[2012] JMSC Civil 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006HCV0577

BETWEEN	DUNCAN MCKOY	CLAIMANT
AND	SONIA WATSON	1ST DEFENDANT
AND	LAURISTON WATSON	2ND DEFENDANT

Appearances

Miss M. Rose-Green for the Claimant

Mr. D. Johnson instructed by Samuda and Johnson for the Defendants

Heard: February 2 and 17, 2012

Road Traffic – Negligence – Pedestrian stepping from in front of a parked bus – Collision with motorcar in process of passing bus

P.A. Williams J

[1] This is the oral judgment delivered on February 17, 2012 and subsequently now reduced to writing.

The claimant is seeking damages for injuries sustained as a result of an incident which occurred on November 15, 2003 along the South Camp Road in Kingston, when he came into contact with a motor vehicle being driven by the 2nd defendant owned by the first defendant.

The words being used to describe the incident were carefully chosen as the claimant under cross-examination insisted that he did not touch the car but rather that it was the car that hit him – the front of the car stuck him.
The 2nd defendant said it was the claimant who collided into the side of his car.

[2] After insightful cross-examination of the witnesses in this matter, one fact remained undisputed – it is that it was the claimant who stepped from in front of a Jamaica Urban Transportation Company "JUTC" bus when the collision took place as the 2nd defendant was in the process of passing that vehicle. The 'JUTC' bus had stopped at a bus stop to let off passengers.

[3] The claimant called no witnesses and in spite of his advanced years – he is now 80 years old – he proved to be a combative, stubborn but resolute witness at times.
He, however, on that day was a man who had taken the wrong bus. He was therefore now intent on getting on a bus going in the opposite direction to get to his intended destination.
This necessitated his having to cross the road and he choose to do so from in front of the parked bus he had just exited.

[4] He was not familiar with the area the bus had stopped. He had used the statue of George Headley at Sabina Park to identify where he was.
He said the bus stop at which he exited was above where the statue was but below where the Traffic Court is located.

[5] It was in those circumstances that he stepped to front of bus, - pushed his head out, looked up and then down – saw nothing. He could see "far down the road," as far as the distance down to where the statue was. He then looked up again. He then said as he proceeded to across he was hit by the car.

[6] The 2nd defendant agreed that the accident took place after passing Sabina Park but positions it beyond a traffic light closer to the Traffic Court.

Under cross-examination he said that he had stopped at the traffic light when he first observed the bus. He then travelled at no more than 15 miles per hour. He was in the process of passing the bus when the collision occurred into the side of his car.

He spoke of slight damage to his car but offered no proof of it.

[7] His witness was allegedly the driver of the JUTC bus – Mr. Rupert Blake – under cross-examination he was asked for and showed Miss Rose-Green his bus driver licence.

He says the bus was stopped at a bus stop by the Traffic Court.

[8] It is agreed by all the witnesses that this was a Sunday afternoon. The 2nd defendant and his witness differed as to what time it was that the accident had occurred.

The claimant is said to have been coming from church and there seems to be no real dispute that it was indeed sometime after noon.

It is agreed that there was not much traffic at this time on this day.

[9] Mr. Blake being on the bus spoke to the fact of the claimant recognizing that he was on the wrong bus and seeking to get out of the bus, across to the other side and to get another bus.

He spoke to the haste with which the claimant exited the bus. Under cross-examination he was forced to admit that he had previously spoken of the claimant running into the road. Admittedly it would have been a short distance and it would be doubtful how much running Mr. Blake would have been able to observe.

[10] Under cross-examination Mr. Blake said the claimant was actually waving at a bus going in the opposite direction – he was trying to stop a moving bus.

This he had not mentioned in his witness statement/evidence-in-chief but said he was saying so under oath because of the questions he was being asked.

He said the car was going at 25-30 miles per hour but later admitted he did not actually see the car before the collision.

There were some discrepancies between the evidence given by the 2nd defendant and that of his witness such that it can be well argued that Mr. Blake cannot be relied on in totality.

[11] It is not disputed that the injuries the doctor described in the exhibited medical certificate are the ones, the claimant received as a result of the accident – a small laceration over his right forearm and a swollen tender right ankle which X-rays revealed was due to a bimalleolar fracture of that joint.

In her submissions Miss Rose-Green opined that these injuries would be more consistent with him being hit to his right side as he said he was as he crossed the road as against his walking front ways into the side of the vehicle.

[12] The claimant was stubbornly unhelpful when under cross-examination efforts were being made to ascertain how far he was from the front of the bus when he was hit. He was unable to say at one point where he fell in relation to this bus.

The 2nd defendant maintained that the claimant was actually lying in front of the bus on his buttocks with his hands out beside him and legs straight out in front of him.

[13] The claimant asserted that ultimately, the accident is due solely to negligence of the second defendant as it was he who had driven around the bus at a very fast speed without looking out for pedestrians including himself who were expected to be using the road.

It is to be noted that the claimant has not led any evidence as to the speed at which the car was travelling. He was adamant he did not see the car before it hit him.

There is therefore in effect no evidence to contradict that of the 2nd defendant that he was in fact proceeding at approximately 15 mph. He had used that route

several times before and was aware prior to that day that a bus stop was at that place.

[14] Using the common sense approach that Miss Rose-Green had alluded to during the trial, if the claimant was indeed driving at a fast speed and struck an elderly man such as the claimant, one might well expect to see more injuries than a small laceration to the forearm and a fractured ankle.
Further, the 2nd defendant travelling very fast might have had difficulty coming to an immediate stop, after hitting the claimant head-on causing him to fall in front of the speeding car.
The issue of liability cannot be resolved solely by a consideration only of this matter of speeding.

[15] It must be considered significant that the claimant said he looked down and up, then down the road again and saw nothing. The road, he said was clear. The car, however, must have been sufficiently close that it could have struck him within apparent seconds of his stepping out in front of the bus.

[16] Miss Rose-Green has relied on two authorities to support her submission that the 2nd defendant was negligent: -

> **Mustard v Morris** 1979 M No 375 - an English Court of Appeal decision found among Official Transcripts 1980 – 1989 delivered on July 21, 1981.
> **Landers v Szymczak** 82/NJ/1535 a Queens Bench Division decision found also in the Official Transcripts 1980 – 1989 delivered April 19, 1983.

[17] The former involved a sixty-three (63) year old plaintiff and the latter a boy who was a little short of his 10th birthday at the time of the accident.
In both cases the defendants who had collided with them as they crossed the road were both held to be liable.

In both cases it appeared that the defendants were in a position where they could have or ought to have seen the plaintiffs.

[18] In the first, the court agreed that the defendant was not keeping a proper look out for pedestrians who could be expected to be crossing the road at that place and that hour of the morning.

In the latter – the plaintiff was found to have been hurrying to get to a bus on the opposite side of the road from where he was. He was found to have ran across within seconds after a friend; as young as he; had done.

The court however held that the defendant did see the plaintiff and did try his utmost to stop in a sensible way.

He however was found not to be driving with due attention because if he had, he would have seen the bus at the bus stop; would have seen the plaintiff on the pavement beside the very spot his friend had run from. This was what the court found to be a potentially dangerous situation and in the particular situation, a reasonable man should take the precaution of slowing down and blowing his horn.

[19] From the latter authority, Miss Rose-Green quoted Justice Hirst who in answering the question whether the defendant was negligent said:

> *"The test in these circumstances is very clearly expressed in the case of* ***Moore v Poyner*** *[1975] RTR 127 and also in* ***Binghams Motor Claim*** *cases 8th edition page 67. The test laid down by Court of Appeal there is as follows:*
>
> *The test to be applied to the facts was this: would it have been apparent to a reasonable man, armed with common sense in and experience of the way pedestrians particularly children are likely to behave in the circumstances such as were known to exist in the present case, that he should slow down or sound his horn or both."*

[20] In the case of **Moore v Poyner** the defendant had been found negligent by the trial judge in circumstances where the plaintiff – a six year old boy – had ran from an obscured pathway across the pavement in front of a 30 foot parked coach straight into the path of the defendant's overtaking car which had not slowed down from going at 30 mph or sounded his horn.
The Court of Appeal overturned this finding and allowed the defendant's appeal finding that in the circumstances he would not have been negligent.

[21] Mr. Johnson relied on one authority **Robert Richard Barry v John Stanley Wynn** [2011] EWCA Civ 710 delivered May 11, 2011.
The plaintiff here was an 11 year old boy who got off at the front of a double-decker bus along with two school friends. As they got off the defendant moved into the right hand lane to overtake the bus. The plaintiff after a pause of three (3) seconds then tried to run across the road straight ahead of a stationary bus precisely at the moment when the defendant was about to overtake it.
The defendant first saw him when the front of his lorry was two to three feet short of the front of the bus. He immediately stamped on his breaks but still hit the plaintiff causing him serious injury.
The defendant was found not to have been negligent on his appealing the finding to the contrary.

[22] The Appeal Court found that it was not open for the recorder to find that the risk of boys running out in front of the bus as they did a reasonable apparent possibility which required the appellant to have sounded his horn and this would be irrespective of whether the appellant could and should have seen the boys fleetingly three (3) seconds earlier on the pavement.
Interestingly, in this case the court also referred to the decision of **Moore v Poyner** and referred to the same test as formulated and noted above. It is also instructive to note that after formulating the test, Lord Justice Buckley had gone on to state:

> *"I think that one must test his duty of care not by reference to what the plaintiff actually did but what*

sort of conduct by any child at any moment of time the defendant ought reasonably to have anticipated and to consider what course of action he could have had to take if he was going to make certain that no accident would occur."

[23] It is without doubt that a greater degree of care and proper look out is to be expected from an adult as against a child pedestrian.

From the authorities relied on it is clear that these matters turn on the particular circumstances of each case; hence one cannot adopt any decision to suit every similar case.

What seems to distinguish the cases relied on by Miss Rose-Green from that relied on by Mr. Johnson is that the courts had to be satisfied on the evidence whether the defendant could or ought to have seen the plaintiffs or anticipated their movements into the road.

[24] The words of Lord Justice Megaw in **Lloyde v West Midlands Gas Board** [1971] 2 All ER 1240 at page 126 are instructive bearing in mind he was discussing the principle of *res ipsa loquitur:*

"....when a pedestrian is knocked down by a vehicle as he is crossing a road and there are no eyewitnesses to the accident and no evidence of excessive speed on the part of the driver of the vehicle, res ipsa loquitur cannot be relied upon to establish negligence on the driver's part since this is not the sort of accident which only happens in the ordinary course of things by reason of the driver's negligence and pedestrians frequently get run over when they attempt to cross the road, having failed to see oncoming traffic."

[25] To my mind these authorities highlight two (2) features to be considered in the instant case.

The first is whether or not the 2nd defendant saw, could have seen or ought to have seen the claimant prior to his attempting to cross the road from in front of the parked bus.

The second is whether he could or ought to have anticipated a reasonable person attempting to cross the road from in front of a parked bus such that he should have taken precautions and sounded a warning.

[26] The claimant had asserted in his particulars of claim that the defendant's negligence was to be seen from the following:

i. Driving at a speed which was excessive in the circumstances.

ii. Failing to keep any or any proper lookout along the roadway.

iii. Failing to have any or any sufficient regard for other users of the roadway in particular pedestrians.

iv. Failing to warn claimant on his approach.

v. Failing to take any or any other precaution in manoeuvring the brake to avoid colliding with the claimant.

vi. Failing to stop, slow down, to swerve or in any other way so to manage or control the motor vehicle as to avoid the said accident.

[27] As has already been noted the claimant has offered no proof of his assertion that the defendant was driving at an excessive speed.

As to the other assertions there has been no real evidence from the claimant in proof either. He seems to be saying the fact the accident occurred means they must be true. The defendant under cross-examination does in fact admit taking no other evasive action. He was driving slowly past the bus and to his mind this may have seemed sufficient.

At the end of the day it is clear that the claimant had failed to see the oncoming traffic. He was stepping as it where into the middle of the road from a position where he could not have been seen.

[28] The claimant was attempting to cross a main road at a time when, from a place where and in a manner in which it was unsafe for him to have done so.

In these circumstances, the 2nd defendant cannot be held to have been negligent and therefore liable.

Therefore there is judgment for the defendants with cost to them to be taxed if not agreed.