Smellie J.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cc. 381 of 1991

GRAND COURT - CAYMAN ISLANDS

9-12-93

GEORGE JACKSON - PLAINTIFF

v.

FRANKLIN ALLEN BALAIR SMITH - DEFENDANT

Mr. Graham Ritchie for the Plaintiff
Mr. Pierre Lamontagne QC with Mrs. Eileen Nervick for Defendant

JUDGMENT

Schofield J.

In September, 1988 the plaintiff and defendant were both seventeen years old. They were friends and had been together at the house of Shane McCoy, a mutual friend, in the early afternoon of the 24th September, 1988. The plaintiff left Shane's house first on his bicycle and he rode from the house which is situated in Newlands, down Newlands Road in the direction of Savannah. A few minutes later the defendant left the house on his motor cycle, with Shane as his pillion passenger. They travelled on the same road as the plaintiff and in the same direction: whether they were to go to the same destination by prior arrangement is a matter of dispute between the parties, but nothing turns on that. When the defendant caught up with the plaintiff, abreast of Hubert Bodden's residence in Newlands Road, the motor cycle and bicycle collided and as a result the plaintiff suffered a serious injury to his hip which required two surgical operations and which will require hip replacement surgery every ten to fifteen years for the remainder of his life. Total damages of $248,213.38 have been agreed, subject to the defendant being found liable in negligence. The defendant maintains that he was not negligent, and alternatively, if he was, that the plaintiff is guilty of contributory negligence. The defence, amended at the trial, contained alternative defences of ex turpi causa non

oritur actio, which defence was abandoned during the course of the trial, and volenti non fit injuria, which defence must be considered but which can be briefly dealt with in the light of the evidence tendered at the trial.

The plaintiff was riding his bicycle on a straight stretch of road. It seems that visibility and the weather conditions were good. He passed Hurbert Bodden's garage on his right and after looking ahead and behind swerved across the road to his right hand side. Why he did this can only really be answered by reference to his age at the time. The plaintiff's evidence is that he was on his way back to the left hand side of the road when he looked back and saw the defendant coming on his motor cycle. The plaintiff said he became frightened of being hit and so straightened up and continued riding and he was struck by the defendant's motor cycle. The collision occurred about seven or seven and a half feet from the left shoulder of this twenty-two and a half feet wide road. A sketch plan prepared by a police officer several days after the accident shows a point of impact abreast of the first of two entrances to Hubert Bodden's residence, but the witnesses put the impact a few feet further up the road. Again I do not consider that anything turns on that.

The plaintiff called two witnesses who were standing in Hurbert Bodden's garage facing the road. They had a full view of Newlands Road for probably a span of thirty-five or forty feet, but their view was restricted to the stretch of road the plaintiff passed just prior to the accident and they did not have sight of the impact itself.

Athens Leonce Jackson is the plaintiff's uncle, and James Jefford Bodden is a second or third cousin of the defendant. They both testified that they saw the plaintiff ride past the garage and as he did so he was looking over his shoulder. A few seconds later they heard the defendant's motor cycle, and saw it as it passed the garage zig-zagging down the road. Mr. Jackson

was in the middle of saying that the defendant would fall off the motor cycle when they heard the collision between the motor cycle and the plaintiff's bicycle. Mr. Jackson put the speed of the motor cycle at twenty-five miles per hour but Mr. Bodden put it at four to five miles per hour. Mr. Jackson said the boys on the motor cycle were laughing whereas Mr. Bodden said their faces were normal.

The defendant testified that he left Shane's house to go to the gas station and he saw the plaintiff on his bicycle before Hubert Bodden's residence. In the vicinity of Hubert Bodden's residence, as he got to within a few feet of him, the plaintiff who had been riding on the left hand side of the road suddenly pulled out to the right. The defendant had pulled to the centre of the road, to overtake the plaintiff, and he applied his brakes. He said the plaintiff appeared to panic and stayed in the road and he, the defendant, tried to turn to his left but it happened so quickly and he did not have time to do so. The defendant said he was wearing a full face crash helmet and Shane was wearing a open face helmet. He was travelling at about twenty miles per hour before he saw the plaintiff cut across the road.

What really happened between these boys on the afternoon of 24th September, 1988? There is a strong suspicion that they were cutting a caper between themselves; that the plaintiff being ahead of the motor cycle was cutting across the road and the defendant was joining in a dangerous game with him. But a finding on that suspicion would not be supported by the evidence and is not open to me. That being so counsel agree that the defence of volenti non fit injuria falls by the wayside.

The plaintiff freely admits that he was cutting across the road. His two witnesses did not see him do that, but the plaintiff says he swerved to his right after passing the garage so there is no inconsistency in that part of the evidence. The

plaintiff would be out of the witnesses' view when he crossed the road. What the witnesses do say they saw was the plaintiff looking over his shoulder, which is fully consistent with the plaintiff's evidence. The two witnesses testified that the defendant was zig-zagging across the road. The plaintiff's testimony is that the defendant was on the left hand side of the road coming straight when he saw him. The defendant's counsel urges that I must accept that evidence from the plaintiff; that it is in the nature of a judicial admission. In fact the plaintiff has not formally admitted that the defendant was not zig-zagging; the plaintiff has called evidence to the effect that he was. The plaintiff's testimony must be considered in the light of the evidence as a whole and his evidence cannot be elevated beyond that of the other witnesses. A party to an incident may have his own perception of an incident which perception is as prone to error as that of any other witness. The Court must assess the evidence of all the witnesses and attempt to ascertain an accurate version of events from the totality of that evidence, which may or may not include the evidence of the parties. Because a party did not see, or remember seeing, something happening does not mean that it did not happen; nor does the Court have to find it did not happen merely because the party did not perceive it.

In this case the most impressive evidence came from the witnesses Athens Jackson and Jefford Bodden. Both are mature individuals and one is related to the plaintiff and the other to the defendant. They both clearly saw the defendant zig-zagging down the road within seconds of the collision. They may not agree on whether the defendant and his pillion passenger were laughing or on the speed of the motor cycle, but these discrepancies do not go to the root of their credibility. I believe them. I regard them as independent witnesses. That the plaintiff testified that when he glanced over his shoulder he observed the defendant coming towards him in a straight line does not detract from the force of the evidence of these two witnesses

that the defendant was zig-zagging down the road. I believe that the two witnesses saw the plaintiff looking over his shoulder prior to him cutting across the road to his right.

I find that both boys were larking about. They must, according to the evidence, have been larking independently and were not involved in a mutual game. But larking they were. I do not believe the defendant's evidence. It does not accord with the evidence of two independent witnesses. If the defendant was attempting to overtake the plaintiff on the right hand side of the road why did the accident occur about one third way from the left shoulder of the road? Even allowing for the defendant's explanation that he tried to pull to the left if the plaintiff was cutting across to the right he must have been well to the left of the road, near the shoulder, when he started his swerve. Had the defendant given him width both could have passed without incident. The more likely explantation was that the accident occurred when the plaintiff was pulling back to the left side of the road.

It follows from what I have said that I find the defendant was guilty of negligence. He followed close on the plaintiff, zig-zagging down the road. Had the defendant been riding in a proper manner and taking proper care to avoid the plaintiff, this accident would not have occurred. He had a duty of care to the plaintiff and he failed to exercise that duty properly.

The plaintiff's counsel argues that the plaintiff's manoeuvre of swerving to one side of the road and then swerving back was not in itself negligent and that he was on his own side of the road when the impact occurred. It is true that he looked behind him before he carried out the manoeuvre, but on his own admission the manoeuvre to the left hand side of the road was not completed when the motor cycle was upon him. Had he not swerved across the road the accident may well not have occurred. I am satisfied that the plaintiff did not in his own interest take reasonable

care of himself and contributed by this want of care to his own injury (see Nance v. British Columbia Electric Rly Co. Ltd. [1951] A.C. 601). The plaintiff is guilty of contributory negligence.

Apportionment of responsibility in this case is difficult and is rendered more difficult by the fact that I do not have independent and indeed, satisfactory evidence of what happened at the point of impact. Taking one thing with another and doing the best I can I reduce the damages recoverable by the plaintiff by fifty per cent.

The award will follow that finding and interest is payable at Court rates on the award from date of judgment to payment in full.

Costs to the plaintiff to be taxed if not agreed.

Judge

Dated this 9th day of December, 1993