

JERSEY / JUDGMENT

McCann v Bateman and Ors

[2005] JRC 027A (10 March 2005)

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judgment

the COMMISSIONER: 1. In September 1997 the Plaintiff, Mr. Edmond McCann sustained various injuries at his place of work. A claim for damages resulting from injuries said to have been sustained in that incident is the subject of another action, No. 2000/167. 2. A little over two years later, in the space of some two months between late October and mid-December 1999, Mr. McCann claims that he was involved in no less than four motor car accidents which successively exacerbated his pre-existing injuries and/or resulted in further injury. It is those accidents that are the subject of the present action No. 2002/155 and it is the issue of negligence, in the sense of breach of duty of care, that is the subject in each case of this judgment (all issues of causation and damage, so far as they may arise, being reserved for trial at a later date together with corresponding issues in action No. 2000/167). 3. The incidents in question occurred on 22 nd October 1999 (collision with the First Defendant); on 24 th October 1999 (collision with the Second Defendant); on 30 th November 1999 (collision with the Third Defendant); and on 13 th December 1999 (collision with the Fourth Defendant). In the original Answer to the Order of Justice, served in December 2002, an admission of negligence was pleaded on behalf of each of the Defendants in the following terms: "For the purposes of this action, but not otherwise, the ... Defendant admits that the accident referred to in was caused by his negligence". But in early 2004, the leave of the Court was given for the Third and Fourth Defendants to withdraw their admissions and to contest the issues of negligence. Incidents on 22 nd and 24 th October 1999 4. There having been no change of pleading as regards the other two, there will be judgment for the Plaintiff against each of the First and Second Defendants on the issues of negligence. We turn now to the two contested cases. Incident on 30 th November 1999 5. Mr. McCann's contention, in the case of the incident on 30 th November 1999, is that it was his habit when unable to sleep at night to go for a drive around the Island sometimes in order to relax; that on the occasion in question he was driving westwards along La Route D'Orange at about 11.40 pm in a Ford Fiesta when he found himself approaching a set of temporary traffic lights just beyond what was then La Moye public house; that he had slowed to a stop as the lights changed from green, through amber, to red when another Ford Fiesta driven by Miss Critchlow had skidded on the wet road and hit the back of his car. He got out of his car, exchanged names, addresses and insurance details with Miss Critchlow - who, he said, appeared embarrassed and said something to the

effect that she had expected him to drive on through the lights as they had only just changed. He then drove home, went to bed, could not sleep because of pain in his back, got up and drove to the hospital, where he was examined briefly at about 00.30am before returning home. 6. Mr. McCann, at that time, ran a panel-beating and paint-spraying business under the name of 'Top Island Bodyworks' from premises at St Brelade. So the following morning, with the assistance of his manager, Mr. MacDonald he completed and signed a Motor Accident Report form. Mr. McCann dictated the content and Mr. MacDonald filled in the form. This was submitted to his business's insurers (the car in question being owned by Top Island Body Works) together with a written estimate for repairs to the vehicle in an amount of £470 plus parts at list price. Loss adjusters acting for insurers had subsequently agreed total repair costs of £558. 7. For reason explained in a separate judgment, Miss Critchlow gave evidence by video-link from Australia at the opening of the trial. Her main contention was that, although both cars had stopped only a few inches apart and the two drivers had got out and exchanged details, there had in fact been no contact at all between the two vehicles, let alone any damage to either of them. Also, according to her, the incident arose in an altogether different way from that related by Mr. McCann. As she approached Mr. McCann's car the lights had changed from red to green, he had begun to pull away and she had followed. But then suddenly, without warning (she said) Mr. McCann had braked and come to an abrupt halt. She too had braked hard, skidding a little but stopping short of the car in front without any impact. The following day she had informed her insurers but had heard nothing more about the matter until service of the Order of Justice in October 2002. 8. Miss Critchlow's evidence that the two cars had ended up only a matter of inches apart was not disputed by Mr. McCann, the difference between them being that Mr. McCann claimed that there was a gap because his car had been bumped forward, whereas Miss Critchlow was insistent that no contact took place. 9. It is also common ground that there were no witnesses to the incident; that no attempt was made by either party to contact the Police; and that there appears to have been no written communication between the parties or their respective insurers - and indeed no letter before action - until service of the Order of Justice in October 2002. 10. The evidence from which we were invited by Advocate Landick on behalf of Mr. McCann to conclude that his car was materially damaged by the (alleged) collision is tenuous and in some respects decidedly unsatisfactory. Mr. McCann himself described what happened as a 'minor impact'. He told the Court that he had seen some damage (which he did not specify) but had not examined it in any detail, not being in a condition to 'get down on his hands and knees'. He conceded that it might well have appeared to Miss Critchlow that there was no damage as, with modern techniques of construction, it is (he said) sometimes only on detailed examination that damage becomes apparent. There was no suggestion that either party had moved their car so as to allow a better look at what damage might have been sustained. 11. The documentary 'evidence' adduced on behalf of Mr. McCann in the form of the Top Island Bodyworks Estimate and the Perkins Loss Adjusters' Repair Authority was in truth of no evidential value whatever as an indicator of the extent, of the damage, if any, or the force of any impact that might have occurred the previous night because (i) it became clear in the course of his evidence that Mr. McCann himself had at no time conducted any detailed examination of his car, the relevant inspection on 1 st December 1999 and the compiling of the Estimate having been carried out by his manager, Mr. MacDonald;

(ii) neither Mr. McDonald nor the loss-adjuster gave evidence; (iii) there was no evidence of any kind as to the pre-existing condition of what was, at the time, a four year-old vehicle; and (iv) even taking Mr. McCann's account of the incident at face value, we are deeply sceptical of the claim that any impact that might have occurred could have resulted in £558-worth of damage at 1999 prices. 12. On the other hand we have Miss Critchlow's insistence that no impact at all occurred, let alone any damage. Advocate Landick, understandably, placed heavy reliance on the inconsistency between the original admission of liability in the Answer filed on behalf of Miss Critchlow in December 2002 and her denial of liability in the Amended Answer of April 2004. Advocate David Benest explained that the original stance had been taken by Miss Critchlow's insurance under their 'delegated authority' (by which we took him to mean the authority conferred on insurers by the policy to conduct litigation) at a time when the full implications of the case in terms of the quantum of damage claimed was not fully appreciated, and that the application to withdraw the admission of liability only arose following more detailed investigation by Bailhache Labesse at a later stage. 13. We, for our part, have little difficulty in understanding how an incident as superficially minor as this might initially have been thought to warrant minimal investigation and might have resulted, for one reason or another, in insurers taking a pragmatic line in relation to the claim made in the Order of Justice. But whatever the position may be (and there are limits as to how far one can usefully inquire into such matters without trespassing into areas of legal privilege), having heard Miss Critchlow's evidence, we are satisfied that she herself has not changed her story at any stage. Despite the inherent limitations in the giving of evidence by video-link, we felt that we were able to get a clear impression of both her evidence and her demeanour as a witness. Not surprisingly, her recollection of certain details was sparse. As far as she was concerned, the incident was of no great consequence. She had given her name and insurance details to Mr. McCann because he claimed that she had bumped into him and he had asked her for them. But, beyond this and telephoning her insurers the following day, she had heard nothing more about the matter until service of the Order of Justice getting on for three years later. It may be, as Mr. Landick established in cross-examination, that Miss Critchlow has some documents relevant to the matter somewhere at her home in England, but she was clear that these would only have been from 2002 or so onwards, in which case they are probably privileged materials. In any event, nothing was put in evidence on behalf of Mr. McCann to suggest that his insurers or anyone else on his behalf had ever notified Miss Critchlow or her insurers of any claim of any kind before October 2002. 14. We found Miss Critchlow to be a straight-forward and honest witness who genuinely did not think that there had been any impact between the two vehicles and who was unable to see any damage to Mr. McCann's car. If we have to decide between the two conflicting accounts of how and why it was that the cars came to a halt and the respective occupants got out, we prefer the evidence of Miss Critchlow to that of Mr. McCann and we find that any case of careless driving on Miss Critchlow's part is not made out. But whether in fact, contrary to her own belief, her car did in fact make contact with Mr. McCann's rear bumper, or whether Mr. McCann mistakenly thought that this had happened, is neither here nor there as we unhesitatingly find that any such contact - if it did occur - was de minimis, trivial. Other considerations apart, had the true position been otherwise, the Police would no doubt have been summoned as the Island's law requires. Mr. McCann's claim against

Miss Critchlow accordingly fails. Incident on 13 th December 1999 15. In the case of the incident involving Mr. De Jesus on 13 th December 1999, there is no dispute that a collision took place at the junction of York Street and Seale Street in St. Helier at around 6.25 pm between a Ford Fiesta being driven by Mr. McCann northwards along York Street and a Mitsubishi Shogun being driven by Mr. De Jesus as the latter pulled out from Seale Street; and that Mr. McCann's car was hit by the front of the Shogun and damaged on its near-side. 16. It is also common ground that both vehicles stopped and the drivers got out; that Mr. McCann was taken to hospital; that the police were summoned but, by the time Police Constable Herd, arrived the vehicles had been moved and it was not therefore possible to make any authoritative record of the scene of the accident. 17. The only persons to give evidence were Mr. McCann, Mr. De Jesus and Detective Constable Herd (as he now is). It appears that Mr. De Jesus had a passenger (an employee) with him in his car at the time but he was not called; nor was an independent witness who was recorded in PC Herd's notes as having observed something of the incident. The only material witnesses in a position to give first hand evidence about the collision were, therefore, the two drivers themselves. 18. Mr. McCann's case was simple: he said that, as he approached Seale Street (on his left), Mr. De Jesus's Shogun, which he had observed waiting at the yellow stop-line at the junction of Seale Street and York Street, pulled out without warning and hit the front near-side of his car. He got out, and being in some pain, perched on the window-ledge of a shop until taken to hospital. He had little conversation with Mr. De Jesus and was in no condition to pay much attention to the extent of damage sustained by the two vehicles. 19. Having heard Mr. De Jesus's own evidence in the witness-box, his Counsel, Mr. David Benest very properly conceded that there had been negligence on the part of his client, but submitted that the Court could and should make a finding of substantial contributory negligence on the part of Mr. McCann. This, therefore, is the sole issue with which we are now concerned. 20. Mr. De Jesus himself was an engagingly frank witness. He was softly spoken, which made him hard to hear sometimes, and Portuguese, rather than English (in which he gave his evidence), is his first language. He readily and repeatedly accepted that the accident must be '80% my fault' as it was he who had pulled out of the side-turning into the main street. At the same time he was evidently reluctant to concede complete 'liability', as he could not, at the time, and still could not, understand 'where he [Mr. McCann] had come from'. This expression of incomprehension was one to which he repeatedly returned. He had, he said, looked to the right, looked to the left for three or four seconds and then started forwards. He had been able to see clearly down to Charing Cross, there had been no sign of any approaching vehicle, so he had thought it safe to pull out. But suddenly Mr. McCann's car was there: 'he came from nowhere'. He could not explain how it was that he had not seen him. The conclusion - his tone of bewilderment implied and Mr. Benest invited us to conclude - was that Mr. McCann must have been driving too fast. 21. Advocate Landick questioned Mr. De Jesus's credibility on two grounds. The first, as in the case of Miss Critchlow, was the departure of his case at trial from the concession of liability made in the original Answer. For much the same reasons as those already mentioned we are not inclined to attach much importance to this. The second ground of attack rested on the fact that in Mr. De Jesus's Amended Answer it was said that he had been pulling out of Seale Street "with the intention of turning right", when his evidence in the witness box was that he was turning left (a point which he said he had checked with his

passenger - recently it appeared). Again we think no great significance attaches to this matter. Mr. Benest read the Court the relevant passage from the original proof of evidence from Mr. De Jesus in which he was recorded as having said that he was turning 'right towards The Parade' - which, of course, is self-contradictory; whether this was an infelicity of expression by Mr. De Jesus or a mis-transcription by whoever took his proof is of no consequence. One way or the other it was clearly no more than a simple error. 22. We have, therefore, no reason to doubt Mr. De Jesus's claim that he did not observe Mr. McCann approaching and thought it safe to pull out. But it would be a big jump from there to conclude, without more, that Mr. McCann's speed as he approached Seale Street had been excessive. It is a common-place experience that there can be a world of difference between 'looking' and 'observing' in the sense of registering and taking note of what our eyes show us and that there can be any number of reasons why the second does not necessarily follow from the first: too-swift a glance, distraction, pre-occupation with other things to suggest but a few. 23. Mr. Benest cross-examined Mr. McCann on the discrepancies between his affidavit of evidence for the purposes of trial in which he said that he was "in a stream of traffic and so my speed was governed by the stream

- no more than 20 m.p.h." ; details entered in the Motor Accident Report to insurers completed the following day (by Mr. MacDonald on Mr. McCann's behalf) in which his speed is recorded as '20-25 m.p.h.'; and hospital notes which prima facie appear to show Mr. McCann as having told staff that he had been traveling at 25 m.p.h. But these variations are not in our view sufficiently marked to justify any adverse inference against Mr. McCann. Nor were we inclined to attach much significance to a single sentence in a letter from an advanced-driving instructor expressing the view that Mr. McCann was apt to approach hazards at too high a speed (as put to Mr. McCann in cross-examination by Mr. Benest). 24. Both sides invited us to draw conclusions one way or the other from the damage sustained by the two vehicles (very little it seems in the case of the Shogun: considerably more in the case of the Fiesta) and/or their positions immediately after the collision. But the truth of the matter is (i) that the parties' own recollections of the way in which, and points at which, the two vehicles made contact are imprecise; (ii) the tendered evidence of the nature and extent of the damage to Mr. McCann's car is insufficiently authoritative or detailed for us to get a clear idea of the pattern and extent of damage; and (iii) in the absence of any measured police record of the accident we have only the most rudimentary idea of where the two vehicles ended up. 25. All in all there is, in our judgment, no substantial evidence from which we could properly conclude that Mr. McCann was going too fast or that he contributed to the accident in any other way. There is certainly nothing compelling to that effect. Bearing in mind that the accident took place in the run-up period to Christmas, that there would probably have been a considerable number of pedestrians about (who are just as capable as a parked car of impeding the view for a motorist turning out of Seale Street into York Street), and that it was after night-fall and wet, the probability, we think, is that for one reason or another Mr. De Jesus failed to look down York Street as closely as he should have done and simply failed to see Mr. McCann coming. The allegation of contributory negligence accordingly fails and there will be judgment on the issue of negligence in Mr.

McCann's favour. Footnote 26. At first blush, Mr. McCann's involvement in a multiplicity of road traffic incidents in a space of only two months inevitably raises, in the mind of the objective observer, concerns as to whether this might reflect in some way his driving capabilities or skills generally - all the more so when it becomes evident that he was during this period taking regular medication of one kind and another. However, given that there have been (unaltered) concessions of negligence by two of the four defendants in these proceedings and given that we have heard no expert medical evidence concerning Mr. McCann's medication or its possible effects, we wish to emphasise that such considerations have played no part in our conclusions on the issues of liability with which we have been concerned in this judgment. No Authorities Page Last Updated: 03 Mar 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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