IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B.274 OF 1983

BETWEEN	CLIFFORD BAKER	PLAINTIFF
A N D	THE ATTORNEY GENERAL	FIRST DEFENDANT
A N D	DETECTIVE CORPORAL LEWIS	SECOND DEFENDANT

Mr. A. Gilman & Dr. W. McCalla for Plaintiff.

Mr. Douglas Leys, Crown Counsel for the First Defendant.

HEARD: July 17, & 18 & October 8, 1986

SMITH, J. (Ag.)

By a Writ dated 8th July, 1983, and served on the defendants on the 28th July, 1983, the plaintiff seeks to recover damages against the defendants for negligence arising out of the alleged negligent driving on the 7th of August, 1982, by the second defendant of a motor car licensed NF 7350 the property of the Government of Jamaica. The first defendant is sued under and by virtue of the Crown Proceedings Act.

Interlocutory judgment was entered against the second defendant in default of appearance. It is admitted that the second defendant was a Detective Corporal of Police and was at all material times the servant and/or agent of the Government of Jamaica and was the driver of motor vehicle NF 7350. It is also admitted that on the 7th of August, 1982, a collision occurred between a cycle ridden by the plaintiff and the said motor vehicle driven by the second defendant along Olympic Way.

At the close of the case for the plaintiff, Counsel for the first defendant made a no case submission and elected to call no evidence. The important question therefore is - Do the proven facts establish on a balance of probability negligence in the second

defendant?

We must look carefully at the plaintiff's evidence.

The plaintiff testified that he was a salesman employed to Tender Flakes Co. On the 7th August, 1982, at about 8.00 p.m. he was pushing a punctured pedal cycle along the Olympic Way going in the direction of Bay Farm Road. He was on his way to a church at 162 Olympic Way. He was on the left hand side of the road facing Bay Farm Road. The church was on his right. He had to cross the road to get to his church. His evidence is that he stopped, faced the church, looked to his left and to his right and seeing no vehicle approaching he crossed the road. As he was about one foot from the sidewalk - just as he was about to step on the sidewalk - he felt a blow to his right leg. "I did not know anything else" he swore.

He regained consciousness about 10.15 p.m. and realised he was at the Kingston Public Hospital. He was treated and sent home. He later returned to the hospital and had his leg placed in a cast. A medical report was, by consent, received in evidence as Exhibit 1. This report refers to "a history of a blow to the inner aspect of his right ankle" as also to a swollen right ankle and "an undisplaced fracture through the base of the medial malleolus and a fracture of the right fibula."

Under cross examination the plaintiff said that the street lights were on. He saw no vehicle approaching. The bicycle was on his right. He did not know what hit him. He did not know from whence whatever hit him came. He said he had clear visibility for about quater mile in either direction. He denied the suggestion that he was crossing the road without first ascertaining that it was safe so to do. The road was about five (5) yards wide. He insisted that he was pushing, not riding, his bicycle when he was hit. A statement given to the police was shown to him. It was not written by him. He admitted signing it but denied that it was read over to him or that he read it

over. By consent statement was admitted in evidence as Exhibit 2. In this statement no mention was made of the plaintiff pushing the bicycle, punctured or otherwise.

Counsel for the parties made their submissions with commendable clarity. Mr. Leys for the first defendant submitted that the plaintiff had not proved any of the particulars of negligence pleaded. That the plaintiff had not shown that it was the negligence of the second defendant that cause the collision. He stood on this point, although reference was made to the statement given to the police to the effect that it impugns the credit of the plaintiff.

Mr. Gilman for plaintiff argued that the evidence of the plaintiff indicates that at the time he was hit he was on the right hand side of the road as one faces Bay Farm Road. That the unchallenged evidence of the plaintiff is that he had crossed the road from left to right when he was hit on his right leg. He referred to the medical report and submitted that this supports the plaintiff's contention.

Therefore, he argued, the second defendant must have been driving towards Bay Farm Road and on his incorrect side of the road when the collision occurred. He submitted that there is a statutory duty to drive on the left hand side of the road and that breach of this duty is evidence of negligence. He also contended that the nature of the injuries would indicate excessive speed.

Mr. Leys in his reply submitted that the court should not draw the inference that defendant was on the incorrect side of road because the medical certificate speaks of a blow to the inner aspect of the right ankle. The medical report as it stands, is not, in my view, very helpful in this respect. But in light of the medical evidence it might well be that the evidence of the plaintiff that the bicycle was on his right would preclude such an inference.

However, what in the view of the Court is crucial is the evidence of the plaintiff that he had crossed the street and was about

to step on the sidewalk - in fact he said he was about one foot from the sidewalk - when he was hit. This evidence is unchallenged. It was pleaded in the statement of claim. It is not inconsistent with his statement to the police - Exhibit 2.

Certainly the plaintiff had every right to believe that at one foot from the sidewalk he would be safe. This in my view provides a classic illustration of the doctrine of res ipsa loquitur. By this doctrine where an accident happens which by its nature is more consistent with its being caused by negligence for which the defendant is responsible than by other causes, the burden of proof shifts to the defendant to explain and to show that the accident occurred without fault on his part. The defendant need not prove how and why the accident happened. It is sufficient if he satisfies the Court that he personally was not negligent or at fault. The defendant, as was his right, chose not to give evidence and so did not attempt to discharge this evidential burden. The plaintiff must therefore succeed. The case of Chapman v. Copeland, The Times, May 7, 1966, is instructive. John Chapman was going home on his moped bicycle. He had to cross the Great North Road to get to his home. The evidence was that he stood by the road waiting for time to cross the dual carriage-way the first lane of which was 24 ft. wide. He got 17 ft. across when he was struck by a car driven by the defendant Mr. Copeland. The police provided measurements showing brake and tyre marks that the car had gone 184 ft. before pulling up and the moped had been thrown some 34 ft. The widow sued for damages but she had no evidence. All she had in addition to the police was a Mr. Wragg who had seen Mr. Chapman waiting to cross the road, had then looked away, and then heard the screech of brakes. Interestingly he thought the defendant was not at fault. The defendant by his counsel, elected not to give evidence. The defendant stood on the point that there was no evidence of negligence against him. The trial judge held the defendant wholly to blame. His decision was upheld on appeal.

The appeal was heard by Lord Denning, M.R., Dankwerts and Salmon L.JJ. The Master of the Rolls delivered himself in this fashion "And when the widow put forward the case as here, without being able, from the necessity of the case, to call evidence, it was incumbent on the defendant if he sought to escape liability to give his side of the case. The very fact that the accident had happened and a man had been killed called for an answer. No answer was given by the defendant and on the slender evidence of the length of the brake marks the inference was plain enough or at least sufficient for the Court's purposes."

It should be noted that Salmon L.J. dissented in part. He held that as the law stood there was no obligation on such a defendant to give evidence. If, however, he chose not to give evidence, he could not complain if on a very narrow balance of probability the evidence justified the Court in drawing the inference of negligence against him.

In my view a reasonable formulation based on Chapman v. Copeland is that where in the circumstances, a defendant who was the only person who could tell the Court what happened, elected not to give evidence he ought not to complain if the Court on a balance probabilities found him to be negligent.

The contributory negligence of the plaintiff was also pleaded. Mr. Leys argued that it is open to the Court to find that there was contributory negligence in the plaintiff. Now the burden of proving contributory negligence in the plaintiff rests on the defendant. It would seem, however, that this may be inferred, in certain circumstances, from the plaintiff's own evidence. I may observe that in Chapman v. Copeland in resolving this difficulty the Master of the Rolls said "If the driver of the car alleged that Chapman was contributorily negligent it was for him to prove it. He had not done so. In the absence of such evidence by the one person who could tell the Court what happened I am not disposed to infer that Mr. Chapman was at fault."

I would respectfully adopt this approach and refuse to consider drawing such an inference.

I accordingly find the second defendant wholly to blame for the accident.

In passing I should mention that the fact that res ipsa loquitur was not specifically pleaded is, in my opinion, of no moment provided that the material facts on which the doctrine may be invoked were alleged. I am fortified in this view by the case of Bennett v. Chemical Construction (G.B.) Ltd. (1971) 3 All E.R 822 at 825E & F. Indeed as was said by Megaw L.J. in Lloyde v. West Midlands Gas Board (1971) 1 W.L.R. 749 at 755: "I think that it (res ipsaloquitur) is no more than an exotic although convenient phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."

As to damages, and in particular Special damages (a) In his statement of claim supported by his evidence the plaintiff claims $8,000 (5 months at $400 per week) for loss of earnings. Mr. Leys submitted that no award ought to be made under this head for the reason that this item has not been specifically proved. Mr. Clarke, the plaintiff gave evidence that he was at the material time paid on a commission basis. That he earned $400 per week. That his income "goes up and down sometimes, but not way down". He got salary slips. He did not produce any such slips.

This Mr. Leys argued 'was not good enough'. He referred the Court to Murphy v. Mills Civil Appeal No. 5 of 1974, delivered 25.7.76 at p. 3.

In that case the Plaintiff said "I could not work for about six months. I usually earn .... $120 to $130 p.m. In cross-examination he said, "I have no salary slips for my earnings .... was not working at the time." The trial Judge made an award of $720.

Hercules J.A. said, "On this evidence I fail to understand the award of six months at 12(p.m." The Court of Appeal held that the plaintiff had not proved the damages and disallowed the award.

I accept Mr. Gilman's submission that Murphy v. Mills can be easily distinguished from the instant case. In the former the evidence was that the plaintiff was not working at the time. In the latter the unchallenged evidence of Mr. Clarke is that he was working at the time. I accept his evidence in this regard. I do not agree that there is no sufficient evidence to justify any award for loss of earnings.

In making an award under this heading the Court is obliged to take into account the plaintiff's liability to tax, his evidence is that at the time he used to pay income tax. For loss of earnings the plaintiff is awarded $5,333.33 (i.e. $8,000 less ⅓ for income tax).

(b) $700 is claimed as amount paid to a household helper. The evidence of the plaintiff is that he had to employ a lady to take care of him for five months paying her $35 p.w. Here there is no dispute.

(c) For loss of the bicycle the plaintiff claims $500. The plaintiff testified that the bicycle was lent to him. The bicycle was "mashed up" he said. It could not be repaired. He valued the bicycle at $500. Mr. Leys submitted that the plaintiff was not entitled to this claim because the bicycle was not his. "He has not shown that he has incurred any loss or expenses as a result of the bicycle being destroyed," Counsel contended. This contention is clearly misconceived. A plaintiff with only a limited interest in the goods is still entitled to recover the normal measure of damages. "As against a wrongdoer, possession is title" - see The Winkfield (1902) P. 42 at 60. Indeed it was stated that as between bailee

and a stranger, possession gives title - that is not a limited interest, but absolute and complete ownership and he is entitled to receive a complete equivalent for the whole loss ... of the thing itself' (ibidem). Of course the bailee would be accountable to the bailor.

I find that the plaintiff is entitled to recover $500.

(d)(e) Trousers and watch. The evidence of the plaintiff, which I accept, is that his trousers were torn and destroyed. He valued same at $45. He lost his watch which he valued at $200. These claims were not disputed.

(f)(g)(h) Medical fees, Xray and medication. Plaintiff testified that he paid $50 to the Doctor, $4 to have Xray done and $20 for medication.

(i)and(j) Transportation. Here the plaintiff in his statement of claim averred that he paid $48 and $50 for taxi and bus fares respectively.

His evidence, however, is that he went to K.P.H. for treatment. Travelled once per week by taxi for three months. Paid $8 per round trip. After first three months he travelled by bus for two months. Paid $50 altogether for bus fares. He is therefore entitled to recover $96 and $50 for taxi and bus fares respectively.

General Damages

The medical report discloses that the plaintiff when seen on the 9.8.82 had a swollen right ankle which was tender and that Xrays showed an undisplaced fracture through the base of the medial malleoulus and a fracture of the right tibia. He was treated by means of a below-knee cast which was removed on the 15th October, 1982. He was last seen on the 14th January, 1983, where according to the report his ankle showed a good shape, the fracture was just visible but was consolidating rapidly and there should be no

permanent disability.

The plaintiff gave evidence to the effect that during the first five (5) months after the accident he suffered severe pain, especially when he tried to walk. He had to use crutches. After this period he felt pain "off and on" for about three months. Thereafter he had no problem other than occasional sticking.

In my opinion an award of $5,000 would be adequate. Accordingly the full award is as follows:

Judgment for the plaintiff against the first defendant for $6,998.33 being special damages with interest at 3% from the 7th August, 1982, and $5,000 being general damages with interest at 3% from the day of July, 1982. The plaintiff must have his costs to be agreed or taxed.