

11/11/05  
1

*IN THE SUPREME COURT OF JUDICATURE OF JAMAICA*

*IN COMMON LAW*

*SUIT NO. C.L. H 035 OF 1999*

*BETWEEN            ALVAN HUTCHINSON            CLAIMANT*  
*AND                    IMPERIAL OPTICAL LIMITED       1<sup>ST</sup> DEFENDANT*  
*AND                    HUGH FOREMAN                    2<sup>ND</sup> DEFENDANT*

*Heard: May 6, July 14, 15, and September 16, 2005*

*Mr. D. Forsythe for claimant  
instructed by Forsythe & Forsythe.*

*Mr. J. Spence and Mr. C. Bailey for the Defendants  
instructed by Dunn Cox.*

*McDonald J. (Ag.)*

The case for the Claimant is that on the 11<sup>th</sup> of November, 1999 Mr. Foreman so negligently drove Suzuki Baleno registered 4819 BN along the Bynloss Road in St. Catherine that he caused it to collide with Mr. Hutchinson who was riding his bicycle across the said road.

Mr. Hutchinson claims to have sustained injuries, suffered loss and incurred expenses as a result of the accident. The 1<sup>st</sup> Defendant was the owner of the said motor vehicle which was being driven by Mr. Hutchinson, the servant and/or agent of the 1<sup>st</sup> Defendant.

According to the Claimants evidence, he rode his bicycle from the left side of the Bynloss road going across to the right. When he crossed the white line in the road, a car was coming behind which he had seen before he went across the road, it passed him and never stopped.

Another car came around the curve from the same direction as the first car, it came on the outside overtaking the first car and knocked him down.

He said that before he went across the road he looked both sides, he was not talking to anyone at the time. He saw the first car coming “ a little way so”, but he could not see behind it around the corner.

He said that the second car came from around the curb/bend and hit him off his bicycle. He knew nothing more until he found himself in the Linstead Hospital where he stayed overnight. He was examined by the Doctor and had two x-rays.

In cross-examination Mr. Hutchinson said that the first time he saw the other vehicle (i.e. 2<sup>nd</sup> vehicle) was when it hit him. He never heard it before it hit him.

He said that as he went cross the white line the second vehicle hit him and it was under/close to a minute after the first car passed that the other car (i.e. 2<sup>nd</sup> car) hit him.

He said he passed in front of the first car which did not hit him and the second car came round to get round the first car and while trying to pass it, hit him.

He denied that he rode his bicycle right into the path of the vehicle which hit him. He denied that the vehicle which hit him was not overtaking any other vehicle.

The claimant called Mr. Anthony Mansfield as a witness. He testified that he was standing at the door of his stall when he saw a car come and stop letting off passengers. He then saw Mr. Hutchinson go across the road on his bicycle. A car then came round on the extreme right very fast, Mr. Hutchinson crossed the road/the white line and the said car hit him off his bicycle.

He rushed from his stall and went up and saw Mr. Hutchinson on the ground. He went around to the vehicle which hit Mr. Hutchinson and looked at the driver, who looked like "him have a bit of alcohol ... became him look that way around the steering like him have this kind of dizziness like when somebody drunk."

Mr. Mansfield said that he did not spend much time with him, he did not speak to him, but rushed back to Mr. Hutchinson and took him to the Linstead Hospital.

He said that the car that hit Mr. Hutchinson was driving in the right land and that he never saw it driving at any point in the left lane.

He said that the only car he saw in that vicinity before or after or about that time was the one which had come down and stopped in the sidewalk on the left side of the road, and it was not blocking the left lane that much.

He said that he saw Mr. Hutchison before he started to cross the road, and he did not see him talking to anyone. He was unable to judge the speed at which Mr. Hutchinson rode across the road. He said Mr. Hutchinson was just trying to make it across the road as quick as possible.

Under cross-examination he said that his stall is about  $1\frac{1}{2}$  chain from where the accident occurred. He said that when he saw the car which hit Mr. Hutchinson, it was about  $\frac{1}{4}$  chain from Mr. Hutchinson, which is the same distance the corner was from where the accident took place.

He said that when the vehicle was  $\frac{1}{4}$  chain away from Mr. Hutchinson, he was on the right hand side of the road already, and he was hit down on the right hand side of the road.

He said that no vehicle passed Mr. Hutchinson on the left hand side after he crossed the road, just before the accident that day.

Mr. Mansfield told the Court that he did not see the vehicle that hit Mr. Hutchinson go around any other vehicle. He said that when he saw the driver sitting in his seat in the driver's position he observed that his upper body was swaying and he was looking straight ahead. The driver's window alone was down and he pushed his head through the driver's window and smelt alcohol inside the vehicle from the driver position.

He said that the front passenger seat was empty and he counted three persons in the back.

He also said in cross-examination that it was three cars in all, one car passed first, and then the taxi came and let off passengers and then a third car, private car came in the right lane and hit down Mr. Hutchinson.

He said that the second car which drive up quickly was the taxi which came up and stopped.

He admitted to saying in his witness statement Exhibit 3 that "one car heading in the left lane towards Linstead passed before Mr. Hutchinson's bicycle reached the centre of the road ..... then a second car drove up quickly in the same direction attempting to head off Mr. Hutchinson in front and was actually in the right lane where Mr. Hutchinson had reached, and they collided."

Mr. Mansfield denied that the car which hit Mr. Hutchinson was at all times before the accident driving on the left side of the road. He denied that Mr. Hutchinson rode out into the vehicle's way.

### **Defendant's Case**

The defence called two witnesses, one being the driver. Mr. Foreman and the other Mr. Keen a passenger in the car.

Mr. Foreman's evidence in chief took the form of his witness statement – Exhibit 5.

His case was that on the 11<sup>th</sup> November 1998 at around 5:30 p.m., he was driving motor vehicle 4819 BR at about 35 mph approaching the Cross Roads District Main Road/Bynloss Road in St. Catherine heading towards Kingston.

He saw a pedal cyclist on the left soft shoulder of the road about one or two car lengths away and who appeared to be engaged in conversation with someone.

At the car approached the cyclist, he suddenly without any warning rode the bicycle into the roadway immediately into the path of his moving vehicle, as if he was going across the road.

He said the cyclist did not give any signal that he was about to move up or enter the roadway. He did not even look up and down the road to see

if it was clear before attempting to cross. He just seemed to push off suddenly into the road into the path of his motor vehicle.

He stated that he tried to avoid the collision by swerving right and applying his brakes. In his evasion manoeuvres he drove the car into the right lane and there were no vehicles coming from the opposite direction at that moment.

He said that despite the fact that he swerved and applied his brakes, the cyclist kept coming across the road and the bicycle collided with the left headlamp of the car. As a result of the collision, the cyclist was thrown off the bicycle unto the bonnet of the car and rolled unto the windscreen.

Mr. Foreman said that he was so completely caught by surprise by the cyclist's sudden entry into the path of his vehicle and it all happened so quickly that there was not any time to alert the cyclist to the danger that he was putting himself into by honking the horn.

After the collision he immediately came out of the car to see if the cyclist was injured and to inspect the damage to the vehicle.

He testified that he was not drinking any alcohol that day, nor were any of his passengers.

He denied that when he was approaching the area where the accident took place, Mr. Hutchinson was already on the right hand side of the road.

He said that no vehicle or any taxi had pulled up over on the left soft shoulder letting off passengers just before Mr. Hutchinson rode across the road. He denied that he was overtaking another vehicle when the impact took place. He denied the suggestion that Mr. Hutchinson rode across the road in front of one vehicle which was in front of his and that he came and hit him off the bicycle.

Under cross-examination Mr. Foreman said that he was not speeding, but was travelling at 30 – 35 mph. He said that when he first saw the cyclist he was sitting on the bicycle seat with one leg on the pedal stationary, looking across the road. He appeared to be in conversation with a woman who was not too close to him but who was also in the soft shoulder on the left side of the road.

He said that when the car approached adjacent to where the cyclist was on the soft shoulder he immediately rode across the path of the car. He immediately applied his brakes and swerved right. The left headlamp hit the rear wheel section of the bicycle. The cyclist was hit in the left lane before he had crossed the centre white line.

Mr Foreman said that he was of the opinion that he exercised the best option that he had in the circumstances. In relation to other options open to him, he explained that if he had gone left, the full front of the car or centre of



the car would have hit the cyclist and the car would possibly run over him. He said that he had to concentrate on the driving surface, he did not know if there was a ditch in the soft shoulder.

He said that at the point where the cyclist came across the road, even at 35 mph the stopping/breaking distance would not allow the car to come to a complete stop before touching the bicycle.

Mr. Keen corroborated Mr. Foreman's evidence that he was driving the Suzuki Baleno, that there were three persons in the car, two in the front and himself seated in the back, that the vehicle was being driven at all times in the left side of the road, at a speed of between 30 and 40 mph. That the cyclist came across the road in front of the car; and the driver applied his brakes and swerved to the right.

He said the cyclist was riding straight across and did not try to stop. The cycle hit the front left of the vehicle and the cyclist came unto the bonnet and windscreen.

He told the court that none of the passenger's were drinking alcohol that day. He denies that Mr. Foreman was overtaking any other vehicle when the accident occurred. Mr. Foreman testified that the impact took place in the left lane and Mr. Keen's evidence is that the cyclist fell in the left lane.

There is discrepancy in the defence witnesses evidence as to where the vehicle stopped. Mr. Keen said that the right front wheel was about a foot or less over the dividing line and the rear right wheel was still in the left lane on the other side of the divide. Whereas Mr. Foreman's said the vehicle came to stop with left wheel 15" from the white line in the middle of the road, so that the vehicle was now entirely in the right lane. On this point I accept the evidence of Mr. Keen over that of Mr. Foreman.

The parties have given diametrically opposed accounts as to how the accident occurred.

It is the Claimant who must satisfy the Court on a balance of probabilities that they have proven the allegation of negligence against the Defendants. It has to determine which of the accounts put forward by the Claimant and the Defendant is more believable. Credibility plays a pivotal role in this exercise, and the Court in assessing credibility will have due regard to the demeanour of the witnesses.

There is an important area of the Claimant's evidence which calls his credibility into question.

Mr. Hutchinson in his evidence reiterated that the vehicle which hit him was trying to overtake the first vehicle when the accident occurred, yet

at the same time he maintains that he saw the vehicle for the first time when it hit him.

If this is so, he cannot speak to the positioning and manner in which this second vehicle was being driven prior to the impact.

There are several inconsistencies in Mr. Mansfield's evidence which calls his credibility into question.

The first is that in cross-examination he said that there were three cars, the first one passed, the second one was a taxi which stopped and the third one hit down Mr. Hutchinson.

Whereas in examination-in-chief he said that there were two cars, the taxi, and the one which hit down Mr. Hutchinson.

In his witness statement – exhibit 3, he said there were only two cars, he saw Mr. Hutchinson crossing the road on the bicycle, the first car passed before his bicycle reached the centre of the road, and the second one drove up quickly and collided with Mr. Hutchinson. There is no reference to any taxi or other vehicle coming up and stopping.

When cross-examined as to what he said in his statement about the first car, Mr. Mansfield said that this car passed a long time before Mr. Hutchinson got hit down and that the car had nothing to do with it. This clearly is irreconcilable with his statement that the car passed before Mr.

Hutchinson reached the centre of the road, and the second car drove up quickly.

Secondly, Mr. Mansfield in his statement Exhibit 2 said that he spoke to the driver, but in Court testified that he did not do so.

Thirdly, in re-examination, Mr. Mansfield attempted to explain inconsistencies between his evidence in Court and the witness statement by saying that he had given the lawyer the statement over the phone and that the lawyer was to call him back and read it back to him and he did not. This is inconsistent with his evidence in cross-examination that he went and gave the lawyer a statement – “we go a town.” In addition the statement contains his purported signature and a certificate of truth.

The Court finds that material discrepancies exist between the evidence of Mr. Hutchinson and that of Mr. Mansfield. Mr. Mansfield stated in examination-in-chief that one vehicle had driven up and stopped on the soft shoulder on the left hand side of the road letting off passengers before Mr. Hutchinson started crossing the road.

On the contrary Mr. Hutchinson did not mention seeing any taxi or car stopping and letting off passengers at any time, and then another car coming on the scene and hitting him off his bicycle.

His evidence is that he saw a car before he went across the road but it was a little way, so he got before it in time, it passed behind him and did not stop; and less than a minute after another car came up overtaking the first car and hit him.

However Mr. Mansfield categorically stated that the car which hit Mr. Hutchinson was not overtaking or going around any other car at the time of the accident. This evidence is critical because it goes to the crux of how the accident happened.

The credibility of the claimant and his witnesses testimony cannot be relied on and I accept the evidence of the witnesses for the defence as being more reliable and truthful.

On a balance of probabilities I find for the defendant and accept:

- (1) that the claimant suddenly and without any warning rode from the left soft shoulder of the road in an attempt to cross without first ascertaining whether it was safe for him so to do.
- (2) At that time the 1<sup>st</sup> Defendants vehicle was approaching on its left hand side of the road at a speed of approximately 35 mph.
- (3) that the claimant placed the 2<sup>nd</sup> Defendant into a dilemma and as a result he applied his brakes and swerved to his right in an attempt to avoid a collision with the Claimant.

- (4) The Claimant kept going across and before the 2nd Defendant could bring the vehicle to a stop, the left front of the vehicle collided with the claimant's bicycle causing him to fall onto the bonnet of the car and eventually onto the windscreen.
- (5) That at the time of the collision the 2<sup>nd</sup> Defendant was not overtaking any other vehicle and had not been driving in the right hand lane.

Accordingly I give judgment for the defendants with costs to be agreed or taxed.