, defendant admitted that he did not see the cyclist before the car stopped and just as he was about to pass Offendel's car he saw the cyclist just flash and came right into his bonnet. Just as he about to pass Offendel who had stopped, he saw cyclist. He was passing Offendel's car when he saw the cyclist for the first time. It happened so fast that all he knew is that he saw him on the bonnet. In further cross-examination he said there was a slight bend in the road where the accident happened and that Offendel's vehicle was about one chain from him when he first saw it. Nothing blocked his view from seeing Offendel's car before. He changed this and said Offendel's car blocked his view of the cyclist.
>
> From the foregoing answers that the defendant gave in cross-examination it is clear as crystal that he was not keeping a proper lookout and was driving without due care and attention or he could not have failed to see the cyclist in broad day light. On his own evidence the cyclist was going up a slight grade so it is unlikely that he was travelling fast."

It was the duty of the learned trial judge to consider all the evidence in the case as a whole and then arrive at his decision. As said before the learned

judge stated that "on the basis of the evidence before me, I accept the plaintiff as a witness of truth."

In ***Qualcast Ltd v Haynes*** (1959) A.C. 743, 744, Lord Somervell said that the reasons given by a judge for arriving at conclusions which would be matters for a jury, if there were one, are not to be treated as citable propositions of law.

I cannot accept Mr. Dunkley's submission that the above passage from the judgment of the learned trial judge indicates that he had rejected the respondent's version and had accepted the appellant's. To the contrary, what the judge was saying is that the answers to questions put to the appellant during cross-examination re-inforces his views that the respondent was speaking the truth. The learned trial judge was certainly not mis-applying the relevant principles of law concerning the burden of proof. This Court should not allow an appeal unless the court was satisfied that the judge was wrong. Indeed even if the Court was in doubt as to whether the judge was right or wrong, since on appeal the burden was on the appellant to satisfy the Court that the judge was wrong, the appeal should be dismissed. ***Colonial Securities Trust Co. Ltd. v Massey and Others*** (1896) 1Q B38.

Mr. Dunkley also submitted that the learned trial judge erred in finding that the appellant kept no proper look out and was driving without due care and attention as the plaintiff (respondent) gave no such evidence. The plaintiff's (respondent's) evidence to the Court he contended, amounted to gross

negligence on the defendant's (appellant's) part. Now the evidence of the respondent is that he was riding a bicycle on his left hand side of the road when he was hit by the car driven by the appellant in the act of overtaking two other cars. It is difficult to understand counsel's submission, that on that evidence the judge could not find that the appellant kept no proper lookout etc. because the respondent gave no such evidence. If I understand this submission what counsel is saying is that because the evidence of the respondent, if accepted, amounted to gross negligence, it was not open to the judge to find that the appellant was driving without due care and attention. If this is the contention of Mr. Dunkley then it is clear in my mind that such a submission is misconceived.

The parties gave diametrically opposed accounts of the accident. The appellant denied overtaking any car and insisted he was on his correct side of the road. The respondent denied swinging out from behind a car and also insisted that he was on his correct side of the road at the time of the collision. The real issue for the trial judge was to determine who spoke the truth. The improbability of the appellant's version was taken into consideration by the learned trial judge. Indeed the injuries to the right leg of the respondent are more consistent with the respondent's version than with the appellant's.

Having accepted the respondent's version, in my view, the judge was in duty bound to give judgment for the respondent.

These grounds in my view also fail.

Ground 6

This ground is stated as follows:

> "The learned trial judge in accepting as a finding, the outcome of the criminal action against the defendant failed to consider it against the evidence of gross negligence and dangerous driving of the defendant, as given by the plaintiff which renders that evidence inherently unreliable."

In this ground the appellant, through his counsel, complains that the learned trial judge failed to consider the outcome of the criminal charge against the background of the respondent's evidence. The rule in ***Hollington v Hewthorn and Co. Ltd*** (1943) 2 All ER 35, which I think we have followed in this jurisdiction, renders the conviction of the appellant inadmissible as evidence of his negligence. Thus the outcome of the criminal charge was irrelevant and should not have been received in evidence. This ground as couched is untenable. It is important to note that such evidence was not relied on by the respondent at trial before Reckord, J. It was introduced by the appellant.

In his judgment the learned trial judge said:

> "In the criminal trial that followed arising out of this same accident the defendant on his own evidence admitted the he was convicted and fined $500.00. It is apparent he was charged for dangerous driving and careless driving and convicted on the lesser charge. The standard of proof being beyond reasonable doubt whereas in this action the standard is on a balance of probabilities."

The learned trial judge said nothing to indicate that he had used the fact of the appellant's conviction as proof of negligence. He was certainly

commenting on the different standards of proof in criminal and civil trials. He thereafter stated clearly that on the basis of the evidence before him he accepted the respondent as a witness of truth. The very experienced judge's comment might well have been an introduction to an intended criticism of the rule in ***Hollington v Hewthorn*** which he did not pursue. This rule has indeed been criticized. See for example the 15th Report of the Law Reform Committee. It is no longer fully applicable in the United Kingdom – see the Civil Evidence Act 1968.

I am firmly of the view that if the evidence of the appellant's conviction of careless driving had not been received the learned trial judge would nonetheless have found for the respondent.

Ground 7

The burden of the complaint in this ground is that the learned trial judge's "finding" that:

> "Nothing blocked his (the appellant's) view from seeing Offendel's car before. He changed this and said Offendel's car blocked his view of the cyclist" (p. 17)

is inconsistent with the evidence.

What is here described as a "finding" is really a recount of the evidence by the judge for the purpose of analysis. The appellant under cross-examination did say "nothing blocked my view from the cyclist before he flashed around – Mr. Offendel's car" (p. 33 of the record). He also said during re-examination

"Offendel's car blocked my view that's why I never saw the cyclist before. He was on the left hand side of Offendel's car coming up" (p. 34).

I accept Mr. Frankson's submission that on the reading of the judgment as a whole, it is clear that what the learned trial judge is saying is that the appellant's evidence was that nothing blocked his view of the cyclist before the accident but at the same time was also saying that Offendel's car blocked his view and he did not see the cyclist until he swung from behind Offendel's car.

I see no merit in this ground.

Conclusion

In my view the appellant has not shown that the judge had misdirected himself in law or had misapplied some principle of law. As to the issue of credibility, it is difficult to upset the judge's findings, he having seen and heard the witnesses as they gave evidence and were cross-examined.

The respondent's evidence, which the judge accepted, clearly on the balance of probabilities, establishes negligence in the appellant and also that such negligence resulted in injuries to the respondent. The appellant has not shown that the judge misdirected himself on the facts as would entitle this Court to say that it would be manifestly unjust to allow his judgment to stand.

I would accordingly dismiss the appeal with costs to the respondent.