122

Judgment Book

SUPREME COURT LIBRARY
KINGSTON
JAMAICA

IN THE SUPREME COUR TOF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A-157 OF 1987

BETWEEN	PETER ANKLE	PLAINTIFF
A N D	FLORENCE COX	DEFENDANT

Mr. Ainsworth Campbell and with him Mrs. Sandra Johnson for Plaintiff

Mr. Patrick Brooks instructed by Nunes, Scholefield, DeLeon and Company for Defendant.

HEARD: 23rd and 24th June, 1992
and 18th October, 1994.

MALCOLM J.

This claim in negligence arose out of a collision which occurred on the 14th May, 1987 between a motor cycle being ridden by the plaintiff and a motor car driven by the defendant.

It is not in dispute that the accident took place along Old Hope Road in Saint Andrew. Where the case for the plaintiff and the case for the defendant part company is the exact locale of the collision. The plaintiff places it near the intersection of Mountain View Avenue (with a gas station on the left) - the defendant places it further south near the busy intersection with Tom Redcam Road on the left and Oxford Road on the right. A gas station on the plaintiff's left is common to both cases.

The case is undoubtedly unique in this regard. Mr. Brooks for the defence submitted, inter alia,:- "In the issue of where the collision took place, if the plaintiff's evidence is wrong the Court could well say it cannot rely on the plaintiff's evidence." Mr. Campbell's contrary submission that, and here I quote him: "even if accident happened where the defendant said it did she still cannot escape liability" I find the latter submission more attractive. To my mind Mr. Brooks is reducing the matter to a state of simplicity it does not deserve.

The Plaintiff's Case

As briefly as I can summarise it, the plaintiff Peter Ankle testified that he was a vegetable farmer, 50 years old. On the 14th May, 1987 he was the owner of a motor cycle which he was riding along Old Hope Road towards Cross Roads. He placed the time at 11:00 a.m. and he stated he was going slow. He was approaching the intersection of Mountain View Avenue - a gas station was on his left - when he saw a car coming up, he said: "turned suddenly to her right seeing her doing that and trying

to get away further, the left front side of her car hit me on the right side, the front wheel skidding me to the back wheel. I fell, I was under the car with my right leg under the left rear wheel which stood on my right ankle." He said he was taken from under her car by two men, lifting the car, after which they both put him in the defendant's car. She thereafter drove him to the University Hospital.

He further testified that the accident took place about 1½ chains from the stop light and that he had not reached the light as yet. He further said:- "the car would have gone where they wash cars, above gas pump."

As regards his hospitalisation and treatment he stated that he felt great pain for five to six days. He was taken to the Operating Theatre where he "passed out" after seeing a hole in his ankle burned from right to left.

His evidence thereafter was as follows (and here I quote): "When I came to my left foot was wrapped up with stiff stuff. There was an opening in the stiff stuff on the right side.....had a lot of pain." He remained in hospital for approximately two months - he had no crutches then. He got them about one week after discharge. He used them for about 2-3 weeks, he said he couldn't balance. The plaintiff said he paid about 10-12 visits to the University Hospital after his discharge. He has stopped using the crutches but walks with a limp and now has constant "arthritis pains" in his ankle.

The plaintiff testified that he couldn't work in the big way he used to before the accident. He couldn't plow with a hand fork, couldn't weed or bend. He employs a man to weed and fork and paid him $80.00 per day. He presently has a smaller farm. He stated that he re-started framing a year and six month after the accident. He gave evidence as to the type of crops he planted and said that on the bigger farm he used to earn $1,890.00 per week compared to $900.00 he now earns. He put his entire total loss of earnings at $196,417.50. The plaintiff claimed also for repairs to his motor cycle and for loss of shoes, cash and tools.

In chief he also said that no motor car had stopped to allow the defendant's car to turn and said he was not overtaking a vehicle at the time.

In due course a Medical Report by Professor John Golding dated 21st November, 1990 and Consumer Price Indices were by consent tendered as Exhibits 1 and 2.

Cross-examined by Mr. Brooks the plaintiff told of the land which he had cultivated. It was at Patrick City and he eventually gave it up between 1989-1990 because

he couldn't work it. He had rented the land and the owner needed the land to build houses.

He said he was quite sure the accident happened where he said it did i.e. at Old Hope Road and Mountain View Avenue. He said he didn't know Monty's Inn but knew Oxford Road and that big intersection. It was not there that the accident happened. There were two single lanes of traffic one going up and he said it was a straight stretch of road. The defendant's car was coming up from the opposite direction then his testimony was as follows:- "The defendant's car was coming hard to come out the amber - coming faster than me. Can't estimate speed but it was coming hard, not busy out there. Collision 1½ chains from light (here he pointed out a distance that was agreed at 1 3/4 chains). He continued:- "When the car turned right it had braked down speed to turn going into the gas station.....it was about 11:00 a.m. don't agree collision was at 12:00-12:15."

He said it was a Monday not a Thursday and that he was not coming from a bar but from a lady with whom he threw a "partner" weekly. He testified that the left front of the defendant's car hit the front wheel of his bike. He ended 7 feet from where he was hit.

I set out the suggestions that were put and the answers that were forthcoming.

Sugg: "The collision occurred when you were riding on the inside of vehicles coming down Old Hope Road?"

Ans: "Nor Sir."

Sugg: "The defendant was stationary with the front of her vehicle pointing north waiting for traffic going in the opposite direction to clear?"

Ans: "No Sir."

The plaintiff rejected as untrue the suggestion that one of the south bound vehicles stopped to let the defendant go across. He said that it was incorrect that other vehicles stopped behind this south bound vehicle. He agreed that there was only one lane going north and one going south.

He denied that he attempted to overtake the stationary vehicle by going on its left. He said it was not at that stage that he ran into the left back wheel of the defendant's car. He rejected this version as to how the collision occurred. He repeated that there were no other vehicles going south and that the defendant turned in front of him. He never reported the accident to the police, he couldn't walk. His

evidence continued as follows:- "I have had other accidents. Not mixing up this accident with another. I have another accident when I was stationary. I got injuries, both legs broken, this was about 1989. I was cultivating a very small plot at that time.....for 2½ years I had to learn to walk again - no one was cultivating my field during that time.

Later, he said he had already given up the big field before he had the second accident. Between first accident and the time he gave up the big field he got no money from it. He continued that there was nothing there selling, nobody was there to nourish them, they just died off. The last portion of his cross-examination deserves being quoted verbatim:- "Went to Professor Golding after the second accident. The injuries I received in the second accident has worsened my condition sustained in the first accident."

The Defence

The defendant Florence Cox, a Financial Assistant at U.S.A.I.D. testified that on the 13th May, 1987 she left her office which is at corner of Oxford Road and Belmont Roads. It was lunch time and she placed the time at somewhere between 12:00 and 1:00 p.m. There was a friend with her who it transpires has since migrated.

She proceed on Oxford Road and eventually turned left on Old Hope Road intending to turn right into "Lloyd Chuck's gas station." At this point there is one lane in either direction. She put on her right hand indicator, she then as she put it:- "pointed myself to turn right and came to a complete stop."

A motor car coming in the opposite direction stopped as did other cars coming in same direction, she couldn't say about how many. The way she said was then clear. It was fairly busy then. After being stationary for about a minute she proceeded to turn into the gas station. A voice from the gas station shouted and then another voice said: "my foot." She was unable to recollect which voice she heard first. She said she didn't feel anything on the vehicle - incidentally hers was a right hand drive vehicle. She testified that she stopped immediately and reversed - got out and walked around to the left hand side. She said she saw a bike on the ground beside her car, on the ground too was the plaintiff.

At that stage some of the gas station attendants came over and put the plaintiff in her car. Lloyd Chuck, who she knew before and others came up too. Continuing she said the bike was left at Lloyd Chuck's gas station. As regards the car, she did not

notice anything about it. It was not damaged. She had been travelling about 10 m.p.h. just before the vehicle stopped to let her through.

To Mr. Campbell, in cross-examination, she said that part of Old Hope Road where the accident occurred was straight for several chains. The defendant said that the first time she saw the plaintiff was when she got out and saw him lying on the ground. Her precise words thereafter were, quote:- "I don't know where he came from - whether down Old Hope Road or across or where. I was aware his ankle was injured. If my left front fender had hit his front wheel I am sure I would have felt it. I had felt no impact with the motor cycle." She said she had been keeping a proper look out. Questioned about distances to some hospitals she said she didn't know whether it was shorter to Kingston Public Hospital or the University Hospital. In conclusion she said that the accident did not take place "up Mountain View Avenue" it did not take place at 11:00 a.m., she did not hit the plaintiff, she saw him under the wheel."

Submissions

Counsel for the defendant said the Court would have to consider the effect of vehicles driving on the inside. He submitted that the authorities show that motor cycle riders should not pass on the inside.

He cited Powell v. Moody S.J. Volume 110 P. 215. This case dealt in large measure with the Apportionment of Liability. It is a short report and the extract reads:

> "The plaintiff was driving his motor cycle along Boston Manor Road intending to go in the direction of the Great West Road and London Airport when he was confronted with a double line of stationary vehicles whichwere held up at the Junction of Boston Manor Road and Great West Road. He decided to jump the queue by going on the offside of the double line of stationary vehicles and was so proceeding when he collided with defendant's car which was emerging from a side road. There was a gap in the queue at the point where the defendant had been beckoned on by a signal from the driver of a milk tanker in the queue to come out. The defendant intended to emerge, pass the double line of stationary traffic, and turn right in the opposite direction along Boston Manor Road towards Uxbridge. He was inching his car out when the plaintiff's motor cycle collided with his car as a result of

which the plaintiff sustained personal injuries. In an action by the plaintiff against the defendant for damages in respect of his injuries the Judge held that both the plaintiff and the defendant were negligent in failing to keep a proper look out, but he held that the plaintiff was the more to blame for the accident and apportioned liability between the plaintff and the defendant in proportions of 80 and 20 percent respectively. He accordingly awarded the plaintiff £220 damages being 1/5 of the damages he would have awarded had the defendant been wholly to blame. The plaintiff appealed.

Sellers L.J. said that the plaintiff had contended that the Judge had shown a bias against traffic, especially motor cycles, jumping a queue of stationary vehicles and had placed undue weight on the plaintiff jumping the queue. But any road user who jumped a queue of stationary vehicles by going on the offside of a line of stationary vehicles in front of him was undertaking an operation fraught with great hazard. Such an operation had to be carried out with great care because it was always difficult to see from the offside of a queue of stationary vehicles gaps in the queue on its nearside from which traffic might emerge. The Judge had taken a reasonable view as to the dangers inherent in jumping the queue. The appeal would be dismissed. Dankwerts, L.J. agreed with judgment of Sellers, L.J. Salmon, L.J. dissenting, said that he would have found both drivers equally to blame, Appeal dismissed."

The instant case is by no means on all fours with the case cited above - on Mr. ankle's account he was never in a queue. The defendant on her part never saw the plaintiff until after the collision. I do not find the case of great assistance to me. No doubt the case was cited as a guideline on the issue of apportionment.

He cited also Clarke v. Winchurch and Others 1969 1 A.E.R. P. 275 - "Negligence" - contributory negligence - apportionment of liability - road traffic accident - parked car aiming to cut across near traffic stream - bus in stream stopping to allow it - bus driver's flashing of lights - car pulling out - collision with moped overtaking bus - moped solely responsible.

Held: (i) The bus driver was not to blame in any way for the accident for he owed no duty to the car driver, his flashing of his lights meant only "come on so far as I am concerned" and he had not seen the moped and owed no duty to the driver to give a signal. (ii) (Russell, L.J. dissenting) the car driver was also not to blame notwithstanding the need for special care in executing a potentially dangerous manouvre etc.

In addition Mr. Brooks referred me to Worsfold v. Howe 1980 1 ALL E.R. at P. 1028:- This case dealt with car emerging from minor to a major road and with the question of contributory negligence. As my findings of facts will disclose the subject of major and minor roads and/or contributory negligence has not featured in my deliberation.

Mr. Brooks addressed me also on certain aspects of Professor Golding's Medical Report (Exhibit 1). It speaks of an examination conducted on the 13th November, 1990 i.e. subsequent to the other accident in which the plaintiff stated he was involved in about 1989.

Mr. Brooks raised the point as to how much of the plaintiff's disability is attributed to the first accident. He submitted that the Court cannot attribute the plaintiff's limp to the first accident, he said the shortening is what cause the limp. I fear I must join issue with learned Attorney on his interpretation of the Doctor's certificate.

The certificate speaks for itself but I quote the last three paragraphs thereof:-

> "When I examined him I found that there was marked crepitus in the ankle joint. The area of the ankle was enlarged from side to side and there was persistent swelling. The skin injuries had healed soundly. He had recently injured his foot again and there was an open laceration over the inner side of the foot which was in need of dressing.
>
> Radiographs showed that the fracture was poorly reduced. The talus was lying ½" too far laterally so that there was already evidence of a traumatic arthritis developing.
>
> I would assess that Mr. Ankle was totally disabled from the time of injury until the end of April, 1988. He then had a disability amounting to 30% of the function of his lower extremity for a further two months. After

that he reached Maximum Medical Improvement and had a permanent disability amounting to 20% of the function of the lower extremity or a whole person disability of 8%."

With the certificate in mind, and with no evidence tothe contrary, I find no great difficulty in attributing the plaintiff's limp to the injury he received on the 14th May, 1987.

Addressing me on Damages, Mr. Brooks referred me to certain cases reported in Volumes 2 and 3 of Mrs. Khan's Report. Naturally none were on all fours with the instant case but I none the less found them helpful. The cases were:-

(1) Richards v. The Attorney General and Kingston and Saint Andrew Corporation - Volume 2 Page 63.

(2) Barnett v. McLeod - Volume 3 Page 33.

He also referred me to Mayne and McGregor on Damages and enunciated the well known principle that a plaintiff must mitigate his losses. This he said the plaintiff had not done.

In a very brief address Mr. Campbell asked the court to reject the defendant's evidence as in his view it was most unconvincing. In his view the plaintiff's evidence was the more credible of the two accounts. He too referred to Khan's Report supra and to the following cases to be found in Volume 3 thereof:-

(1) Barnett v. McLeod

(2) Layne v. Dryden - at Page 71

(3) Edwards v. Browning - at Page 238

(4) Carter v. Jamaica Inn Limited et al - Page 225

He suggested that these cases would provide a useful guideline to a reasonable award in this case. Among other things he submitted that $450,000.00 would be a proper award for pain and suffering.

Findings and Conclusions

I have already made passing reference to the conflict between both sides regarding the exact locale of the accident. In the final analysis it may well be a matter of academic interest only, suffice it to say I accept the plaintiff's evidence that the accident occurred at Old Hope Road and Mountain View Avenue.

As to the way in which the collision took place I accept the plaintiff as a witness of truth and find:

1. That as he was approaching Mountain View Avenue going south, the defendant who was proceeding north along Old Hope Road turned suddenly to her right intending to go into a section of a gas station there.

2. That in executing this manouvre the defendant's car collided with the plaintiff's motor cycle and hit him. He ended up under the defendant's car with the left rear wheel on his right ankle.

3. The collision did not occur when the plaintiff was riding on the inside of vehicles coming down Mountain View Avenue.

4. I find as totally untrue that the defendant was stationary with the front of her car pointing north waiting for traffic going in the opposite direction "to clear."

I set out again the defendant's evidence in cross-examination which I have earlier quoted:- "I don't know where he came from, whether down Old Hope Road or across or where.....if my left front fender had hit his front wheel I am sure I would have felt it. I had felt no impact with the motor cycle."

In these days of "bad driving" and insanity on our roads it could be argued that her answers above indicate a detachment and unconcern that are truly commendable. Of course her answers are equally consistent with a person not keeping a proper look out. I find that the defendant was <u>not</u> keeping a proper look out.

In my opinion the accident was caused solely by the careless manner in which the defendant drove her car on the 14th May, 1987 and her failure to exercise due care and attention.

I find in particular, that she drove across the path of the plaintiff when it was dangerous to do so.

For these reasons there will be judgment for the plaintiff with costs to be agreed or taxed.

I award for General Damages a total sum of $440,000.00 being $360,000.00 for pain and suffering and Loss of Amenities and $80,000.00 for handicap on the labour market. There will be interest on $360,000.00 at 3% from date of service of the Writ to date of judgment.

I award for Special Damages the sum of $121,165.00 with interest thereon at 3% from the 14th May, 1987 to date.

Accordingly the total award is for $561,165.00.