GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2003

BETWEEN:

EDYTH LEONARD

Appellant

and

ERNEST JOHN

Respondent

Before:

The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal

Appearances:

Mr. Gregory Delzin and Mrs. Michelle Emmanuel-Steele for the Appellant
Mr. Archelaus Joseph for the Respondent

2004: March 9;
June 21.

JUDGMENT

[1] ALLEYNE, J.A.: This is an appeal against a judgment of the High Court in an action for negligence in driving a motor vehicle, a running down action.

[2] Edyth Leonard, the Appellant, a 70 year old woman at the time of the accident, was walking across a pedestrian crossing when a collision occurred between her and a car driven by Ernest John, the Respondent, who was about the same age as the Appellant. She claims to have suffered extensive injuries. After a hearing, the learned trial Judge dismissed the claim on the ground that on the totality of the evidence the claimant had failed to prove her case on a balance of probabilities.

The pleadings; admission of liability

[3] At paragraph 6 of her statement of claim, the Appellant pleaded that by letter dated 11th September 2000, the insurers of the Defendant/Respondent's vehicle through its solicitors informed the solicitors for the plaintiff that they were not contesting liability. The Defendant/Respondent, in his defence, did not address this allegation specifically or at all. Learned counsel for the Appellant submitted that the Respondent's failure to deny the allegation of an admission of liability amounts to an admission, and the Respondent was thereby estopped from contesting liability at trial. The relevant provisions of the Civil Procedure Rules 2000 (CPR) can be found at Part 10.5(1), (3), (4), (5) and (6) and Part 10.7, which are reproduced hereunder.

Defendant's duty to set out case

> 10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.
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> (3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
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> (a) are admitted;
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> (b) are denied;
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> (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
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> (d) the defendant wishes the claimant to prove.
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> (4) If the defendant denies any of the allegations in the claim form or statement of claim –
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> (a) the defendant must state the reasons for doing so; and
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> (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
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> (5) If in relation to any allegation in the claim form or statement of claim, the defendant does not –
>
> (a) admit it; or
>
> (b) deny it and put forward a different version of events;
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> the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.

Consequences of not setting out defence

10.7 (1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.

(2)The court may give the defendant permission at the case management conference.

(3) The court may not give the defendant permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference.

[4] I am of the view that the learned trial Judge was wrong in failing to uphold the Appellant's contention that the issue to be tried was the issue of general damages only, the issues of liability and of special damages having been deemed to have been admitted by the Respondent's failure to traverse the allegation in that regard in the Appellant's statement of case. It is perhaps significant that the Appellant filed skeleton arguments in preparation for trial on the sole issue of general damages.

The evidence

[5] The essential facts of the case, as found by the learned trial Judge, are that on a sunny and clear day the Appellant walked on the left side of a road until she reached a pedestrian crossing. She looked both ways for oncoming traffic. When she was certain that there was none in the vicinity she stepped onto the pedestrian crossing and walked slowly towards the other side of the road. The Respondent drove his car from a lay by about 50 feet away from the pedestrian crossing,

towards the crossing, where a collision took place involving the Appellant and the Respondent's car.

[6] It is the uncontroverted evidence of the Appellant and of the police investigator Constable Nimrol Beckles, that the collision took place about 10 feet from the left side of the road. The measurements taken on the spot by Constable Beckles, relying on information supplied by the Respondent and his own observations, support this evidence. The Respondent's witness statement asserts that 'as I approached the crossing I saw the claimant about to walk onto the crossing. I stopped my car. She continued walking across the crossing and walked into the left side of my car.' However, in cross-examination he said 'When I first saw the claimant she was already on the crossing. I was already on the crossing when I saw the claimant for the first time.' This is entirely consistent with the Appellant's case and contrary to the Respondent's witness statement. Further, in his statement to Constable Beckles, which was not denied or challenged in cross-examination, the Respondent is reported to have said, apparently in explanation of the fact that he had not seen the Appellant earlier, that 'he was looking over to the right to see if there was any other traffic coming'.

[7] It is the clear duty of a driver approaching a pedestrian crossing to proceed at such a speed as to be able to stop if necessary, and to allow free and uninterrupted passage to any pedestrian who is on the crossing. Pedestrians within the limits of the crossing have precedence over all vehicular traffic. Charlesworth and Percy on Negligence ninth edition at paragraph 9-223 says 'If by the exercise of reasonable care, the driver can see that there is a pedestrian on the crossing, it is no defence to prove that, before moving on to the crossing, the pedestrian did not look to check for the presence of traffic'. I note that the duty of the driver is to exercise reasonable care, and it seems to me that, in the circumstances of this collision, given that it was a sunny and clear day, and there is no reason to believe that there was anything obscuring his vision, had the Respondent been exercising reasonable care, he would have seen the Appellant

on the crossing. The fact that, as he said, he did not see her until the last moment, whether because he was looking over to the right to see if there was any other traffic coming, or for some other reason, it is clear that there was a lapse in his exercise of the duty of care which he owed to the Appellant, resulting in the collision.

[8] If a pedestrian suddenly steps from the footpath onto a crossing, just as a vehicle is about to enter the same area, so that the driver is given no chance of avoiding a collision, there may be no breach of (statutory) duty, provided that all reasonable care has been taken by the driver, having regard in particular to the fact that a crossing is present.[1] The learned author of Charlesworth continues 'In terms of civil liability, the driver could possibly avoid all responsibility,[2] although more usually it is shared'.[3]

[9] It seems to me that on the evidence before the learned trial Judge, applying the above principles, the learned trial Judge was wrong in his finding that the Claimant/Appellant had failed to prove her case on a balance of probabilities.

Appellate approach to findings of fact

[10] Learned Counsel for the Respondent strongly urged that if a Judge has reached clear and definite conclusions of fact after seeing and hearing witnesses and forming his opinion, only by reason of some very telling factors or compelling circumstances will an appellate Court differ from such conclusions[4]. I agree. However, in Benmax, Viscount Simons at page 372, quoting Lord Halsbury L.C. to the effect that:

> "where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the

[1] Charlesworth & Percy on Negligence, 9th edition, para. 9-224.
[2] Chisholm v London Passenger Transport Board [1939] 1 KB 426; Sparks v Edward Ash Ltd. [1943] KB 223.
[3] Maynard v Rogers (1970) SJ 320, Mulligan v Holmes [1971] RTR 179, Clifford v Drymond [1976] RTR 134, C.A.
[4] Bookers Stores Ltd. v Mustapha Ally (1972) 19 WIR 230; Benmax v Austin Motor Co. Ltd. [1955] AC 370; Watt or Thomas v Thomas [1947] AC 484.

> original tribunal is in no better position to decide than the judges of an appellate court."

and Lord Somervell of Harrow, at page 377, agreeing with Viscount Simon, added:

> "In a negligence action it may be clear on appeal from a judge alone how he has found what have been conveniently called the primary facts. An appellate court must be free to consider whether the judge, who has, I will assume, found for the plaintiff, applied the standard of the reasonable man, as our law prescribes, or the standard of a man of exceptional care and prescience."

[11] In Watt v Thomas, at page 488, Lord Thankerton said:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[12] This Court, as recently as January 2003, in the case of Grenada Electricity Services Limited v Isaac Peters[5], adopted the very same approach and Byron C.J., in delivering the unanimous decision of the Court, had this to say:

> "This … requires the court to draw a distinction between a finding of specific fact, and finding of fact which in reality is an inference from facts specially found. To use different words the court must distinguish between the perception and evaluation of facts. It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving the testimony. On the other hand the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inferences or to evaluate as the trial judge. This is particularly so in cases of negligence, because the judge has to make specific findings of fact to determine what actually happened, and then he has to draw inferences to determine whether the facts found support a conclusion of negligence."[6]

[5] Civil Appeal No. 10 of 2002 (Grenada)
[6] Unreported judgment, paragraph 7.

[13] This case is a striking example of the distinction between facts as such, and inferences drawn from those facts. I am of the view that this Court is in as good a position as was the trial Judge to draw inferences from the facts found. For the reasons given earlier in this judgment I would allow the appeal, set aside the judgment of the trial Judge, enter judgment for the Appellant on his claim, order that damages be assessed, and for costs here and in the Court below on the basis of prescribed costs.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal