Damien Davidson (By his Mother and Next Friend) v Alan Christopher Garner


No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
1 November 1995

FC3 95/5669/D

Supreme Court of Judicature Court of Appeal (Civil Division)

1995 WL 1083738

Before Lord Justice Otton Lord Justice Thorpe Sir Ralph Gibson

Wednesday 1 November 1995

On Appeal from the Queen's Bench Division (Manchester)

Mr Justice Buxton

Representation

Mr M Redfern QC and Mr T Rowley (Instructed by Rowlands , Manchester M2 2AF) appeared on behalf of the Appellant/ Plaintiff.
Mr S Grime QC and Mr P Field (Instructed by Keogh Ritson , Bolton, BL1 4DH) appeared on behalf of the Respondent/ Defendant.

Judgment

Lord Justice Otton:

This is an appeal by the plaintiff, Mr Davidson, against the order of Buxton J on 25 February 1994 when he entered a judgment for the defendant. The background can be briefly stated. The action arises out of a road traffic accident which occurred at approximately 10.30 p.m. on the night of 9 April l990. The plaintiff was 17 years of age and was riding a bicycle along Stockport Road, Denton in Greater Manchester. When he was near to the junction of St Lawrence Road, on his right, a car travelling in the same direction, driven by the defendant, collided with his bicycle. The plaintiff suffered a severe head injury and is now grievously handicapped.

When the matter came before the learned judge, the only issue for him to determine was that of liability. The plaintiff's case was that the defendant was negligent in failing to observe or heed the fact that the plaintiff was turning, or about to turn, to his right into St Lawrence Road. A somewhat unusual plea was included in the statement of claim:

"The defendant was negligent in that he:

…failed to observe or heed the plaintiff

i) looking from left to right;

ii) apparently eating something;

iii) wobbling on his bicycle as though he were off balance;

iv) looking down St Lawrence Road and across at a taxi;

v) looking to his right;

vi) turning to his right."

The defendant's case, in summary, was that he was not negligent or in any way responsible for the collision or injuries; the plaintiff had failed to keep a proper look out; he failed to be aware of the presence or approach of the defendant's car; suddenly, and without warning or without any signal or of his intention to do so, he turned or swerved to his right to make the turn into St Lawrence Road when it was manifestly unsafe to do so. Thus the question which the learned judge had to determine was, (1) was the defendant negligent; (2) was the plaintiff negligent; and (3) if both, what apportionment was appropriate? In the event the judge found that the defendant was not to blame and the plaintiff was wholly to blame. Accordingly the plaintiff appeals.

In order to appreciate the grounds of appeal it is necessary to explore the basic facts and circumstances of the accident. The scene can be clearly understood from the most helpful photographs supplied by the police, which were taken immediately after the accident, and the colour photographs which were taken at a later date. They show, as is also evident from the plan, that this is a built-up area with a 30 mph speed limit. The Stockport Road is about 31 feet wide at this point and it has two roads joining it. One is St Lawrence Road, which is the road leading off to the right as the parties approached it, which is staggered with another junction, namely Town Lane out of which the plaintiff had turned into Stockport Road before making his right-hand turn into St Lawrence Road. The distance between the two junctions appears to be in the region of about 100 feet.

The plaintiff has no recollection of the accident. However the judge was able to establish that shortly before the accident the plaintiff had visited the River Fortune Take-Away Restaurant in Town Lane. There he had purchased a take-away meal, mounted his cycle and ridden to the junction with Stockport Road where he had turned left. He was a carrying his meal in one hand and was seen to be eating part of that meal with only one hand on the handlebars.

A Miss Nicola Bentham was a passenger in a taxi waiting at the mouth of St Lawrence Road at the junction with Stockport Road. She saw that he was riding very slowly and that he had only one hand on his handlebars and was eating. He was wobbling as though he were off-balance; he was keeping to his left-side of the road near the kerb; he was seen to look across towards St Lawrence Road. The plaintiff then made, in her description, a sudden movement, or swerve, to the right and across St Lawrence Road. The car, at this stage, was very close to him and a collision occurred. Apart from the glance to the right, the plaintiff had given no indication of his intention to turn to the right.

Mr Booth was Miss Bentham's taxi driver. He clearly did not see as much as Miss Bentham, but did describe how the cycle swerved into the path of the car. The defendant himself described how he saw the cyclist but did not notice anything untoward in the manner in which the cycle was being ridden. He had slowed down and changed from fourth to third gear in anticipation of driving past the cyclist. The defendant described how the cycle suddenly swerved across his path. It was an abrupt manoeuvre and made without any warning or signal. He braked heavily but could not avoid hitting the plaintiff. In

essence, the judge accepted the evidence of the two eye witnesses and the defendant. He found that the plaintiff did suddenly, and without any signal of his intention to do so, turn to the right when the defendant's car was very close to him.

There was, however, other evidence on which the plaintiff sought to rely in order to establish fault on the part of the defendant. Mr Moore is an expert auto-motive engineer. He did not examine either vehicle but he did see the police photographs which show the damage to the bicycle and the fact that there was a crack in the front number plate of the defendant's vehicle consistent with where it struck the cycle. He gave evidence to the effect that, in his opinion, the cycle was struck at an angle of less than 45 degrees to the car and not broadside or semi-broadside as the defendant contended. The judge concluded, on the balance of probabilities, that the cycle was struck more at an angle of the sort indicated by Mr Moore but he considered this of little value. He said:

> "It did not seem to me that this dispute as to the angle at which the cycle had been struck, tenaciously though it was pursued on both sides, was really of any help in deciding the case before me. It seems to me only to be relevant to the question of how long the defendant saw or should have seen the plaintiff when the latter turned into his path, the argument being that a right angle path would be shorter than cycling at a lesser angle, such as Mr Moore's evidence suggested."

Later, having considered the expert's testimony he indicated that a lot of the evidence relating to how far the cycle had moved, was really leading to a rather speculative situation. He said:

> "I say all that only to demonstrate that I was really not helped, although I understand why the evidence was given in the circumstances, by trying to work out from suppositions about Mr Davidson's path and the speed at which he was covering the path how long Mr Garner might have had to stop the car when it became apparent that Mr Davidson was indeed turning into his path."

Mr Martin Redfern, leading counsel on behalf of the plaintiff, has presented an attractive and tenacious argument to the court. In his final ground he seeks to criticise, in the best sense of the word, the approach of the learned judge. He contends that the learned judge may well have fallen into error in arriving at the conclusion that he did in that, when considering causation and blameworthiness, the judge failed to analyse the defendant's conduct in the same manner as he had analysed the plaintiff's actions.

Mr Redfern opened the case before the learned judge by acknowledging that the plaintiff himself must bear some part of the responsibility. This was, of course, a realistic approach on the part of leading counsel who went on to suggest an apportionment of 50/50. However, Mr Redfern submits that, by making that concession, the learned judge may have been led into error in the way that he continued to scrutinise the plaintiff's conduct and analyse it in detail, but he did not carry out the same exercise in respect of the defendant's conduct.

The second point taken by Mr Redfern is that the defendant should have seen what was so clearly described by Nicola Bentham. The plaintiff was behaving in a very unusual and irresponsible way and, if the defendant had been attentive and

had seen the manner in which the cycle was being ridden (as was suggested to the defendant at the trial) then he would not have begun to overtake the cyclist at all at that point.

Thirdly, he submits that the situation as it built up that night as the defendant approached the road junction, and the emergence of the cyclist from the side road and its path down towards the second junction on the right, should have alerted the defendant to the possibility of danger. He should have anticipated that the plaintiff would in some way continue his manoeuvre and route in such a way that danger to other road users, including himself, might occur. Accordingly, Mr Redfern submits that the defendant should have remained behind the plaintiff while traversing the zig-zag lines on the pelican crossing until he was sure what the plaintiff was going to do. Finally, he submits that the defendant, on the evidence, failed to keep a proper look out; to sound his horn; flash his lights; swerve or execute an emergency stop. In those circumstances, there is room for a finding of negligence against the defendant and the judge should have so found.

Mr Redfern also drew our attention to a sketch which was annexed to the grounds of appeal purporting to show the track of the cyclist across the road as he moved to his right, and the opportunity which the defendant would have had to pull up, sound his horn, or taken other avoiding action. He suggests that the proper outcome of this case, bearing in mind all the evidence, is that there should be an apportionment of liability between the two parties.

In considering those submissions, I take as my starting point the approach of the judge to the issues of fact. I do so because Mr Redfern, in the course of his argument, dissected and subjected to scrutiny the way that the learned judge approached some of the evidence and the conclusions he drew from it. I am satisfied that learned judge examined all the evidence with considerable care. He accepted the evidence of the two eye witnesses as reliable. For example, he described Miss Bentham as a clear and intelligent witness. He clearly believed the defendant and accepted the general thrust of his evidence. The credit of the defendant was not impaired in any degree. As to the evidence of the expert, he clearly took it into account. He accepted the angle theory. What weight he was to attach to that evidence was a matter entirely for the judge in the light of the eye witnesses' evidence. In my judgment, it cannot be said that he should have attached more weight than he did. The sketch was no more than a paper exercise based on speculation based on estimates of distances and speeds. It suffered from the disadvantage in that there was no evidence to fix a point of impact which would have given a datum point for such a theoretical exercise to be carried out. In the absence of such a critical piece of evidence that sketch must carry little weight.

Turning to the final ground, I can find no justification for the suggestion that the judge fell into error in the approach that he adopted in his analysis of the defendant and his conduct. As I have already indicated, the judge analysed the evidence with considerable care and detail. I consider that there is no substance in that criticism. Leading counsel's concession did not detract from the judge's analysis. The concession was rightly made but there is no substance in the suggestion that it in some way distracted the judge from the task that he had to fulfil.

In the second ground it is suggested that the defendant should have seen what Miss Bentham saw, and the fact that he did not record or notice what she did is indicative of a poor lookout. It is true that Miss Bentham saw this incident for two seconds which, in a road traffic accident, is an unusually long time. She saw the build up of the accident; she clearly had the plaintiff in view for the same period of time as the defendant would have had before the accident actually occurred. The defendant was travelling along the same road as the plaintiff and was, no doubt, catching up with him, driving at a speed which was probably in the region of about 25 - 30 mph. It is clear from the evidence that the defendant did not see precisely what Miss Bentham observed, in particular what the judge aptly described as the "singular behaviour" of the plaintiff in eating, riding his bicycle with the one hand and wobbling from side to side.

I have come to the conclusion that there is no force in that criticism of the defendant. It is true that he did have a good view but he was coming from behind the cyclist and it cannot be said that he fell into error by failing to observe what the other witness sitting in the taxi observed. When dealing with this matter the learned judge said this:

> "I do not think it is a criticism of the defendant who was approaching the cyclist from the rear and must have had him in his sights for not a very lengthy period of time, that he did not observe some of the more singular aspects of the plaintiff's conduct such as the fact that he was eating, or appeared to be eating an object, and that at one point he had only hand on the handlebars."

Later he said:

> "I am not satisfied that the defendant should have observed whatever behaviour it was on the plaintiff's part that Miss Bentham described as off-balance cycling."

Those findings are essentially of fact. In my judgment they were findings which the judge was fully entitled to make on the evidence before him. His conclusion that the Defendant was not negligent was not unreasonable in any sense of the word and was clearly supportable by the evidence. In my view there is no basis upon which this court would be justified in setting aside the judge's conclusion that the defendant was not negligent. However, even if it were negligent not to have noticed such behaviour, I am satisfied that that failure was not causative of this particular accident or the damage which flowed from it. The immediate and direct cause of this accident was the swerve to the right by the cyclist in the manner which has been described. There is, thus, no substance in that ground.

Turning to the next ground advanced by Mr Redfern, he says that the defendant should have anticipated the possibility of danger, including the chance that the plaintiff might turn to his right and into the side road in the manner that he did. In the course of argument both sides referred to various authorities. Perhaps the most appropriate statement of principle is to be found in the speech of Lord du Parcq in *London Transport Board v Upson & Anor 1949 AC 155* at p176 where, having considered previous authority, he said:

> "The correct principle was stated by Lord Dunedin when he said: 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.' I regard this statement and that of Lord Macmillan in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that (if I may repeat what I said in the recent case of *Grant v Sun Shipping Co Ltd* in this House), 'a prudent man will guard against the possible negligence of others when experience shows such negligence to be common.'
>
> A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from the consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which was caused him injury."

Later he said:

> "These are questions for a jury…"

in other words they are questions of fact,

> "…but I must say, with all respect, that a direction to a jury in the terms of the propositions enunciated by the learned Master of the Rolls would be, in my opinion, unduly favourable to a defendant driver."

The trial judge, when dealing with this aspect of the case, having considered the authority said as follows:

> "Of course, that general rubric, salutary warning although it is, requires the Court, in a given case, to decide what folly it was on the part of the plaintiff that the defendant should reasonably have anticipated and should reasonably have taken steps against. In this case it is argued that what should have been realised was the erratic progress of the bicycle and that therefore the driver should have held back. It was also argued that he should not have been passing in any event because various provisions of the Highway Code suggest that there should not have been any overtaking at that position because it was near a junction and also within the area of a pedestrian crossing."

In coming to my conclusion on this particular aspect, I bear in mind the undisputed evidence that the plaintiff did not take either of the precautions which one would expect for this particular type of manoeuvre. He did not look over his right shoulder to see if there was any vehicle coming up behind, nor did he give any signal with his right-hand of his intention to do so. Whether that was the because he had food in his right-hand and was holding his handlebars with his left-hand, or whether he had his food in the left-hand and was thus unable to give a signal to the right is not possible to determine. The fact remains undisputed that he did not give any signal at all.

If either of those precautions had been given it would have been an indication to the motorist coming up behind him of his intention. In my judgment, in the absence of either, the possibility of this particular form of danger was only a mere possibility which would not have occurred to the mind of a reasonable man. In other words, this particular folly was not to be anticipated.

It is impossible to say that the learned judge erred in principle in the way that he approached this proposition, or in the conclusion that he reached. I would therefore reject this ground of appeal.

I turn to the more general criticism adumbrated by Mr Redfern, namely, that there was inherent negligence on the part of the defendant in overtaking the cyclist at or near the road junction with St Lawrence Road and also or, in the alternative, within the confines of a pelican crossing. The basis of this argument is to be found in the highway code, paragraph 72 which provides:

> "You **MUST NOT** overtake or park on a Zebra or Pelican crossing, including the area marked by zig-zag lines. Even when there are no zig-zags, do not overtake just before the crossing."

My emphasis "just before the crossing." At paragraph 101:

> "When overtaking motorcyclists, pedal-cyclists or horse riders, give them at least as much room as you would give a car. Remember that cyclists may be unable to ride in a straight line, especially when it is windy or the road surface is uneven."

Paragraph 106 a:

> "You **MUST NOT** overtake:
>
> •if you would have to cross to straddle double white lines with an unbroken line nearest to you;
>
> •if you are in the zig-zag area at a pedestrian crossing."

In approaching this proposition, it is doubtful whether the accident, in the absence of any precise point of impact, occurred within the confines of the pelican crossing. Looking at the sketch plan, and also the photographs which are much more helpful on this particular aspect, it is clear that the zig-zag line on the nearside of the road, which is the one governing the pelican crossing so far as the these two road users are concerned, probably come to a end before the point when the defendant was about to overtake the cyclist and the point of impact. In other words, both had passed over the pelican crossing and the zig-zag line beyond it. It is important to note that the injunction contained in the paragraph is not to overtake before the crossing. It does not provide a prohibition against overtaking after the crossing. In any event, the precautions envisaged by the passages in the highway code, and in particular paragraph 72, are designed primarily to protect the safety of the pedestrians rather than other road users. In any event, these requirements do not impose, in my judgment, a blanket prohibition against overtaking a slow moving cyclist in a situation such as this. The only requirement under paragraph 101 is to give the cyclist sufficient room. There is no evidence that he did not do so, indeed there is evidence, which apparently the judge accepted, that he did.

The judge said:

> "In my judgment that movement by the defendant was, in normal circumstances, a perfectly proper and satisfactory way of passing a pedal cyclist."

Later in the judgment he said:

> "The motorist's duty is to do what Mr Garner did do, which was to give satisfactory room in passing the cyclist. Nor do I think that the provisions of the Highway Code assist me in this case. Those provisions are, of course, in this Court only matters of guidance and it cannot be the case that every time anybody passes anybody else within the vicinity of a road junction that that in itself is a ground of negligence; it all depends upon the circumstances. One of the relevant factors in respect of a road junction is whether it is safe to pass in circumstances where other traffic is coming from the road junction. The Highway Code, I venture to think, offers that injunction to drivers principally for that reason, not because other road users who have given no indication that they are going to turn may suddenly decide to take advantage of the turn."

In my judgment the learned judge dealt with this matter with total correctness. He identified the principles involved and his conclusions are unassailable.

This leaves the criticism that the defendant did not react properly when he was confronted with danger as it built up and occurred. It is said that the defendant should have sounded his horn, braked more abruptly than he did and that he should have taken other avoiding action. It is not necessary to go into this aspect in any detail, save to say that the judge, having considered those criticisms, exonerated the defendant from any negligence based on such findings of fact. He said at page 8:

> "I will deal with the second allegation that the defendant did not brake fast enough when the plaintiff came across his path. I do not accept on the evidence that the defendant is to be criticised in respect of that matter. As I have indicated, it is really impossible, on the evidence, to be clear as to how long the defendant had in order to put his brakes on. It was suggested that he should already have been on guard against the plaintiff, and indeed that he had admitted that by reason of the fact that he had slowed down to pass him. I do not accept that, because the defendant's evidence was that he was taking a normal manoeuvre for a normal cyclist, and was in no way on guard against reaction on the part of the plaintiff. I do not accept that there is any evidence which I can safely rely on to suggest that there was inadequate reaction time on the part of the defendant once he had seen the plaintiff drive into his path."

In my judgment those findings of the judge are again essentially of fact and cannot, on the evidence available to this court, be assailed or thought in any way to be unsatisfactory. In those circumstances, the final argument advanced by Mr Redfern must also be rejected.

The outcome must, therefore, be that this appeal must be dismissed. In a case such as this, it always creates a position of considerable anxiety for all those involved where the outcome of a road traffic accident, or indeed any other accident is as calamitous as this. While having every sympathy with the plaintiff and his family, I find it quite impossible to say that there is any ground for the defendant to be held responsible in any degree for this accident. It must be said that the plaintiff was wholly the author of his own misfortune.

The appeal, therefore, must be dismissed.

Lord Justice Thorpe:

I agree. The obstacles to the plaintiff's success at first instance were formidable. In my judgment, the conclusion reached by Buxton J was almost inevitable. I saw no attraction in Mr Redfern's critique of his judgment. I, too, would dismiss this appeal.

Sir Ralph Gibson:

I agree with both judgments.

Order: Appeal dismissed. Section 18 costs order. Legal Aid taxation.