



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV00927

BETWEEN	REGINALD MCKENZIE	CLAIMANT
AND	WILLIAM BOX	DEFENDANT

Negligence – Motor vehicle colliding with pedal cyclist – Issues of Fact – Whether Condition of road caused accident- Whether Defendant breached duty of care to Claimant .

Sudine Riley instructed by Kinghorn and Kinghorn for Claimant

Simone Jarrett instructed by the Kingston Legal Aid Clinic for Defendant.

Heard: 8th October 2014 and 31st October 2014

BATTS J

1. This judgment was delivered orally on the 31st October, 2014. I have now been able to record it in permanent form.
2. In this case, as so often happens in these types of matters, the respective accounts of how the incident occurred differ remarkably. The Claimant alleges that he was standing on the sidewalk, with a bicycle beside him, when the Defendant drove his motor vehicle in such a manner as to hit him down. The Defendant on the other hand asserts that the Claimant was riding a bicycle along the roadway towards him and swerved from a pothole and into the path of his vehicle, hitting it.

3. Neither side called any expert evidence as to the condition of either the motor car or the bicycle after the accident, nor was there any plan of the locus in quo put in evidence. The evidence as to liability consisted only of persons' recollection. It falls to this court to determine the issues on a balance of probabilities and on the evidence available. I bear in mind that the burden of proof is on the Claimant.
4. Having seen and heard the witnesses, I must say that I do not accept the Claimant as a truthful witness. I do not intend to repeat all the evidence presented but will only reference same to the extent necessary to state my reasons.
5. In the first place, the Claimant's account borders on the fantastic. He has managed to insert almost every available act of negligence on the Defendant's part. So that he says the Defendant was driving fast, he says he had his head partway out the window, he says he was using his cellphone whilst driving. He also says that, having seen the Defendant's vehicle he went further onto the sidewalk but that, it came there to hit him down.
6. In the second place, there are some unexplained features of the Claimant's evidence. He said that he was talking to a little boy at the time. That boy was a student at a nearby school. He was giving the boy a message for his mother. The boy's mother was across the road. The Claimant knew her. He called neither the boy nor the mother to give evidence. He said the boy was off the island. He said the little boy ran off and so avoided being hit. It seems to me unlikely that a speeding vehicle coming onto the sidewalk could be avoided in this manner by a little boy. The Claimant also says that he did not own a bicycle and had never learned to ride one. This is a man in his 60's. He admitted that he knew and was well known to the Defendant. The Defendant on the other hand said that the Claimant rode his bicycle daily along that road and had done so for a long time. I find it incredible to believe that the Claimant a farmer from a

rural district had never learned to ride a bicycle. The Claimant says the bicycle which was beside him belonged to his grandson who is also abroad.

7. Importantly, the Claimant admitted there was a pothole on the road. He stated also that the place was well lit and bright at the time. Yet it was, according to the Claimant, the driver's side of the vehicle that hit him. I find it incredible that in such circumstances the Defendant would fail to see the Claimant and so hit him off the sidewalk. I also do not find, and it is not alleged, that he deliberately hit the Defendant.
8. Interestingly, prior to his giving evidence, I told the Claimant that he was free to sit and give evidence rather than stand if he wished. He opted to stand. I inferred from this that his foot might not be that badly injured. However, a few minutes into his cross-examination, almost on cue, he asked to sit because his foot was hurting. I ask myself if, as seems to be the case, his foot was badly injured (so much so that he was unable for 2.5 years to do the farming he normally did) why did he not accept my offer to sit in the chair provided. This bit of gamesmanship did not go to his credit. He ought reasonably to have known, if it were true, that standing was likely to result in pain. Hence it is either he refused the offer in order to make a demonstration or, it is not true that his foot still causes pain when he stands.
9. Having seen and heard the Claimant I therefore did not accept his account of the accident as truthful.
10. The Defendant gave evidence and he called one witness as to fact. Interestingly, their evidence was not identical. Where they diverged, I preferred the evidence of the Defendant's witness. The witness was a passenger in the Defendant's motor vehicle. They both stated that the Claimant was riding his bicycle in the opposite direction to their car. They both give the approximate time of the accident as 7:30 p.m. and say it was dark. The cyclist they said, came into the middle of the road apparently to avoid a pothole. Their vehicle came

almost to a complete stop. The Defendant says it was the left wing mirror of the car, which made contact with the cyclist. He lost control of the cycle hit the embankment and fell from the bicycle on the opposite side of the road.

11. The Defendant when cross-examined asserted that there was another vehicle coming towards him on the road. Further that the pedal cyclist (the Claimant) rode past that vehicle. He said he knew his passenger by the name of "security." He blamed the cause of the accident on the fact that the Claimant had no light on his bicycle. The Defendant says after the accident the Claimant asked to be taken home rather than to be taken to hospital. He therefore took him home. He denies that the Claimant was unconscious. The Defendant admitted that his vehicle was still moving at the time of the accident but he had slowed "right down." He said he did not blow his horn as his lights were on.
12. He tried to put a little distance between himself and his witness. He admitted knowing him a long time and said he gave him a lift as they were both going to Old Harbour. He to buy food and the witness to buy "Cash Pot." I believe, as his witness subsequently came to say, that their relationship was a little closer than that. The witness said that they were friends and even described the Defendant as being like his "father." The shop at which he was standing when, offered the lift was a regular meeting place. They were both going to buy lotto tickets in Old Harbour.
13. The witness a part-time security guard is Mr. Donovan Williamson. He is much younger than both Claimant and Defendant. He brought a refreshing candour to the proceedings. He was direct with his answers. His evidence as to how the accident occurred was similar to the Defendant's. He said,

Q. Cyclist was on your side of the road

A. yes on my left side riding towards me.

Q: how long you saw him riding towards you.

A: Not long. He came across to avoid a pothole on my side.”

14. The witness explained that another oncoming vehicle swerved to avoid the pothole. This it seems is what caused the Claimant to go onto the other side of the road. When asked why was this not in his witness statement, the following exchange occurred,

“Q: Why was it not mentioned in your witness statement

A: the first day I mentioned it but don’t know why it not there.

Q: you read it over before you signed it.

A: you know sey tell you honest truth. I read it but was not taking that full notice of it. Just read what I see.”

15. He too recalled that the Claimant said he wanted to go to his home. He admitted, contrary to the Defendant’s evidence, that the Claimant had to be lifted into the car. He denied knowing the Claimant before the accident and said the statement to that effect in his witness statement was untrue.

16. The only objective evidence in this case was in the form of medical reports. Exhibit I indicate that the Claimant suffered: Fracture left distal radius and compound fracture of 2nd, 3rd and 4th metatarsals. He was treated with a below elbow cast of left forearm and wound debridement to left foot. Exhibits 2 and 3 are reports from Dr. Rory Dixon an Orthopaedic Surgeon. The doctor said the Claimant sustained fractures of left wrist, left foot and disruptions of the right acromioclavicular joint. The accident occurred on the 19th January 2007. He was first seen by this doctor on the 18th July 2007. Initially Doctor Dixon says there was no loss of consciousness. The hospital did not report loss of consciousness (Exhibit 1). Exhibit 4 was a report from the physiotherapist.

17. No doctor was asked to opine about the consistency of the injuries with the Claimant's report of the accident. It does seem to me however that, if the Defendant had been speeding or driving at a fast rate of speed as the Claimant alleges, far more serious injuries might have been expected ; moreover, because the Claimant denies that it was the wing mirror of the car that made contact with him.
18. In my judgment, this accident was caused primarily because of the bad road conditions. This caused the vehicle coming in the opposite direction to the Defendant's vehicle, to move to its right in order to avoid a pothole. The Claimant, riding his bicycle at night and without lights, was behind or beside that vehicle and therefore was forced to move to his right. In an attempt to avoid the Defendant's oncoming vehicle the Claimant went all the way across the roadway. The Defendant in the dilemma slowed his vehicle right down almost to a stop. He could not swerve right for fear of colliding with the other car, or left for fear of colliding with the Claimant. The left wing mirror of the Defendant's car made contact with the handlebar of the Claimant's bicycle causing him to lose control and fall with the bicycle onto the sidewalk to his right.
19. In these circumstances, the Defendant is in no way to be blamed for this collision. He was on his correct side of the road and was unable to avoid a collision with the Claimant's vehicle in the circumstances.
20. The claim is dismissed. Costs will go to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge