JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 105 OF 1998

SUIT NO. C.L. 1993/C300

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

BETWEEN **WINSTON CAMPBELL** **PLAINTIFF/APPELLANT**

AND **CABLE & WIRELESS JAMAICA LIMITED** **DEFENDANT/RESPONDENT**

Arthur Kitchin for the appellant

Garth McBean, instructed by Dunn, Cox, Orrett and Ashenheim, for the respondent

October 18, 19 and December 4, 2000

BINGHAM, J.A.:

For the reasons which have been fully rehearsed and set out in the judgment of Cooke, J.A. (Ag.), I agree that this appeal ought to be dismissed. Having regard to the circumstances which led to the appellant's vehicle being damaged and passengers suffering injuries, I find it necessary to add a few words of my own.

Although the defence, as pleaded, was at variance as to the date and time of the accident, with the evidence given at the trial, the burden of proof

remained throughout the case on the appellant to adduce credible evidence establishing on a balance of probabilities that the obstruction in the road caused by the broken telegraph pole and the lowered cable wires was due to some neglect or default on the part of the respondent or its servants or agents to properly maintain the said pole or to maintain its equipment in the area where the accident occurred.

The evidence as to the maintenance and inspection of the poles carried out by the witness Stanley Keith Crooks, an external plant supervisor with the respondent company, was that regular periodic checks were carried out on poles in the particular area where the accident occurred. This included the pole to which the incident related. This pole had been installed three years prior to the incident. It had a life span of 26 years. The regular checks carried out by Mr. Crooks revealed no defect in the poles in the area including the pole in question. This pole had been checked for defects twice since Mr. Crooks became the utility supervisor for this area.

The weight of the evidence coming from both the appellant and Mr. Crooks was that up to the evening prior to the accident they both had the occasion to drive through the area where the poles were sited and observed nothing unusual occurring in the area. The poles were in place and the wires attached to them were at the normal height across the width of the roadway.

As the accident occurred in the early hours of the morning of January 9, 1993, when the bus driven by the appellant on its way from Christiana to Walderston came into contact with the lowered cable wire resulting from the broken pole, there was no evidence to establish that:

1. This situation was due to any defect in the pole causing it to snap in three places.

2. That the respondent knew of the danger caused by the broken pole and dangling wires, and had sufficient notice to take remedial action.

The inescapable inference to be drawn from these facts, therefore, was that the broken pole and lowered wire was the result of the action of a third party over which the respondent had no control.

These facts, when considered and assessed demonstrate that the burden of proof resting on the appellant to establish the claim brought in negligence or nuisance was not discharged.

At the conclusion of the hearing, the Court ordered that the appeal be dismissed with costs to the defendant/respondent to be taxed if not agreed.

WALKER, J.A.:

I agree with the judgments of Bingham, J.A., and Cooke, J.A. (Ag.), having had the benefit of reading them in draft form. I have nothing further to add, except to emphasize the absolute necessity for trial judges to give reasons for judgment. Where an oral judgment is delivered, counsel in the case should be invited by the court then and there to take a careful note of the judicial pronouncement so that, in the event of an appeal, that note may be agreed between themselves and afterwards submitted for the judge's approval.

It is becoming increasingly difficult for this court to resolve cases on appeal in circumstances where a trial judge gives a bald judgment while maintaining inscrutable silence as to the reasons for the court's decision.

At all times, reasoned judgments best serve the interests of justice.

COOKE, J.A. (Ag):

At the conclusion of the hearing of this appeal the court announced its decision that the effort of the appellant was without success. There was a promise then, that there would be reasons in writing. This is my contribution.

The appellant is a bus operator who plies the route between Christiana and Kingston. His journey took him through the district of Fine Grass in Manchester. On the 9th January, 1993, he began his loading exercise in Christiana at about 6:45 a.m. after which he then set off for Kingston. When he reached Fine Grass (at an unascertained time) he recounted his experience thus, as is disclosed in the record:

> "I suddenly felt bus started to struggle as if it was being pulled back. Passengers screamed, I stopped immediately. I came out (and] I saw bus in contact with a black wire. On the right side of bus I saw piece of pole – light pole-wooden protruding through the window of the bus".

The bus had come in contact with a telephone cable which normally traversed the roadway above the reach of motor vehicles. The pole to which it was attached had snapped in three places.

At the time of the incident it was raining heavily and the visibility was poor. The appellant was driving at approximately 25mph and the conditions were such that necessitated the use of headlamps. The bus was damaged. Legal proceedings to recover damages resulting therefrom were instituted in September, 1993. The defence is dated the 3rd of March, 1994. This matter was heard in September, 1998.

The appellant's case is founded on two causes: negligence and nuisance. The particulars of negligence as averred by the appellant in his statement of claim were:

> "(a) Causing or permitting the said wooden pole and cable to be or to become or to remain in a defective or dangerous condition so that it was liable to and did in fact come into contact with the Plaintiff's said motor vehicle.
>
> (b) Failing to take any or any proper or effective measures, whether by periodic examination or inspection or otherwise, to ensure that the said wooden pole and cable could not come into contact with the plaintiff's said motor vehicle.
>
> (c) Failing to carry out any or any proper or timely repairs to the said pole and cable".

The nuisance was that:

> "The defendant created a nuisance upon said main public road as aforesaid by placing and keeping the said wooden pole and cable thereon so that it projected over the said main public road and constituted a nuisance to persons lawfully using the same."

The defence was a denial of both complaints. The fulcrum of the respondent's position is stated in paragraph 7 of the defence. It is of such importance that it must be stated in full:

> "The defendant states that about 5:10 p.m. on January 7, 1993, that is, shortly before the accident of which the plaintiff complains, a vehicle, the owner and driver of which are not known to the Defendant, negligently collided into one of its telephone poles, causing the wire which ran from it over the main road to be lowered. No report was, or could in the circumstances reasonably have been expected to be received by the Defendant's office in Mandeville, the nearest office to the site of the accident, prior to the accident of which the Plaintiff complains so that the Defendant's personnel could attend and effect repairs".

At the hearing, the respondent called a witness, one Reginald McNeil, whose evidence seemed to have impressed the learned trial judge and was decisive in respect of his decision. The evidence was as follows:

> "9/1/93 at about 5:30 a.m. I was awakened by an impact sound from the road – formed impression there was an accident. I went down roadway 7:00 a.m. Apart from that impact sound, a few minutes later I heard another sound a little louder than the first one – I walked down to the road. Old truck parked on the left side of the road – persons standing at the gateway. I saw a portion of a telegraph pole in the ground – the top of it was knocked off and lying down on the ground connected by a wire from one of the 2 poles on either side of the road. Bits of pole and wires on the road".

It must have been based upon the evidence of McNeil that the learned trial judge, without more, tersely concluded that "court finds on a balance of probabilities pole

damaged in accident immediately prior to plaintiff colliding with it. Defendant not liable".

Mr. Kitchin on behalf of the appellant contended in ground 1 that:

> "The learned judge erred or misdirected himself in law in taking and/or relying upon the evidence of the Defendant's witness, Mr. Reginald Benjamin McNeil as to the impact sound he heard at about 5:30 a.m. on January 9, 1993, as the said facts were not pleaded by the Defendant and no amendment was sought or granted to allow admission of evidence of the said facts".

It is clear that the evidence given by McNeil is at distinct variance with the factual averments of the defendant as to the date and time when an unascertained vehicle collided into the telephone pole. The pleading (supra) states that it was about 5:10 p.m. on January 9, 1993. From the evidence of McNeil (supra) the defendant aspired to have the learned trial judge infer that the pole was damaged in the early hours of the 9th of January, 1993. Mr. Kitchin who appeared for the appellant at the trial did not cross examine McNeil. The explanation proffered by Mr. Kitchin was that "the plaintiff was taken completely by surprise as a consequence of which no challenge was made to the said evidence (i.e. evidence of McNeil) and objection to the same was taken only after the defendant had closed its case". The record does not indicate that there was any "objection" made by Mr. Kitchin. The judge's note of Mr. Kitchin's closing address is now reproduced:

> "**Mr. Kitchin**
>
> ***Wayne v. Cohen*** (1940) KB 229 See p. 233
>
> Duty absolute.
>
> That no inescapable inference that first impact sound Mr. McNeil heard contributed to the lowering of the cable.

No evidence cable broken by external means.

Evidence plaintiff vehicle collided with cable.

Defendant to show cable properly maintained at that height.

See Loss Adjusters Ltd."

Then there is the note of Ms. Small's closing address:

"**Ms. Small**

Burden of proof – rest on plaintiff – no breach of clear established system of maintenance.

Violent impact with pole.

No evidence defendant failed to maintain wires and poles.
Baker v Herbert (1911) 2KB 633.
Damages awarded for no more than 20 years.

Court find on a balance of probabilities, pole damaged in accident immediately prior to plaintiff colliding with it. Defendant not liable."

The notes of the learned trial judge and indeed his blunt finding does not reflect that the issue, now complained of, was brought to the attention of the court. I can only conclude that when McNeil's evidence was received neither counsel nor judge then considered the state of the pleadings. Consequently, his evidence became proper material for the learned trial judge to consider. Mr. Kitchin submitted in his closing address "that no inescapable inference that the first impact sound McNeil heard contributed to the lowering of cable". Thus the trial was conducted with McNeil's evidence being an unexceptional and integral part of the case. As such, in my view, it is too late for the appellant to complain as is formulated in ground 1. I find support for my stance in a passage from the opinion of Lord Wright in the Privy Council case of ***North Western Utilities Ltd. v***

London Guarantee and Accident Co. Ltd. [1935] All E.R. Rep. 196 at p. 199 letter A-C:

> "The main defence of the appellants was that the breaking of the joint in the pipe was solely due to the action of the city in letting down the soil under the pipe by the negligent and improper way in which they excavated the weir chamber and tunnel under the appellants' main, without providing adequate support. The respondents' case originally was that the city's work had been properly designed and carried out, so that there could be no reason at any time, either while it was being carried on or at any subsequent period, to anticipate that it could cause any mischief, but in the course of the trial there was alleged, as new and alternative ground of negligence or breach of absolute duty against the appellants, that the appellants either knew or ought to have known what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings, nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is **pessimi exempli** to admit a new head of claim without a proper amendment of the pleadings. But this ground of claim has been considered by the trial judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The trial judge decided against the contentions of the respondents but the Appellate Division allowed the appeal solely on the new ground of claim".

I would say that McNeil's evidence having been introduced and acted upon, must now be regarded as relevant to the determination of the issues before the court. ***Ketesha Clark (by next friend Errol) v Patrick Hughes and the Jamaica Public Service Company Ltd.*** 28 JLR 383 is a judgment of this court. It concerned the assessment of damages. One of the issues before this court pertained to evidence of a psychiatrist given on behalf of the appellant. Part of this evidence, given without objection, did not fall within the confines of the

pleadings. This court held that since there had been no ruling to exclude the evidence that did not conform to the pleadings the trial court was obliged to assess that evidence. So too, in this case, the learned trial judge cannot be faulted for giving attention to the evidence of McNeil. This ground of appeal fails.

Grounds 2 and 3 were expansive of ground 1 and therefore I will proceed to ground 4 which was:

> "Alternatively, even if the said evidence was properly received, the learned judge erred or misdirected himself in law and/or fact in finding that the same was sufficient to raise or support an inference that the impact sound was the sound of a vehicle colliding with the said post and lowering the said cable on January 9, 1993."

Unfortunately the learned trial judge did not reveal the reasoning which led to his conclusion (supra). This regrettable omission offends an essential mandatory obligation that judicial decisions are anchored and must be seen to be so anchored on an analysis of the facts with due regard to the principles of law which inform the issues at hand. Litigants deserve no less. The public demands no more. And of course the presence of reasons will be most helpful to this court. Confidence in the judiciary can only be maintained if there is a consistent demonstration that decisions are a result of due consideration. Therefore, it is imperative that judges, sitting without a jury, state the rational basis upon which a decision is founded. In this case, absent was any indication of the learned trial judge's thought process, so this court must now review the evidence to ascertain if his bald finding can be sustained.

The evidence of McNeil has already been recounted. He said that when he went down to the roadway "bits of pole wires" were on the road. He did not see the bus entangled in the wire. It would mean therefore that if the wire was on the

roadway the bus would have already come in contact with it. That wire which had obstructed the bus would have no longer been an obstruction. Mr. Stanley Crooks, of whom more will be said, on his way to work in the morning saw the bus "with cable (wire) embedded on top of bus". It is therefore inexplicable that McNeil did not see the bus. In any event, as Mr. McBean conceded, the learned trial judge was not, based on the evidence of McNeil, entitled to draw the inference which he expressed in his conclusion. I would say that there is merit in this ground of appeal. However, this is not the end of the matter. Mr. McBean sought and was granted permission to support the judgment of the learned trial judge on other grounds. Essentially, his submission was that the appellant had failed to prove his case.

What is the burden placed on a plaintiff in pursuing his (her) cause? I will now refer with approval to two passages from well known textbooks which correctly state the law. The first is from **Best of Evidence** 10th Edition at p. 243 where it is written:

> "And therefore the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof and not on the want of right or the weakness of proof in his adversary".

The second is from **Cross on Evidence** 4th Edition at p. 83. It says:

> "This means that as a matter of commonsense the legal burden of proving all facts essential to their claim normally rests upon the plaintiff in a civil suit or prosecutor in criminal proceedings".

So now, the question is whether or not the plaintiff has on a balance of probabilities discharged the burden placed on him. I will deal firstly with the allegation of nuisance. In dealing with this issue a critical question to be

answered is when did the pole become dislodged? The evidence from Stanley Crooks, the external plant supervisor of the respondent company was that, on the evening of the 8th (the evening before the accident) the pole which had snapped was intact and the cable (wire) which traversed the road was in its normal position. The appellant's evidence was that on the morning of the 8th January, 1993 he noticed nothing unusual about any pole or cable in Fine Grass as he journeyed to Kingston. Presumably, he would have made a return trip later that day. He did not say if at that time he noticed if anything was amiss in respect of that pole and wire. This pole is fairly close to the paved roadway. On this evidence there is an inescapable inference that the pole became dislodged between the evening of the 8th January 1993 and the morning of the 9th January, 1993, the time of the accident. If this is so, then the legal issue would be whether or not in those circumstances the defendant should have taken corrective measures which would have prevented the accident. This is for the plaintiff to prove. In my view the plaintiff had the burden of demonstrating that the respondent knew, or ought to have known, of the dislodged pole yet did nothing to remedy the dangerous situation (there is evidence from Crooks that no report had been made to his office). This the plaintiff has failed to do. Of course, if the pole was dislodged from want of repair actual or imputed knowledge would not have to be proven, see ***Wringe v Cohen*** [1940] 1 K.B.229. As the issue of want of repair, is the focus of the allegation of negligence I will deal with that under the head of negligence to which I now turn.

Here the question to answer on a balance of probabilities is what caused the pole to snap. Is it as the particulars of negligence aver (supra) or by the impact

of some external force. In this regard the only evidence came from Crooks. The important parts of his evidence are:

(i) Average life span of a pole is 25 years;

(ii) This pole was three years old;

(iii) The poles are 25ft in length with 4 –5ft inserted in the ground. These are anchored by guides;

(iv) The pole was checked two months before (from records)

(v) Pole broken in 3 pieces;

(vi) 3 ½ -4 ft of pole still erect in ground;

(vii) There was no sign of any rot;

(viii) With 24 years of experience he had never seen a pole 'break of its own accord';

(ix) The breakage I saw on pole was one of those occurrences involving other agencies.

The cross examination of Crooks centered on whether or not he was personally involved in planting the pole, or if he knew the age of the pole before it was planted. I would describe this cross-examination as innocuous . The appellant did not discharge the requisite burden to prove that the defendant was negligent because there was want of repair. Accordingly, the appellant would fail both in nuisance and negligence.

Perhaps, the appellant might well be considering the difficulty of presenting a case in circumstances such as this. Well the difficulties I would think are illusory rather than real. The appellant was entitled to discovery at any time after the Writ

of Summons even before the statement of claim is settled. Further there could have been interrogatories.

I hold that Mr. McBean's submissions have merit and I would say that the decision of the learned trial judge is correct, albeit for reasons other than that on which he based his judgment. I would dismiss the appeal and affirm the judgment of the court below. The respondent shall have the costs of this appeal.