



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: 213

RASHAUN MICHAEL DE ANGELO ZUILL

Plaintiff

-v-

JAHNI HOLDER

Defendant

JUDGMENT

(In Court)¹

Personal injuries-negligence-road traffic accident

Dates of hearing: January 16-18, 2017

Date of Judgment: January 30, 2017

Ms Akilah Beckles, Cox Hallett Wilkinson Ltd, for the Plaintiff

Mr. Richard Horseman, Wakefield Quin Limited, for the Defendant

Introductory

1. On the evening of November 9, 2012, the Plaintiff was riding his Honda Scoopy motorcycle in an easterly direction on South Road in Warwick Parish while the

¹ The present Judgment was circulated without a hearing to save costs.

Defendant was riding his Yamaha Sniper motorcycle in the opposite direction. The two motorcycles collided and both riders were seriously injured. The Plaintiff claims that the accident was caused by the negligence of the Defendant. The Defendant counterclaims that the accident was caused by the negligence of the Plaintiff.

2. The Plaintiff's Specially Endorsed Writ was issued through his mother as his 'next friend' when he was a minor on May 30, 2014. The Defendant's Defence and Counterclaim was filed on July 1, 2014. Having attained 18 years of age on October 19, 2014, the Plaintiff adopted the present proceedings which were initially commenced on his behalf by Notice dated December 10, 2014. On December 11, 2014, by consent, I ordered a trial on liability alone and gave leave for each party to adduce expert evidence in relation to accident reconstruction.
3. The trial was conducted on the following legal and factual basis. If the Plaintiff established that the collision occurred while he was riding in his own lane and the Defendant was driving in the wrong lane, the Plaintiff's case would be made out. If the Defendant established that the collision occurred while he was riding in his own lane and the Plaintiff was driving in the wrong lane, the Defendant's case would be made out.
4. The Defendant was previously charged before this Court on indictment (Greaves J) on November 25, 2013 with offences of (1) causing grievous bodily harm whilst being an unlicensed driver, (2) causing grievous bodily harm whilst being an uninsured driver, (3) driving without due care and attention, (4) driving without a valid license, and (5) driving whilst uninsured. He pleaded not guilty to the first three charges and was acquitted of all three charges. Those charges were tried on the basis that the accident was caused by the Defendant travelling west on South Road, crossing the centre line and colliding with the Plaintiff who was travelling in the correct (eastbound) lane. The Defendant pleaded guilty to the last two charges.
5. The most reliable evidence in this case comes from the parties' respective experts. The Plaintiff and the Defendant both suffered head injuries. The Plaintiff cannot remember anything of the accident at all. The Defendant cannot remember anything after the collision and his evidence as to where the collision occurred was hotly disputed. There were no independent eyewitnesses on the issue of where the collision occurred.

The factual evidence

The Plaintiff's witnesses

6. The Plaintiff himself had no recollection of the accident itself. In his Witness Statement in these proceedings he stated that he remembered leaving home in White Hill and heading for Boaz Island Community Centre field, joining friends travelling

in the opposite direction at Somerset Bridge and travelling eastward on South Road past Henry VIII. In his Police Witness Statement dated March 12, 2013 and in his civil Witness Statement, he stated that he next remembered waking up in hospital and being told that he was in Boston.

7. The Plaintiff's friend Makinday Johansen gave evidence at both the criminal trial and the present trial. In the present proceedings, he described riding behind the Plaintiff with a passenger on his cycle (together with two other motorcyclists), overtaking a slow moving car at the top of the hill opposite Astwood Park. He testified that the accident occurred when, by Marley Beach, the Plaintiff's motorcycle (as the lead vehicle in the group) was struck by the Defendant's westbound motorcycle which had crossed over into the eastbound lane. The Defendant's vehicle then struck Johansen's vehicle. He denied the pack-racing allegations made in the course of the criminal trial. This evidence was broadly consistent with his Police Witness Statement made on May 8, 2013. The material aspects of Mr Johansen's evidence were supported by the evidence of another friend of the Plaintiff, Jahvon Outerbridge, who did not give evidence for the Prosecution at the criminal trial. Mr Outerbridge testified that he was riding immediately behind Mr Johansen as part of the group at the time of the accident.
8. Both these witnesses gave their evidence in a straightforward manner. However, the weight to be attached to it was diminished by reason of their close connection with the Plaintiff and the risk that they would be inclined to say anything to assist his case out of a sense of solidarity with him. The motivation to assist him would be even greater if they had all been overtaking carelessly at best, or recklessly at worst, as the Plaintiff's friends would feel partially responsible for his injuries.
9. The Plaintiff called two other factual witnesses. Firstly, Christyola Smith testified about drinking with the Defendant at Robin Hood on the evening of the accident. He also testified that the Defendant was generally a reckless driver. He was a reluctant witness who regarded the Plaintiff's mother as a mother but also was a co-worker of the Defendant. Alcohol was not a pleaded issue and Mr Smith's wavering evidence about the accuracy of his own Witness Statement made it impossible to place much reliance on his evidence. However, Mr Horseman was happy to embrace one aspect of his Witness Statement which assisted the Defendant. When Mr Smith visited the Defendant in hospital shortly after the accident, he recalled the Defendant saying that "*some little bies hit me*" and that one of them had been flown away and might die. That statement by the Defendant was clearly consistent with his position when interviewed by the Police and his evidence in the present trial and the earlier criminal trial that
10. Secondly, the Plaintiff called a witness who was apparently unconnected with the parties, Mrs Terretta Robinson-Bowles, who described travelling east near Astwood Park and being overtaken by a group of bikes ridden by young men shortly before

arriving at the scene of the accident, which by then had occurred. She recalled that her husband was driving very slowly and that another couple on a bike overtook her car just before the Breakers. The young bikers overtook both her car and the other couple on a motor cycle, but were not going unduly fast. On the face of it, this was credible evidence rebutting the suggestion that the Plaintiff and his friends were pack-racing. But it shed no light on whether or not the Plaintiff was on his side of the road when the accident actually occurred and not overtaking other slow-moving vehicles as the Defendant's evidence suggested may have occurred.

The Defendant's witnesses

11. The Defendant was riding alone and was the only eyewitness he could call to support his case. He gave his oral evidence in a somewhat abrupt and defensive manner. It would be surprising if he did not feel as if he was up against the world with the array of witnesses called against him, against the background of a criminal trial, albeit (from his perspective) a successful one. The Defendant's girlfriend Faron Aitkin loyally supported the Defendant's account about the earlier part of the evening before the accident occurred.
12. The Defendant agreed that he had been at Robin Hood and had some drinks before the accident, but firmly stood by essentially the same account of the accident he first gave when interviewed under caution by the Police on April 13, 2013. That was an initial account which, perhaps unsurprisingly, omitted any mention of visiting the Robin Hood between leaving work and heading home. In his Witness Statement, he admitted overtaking a slow-moving car near Swizzle Inn, well before the accident. As he came around a "fairly sharp bend" just before Marley Beach Road, he saw two or three bikes heading towards town:

"4...It was dark at the time and it was difficult to make out exactly how many there were as the bikes were overtaking a line of cars traveling in the same easterly direction. They were over the line in the westbound lane travelling in single file from my brief look it looked like they were pack racing one right behind the other.

5. I tried to move as far to the left as I could in my lane in order to give them space to get by but there simply wasn't enough time. It was simply a matter of a couple of seconds before the first cycle hit me. I now know that the rider of the cycle was Rahsuan Zuill. He was definitely in my lane overtaking a car as he approached the bend. He left me no room to get by. That was the last thing I remember."

13. Under cross-examination, the Defendant admitted that he could not remember how many cars were being overtaken and clarified that his reference to a "line" could have

been only a “couple” of cars. He agreed that he was the only person to describe the Plaintiff and his friends overtaking cars just before the accident. However, he was adamant that immediately prior to the collision the Plaintiff was on the wrong side of the road. Bearing in mind that this account of the accident was first formally recorded in response to the threat of criminal charges, the Defendant’s evidence clearly must be assessed with care. His attribution of blame for the accident to the Plaintiff and his friends while in hospital is valuable potential support for his version of events. On the other hand the fact that the Defendant mentioned to Mr Smith that one of the boys involved might die suggests a concern which would have provided him with an obvious incentive to proclaim his own innocence.

The expert evidence

The Plaintiff’s expert

14. Ms Shannon Haddox has a BSc in Mechanical Engineering and has been employed with the Georgia-based company EFI Global as a Senior Forensic Analyst for almost 20 years. Her specialties include component failure analysis and accident reconstructions and she has given expert evidence in various United States courts on around 50 occasions. She has published and presented extensively on topics such as vehicle accident reconstruction and low speed impact biomechanics. Ms Haddox gave her evidence in a matter of fact and objective manner, and in answer to the Court at the end of her evidence indicated that she regarded the present case as a comparatively straightforward one. She produced a scale sketch of the scene based on photographs taken by the Police shortly after the accident.

15. The most significant finding in her Report dated July 30, 2015 was the following:

“...The pattern of the post-impact markings of the Holder vehicle, as well as the eastbound lane gouge marks and the pattern of the debris field, is consistent with an area of collision in the eastbound lane. The start of the Holder vehicle post-impact marks at the centreline, along with their angle to the south, render it most likely that the Holder vehicle was in the eastbound lane at the time of the initial collision. In addition, the debris field after a collision will extend in the general post-impact directions of each vehicle post-collision. In this case, the majority of the debris field extends across the eastbound lane into the westbound lane, and includes parts of the Holder vehicle, rendering it most likely that the initial impact occurred in the eastbound lane....”

16. This aspect of her evidence was not very convincingly challenged in her initial cross-examination. The Defendant’s expert Mr Gary Venning in his Report asserted that the physical debris evidence was unreliable and did not indicate where the collision

occurred. An entirely new theory of what the debris showed was advanced in Mr Venning's oral testimony, so Ms Haddox was recalled to enable this aspect of the Defendant's case to be put to her. She stood by her original opinion that this was a near head-on collision in the eastbound lane in a calm and confident manner. She stated that if the collision had occurred on the Defendant's side of the road she would have expected the respective vehicles to have ended up in a different position altogether. Ms Haddox agreed with Mr Venning's conclusion that the scrape marks on the road did not assist in identifying the point of impact as it seemed likely that the two main vehicles involved flew through the air for some distance after the collision. Overall, I found her to be an impressive witness.

The Defendant's expert

17. Mr Gary Venning is a retired Police Officer who has been involved in accident investigation for 37 years. After initial training and work in England, he was a Police Accident Investigator in Bermuda for 20 years. He has for many years given expert evidence in the Magistrates' Court and Supreme Court. The main focus of his evidence was based on sight-line analysis supported by video evidence of the site of the accident which was of great assistance to the Court.
18. He demonstrated clearly that if the Plaintiff had been on the wrong side of the road immediately before the collision neither he nor the Defendant would have been visible to each other until it was too late to avoid a collision. The combined speed of the converging vehicles he estimated at 91 feet per second. On the other hand, if the Plaintiff's group had been in their correct lane, the parties would have been visible to each other for a far greater time. He opined in effect that the only logical explanation for the collision occurring was that the Plaintiff and friends were on the wrong side of the road when the collision occurred.
19. It was essentially agreed (or assumed by both experts) that speed was not a material factor and that the Plaintiff and Defendant were each riding in the range of 50-60kph. The part of the roadway in an east west sense (adjacent to the cottage on the south side of the road at a point where the centreline was straightening out) where the impact likely occurred was also essentially common ground. In his oral evidence, Mr Venning, admittedly veering into the field of sociology, nevertheless suggested that it was possible that the Plaintiff and friends were 'pack-racing'. However, he also materially departed from his essentially neutral written evidence (in his May 10, 2016 Report) on the relevance of debris, which was crucially as follows:

"...the debris field is often a useful indicator of POI when two cars collide, however, in motor cycle collision this is unreliable because the brittle lightweight plastic panelling on a motorcycle can be propelled a considerable distance from the POI and once it lands on the road it can slide a further distance....The physical evidence at the scene does not enable an accurate

determination of the point of impact. The scrape marks are unreliable as the cycles went airborne before landing on the road surface and the debris could easily have been scattered a considerable distance over the area.”

20. The position adopted in his Report was that the debris could not be relied upon at all in an accident involving light motorcycles such as those involved in the present case. The clear implication from his written evidence was that the debris found at the scene would otherwise suggest an impact in the eastbound lane as Ms Haddox opined was the case. In his oral evidence, however, Mr Venning contended that the debris, far from being unreliable, positively pointed to a point of impact on the Defendant's correct side of the road. He explained the debris from the Defendant's cycle being found in the eastbound carriageway was indicative of the direction in which the Defendant was travelling, still in the process of negotiating the bend in the road. It is easy to see how Mr Venning's evidence (and Mr Horseman's typically eloquent submissions) would impress a jury and doubtless assisted the Defendant in his criminal trial by raising a reasonable doubt as to what must have occurred. However, as Ms Beckles in her submissions pointed out, the enthusiasm with which Mr Venning advanced the contested aspects of his generally impressive evidence undermined the weight which could properly be attached to his opinion evidence on the crucial point of impact issue.

Findings

21. In my judgment the evidence of the eyewitnesses on both sides is insufficiently reliable to support a finding as to which party was to blame for the accident. I find that the Plaintiff and his friends were not pack-racing because the experts agreed there was no reliable evidence of high speed at the time of the collision and because I accept the evidence of Mrs Robinson-Bowles that the young men were not speeding unduly when they overtook her vehicle shortly before the collision.
22. I accept the expert opinion of Ms Haddox that the debris clearly suggests a point of impact on the eastbound side of the road opposite the cottage adjacent to Marley Beach Road and that this finding is consistent with the agreed evidence as to where the respective vehicles (and their riders) were found after the collision. I also accept her evidence that the collision was nearly head on which I consider to be more consistent with the straightness of the road in the agreed general area of impact. The angle suggested by Mr Venning in his oral explanation of the debris field seemed improbably sharp and inconsistent with where the Defendant's vehicle ended up. Mr Venning's explanation of how the Defendant's vehicle and the Defendant himself detached from it ended up on the south side of the road west of Marley Beach Road was vivid but more speculative than scientific.

23. The same applies to Mr Venning's attempt to support the Defendant's evidence that when he came around the corner he saw cycles overtaking a line of cars. The expert admitted that the Defendant's evidence made no sense if one assumed that the Plaintiff had completed the act of overtaking when the accident occurred. On this basis he conceded the overtaken cars would have become embroiled in the collision. However, his alternative scenario that the crash occurred before the Plaintiff had completed overtaking so the cars were able to drive on oblivious of the collision behind them seemed almost equally improbable. By his own account, the Defendant would only have seen the Plaintiff's motorcycle a few seconds before the collision. The Plaintiff's vehicle and the Plaintiff himself were thrown forward in an easterly direction by the impact of the collision. How could vehicles being overtaken which were driving parallel to the Plaintiff a mere one or two seconds before the collision have driven on, not struck by the Plaintiff's flying bike or the Plaintiff's body, and without even hearing a major collision?
24. The Defendant's evidence that the Plaintiff was overtaking was unreliable in particular because of the following features to it:
- he claimed to have seen more than he would have had time to see based on Mr Venning's evidence;
 - his original description of a line of cars being overtaken in his police Statement and his Witness Statement changed at trial to a "*couple of cars*";
 - it seems improbable that any cars being overtaken in the split seconds before the accident must have occurred could have avoided being embroiled in the collision;
 - his account of where he was in the roadway at the time of the collision is inconsistent with where Ms Haddox opined and I accept he and his cycle would have ended up.
25. Ms Haddox's evidence was consistent with the evidence of Mr Johansen and Mr Outerbridge and (although I place no material reliance on this) the fact that the Police investigators formed a similar view as to who was to blame for the collision. More significantly, her evidence was based on substantially agreed facts supported by physical evidence photographed shortly after the accident. Her crucial findings were not to any material extent dependent on witness statements which she acknowledged are often unreliable guides to how an accident actually occurred. I accordingly find that the accident was caused by the negligence of the Defendant who was riding on the wrong side of the road when the accident occurred.

Conclusion

26. The issue of liability is resolved in favour of the Plaintiff.
27. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Plaintiff is awarded the costs of the action to be taxed if not agreed.

Dated this 30th day of January, 2017 _____
IAN RC KAWALEY CJ