J A M A I C A

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 40/68

Before: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham Perkins

NEVILLE BRYAN v. SIDNEY ROBERTSON

Mr. E. George Q.C. for the Appellant/Defendant
Mr. B. K. Frankson for the Respondent/Complainant

9th June, 1972.

FOX, J.A.:

At the trial of thes 'running-down' action 13th to 15th October, 1969, by Mr. Justice Parnell, the learned judge found that the accident in which the plaintiff, a pedestrian, was struck and injured by a car driven by the defendant, was caused by the joint negligence of both parties in a proportion of fault one-third to the plaintiff and two-thirds to the defendant.

In his evidence the plaintiff said that at about 7.00 p.m. on the 25th of February, 1966, he was proceeding across Windward Road from the southern to the northern side where Hippolyte Road forms a junction with Windward Road. While crossing he looked up and down Windward Road. When he was in the middle of the road he saw the headlights of a motor car coming from the west around a corner, which he estimated was about four to five chains away from him. He hastened to cross the aoad. He, "heard the car draw its brakes". He was about one or two steps from the northern sidewalk when he was struck by the car. It, "came down so fast, I could not say whether it turned or not". The plaintiff said further that as a result of the collision he was flung unto the bonnet of the car, his head struck and shattered the windshield, he fell from the bonnet to the road. The car stopped and the defendant came from it, raised him up and said, "A' not even did see you, I think it's a dog a' knock".

The plaintiff's account of the accident was confirmed in substantial respects by Sulvera Wallace, a haulage contractor. He said that he was walking on the northern sidewalk of Windward Road from east to west. He saw the plaintiff coming across Windward Road towards its junction with Hippolyte Road on its northern side. There was no traffic on Windward Road when the plaintiff stepped off from the southern side. Wallace said that he saw the headlights of the car coming from the west around the corner, which in his estimate was about two chains away. The plaintiff was about one step from the northern sidewalk when the car came up "speeding". Wallace did not see the car strike the plaintiff. He heard the sound of the impact "a couple of yards" in front of him. As the car passed him he "saw something fall from the bonnet of the car and drop in the road". The car went about 18 to 20 yards from the spot where he "heard the sound", and stopped. The plaintiff fell in the road "near to the righthand side back wheel of the car". The driver came out, went to him and said, "Boy, I never see you. I thought it was a dog".

In his evidence the plaintiff, a civil engineer, said that he was driving the car from west to east along Windward Road at about 7.30 to 7.40 p.m. His headlights were on the 'dim', the street was well lit, the speed was about 25 m.p.h., not fast. As he approached Hippolyte Road he "saw a person running along the road. He was running towards the east, on the northern side of the road. He continued doing this for a short time and then turned at right angles across the road. He was in front of me".

Under cross-examination the defendant explained that when he saw the plaintiff "dash" across the road he did not try to stop the car. He slowed down but he did not apply his brakes because at that time he thought that the plaintiff would have run safely across the path of his car. He hoped to pass the plaintiff on his right. Continuing his account of the accident the defendant said, "As he got into the centre of the road he turned around and ran into the right side of my car, which was just abreast of him. The man hit the right front fender just behind the front wheel. He fell over unto the bonnet and was hit by the windscreen and then he fell unto the road

almost immediately, it was one action. I turned the car to the left sidewalk and stopped. I stopped about fifteen yards behind where the man dropped".

Constable Kevert Faloon of the Denham Town police station gave evidence in support of the defendant's case. He arrived at the scene of the accident shortly after its occurrence. The plaintiff had by that time been removed to the hospital. The constable saw the defendant only and received a report from him. The constable described the damage to the defendant's car, "The right portion of the windshield of the car was broken and there were signs of human hair on the portions of the glass that were left on the car. There was a slight dent on the right portion of the dashboard".

After listening to the addresses of counsel the learned judge delivered oral judgment. There is no verbatim report of what was said but the printed record contains a note made by the judge which is headed "Oral judgment delivered on the main facts found and proved and observations, if any, as shown hereunder". This note shows that the pleadings and the evidence were examined and particular aspects of the evidence commented upon. In the light of the note of the judge's comment on the damage to the defendant's car it would seem that although this was not specifically stated, the judge accepted the constable's description of the damage to the defendant's car. In paragraph 5 of the judge's note this statement occurs:

> "5. The facts accepted -proved on a balance of "probability -
> "(a) that the defendant was not keeping a proper look
> " out, having regard to the nature of the road, the
> " time of the accident, 7.00 to 7.30 p.m. when to
> " his knowledge traffic would have been heavy on a
> " very busy road;
> "(b) that the plaintiff took a foolish risk to cross a
> " busy road when it was clearly unsafe so to do. He
> " either was not paying a proper look out for traffic
> "coming from the west when crossing from south to north
> "or he saw the traffic but believed he could escape it
> "before the car came on. Court finds that the
> "plaintiff was negligent but that his negligence was not
> "as much as that of the defendant. Court apportio

"fault as between the plaintiff and defendant in the "ratio of 1:2."

These are the only findings of fact recorded in the judge's note on which his decision on liability is based. These findings are obviously conclusions from the primary facts which the learned judge must have found. These primary facts were not tabulated in the judge's note but having regard to the statement in concluding that the plaintiff "took a foolish risk to cross a busy road when it was clearly unsafe so to do", it is clear that the assertions of the plaintiff of the manner in which the accident occurred were substantially accepted. As a corollary it is equally clear that the defence version was rejected.

On the basis of this accepted position Mr. George submitted that it had not been established either that the defendant owed a duty of care to the plaintiff or if he did, that he was in breach of this duty. This submission was based upon an elaborate discussion as to whether the injury to the plaintiff was a reasonably foreseable consequence of the way in which the car was being driven on the occasion.

In my view the position is too plain to admit of any real argument. The test for the existence of a duty of care can only be applied ex poste facto. As Lord Atkin explained in Donoghue v. Stephenson (1932) Appeal Cases 562 at 581; the duty of care is owed to "neighbours". Neighbours are "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

As he drove along the Windward Road the defendant could not have avoided foreseeing that if he allowed the car to mount the sidewalk it could easily injure such persons who were there at that time. Equally should he have been able to foresee that if a person left the comparative safety of the sidewalk and attempted to cross the road that in the particular events which did in fact occur that person could be injured by the car. The pedestrian on the sidewalk or attempting to cross the street, and indeed all persons who were within the range of the potential danger of the moving vehicle were

owed a duty of care by the defendant. The critical question was whether he was in breach of that duty. This was a question of fact which is left to the judge to decide. In doing so he considers "what in the circumstances of the particular case, the reasonable man would have in contemplation, and what accordingly, the party sought to be made liable ought to have foreseen", per Lord Macmillan in Glasgow Corporation v. Muir, (1943) Appeal Cases 448 at page 457.

In the light of the observations which I have so far made on this interesting subject, it should at once be apparent that as the learned authors in Winfield and Jolowicz on Taut 9th Edition concluded at page 59: "It is impossible, therefore, always to keep separate from one another questions of the existence of a duty in fact and questions of the breach of that duty. The foresight of the reasonable man is of critical importance to both questions and in practice it matters not at all whether the form of the decision is that there was a duty but no breach or that there was no duty".

On the evidence in this case it was open to the learned judge to consider that having regard to the range of visibility available to the defendant, admitted by him to be about 200 feet, and bearing in mind the distance separating the defendant from the plaintiff as the car came around the corner, about 130 feet, according to Wallace, about 330 feet according to the plaintiff, the defendant should have sufficiently observed the plaintiff and should have been able to prevent the car colliding with him. He failed in the discharge of this duty to the plaintiff because he was not keeping a proper look out. In view of his rejection of the defendant's version of the accident, the learned judge could also have considered further that the defendant had not seen the plaintiff until at the moment of or after the collision. It would also have been reasonable for him to think that this conclusion was confirmed by the statement made by the defendant that he had not seen the plaintiff and thought that the car had hit a dog. Such a conclusion could very well have been the basis for the judge's determination of the apportionment of the fault between the plaintiff and the defendant in the ratio of 1 to 2.

On this subject, "..it is well established that regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness", per Lord Justice Winn in Brown et ux vs. Thompson, (1968) 2 A.E.R. page 708 at page 709. I find it difficult to make any sensible distinction between the causative potency of the acts or omissions of the plaintiff or the defendant. Both appeared to have been inattentive to a high degree, and by this inattention each of them must have potently contributed to the causation of the accident. But the learned judge must have concluded that the inattention of the defendant was gross and more intense than that of the plaintiff. The judge must therefore have decided that the defendant was more blameworthy than the plaintiff. It was open to him to so conclude. In such a situation, as the authorities show, the case would have to be a very strong one indeed to justify interference by an appellate court of the judge's apportionment. "It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice of discretion, as to which there may well be differences of opinion by different minds", per Lord Wright in British Fame (Owners) vs. Macgregor (Owners) et ux, (1943) Appeal Cases page 197 at page 201. I would therefore not disturb either the judge's findings on liability or the proportion in which he ascribed that liability between the parties. The judge's assessment of the general damages is much more clearly open to question. The award of £311.14.6 for Special damages was accepted. The assessment of General damages in the sum of £4,900 was vigorously challenged.

In support of his submissions, Mr. George relied heavily on the written medical report of Professor John Golding, Professor of Orthopaedics at the University of the West Indies. This report was tendered as a part of the plaintiff's case; by consent it was received in evidence. It shows that the substantial injury received by the

plaintiff was a simple fracture of the shaft of the femur. Upon admission to the University Hospital he was bleeding profusely from lacerations around his head. These wounds were treated and the plaintiff was given a transfusion of blood. On the 9th of March an open operation on the fracture of the femur was performed and a kuntscher nail was inserted. The report continued to record that the plaintiff made a good recovery from the operation and when he was seen by Professor Golding on the 18th of November 1966 the condition of the leg "was found to be virtually perfect. He was getting no pain in the leg". There was, however, some slight shortening of this leg possibly about quarter of an inch and some limitation of external rotation and abduction. The kuntscher nail was not causing any trouble. Professor Golding saw no reason to have it removed. When he gave his report on the 30th of November, 1966, ten months after the accident, the professor assessed the plaintiff's disability as "total for five months from the time of injury with a partial disability amounting to fifty per cent of the function of his leg for a further three months and no final disability".

In the note which he made as to general damages, the learned judge indicated that these included (a) pain and suffering; (b) loss of amenities of life (shortening of leg, inability to indulge in pastime etc.); (c) prospective loss of earning in the labour market as a plumber if he wishes to continue with that trade or of a casual worker (which plaintiff was before he took up plumbing) - taking into account the age of plaintiff; vicissitudes of life, uncertainty in labour market etc".

The learned judge appears to have accepted the plaintiff's evidence that he could not stoop down to do plumbing because of pain in his hip and that he had attempted to do this work about a year after the accident, but had to desist because of pain. In the note of his findings in relation to damages this primary position was specifically found. The note reads:

"(a) Court finds that even if on 30.11.66 the plaintiff was not

/experiencing

any pain, he does suffer from pain occasionally as a result of the injuries and that the "kuntscher nail" inserted in his femur may well remain for a long time and that lifting load, stooping and long standing will cause discomfort and may make him less mobile.

(b) That in fact one leg, (left), will forever be half inch to quarter inch short, and this will cause a 'drop' or 'limp' when the plaintiff walks".

It is at once apparent that the plaintiff's claim that he was suffering from pain and was unable to stoop down is in conflict with the tenor of Professor Golding's medical report in 1966. In November of that year when he was examined by Professor Golding he was "getting no pain in his leg". In addition Professor Golding said that the plaintiff would suffer no final disability. This conflict could not have escaped the notice of the learned judge. It should have caused him to reflect whether the plaintiff was not malingering when he said at the trial that he was suffering pain and was disabled to the extent that he could not stoop down and do his plumbing. There is nothing to show that the learned judge did so reflect. Nevertheless the point is so obvious that I think it should be assumed that he did in fact so reflect.

In this situation I take the view that the advantage which the learned trial judge had in seeing and hearing the plaintiff was sufficient to outweigh Professor Golding's opinion that he would not suffer any residuary pain as a consequence of the accident. But objectively analysed I do not think it would have been reasonable for the judge to conclude that this pain was either excessive or continuous. Further, I take the view that it was not open to the judge to conclude that the plaintiff would be disabled for all time and thereby prevented from performing the work of a plumber. I take this view because not only is there no material upon which any such conclusion could be found, but also because on the material available to the judge and which was provided by the plaintiff himself, the clear indications are that he would have no final disability.

By way of the method not infrequently followed by judges, I have attempted to set down item by item what seems to me to

be a correct amount for the assessment of damages under each head. In this way I have arrived at a final figure which is less than £1,500. In my view it is obvious that the sum awarded for General damages £4,900 is a wholly erroneous estimate. I would therefore set that finding aside and in its place I would substitute the figure of £1,500, in the proportion found by the judge. I would therefore award the plaintiff £1,000 for General damages and £207.16.4 for Special damages. I would award to the plaintiff a total sum of £1,207. 16. 4, converted to dollars this is $2.415.63. To this extent I consider that the learned judge's judgment should be varied.

SMITH, J.A.:

I agree that there is no ground on which the learned judge's finding as to liability and his apportionment of fault can be disturbed. I also think that the award is wholly out of proportion to the injuries received by the plaintiff, and I would also award the sum which has been stated by Mr. Justice Fox. To that extent I agree that the appeal should be allowed.

GRAHAM PERKINS, J.A.:

I agree that the appeal should be allowed to the extent indicated by my brother Fox. I wish, however, to add a word or two on the question of liability and on the question of the function of this court on the question of trial judges' apportionment. As far as the trial judge's apportionment of liability is concerned, I am of the clear view that the authorities both here and in England, recognise that an appellate court can interfere with an apportionment made by a trial judge, albeit not lightly. What has given me some considerable difficulty in this case, and this proceeds from the absence of any reasonably clear factual picture resulting from the trial judge's failure to record any primary findings of fact, is the identity of the basis on which it ban be predicated that the fault of the plaintiff was not at least equal in degree to that of the defendant. In that circumstance any interference by this court on the question of the apportionment would necessarily involve entering an area of pure speculation, and for that reason only I refrain from concluding that the trial judge proceeded on an entirely erroneous principle in

arriving at a 1 to 2 proportion of liability in favour of the plaintiff.

As to the question of liability, I recognize Mr. George's submission as valid as a matter of principle and as supported by authority. I regret, however, that in the particular circumstances of this case questions involving foreseability must at the end of the day remain purely academic. Since the basis on which the defendant was found liable was his failure to keep a proper look out, a result that must have followed from the acceptance by the trial judge of a situation in which it was open to him to find that the defendant ought to have foreseen that if in relation to the plaintiff when in a critical area he did not proceed with caution and keep a proper look out, he might cause injury to the plaintiff.

As far as the award of General damages is concerned, with the best intention in the world, I find myself in the impossible position of not being able to accommodate my thinking to an award in excess of £1,000, but in view of the views of my brothers Fox and Smith, I only observe that I am not prepared to dissent therefrom. I agree that the appeal should be allowed in so far as the award of General damages is concerned.

FOX, J.A.:

The appeal on liability is therefore dismissed. The appeal on damages is allowed. The award of £4,900 for General damages is set aside and in its place the sum of £1,500 is substituted. The judgment in favour of the plaintiff is varied accordingly. Each party is to have one half of each party's costs of this appeal.