



[2013] JMSC Civil 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 03033 OF 2010

BETWEEN	DATHILDA SMITH (Administrator in the Estate of Robert McCarthy, Deceased, Intestate)	1ST CLAIMANT
AND	CLIFFORD McCARTHY (Administrator in the Estate of Robert McCarthy, Deceased, Intestate)	2ND CLAIMANT
AND	LEONARD SULLIVAN	1ST DEFENDANT
AND	MAVIS JADOO	2ND DEFENDANT

Mr. Dale Staple, instructed by Kinghorn & Kinghorn for the Claimants.

Ms. Vinette Grant, instructed by H. G. Bartholomew & Co. for the Defendants.

Fatal Accident Claim – Negligence – Whether Mother Vicariously Liable for Alleged Negligence of Son – Claim under Fatal Accidents Act and Law Reform (Miscellaneous Provisions) Act – Reliability of Expert Evidence.

In Open Court

Heard: January 14, 15 & 16; & September 16, 2013.

Coram: F. Williams, J.

Introduction

[1] The loss of a valuable human life is always a regrettable and sorrowing experience – especially for the family members and friends of the deceased. The loss of life in this case is, (there can be no doubt), no different.

[2] This action arises from the death on the 27th day of December, 2005 of Mr. Robert McCarthy, the son of the two claimants. Mr. McCarthy died along the Zephyrton Main Road (which runs between Ewarton and Linstead) in the parish of St. Catherine. He was 26 years old at the time of his death (having been born on the 19th of September, 1979), and was, on the evidence for the claimants, a farmer. He was on a bicycle at the material time, although there is some dispute on the evidence as to whether he was stationary or moving at the time of impact.

[3] As might be expected, the matter has come on for trial because of a denial of liability on the part of the defendants. Mr. Leonard Sullivan was the other person involved in the accident. He was driving a Nissan pickup registered 7641 DM, owned by the 2nd defendant, his mother.

[4] The approach to the resolution of this matter that commends itself to the court is an examination of the question of liability first, then, if necessary, an examination of the question of quantum.

Liability

Summary of the Case for the Claimant

[5] The claimant called three witnesses; one being called in the capacity of an eye-witness to the accident.

[6] That witness was Mr. Clinton Blair, a farmer, who testified to being by a stall on the Zephyrton Main Road on the day in question across from the new fire station. The collision, he said, occurred in the vicinity of the old fire station. As he stopped by the stall, he observed the pickup driven by the 1st defendant approaching and heading in the direction of Ewarton. There was a motor car ahead of the pickup, which stopped in

order to make a right turn onto the Rose Hall Road. The pickup, in order to avoid colliding into the rear of the motor car, swerved to the left, onto the soft shoulder, where Mr. McCarthy was, stationary on his bicycle, and there collided with him. Mr. McCarthy, as a result of the impact, hit the bonnet and the windshield of the pickup, breaking the said windshield. He fell into the bed of the pickup and then out in the road – on the left side as one faces the direction of Ewarton. The pickup continued along the road, with the bonnet up, and came to a stop near to Mr. Blair on the left hand side and near to the middle of the road, facing Ewarton.

[7] He testified to hearing the 1st defendant say, on exiting the pick up, words to the effect that the deceased had damaged his van; to which he, Mr. Blair, replied that it was he, the 1st defendant, who had caused the damage to his own vehicle. A group of firemen took Mr. McCarthy away. Some time after, two policemen visited the scene, made observations and made some comments. He cannot remember exactly when he informed the relatives of Mr. McCarthy about what he had seen; but they are persons whom he knew fairly well before.

[8] Evidence was given as well by Mr. Floyd Taffe, the brother of the deceased whose purpose for being called was to give evidence in relation to the farming activities carried on by the deceased and to give some indication of the type and scale of farming he conducted and his earnings.

[9] The other witness for the claimant was the first claimant – the mother of the deceased whose testimony related mainly to the age and date of birth of her son and other similar background; as well as to prove the funeral expenses.

Summary of the Case for the Defendants

[10] The first witness for the defendants was the 2nd defendant herself- Ms. Mavis Jadoo. Her evidence is consistent with the position stated in paragraph 2 of the defence – which is to the effect that at the time of the accident, he, the 1st defendant, was not acting as her servant or agent at the time but was, as it were, “on a frolic of his own”.

[11] The 1st defendant gave evidence next. His evidence was to the effect that on the day in question he was travelling in the direction of Ewarton with his common-law spouse and their child, who were seated beside him – the child being held by the mother, Ms. Stasha Reid. For convenience's sake and for another reason which will be adverted to later on in this judgment, the evidence of both Mr. Sullivan and Ms. Reid will be taken together at this stage.

[12] Their evidence is to the effect that there was no car ahead of them making a right turn and from which they had suddenly to turn away, as testified to by Mr. Blair. On the contrary, they were proceeding along the roadway, when Mr. McCarthy, who was proceeding on the side of the road to their left and in the opposite direction to that in which they were travelling, suddenly rode into the path of the pick up, as if attempting to go across the road. That, on their evidence, is how the collision occurred. Mr. Blair's account of how the collision occurred is denied.

[13] Mr. Sullivan and Ms. Reid were the witnesses as to fact. However two other witnesses were called by the defence: namely, Raymond Roberts, a Constable formerly stationed at the Traffic Division of the Linstead Police Station, St. Catherine for 14 years; but now stationed at the Protective Services Division; and Sgt. Leroy Christopher, an accident investigation and reconstruction expert.

[14] For his part, Constable Roberts testified to visiting the scene of the accident on the day in question. There he says he observed the pickup in the left-hand lane as one faces Ewarton. In front of it in the same lane and about three feet away was the bicycle. The front wheel, front fork and handle bar of the bicycle were damaged. The damage he saw to the pickup was to the bonnet, front grille, windscreen and roof; and the damage was concentrated to the centre of the vehicle.

[15] Constable Roberts said he saw nothing on the left hand soft shoulder (which he examined) to indicate that the collision could have taken place there. There was nothing

in the nature of brake and wheel impressions in the loose gravel or debris from either the pickup or the bicycle on the said soft shoulder. The debris that he saw was on the roadway in front of and behind the pickup. These observations indicated to him that "...the point of impact was in the left hand lane as one travels from Linstead to Ewarton. There was also what appeared to be blood in the left hand lane near to where the pickup was".

[16] The soft shoulder actually begins about 30 feet after passing the intersection of the Zephyrton Main Road and the Rose Hall Road, in the vicinity of which the accident occurred.

[17] The deceased was about five feet, ten inches tall and weighed about 200 pounds.

[18] Sergeant Christopher, in his evidence, indicates that he visited the *locus in quo* on Thursday December 29, 2005, around 12 noon – that is, some two days after the accident. He received information from Constable Roberts (who accompanied him to the scene), concerning the incident. He also made observations – both of the scene itself, as well as of the pickup and the bicycle involved in the accident. He also took measurements and photographs.

[19] From his observations, the pedal cycle had damage to the "frontal area to include the front wheel, fork, and cross bar." The pickup had damage to "the front bumper, bonnet, widescreen (sic) and both left and right A pillars". He noted as well in his report that the area in which the collision took place is subject to a speed limit of 50 kilometres per hour (kph). Of the photographs that he took, which were tendered and admitted into evidence by consent, those in respect of the bicycle are numbered 6-8; whereas those in respect of the pickup are numbered 9-12.

[20] In relation to the marks that he said he observed at the scene, the only ones were what appeared to him to be blood stains in the left lane as one travels to Ewarton.

[21] This is how he sets out his conclusions:

“Having personally attended the collision locus, reviewed and analyzed the material I offer the following conclusions:

- Prior to the collision, the Red and Black Nissan motor truck registered 7641 DM was travelling westerly along the Zephyrton Main Road towards the direction of Ewarton.
- Prior to the collision Red and Blue pedal cycle ridden by now deceased Dave McCarthy was travelling in the left lane of Zephyrton Main Road towards the direction of Ewarton when it made a right turn from the left to the right, this is evident by the damage done to the Red and Black Nissan motor truck. I concluded that both vehicles collided in the left lane whilst the pedal cycle was moving from left to right of the roadway.
- Based on the damage done to the Red Nissan motor truck, I conclude that both vehicles collided in the left lane whilst the pedal cycle was moving from left to right of the roadway.
- Based upon the extend (sic) to damage done to both vehicles, the driver of the Nissan motor truck was travelling at a high rate of speed and may have had little or no time to react to the impending hazard, in this case, the Red pedal cycle.
- The driver of the pedal cycle sustained injuries after the collision.”

[22] A great deal in this case turns on a consideration of, in particular, conclusion number 2 and the photographs of both vehicles – but in particular of the pedal cycle.

The Issues in the Case

[23] The issues that arise for the court's determination may be shortly stated to be as follows:

- Whether the 1st defendant is liable for the accident.
- If the 1st defendant is liable for the said accident, whether the 2nd defendant is vicariously liable.
- If the 1st defendant (whether by himself or, along with the 2nd defendant) is liable, what would be an appropriate award of damages.

Issue 1: Whether the 1st Defendant is Liable

The Expert Report

[24] The matter of liability falls to be determined based on an assessment of the credibility of the witnesses and an analysis of the expert report of Sgt. Christopher.

[25] One matter that is of significance about the expert report is its date of preparation. It is dated December 27, 2012. This is to be compared with the date of the accident, which, it will be recalled, it December 27, 2005 – so that, the report was prepared seven years after the accident.

[26] Apart from the late preparation of the report, which might or might not be significant in and of itself, there are at least two other causes for concern arising from the report and photographs. One relates to conclusion 2 of the report, which indicates the view of the expert that the accident occurred when both the pickup and the pedal cycle were travelling towards Ewarton – that is in the same direction – and the pedal cycle turned right, across the path of the pickup.

[27] The concern that this raises is that it runs completely counter to both the case for the claimants and the case for the defence. Both the claimants' witness as to fact – Mr. Blair – on the one hand; and, on the other, the witnesses for the defence – namely, Mr. Sullivan (the 1st defendant) and Ms. Reid, place the deceased on the left side of the road, facing the direction of Linstead, from which direction the pickup was coming, facing Ewarton.

[28] What could account for this great difference? Did this conclusion come from what Sgt. Christopher was told by Constable Roberts; or from what he (Sgt. Christopher) observed for himself? Or was this an error caused by the delay in the preparation of the report and the fading of memory? Or, could it be that the report is correct (about the direction in which Mr. McCarthy and Mr. Sullivan were travelling); and the witnesses themselves wrong – whether from lying or for some other reason?

[29] This is, at best, doubtful and highly unlikely. It would have been more understandable if the claimant's witness as to fact and the defendants' witnesses had been saying two different things about the directions in which Mr. Sullivan and Mr. McCarthy were travelling and one of them gave an account similar to the expert's conclusion; but that is not so. The court finds, in the circumstances, that the expert has erred in coming to this conclusion.

[30] Another very real concern raised by the photographs and the evidence, relates mainly to photographs 6, 7 and 8 – but mainly 7. The expert's evidence was to the effect that photograph 7 showed damage to the fork – mainly to the side. It was the fork that likely came into contact with the front bumper of the pickup and that caused the damage to the pickup, seen mainly in photograph 12.

[31] The submission for counsel for the claimants is that this view is not borne out by the photograph; and that instead, what that photograph shows is the curve that is a part of the design of the bicycle. The court has perused photograph 7 repeatedly and

compared it with photographs 6 and 8. Having done so, it is of the view that it is not impossible that the expert is once again in error in this regard; and that what is shown in photograph 7 might not be damage to the fork; but an indication of the curve of its design. In this regard, the photographic evidence might be at variance with the oral evidence and the conclusion of the expert.

[32] In light of these two findings, the court considers the foundation of the expert report to be seriously eroded. Apart, therefore, from matters relating to distance, and the general description of the area, the court will place no reliance on the expert report in the consideration of the matter of liability, as it deems it unreliable. Liability will therefore have to be determined based on the evidence of the other witnesses.

The other Evidence

[33] In relation to the evidence of the claimants' main witness – Mr. Blair- the court found him to appear to be at first a straight forward, and fairly-credible witness, although there were some aspects of his evidence that gave some cause for concern. Among these was the fact that he could not recall whether Mr. McCarthy had been talking to someone across the road, as he stated in his witness statement. Another was his uncertainty as to when he told the 1st claimant about her son's death. He gave somewhat conflicting evidence in this regard, as pointed out by counsel for the defendants. But then again, the giving of less-than-satisfactory evidence is not unusual in the evidence of any witness. It may be useful, therefore, to look at Mr. Blair's evidence a bit more closely later on and also to look at the evidence of the other witnesses in the case to see in whose favour the balance of probabilities will ultimately tilt or tip. This, therefore, takes us to the evidence of Mr. Sullivan and Ms. Reid.

The Evidence of the 1st Defendant and Ms. Stasha Reid

[34] Ms. Reid, as already noted, is the common-law spouse of Mr. Sullivan, the 1st defendant. They live together and had done so for some 15 years at the time of the collision; and Ms. Reid, being unemployed (or, depending on how you look at it, being a housewife) is totally dependent on Mr. Sullivan for financial support. They live together

at the home of the 2nd defendant and have two children together. Although these factors do not ineluctably point to bias, they are nonetheless significant enough to be considered by the court in its assessment of the evidence.

[35] As was pointed out before, their evidence will be considered together, as there is very little difference in the evidence that they gave. At paragraph 6 of his witness statement, the 1st defendant stated that when he first saw the cyclist, the cyclist was some four yards away from him, when he (the cyclist), looked behind him and suddenly rode across his path. He changed this distance whilst giving his *viva voce* evidence to say that it was really four feet.

[36] Ms. Reid did the same: in her witness statement (at the same paragraph 6) she stated the distance at which the cyclist made the sudden manoeuvre to be four yards. In her *viva voce* evidence as well she changed this to four feet. As pointed out by counsel for the claimants, the witnesses, when asked to account for the inconsistency, both gave the same explanation: that is, that they did not know the difference between yards and feet or thought that they were the same. Ms. Reid, however, during the course of cross-examination, revealed that she had had some experience buying fabric by measurements and so would likely have known the difference.

[37] Interestingly, as well, when asked to demonstrate what they meant by a yard or what they meant by four feet, the witnesses gave the same demonstration with their hands. Without a doubt, the evidence of these witnesses had a strong “odour” of collaboration and rehearsal. However, collaboration, collusion and/or rehearsal of evidence does not automatically and necessarily translate into fabrication – especially in the case of witnesses of simplicity such as the court found these two witnesses (and, to some extent, Mr. Blair) to be. This is yet another matter to be taken into account in the court’s efforts to resolve the evidence. And, it is to be remembered as well that there was another witness – Constable Roberts, who testified to making observations at the scene of the accident.

The Evidence of Constable Roberts

[38] Much of Constable Roberts' evidence has already been recounted. In a nutshell, he speaks to having come to the view that the collision occurred on the road surface and specifically in the left lane as one faces Ewarton. This view is based, he testified, on his observations at the scene – as to where the blood stains were located and there being no physical marks or evidence to show that a collision could have occurred on the soft shoulder.

[39] Before giving further consideration to the evidence of Constable Roberts, it should be mentioned that there was something said by Mr. Blair in his testimony concerning the visit to the scene of the accident by the police. He said two policemen went there on the day in question and one of them made certain comments. Now, in the first place, he did not specify which of the two is alleged to have made the comments – whether Constable Roberts or another policeman. Nonetheless, the alleged comments were put to Constable Roberts and he denied having made them.

[40] In the court's view, that is where the matter must rest, because, in the first place, the admissibility of that bit of evidence is doubtful, primarily because there is no clear indication of who said it. It should be said as well (but just in passing) in case the court is in error in this regard, that even if what was said is admissible, the substance of it would be innocuous, and not something that paints the person who might have said it as partial or corrupt.

[41] Apart from this allegation of what might have been said at the scene, there is nothing else or not much else said about Constable Roberts' testimony that would seek to cast doubt on its accuracy, the brunt of the claimants' challenge being directed at what they posit as the unlikelihood of the accident having occurred in the way described by the defence.

[42] We may now proceed to look at Constable Roberts' observations and the damage to the vehicles to see if this will assist with the resolution of the matter.

The Physical Damage/Marks vis-à-vis the Two Accounts

Damage to the Pickup and Pedal Cycle

[43] There is not much, if any, difference between the accounts of the damage seen to the pickup and the pedal cycle, given by the witness. For example, Mr. Sullivan describes the damage to the pickup as follows: "...the centre of the front near the licence plate; the bonnet; roof of the cab especially in the centre; and the front windshield..." As for the damage to the pedal cycle, this is where he described it: "...the handle bar, the front wheel and the fork for the front wheel".

[44] The testimony of Ms. Reid is exactly the same (see, for example, paragraphs 14 and 15 of her witness statement).

[45] Constable Roberts' testimony in relation to the damage he observed was as follows: "The front wheel, front fork, and handle bar of the bicycle were damaged. The bonnet, front grill, windscreen and roof of the pick-up were damaged. The damage to the pickup was concentrated in the centre of the vehicle".

[46] This was the evidence of the expert: "The pedal cycle had damage to the frontal area to include the front wheel, fork and cross bar. ...This pickup had damage to the front bumper, bonnet, widescreen (sic) and both left and right A pillars".

Marks at the Scene

[47] For the claimants, the only evidence about any marks or otherwise observed at the scene that would assist in determining liability, comes from Mr. Blair in terms of what he did not see. For example, at paragraph 14 of his witness statement he states: "I did not see any skid marks or anything like that to suggest that the driver of the pick-up was trying to stop or anything like that".

[48] Likewise, on the part of the defendants, their witnesses as to fact do not speak much to observations made of marks at the scene. That kind of evidence comes from Constable Roberts and the expert.

[49] In this regard Constable Roberts stated at paragraph 5 of his witness statement that:

“...I saw nothing on the left hand soft shoulder in the vicinity of the scene of the accident which indicated to me that the collision between the red pick-up and the bicycle had occurred on the soft shoulder. I had examined the soft shoulder to see if there was anything to indicate that any collision had taken place there. I was looking for brake and wheel impressions in the loose gravel which was on the soft shoulder, and also for debris from either the red pick-up or the bicycle, but I saw nothing that like that (sic).”

[50] In paragraph 7, he states:

“I saw debris, being glass from the windscreen, on the roadway at the front of and behind the pick-up which indicated to me that the point of impact was in the left hand lane as one travels from Linstead to Ewarton. There was also what appeared to be blood in the left hand lane near to where the pick up was”.

[51] At pages 3 and 4 of his report, these were the expert's observations:

“I conducted an inspection of the collision locus and observed what appeared to be blood stains in the left lane of the Zephyrton Main Road as one travels towards the direction of Ewarton.

I observed no other marks or physical features, which could be attributed to this collision”.

Discussion

[52] It is difficult, if not impossible, for the court to observe the damage to the fork of the bicycle from the photographs. However, given the nature of the collision, it is not unlikely that there was some damage to it – although the exact nature of the damage cannot be observed and was not specified in the evidence (apart from in the testimony of the expert, whose evidence the photographs cannot be used conclusively to support). And the other damage to the bicycle is really unremarkable.

[53] Of great significance, however, is the damage to the pickup. In the court's view, it is significant that the damage observed was concentrated to the centre of the pickup – both to the bumper and also to the windscreen, causing damage to the left and right A pillars and the windscreen. This needs to be considered against the background of the description of the locus and the account given by the witnesses on each side.

[54] It ought to be remembered that Mr. Blair puts Mr. McCarthy on the soft shoulder at the time of the collision. However, there can be no doubt on the evidence that there was not much of a soft shoulder in the immediate vicinity of where the accident occurred – even on the account of the defendants' witnesses. How does this square with the evidence of Constable Roberts that there was no sign of any disturbance of the soft shoulder, from his observations? Is his evidence to be accepted? If so, it would raise doubt on the credulity or reliability of Mr. Blair's evidence.

[55] Additionally, the question arises as to how this evidence ties in with either the evidence of Mr. Sullivan and/or Ms. Reid. In this regard it should be noted that the one material respect in which the evidence of Mr. Sullivan differs from that of Ms. Reid is in relation to the position of Mr. McCarthy on approach and around the time of the collision. For his part, Mr. Sullivan puts Mr. McCarthy as travelling across his path, so that the collision would have been more to the side of the bicycle.

[56] On the other hand, for her part, Ms. Reid testified to it being more of a frontal collision, rather than a collision to the side of the bicycle; and to the collision taking place in the left lane; and not on the soft shoulder.

[57] In relation to this discrepancy, the court prefers the evidence of Ms. Reid, as it is more consistent with the physical evidence – especially to the pickup, as depicted in photographs 10 -12. The court finds as well that the collaboration and rehearsal that it suspects took place between Mr. Sullivan and Ms. Reid were done in an effort to “gild the lily”; and did not involve a fabrication to escape liability that (as the claimants contend), the other evidence showed should be laid at the feet of Mr. Sullivan.

[58] It is also consistent with the evidence of Constable Roberts – in relation to the absence of any signs of disturbance of the narrow soft shoulder. In this regard, the court accepts Constable Roberts’ testimony, finding him to be a witness of truth, and that he was not discredited by means of utterances allegedly made by a policeman who visited the scene – possibly the said Constable Roberts - (on the claimants’ case). In any event, the court finds that he did not make these utterances and, in any event, finds their admissibility to be at best doubtful. The court accepts his evidence. His evidence is made further reliable as his observations were based on the experience that he amassed working in the Linstead Traffic Division for some 14 years, during the course of which he investigated “countless” motor-vehicle accidents (see paragraph 3 of his witness statement).

[59] There was no sign of a collision that was observed to the soft shoulder because, the court finds, that is not where the collision took place. It took place in the left lane of the road as one faces Ewarton, as all the witnesses for the defence have testified. The physical evidence of this lies in what Constable Roberts observed as debris on the roadway – as indicated in paragraph 7 of his witness statement.

[60] In relation to the position of the vehicles after the collision, the court also accepts the evidence of Constable Roberts that is contained in paragraph 4 of his witness statement: that is, that –

“...I saw a red pick-up in the left hand lane as one travels from Linstead to Ewarton. I also saw a bicycle on the ground in front of this red pick-up. The bicycle was about 3 feet in the front of the pick-up.”

[61] Accepting this bit of evidence means, of course, that Mr. Blair’s testimony as to the vehicle travelling some distance away with its bonnet up and coming to a stop near to where he was standing must also be rejected as being in conflict with the evidence of Constable Roberts; and also, on its own, highly unlikely – even incredible, including that part of his testimony of Mr. McCarthy bouncing out of the bed of the pickup.

[62] Incredible too, in the court’s finding, is that part of Mr. Blair’s testimony in which he says that after the collision, Mr. Sullivan, on exiting the pickup said the following words: “Lawd Jesas Christ look how the man mash up me van”. Mr. Sullivan denied using these words. However, even if they had been used, they would signify either (a) an amazing outburst from someone who, fully well knowing that he was solely responsible for colliding with a cyclist who was in no way at fault, displayed a callous disregard for human life, elevating above it mere damage to a motor vehicle that could always be repaired; or (b) someone who, whilst driving with care and skill, had his vehicle damaged by a careless cyclist. The court accepts Mr. Sullivan’s denial that he used these words; but finds further that even if he did, those utterances would be more in keeping with scenario (b); and unlikely to have arisen from scenario (a).

[63] One very important aspect of Mr. Blair’s testimony concerned his inability to recall (during cross-examination), whether Mr. McCarthy had been talking to someone around the time of the collision. This the court found to be quite peculiar, given his general adherence to his written witness statement. In that witness statement (at paragraph 7)

Mr. Blair said of Mr. McCarthy: "He was standing talking to someone on the street". Yet his memory seemed to fade when this particular question was asked of him in cross-examination, whilst remembering most other details about the collision without any apparent difficulty. What could be the reason for this?

[64] Whilst considering this, it is important to remember that an important part (perhaps the crux) of Mr. Sullivan's case is that shortly before the collision, Mr. McCarthy turned around to look behind him and then veered into the path of the pickup. He said in paragraph 7 of his witness statement:

"When the cyclist was about 4 yards from me, I saw him turn his head to look behind him and while he was doing so, he suddenly rode across the path of the vehicle I was driving. He rode across the path of this vehicle so suddenly, that I could not swerve away from him in order to avoid hitting him."

[65] Similarly, Ms. Reid, at paragraph 6 of her witness statement states:

"When the cyclist was about 4 yards from me, I saw him turn his head to look behind him and while he was doing so, he suddenly rode across the path of the vehicle in which I was travelling and the vehicle hit him."

[66] The concern about the change by Mr. Sullivan and Ms. Reid in their testimony from saying that the distance at which Mr. McCarthy veered into the path of the pickup was four feet and not four yards is viewed by the court in the light of an attempt to bolster Mr. Sullivan's defence, which the court finds would be viable in and of itself without such an unfortunate effort. However, at the end of the day the court finds again that this was an

attempt to bolster a good defence; and not an attempt to invent one when the evidence pointed in the other direction.

[67] At paragraph 54 of the claimants' written submissions/speaking notes filed January 16, 2013, the court was asked to reject this aspect of the testimony of Mr. Sullivan and Ms. Reid, about the manoeuvre of Mr. McCarthy and the distance at which it was executed in the following terms:

“54. It is submitted that this must be a fundamental lie.

The deceased is a sensible young farmer. By all accounts he is responsible. Why then would a sensible you (sic) man, who is responsible, see a van speeding towards him at over 60 km/h and then decide to swerve into its path when it is four feet away from him?”

[68] Accepting the evidence of Mr. Sullivan and (more particularly) Ms. Reid, this manoeuvre on the part of Mr. McCarthy would be a complete answer to this question and explains the strange circumstances of Mr. Blair's seeming selective memory and uncertainty on this very important issue. However there are other observations to be made – not the least of which is the fact that there is no evidence that Mr. McCarthy did in fact “see a van” whether “speeding towards him at over 60 km/h” or otherwise.

[69] What the claimants are asking the court to do is to draw an inference to the effect that, since Mr. McCarthy was on the left hand of the road as one proceeds to Ewarton, but facing the direction of Linstead; and since Mr. Sullivan was also on the left hand side of the road, facing the direction of Ewarton, then they must have seen each other; or, at the very least, that Mr. McCarthy must have seen Mr. Sullivan. However, this is not an inescapable or the only inference that might be drawn.

[70] In relation, as well, to the argument that Mr. Sullivan would have been travelling at “over 60 km/h”, although Mr. Blair gave evidence to that effect, the basis for that

statement or what knowledge and/or experience qualifies him to give such evidence was not given, making that testimony of dubious value. The only other evidence as to speed that exists comes (i) from the expert (the reliability of whose report has already been called into question), who expressed the view that the pickup would have been travelling at “a high rate of speed”, without condescending to greater particularity; and (ii) from Mr. Sullivan who states in his witness statement that he was traveling at “about 40 miles per hour” (see paragraph 6); but whose testimony in cross-examination raises doubt about his knowledge of the difference between miles per hour and kilometers per hour.

[71] The evidence in relation to speeding is therefore inconclusive; and, in any event, the authorities establish that speeding by itself is not necessarily evidence of negligence. In this regard, see, for example, the case of **Quinn v Scott** [1965] 2 All ER 588. Neither was it conclusively established, in the court’s view, that the accident occurred in what might be regarded as a “built-up area”.

[72] The answer to the question as to how the accident could have occurred, therefore, is that it occurred when Mr. McCarthy became distracted whilst engaging in conversation with someone nearby and suddenly and without warning rode onto the roadway and into the path of the pickup driven by Mr. Sullivan, thus causing the collision. In these circumstances, therefore, Mr. McCarthy must be viewed as the author of his own regrettable misfortune and, unfortunate as his death undoubtedly is, there can be no finding of liability against Mr. Sullivan. This finding makes it unnecessary for the other issues relating to vicarious liability and damages to be addressed.

[73] The claim must, therefore, be dismissed with costs to the defendants to be agreed or taxed.

Orders

- Claim dismissed.
- Costs to the defendants to be agreed or taxed.