

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' COURT CIVIL APPEAL NO. 25/06

BEFORE: THE HON. MR. JUSTICE PANTON, J.A
THE HON. MR. JUSTICE K. HARRISON, J.A
THE HON. MR. JUSTICE DUKHARAN, J.A (Ag)

BETWEEN THE ATTORNEY GENERAL OF JAMAICA FIRST APPELLANT

A N D THE MINISTRY OF NATIONAL SECURITY SECOND APPELLANT

A N D PAUL FACEY RESPONDENT

Miss Tasha Manley and **Mrs. Trudy-Ann Dixon-Frith** instructed by Director of State Proceedings for the Appellants

Mrs. Stacey-Ann Soltau-Robinson instructed by **Dorothy Lightbourne** for the Respondent

18th and 21st June and July 31, 2007

PANTON, P.

I have read in draft the judgment of Dukharan, J.A. (Ag.). I agree with his reasons and conclusions and there is nothing further that I wish to add.

HARRISON, J.A.

I too agree with the reasons and conclusions of Dukharan, J.A. (Ag.) and I have nothing further to add.

DUKHARAN, J.A. (Ag.):

This is an appeal from a judgment of Her Honour Mrs. Marlene Malahoo-Forte, Resident Magistrate for the Corporate Area held at Sutton Street, Kingston,

giving judgment in favour of the Respondent for negligence against the Appellant.

On the 22nd June, 2007 we allowed the appeal and set aside the judgment of the Court below. We promised to put our reasons in writing and this we now do.

This matter arose out of a motor vehicle accident which occurred along the Duncans main road in the parish of Trelawny on the 14th August, 1992 between the Respondent's vehicle and the appellants' service vehicle (a Jamaica Defence Force truck) while they were traveling in opposite directions.

The Respondent filed an action for negligence against the appellants in the Supreme Court on the 1st July, 1993. The appellants counter-claimed for negligence for \$150,000.00. The matter was subsequently transferred to the Resident Magistrate's Court for the Corporate Area on the 26th August, 2004.

The facts which gave rise to this appeal are that on the 14th August, 1992, the respondent/claimant Paul Facey was driving a Mazda bus from Kingston to Montego Bay. On reaching a section on the Duncans main road he said he observed a truck approaching from the opposite direction. The truck overtook a parked car and encroached on his side of the road. To avoid being hit by the truck the respondent said he drove onto the soft shoulder of the road and on the banking, and in doing so the right front fender of the truck hit the right rear side of the bus. Both vehicles were damaged.

He also gave evidence that the road surface was dry at time. However in cross examination he admitted that he said in a statement to the Police that the road was damp and he picked up a skid.

The appellants' version of the accident differed from that of the respondent. Lloyd Smith a passenger in the appellants' truck said the truck was being driven at about 20-25 mph down a slight grade. He said the road was wet because it was raining. On approaching a long corner he saw a white minibus come around in the middle of the road. It slowed, turned across the road and skidded in the direction of the truck. He said the right rear fender of the respondent's bus hit into the truck causing it to end up in a culvert.

The learned Resident Magistrate in giving her reasons for judgment found that at the time of the accident the respondent was traveling on his correct side of the road and that the appellants' driver in the act of passing a parked vehicle had encroached on the respondent's side resulting in the collision. The appellants breached the duty of care owed to the respondent not to obstruct his path. She also found that the respondent's vehicle skidded, but the skid did not take him into the path of the appellants' truck. She found that the inconsistent statement of facts in the respondent's evidence resulted from lapse of time.

Four grounds of appeal were filed as follows:

- 1) The learned Resident Magistrate erred in finding that the defendant/appellants breached a duty of care owed to the plaintiff not to obstruct his path, as such a finding is not supported by the evidence.

- (2) The finding of the learned Resident Magistrate that the plaintiff was traveling on his correct side of the road and that it was the J.D.F. driver who in the act of passing the parked vehicle encroached on the plaintiff's side of the road is unreasonable and unsatisfactory in light of the evidence.
- (3) That the learned Resident Magistrate failed to assess or properly assess the evidence given at the hearing and in particular failed to appreciate the significance of the evidence of a skid which the plaintiff/respondent's vehicle had developed at the time of the collision.
- (4) The learned Resident Magistrate erred in awarding the sums claimed for loss of use in circumstances where no documentary or other proof had been placed before the Court in support of the losses claimed."

Miss Manley for the appellants argued grounds 1-3 together. She submitted that the conclusion arrived at by the learned Resident Magistrate was irreconcilable with the evidence was therefore unsatisfactory and unreasonable. She attacked the credibility of the Respondent, and the material inconsistencies in his evidence which in her view the learned Resident Magistrate had failed to deal with adequately. She highlighted the fact that when the respondent gave evidence-in-chief he indicated that the accident occurred on a straight road which was dry with a very good surface. In cross-examination he admitted that he gave a statement to the Police in which he said:

"On reaching a section of the road which was damp at the time I was negotiating a bend, a left bend. I observed a green truck had just passed the parked car and was a little over my side of the road. I kept as close as possible to the left side of the road and applied my brakes, my vehicle, picked up a skid and

the back swerved to the right, and the right rear section collided with the right front section of the truck."

Miss Manley further submitted that the condition of the road was a material consideration which affected the credibility of the respondent and in particular the fact of the "skid" was crucial to that determination. She said the failure of the respondent to mention the "skid" affected his credibility and the learned Resident Magistrate having heard all of the witnesses could not have accepted the respondent's version. She also complained that there was nothing in the reasons given by the learned Resident Magistrate as to why she accepted one side over the other.

In relation to ground 4 it was submitted by Miss Manley that no proof had been put forward by the respondent to establish the claim for loss of use of his vehicle. The respondent merely stated in evidence that he had a contract with Jamalco from which he earned \$18,000.00 weekly. Although he had a copy of the contract he failed to exhibit the document and no explanation was given for his failure to do so.

Mrs. Robinson for the respondent supported the findings of the learned Resident Magistrate who she said engaged herself in a carefully, reasoned analysis of the evidence, including the credibility of the witnesses and the effect of the "skid" as probative matters. She cited the case of **Industrial Chemical Co. (Jamaica) Ltd. v Ellis** [1986] 35 W.I.R. 303 where the Privy Council in applying **Thomas v Thomas** [1947]1 AER 582 held that an Appellate Tribunal should only

upset findings of fact by a trial judge if it is satisfied that, on the evidence the reliability of which it was for him to assess, he had plainly erred in reaching his conclusions of fact.

How did the learned Resident Magistrate deal with these inconsistencies?

She said in her reasons for judgment:

"Having seen and heard all the witnesses, I accept the Plaintiff as a witness of truth. I find that the inconsistencies in his evidence resulted from lapse of time and not from untruthfulness. I reject Mr. Lloyd Smith as a credible witness."

This Court is always reluctant to disturb the findings of fact of a trial judge. The reason being that the trial judge has had the advantage of observing the witnesses and assessing their demeanor and credibility and is in a much better position in arriving at a conclusion. However, this does not preclude an Appellate Court from reviewing the findings of a trial judge to see whether or not the decisions arrived at are justified. In **Moore v Rahman** [1993] 30 J.L.R 410, Patterson J.A. said at page 412:

"It is undoubtedly true that the learned trial judge in this case, saw and heard the witnesses, and had an opportunity of watching their demeanor and, therefore, an appellate court should be reluctant to interfere where the question is one of credibility. But that is not an inflexible rule, and the circumstances may give rise to the matter becoming at large for the Appellate Court."

A trial judge sitting alone is expected to make full judicial use of the opportunity given to him by hearing the **viva voce** evidence.

In **Powell v Streatham Manor Nursing Home** [1935] All E.R. Rep. 58 Lord Wright at page 67 quoted Lord Summer's views in the case of **S.S. Hontestroom vs. S.S. Sagaporack** 1927 A.C. 39 at Page 50 as to the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge:

- “(i) Does it appear from the President's judgment that he made full judicial use of the opportunity given to him by hearing the viva voce evidence?;
- (ii) Was there evidence before him, affecting the relative credibility of the witnesses which would make the exercise of his critical faculties in judging the demeanor of the witnesses a useful and necessary operation;
- (iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure', that has had the same effect?”

In the instant case did the learned Resident Magistrate give a careful and reasoned analysis of the evidence as it related to probative matters? There were material inconsistencies in the evidence of the respondent which called for analysis. The learned Resident Magistrate in dealing with those inconsistencies said:

“I find that the inconsistencies in his evidence resulted from lapse of time and not from untruthfulness...”

In our view no reasoned analysis was given by the learned Resident Magistrate as it related to the inconsistencies that arose on the evidence. In relation to the "lapse of time" mentioned by her, there is no evidence from the respondent that he had a lapse of memory and no explanation was given for the different version that he gave the court.

In relation to the "skid" the learned Resident Magistrate said the "skid" did not take him into the path of the appellant vehicle. This does not accord with the respondent's evidence when he said that he picked up a skid and the back of his vehicle swerved to the right and the rear section collided with the front of the truck. This, in our view, was an important bit of evidence which called for an analysis by the learned Resident Magistrate which she failed to do.

In our view the learned Resident Magistrate also overlooked the nature of the damage sustained by both vehicles as to their relative or final positions after the accident.

Ground 4 that the learned Resident Magistrate erred in awarding a sum for loss of use without documentary proof is not without merit. It is trite law that Special Damages must be strictly pleaded and proved. We agree with counsel for the appellants' that the respondent ought to have strictly proved his loss when documentary proof was available and he failed to exhibit such proof.

For the foregoing reasons the appeal was allowed. The judgment of the Court below is set aside. Judgment is entered for the Appellants on the claim and counter claim. The matter is referred to the Resident Magistrate to assess

damages in the counter claim. There shall be costs to the appellants in the Court below to be taxed if not agreed and costs here in the sum of \$15,000.00

PANTON, P.

ORDER:

Appeal allowed. Judgment of the Court below set aside. Judgment for the appellants on the Claim and Counter-Claim. Matter referred to the Court below for assessment of damages in respect of the Counter-Claim. Costs to the appellants in the Court below to be taxed if not agreed. Costs here of \$15,000.00.