J. Smellie

OPEN COURT

#400

16-01-96

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 200/92

BETWEEN	:	EDITH ALEXANDRA BODDEN & TRUMAN MURRAY BODDEN (Executors of the Estate of Arthur D. Bodden, Deceased)	PLAINTIFFS
AND	:	ANDY'S RENT-A-CAR	1st DEFENDANT
AND	:	PETER DELROY WILLIAMSON	2ND DEFENDANT

Mr. Pierre Lamontagne Q.C. with Mr. Phillip Boni for the plaintiffs.
Mr. Michael Parkinson for the defendants.

Schofield J.

On the sea side of North Church Street, George Town, is the 7-11 Store which was owned by the late Mr. Arthur Bodden (to whom I shall refer as "Mr. Arthur") before he met his death on 19th August 1991. Mr. Arthur was a vigorous 85 year old. His home was opposite the 7-11 Store, on the other side of North Church

Street. Next to his home was Mr. Arthur's printing business. Mr. Arthur spent his time between his home, and his two businesses and, according to his former employee Ivy Velonie Ebanks, often worked very long hours.

The afternoon of the 19th August,1991 was a wet one in George Town. When Mr. Arthur left the 7-11 Store at around 4 p.m. it was raining heavily so he used a soft drinks carton to protect his head from the rain. He turned left out of the front door of the shop and stood there waiting to cross to his home or to his printing business. Mr. Arthur was holding the box in his right hand and either did not see a truck on the nearside of the road travelling in the direction of West Bay or misjudged its speed or the intentions of the driver because he stepped into the path of the truck and collided with it, sustaining injuries from which he died. The truck was driven by Peter Delroy Williamson (the second defendant), who has since left for his home in Jamaica. The second defendant had left the airport on that day after performing some work there. He had with him in the truck his co-workers Irvin Carlon Bush and Johnson Robert Ebanks who were with him in the front cab, and a very wet Ashley Eddington Hydes who was in the back of the truck, behind the second defendant. They proceeded from the airport into Eastern Avenue and cut across into North Church Street entering it by what was then a liquor store in Bodden Avenue. Bodden Avenue is 141 feet from the door of the 7-11 Store. The second defendant turned right into North Church Street and was not picking up speed because he had been asked to

stop at the 7-11 Store for Hydes to collect some cigarettes. There is evidence that the second defendant turned on his left hand indicator to indicate his intention to pull over. His speed cannot have been more than 15 m.p.h. and was quite possibly less.

The second defendant gave a witness statement to Police Constable McLean on the date of the accident. He also gave evidence to a Coroner's Inquest held on the 28th October,1992. His witness statement and a transcript of his evidence to the Coroner were admitted in evidence. In his witness statement the second defendant said he saw Mr. Arthur standing in front of the shop under the eaves. Upon reaching very close to him Mr. Arthur stepped out into the road "very fast". The second defendant applied his brakes and tried to avoid Mr. Arthur by swerving to his right but his front nearside bumper hit Mr. Arthur. In the Coroner's Court the second defendant said that Mr. Arthur was standing with a box over his head and his head was turned away from him. Mr. Arthur ran into the road when he, the second defendant, was three feet away from him. He ran five feet before the collision. Police Constable McLean was called to the scene of the accident. She drew a sketch plan which was exhibited and she took the witness statements from the second defendant and the other occupants of the truck. According to Ivy Velonie Ebanks, Mr. Arthur's employee, after the accident she was approached by the second defendant who said to her: "I saw him standing there but me didn't know he wanted to cross the road".

As is not unusual in such cases the evidence of the three other eye witnesses to the accident did not correspond exactly to that of the driver of the vehicle, or for that matter to each other's evidence. Hydes, who was in the back of the truck, first saw Mr. Arthur as he was standing at the edge of the road, not, as the second defendant first saw him, under the eaves of the shop. The preponderance of evidence shows that there was a van parked in front of the shop in the West Bay direction of its entrance. Other smaller vehicles were parked behind the van, but we are unsure as to the numbers of such vehicles. Hydes placed Mr. Arthur at the edge of the road immediately behind the van when he saw him. He testified that when the truck was ten feet away from Mr. Arthur, Mr. Arthur walked across the street without looking in the direction of the truck. The second defendant applied his brakes and pulled over to the right to avoid Mr. Arthur but a vehicle coming in the opposite direction prevented him from pulling all the way over to the right. The truck came to a stop and as it did so Mr. Arthur turned around, panicked, bumped into the truck, tripped and fell. Not surprisingly Hydes had difficulty explaining how Mr. Arthur came to rest on the street eight to ten feet from the stationary truck, as demonstrated by the sketch plan prepared by the police officer.

Irvin Carlon Bush also testified that his first sight of Mr. Arthur was when he was standing at the edge of the road towards the back of the stationary van. Mr. Arthur remained in that position for a few seconds and when the truck was about ten feet

away from him he tried to cross the road. The truck was almost at a stop and the driver applied the brakes. Bush could not tell whether the driver pulled to the right or skidded in that direction. As the truck came to a stop Mr. Arthur turned in its direction and bumped into it. Mr. Arthur struck the truck rather than the opposite way about.

Johnson Robert Ebanks testified that he first saw Mr. Arthur when he was in the middle of the shoulder of the road, that is between the eaves of the store and the road's edge. When the vehicle was about eight feet from him Mr. Arthur walked right out into the road. He did not look in the direction of the truck. The driver applied his brakes and hit Mr. Arthur, who fell down.

The plaintiffs called Miles Elliott Moss of Miami, Florida, U.S.A., who is the President of Miles Moss and Associates and who provides analysis of pedestrian and vehicular accidents. Moss' original report was furnished to the defendants' attorney pursuant to an order for directions granted by this Court. A second report was sought to be tendered at the date of trial and outside the time limits of the directions. I formed the view that the late appearance of the second report was not a deliberate attempt to take the defendants by surprise and that no real prejudice would be caused to the defence because (a) the second report, whilst differing slightly from the first, was not so materially different as to throw the defence off balance, and (b) an adjournment of the trial would be offered to the defence. In those circumstances the

Court should not exclude the evidence (see Rover International Ltd. and Others v Cannon Film Sales Ltd (No2) [1987] 3 All ER 986).

Moss reviewed the documentary evidence available to the Court. He visited the scene of the accident and interviewed Velonie Ebanks and Police Constable McLean. He based his calculations on the second defendant's statement that Mr. Arthur embarked on his dash across North Church Street from under the eaves of the 7-11 Store. Mr. Arthur travelled 9.1 feet from the eaves to the edge of the road, and a further 5 to 7 feet into the road (a total of 14 to 16 feet) before he was hit by the truck. That is assuming he crossed the road at a 90 degree angle. Moss also computed the travel velocity of Mr. Arthur basing that computation on a standard textbook on the subject. The computation takes account of Mr. Arthur's age. From the distance travelled and the travel velocity Moss estimated that it took Mr. Arthur between 3.3 and 4.4 seconds from start to finish on his fatal journey.

Moss then computed the travel distance of the truck and the time it would take the second defendant to perceive and react to the hazard. Basing his findings on the official Road Code of the Cayman Islands and other published studies, Moss concluded that the second defendant's "thinking time" would be between .68 and 2.5 seconds. Given a 15 m.p.h. speed, the truck would travel between 14.9 and 55 feet in the time it would take the second defendant to perceive and react to Mr. Arthur's appearance in the

road.

Moss measured the coefficient of friction of the roadway when wet to ascertain how long it would take the truck to stop after its brakes were applied. The value was 0.61. He calculated the stopping distance to be 12.2 feet at 15 m.p.h. He testified that the total distance to perceive, react and stop was determined by combining the 14.9 to 55 foot perception/reaction distance and the 12.2 foot stopping distance, a total of 27 to 67 feet to react and stop. For a vehicle travelling at 15 m.p.h. this would take 1.2 to 3 seconds before impact.

Moss then worked back basing his computation on the travel time of Mr. Arthur of 3.3 to 4.4 seconds and a speed of 15 m.p.h. for the truck, which resulted in a calculation that the truck was 72 to 97 feet away when Mr. Arthur began to cross the road. Moss concluded that as the second defendant needed only 27 to 67 feet to react and stop from first sight of Mr. Arthur as a hazard he could have stopped the truck in time to avoid an impact with a safety margin of 5 to 70 feet.

I am sure that Moss was giving the Court his fair analysis of the accident and that where possible in that analysis he gave the second defendant the benefit of the doubt. However, doing the best he could Moss had to base his calculations on various assumptions such as that Mr. Arthur was travelling across the road at a 90 degree angle, that the road was in the same condition in

November 1995 as in August 1991 and, most importantly, that Mr. Arthur started his dash across North Church Street from under the eaves of the 7-11 Store. It cannot be doubted that Mr. Arthur started his journey across the road from under the eaves, and that is where the second defendant first saw him, but the preponderance of evidence is that Mr. Arthur stepped to the edge or near the edge of the road and started his final dash across it from that position and when the truck was very close to him. I prefer to rely on the evidence of the eye witnesses.

This was a tragic accident made no less tragic by what I regard as an inevitable finding that in stepping out into North Church Street as he did Mr. Arthur contributed to the accident. To my mind the only issues which really merit lengthy consideration are whether the second defendant was in breach of his duty of care to Mr. Arthur and if he was the proportion of responsibility to be attached to each party. I should say that it has been argued by the parties, and the Court endorsed this course, that the question of liability only should be determined at this hearing, and that the question of quantum should be left to a later date, if it arises at all.

Mr. Arthur must have dashed into the road. The evidence of the eye witnesses leads to that conclusion and the fact that it was raining at the time, supports a conclusion that he was anxious to get across the road as quickly as an eighty five year old man in good health could. He started his journey from under the eaves

of the 7-11 shop and this is where the second defendant picked up sight of him. Not surprisingly the passengers in the truck picked up sight of Mr. Arthur at various stages of his journey into the road. From where did he make his final dash into the road? The preponderance of evidence leads me to the conclusion that it was from the edge of the road just at the corner of the van which was marked on the plan. I should also say that I am satisfied that the truck hit Mr. Arthur and that the evidence of Hydes that the truck hit Mr. Arthur and that is supported by the fact that Mr. Arthur was found several feet away from the truck by the police officer.

The second defendant had a duty to drive with reasonable care given the circumstances presented to him. Section 52 of the Traffic Law (Revised) sets out the general duty of road users in the following terms:

> "52. It is the duty of every road user to exercise care and attention when using the road and to have due regard to the safety and comfort of other road users and the preservation and protection of public and private property.

Section 55 sets out such duties with more particularity. I need not set those duties out in full save to comment that by s.55 (o) it is the duty of a driver of a vehicle to comply with the Road Code. Paragraph 4(j) of the Road Code is relevant to the issues before me. It reads:

> "Whatever the speed limit, no speed can be justified, even in an open road devoid of traffic, if the driver would not be able to pull up in time to avoid such an accident as might occur if a child suddenly ran into the road; it is important to realize that acceleration can be as vital as braking capacity and that the driver who keeps in hand a reserve of acceleration affords himself two ways of avoiding an accident in a sudden emergency, while the driver who leaves himself no such reserve is left to rely entirely on his brakes;"

Does a breach of the Road Code automatically make a driver of negligent? I think not. This matter was considered by the English Court of Appeal in Croston v Vaughan [1938] 1K.B. 540 where Greer L.J. said, at pp.551-2:-

> "There has been a good deal said about the effect of the Statutory Rules and Orders made under the Road Traffic Act, 1930, and of the Highway Code which was made under the provisions of the 1930 Act. I do not find it necessary to refer to the provisions of the statute, but I want to say this with reference to the Statutory Rules and Orders: that though, of course, they can be used as a guide to see whether there ought to be a finding of negligence or no negligence, when nothing is done except putting the light on and putting it on too late, I disagree with the view that a compliance with the

> requirements of the Statutory Rules and Orders would prevent a finding of negligence. They do not provide that in any way, and a learned trial judge (or, it may be, a jury) is not confined to the question whether the action of the driver is consistent or inconsistent with the Regulations. The Highway Code is not binding as a statutory regulation; it is only something which may be regarded as information and advice to drivers. It does not follow that if they fail to carry out any provision of the Highway Code they are necessarily negligent. The Road Traffic Act provides that a failure to observe any provision of the Code may in any proceedings be relied upon as tending to establish or rebut any liability which is in question in those proceedings. Nor is it sufficient excuse for any person to say, in answer to a claim for negligence, that he carried out every provision of the Code."

The duty to follow the Road Code is set higher in these Islands than was the duty in England to follow the Highway Code set out in the passage above, for in these Islands the duties set out in the Road Code are applied by the Traffic Law. However that does not mean that every breach of those duties amounts to negligence because a breach of a duty may not satisfy the test of unreasonableness necessary to found an action for damages. For example for every driver to comply strictly with the counsel of perfection contained in paragraph 4 (j) of the Road Code would slow down the traffic in many parts of these Islands to possibly

5 m.p.h. All must depend on the circumstances. A person driving at a slow speed in a built up area may not be able to avoid colliding with a child who darts, previously unseen, from between two tall vehicles in chase of a ball. In those circumstances , all other things being equal, can the driver be said to be driving outside the requisite standard of care if he was keeping a proper look out? The answer must be no, even though the driver may be in strict breach of paragraph 4(j) of the Road Code. On the other hand if the driver sees the child in advance playing on the side of the road with a ball he is on notice of a hazard and may well be under a duty to keep the child in his concentrated vision. In this case we have it from the second defendant that he had first sight of Mr. Arthur when he was under the eaves of the 7-11 Store. Here was a man carrying a box in the hand closest to the truck, partly obscuring his face and concentrating on the traffic coming in the opposite direction. The second defendant should have seen him move to the side of the road and should have perceived the danger of Mr. Arthur crossing the road in front of him. In the circumstances there was a want of reasonable care on the part of the second defendant in not reacting to the hazard he had in his sight or should, with reasonable care, have kept in his sight.

What, then, is the extent of the second defendant's liability? I have been referred to the case of Baker v Willoughby [1969] 3 All E.R. 1528 where the House of Lords affirmed the trial judge's apportionment of 25 per cent liability to a pedestrian and 75 per

cent liability to the driver of a motor car in the following circumstances. The pedestrian started to cross a road on which there was a 40 m.p.h. speed limit and on which the parties had a clear view of each other for 200 yards. The pedestrian saw a car coming from his right. He was struck in the centre of the road by a vehicle which he had not seen and which was overtaking the car he had seen, and as he was looking away from that car. The trial judge found that the driver of the motor car had been driving at an excessive speed or had failed to keep a proper look out, or both, and that the pedestrian had been negligent in not seeing more than one car and in not waiting until they had passed.

In my judgment the negligence of the driver in that case exceeded the negligence of the second defendant in this case. In Baker v Willoughby the driver was undertaking an inherently dangerous manoeuvre, that of overtaking. In this case the second defendant was not undertaking any improper or dangerous manoeuvre. The negligence of the pedestrian in Baker v Willoughby was less than the negligence of Mr. Arthur in this case. The pedestrian in that case did look to his right, although he failed to see all that was there. In our case, on the other hand, Mr. Arthur failed to look right and darted into the road.

Balancing one thing with another and doing the best I can I apportion liability at 25 per cent to the second defendant and 75 percent to Mr. Arthur.

The first defendant has been brought in to these proceedings because it is the owner of the truck driven by the second defendant. No other basis of liability has been sought to be proved and it is simply insufficient to establish liability against it.

I find the action proved as against the second defendant in the terms set out above. Costs will follow the event. I dismiss the action as against the first defendant and it will have its costs against the plaintiffs accordingly.

Dated this 16th day of January, 1996.

CAYMAN ISLANDS - GRAND COURT

D. Schofield

Judge