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Judgment: approved by the Court for handing down | *Delivered:* **19/12/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IVAN FUNSTON

Appellant/Plaintiff;

-v-

JONATHAN KERR
CHARLOTTE KERR

First and Second Respondents.

Before: Morgan LCJ, Higgins LJ, and Weatherup J

HIGGINS LJ (giving the judgment of the court)

[1] This is an appeal from the decision of Gillen J whereby he dismissed the appellant's claim for damages for negligence arising out of a traffic accident around 0920 on 6 September 2004 at Wellington Road, Enniskillen. The appellant was crossing Wellington Road in front of an oil tanker driven by Alan Wright and owned by DCC Energy (NI) Limited when he was struck by a car driven by the first respondent and owned by the second respondent. The appellant has no memory of the accident due to the injuries he sustained. He was born on 3 August 1956 and at the time of the accident was 48 years of age. The trial proceeded as a split hearing in which the only issue before the trial judge was liability. The action was brought against the two respondents and also against Alan Wright and DCC Energy (NI) Limited. The case against the latter (but not the respondents) was based on the evidence of an alleged eyewitness (since deceased) whose evidence that Mr Wright waved the appellant across the road was not accepted by the trial judge. There is no appeal against that aspect of the decision below.

[2] Wellington Road at the scene of the accident is a four lane roadway with no central reservation. Two lanes feed traffic into the centre of Enniskillen and two lanes take traffic from Enniskillen in the direction of Sligo. The roadway is within the 30 mph zone in Enniskillen and there is a pedestrian crossing a short

distance from the scene of the accident. The outside lane Sligo-bound provides access by way of a right hand turn to car parks at the Iceland Centre. The first respondent and Mr Wright, the oil tanker driver, were travelling in the same direction in the two lanes taking traffic out of Enniskillen in the direction of Sligo. The oil tanker was being driven in the inner or first of the two country-bound lanes and the first respondent was driving a car in the outer lane overtaking the vehicles in the inner lane including the oil tanker, which were either slow-moving or stationary. The appellant was a pedestrian who crossed the Sligo bound lanes from left to right as the first respondent and the tanker driver would observe it. The appellant crossed the road about two feet in front of the oil tanker and proceeded into the outer lane where he was struck by the car driven by the first respondent. The first respondent informed the police in interview and the court in evidence that he was travelling between 20–25 mph immediately prior to the accident and that he did not see the appellant until the collision between them occurred. The driver of the oil tanker made a statement to the police that he was driving on Wellington Road in heavy traffic. He saw the appellant standing on the footpath on the left hand side of his vehicle. In the statement he said that the appellant ran across the road in front of his lorry whilst looking to his left. He was struck by the car which was travelling in the outer lane and this car was travelling at a normal speed. The stopping distance (reaction time and braking) for a vehicle travelling at 25 mph is 54 feet (22 feet and braking 32 feet) and for a vehicle travelling at 20 mph is 38 feet (18 feet and 20 feet) respectively.

[3] The learned trial judge made the following findings –

i. that driving at 20 – 25 mph on the relevant section of the road passing a queue of stationary traffic was not an unreasonable speed;

ii. that the likelihood of someone acting as the plaintiff did was "so remote that drivers whilst of course they must be vigilant to the possibility cannot have their driving dictated entirely by this" (paragraph 9);

iii. that, notwithstanding the first respondent's own evidence the first respondent "may have seen the Plaintiff fractionally before he actually recalled in his evidence" (paragraph 9);

iv. that the first respondent had "no realistic prospect" of avoiding the collision (paragraph 9);

v. having heard the evidence of the first respondent and the tanker driver he was satisfied that they were trying to tell the truth (paragraph 9).

[4] The lane in question was 9 feet 2 inches in width. In addition to stopping distances, namely reaction and braking time (which were agreed), evidence was given about the speed at which a person can run, the time it would take a pedestrian to cross the lane, the time it would take to stop a vehicle at different speeds, the relative positions of the car and the tanker at the time the appellant came into view having emerged from the front offside of the tanker, whether that manoeuvre was executed at an angle or otherwise and the approximate length of a car. The trial judge commented, rightly, that much of this was imponderable, for example, different people run at different speeds. The situation was further problematical due to the fact that the oil tanker was moved after the accident occurred and its position on the police sketch was inaccurate and therefore unhelpful, if not confusing. The sketch suggested that the front of the car was three feet in front of the oil tanker after the accident. If the oil tanker was moved a car length after the accident (and before the sketch was drawn) then the car came to rest 17 or 18 feet in front of the oil tanker, referred to by the Judge as the gap between them. If the tanker was moved half a car length, or less, then the gap between the vehicles was commensurately less than 17 or 18 feet. The distance between the car and the tanker after the accident was relevant to the location of the car when the appellant emerged from the front of the tanker and thus the consequent reaction and braking time and distance before the collision with the appellant.

[5] The appellant's case at trial was that the appellant crossed the road having received a signal to do so from the driver of the oil tanker. The tanker driver denied that he had given any signal and the judge believed him. The evidence of the alleged eyewitness was so at variance with the known and undisputed facts that the trial judge could place no reliance on her evidence and dismissed the case against the tanker driver and his employer the owner of the oil tanker. That left the case against the first respondent. This was that the first respondent in the outer lane should have anticipated a pedestrian emerging from the line of stationary traffic on his left and moderated his speed accordingly. The judge concluded that this approach was a counsel of perfection being satisfied that the first respondent was an honest witness who was travelling between 20–25 mph which was not unreasonable in the circumstances. In light of expert evidence as to thinking and stopping time and distances travelled the judge considered that the first respondent probably saw the appellant slightly earlier than he deposed. However the judge concluded that this made no difference as the appellant emerged running into the outer lane leaving the first respondent with no reasonable opportunity to avoid colliding with him. He therefore concluded that the appellant had failed to prove a case of negligence against the first respondent on the balance of probabilities and dismissed the claim.

[6] The appellant now appeals against that decision on the facts on the basis that the learned trial judge misdirected himself on the questions he needed to

consider and in his approach to the facts. It was advanced on behalf of the appellant, based on the Grounds of Appeal, that the trial judge erred in the following respects -

i. that he failed to recognise the high standard of care that a motorist owes to a pedestrian in particular bearing in mind the disastrous consequences for a pedestrian if there is a collision;

ii. that he paid no regard and dismissed as remote the possibility of a pedestrian, emerging from between stationary vehicles in the inner lane and proceeding into the lane the first respondent was travelling in, attempting to cross the road when pedestrians, on occasions, do just that;

iii. that he unquestioningly accepted the first respondent's own unconvincing estimate of his speed and failed to have regard to the possibility that he was travelling at a faster speed. No-one overestimates their speed.

iv. that he wrongly concluded that the first respondent saw the appellant before the collision occurred. There was no evidence to support this conclusion which was at odds with the only evidence on the point from the first respondent. It was submitted that the first respondent had the opportunity to see the appellant before the collision occurred and so take evasive action which he failed to do.

v. that he wrongly ignored the expert evidence which offered the opinion that the first respondent had time to react to the appellant emerging into his lane and thereby to avoid or minimise the impact of the collision;

vi. that he wrongly failed to take account of the first respondent's admission that he took no steps to address the possibility of a pedestrian emerging into his lane as he passed a stationary line of vehicles which obscured the first respondent's view of the left hand footpath when his evidence was that he kept a vigilant look out and failed to see the appellant until the collision occurred yet had he braked a second earlier the appellant would have crossed the road safely.

vii. that his finding that the criticism of the first respondent was a counsel of perfection was not tenable in light of the evidence.

[7] It was contended by Mr McCollum QC who with Mr Egan appeared on behalf of the appellant, that the learned trial judge made two findings which were not supported by the evidence. The first related to the distance between the car and the oil tanker after the collision occurred when the respective vehicles were then stationary and before the tanker was moved forward. It was submitted that the trial judge found this to be approximately 18 feet, that is, the length of a car plus the distance separating the vehicles on the sketch. The second related to whether the first respondent saw the appellant prior to the collision occurring. It was submitted that there was no basis for the judge to find that the first respondent saw the appellant shortly before the collision. It was submitted by Mr McCollum QC that the distance between the car and the tanker after the collision was critical to the question whether the accident could have been avoided whether by the first respondent taking appropriate action to prevent the collision or by the appellant reaching safety on the far side of the lane before the first respondent's car arrived at the collision point. It was submitted that if the distance between the car and the oil tanker after the collision (and before the tanker was moved) was other than 17 feet or thereabouts, then the relevant 'mathematics', as he put it (the accepted reaction and braking times and distances for a speed of 20 – 25 mph) did not support the first respondent's case. Therefore the finding of the trial judge relating to the distance between the two vehicles and the evidence thereon was crucial.

[8] The sketch map drawn by Constable Giles showed the front of the car to be about three feet beyond the front of the tanker. The oil tanker was in the inner lane and the car in the outer lane with a lateral separation distance between them of 4 feet and 8 inches. The tanker driver made a statement to the police on 6 September 2004 but did not mention that his vehicle was moved after the collision. In that statement he said –

> "When I came to a stop I remember seeing the top of someone's head at the passenger window and the next thing this person ran across the front of the lorry. He appeared to be looking to his left the next thing I heard a thump."

In his evidence in chief he stated "the next thing I just seen was a head across the front of me and I heard a thump and then a screech; he was running and looking to his left". Later he stated –

> "I stayed in the cab as a crowd was already round him and the ambulance and things started to arrive and there was a man standing in a suit said he was a policeman and waved me on and I may be moved up a few feet and I said would I not have to stay here because that man ran across the front of me and got

hurt there. He said just you stay were you are then and I stayed there til.

The following questions and answers were given –

Q. Can you estimate how far you had moved your vehicle
A. Maybe, the car, it was half a car to a car in front of me and at first and I moved up until whatever the
Q. How far do you think you moved
A. About half a car length maybe
Q (Judge). I mean the average car is about 13 feet long half a car length would be now only be about 6-7 feet is that all you moved 6–7 feet would be less than the distance between you and me
A. Yeh – I wouldn't have moved that far
……..
Q Did Constable Giles ask you whether the lorry had been moved at any stage
A. No
Later he said in answer to counsel on behalf of the first respondent that the car stopped very quickly and in answer to Mr McCollum QC that the car screeched until it stopped. The following questions and answers were given –
Q. And you saw the car coming to a stop or you saw the car at a stop
A. It had stopped then
Q. And were was it when it had stopped
A. Just to the right of the lorry in the lane for turning right
Q. Level with you
A. Forward a bit
Q. A bit
A. Say half a car to a car length
Q. It was half a car to a car length in front of you
A. The back of the car would have been maybe level with the front of the lorry
Q. And are you sure about that
A. Yes
He was then shown the police sketch.
Q. And you see on that sketch that that demonstrates a different position
A. Yeh

> Q. And that shows Mr Kerr's car marginally in front of your lorry and estimated perhaps is 3 feet.
> A. Yes but I said I'd moved forward a little bit
> Q. The distance you moved forward was the difference between a car and half a car from 3 feet whatever that is
> A. Whatever length the car is
> Q. So you moved forward really a fraction of …..
> A. A few feet."

Later in answer to the judge he said:

> "He (the man in the suit) asked me to move and I moved slightly forward…"

It is clear from the above that there was very considerable doubt about the distance the tanker was moved after the collision.

[9] The judge found the tanker driver to be a straightforward and honest man. In relation to the distance between the two vehicles after the collision the judge made the following observations in his judgment. At paragraph 8 he referred to the two consulting engineers and stated that one of the key ingredients under consideration by both of them was that the tanker driver "may well have moved his vehicle about a half a car length to a car length or more after the accident occurred. However there was some doubt as to exactly what was the length involved here." Later he said "Next, if Mr Wright's vehicle (the oil tanker) was a car length back and then was moved forward the gap between the vehicles would not be the three feet depicted on the police sketch map but something more like 17 or 18 feet depending on whether it was a half car length he moved, a full car length or more." He then referred to the evidence relating to the reaction and braking distances at 25 and 20 mph and two matters which he 'fed' into that one of which was –

> "The statement of Mr Kerr to me that he did not see the plaintiff until he ran into his car whereas the probabilities are that he was braking before his (sic) reached the lorry ie. If there was a gap of 18 feet between the resting place of the car and the lorry he could not have stopped within that distance if he had only one the plaintiff ran out from the lorry and he was at the end of the lorry at that time."

[10] In his judgment the trial judge said at paragraph 9 he believed that both the first respondent and the tanker driver were trying to tell the truth. He then found that the first respondent was travelling at 20–25 mph which was not

unreasonable in the circumstances and that it was a counsel of perfection to expect a driver in the outside lane to crawl along beside a line of traffic in the inside lane because of the remote possibility that someone might run between the vehicles in the inside lane and out into the path of the traffic in the outside lane. Then he stated –

> "Next I think the likelihood is that this defendant Mr Kerr may have seen the plaintiff fractionally before he actually recalled in evidence before me his stopping distance past the lorry of even 18 feet seems to dictate this. However I do not believe this has any effect on the real issue."

He then identified the real issue in the case. This was –

> "Running at 8 feet per second, if that is what he did, into a laneway 9 feet wide by the plaintiff gave Mr Kerr no realistic prospect of avoiding impact given a reaction time of .6 or .7 or perhaps longer and a stopping distance at 25 mph of 54 feet or 20 mph of 38. He had no opportunity to see him before he emerged from this lorry given the proximity of the plaintiff to the front of lorry (sic) according to Mr Wright and thus I believe that this defendant Mr Kerr had absolutely no warning of his emergence. ……. Mr Kerr saw nothing until at least shortly before the impact. I therefore have no doubt that this plaintiff gave Mr Kerr no adequate opportunity to avoid impact. I am not persuaded that the plaintiff could have been in his view long enough for him to react and break so as to avoid an impact."

[11] It is clear that the trial judge recognised there were quite a number of uncertainties or imponderables in the evidence that was given, not least relating to running speeds and how far the tanker was moved after the collision. However there was other evidence which was more cogent - the fact the appellant ran across the road, the impact with the front of the car, the reaction time of .6 or .7 of a second and his acceptance of the first respondent's speed as 20 or 25 mph. It is implicit in the judge's findings that the first respondent was given no opportunity to avoid the collision because the appellant ran out when the first respondent was close to the front of the tanker, otherwise a collision would not have occurred. If the first respondent was further back the running appellant would have cleared the lane to safety. Trying to work back from a series of imponderables to where the first respondent might have been when the appellant emerged from the front of the tanker was, as Mr Ringland QC

stated, an artificial exercise in the face of several incontrovertible facts. We agree that the learned trial judge correctly identified the real issue in the case and reached the only conclusion possible on the evidence. In those circumstances the appeal is dismissed.