

B3/2003/0942

Neutral Citation Number: [2003] EWCA Civ 1649
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KINGSTON-UPON-THAMES COUNTY COURT
(HIS HONOUR JUDGE COOK)

Royal Courts of Justice
Strand
London, WC2

Monday, 20 October 2003

B E F O R E:

LORD JUSTICE WARD

LORD JUSTICE SCOTT BAKER

LORD JUSTICE THOMAS

DOROTHY COOPER

Claimant/Respondent

-v-

FLOOR CLEANING MACHINES

DEAN CROMPTON

Defendants/Appellants

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MR R MENZIES (instructed by KSB Law, London EC4A 1QD) appeared on behalf of the Appellant
MR D TOBIN (instructed by Judge & Priestly, Kent BR1 1JN) appeared on behalf of the Defendants

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE WARD: I will ask Lord Justice Scott Baker to deliver the first judgment.
2. LORD JUSTICE SCOTT BAKER: This is an appeal from a decision of Judge Cook sitting in the Guildford County Court on 10 April 2003. The case concerned a collision between two motorists, Mrs Cooper and Mr Compton, both of whom were leaving the M25 at junction 10 and intending to travel north onto the A3. They were the only two witnesses. The judge felt unable to accept the evidence of either and concluded that neither had established negligence on the part of the other. Accordingly, both the claim and the counterclaim failed. Both suffered personal injuries as a result of the accident, and accordingly neither is able, if the judge's decision stands, to recover a penny.
3. A split trial had been ordered and the judge was therefore only concerned with liability. The appeal is brought by Mr Crompton. There is no cross-appeal by Mrs Cooper. The learned judge did not raise with counsel at the conclusion of the evidence and before giving judgment that he was of the provisional view that both sides claims would fail on the basis of failure to discharge the burden of proof. Had he raised it with counsel, and in my judgment it would have been prudent for him to have done so, it may well have been the case that he would have been dissuaded from this course by one or both sides. It is, on any view, a wholly exceptional situation for a judge to conclude, particularly in a case concerning a road traffic accident, that a claim and counterclaim both fail on the basis of failure to discharge the burden of proof.
4. Mrs Cooper is now 82 years of age and will very shortly be 83. She had been visiting friends in Eastwood near Southend. She joined the M25 and drove west, ie in a clockwise direction. She intended to leave at junction 10 and to go to her home in West Wimbledon. This involved travelling north for some distance on the A3.
5. The accident is said to have occurred at 4.15 on the afternoon of 27 November 2000. The time is not in issue on the pleadings, although Mr Crompton alleged at the trial that the accident had occurred a good deal later, about 6.00. In the event nothing, in my judgment, turns on the question of time. The roads were greasy. It was wet and it was certainly getting dark if it was not dark already. The traffic was heavy.
6. The judge had the advantage of a plan, which is to be found at page 75 of the bundle. Mrs Cooper's account is that she was driving her Volkswagen and that she stopped at the traffic lights in the position shown on the plan with a 7 and a circle round it, which is where photograph No7 was taken from. That was in the middle of three lanes. There was another vehicle alongside her in the nearside lane and it is her case that Mr Crompton, who was driving a vehicle pulling a trailer, was immediately behind her but in the nearside lane. Her account of what happened is set out in her witness statement in these terms:

"29. I looked in my rear nearside mirror prior to when the lights were green and then checked when the lights turned from Amber to Green.

30. On indicating I then moved off slowly in first gear at approximately 3 mph. I had not moved my vehicle into second gear.

31. The vehicle that had been [in the] lane to my nearside had moved off at quite a speed and had joined the slip-road to the A3 in which I also intended to do.

32. Proceeding behind that vehicle was Mr Crompton who then undertook me at a speed I would estimate to be at 12-15 mph and in doing so his car was too close to my own. My car was still positioned in the correct lane and I had not approached into Mr Crompton's lane. Mr Crompton then swerved to the left in an attempt I believe to avoid hitting my car, however his trailer swung out behind his car and unfortunately the front right corner of his trailer hit the nearside wheel arch of my car.

33. At the time of impact I had only just started to move my vehicle and travelled a very short distance indeed as stated above, I was travelling only approximately 3 mph."

The position where she contends that the impact occurred is just a few yards from the traffic lights at which she had originally been stationary and is marked by a circle on the plan.

7. Mr Crompton described the accident as having occurred very differently. He said that it occurred at about 6.00, although this time difference, as I have said, was not in dispute on the pleadings. He was driving his company vehicle in the course of his business. His trailer contained some machinery. He had come from Daventry and had come anticlockwise round the M25, ie he was travelling east on the M25, the opposite way from the way

that Mrs Cooper had come. He had come off the M25 slip road and on his evidence he was not waiting at Mrs Cooper's traffic lights at all. He could only have been at those lights if he had made a complete circuit of the roundabout which would have been totally unnecessary as the A3 was for him the first exit left off the slip road down which he had come. He was therefore waiting at a different set of lights, namely, the lights which would have been to the extreme right-hand bottom edge as we look at the plan at page 75 of the bundle.

8. His account of what happened, reading from his witness statement, runs as follows:

"3. I exited the M25 at junction 10 (anti-clockwise) and waited in the second hand near side lane. There are four lanes in total. I was stationary at the lights to proceed left and exit the roundabout on to the A3 slip road to the A3 London bound.

4. When the lights turned green, I proceeded towards the first exit and noticed a Volkswagen Polo, which I now know to be driven by the Claimant, Mrs Cooper. The Claimant appeared to be stationary as I approached and was situated immediately after this first exit and facing the oncoming traffic. I continued to travel in the correct lane. The Polo was parked so as not to hinder progress onto my lane however, very shortly from leaving the lights, the Claimant slowly started to move and then stopped. As my vehicle and trailer was almost level the Claimant started to move forward, trying to come into my lane. It was apparent that there was going to be a collision between the Claimant and my vehicle. On my inside lane, there was a four-wheel drive, and a trailer very similar to mine. I was unable to turn into the inside lane, thereby avoiding a collision with the Claimant. Even if the inside lane was empty I would not have had time to indicate.

5. I was forced to take evasive action and had to swerve severely and abruptly in order to avoid the Claimant hitting my car. However, the Claimant continued to move forward and collided with the right side of my trailer.

6. I parked on the hard shoulder, got out of my vehicle and asked the Claimant if she was ok. She seemed to be very confused. She said that she had been to see her daughter and had been driving around the M25 for hours. She said that she knew how to get off the A3 on to the M25, but not vice versa. She said that she had missed the A3 exit off the roundabout."

I emphasise that last sentence which was unchallenged in cross-examination.

9. There is a photograph at page 83 which shows in diagrammatic form how Mr Crompton says that the accident happened. Mrs Cooper's Volkswagen is no1. His vehicle with the trailer is no2 and the third vehicle, no3, was the other vehicle on his nearside which was also joined to a trailer. The photograph at page 85 shows his position when he was waiting at the lights second from the left on the nearside, the asterisk showing the position of his vehicle at the material time. It is of course a different vehicle in the photograph. It is also relevant to point out that both the nearside lane and the second from nearside lane in which he was have arrows to the left indicating progress down the slip road to the A3, whereas the other two lanes on the offside have arrows pointing straightforwards.
10. So his account was that Mrs Cooper had, in effect, overshot the junction and was trying to retrieve the situation by going to her left over the crosshatching rather than going round the roundabout again and then exiting at the correct point. There were no eye witnesses. There was no debris, and it was impossible from the viewpoint of any independent evidence to say with any precision where the accident had occurred. Obviously on Mrs Cooper's account the accident occurred in a very different place from where it occurred if Mr Crompton was correct.
11. The police attended the scene, having apparently been called by a paramedic who was in the vicinity at the time; but because they were under the impression that this was a damage-only accident they took no steps to take statements or produce a police report, and therefore there was no assistance from that quarter.
12. The judge in the course of his short judgment said that the damage to the two vehicles was not sufficiently inconsistent with either version to make one more likely than the other. He said he found it incredible that either of the parties could have acted as the other alleged. The two accounts put to the judge by the parties were so different that it was difficult to escape the conclusion that one of the two of them was not telling the truth and the judge plainly did not want to make a finding of that kind against either of them.

13. What seems to me to be inescapable is that this accident could not have happened without one, at least, of the two drivers having been negligent. The judge, however, decided the case on the basis that neither had discharged the burden of proof. Other than that Mr Crompton had come from Daventry and had travelled from the west ie anticlockwise on the M25, the judge made no findings apart from accepting that Mr Crompton did this journey on most working days.
14. Mr Menzies for Mr Crompton, who is the second appellant, submits that the judge was wrong to approach the case on the basis that there was one right story and that the other was untrue. He should, he submitted, have looked at the issues and decided what findings of fact he could make. If Mrs Cooper's account is correct it follows that Mr Crompton must, for some reason, have failed to turn down the slip road of the A3, gone right round the roundabout and ended up in the lane on her nearside. If Mr Crompton is correct it follows that to a greater or lesser extent Mrs Cooper must have overshot the exit to her left down the slip road to the A3 and then decided to try and retrieve the situation by turning back.
15. In my judgment, the judge fell into error in failing to analyse the evidence and decide which of the two accounts of where Mrs Cooper and Mr Crompton were was the more likely. Had he embarked on that exercise he would, in my judgment, have noticed various features of the evidence which were pointers in favour of Mr Crompton's account. In the first place there was undisputed evidence of a conversation having taken place after the accident. When Mrs Cooper gave evidence she was asked:

Q. "In fact, you unintentionally drove past the right exit, did you not?"

A. No, I did not. This suggestion was put forward to me by the gentleman that I had missed the turning, but I had not missed the turning. I mean it is quite wide the lanes on the roundabout.

Q. He actually said that to you at the time, did he?"

A. Yes, he was quite condescending when he was speaking to me. He said did I know where I was going 'dear'? 'I don't think you know this area, do you, dear?' I must say, I rather resented that.

Q. But you also said that he said that you had missed the junction or missed the turning or something?"

A. Yes, he did say that to me. He said, 'You missed the junction, didn't you?' and I said, 'no'"

In my judgment, the judge should have found as a fact that that conversation did take place. It is accepted by Mrs Cooper, and indeed it accords with the evidence which I have read from Mr Crompton's witness statement which was not challenged in cross-examination. In my judgment, had the judge found as a fact that that conversation took place, it would have been but a small step for him to conclude that it was quite a clear pointer in favour of Mr Crompton's account of how the accident happened.

16. It is also argued that the damage to the two vehicles likewise points in favour of Mr Crompton's account. We have photographs in the bundle. They show that the damage to the vehicle of Mrs Cooper was to the front nearside rather than extending along her nearside, and there is less clear evidence about the damage to Mr Crompton's vehicle because it was repaired before any photograph was taken. However, it does seem to me that, if anything, the damage is marginally supportive of Mr Crompton's account rather than Mrs Cooper's. Again there is the position of the vehicles as described by Mrs Cooper. It is difficult to see how if Mr Crompton's vehicle was in its nearside lane having once missed the turning and gone round the roundabout that he should have been moving to the right and then to the left and causing a collision with Mrs Cooper. Indeed it seems to me that the account of the way in which the accident happened that I have read from Mrs Cooper's statement is not very far removed from what would have been the position on Mr Crompton's account, she having gone past, or partly past, the junction and then turned to her left and collided with Mr Crompton's vehicle.
17. Taking all these matters together, it seems to me that the broad probability is that the account of Mr Crompton is more likely to be correct than that of the appellant. As my Lord, Ward LJ pointed out during the course of argument, the crucial question that the judge had to decide in this case can be summarised in this way: which of the two parties was it that was lost? It seems to me inherently more likely in the light of the evidence that I have recounted that the person who was lost was Mrs Cooper, rather than Mr Crompton, who was extremely familiar with this junction, passing it practically every day. He would have had to make quite a serious error to have found his way from one of the left turning lanes as he came off the M25 onto the roundabout and been forced to go round the roundabout so that he could get into the position on the traffic lights where Mrs Cooper alleges that he was.

18. Turning briefly to the law Ashraf v Akram (unreported) 22 January 1999, was an action for assault and battery arising out of a fight. It was one of those exceptional cases described by May LJ in Morris v London Iron and Steel Company [1998] 1 QB 493, where the judge simply could not resolve the issue which of two witnesses was telling the truth and where neither was able to discharge the civil burden. Chadwick LJ said at page 10 of the judgment:

"In my view, for the reasons which the judge set out in his judgment, this was a case in which he was left in the position that the fight must have been started either by the plaintiff's son or the defendant; that he was not persuaded on the balance of probabilities that it had been started by the defendant; or that the defendant had used more than reasonable force in self-defence and that, accordingly, in fulfilling his judicial duty he was bound to reach the conclusion that the plaintiff had not made out the facts which he needed to establish in order to succeed in his claim. Accordingly, he was right to dismiss that claim; and, having dismissed it, was entitled to dismiss the counterclaim..."

Then Sedley LJ at the beginning of his judgment said:

"The authorities confirm what one would expect, namely that a trial judge's duty is to decide the issues relevant to his judgment and not to evade them. But the authorities also recognise that there will be the occasional case in which the common path to the resolution of the ultimate issue, namely who is telling the truth, is blocked by an intractable evidential tangle. In such a case it may be not only legitimate but inevitable that the judge will hold that the plaintiff has failed to show a preponderance of evidential probability in favour of his case. Where there are cross-claims, in such a situation the counterclaim will also logically fail."

That case must be contrasted with Sewell v Electrolux Ltd (unreported) 8 October 1997, where there was an important conflict of medical evidence that the judge had not tried to resolve. The judge was not entitled to resort to the primary burden of proof in lieu of resolving a difference of medical opinion. The necessary findings of fact could and should have been made.

19. In my judgment, it will be rare indeed that a motor accident case will fall into that exceptional category described by May LJ in Morris v London Iron and Steel Company. Ordinarily there will be pointers or some indication that one account is more likely to be correct than the other. There are cases like Baker v Market Harborough Industrial Co-operative Society [1953] 1 WLR 1472 where vehicles meet in the middle of the road and no witness is alive or able to tell the tale where there is an inference that both parties are equally to blame. But that is not this case. In my judgment the position in this case is that the judge did have two diametrically different accounts of how the accident happened, but it was incumbent on him to analyse such evidence as there was and to conclude which of the two accounts was the more likely. In my judgment if the judge had gone on to conduct that exercise he would have concluded that the account of Mr Crompton was more likely to be correct.
20. It is said that there are various interpretations of the facts that could lead the court to a finding of contributory negligence, for example, that Mr Crompton's case was substantially correct, but that Mrs Cooper had turned a little earlier than he would have had the court believe. If so, he should have taken steps to avoid her and let her extricate herself from the predicament that she was in. However, I note that on his account he was in the outside of two lanes marked with the left arrow. On his account there is no suggestion that he was improperly positioned in the road, and in my judgment it would, on the evidence that we have seen, be entirely speculative to hold, having accepted broadly his account, that he was in any way partially responsible for the accident.
21. We have to consider what is the appropriate course, having concluded that the judge was in error in the way that he analysed and approached this case. There are two possibilities. One, that the case should be sent back to the county court to be reheard by a different judge; and the other, that we should make the findings that the judge failed to make. In my judgment, it would not be doing a service to the parties to send this case back to the county court, particularly bearing in mind that there is no cross-appeal by Mrs Cooper. To do so would simply add yet further to the already substantial costs of these proceedings. In my judgment, we are in just as good a position as the judge was to make the appropriate findings.
22. For my part, I would conclude that the case of negligence was made out against Mrs Cooper and I would find her to blame for the accident. Accordingly, I would not remit the case to the county court but would conclude the appeal on that basis.
23. LORD JUSTICE THOMAS: I entirely agree with the judgment of my Lord. I would add just one observation on a point to which my Lord has already referred. In an exceptional case where a judge has in his mind the

possibility that he might have to decide the case on the burden of proof, such a possibility, if not already canvassed in the course of final submissions, should be raised by the judge with the advocates before him. This was the course taken by the judge, Judge Crowther QC, whose decision was the subject of the appeal in Ashraf v Akram (unreported) 22 January 1999. It is clear that it helped focus the trial judge's views in that case on the arguments before him and assisted this court in upholding his decision.

24. I am sure that if in this case the possibility which must have been in the judge's mind that he would have to decide the matter on the burden of proof had been canvassed with the advocates before him, he would have received, first of all, the benefit of being reminded of the authorities decided in this court and appreciated this was not, with all respect, an exceptional case, and moreover received the benefit of the detailed analysis of the facts from the advocates which we have enjoyed today.
25. I, for my part, feel that if that course had been taken, he would have found that he was able to reach a decision which we have reached without the incurring of the significant costs of this appeal, which are particularly significant when viewed as proportionate to the sums involved in this case.
26. LORD JUSTICE WARD: I also agree. In deference to the judge from whom we are taking a different view, I will add a few short words of my own. On Mrs Cooper's case Mr Crompton was in the nearside lane a little way behind her. She waited at the traffic lights in the middle lane waiting to turn into the slip road and head north up the A3. For the collision to have occurred as Mrs Cooper said it did, Mr Crompton, whom the judge accepted had travelled in an anticlockwise direction around the M25, must have become lost, or, as Mr Tobin prefers to put it, must have found himself not being where he wanted to be.
27. On Mr Crompton's case, Mrs Cooper had missed the A3 slip road, having overshot it, and was on the chevron lines at the north-east part of the junction of the roundabout and the slip road. To have been positioned there she, too, must have become lost or not be where she wanted to be because she, too, had wished to travel north up the A3. In the exchanges after judgment had been delivered the judge said this in paragraph 11:

"It is very unfortunate and the Court of Appeal has said that wherever a judge can come down on one side or the other, he should do so, but, unless I am going to toss a coin, this is the only fair decision I can make."

28. For me the question is whether he was right to have concluded he was at the point where he felt he should reach in his pocket for the trusty shilling which the Queen gives all judges on their appointment. In my view he was not. The analysis of the facts leads one to conclude that the crucial issue was which party on the balance of probabilities found himself or herself in the wrong position.
29. Two matters throw light on that. The first is the judge is accepting that Mr Crompton had done this particular journey on most working days. The consequence of that finding is that Mr Crompton must have been familiar with the road; that knowledge of the layout of the road makes it less likely that he would miss his way. There is, it is to be noted, no corresponding finding about Mrs Cooper's familiarity with this roundabout. Moreover, unlike Mr Crompton, she had to pass through 270 degrees of the roundabout and would thus be at slightly greater risk, although it may only be slight, of getting lost compared to the driver missing just the first exit from the roundabout.
30. But the second, for me crucial, matter is that immediately after the accident there was a conversation between the two drivers. Mrs Cooper's evidence was this (page 158):

Q. "In fact, you unintentionally drove past the right exit, did you not?"

A. No, I did not. This suggestion was put forward to me by the gentleman that I had missed the turning, but I had not missed the turning. I mean, it is quite wide the lanes on the roundabout."

A conversation in those terms is more consistent with Mr Crompton's case. The judge recognised that in saying in paragraph 6 page 209:

"I also find it incredible"

- I note the word "incredible" -

"on the claimant's version that, immediately after the accident, the defendant should have invented his accusation that it was in fact the claimant who had missed her turning and instead of proceeding round the roundabout had so manoeuvre her car as to face and drive into the

traffic proceeding up the A3 slip road."

I would agree. But one could easily, and perhaps more accurately, substitute "improbable" for "incredible".

31. Mr Tobin tries to meet that point by submitting to us as he successfully submitted to the judge, who accepted, "it is also difficult to conceive that if that is what the police had thought she had done they would have allowed her to proceed on her way and have taken no action against her". But that goes to another point altogether, namely, how probable is it that the police would have reacted one way or the other? Forensically, it might have also gone much more to an issue as to whether those words were spoken or not. But that was not in issue because Mrs Cooper accepted that she said it. As she put it later in her evidence at page 163 of our bundle:

A. "He told me I had missed the access road and I should have gone round the roundabout again.

Q. Did he actually say that?

A. He actually said that."

If that was Mr Crompton's immediate suggestion, as she has agreed it was, then it seems to me most likely that the accident happened as Mr Crompton said it did and that it did not more probably happened as Mrs Cooper said it did.

32. On a proper analysis of the issues, and drawing the relevant inferences from the evidence which we can do as well as the judge can do, I am persuaded that it would be quite wrong to allow the appeal and send this matter back for a rehearing. There is no cross-appeal. There is no respondent's notice, and if, therefore, the accident was more likely to have happened as Mr Crompton said it did, in the result Mrs Cooper is unhappily only to blame for it and judgment should be entered for Mr Crompton on his cross-claim.
33. I will, therefore, like my Lords, allow the appeal and enter judgment for the appellant accordingly.

(Appeal allowed; judgment will be entered for the defendant; the defendant is to be awarded costs both here and below, such costs to be assessed if not agreed).