[2012] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 37/2007

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**GLENFORD ANDERSON**	**APPELLANT**
AND	**GEORGE WELCH**	**RESPONDENT**

Christopher Dunkley and Miss Janene Laing instructed by Phillipson Partners for the appellant

Mr Errol Gentles instructed by Gentles and Willis for the respondent

8 November 2011 and 28 September 2012

HARRIS JA

[1] This is an appeal from the judgment of Cole-Smith J delivered on 23 January 2007 in favour of the respondent. Damages were awarded as follows:

> "**Special Damages**
>
> Assessed at $243,768.00 with interest at 6% per annum from the 16th January, 1992 to the 23rd January, 2007.
>
> General Damages assessed at $1,400,000.00 with interest at 6% per annum from 30th May, 1996 to the 23rd January, 2007.

Cost to the Claimant to be agreed or taxed."

[2] On 8 November 2011 this court made the following orders:

> "Appeal is allowed. Judgment of the trial judge is set aside. Cost of the appeal to the appellant to be agreed or taxed."

We now furnish the reasons for that decision.

[3] The appeal has its origin in a claim in negligence, brought by the respondent for damages for injuries and loss sustained by him, arising from an accident along Olympic Way on 16 January 1992. Paragraphs 2, 3 and 4 of the statement of claim reads:

> "2. The Defendant was at all material times the owner of a Volkswagon [sic] Mini Bus licensed and registered number PP739.
>
> 3. On the 16th day of January 1992, the plaintiff was walking along the left hand side walk by the main road on Olympic Way facing the South when the Volkswagon [sic] Mini Bus driven by the Defendant mounted the pavement and hit the Plaintiff from behind and ran him over.
>
> 4. That the accident was caused solely by the negligence of the Defendant."

[4] In his defence, the appellant denied being negligent and stated that the collision was due to the negligence of a third party.

[5] The respondent died prior to the trial of the action and an order was made appointing his widow the representative of his estate for the purpose of continuing the action.

[6] A police report relating to the accident was tendered and admitted into evidence. The report shows that at about 4:05pm on 16 January 1992 an accident occurred at Olympic Way involving a white Toyota Carina motor car registration number 7454 AI and a Volkswagen minibus bearing registration letters and number PP 7379. Radcliffe Brown was the owner of the motor car which was driven by Lilieth Brown, while Glenford Anderson was the owner and driver of the Volkswagen minibus. The summary of the report is as follows:

> "Reports are that V.W. minibus was carrying passengers from Water House to Three Miles travelling southwardly along Olympic Way. On reaching the junction with Hill Avenue, motor car (Toyota) proceeded from same and collided into the left side of the minibus. It got out of control and mounted the left side walk where it hit down male pedestrian George Welsh."

[7] On 14 October 1998 a summons was issued for leave to issue and serve third party notice and an order was granted on 18 February 1999 for the service of the notice on Radcliffe and Lilieth Brown. A third party notice filed on 13 April 1999 was subsequently served on Radcliffe Brown.

[8] The witness statement of George Welch was admitted into evidence. He stated that on the day of the accident, he was walking on the sidewalk along Olympic Way on the left when a Volkswagen minibus hit him from behind, causing him to fall on the sidewalk. He asserted that at that time, he saw no other vehicle save and except the minibus.

[9] The appellant's witness Jestina Cameron stated that she is a higgler and carries out the sale of her wares at Olympic Way and Tower Avenue. On the day of the accident, she saw Mr Welch, who had earlier spoken to her, walking along Olympic Way on the left side of the roadway towards Three Miles. She saw a light blue minibus travelling about 50 miles per hour towards Three Miles on the left side of the road. Thereafter, she saw a white Volkswagen minibus driven, by the appellant, who was previously known to her as Christian, at a fast rate of speed. The Volkswagen attempted to pass the blue minibus which sped up. The Volkswagen seemingly out of control, having swerved to the left, collided with a gate, skidded against the sidewalk with its back wheels lying on the roadway and the front wheels on the sidewalk. The Volkswagen hit the wall, hit Mr Welsh and ran over him. She further asserted that subsequent to the accident, Christian informed her that the matter was before the court and requested that she testify on his behalf by stating that he was not speeding.

[10] Mr Stanford Love, testifying on the respondent's behalf, stated that at the time of the accident he was walking along the left side of the road on Olympic Way, when he heard an impact as if a vehicle hit against a wall. He looked around and saw a Volkswagen minibus, which appeared to be skidding towards him. This prompted him to run towards Three Miles. After running approximately one chain, he stopped, looked back and observed Mr Welch being pulled from beneath the front of the minibus. He also stated that he saw no other vehicle there.

[11] Mrs Welch gave evidence which essentially showed that Mr Welch was injured in the accident and his health deteriorated.

[12] In delivering her reason for judgment, the learned judge said:

> " I accept that there was a car which hit the Defendant's bus and pushed it against the wall, hitting the Claimant. Although there is no evidence of the manner of driving of the Defendant. The police report exhibit 4 speaks to two vehicles involved in the accident.
>
> I find on a balance of probabilities that the Defendant is responsible for the injuries of the Claimant although he is not the sole cause of the accident."

[13] The appellant placed reliance on four grounds of appeal. The first ground is listed hereunder:

Ground (a)

> "The Learned Judge erred in law and in fact in failing to find that the Appellant/Defendant could rely on Court documents sealed and stamped with the seal of the Supreme Court from another Suit No. C.L.A. 111 of 1993 and which was relevant and of probative value to the present case pursuant to section 3.9 (4) of the Civil Procedure Rules 2002."

[14] It was Mr Dunkley's submission that the learned judge erroneously refused to admit documents filed in the Supreme Court relating to the vehicle which caused the accident by ruling that they were irrelevant. Rule 3.9 of the Civil Procedure Rules (CPR) allows admission of a document under seal into evidence without further proof and the writ of summons in suit number CL

1993/A11 **Glenford Anderson v Radcliffe and Lilieth Brown** which predated the claim at issue is a document sealed in the Supreme Court, he argued. He submitted that before the Supreme Court was an interlocutory judgment in that suit, CL 1993/A11, against the defendants in which the appellant stated that he obtained a monetary settlement and as a matter of record, that evidence having relevance to the material facts in the present case, the learned judge ought to have admitted the documents in evidence.

[15] Mr Gentles submitted that the learned judge was correct in denying the appellant the right to tender into evidence records relating to an unconnected suit as those records were irrelevant and although rule 3.9(4) of the CPR permits documents bearing the court's seal to be admitted into evidence without further proof, it does not contemplate records as evidence that a suit was filed to establish the absence of negligence. He relied on the case of **Edwards v Arscott and Another** (1991) 28 JLR 451.

[16] The appellant, in his defence, in denying that the injuries of the respondent resulted from his negligence, averred that the injuries emanated from the negligence of Radcliffe Brown. In his evidence, the appellant stated that an action was brought against Lilieth Brown to recover damages for his minibus in the accident occurring on 16 January 1992 in which Mr Welch was injured and arising therefrom, he, the appellant, participated in an out of court settlement.

[17] Mr Dunkley sought to tender into evidence certain documents filed in suit number CL 1993/A11 – **Glenford Anderson v Radcliffe Brown and Lilieth Brown**. These are: writ of summons, notice of proceedings to the insurance company and a memorandum of appearance. The learned judge, upholding an objection by Mr Gentles that the documents were not relevant and had no probative value to the issue before the court, refused to admit them into evidence. The question which now arises is whether the documents which the appellant endeavored to tender were admissible under rule 3.9 (4).

[18] Rule 3.9(1)(a) and (b) of the CPR provides that claim forms, all judgments, and orders or directions of the court must be sealed when issued. Rule 3.9(4) allows the reception into evidence of a document bearing the court's seal without further proof. The rule reads:

> "3.9 (4) A document purporting to bear the court's seal shall be admissible in evidence without further proof."

[19] As can be observed, rule 3.9 (1) (a) and (b) mandates only the sealing of claim forms, judgments, and orders or directions of the court, at the time of issue. These documents are admissible in evidence, on the presumption that they were sealed with the court's seal, under rule 3.9 (4). That is, their admissibility need not be subject to further proof of their authenticity, once sealed. However, they would only become admissible if they are in fact relevant to the proceedings in which they are sought to be admitted.

[20] The only document of those which the appellant had sought to tender into evidence as qualifying under rule 3.9 (4), would be the writ of summons. The memorandum of appearance or notice of third party proceedings, would be excluded by rule 3.9 (1) (a) and (b). Although the writ of summons is capable of qualifying under rule 3.9 (4), it would only tend to show that the appellant had commenced an action against a party or parties and the nature of his claim. It does not establish liability of any party or parties against whom the proceedings were initiated, nor does it show the outcome of the proceedings, or show that it tended to absolve the appellant. As a consequence, if admitted into evidence, it would have had no probative value whatsoever. Further, even if the memorandum of appearance and the notice of proceedings were sealed, they too would be irrelevant to the proceedings before the learned judge.

[21] The case of **Edwards v Arscott and Another** is inapplicable. In that case the issue was the grant of leave to the respondents to amend their defence to the appellant's claim to plead by way of estoppel, a judgment in a former action, in which the appellant was not a party. This is clearly distinguishable from the issue in the present case.

Grounds (b) (c) and (d)

> "(b) The Learned Judge erred in law and in fact where after finding that the police report speaks to two cars, and she accepts that there was a car which hit the Defendant's bus against the wall

hitting the Claimant, she then ruled that on a balance of probability [sic] the Defendant is responsible for the injuries of the Claimant although not solely responsible, yet failed to make a finding of contributory negligence.

(c) The Learned Judge in Chambers erred in failing to give any or any sufficient weight to the evidence that there was another car, which hit the Defendant's bus against the wall, causing the bus to hit the Claimant.

(d) That [sic] Learned Judge failed to consider properly or at all the evidence of the Police Report, which speaks to a car hitting the Appellant's bus in the rear causing it to lose control, mount the sidewalk, and hit the Claimant."

[22] The issues arising from these grounds are inter-related. It would therefore be convenient for them to be considered simultaneously.

[23] The essence of Mr Dunkley's main submission was that there was a lack of evidence to show negligence on the part of the appellant. He argued that the learned judge was wrong in finding that the appellant was responsible for the respondent's injuries although he was not the sole cause of the accident. This, he submitted, is inconsistent with her having found that the appellant's bus was hit by the vehicle of a third party which pushed it against the wall hitting the respondent.

[24] It was his further submission that the respondent alleged negligence on the part of the appellant in injuring him while driving his white Volkswagen

minibus. However, the witness Jestina Cameron testified that she saw a blue minibus going into the wall but did not see another vehicle hit the minibus nor did she see another vehicle on the scene. Neither the respondent's witnesses, Stanford Love nor Mrs Matilda Welch, saw the accident occur. He argued that the appellant established by way of viva voce evidence and documentary evidence that his collision with the respondent was as a result of the negligence of third parties who settled his claim against them. He further argued that the police report corroborated the appellant's account of the accident which the learned judge failed to consider.

[25] Mr Gentles submitted that there was evidence on which the learned judge could have reached her decision. There was evidence from Stanford Love and Jestina Cameron showing that the appellant was driving at a fast rate of speed, and the weight of the police report was insufficient to displace the inference that the appellant was speeding, despite the learned judge's failure to give any or sufficient analysis with regard to the evidence, he argued.

[26] It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or

control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.

[27] The general state of the law as to the proof of negligence was eminently enunciated by Lord Griffiths in **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another** Privy Council Appeal No 1/1988 delivered on 24 May 1988, when he said at pages 3 and 4:

> "The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…
>
> … it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."

[28] In establishing a duty of care there must be foreseeable damage consequent upon the defendant's negligent act. There must also be in existence, sufficient proximate relationship between the parties making it fair and reasonable to assign liability to the defendant. Lord Bridge, in **Caparo Industries plc v Dickman** [1990] 1 All ER 568 at 572 spoke to the test in the duty of care, sufficient to ascribe negligence, in this way:

> " In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence."

At pages 573 and 574 he went on to say:

> "What emerges, is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

[29] Liability will be affixed to negligence where the defendant's act is the sole effective cause of the claimant's injury or it is so connected to it to be a cause materially contributing to it. The negligent act as a cause of a claimant's injury may arise out of a chain of events leading to liability on the part of a defendant but the claimant must so prove. Proof that a claimant's injury was caused by the defendant's negligence raises a presumption of the defendant's liability. However, the claimant must satisfy the court that his or her injury was caused by the defendant's negligence, or that for want of care, the defendant's negligence substantially accounted for the injury.

[30] The question now arising is whether, on the evidence, negligence could have been ascribed to the appellant as the learned judge found. The evidence of the respondent, Mrs Welch and Mr Love failed to throw light as to how the accident occurred. Miss Cameron's narrative of the events was that, the appellant was travelling at a fast rate of speed and "while passing the blue minibus on the right, the blue minibus speeded [sic] up and drove towards Three Miles. The Volkswagon swerved to the left, it appeared to be out of control as it crashed into the gate of a business place owned by Clive Grannel. After it hit the gate it slid against the side walk with the back wheels in the road and one front wheel on the side walk with the front facing Three Miles. It hit the wall where Mr Welch was walking and hit him down and ran over him. There was no collision with the other bus or any other vehicle".

[31] The learned judge no doubt accepted Miss Cameron's evidence that the appellant was driving fast. There is no evidence as to the rate of speed at which he was driving. This notwithstanding, the learned judge failed to assess this witness' testimony that in the appellant's attempt to overtake the blue minibus, the driver of that vehicle accelerated causing the appellant to have lost control of his vehicle, hitting the sidewalk and injuring the respondent. In which event, there could have been room for consideration as to whether the accident could have happened in the manner described by her and whether contributory negligence arose as between the owner and the driver of the blue minibus and the appellant.

[32] Despite the failure to evaluate Miss Cameron's evidence, what is of very great importance is the fact that the learned judge found that the appellant's bus was hit by a car, yet she failed to properly examine and assess the police report against the background of all the evidence before her, in particular that of the appellant regarding his vehicle being hit by another vehicle, causing the accident. The police report was highly material in deciding whether the appellant's negligence had been proved, as it strongly supported his evidence.

[33] The learned judge erred in not properly evaluating the evidence. Her findings are flawed. She wrongly imposed liability on the appellant. It is without doubt that the respondent failed to prove, on the balance of probabilities, that the injuries he sustained were caused by the appellant's negligence.

[34] For the foregoing reasons we allowed the appeal.