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IN THE COURT OF APPEAL

CIVIL APPEAL NO. 44 of 1972

Before: The Honourable Mr. Justice Luckhoo - Presiding
The Honourable Mr. Justice Graham-Perkins J.A.
The Honourable Mr. Justice Swaby J.A.

B E T W E E N Seymour Almon - Defendant/Appellant

A N D Reginald Jones - Plaintiff/Respondent

Dr. L. G. Barnett for the Defendant/Appellant

Mr. Enos Grant for the Plaintiff/Respondent

7th June, 1974

GRAHAM-PERKINS, J.A.:

This is an appeal against a judgement of Robinson, J., in favour of the plaintiff in an action in which he sought to recover damages for negligence. The appeal is concerned solely with the question of the defendant's liability.

On the afternoon of the 9th October, 1962 the plaintiff was standing on the soft shoulder on the north rn side of the main road from Kingston to Spanish Town and in front of a building identified as the Carreras factory when he was run into and hit down by a car driven by the defendant and proceeding in the direction of Spanish Town. The plaintiff sustained somewhat severe injuries.

In his statement of claim the plaintiff alleged that the defendant was negligent in that, inter alia, he (a) drove at too fast a rate of speed; (b) failed to keep a proper look out; (c) drove on the incorrect side of the road; (d) left the driving surface of the road and drove on the soft shoulder. There was also an assertion in the statement of claim that

the plaintiff would rely on the doctrine of res ipsa loquitur. In answer to the foregoing allegations the defendant claimed that the collision with the plaintiff was caused entirely by the latter's negligence in that he attempted to cross the road in the path of the defendant's car at a time when it was dangerous so to do.

At the trial the plaintiff in his evidence was unable to say any more than that he was hit down by a motor car while he was standing on the soft shoulder. He could give the court no information as to the circumstances surrounding the accident, nor could he point to any particular negligent act or omission on the part of the defendant. He called a witness, however, one Kelly, who said that he was riding his cycle on the main road towards Spanish Town when on reaching the vicinity of Carreras he brought his cycle to a stop some four to five feet behind a Spanish Town bound bus which had stopped on the southern side of the road to allow passengers to alight. He looked behind in order to ascertain whether or not it was safe to proceed. He saw the defendant's car approaching from behind, i.e. travelling towards Spanish Town. He allowed this car to pass and as soon as it had done so he "continued to travel". Kelly said further:

> "I started to travel but never passed the bus and the said motor vehicle that came up and passed me going towards Spanish Town and when I actually middled the parked bus, I saw that said motor vehicle, a car, hit down a man on my right side ... and that man was over on the banking by Carreras ... After the car that passed me go and overtake the bus, when that car came from behind the bus there was an approaching motor vehicle coming from Spanish Town direction and the passage between the bus and that approaching motor vehicle was too narrow for the car that passed me to go between and that car swerved again to its right and that's what cause the whole thing, it couldn't come back in the road again for it hit the man just as he take away from that approaching vehicle ..."

Later in his evidence Kelly said: "When I first saw the car approaching from Spanish Town it was about fifteen to sixteen yards from me."

Robinson, J., rejected the version of the accident advanced by the defendant to the effect that the plaintiff ran into the path of his car. In finding that the defendant was guilty of negligence the learned trial judge said:

> "The plaintiff's case is diametrically opposed to that of the defendant in almost all material details ... I find that at the time of the accident (1) there was a bus parked facing Spanish Town opposite Carreras; (2) there was a car approaching travelling from Spanish Town on its left side of the road; (3) the defendant's car swerved to its right on attempting to pass the bus to avoid colliding with the approaching car; (4) the plaintiff was hit on the soft shoulder and not near the centre line of the road..."

Dr. Barnett challenged these conclusions of Robinson, J., and urged this Court to take the view, firstly, that there was nothing in Kelly's evidence that could fairly be said to support any of the allegations of negligence pleaded in the statement of claim; secondly, that at the highest Kelly's evidence was either neutral or in favour of the defendant; and thirdly, that there was, in view of Kelly's evidence, no room for the application of res ipsa loquitur. He also invited us to say that there was no evidence on the basis of which a conclusion could be reached that at the moment when the defendant decided, and/or began, to overtake the parked but he was embarking on a dangerous exercise. Indeed, Dr. Barnett observed that a fair inference from that part of Kelly's evidence in which he describes himself as having "continued to travel" after the defendant's car had passed him was that there was nothing untoward happening ahead of him that caused him to apprehend a situation of danger. For myself I do not think that Kelly's movements after the defendant's car had passed him assume any relevance in the circumstances of this case.

It is my view that certain very distinct probabilities emerge from Kelly's evidence when once that evidence was, in substance, accepted by

Robinson, J. In the first place the existence of the "too narrow passage" between the bus and the approaching vehicle lends itself to the probability that that vehicle had reached a point where it was either abreast of the bus, or at least very nearly so. Secondly, when the defendant's car "came from behind the bus" there was, within the view of Kelly, a car approaching from the direction of Spanish Town. That car was then some fifteen to sixteen yards from Kelly who was then four to five feet behind the bus. The defendant's car, having come "from behind the bus", then swerved again to its right. Notwithstanding the absence of any evidence as to the length of the bus, these circumstances, coupled with the first probability mentioned above, are clearly capable of giving rising to the further probability that the defendant's car swerved to its right before it had overtaken, or completely overtaken, the bus. This situation leads very naturally to the further probability that when the defendant resolved to pass the bus he did so at a time and in circumstances which made that manoeuvre quite unsafe.

To say that there was nothing in Kelly's evidence to support the allegations in the statement of claim that the defendant was at least guilty of not keeping a proper look out when he decided to pass the bus is merely to say that there was no direct evidence in terms of relative speeds and distances vis-a-vis the two cars and the bus. It is clear, however, that the problem, if it is a problem, must, in the end, be resolved not by regarding particular items of evidence in isolation but rather in the context of the realities of the situation existing at the relevant time. As Lord Buckmaster said in Jones v. G.W. Railway (1930) 47 T.L.R. 39:

> "It is a mistake to think that because an event is unseen its cause cannot be reasonably inferred."

In the particular context of this case I would paraphrase Lord Buckmaster to read that it is a mistake to think that because a witness is unable to give evidence of relative speeds and distances the cause of an accident cannot reasonably be inferred. Equally it is a fallacy to think that in order to succeed in an action of negligence a plaintiff must place before the court direct evidence of negligence. He may always prove his case partly by direct and partly by circumstantial evidence. Over one hundred years ago

Willes, J., said in Daniel v. Metropolitan Railway (1868) L.R.3 C.P.216:

> "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to."

Indeed, this must have been the view taken by the trial judge in approaching Kelly's evidence. True it is that he did not catalogue the probabilities emerging from Kelly's evidence as I have attempted to do. It cannot, however, be held that he was blind to them. At the end of the day, having categorically rejected the evidence of the defendant and his witness, as undoubtedly he was entitled to do, it was open to the trial judge to conclude from so much of the data provided by Kelly as he accepted that the collision with the plaintiff was caused solely by the negligence of the defendant.

I agree with Dr. Barnett that there is, in this case, no room for the application of res ipsa loquitur. As Lord Porter said in Barkway v. South Wales Transport Co. Ltd. (1950) 1 All E.R.392 at p.394:

> "The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether on the facts as established, negligence is to be inferred or not."

I ask the question: Can it be said that the facts were sufficiently known in this case? My answer is that indeed they were. What were those facts? I set them out as follows: (i) There was a stationary bus on the southern side of the road. (ii) A motor car "A" was travelling in a westerly direction on that road and approaching the rear of the stationary bus. (iii) Another motor car "B" was proceeding in an easterly direction and

approaching the front of the stationary bus. This car was travelling on its correct side of the road. (iv) Car "B" reached a point abreast of the stationary bus, or very nearly so. (v) Car "A" began to pass the stationary bus having come from behind the bus. (vi) Kelly from his position behind the bus saw car "B" approaching fifteen to sixteen yards away. This distance, albeit only an estimate, includes the length of the bus and an additional four or five feet. (vii) The space between the bus and car "B" was too narrow to allow car "A" to pass. (viii) Car "A" swerved to its right and on to the soft shoulder on the northern side of the road.

It is unarguable, I think, that the foregoing provides sufficient data on which to rest a conclusion that the cause of the accident in this case was the failure of the defendant to keep a proper look out. Had he done so he would have come to a stop, or at least slowed down, behind the stationary bus and allowed the oncoming car its right of way. In these circumstances res ipsa loquitur is clearly inapplicable.

I would dismiss the appeal with costs to the respondent to be taxed or agreed.