In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 54

BETWEEN:

DWAYNE L. BROWN

Plaintiff

-v-

(1) BRANDON LEVON

(2) ERVIN DEAN GRANT

Defendants

JUDGMENT

(In Court[1])

Date of Trial: March 9, 2015
Date of Judgment: March 16, 2015

Mr. Mark Diel, Marshall Diel & Myers Limited, for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

[1] To save costs in a case which was conducted by counsel at trial with commendable economy, this Judgment was circulated without a hearing.

Introductory

1. At around 6.35pm on the evening of November 10, 2011, as Tropical Storm Sean approached Bermuda, the Plaintiff was following his usual route home from work travelling west across Longbird Bridge and onto the Causeway, riding his motor cycle. At a point the precise location of which was in dispute, the Plaintiff collided with a parked taxi driven by the 1st Defendant ("D1") and owned by the 2nd Defendant ("D2").

2. The Plaintiff suffered a fractured right tibia/fibula and was initially hospitalised for four days. The fracture injury had completely healed by October 2012, but the Plaintiff sustained a permanent partial disability resulting from a 1cm shortening of the right tibia and a slight loss of range of movement in the right ankle. On February 28, 2013, the Plaintiff filed a Writ together with a Statement of Claim seeking damages for negligence against:

    (a) D1 for parking around a corner on a double yellow line;

    (b) D2 for vicarious liability as the employer of D1.

3. The Defendants asserted that the collision was caused or contributed to by the negligence of the Plaintiff in that he:

    (a) failed to keep a proper look out;

    (b) failed to see the taxi in time;

    (c) failed to act in response to the presence of the taxi;

    (d) collided with the rear of the taxi;

    (e) failed to avoid the collision;

    (f) failed to ride at a safe speed (added by amendment at trial).

4. D2 advanced the additional defence that he was not vicariously liable for D1's negligence in any event because no employment relationship existed between them.

Legal findings: negligence

5. Mr. Rothwell submitted that proof of a breach of the Traffic Code by parking on a yellow line was insufficient, in and of itself, to make out a case of negligence. That must be right as a matter of legal principle, not just because what conduct amounts to negligence is very closely connected to the circumstances in which the breach of duty alleged occurred. Section 48 (2) of the Road Traffic Act 1947 ("the Act") provides that a failure to rely on the Traffic Code "*may… be relied on by any party to the proceedings as tending to establish or negative any liability which is in question*". That a breach of the Traffic Code by itself is creates no presumption of negligence was also supported by *Powell-v-Phillips* [1972] 3 All ER 864. On the other hand, parking between a yellow lane marker and an adjoining curb is an offence under the Act (section 13(4)(a)(vii)). This is what the Plaintiff in part complained of, and it does constitute an offence.

6. The Defendants' counsel further made reference to cases involving parking or stopping in unsafe circumstances. In *Foster-v-Maguire* [2001]EWCA Civ 273, Sir Anthony Evans (with whom Walker LJ agreed) opined as follows:

> "*17. The conventional and correct approach in any case where the claimant seeks damages for injury caused by negligence of the defendant is to ask three questions: did Mr Maguire owe the claimant a duty of care? If so, was the duty broken (did the defendant act carelessly)? If so, did the negligence cause the claimant's injury?...*
>
> *21. This overlap between duty and remoteness of damage, and what constitutes negligent conduct in the circumstances of the case, means that the three conventional questions to which I have referred above can be telescoped into one issue of fact in cases such as Jolley and also the present case, where no other complicating factors arise. That was true also of Howells v. Trefigin Oil the Court of Appeal judgment given by Beldam L.J. to which the Judge referred. Conscious of the admonitions in Jolley, not to refer to the facts of other cases in this field, I will say merely that Beldam L.J.'s dictum, that "a road user is not bound to anticipate folly in all its forms, but he is bound to pay regard to carelessness by other road users where experience shows that such carelessness is common", was spoken in the context of whether Mr Maguire was at fault i.e. negligent, but it is equally applicable in deciding what was reasonably foreseeable by the defendant for the purposes of establishing whether a duty of care existed and whether damage was too remote.*"

7. In that case, where a lorry parked so as to block a cycle lane, the driver was found to be 30% responsible when a cyclist collided with the lorry. The cyclist was found to have had a clear view of the lorry well before the collision occurred (the lorry driver having parked saw the cyclist some 300 metres away). The cyclist had not seen the lorry and collided head on without swerving because he was riding with his head down, only able to see a few feet ahead. Mr. Rothwell also referred to *Howells-v-Trefigin Oil& Trefigin Quarries Ltd.,* Court of Appeal Civil Division, December 2, 1997 (transcript). Here, a lorry parked in daylight around the second part of an S-bend. The cyclist who struck him was riding at 25 mph with his head down in driving rain and only saw the lorry when it was too late to avoid a collision. Beldam LJ (with whom the other panel members agreed) held as follows:

> "*In my view the Judge was wrong in finding that Mr. Rogers ought reasonably to have had in contemplation the kind of conduct which it was virtually agreed the* [plaintiff] *exhibited on this occasion. He was almost riding around this bend blindfold if he did not look up until he was within 15 yards of the back of this lorry. He was riding at a speed of 25 miles an hour, which is a fast speed, particularly having regard to the road conditions, and one might have expected that those conditions would have caused him to have kept a much better lookout, or to have moderated his speed so that he could have avoided the presence of this lorry partially obstructing the road ahead of him…*"

8. I find that the central test the Plaintiff has to meet is establishing that it was reasonably foreseeable that if D1 parked where he did an accident might occur and the accident which did occur was not too remote an event to justify the conclusion that no actionable breach of duty occurred. Clearly, if the sole cause of the accident was the Plaintiff's own negligence, the Defendants cannot be liable. I am also guided by the following *dictum* of McKenna J in the English Court of Appeal decision of *Rouse-v-Squires*[1973] 2 All ER 903 at 911:

> "*We have been referred to a number of cases where two parties were guilty of negligence and it was argued that the negligence which was subsequent was the sole cause of the accident. I deduce this rule from the cases. Where the party guilty of the prior negligence has created a dangerous situation, and the danger is continuing to a substantial degree at the time of the accident, and the accident would not have happened but for this continuing danger, he is responsible for the accident as well as the party who was subsequently negligent.*"

9. I also accept Mr. Diel's submission that exceeding the speed limit is not in and of itself proof of negligence. As Meerabux J held in *Smith-v-Furtado et al* [1997] Bda LR 27 (a finding which was upheld on appeal[2]) :

> "*…to exceed the speed limit, though an offence, is not itself negligence imposing civil liability. Barna-v-Hudes Merchandising Corporation (1962) Sol Jo 194, CA. Again, high speed alone is not evidence of negligence unless the particular conditions at the time preclude it. Quinn-v-Scott [1965] 2 All ER 588.*"

10. In *Defrias-v-Rooney* [2002] Bda LR 21, Clough JA (delivering the judgment of the Court of Appeal in a case the Plaintiff's counsel also placed before the Court, held as follows:

> "*37….Contributory negligence required the foresee-ability of harm to oneself. A person is guilty of contributory negligence if she ought reasonably to have foreseen that if she did not act as a reasonable prudent person she might be hurt and in reckoning must take into account the possibility of others being careless. All that is required here is that the Plaintiff should have failed to take reasonable care for her own safety. I do not find that the Plaintiffs conduct was in any way contributory negligent. In the agony of the moment she made an unsuccessful attempt to avoid the collision.*"

11. I adopt this test for determining whether or not the Plaintiff was contributorily negligent.

Legal and factual findings: vicarious liability

12. Mr. Rothwell referred the Court in his closing submissions to the following authorities to support the proposition that D2 could not in the circumstances of the present case be held to be vicariously liable for D1's negligence.

13. In *Pearman-v-Pitt and Daniels* [1986] Bda LR 46 (at page 7), Judge J (Acting) cited, *inter alia*, the following the following authorities as reflecting the Bermudian law position on vicarious liability or agency in relation to the use of a motor vehicle:

[2] [1998] Bda LR 15.

"*On the authorities, there appears to be no, or no very great distinction to be drawn between the nature of the liability of a master for the torts of his servant and the liability of a principal for the torts of his agent though of course there are important distinctions in the incidence thereof. In Ormrod v. Crosville Motor Services Ltd. and another , Murphie third party reported at[1953] 1 W.L.R. at page 1120 Singleton L.J. said at page 1122.—*

> *'The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the purpose for which the car was being taken down the road on the morning of the accident was, either that the car should be used by the owner or that it should be used for the joint purposes of the owner and the plaintiffs' (i.e. the driver and his wife).*

In the same report Devlin L.J. said at 1123—

> *'The law puts an especial responsibility on the owner of a vehicle who allows it out on to the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern'...*"

14. In *Avis Rent-A Car Ltd.-v-Maitland* (1980) 32 WIR 294, the Jamaican Court of Appeal held that the owner of a rental car was not vicariously liable for the negligent driving of the hirer of the car. The same principles followed by this Court in *Pearman-v-Pitt and Daniels* were applied. Zacca (Acting President) held (at page 296):

"*The fact that the appellant may make a profit whilst the car is being driven by the second defendant does not mean that the second defendant was driving the car for the owner's purposes in pursuance of a task or duty delegated by the company to him. The law is stated thus in 28 Halsbury's Laws of England (3rd Edn) paragraph 71, page 71:*

'The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purposes.'"

15. The accuracy of the above principles in terms of summarising the applicable law was not in controversy.

16. The Defendants' evidence that D1 drove D2's taxi for a fixed fee and that nothing resembling an employment relationship existed between them in this regard was not positively or effectively challenged. I find that D2 is not vicariously liable for any negligence of D1 and the case against him is dismissed.

Findings: responsibility for the accident and the Plaintiff's injuries

Was the accident caused to any extent by D1's negligence?

17. D1 admittedly stopped on a yellow line but insisted at trial, seemingly contrary to his instructions to his counsel who did not put this crucial point to the Plaintiff in cross-examination, that he stopped in plain view of traffic coming over Longbird Bridge, and not out of sight around the bend. The Plaintiff's evidence was that the collision occurred because D1 parked just around a corner and he saw the taxi (keeping a

proper lookout) too late to be able safely avoid striking it. It was clearly D1's case that the Plaintiff ought to have been able to see the taxi in time to avoid the collision. But when the Plaintiff in cross-examination identified by reference to two photographs where he said the vehicle was parked, his evidence was not challenged.

18. I prefer the evidence of the Plaintiff on this issue. He was generally a credible witness and his account of where the accident occurred was consistent with his previous statements. D1 ended his Police Statement with the following words: "*I just want to say that I am sorry.*" He was charged by the Police with driving without due consideration; he failed to appear in Court when required and a warrant is outstanding against him. It is D1's positive case that it was windy with winds coming from the Plaintiff's left as he crossed the bridge and that he was distracted by sea-spray. The Plaintiff disputed telling the Police that he was distracted by sea-spray. I am satisfied that he must have at least mentioned seeing sea-spray causing this matter to be recorded in the Police Report. It is common ground that D1 had rear lights illuminated. I make no finding as to whether or not the taxi's left indicator light was on. The Plaintiff's evidence did not support a finding in any event that the absence of an indicator had any material impact on the accident which occurred.

19. I find that when D1 stopped to wait for his potential passengers around the bend, it was reasonably foreseeable that following vehicles generally, not merely vehicles whose drivers/riders were not exercising due care, might have difficulty in either stopping in time or safely overtaking the taxi because:

    (a) the taxi was parked just around what was effectively a blind corner;

    (b) the taxi had stopped in an area where vehicles were prohibited from parking;

(c) riding conditions in particular were less than ideal due to the combination of darkness, windy pre-storm conditions and sea-spray in the general area of the Causeway; and

(d) D1 in all the circumstances created a dangerous situation by stopping where he did when the accident occurred. I primarily rely on the photographic evidence (especially Photo B) which clearly shows that the taxi (parked where the Plaintiff says it was parked) would not have been visible to a cyclist riding in the middle of the road travelling west until the cycle left the bridge and came round the bend.

To what extent, if any, was the Plaintiff contributorily negligent?

20. The Plaintiff admitted under cross-examination that he crossed the bridge at around 35kph, which was in excess of the 20kph speed limit for the bridge. Although in answer to the Court he indicated that he "generally" slows down for bends, I understood his evidence to be that he was travelling at about that speed when he first saw the taxi possibly 20 feet away. He accepted that based on the United Kingdom Government "Typical Stopping Distances", put to him by Mr. Rothwell, it appeared that just over 40 feet was required to normally stop at 35kph. This prompted the belated amendment to the Defence to allege excessive speed as a contributing cause of the accident.

21. I infer from the Plaintiff's evidence that he probably turned the corner around which the taxi was parked within the lawful speed limit for the Causeway itself, but at a somewhat faster speed than would be expected of a cautious driver in that section of roadway. However, a model driver or rider travelling at 20kph over the bridge would likely accelerate on returning to the Causeway, even approaching the bend, to perhaps 25 to 30kph. I infer this in part from the direct evidence of the metal surface on the bridge, which is linked to the special speed limit prescribed for it. In addition I take judicial notice of the notorious fact that most drivers in Bermuda travel on open

roadways within an unofficial speed limit of approximately 50kph. It seems wholly fanciful to suggest that the Plaintiff having left the bridge should still have been travelling at the snail's pace of 20 kph when he negotiated the bend.

22. On this basis, and bearing in mind that D1 asserted no pleaded case on speed until trial and that the only evidence of speed comes from the mouth of the Plaintiff himself, I find that the Plaintiff was only travelling at marginally (perhaps 15%) above the speed that I find that a model driver or rider adhering to the special bridge speed limit would likely be travelling at. Extrapolating from the document put to the Plaintiff in cross-examination, and accepting the Plaintiff's evidence that when he first saw the taxi it was about 12 feet away, D1 was parked closer than the typical stopping distance 20 feet for a following vehicle travelling at 16 kph, let alone a vehicle travelling at the special bridge limit of 20kph. This created a hazard for all following traffic without even taking potential carelessness or excessive speed into account.

23. Rounding the corner at 35kph would likely have required either a sharp braking action or a rather sharp overtaking manoeuvre to prevent a collision. It is common ground that the Plaintiff only clipped the rear corner of the taxi, and did not simply drive into the rear of the vehicle without attempting any evasive action. I infer from this that he was attempting to overtake the taxi and only just failed to exercise the manoeuvre successfully. If the Plaintiff had crossed the bridge at the prescribed speed and accelerated to 30 kph, he would still in my judgment based on the evidence not have been be able to stop or overtake comfortably without deploying 'emergency' evasive measures. There is, however, no clear or reliable basis for determining whether the collision was actually caused to any material extent by virtue of careless or reckless speed or any other specific act of carelessness. Allegations made in correspondence which might have supported such findings were not pursued at trial.

24. The Defendant has failed to prove that the Plaintiff failed to keep a proper look out, or was distracted by splashing water, or failed to see D1's taxi in time. The Plaintiff clearly failed to avoid the collision, but that was mostly because he was confronted with a dangerous situation and only partly because, as I find, he was riding marginally faster than a model driver complying with the special speed limit on the bridge would likely have done in all the circumstances of the case. But it does not follow that simply because the stopping distance was shortened that the Plaintiff was contributorily negligent. As Mr. Diel rightly submitted, this was not a case where it was reasonably foreseeable that a vehicle would be parked in what I accept was an unusual spot to stop. It is simply the case that the Plaintiff's admittedly traveling over the bridge at an excessive speed (i.e. in excess of the special speed limit of 20 kph) meant that he rounded the corner at a rate which potentially exacerbated the danger D1 had created, by reducing the normal stopping distance. Is that enough, in the absence of clear evidence of carelessness on the Plaintiff's part, to support a finding of contributory negligence?

25. The 'Typical Stopping Distances' chart is clearly designed as a guide for vehicles travelling behind vehicles that they can see with a view to deterring vehicles following too close behind other vehicles. The most orthodox factual context for alleging contributory negligence in relation to a rear-end collision attributed to excessive speed is where a following vehicle is travelling too close behind another vehicle to be able avoid a collision. The chart is designed to encourage drivers to keep a safe distance between themselves and other vehicles which they can see, using, *inter alia*, car lengths as measures. In the road traffic collision context, one generally posits a case of negligence where one driver carelessly fails to avoid a collision which ought with reasonable care to have been avoided. The party asserting negligence must prove a failure to take care to avoid a reasonably foreseeable risk as well as a causative link

between the act of carelessness relied upon and the relevant collision. This view of the law is illustrated by all of the cases upon which the Defendants' counsel relied.

26. Mr. Diel crucially submitted that (a) evidence of excessive speed was not by itself evidence of negligence and that (b) there was no basis for the Court to find contributory negligence in the sense of any specific act of carelessness on the Plaintiff's part. I agree that specific carelessness in the sense of a failure to take reasonable care to avoid a foreseeable risk must be proved. The fact that the Plaintiff likely turned the corner slightly faster than a driver adhering to the special speed limit for the bridge can only be evidence of negligence if the Court further finds either that:

    (a) it was inherently unsafe to turn the corner at that speed irrespective of any dangers lurking around the corner; or
    (b) it was an unsafe speed because the possibility of a vehicle parked on the bend was sufficiently foreseeable that a driver exercising reasonable care would only negotiate such a corner at a speed which would allow him to safely evade any such obstructions.

27. As Beldam LJ famously put it in *Howells-v-Trefigin Oil& Trefigin Quarries Ltd.*, Court of Appeal Civil Division, December 2, 1997 (transcript, at page 3): *"a road user is not bound to anticipate folly in all its forms, but he is bound to pay regard to carelessness by other road users where experience shows that such carelessness is common*". While Mr. Rothwell rightly argued that stopping on yellow lines is notoriously common, Mr. Diel rightly countered that stopping on blind corners is not. I find that:

(a) there is no evidence that the Plaintiff was travelling at an inherently unsafe or careless speed at the time when he turned the corner around which the taxi was dangerously parked;

(b) there is no sufficient evidential foundation for concluding that the Plaintiff failed to exercise reasonable care for his own safety in the sense of ignoring a reasonably foreseeable risk that a vehicle might be parked out of sight a short distance around the bend; and

(c) there is no sufficient evidential basis for concluding that the collision occurred to any material extent due to carelessness on the Plaintiff's part and that this was not simply a case where "[i]*n the agony of the moment* [the Plaintiff] *made an unsuccessful attempt to avoid the collision*": *Defrias-v-Rooney* [2002] Bda LR 21 (Clough JA).

28. A mere "hunch" that the Plaintiff's own carelessness may have contributed to the accident is not a sufficient foundation for a finding of negligence of any kind in the absence of a legal presumption that a particular act constitutes *prima facie* proof of negligence.

Conclusion on responsibility for the accident

29. The accident and the Plaintiff's resultant injuries were caused by the negligence of D1 in parking just around a corner in an unusually hazardous position. I find that no contributory negligence has been established by the Defendant.

Findings: assessment of general damages

30. The injuries suffered by the Plaintiff as a result of the accident were not controversial. He was in hospital for four days, he returned for bone grafting surgery a few weeks later, and his fracture and wounds had essentially healed 3 ½ months later. He was diagnosed with a 1cm shortening of the right tibia and a slight loss of motion in the right ankle, the latter disability only partially attributable to the accident. Controversy primarily centred on where this injury fell in paragraph (7) of the Judicial Studies Board (JSB) Guidelines: (c) Less Serious Leg Injuries (i) (JSB-067). The Plaintiff contended for the top of this range while the Defendants contended for the bottom of this range. The modest special damages claim was agreed.

31. The agreed range was roughly between $26,000 and $40,000. None of the cases relied upon by Mr. Diel in support of an award above the $36,000 proposed by Mr. Rothwell for general damages appeared to me to reflect injuries comparable to the Plaintiff's. In my judgment $36,000 is an appropriate award for general damages in all the circumstances of the present case.

Conclusion

32. The Plaintiff's claim for damages for negligence succeeds as against the 1st Defendant whom I find is 100% responsible for the accident.
33. The Plaintiff's claim against the 2nd Defendant based on vicarious liability is dismissed on the basis that no employment relationship existed.

34. The Plaintiff is awarded $36,000 by way of general damages for pain and suffering and loss of amenity together with special damages in the agreed amount $1046.

35. Unless either party applies within14 days by letter to the Registrar to be heard as to interest and costs (or any other matters arising from this Judgment), the Plaintiff is also awarded the costs of the action to be taxed if not agreed and pre-judgment interest at the rate of 3.5% from November 10, 2011 (the date of the accident) until judgment, together with interest at the statutory rate from the date of judgment until payment.

Dated this 16th day of March, 2015 _____

IAN R.C. KAWALEY CJ