[2014] JMSC Civil 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV04383

BETWEEN	***EDWARD GEORGE TAYLOR***	***CLAIMANT***
A N D	***BERNARD MAHONEY***	***DEFENDANT***

Mr. Sean Kinghorn and Miss Danielle Archer instructed by Kinghorn and Kinghorn for the Claimant.

Mrs. Suzette Campbell instructed by Campbell and Campbell for the Defendant.

Heard: July 25 and October 10, 2013 and February 11, 2014.

Negligence – Collision involving a pedal cycle and a truck – Cyclist travelling to left side of the truck when truck proceeded to turn left – Liability of the parties – Whether there is contributory negligence.

P.A. Williams, J.

[1] This claim arose out of an accident which occurred along the Independence City main road at the T-junction of Passage Fort Drive and Knutsford Drive, in the parish of St. Catherine. Although damages are being sought, given difficulties experienced in securing the attendance of the Doctor to speak to injuries suffered by the claimant, it was agreed that this Court would limit itself to a determination of liability with assessment of damages to follow; if it becomes necessary.

[2] The claimant, Edward George Taylor was riding his bicycle along Knutsford Drive when a truck being driven by the defendant, Bernard Mahoney passed him. The truck was later stopped at T-junction, where Knutsford Drive meets Passage Fort Drive. The claimant brought his bicycle to a stop beside the truck and they subsequently moved off from that position. The claimant intended to turn right after clearing the junction. The defendant intended to turn left. They collided and the claimant fell from his bicycle under the wheels of the truck.

[3] On July 12, 2011 the claimant filed a claim form which was amended and re-filed January 11, 2013. In his re-amended claim form he claims against the defendant, damages for negligence. On or about the 22nd of May 2009, he was lawfully riding his bicycle along Independence City Main Road, in the parish of St. Catherine, when the defendant, so negligently drove and/or operated and/or managed motor vehicle registration number CC9672, that he caused and/or permitted the said motor vehicle to come violently into collision with the claimant hitting him from his bicycle.

[4] In his amended particulars of claim, at the particulars of Negligence of the defendant, the following were outlined:-

(i) Driving at too fast a rate of speed in all the circumstances.

(ii) Failing to maintain any control of motor vehicle registration number CC9672.

(iii) Failing to see the claimant within sufficient time or at all.

(iv) Driving along the said road in a carless manner.

(v) Failing to stop, slow down, swerve or otherwise conduct the operation of motor vehicle registration number CC9672 so as to avoid the said collision.

[5] It is to be noted that one other matter was included in this amended particular of claim namely:-

> "As an alternative to the Particulars of Negligence averred, the claimant intends at the hearing of this claim to rely upon the doctrine of Res Ipsu Loquiter"

The only indication that the claimant had got permission to amend his particulars of claim is seen in the orders made at a Case Management Conference on the 11th of December 2012. At that time an order was made on the following terms:-

> "Permission granted for the claimant to amend Claim Form and Particulars of Claim to reflect correct registration number of the Defendant's truck".

[6] The defendant denies negligence as alleged and has stated that the accident was caused solely by the negligence of the claimant. Permission was granted at the Case Management Conference, for the defendant to amend his defence which had been filed on August 3, 2011. The permission was for the defence to be amended at paragraph 3, to conform to Rule 10.5 (4) of the Civil Procedure Rules which states:-

Where the defendant denies any of the allegations in the claim form or particulars of claim –

(a) the defendant must state the reasons for doing so; and
(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

[7] In his amended defence therefore his version was set out as follows, inter alia:-

(3) The defendant admits that on the date stated in the particulars of claim at the T-junction of Passage Fort Drive and Knutsford Drive there was a collision between a motor truck he was driving and the claimant who was

riding a pedal cycle. The defendant will say that the truck he was driving was licenced CC9672 and not as alleged.

(4) The defendant will say that he was proceeding in his correct left lane along Knutsford Drive towards Passage Fort Drive and had passed the claimant who was riding along the roadway in the same direction as the motor truck. On reaching the junction with Passage Fort Drive the defendant stopped, ensured the way was clear and was in the process of turning left onto Passage Fort Drive when the claimant rode onto Passage Fort Drive into the path of the truck and/or attempted to undertake the truck.

(5) The defendant will say the collision was caused by the negligence of the claimant.

Particulars of Claimant's Negligence

(1) Failing to keep any or any proper look-out.

(2) Failing to see or heed the presence of the defendant's vehicle on the roadway.

(3) Failing to wait until the defendant had completed his turn onto Passage Fort Drive before also turning onto Passage Fort Drive.

(4) Failing to give precedence to the motor truck which was at all material times ahead of him on the roadway.

(5) Failing to see or heed the defendant's indication to turn left.

(6) Riding into the path of the defendant's truck.

(7) Riding at night without any lights or reflectors on his pedal cycle.

(8) Failing to have any or any due regard for his own safety.

(9) Riding and/or attempting to ride across the path of the defendant's motor truck.

(10) Failing to stop, to slow down or to so manage his pedal cycle so as to avoid the accident.

[8] There is no dispute as to the location of the accident. At that location, there were two (2) lanes running in the direction towards Waterford and two (2) lanes running in the opposite direction towards the road commonly referred to as I-95; or also referred to as towards the Independence City stop light. This therefore is a four lane thoroughfare. It is a concrete median that separate the two (2) lanes running in one direction from the other two. There is an opening in this median which permits motor vehicles to turn through it primarily to access Knutsford Drive which is the road one travels to get to Caymanas Park.

[9] It is accepted that at this T-junction coming from Knutsford Drive one can either go left to go in the direction of Waterford or go straight across these first two lanes to go through the opening and then turn right to go towards the stoplight; eventually to I-95 direction.

What caused the collision?
The claimant's version

[10] It is curious to note that in his amended Particulars of Claim, the claimant swore to the fact that he was at all material times a storekeeper and was born on the 20th day of June, 1986. This varied from his witness statement which stated that he was a fifty-nine year old Race Horse Groomer. Having seen and heard from the claimant, the assertion in his witness statement appears to be the truth and in keeping with his original particulars of claim where he asserts the said profession and that he was born on the 4th day of December, 1953. The information contained in the amended particulars of claim will be viewed as an error to be laid squarely at the feet of his attorneys.

[11] A further area of confusion found was as to the date the accident took place. In all his documents filed the claimant says it took place on the 22nd of May, 2009.

The confusion arises however, in that the defendant in his witness statement says the accident took place on the 23rd of May, 2009 and in his statement of case admits to the date stated in the particulars of claim. In an effort to resolve this matter, I was forced to have sight of medical reports which had been exhibited by the claimant but were not admitted or relied on for the purpose of this trial. From them, it appears the accident took place on the 23rd of May.

[12] The claimant said it was about 7:30 p.m. when he was riding home from work that the accident occurred. He was insistent that while it was not bright daylight, it was not yet dark. He therefore maintained that there was no need for him to be using lights.

[13] Having been travelling on Knutsford Drive he saw when a truck passed him and stopped at the intersection. All the time he was riding behind the truck he said he was looking for an indicator to tell which direction the truck would be turning. He saw none and he further noticed the truck had no side mirrors.

[14] It was his intention to cross the two lanes going towards Waterford to go through the opening in the barrier to go right towards a gas station in the direction of the I-95. He needed to get air in the back tyre of his bicycle.

[15] Having seen no indicator on the truck, he thought the truck was going in the same direction he was going. He therefore, chose to ride to the left side of the truck and stopped waiting for the traffic to clear. He said he intended to use the truck as cover to go across the road. In his evidence under cross-examination he explained that he stopped right at the front door of the truck which he accepted was much taller than his bicycle. Further he expressed that he was waiting with the truck to get the go ahead so he could travel with it.

[16] He was pressed to explain whether he had proceeded to move out alongside the truck as he had said in his witness statement. He seemed to be resiling

somewhat from that position as he was now saying it was not at the same time that the truck moved that he moved also. Eventually when his attorney sought to have some clarity brought to this aspect of the evidence, the claimant explained he was using the truck as a "guardiancy" to protect him as he was going across the road.

[17] The claimant was clear in his explanation that it was because he had seen no indicator he felt it was sufficient reason for him to pull up on the left side of the truck rather that stopping behind it. As he put it he "figure more or less" that the truck was going in his direction; meaning going straight across. He went so far as to describe how he waited, with a foot resting on the concrete, until the truck got the go ahead so he could travel with it. He said he expected the truck as a big unit could cover him to go across the road.

[18] He went on to describe how after they had crossed the first lane and had crossed the dividing white line into the middle of the second lane the truck suddenly began to turn left. He was able to swing the front wheel of his bicycle to the left but the front left wheel of the truck hit the back wheel of his bicycle.

[19] After the collision he fell from the bicycle to the ground with the truck stopping on his leg. The driver came from the truck, looked at him and then went back in to drive the truck away. The claimant said the truck reversed off his right leg so he attempted to pull himself out of the way. The truck was however then driven over the right leg again, then unto his left leg and stomach before finally coming off. The claimant remained conscious throughout, despite what he described as the severe pain he was feeling.

[20] The defendant then was assisted in placing the claimant in his truck, took him to his home before taking him and leaving him at the Spanish Town Hospital. He remained there until the 31st of May when he was discharged. Some days later

he returned to have his dressing changed but the left leg was now swollen. He was admitted for a second time and did surgery a few days later on the left leg.

[21] Under cross-examination the claimant said he had been riding a bicycle for "nuff" years, from he was a little boy. He rode on the main road to go to work every day. He did not receive any formal training to ride and he used the road according to how other vehicles use it. The bicycle he was riding was his and he had owned it for some five (5) years before the accident. The bicycle, he insisted had reflectors and a light. He travelled with a flash light in the event the light on the bicycle should fail him.

The **defendant's version**

[22] The defendant said at the time he was driving a Leyland Freighter motor truck which was a tipper truck, popularly known as a 'dumper truck'. He said it was used to haul sand, gravel, asphalt and rubbish. He had been driving it for over five (5) years before the accident. The truck including the cab and the body was about 17-19 feet long and while he did not know the exact height it was much higher than a normal car. He had been driving a truck for thirty (30) odd years.

[23] He said both sides of the truck were fitted with mirrors about fourteen (14) inches in height which made it possible to see along the length of the truck. Further there was also a mirror on the left door which allowed him to see the front trye and anything near to him at the front. It was a right-hand drive vehicle.

[24] He maintained that it was after 9 o'clock in the evening that he was driving along Knutsford Drive. He had his headlights on - there were about seven (7) lights along each side of the truck which were also on. The truck also was fitted with reflectors at the back.

[25] He admitted that he did pass the claimant along Knutsford Drive and had noted that there were no lights or reflectors on the bicycle he was riding. The

defendant went on to explain that he was able to see the claimant with the assistance of the headlights on the truck.

[26] Having passed him, the defendant said he continued before getting to the intersection where he put on his left indicator as he intended to turn left onto Passage Fort Drive. He stopped, waited a while until it was safe to do so and pulled out. He cleared the left lane and went to the extreme right lane with the intention of going on to make the next right turn which in his estimation was either three (3) feet or three (3) chains from the intersection. It was while making this turn that the collision took place.

[27] Under cross-examination, he admitted that he had not looked into the mirrors, which allows him to see the entire left side of his truck, before driving out on to Passage Fort Drive. He said he did not think it necessary to do that. As he expressed it, he said he never had to do that because he never expected anybody “to undertake” him.

[28] It was after he had commenced turning that he heard somebody hit on the side of the truck, by his left door, and then he stopped. He agreed that he could have seen that part of the truck if he had checked the mirrors but he was not able to see through that mirror in any event because the place was dark.

[29] The defendant under cross-examination explained that he could turn his long truck from Knutsford Drive into Passage Fort Drive to the left without going into the extreme right lane to get the truck properly on the road because the truck had a “lot of lock”. On that day he had come out and start to make the turn but he did not contemplate anyone being to the left side of the truck as he felt no one would have any right to be around there at the time he was turning. He said it was the “dead side”. He expected no one there due to the fact that is a one way road he was coming off and when he was coming up everything was clear before he came out. He was insistent that in his thirty (30) odd years of driving he had no

memory of ever before encountering a bicycle man on the left of his truck when he stopped at an intersection.

The Submissions

For the claimant

[30] The issues identified by Mr. Kinghorn for determination are:-

(i) On the evidence presented, is the defendant liable for the said collision as claimed by the claimant?

(ii) Is the claimant contributorily negligent?

[31] In presenting the law he deemed applicable, the starting point was the case of **Boss v. Litton [1832] 5 C & P 407** which he described as the locus classicus. In that authority it was declared:-

> "All persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of the persons driving carriages upon it".

[32] The opinion of the Law Lords in the case of **Baker v. Willoughby [1969] 3 All ER 1528** was highlighted as being instructive. It was stated by Lord Reid at pages 1529 to 1530 –

> "There were two elements in an assessment of liability causation and blameworthiness….. A pedestrian has to look both sides as well as forwards. He is going at perhaps 3mph and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways although he may have to observe over a wide angle ahead; and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous……. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian".

[33] Mr. Kinghorn pointed to the comments from three (3) decisions in our local court as useful statements of the law to be applied in cases such as this –

(a) In **Jowayne Clarke and Anthony Clarke v. Daniel Jenkins Claim No. 2001/C211** delivered 15/10/2010 Her Ladyship Justice Sarah Thompson James stated:-

> "A driver of a vehicle on the road owes a duty to take proper care and not to cause damage to other road users – whom he reasonably forsees is likely to be affected by his driving. In order to satisfy this duty, he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations.
> It is a question of fact in each case whether or not the driver had observed the above stated standard of care required of him.

(b) In **Pamela Thompson et al v Devon Barrows et al Claim No. CC 2001/T143**, Mr. Justice Campbell at paragraph 11 stated:-

> "Section 23 of the Road Traffic Act places a duty on each driver to take steps to avoid an accident. I find that neither driver was exhibiting the necessary care and skill in light of all those circumstance. Mr. Campbell submitted that the driver who is on his correct side should not be saddled with additionally responsibility. I understand this to mean a driver who is operating correctly, if confronted with a collision which he can avoid, has no responsibility to do so. I find that repugnant to the spirit and intendment of section 23 of the Road Traffic Act."

(c) In the decision of **Cecil Brown v. Judith Green and Ideal Car Rental Claim No. 2006 HCV02566** delivered October 11, 2011, Mrs. Justice McDonald-Bishop is noted as having referred to the provisions of the Road Traffic Act and the common law and going on to declare:-

> "It is clear that there is indeed a common law duty as well as a statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident".

[34] Mr. Kinghorn found the section of the Road Traffic Act which renders some assistance on the facts of his case to be section 51 (2) which states:-

> (2) "Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection".

It is of course to be noted that section 51 deals with driving rules.

[35] Having reviewed the defendant's case which he described as quiet simple, Mr. Kinghorn expressed the opinion that the sole and central question that arises as to the defendant's liability is whether it would be reasonable for the defendant to expect that persons could be to the left of his vehicle. The answer he submitted involved a mixed question of law and facts.

[36] So far as it relates to the law, two (2) cases from the text Bingham's Motor Claim were round to be useful. **Sorrie v. Robinson [1944] JC 95** at paragraph 9.48 of the text and **Kenfield Motors Limited v. Hayles [1998] CLY 3919** at paragraph 9.54 of the text. From these authorities Mr. Kinghorn opined that the following salient points arise:-

> (i) If the defendant did give a signal the he was turning left, he had a duty to ensure that his signal was appreciated. This entailed checking his left rear view mirror with the expectation that someone could be travelling to his left;
>
> (ii) The defendant had a duty to look both left and right prior to entering a major road in keeping with his duty to keep a proper look out. It is submitted that duty does not end at viewing what is ahead, it also entails viewing what can be seen in his rear view mirror.

[37] From his cross-examination of the defendant, Mr. Kinghorn concluded that the evidence was clear that the defendant in making the turn had not checked, although he ought to have expected that persons could have been on his left. This was conclusive of the defendant's liability. He did not keep a proper look

out. His vehicle was equipped with special mirrors that allowed for him to see all that was happening in the left side of the truck. Had he used those mirrors, he would have been able to see the claimant and avoid the said collision.

[38] Mr. Kinghorn however did not end his submission there. He raised the issue of whether the claimant was contributorily negligent. He was, to my mind being very candid when he made as his concluding submission the following statement –

> "On a proper interpretation of the authorities and upon a sincere analysis of the evidence, it is submitted that the claimant cannot escape a finding that he contributed to the occurrence of the accident. His assumption that the defendant would have turned right was unsafe and dangerous. Paradoxically, it is not difficult to understand that in trying to use the truck as shield in crossing the road, the claimant was attempting to exercise care and caution and be safe from oncoming traffic".

[39] He urged that a fair and reasonable apportionment of liability in this matter was (⅔) two-thirds/one-third (⅓) in the claimant's favour and that the claimant be found one-third (⅓) responsible for the occurrence of this accident.

For the defendant

[40] Mrs. Campbell began her submissions by reminding the court of the elements she opined was necessary for the claimant to prove on a balance of probability. She submitted that there were three (3) areas of factual dispute which were to be contemplated on the question of liability.

(a) Whether the defendant had signaled his intention to make a left turn onto Passage Fort Drive.

(b) Whether it was reasonable for the defendant to have commenced making the left turn onto Passage Fort Drive, without checking his mirror to ensure nothing was coming from behind to the left of his vehicle.

(c) Whether it was reasonable for the claimant to move along the side of the truck i.e. undertake the truck when it was turning onto Passage Fort Drive, when by his own admission, he did not know in which direction the truck was going.

[41] In terms of issues of law there were two (2) questions she raised as to be considered.

(a) whether the defendant failed in his duty of care towards the claimant.

(b) whether the claimant was wholly responsible for the accident or was there contributory negligence on his part.

[42] Mrs. Campbell then went on to challenge the attempt by the claimant to assert and now rely on the failure of the defendant to turn on his indicator as contributory to the collision taking place. She noted that an examination of the Particulars of Claim and the Particulars of Negligence pleaded on behalf of the claimant reveal that there was no such allegation made. This, she submitted, meant that the claimant had failed to set it out as one of the facts on which he was relying as required by Civil Procedure Rule 8.9 (1). Thus the claimant could not now rely on this allegation which having not been set out, was not permitted by the Court to stand pursuant to Civil Procedure Rule 8.9 (A). The court, she urged, cannot therefore consider any evidence given as to the absence of the defendant's indicator and whether this played a part in the accident.

[43] In any event, she opined that there was an internal conflict in the claimant's case. It was her contention that the claimant, having placed himself past the back of the truck to a position alongside it, would have been unable to see the indicator light which would be illuminated at the back of the truck. Further she pointed out that in his witness statement he had said that he watched the truck lights for a while as he approached as he was checking for an indicator. However, under cross-examination he vehemently denied seeing any light at all at the back of the truck.

[44] The next matter Mrs. Campbell sought to address was the question of whether it was reasonable for the defendant to have commenced making the left turn unto Passage Fort Drive without checking his mirror to ensure nothing was coming from behind to the left of his vehicle. It was her opinion that it is now established that the standard of a user of the road, is the care expected of a reasonable man. She argued that the sum total of judgments in cases such as **Bourhill v. Young (1943) AC 92** and **Almon v. Jones (1974) JLR 1474** is that a reasonable man in exercise of his duty of care must keep a proper look out, observe traffic rules and signals, avoid speed and use the road according to accepted principles, such as passing on the right, not overtaking on a corner and stopping at road junctions.

[45] Against the underlying submission that reasonableness has to be determined by the surrounding factual circumstances, Mrs. Campbell reviewed the evidence and concluded that the defendant could not have anticipated, in the circumstances, that the claimant without warning or reason would place himself in a precarious position to the left side of the truck to use the truck as a guard to cross from Knutsford Drive onto Passage Fort Drive. The defendant exercised reasonable care in the use of the road as such anticipation would have been outside the realm of reasonable behavior.

[46] On the other hand, a review of the evidence of the claimant as to his actions on the road, led Mrs. Campbell to the opinion that the claimant was doing all within his power to ensure that an accident took place. The correct position for the claimant at the T-junction was behind the truck, especially since on his assertion he did not know where the truck was going – he just thought it was going in same direction he was, hence his decision to use it as a shield. If his version of the accident is to be accepted, Mrs. Campbell described it as foolhardy for him to move off along with the truck when it started turning onto Passage Fort Drive, he having not see any indicator as to where the defendant was going.

[47] On the matter of contributory negligence, the simple pronouncement of **Viscount Birkenhead in Admiralty Comrs. v. SS Volute [**1922**] 1 AC 129** was noted as providing a definition.

> "The test, he said, is whether the claimant in the ordinary plain sense of this business ……contributed to the accident".

[48] It was also noted that in **Nance v. British Columbia Electric Rly Co. Ltd. [supra]** the court said in order to establish the defence of contributory negligence:-

> "All that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury".

[49] It was Mrs. Campbell's submission therefore that having regard to all the circumstances, the accident was caused by the claimant's action of undertaking – and stopping to the left of the defendant's truck. This sudden and unexpected action of riding alongside the truck as soon as it had started making the left turn provided the defendant with no real and reasonable opportunity to stop in time to avoid the accident.

[50] When pressed by the court, Mrs. Campbell insisted that the claimant was more liable and if needs be should be awarded no more than 10% or 15% of damages.

The applicable law

[51] The appreciation by both sides that the driving standards and rules of the road applies to all road users – whether in motor vehicle, on a bicycle or on foot is to be foremost in a consideration of matters such as this.

[52] It is also useful to bear in mind a general definition of negligence. The one provided in the early case of **Blyth v. Birmingham Water Works Co. 856 Exch 781** is sufficient.

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

[53] The Privy Council decision of **Nance v. British Columbia Electric Railway Co. Ltd. [1951] 2 All ER 448** also provides some guidance as to how to approach a matter such as this.

At page 450 Viscount Simon had this to say:-

> "Generally speaking, when two parties are so moving in relation to one another so as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle".

[54] The general premise in negligence matters is recognized to stem from the three (3) elements necessary for proof in the action: a duty to the person injured, a breach of that duty and the forseeability of loss. It cannot be gainsaid that the duty of care expected of the user of the road – is to observe ordinary care or exercise reasonable skill towards other users whom he could reasonably forsee as likely to be affected.

[55] Due regard must also be had of applicable section of the Road Traffic Act as cited by Mr. Kinghorn i.e Section 51(2) which provides the statutory duty of care imposed on a driver and must be considered in conjunction with the common law duty requiring a driver to take reasonable care.

[56] The issue of contributory negligence was raised, somewhat unusually, by the claimant as it has been candidly conceded that the claimant could be viewed as having contributed to this accident. Hence the opinion of the Board in **Nance v.**

British Columbia Electric Railway Company Ltd [supra] as referred to by Mrs. Campbell must be the starting point for this consideration.

[57] The words of du Parig L.J. in **Lewis v. Denye [1959] KB 540** is also instructive –

> "The defence of contributory negligence – the defendant must prove first that the plaintiff failed to take ordinary care of himself, or in other words such care as a reasonable man would take of his own safety and second that this failure to take care was a contributory cause of the accident".

The analysis of the facts relative to the applicable law; and the findings on liability

[58] Going back to the basic rule for all such matters, he who alleges must prove, I will consider what the claimant has established on his case. He first particularized that the defendant was driving at too fast a rate of speed in all the circumstances. There was clearly no evidence to support this allegation. The defendant was moving off from a stationary position driving a nineteen foot truck unto a main road with the intention of turning off it soon thereafter.

[59] The next allegation of failure of the driver to maintain any control of the truck also was not substantiated by the evidence led. There is no suggestion that the defendant was engaged in a maneuver showing any absence of control over the vehicle.

[60] The next matter alleged is that the defendant failed to see the claimant within sufficient time or at all is to my mind at the root of what caused the collision. The defendant has detailed the mirrors affixed to the truck to allow him being able to see down the left side of the truck. He however, admits he did not check them because he expected no one to be there – he described it as his dead side. He thus seemed to have been paying attention to where he was going and this would have been prudent, given that he was crossing what may be regarded as a

busy main road. Both parties acknowledge that they had had to wait a while for there to be a break in the flow of traffic so that they could exit.

[61] The matter however cannot end with the defendant's admitted failure to check. Consideration now must turn to whether it was reasonable for him to do so. The claimant explained that he saw no indicator, taken to mean he saw no signal from the driver as to where he proposed to go. It is generally accepted that his options were to turn left or to go straight and then turn right. The claimant having seen no indication, indeed, he was adamant he saw no light at all; chose to position himself right at the front door of the truck, where the rear-view mirror is on the truck or the side farthest away from the driver. I frankly find myself wondering if in all the circumstances it would have been reasonable for the driver to have seen him there.

[62] I am also not satisfied that the time was as bright as the claimant would have wanted to make it out to be. Indeed, the defendant's assertion that at some point he would not have been able to see anything at a particular position because it was too dark, was left unchallenged.

[63] it is to my mind also significant of the claimant's positioning that he said after they had moved off and the truck had started to turn, he swung away and it was the front wheel of the truck that connected with the back wheel of his bicycle. Hence this supports the view that it was not unreasonable to find the driver may well not have been able to see the bicycle when he started to turn.

[64] The claimant to my mind, was not exercising reasonable care for himself when instead of waiting sufficiently away from the truck to avoid the chance of contact since on his case, he saw no light on the truck, and no indication where it was going. He presumed what turned out not to be so and took a guess and assumed a risk when he "figured" the truck must have been going in his direction.

[65] It may well be argued that up to the point before he actually started the turn, the defendant could have turned on his indicator if he so choose at any time. Once the claimant rode up on seeing no lights, he did not wait but went to the position on the left side where he had enough time to wait, resting his foot on a concrete there. The question then becomes whether he would have been able to see the indicator in any event from the position he was in.

[66] In any event as Mrs. Campbell asserted this issue of the indicator was not relied on, in and of itself as a particular of the negligence of the defendant. It was however stated as part of his account of the accident in his witness statement. It could be viewed therefore in the context of whether this alleged failure could substantiate the allegation of the defendant driving along the said road in a careless manner which is a particular of negligence alleged.

[67] However, having considered the evidence given by the claimant as regard this area, I find that he was less than credible in his assertions, firstly that he was watching the lights but saw no indicator and then asserting that there were no lights at all. Further as already referred to above, it is questionable whether he had taken himself out of the position of seeing any lights at all.

[68] The analysis of the evidence therefore leads to the conclusion that the accident was caused by the actions of the claimant. He more than just contributed to his fate. It was for want of care on his part when he chose to assume the position he did, on a guess as to where the truck was going and then to move off with the truck intending to use it as a shield. He engaged in a maneuver which I find the truck driver as a user of the road could not be called upon to have reasonably expected and thus to forsee he would have affected.

Decision

The judgment of the court is therefore as follows:

1. Judgment for the defendant

2. Cost to the defendant to be taxed, if not agreed.