ROYAL COURT

8th June, 1988

Before: the Bailiff,
assisted by
Jurats Lucas and Le Ruez

Between:	**Ann McCourt, wife of David Kaye**	Plaintiff
And:	**Rodney Graham Rawnsley-Gurd**	Defendant

Negligence: Judgment in respect of
Plaintiff's claim for damages
against the Defendant as a result
of a road traffic accident

Advocate C.M.B. Thacker for the Plaintiff
Advocate G.R. Boxall for the Defendant

JUDGMENT

BAILIFF: This action arises from an accident that occurred at about 6.20 p.m., on the evening of Tuesday, 30th July, 1985, along the Route Orange. The plaintiff, Mrs Ann Kaye, née McCourt, was jogging, or, as she told us in her evidence, running with a friend, Mrs Jennifer Gray, who also gave evidence, in an easterly direction on the pavement on the north side of the road when, noticing that the pavement was narrowing, both ladies decided to cross the road to the south side where there was a wider pavement. Shortly before

they decided to do so, a car driven by a Mr Geary had come out of one of the turnings to the north of Route Orange and he had seen the ladies either as they crossed that turning or a little later when he saw them running along the pavement. He slowed down or stopped completely - there is some suggestion that perhaps he had not totally stopped but for the purposes of this action it does not matter - and Mrs Gray went across the road, and reached the other side safely. The plaintiff stopped on the pavement, but as she said, still moving her limbs, or running, because we were told that in training runs of the sort that she and her friend were engaged on, if you stop suddenly you can damage your muscles. Be that as it may, whether she had actually stopped or was still moving whilst perhaps giving the appearance of having stopped to a casual passerby, she was waved across by Mr Geary. Unfortunately, she was then struck by a motorcycle being ridden by the defendant. He had also come down one of the roads to the north of the Route Orange, giving on to it, and he was driving, he told us, a 200 c.c. Kawasaki with a four stroke engine, which makes a certain amount of noise, but not an excessive amount. It was not, he told us, a powerful machine; he had with him a passenger, a French National, whom he has unfortunately been unable to contact, ~~a French National~~ and we have no further news as to what has happened to him. But the fact that he had a passenger with him did not effect the manoeuvrability and the control he had over his motorcycle.

According to the defendant he was going along the road at some 35 miles an hour; he saw the two ladies; he saw that one had crossed the road; he saw that the car had stopped or slowed down, and he saw the plaintiff as he thought virtually stopped on the north side of the road. He made two assumptions; first that she had stopped and was not going to move; and second that she would not move in any case because there was some west bound traffic on the other side of the road. Dealing with the second point first, there is a clear conflict of evidence. The Order of Justice refers to a Mrs Christine Apsley and alleges that the plaintiff, on reaching a point (and I quote from paragraph five) ... "near the white central line the plaintiff stopped to allow a vehicle approaching on the west bound carriageway driven by Mrs Christine Apsley to pass. Then on glancing to her right to the east bound carriageway the plaintiff saw a motorcycle registration number J34762 ridden by Mr Rodney Graham Rawnsley-Gurd, hereinafter called the

defendant approaching her at speed".

As I have said to Advocate Boxall for the defendant, we must of course determine this case on the evidence we have heard. But the defendant has said that he felt that Mrs Christine Apsley was there, and her car was on the roadway, not because he saw the car and recognised it at the time, but after the accident she came across and he spoke to her and he recognised her, because as he told us he had at one stage been engaged to her daughter. But that evidence is in conflict with the evidence of Mr Rayson. Mr Rayson is a prison officer and a car driver since 1972 and he was driving in a westerly direction and he saw Mr Geary's car stop to allow the two ladies to cross. He himself was some fifty yards back. He recalled that they were in jogging clothes and the first one got across, he did not recall any noise of a motorcycle slowing down quickly. He noticed that the two ladies appeared to cross almost together then one hesitated in the middle and at that stage the motorcycle clipped her and as he said: "That was it". He also said, however, that there was no vehicle in front of him and therefore when we have a conflict of evidence of that nature, the Court has to decide whom to prefer.

Now, in relation to the evidence of parties in traffic accidents, this Court in a recent judgment adverted to the difficulty that faces a Court in deciding between the veracity or reliability of conflicting witnesses and I refer to the case of Poole -v- Edingboroough in which judgment was given on 28th November, 1986. On the second page of that judgment, the Court says this, (although of course one must remember that the facts in that case were substantially different from the present case): "There is a substantial conflict of evidence between the plaintiff and a number of witnesses for the plaintiff on the one hand and the defendant on the other in particular with regard to the point of impact and consequently to the speed, impact and the movement of the plaintiff's body after impact. In addition to that conflict there were many descrepancies in the evidence of the witnesses generally". (I add that in our opinion that is not the case here) "Notwithstanding which," (and this is the part I wish to stress) "the witnesses were in the main truthful and trying to assist the Court to the best of their recollection. Road accidents are by their very nature fast-moving and confusing and false or erroneous impressions can become fixed in the mind as fact".

We have reached the conclusion that the evidence of Mr Rayson is to be preferred where it conflicts with that of the defendant and accordingly, so far as the assumption or part of the assumption which the defendant says he was entitled to reach is concerned: that the plaintiff would not cross the road because of west going traffic, we find that is not an assumption which we can accept. The first part of the assumption that I turn to is that the plaintiff was standing there and waiting in effect and it was assumed that she would not cross at all because of the second part of the assumption. He had already seen the first lady, Mrs Gray, crossing and we have the evidence of the plaintiff that she had not entirely stopped. We think that the duty of a driver in such circumstances must go beyond mere assumptions. He had already seen one lady crossing, it must have been clear to him that the other one, that is to say the plaintiff, was certainly intending to cross when she could and that indeed is what he agreed was the position.

The duty in such circumstances was considered again in the case I have just mentioned of Poole -v- Edingborough and it is referred to later in the judgment when the learned Court cites the case of Lowry -v- Hudson, (1972) Jersey Judgments, 2055, where at page 2062 the Court in the latter judgment said this: "The essential ingredients of actionable negligence are: (1) the existence of the duty to take care owing to the complainant by the defendant; (2) failure to attain that standard of care prescribed by the law; (3) damage suffered by the complainant which is causally connected with the breach of duty to take care. The driver of a motor car owes a duty to exercise reasonable care and skill towards all persons using the highway, including pedestrians who in general terms have an absolute right to be on it. However, pedestrians are not entitled to more than the exercise of reasonable care on the part of drivers and they must take reasonable care for themselves when using the highway. Moreover, although a driver is not entitled to assume that all other road users will take reasonable care, his duty to take care is based on the normal so that only when it is known that the abnormal is present is there a duty based on abnormality".

It must have been apparent, we think, to the defendant that one lady having crossed the road, it was only a matter of time before the other lady, the plaintiff, would do the same. So far as the question of speed is concerned, according to the defendant he was doing 35 m.p.h. but he then

reduced his speed to some 25 m.p.h. P.C. Taylor, called for the defence, said that in his opinion, in the circumstances, overtaking a stopped or nearly stopped car on a wide road with ample room at 25 m.p.h. was a safe speed. On the other hand P.C. Taylor felt that both parties should have paid more attention, but did not feel constrained to report the matter for a prosecution.

The Court had to decide whether what the defendant was doing at the time he overtook was negligent. Advocate Boxall very carefully constructed the two assumptions for us; he was entitled to do this. He said that if we found that what his client was doing in overtaking was safe, then what happened afterwards was due not to anything his client did, but to something the plaintiff did and all his client was doing was reacting in a reasonable way. We are not really called upon to decide whether this is so because we are satisfied that by overtaking the car when he did, in the circumstances I have described, the defendant was in breach of his duty to the plaintiff and what he did, when confronted with her, as indeed he was, does not alter the degree of the failure to fulfil that duty. I should add that we had regard to two extracts to which we were referred from Halsbury, (4th edition), the first: volume 34, paragraph 44 "Use of the highway. Where two persons on a highway are so moving in relation to one another as to involve risk and collision, each owes to the other a duty to move with due care. This is true whether they are both in control of vehicles or moving on foot and whether one is on foot and the other controlling a moving vehicle". The other passage, was at paragraph 49, relating to pedestrians: "Persons on foot have a right to be on the highway and are entitled to the exercise of reasonable care on the part of persons driving vehicles on it but they must take reasonable care of themselves and may be answerable if they occasion accident to vehicles. The amount of care reasonably to be required of them depends on the usual and actual state of the traffic and on the question of whether or not the foot passenger is at an approved and indicated pedestrian crossing".

Furthermore, there is a passage in Charlesworth on Negligence, (5th edition) which refers to overtaking: paragraph 820: "The driver or rider of the overtaking vehicle before attempting to overtake should see that it is safe to do so". It was not safe, in our opinion, to do so, with the possibility

of another pedestrian crossing the road. There is a further passage from Charlesworth as regards speed, at paragraph 821: "If the driver of a vehicle sees a pedestrian in time to avoid a collision but does not slacken speed because he thinks there will be no collision, if the pedestrian moves normally and the pedestrian owing to age and infirmity does not do so and a collision occurs the driver will be liable". That is not quite in point because we are satisfied that the driver did reduce speed but because of the circumstances he was unable to reduce it any further. One can also refer to paragraph 823: "Where there are pedestrians about the driver or rider must be ready in case they step from a street refuge or a footpath - and I interpolate here: or indeed from behind a vehicle or other obstruction - and must also be prepared for children who may be expected to run suddenly on to the road. When passing a standing vehicle or other obstruction which prevents a clear view of oncoming traffic or pedestrians, care should be taken and a good lookout kept".

We have already found that in our opinion the assumption which the defendant says he was entitled to make was one that we feel he was not entitled to make.

But that is not the end of the matter because in the same judgment in Poole -v- Edingborough, the Court applied its mind to the test of contributory negligence. Contributory negligence was first allowed to be pleaded as a result of a change in the law in 1960. Under Article 6 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960, "Apportionment of liability in case of contributory negligence:"

(1): Where any person suffers damage as the result partly of his own fault and partly of the fault of another person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

The general test accepted by this Court is well known and was again referred to in the case of Poole -v- Edingborough which cited the case of Louis -v- E. Troy Limited & Others 1970 J.J. p.1371 and at p.1399 the Court

in that case accepted the general test on the plea of contributory negligence which was stated in Halsbury (the 3rd edition) Volume 28 paragraph 93. It is not necessary for me to cite it; it's been accepted by this Court and it is quite clear.

So the question we have to ask ourselves, having found for the plaintiff on the general issue of liability, is whether the injured party did not, in her own interest, take reasonable care of herself, and therefore contributed by her want of care to her own injury.

The plaintiff in her own evidence is very clear as to what she did. She ran in front of the car, she said; "... and as I got to the side of the car it hit me", but she then qualified that later by saying she had reached the position just over the white line and if she had reached the position just over the white line, that is clearly some distance from the bonnet of the car. And we reached the conclusion that although it could not be said that she contributed to the accident by running as far as the bonnet of the car, thereafter when she stepped across the line and into the path of the motorcyclist, who was, we have already found, in breach of his duty of care, without continuing to look carefully to her right, as she admitted she knew she should do in obeying the rules of the road, she was to some extent, the author of her own misfortune. She said she was concentrating on crossing the road; she said: "... I was paying attention to get across the road", and she saw nothing behind the car. When she did see the motorcycle, it was too late to do anything about it. The fact that she hesitated cannot be ascribed to contributory negligence, it is a perfectly natural action; if you are suddenly confronted with a motorcycle or a car and you are crossing the road, you may well stop or hesitate; that in itself would not have been a ground for our finding that she had contributed to some extent to her own misfortune.

But there is a further point which the Court has to have regard to: the plaintiff said that she did not look to the right, the left and to the right again (she said she was looking over her shoulder). Anybody who does not observe the rules of the road, does not thereby, of course, become liable for

anything, but there is an interesting article in the Road Traffic (Jersey) Law 1956, again which is referred to in the case of Poole -v- Edingborough and this is Article 12(ii), and I read: "A failure on the part of any person to observe the rule of the road shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings, (whether civil or criminal and including proceedings for an offence under this Law) be relied upon by any party to the proceedings as tending to establish or to the negative any liability which is in question in those proceedings". The fact that it was cited in a civil case leads us to the view that a general principle of failure to observe the rule of the road can be used in either a civil or a criminal case. We think the plaintiff did not observe the rule completely and as we have said, by concentrating on crossing the road which she was entitled to do in the sense that she had been waved on and so had no reason to suppose that something else was coming (and certainly she had been looking to the west as well) she contributed in a measure which we have assessed at twenty per cent. Therefore we find for the plaintiff on the question of liability, but her damages will be reduced by twenty per cent and that goes for costs as well, Mr Thacker. She will have her costs, but reduced by twenty per cent.

Authorities cited

Halsbury's Laws of England 4th Edition, volume 34 paragraphs: 42 to 52 and 72.

Charlesworth on Negligence 5th Edition paragraphs 820, 821 and 823.

Boss -v- Litton E.R. 172 p.1030.

Kayser -v- London Passenger Transport Board [1950] 1 All E.R. p.231.

Baker -v- Willoughby [1969] 3 All E.R. 1528.

Clarke -v- Winchurch and others [1969] 1 All E.R. 275.

Poole -v- Edingborough unreported Jersey case ref. 1986/32.

Parkinson -v- Liverpool Corporation (1950) 1 All E.R. 367.

Nance -v- British Columbia Electric Railway Company Ltd (1951) A.C. 601.

Lowry -v- Hudson (1972) J.J. p.2055.

Louis -v- E. Troy Limited (1970) J.J. p.1371.