Miller v Lewis
2013 NY Slip Op 33913(U)
October 8, 2013
Sup Ct, Kings County
Docket Number: 11358/09
Judge: Leon Ruchelsman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

SHIRLEY MILLER, by YEHUDA MILLER and MALKA MILLER, Guardians of the Person and Property of SHIRLEY MILLER Pursuant to the Laws of the State of Israel,

Plaintiffs,

- against -

HENRY F. LEWIS, DUANE READE SHAREHOLDERS, LLC, DUANE READE INC., & DUANE READE GENERAL PARTNERSHIP,

Defendants,

Decision and order

Index No. 11358/09

October 8, 2013

PRESENT: HON. LEON RUCHELSMAN

The court invited the parties to brief the issue whether the defendants may call a human factors expert "to bolster what has been deemed circumstantial evidence" (see, Miller v. Lewis, June 12, 2013 decision, page 8). The plaintiff has moved seeking to preclude the human factors expert from testifying in any manner arguing essentially that the subject matter of the testimony would be speculative and not beyond the ken of the average juror. The defendants have opposed the motion arguing that the expert will testify concerning matters beyond the knowledge of the average juror, specifically the science known as 'inattentional blindness'. The defendants argue the human factors expert will testify concerning this scientific field and therefore such expert should be permitted to testify. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

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On December 19, 2008 the plaintiff Shirley Miller was hit by a truck driven by defendant Henry Lewis at the intersection of Ninth Avenue and West 48th Street in New York County. In previous decisions the court noted that there was circumstantial evidence of the plaintiff's cell phone use and permitted the introduction of those cell phone records for that purpose. The defendants seek to introduce the testimony of Dr. Joseph Sala a human factors expert who will testify regarding the plaintiff's visual and auditory information at the time of the accident. As noted, the motion seeking to preclude the expert has been filed.

Conclusions of Law

To resolve this issue it is necessary to consider general tort principles that are deeply rooted in common law and decisional law and the emerging fields of psychological and cognitive understandings of human behavior and the interplay between the two.

To avoid negligence a person must conform his or her conduct to that of a reasonable man (or woman) under like circumstances (see, Restatement (Second) of Torts §283). This general standard includes elements of duty, breach of duty and causation. Thus, conduct that is reasonable will generally not result in any liability even if an injury occurs. The precise definition of 'reasonable' cannot be reduced to a catchphrase or even a brief explanation, however, for purposes of this decision the definition

offered by the Restatement will suffice. Section 289 states that "the actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has" (id). Therefore, when deciding if an individual was negligent the jury must consider cognitive factors such as attention, perception, awareness, surroundings and a host of other factors and determine whether the individual's conduct was "reasonable" under the circumstances. These well entrenched principles should require little analysis. For example, a jury could determine whether discarding a banana peel on a busy sidewalk is 'reasonable' or whether slipping upon a banana peel is 'reasonable' as well. Every juror is a pedestrian, familiar with busy streets, the dangers of banana peels, the need to place them in trash containers and the need to avoid them while walking. A case about someone who slipped upon a banana peel would require the jury to evaluate both the conduct of the person who dropped it, the person who slipped, the weather, other conditions of the street and the common everyday familiarities of city streets that need no elaboration. Focusing upon the person who slipped, if that person were talking to someone

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at the time or running to catch a taxi or looking down anticipating any pitfall, including banana peels, those additional facts would surely benefit the jury's determination whether such conduct was reasonable. Likewise, if unusual events were taking place, distracting pedestrians and motorists alike, for example a parade was marching by or someone thought they saw a celebrity, those facts would additionally assist the jury in evaluating whether the parties were reasonable under the circumstances and whether negligence occurred. In any event, there would hardly be a need for expert testimony in any of the above scenarios. There could be nothing that would "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (DeLong v. Erie, 60 NY2d 296, 469 NYS2d 611 [1983]).

The study of 'human factors' or ergonomics focuses upon the interrelationship between human behavior and the surrounding environment (Douglas R. Richmond, *Human Factors Experts in Personal Injury Litigation*, Arkansas Law Review [1993]). While that area of expertise is broad indeed, in this case the defendants seek to introduce a narrower category of expertise concerning 'inattentional blindness' to further explain the plaintiff's visual perception at the time of the accident. This will include, according to the defendants, evidence of the plaintiff's surroundings "and the sufficiency of visual and auditory

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information at the time of the accident concerning the presence and approach of the turning vehicle for a reasonably alert and attentive pedestrian attempting to cross 48th Street to have detected, perceived and avoided contact with the turning vehicle" (see, Defendant's Memorandum of Law, page 14). The defendants further argue that the cell phone records of the plaintiff is but one factor upon which the expert will rely.

The study of inattentional blindness is a recent psychological phenomena demonstrating that people fail to notice obvious objects when otherwise engaged. Two prominent studies highlighted the existence of this 'blindness' (see, Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 Perception 1059 [1999] and Ira E. Hyman Jr. et al, *Did You See the Unicycling Clown? Inattentional Blindness While Walking and Talking on a Cell Phone*, 24 Applied Cognitive Psychology 597 [2010]). In the first study participants watching basketball practice failed to notice a man in a gorilla suit and in the second study people talking on their cell phones while crossing a college square failed to observe a man dressed like a clown riding a unicycle. While those studies and the conclusions reached are interesting and provide penetrating insight into the human mind their use in an ordinary tort context is questionable. First, those studies and many like them introduce a very unusual, almost bizarre factor which is then ignored by the

subject. Thus, people do not ordinarily expect to see a man in a gorilla costume (*Gorillas in Our Midst*, supra) or clowns riding unicycles (*Did You See the Unicycling Clown?* supra) and in any event those objects are not usually part of an automobile or pedestrian accident. Thus, any *a fortiori* arguments concerning the failure to observe ordinary and routine objects such as a stop sign or a pedestrian or an oncoming vehicle are undermined (see, generally, Jeffrey Rachlinski, *Misunderstanding ability, misallocating responsibility*, Brooklyn Law Review [2003]). This does not mean that such expert testimony is never appropriate, however, in this case its usefulness is tempered.

More importantly, the defendants have failed to present sufficient arguments why this testimony is beyond the ken of the average juror. Of course, the science noted is well beyond the knowledge of the average juror, however, the defendants have failed to explain the usefulness of the science involved. In other words, there can be little dispute, as explained, that all jurors fully appreciate the risks inherent when walking down the street. Likewise, all jurors fully understand the distractions caused by the weather, crowds, being in a rush and even talking on a cell phone. The defendants really seek to explain why those risks exist based upon the science of inattentive blindness. However, that science does little, if anything, to help the jury assess the plaintiff's conduct in a more meaningful way. Indeed, research has

revealed only three cases that have utilized the term inattentional blindness. Two of them State v. Shong, 346 Wis2d 742, 828 NW2d 593 [Court of Appeals of Wisconsin 2013] and People v. Meheerle, 206 CalApp4th, 142 CalRptr3d 423 [Court of Appeal First District Division I California 2012] introduced an expert to explain inattentional blindness to justify criminally negligent conduct. The third, Castro v. San Diego Gas and Electric Company, 2010 WL 1919397 [Court of Appeal Fourth District Division I California 2010] utilized the science of inattentional blindness to explain why a roofer failed to observe power lines near where he was working. While the science was rejected by the juries in all three cases the facts of those cases do not demand its introduction here.

Thus, continuing the hypothetical example above, there would be no need for an expert to explain why a pedestrian would be drawn to a parade or the President's motorcade or fireworks in the sky and thereby be more prone to slip upon a banana peel. In addition, there would be no need to explain why an individual did not see the stop sign or the oncoming vehicle or the banana peel. The obviousness of those activities which then might lead to an accident are readily apparent and fully appreciated by the average juror. The complex cognitive neurological processes taking place in the brain which can explain inattentive blindness do not serve to assist the jury in making factual determinations concerning fault. Rather, they merely provide a scientific explanation for

intuitive everyday activities.

Thus, if a witness testifies that he thought he saw the Pope down the block, became distracted and failed to notice the banana peel the jury is fully equipped to evaluate the reasonableness of that conduct under the circumstances. Equally true, if the witness testifies that there was nothing particularly unusual that day and he merely slipped upon a banana peel the jury can evaluate that conduct as well. The sheer regularity of the conduct, even if an unusual factor exists, forecloses the need for expert testimony (see, Vaglica v. Homeyer, 30 AD3d 587, 819 NYS2d 529 [2d Dept., 2006]). As noted, an expert seeking to explain why the Pope or a banana peel or snow or cell phone use or a crowded sidewalk causes the brain to focus upon the stated activity to the exclusion of the surroundings does not serve to explain something beyond the knowledge of the average juror.

As stated in previous decisions, this accident while tragic in its result is quite simple in its facts. It involves a woman on a busy Manhattan street that was unfortunately struck by a truck near an intersection. There were many external factors, as in all cases, that require evaluation by a jury including the time of day, the time of year, the weather, the crowds, the size of the truck, the ability of the truck and the plaintiff to observe each other and a host of other important factors. There are other potential factors of which there is no reliable evidence, for example where

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the plaintiff was going, how fast she was walking and what she was thinking at the time of the impact. There are further circumstantial facts which may be guardedly introduced including the plaintiff's possible cell phone use and whether either party could have acted to avoid the accident. All of these factors, including the possible distractions, exist in basic form in virtually all pedestrian/vehicle accidents. The need to be careful, watch the surroundings, maintain attention and focus and avoid dangerous activities are fundamental tenets inherent in all tort cases. They comprise, along with other factors, the question that must be asked concerning whether the parties were reasonable and whether negligence took place. Any expert testimony concerning inattentive blindness as applied to the plaintiff in this case is simply not beyond the knowledge of the average juror.

For the foregoing reasons the motion seeking to preclude the defendants expert, Dr. Joseph Sala from testifying is granted.

So ordered.

ENTER:

DATED: October 8, 2013
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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