In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 007

B E T W E E N:

URBAN FLEMING

Plaintiff

-v-

NICOLE BROWN

Defendant

EX TEMPORE JUDGMENT

(In Court)

Personal injuries – negligence – road traffic collision – pedestrian

Date of hearing: March 13, 2017

Mr Richard Horseman, Wakefield Quin Limited, for the Plaintiff
Mr Craig Rothwell, Cox Hallet Wilkinson Limited, for the Defendant

Introductory

1. The present action was commenced by a Generally Endorsed Writ of Summons issued on the 7th January 2017. The Endorsement of Claim reveals that the Plaintiff's claim was for damages for personal injuries suffered in a road traffic collision on the 9th March 2011.

2. The claim was particularised in the Statement of Claim, which crucially alleged that the Defendant was negligent in that she "*failed to keep any proper look out and/or to observe or heed the presence of the Plaintiff in his capacity as a pedestrian*".

3. The Defence essentially averred that this alleged collision did not occur. The sole issue in the present case, which is a trial dealing with liability alone, is the following question: did the Defendant, driving a blue BMW, hit the Plaintiff while entering the parking lot in the general vicinity of the 'Supermart' on Front Street, or not? If she did collide with him, it seems inevitable that the Court would be bound to infer that she failed to keep a proper lookout.

The Plaintiff's case

4. The Plaintiff adduced evidence in three forms:

    1) firstly, his own oral testimony;
    2) secondly, the evidence of an eye witness Mr. Berkeley, and
    3) thirdly, in by way of medical records from King Edward VII Memorial Hospital, which demonstrated that he received minor injuries, which were broadly consistent with the collision which he described.

5. The Plaintiff's evidence was not entirely credible. The first issue which was raised by the Defendant was that he was intoxicated and that he had approached her, after she had parked her vehicle without incident, and made the allegation that he had been struck. The Plaintiff denied drinking on the day in question and also somewhat surprisingly to my mind, denied frequenting the area of Front Street, in which the Defendant said that she frequently saw him. In effect, he went out of his way to portray himself as a hardworking citizen, and refuted the suggestion which his own case, to some extent supported. Namely, that he presented, at least from time to time, as someone who might be described by the Defendant as a "bum".

6. The evidence that he gave about the collision was given in a very passionate way, and despite being vigorously crossed-examined, his evidence was broadly consistent with that in his Witness Statement, and was quite coherent and clear.

7. I say that his evidence about not being under the influence was not credible in part because he appeared to me to be under the influence in the witness box. I asked him at the end of his evidence, whether he was, and indicated that his speech appeared slurred. He sought to explain this away by reference to a speech impediment. That might well have been convincing, but for the fact the police officer who attended the scene shortly after the incident was quite clear that he was intoxicated. And she based that assessment which was included in police records at the time on not just the manner of his speech, but also on the smell of his

breath. And so, the Court is bound to find that the Plaintiff's evidence, standing by itself, is not reliable, because he has misled the Court on a collateral issue.

8. Mr. Berkeley was the Plaintiff's eyewitness. His evidence, it must be said, was given a very straightforward manner, and I found him to be credible. That does not mean to say that I accept everything that he said, because if he was right in identifying the Defendant as the driver of the vehicle that he clearly said he saw striking the Plaintiff, he was wrong about the colour of the vehicle. It is also quite difficult to place much reliance on the precise words that he claims to have overheard the Defendant using when she was confronted by the Plaintiff after the incident. There is no suggestion that he made notes of what was said shortly after the incident. Indeed, by his own account, he did not put himself forward as a witness initially, because he says he was on his way to the Department of Marine & Ports when he observed the incident and, having observed it, left the scene having satisfied himself the Plaintiff was not seriously injured.

9. His occupation being the Operations Manager of Stevedoring Services fortifies the impression that he is not the sort of person who would come to the Court to give false evidence. It is interesting that PC Furbert, who was called by the Defendant, was pressed by Mr. Horseman why it is that no witness statement was recorded from any eyewitness. Her answer was that she had been told by a colleague, that an eyewitness had approached the Police but had walked out of the office or interview room after having been warned about the consequences of giving false evidence. Assuming that this did occur, that would be, in my view, not inconsistent with the impression that Mr. Berkeley gave of being a straightforward man, who although admitted knowing the Plaintiff as someone who occasionally did odd jobs for him, would not be a deliberate perjurer[1].

10. Finally, the medical reports do indicate that there were minor injuries which the Plaintiff displayed when he was taken to hospital by ambulance, seemingly an ambulance that was summoned by the Police to the Police station where the Plaintiff walked after the initial inquires made by PC Rhiannon Furbert. Those reports are not decisive in my view, because the Defendant's case is that no collision occurred. If any collision occurred, it may have been another vehicle; and in the further alternative, the injuries sustained are entirely consistent with the Plaintiff having fallen, it being suggested that this is a plausible innocent explanation in light of the Plaintiff's intoxication.

[1] To my mind he was the sort of no nonsense person who would have been offended at the apparent suggestion that he intended to waste the Police's time and would quite likely have felt it would be a waste of his own time to furnish a statement.

11. Mr. Horseman referred the Court to the ambulance records which he fairly argued did not make any record of intoxication, looking at the part of the record that Counsel referred to, it really is a 'coma scale', but the record in my view certainly suggests that the Plaintiff was sufficiently coherent, if not stone-cold sober, to give a rational account of what had occurred. Had he been extremely intoxicated, it would be surprising if no record would have been made of that by those who examined him shortly after the incident.

12. The Defendant's case relied on her own evidence, and that of the Police Officer, to whom I have already referred. The Defendant's evidence was, on the face of it, straightforward, even if not given in an entirely convincing manner. She insisted that she was unaware of any collision, and that, in particular, was keen to deny any suggestion that she had referred to the Plaintiff as a bum. Those suggestions were in large part made on the strength of the evidence of Mr. Berkeley. But Mr. Rothwell fairly points out that the Plaintiff himself did not make much of that in his own evidence. The only reference in the Plaintiff's Witness Statement to the label of 'bum' is in paragraph 10 of his Witness Statement, where he says "*she thinks I'm a bum on the street and she can get away with this.*"

13. The Plaintiff can only be right if the Defendant is wrong, and it is not easy for me to resolve this issue. Did the collision take place or not? It seems to me that the Plaintiff can succeed on one of two possible bases:

    (1) that the Defendant was in fact aware of the collision, and has tried to get away with it; or

    (2) that the Defendant was unaware of the collision, in part, because the collision was a very minor one – a glancing blow – by a well-constructed BMW vehicle, which may well have made no noise and caused no vibrations which could be experienced or felt inside the vehicle. Indeed the Plaintiff himself, in perhaps the most colourful part of his evidence, said that in his experience has a one-time mechanic, a BMW is so soundly built, that you could "*do the gombeys on it*" and it would not be dented.

14. Perhaps the most significant alternative scenario raised by Mr. Rothwell for the Defendant was the possibility that there was in fact a collision but that the Defendant was not the driver. The hypothesis was that there was in fact another BMW and in effect the Plaintiff and Mr. Berkeley were both mistaken in believing that the Defendant was the driver. Mr. Berkeley, it is true, was alone in saying that the Defendant had a passenger. By his account, he was

walking in an easterly direction along Front Street just before the collision occurred and the Defendant's vehicle was turning right into the parking lot. Meaning that from his perspective the Defendant would be closest to him and he would not be able to have a clear view of any passenger.

15. So his evidence in my view, bearing in mind that the Plaintiff himself says that the Defendant had no passenger, is unreliable on that point. But, it beggars belief that he should be so positive that it was the Defendant who the Plaintiff spoke to immediately after the collision that was the driver. And at the end of the day the Plaintiff bears the burden of proof to the civil standard, not to the criminal standard.

Findings

16. I am bound to find that it is more likely than not, that the Defendant did in fact collide with the Plaintiff as the Plaintiff says, and in reaching that conclusion, which I would not have reached based on the Plaintiff's word alone, I rely heavily on the evidence of Mr. Berkeley.

17. It is not necessary for me to find whether or not the Defendant was aware of the collision, or whether she was not. It suffices for me to find, that in my judgment, it is entirely plausible that a glancing blow was struck which she did not feel and that when she was approached, she genuinely believed there was no collision. It is only the Plaintiff who alleges that she admitted the collision immediately after, and I am not willing to accept his word alone, to support a finding that that is what occurred.

18. Another important consideration in reaching this conclusion is that it does seem to me that the Plaintiff has made more of his injuries than is strictly justified. I say that because he rather dramatically described having to be assisted by PC Furbert to the Hamilton Police Station which was then located on Parliament Street, which she did not recall, and indeed the Police records, which were generated by a records officer, make mention of the fact that he had no visible injuries. It seems improbable to me that if he was as viably injured as he now suggests that the Police would have not taken his complaint more seriously at the time, and made some reference to that fact.

Conclusion

19. I should also note, although at this stage I am only dealing with liability, that when he first got up in the witness box to demonstrate how the accident occurred, the Plaintiff seemed to me to

move with much greater dexterity then he had moved toward the witness box with the aid of his cane. And so the finding that he was struck is not the finding that this was a very dramatic collision but is primarily based on the finding that this was a glancing blow, which did result in him falling to the ground and receiving the injuries that are in the general sense supported by the medical records.

20. In summary, for the above reasons I find that the Plaintiff has succeeded in proving the liability phase of this claim.

Dated this 13th day of March, 2017 _____
IAN RC KAWALEY CJ