

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 101 of 1975

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.(Ag.).

B E T W E E N BARRINGTON WALTER - Defendant/Appellant
A N D PATRICK BOOKER - Plaintiff/Respondent

Hugh Small for the defendant/appellant.

Dorothy Lightbourne for the plaintiff/respondent.

January 23, February 11, 1976

ROBINSON, J.A.:

This is an appeal from the judgment of the learned Resident Magistrate for Kingston in a negligence action whereby it was adjudged that both the appellant and respondent were liable in the proportion respectively of 70% and 30%. At the trial the appellant had counter-claimed for special and general damages.

The issues involved in this appeal are few and straightforward and we do not see it necessary to set out the facts in any detail.

On the 11th August 1972 at about 11 a.m. the respondent was being driven by his wife in his Volkswagen car along Barry Street travelling in a westerly direction. On reaching the intersection of Barry and Fleet Streets, she stopped the car, looked right and left and then proceeded to go across and through the intersection, although she saw a car which must have been the appellant's car travelling southerly along Fleet Street approaching the intersection. This car, she said was a distance of about one hundred yards (or one and one half times the length of the Civil Court building in East Street) from her. It was travelling in the centre of Fleet Street said to be a through street - "I couldn't say whether it was moving quickly or slowly." An accident occurred in the intersection.

The appellant gave evidence to the effect that he was driving at about 25 m.p.h. down Fleet Street when he saw the "flash of the thing come across, I applied my brakes, it could not stop it when I saw

the Volkswagen flash out I was about two yards from it." This estimate of measurement appears to be nothing more than "gilding the lily."

It would however suggest that inasmuch as he saw the car crossing Fleet Street, he was paying too little attention.

The Civil Court building in East Street is well known, and one and one half times its length, the estimated distance as given by the respondent's wife when she first saw the appellant's car, would be no more than 130 feet; added to this, at that particular point of time, she couldn't say whether that car was moving quickly or slowly. The learned Resident Magistrate concluded that she either misjudged the speed of the appellant's car or the distance it was from her. In our view, it is clear that in all the circumstances, it was unsafe for her to cross when she did; she was the major contributor to the accident and not the appellant. Accordingly we apportion blame in the ratio of 70% to the respondent and 30% to the appellant. The evidence accepted by the learned Resident Magistrate does not support the conclusion reached by her.

It was argued that the amount of two hundred dollars (\$200) for general damages is an erroneous estimate of the compensation which ought to be awarded for injuries suffered by the appellant. His medical report shows that he was examined by Dr. McNeil-Smith at the Kingston Public Hospital three days after the accident, when he was found to have a swollen and painful knee; xrays showed an undisplaced fracture through the lower pole of his right patella; he was in plaster for about five weeks. On the 3rd January 1975, when he was finally examined, he complained of pain on bending low. In the doctor's opinion, he has suffered permanent partial disability which should not exceed ten per cent of his right lower limb.

We agree that the award by the learned Resident Magistrate is erroneous and inordinately low and that the sum of \$600 (six hundred dollars) is a more realistic figure.

In the result, the appeal is allowed to the extent indicated herein; judgment of the learned Resident Magistrate set aside. There will be judgment for the appellant on the counter-claim in the sum of \$911 (nine hundred and eleven dollars) with costs in the court below

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on the counter-claim to be taxed or agreed and with costs of this appeal fixed at \$50 (fifty dollars). There will be judgment for the respondent on his claim in the amount of \$201 (two hundred and one dollars) with costs.