

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 39/94

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (AG)

BETWEEN	THE ATTORNEY GENERAL	1ST DEFENDANT/ APPELLANT
AND	WOMAN SGT. SYLVIA COLPHON	2ND DEFENDANT/ APPELLANT
AND	CALBERT SMITH	PLAINTIFF/ RESPONDENT

Lackston Robinson instructed by Director of State Proceedings
for first and second defendants/appellants

Audley Foster instructed by Wong Ken and Company for the
plaintiff/respondent

22nd October & 16th December 1996

WALKER J.A. (AG.)

On September 14, 1989 a motor vehicle accident occurred at the entrance to the Police Academy at Twickenham Park, St. Catherine. The collision involved a motor cycle ridden by the respondent and a Toyota Land Cruiser driven by the second appellant. It was admitted that at all material times the second appellant was acting in the execution of her duty as a member of the Jamaica Constabulary Force in which capacity she was employed to the Government of Jamaica. As a consequence of this accident the respondent brought an action in negligence in the Supreme Court against

the first and second appellants. Upon the conclusion of the trial of that action the learned trial judge gave a judgment in the following terms:

"(1) That blame be apportioned at 60% on the part of the defendants and as to 40% on the part of the plaintiff.

(2) That after taking into account calculations based on the finding in (1) above there be a final award to the plaintiff in the sum of \$328,330.00.

(3) That the defendants do pay to the plaintiff interest as follows:

(a) On the sum of \$28,330.00 being the amount awarded for special damages at the rate of 3% per annum from the 14th day of September 1989 to the 25th day of February 1994.

(b) On the sum of \$300,000.00 being amount awarded for General Damages at the rate of 3% per annum from the 2nd day of February 1990 to the 25th day of February 1994.

(4) Costs to the plaintiff to be taxed or agreed."

It is from the learned trial judge's finding on the issue of liability that the appellants now appeal. On his part the respondent by Notice, seeks to have this judgment varied as follows -

"That the negligence of the 2nd Defendant is the sole cause of the accident and that judgment be entered for the Plaintiff for the full damages awarded with costs to the Plaintiff to be taxed or agreed."

On October 22, 1996 after hearing arguments from Mr. Robinson, we dismissed the appeal and varied the judgment of the learned trial judge to reflect a finding of liability to the extent of 100% on the part of the appellants. We also ordered that the

respondent should have the costs of this appeal. We promised then to put the reasons for our decision in writing and we now do so.

At the trial the plaintiff's case consisted of the evidence of the plaintiff, himself, and that of Dr. Adolpho Mena, Senior Orthopaedic Registrar attached to the Kingston Public Hospital. The plaintiff testified that at about 5.00 p.m. on the day in question he was riding his motor cycle at 25 m.p.h. on the main road from Spanish Town to Kingston. He was proceeding on his left hand side of the road. Upon reaching the entrance to the Police Academy which was situated on the same side of the road he observed the defendants' vehicle which was approaching him from the opposite direction. It was the plaintiff's testimony that that vehicle which was travelling at a speed of 15 m.p.h. - 20 m.p.h. suddenly turned to the right and across the path of his motor cycle.

Before turning, the second defendant, who was the driver of that vehicle, gave no indication of her intention to turn, and did so at a time when no more than about 5 yards separated both vehicles. Having observed this unexpected manoeuvre, the plaintiff "speeded up to get out of the way" but to no avail as both vehicles eventually collided. As a result of this mishap the plaintiff suffered bodily injuries, the most serious of which was a fractured right leg. He was admitted to the Spanish Town Hospital the same day and transferred the next day to the Kingston Public Hospital where he remained for 4 months and 2 weeks. At the end of this period of time he was discharged home on crutches and, thereafter, treated as an out-patient for nearly 2 years. Dr. Mena who first saw the plaintiff on September 15, 1989 enumerated the latter's injuries as:

- (1) 2cm laceration to the left side of the forehead,
- (2) 4cm laceration to the right elbow and

(3) 15cm deep laceration to the anterior aspect of the mid-shaft of the right leg with obvious deformity.

Dr. Mena testified that Xray examination revealed a compound comminuted fracture of the right leg, meaning that the bones of the right leg were shattered in several pieces. The patient received treatment, including surgery, in hospital during a prolonged stay. He was discharged home on February 1, 1990. Dr. Mena last saw the plaintiff on September 28, 1992 at which time the plaintiff's right lower limb showed marked muscle waste of the thigh and leg. He walked with a significant limp and his right lower limb was shorter than his left lower limb by 2 1/2 inches. In Dr. Mena's opinion the plaintiff suffered a permanent functional impairment of 35% of his right lower limb and a permanent partial disability of 15% - 17% of the whole man.

Insofar as the issue of liability was concerned the case for the defendants consisted of the evidence of the second defendant, then a Sergeant of Police in the Jamaica Constabulary Force. She testified that she was driving her vehicle, a Toyota Land Cruiser, along the main road at Twickenham Park, and that upon approaching the premises of the Police Academy she moved closer to the centre of the road intending to turn right into these premises. She said that she gave due notice of her intention to turn by using the right indicator light on her vehicle and also by giving a hand signal. She brought her vehicle to a stop and after receiving "the okay" from vehicles coming in the opposite direction she proceeded to turn. As she entered the gateway of the Police Academy she observed an on-coming motor cycle which was being ridden at a very fast speed. The motor cycle travelled on the soft shoulder of the road and eventually collided into her vehicle. Somewhat contradictorily, she also said that the first time that she saw the motor cycle was when it collided with her vehicle.

It was on such evidence that the learned judge gave his judgment in which he apportioned blame for the accident as has already been described. Regrettably, the learned trial judge gave no findings of fact on this issue of liability and his inscrutable silence in this regard renders it impossible for us to appreciate the factual basis for his decision to apportion blame as between the parties. In our opinion the evidence in this case does not support a finding of contributory negligence. But, even assuming that it did, the further question arises as to whether it was permissible in law for the learned trial judge to have determined the matter in the way he did. Contributory negligence is a statutory defence which is available to a defendant in an action for negligence, the relevant statute being the Law Reform (Contributory Negligence) Act. But this defence cannot avail a defendant unless it is pleaded specifically (see **Fookes v. Slaytor** [1979] 1 All E.R. 137). In the instant case there was no such pleading. Indeed, it appears from the record that the second defendant filed no defence at all.

In these circumstances, the learned trial judge had no jurisdiction to make a finding of contributory negligence, and he fell into error in apportioning blame for the accident. This judgment, therefore, corrects that error by ordering as we have done.

DOWNER J.A.

I concur.

PATTERSON J.A.

I agree.