Neutral Citation Number: [2017] EWCA Civ 79

Case No: B3/2015/3870

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HHJ RAYNOR QC (SITTING AS A JUDGE OF THE HIGH COURT)
A90LV016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2017

Before :

LORD JUSTICE TREACY
LORD JUSTICE CHRISTOPHER CLARKE
and
LORD JUSTICE DAVID RICHARDS

- - - - - - - - - - - - - - - - - - - -

Between :

Collette McGeer (A Protected Party by her Litigation Friend, Amy Elizabeth Clague)	**Claimant/ Respondent**
-and-	
Robert McIntosh	**Defendant/ Appellant**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Charles Feeny (instructed by **Ead Solicitors Llp**) for the **Claimant/Respondent**
Mr Douglas Herbert (instructed by **Keoghs Llp**) for the **Defendant/Appellant**

Hearing date: 14 February 2017

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

LORD JUSTICE TREACY:

1. This appeal raises no issue of law, precedent or other matters of general significance. The result of the appeal is of significance only to the parties. Accordingly, it is possible to reduce the degree of detail in this judgment.

2. The evidence, facts and judge's findings are set out in the judgment of HHJ Raynor QC, sitting as a judge of the High Court, at Manchester Civil Justice Centre, on 9 November 2015. The judge found for the claimant in negligence and, by reason of her contributory negligence, awarded her 70% of her damages to be assessed.

3. The claim arises from an accident which took place at about 1513 hours on 19 May 2011. An articulated HGV driven by the defendant, Robert McIntosh, was in collision with a pedal cycle, being ridden by the claimant Colette McGeer. As a result Ms McGeer suffered very severe injuries.

4. The basic facts were not in dispute. Both parties had been travelling in the same direction, south westwards, on Whitby Road, Ellesmere Port. The defendant, having driven over a railway bridge, had stopped at traffic lights governing the junction with Cromwell Road on his left. He was straddling two lanes of traffic indicating an intention to turn left. When the lights turned to green he executed a left turn into Cromwell Road. At the same time the claimant passed along the near side of his vehicle and across its front. The collision took place.

5. The allegations of negligence against the defendant were that (a) he had carried out an intrinsically hazardous manoeuvre, turning left in effect from the right hand lane and not from the nearside lane, and (b) he had failed properly to check in his near side mirrors, before and during this left turning manoeuvre. That manoeuvre was said to be hazardous because traffic in the near side lane might anticipate that the defendant was turning right or moving into the right hand lane and think it safe to pass along the near side of the lorry.

6. It is alleged that prior to the manoeuvre the claimant had come over the brow of the hill on the railway bridge, (some 76 metres from the stop line), and was visible in the defendant's near side rear view mirrors at times when he should have been carrying out observations in his mirrors.

7. Liability was denied. The defendant asserted that he made a proper check in his near side rear view mirrors before setting off, and saw nothing coming down, or towards his near side. He denied he was negligent to execute his left turn in the manner that he did. Having checked his mirrors before setting off, there was no further need to check as he made the turn.

8. The defendant alleged that the accident was caused wholly or in part by the claimant's own negligence, in (a) failing to keep any proper look-out or to observe the defendant's left turning indication, (b) failing to observe at all or heed that the defendant was attempting to turn left, (c) riding at a speed through the traffic lights stop line when it was unsafe to do so, (d) attempting an unsafe undertaking manoeuvre and failing to stop or allow the defendant to complete his turn.

9. The judge said that there were four essential issues. (1) Whether he was satisfied on the balance of probabilities that the defendant would have seen the claimant if had properly checked his nearside rear mirrors, *before* he moved off. This involved a consideration of the probable time elapsing between the defendant pulling off and the impact, having regard to agreed calculations regarding distances and consideration of speeds. (2) Whether the defendant should have checked his near side rear view mirrors *after* moving off, and *before* commencing the left turn (at which time the claimant would certainly have been visible). (3) The manner in which the turn was executed. (4) Whether the claimant should have realised that there was a real risk that the defendant might turn across her path.

10. Having reviewed the evidence, in detail and with care, the judge found that (a) the lights changed to green for the defendant no earlier than 15:13:20 hours; (b) allowing for 1-2 second delay before the defendant started to move, the maximum time taken by the defendant from starting to the point of impact, was 8 seconds, the time of impact having been agreed at 15:13:29; (c) the claimant was not pedalling down the hill. She was not travelling in excess of 16.5 mph.

11. The relevant legal principles were not in dispute. The judge took account of rules 72, 73 and 211 of the Highway Code. These rules relate in particular to road junctions.

12. The judge held that the defendant was negligent. Adopting his findings as to the claimant's speed and the time between the lorry pulling off and impact, the judge found that the claimant was 43.5 metres behind the defendant's rear view mirrors when he pulled off. On the basis of a finding that the claimant would have been visible in his mirrors at a distance of 65 metres, it followed that the claimant would have been visible in the mirrors for a distance of 21.5 metres before he set off. At 16.5 mph the claimant would have been travelling at 7.38 metres per second, and so would have been visible in the defendants mirror for approximately 3 seconds before he moved off. The judge found, that had the defendant made a reasonably careful check of his nearside in his mirrors before moving off, he would have seen the claimant. She would definitely have been on the junction side of the brow of the hill, and visible to the defendant at a time when he should have been carrying out his rear view observations.

13. The judge found that the appellant did not carry out such observations with reasonable skill and care. Either he had not taken sufficient care when looking in his mirrors, because if he had he would have seen the claimant, or alternatively, he had made his observations at an excessive interval before moving. On this basis the defendant was negligent.

14. The judge also found negligence in an additional respect. The judge rejected a submission that it was negligent of the defendant to carry out the manoeuvre by straddling both the left and right hand turning lanes, so as to lead a following cyclist to think he was moving into the right hand turning lane. He held that such a manoeuvre would not have been negligent if the defendant had carried out proper observations in his mirrors before the manoeuvre **and** during the time he was executing the manoeuvre. However, the defendant had not claimed that he had checked on his nearside mirrors *after* moving off. His case was that it did not occur to him that anyone would come up on his near side in an attempt to pass, but at the same time the defendant could not know that his indicators were clearly visible to a cyclist

behind a motor car positioned behind the HGV. It was common knowledge that accidents involving undertaking cyclists and HGV vehicles were all too common, and the defendant had accepted that he knew that the road configuration gave the impression to someone behind that he was moving to his right. In those circumstances, the judge held that the exercise of reasonable care in making the manoeuvre required the defendant to check again in his mirrors, *after* he moved off, and immediately before starting to turn left. If he had done so, he would have seen the claimant.

15. As to contributory negligence, the judge found that none of the rear view indicators would have been visible to the claimant as she came down the slope towards the junction because a Vauxhall car driven by Mr Silcock was immediately behind the HGV, but held that she must bear some responsibility for the accident. Based on his findings as to time and distance, he held that the claimant was 27 metres behind the rear of the trailer when it moved off, and that she would have had a view of its rear for 32.6 metres before then, a distance it would have taken her about 4½ seconds to travel. She should have realised before the HGV moved off that it was straddling 2 lanes and that she could not reasonably or safely assume that it was going to go straight ahead. Although it had moved slightly to its right as it moved off, the claimant could not reasonably or safely assume that it was going to turn right, in the absence of a right indication. By proceeding down the slope at some speed, and with no ability to stop if the HGV made an unexpected manoeuvre, the claimant had been negligent and had failed to heed the advice in rule 73 of the Highway Code. In particular, had she been acting carefully, she should not have undertaken the defendant, whom she had seen, or should have seen, was straddling the nearside lane as she rode towards his vehicle.

16. As to apportionment of liability, the judge found the major responsibility lay with the defendant. He said that the causative potency of the HGV was highly significant in assessing apportionment, given the likelihood of very serious injury to a cyclist in the event of collision. The HGV was potentially a dangerous machine, which, had the defendant exercised reasonable care, would not have turned across the path of the claimant. In the circumstances the claimant was found to be 30% contributorily liable.

17. Mr Herbert's grounds of appeal seek to challenge both the primary finding of liability as well as that relating to contributory negligence. He presented a highly detailed argument, designed to show that the time between the HGV moving off and the collision with the claimant was greater than the 8 seconds found by the judge. If this analysis was correct, then it would have produced a conclusion that the claimant would have been at a distance behind the HGV whereby she would not have been visible to the driver when he moved off. On this basis the judge should not have found that the defendant was negligent in failing to see the claimant at that stage.

18. The basis upon which this argument was constructed was by reference to evidence given by Mr Silcock, the driver of the Vauxhall following behind the HGV, who had said that the claimant passed him on his near side as he crossed the stop line. He had given an estimate of his speed as being about 4 to 5mph and Mr Ward the claimant's expert had accepted propositions as to timing based on that account. That estimate of speed was consistent with evidence from other eye witnesses. If that were a sound basis for proceeding, as Mr Herbert urged it was, then a greater time than the 8

seconds between moving off and impact found by the judge, should have been found. The effect of this approach, if accepted, would have led to a finding that the claimant was not visible at the time the HGV started off.

19. Mr Herbert urged that this amounted to firm evidence upon which the judge should have based his findings. I cannot accept that the submission that the judge came to an incorrect conclusion can be sustained. The judge undoubtedly considered submissions of the type made to us, based on an analysis of the evidence of Mr Silcock which was commented on by Mr Ward. However, he also took account of re-examination of Mr Ward, which showed that the figure of 4 to 5mph given by Mr Silcock could be a higher figure, such as 6mph, which would have an impact upon the analysis. The judge made specific reference to this line of argument, but noted that the result of Mr Ward's re-examination was that Mr Silcock's precise speed was simply not known and that Mr Silcock was in no position to give reliable precise evidence about his speed. Later in the judgment, the judge noted the need to guard against making findings of fact of unwarranted precision, when that was not justified by the evidence. Treating what in truth could be no more than "guesstimates" as if they were secure findings of fact could easily lead to an unjust result either way.

20. The judge's preference in resolving this issue was to rely on Mr Ward's opinion which itself was based on a consideration of CCTV evidence. Some of that evidence was based on re-enactment using the same, or an identical vehicle. On two occasions the time taken from the stop position to the impact point was approximately 7 seconds.

21. In addition CCTV images from the day in question were examined. The time of collision was agreed as 15:13:29 hours. By analysis of the movement of a vehicle travelling in the opposite direction, and which had been stationery at the traffic lights, the judge concluded that the lights changed to green for the defendant no earlier than 15:13:20 hours. This would provide support for the judge's conclusion that, allowing for a second or two's delay before the defendant started to move, the maximum time taken by the defendant from starting to the point of impact was 8 seconds.

22. Mr Herbert criticised this approach as involving speculation and contrasted it unfavourably with his exercise involving the Silcock/Ward evidence. In my judgment the judge was not speculating. Rather, he was drawing permissible inferences from the CCTV evidence recorded both at the time and in subsequent reconstructions, one of which involved the defendant himself driving the vehicle. The judge was not bound to accept the approach adopted by Mr Herbert, which he was entitled to find was based on a degree of uncertainty and which had the capacity to lead to an unjust result.

23. The judge said that he had reached his finding of 8 seconds based on the totality of the evidence before him. I am not persuaded that his approach was wrong or that his conclusion has been shown to have been in error. That being so, the extrapolation made from the timing point, leading to an assertion of invisibility of the claimant at or about the time the HGV moved off, cannot be sustained. On the contrary, the result of the judge's analysis supports his finding that the claimant would have been visible at the time when the vehicle moved off, and thus that her presence should have been heeded by the defendant.

24. Mr Herbert took a further point on liability, which was to argue that even if the judge was correct in finding that the claimant was visible at the time the HGV moved off, it was a counsel of perfection to say that the defendant should have checked his mirror again immediately before he started to turn left. His submission was that the judge was not justified in making such a finding, not least because the nature of the manoeuvre being carried out by the defendant required attention to the road ahead of him. Moreover, any sighting of the claimant some way behind the defendant at the point he moved off, should not reasonably have lead him to anticipate that there was any or any significant danger that the cyclist would come up on his near side in an attempt to pass him.

25. The judge expressly gave consideration to this point, and rejected it. He placed reliance on the fact that the defendant could not know that his indicators were visible to a cyclist behind the Vauxhall, given the position of that vehicle. The judge took account of the provisions of the Highway Code, requiring particular care when turning, changing direction or lane, and emphasising the need to check mirrors. The judge also referred to the fact that accidents involving undertaking cyclists and HGV vehicles are unfortunately all too common, and noted that the defendant accepted that he knew that the road configuration could give the impression to someone behind the HGV that it was moving to its right. The judge did not find that the defendant ought reasonably to have kept a constant eye on his rear view mirrors, merely that he should have made a further check immediately before turning left. On that basis I am not persuaded that the judge was indulging in a counsel of perfection. He appears to me to have considered the relevant evidence and drawn conclusions from the situation, as he found it to be, which justified a finding of negligence. Mr Herbert conceded that if we rejected this argument, the appeal must fail. For this reason, as well as reasons given earlier, I would reject the appeal on liability.

26. I turn next to contributory negligence. Mr Herbert's contention was that the judge should have found that the claimant was significantly more responsible for what occurred. She had been coming down the hill on her bicycle at some speed. The HGV would have been in her sight, and she should have seen the indicators. As to that latter point, the judge made an unimpeachable finding that the indicators were not visible until the claimant overtook the Vauxhall. By that stage it would have been too late to avoid a collision. Be that as it may, it was argued that the HGV was travelling at a lower speed, (around 5mph), than the cyclist and that she bore the greater responsibility for what happened.

27. I remind myself that s.1(1) of the Law Reform (Contributory Negligence) Act 1945 provides for the reduction of damages in a contributory negligence case "to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage". In *Jackson v Murray and Anr* [2015] UKSC 5, Lord Reed said:

> "In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be

> satisfied that the apportionment made by the court below was not one which was reasonably open to it."

28. I consider that whilst the judge had found that both parties were at fault in the respects identified by the judge, it was appropriate for the him to take into account the causative potency of the HGV, given the likelihood of very serious injury to a cyclist in the event of a collision. Although Mr Herbert sought to discount this on the basis of the low speed of the HGV, I consider that the judge was entitled to find that it was potentially a very dangerous machine. Its size and bulk were such that in the event of collision it constituted a very serious danger to a person in the position of the claimant. I therefore see no basis for interfering with the judge's assessment, and, for the reasons given, would dismiss this aspect of the appeal.

29. Accordingly this appeal must fail.

LORD JUSTICE CHRISTOPHER CLARKE:

30. I agree.

LORD JUSTICE DAVID RICHARDS:

31. I also agree.