IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW CL B. 141 of 1986

BETWEEN	DOLCIE BROWN	PLAINTIFF
AND	WYNCOFF MCKENZIE	DEFENDANT

John Graham instructed by Broderick and Graham for Plaintiff;

John Givans instructed by Dunn Cox and Orrett for Defendant.

Heard March 19, 20, and April 20, 1990.

Cooke, J.:

The plaintiff Dolcie Brown was not to be denied her day in court. She hobbled into the witness box -- and just barely -- with the aid of a walking stick. She displayed histrionic ability - real or pretended - as she related her account of how the defendant's motor car injured her on the 21st of November, 1980 at about 1:30 p.m. Through intermittent bouts of crying she related that she was walking along the sidewalk of Strand Street in Montego Bay. When she reached a point opposite to the Strand Theatre, she stepped down into the roadway for it was her intention to cross the road as soon as the passage of motor motor cars along that road permitted. When she stepped down she was about 12 to 18 inches from the sidewalk. She estimated that about 8 minutes previously she had passed the defendant in his parked motor car with the defendant sitting behind the

steering wheel - his head leaning back on the back of the seat with his right hand folded behind his head. His eyes were closed. As she waited to cross the road she was about 4 yards from this motor car. Then the defendant's motor car collided into her. The immediate impact was to her left buttock which felled her. As she lay prostrate, the defendant's motorcar ran over and rested on both her legs. The left rear wheel was resting on her left ankle and the right front wheel pinned her right ankle. Help had to be sought of some men to lift the car off and so release her. The medical report by Dr. Y. S. Mohan Rao pertaining to the injury to the plaintiff is that "clinically and radiologically it was diagnosed that the patient sustained undisplaced fracture of lower 1/3rd of right fibula." The defendant does not deny that his motor car caused injury to the plaintiff. However his account is that he was parked just in front of the Strand Theatre. He describes the roadway as round, in that the surface tilts downward into the sidewalk. He started to move out, he says, from his parked position and as he "pointed" he became aware of an approaching bus. This bus was approaching from his rear, and he stopped. He continued "when I stop, the car ease back down in the tilt. I do not know where she was coming from. When I ease back my left hand back bumper catch her and she drop on the ground. The left wheel could have run over her foot."

I will now comment on the evidence of the plaintiff. Her description of the manner in which her legs were pinned by the wheels of the car defies the imagination. The medical report makes no mention of any injury to her left ankle - indeed to any part of the left side of her body. On her account, it was her left side which would have been nearest to the defendant's motor car at the point of impact. Further, in her evidence she maintains that because of the accident her left leg is severely handicapped. Her counsel recognised that her description of how her legs were pinned was "problematic". However he submitted that the court should not be unmindful of her age. (She was 52 years old at the time.) Further, even if the court were to conclude that that aspect of her evidence was implausible, it is uncontested that she suffered a fracture. The circumstances were such that the plaintiff's recollection would be affected by the "unexpected traumatic stressful and an unusually painful event which happened some ten years ago." I am not moved by this evocative submission. I do not expect confusion to arise as to such a central aspect as to whether her legs were pinned or not. The plaintiff's demeanour did not bring conviction to the mind. Whenever she was asked questions the answers to which she thought would not advance her cause she took a very long time to answer, and when she did was halting and hesitant.

As for the evidence of the defendant, it was given in a straightforward and unadorned fashion. He readily agreed under cross-examination that:

(a) he could have used his brakes to prevent the car from running back;

(b) he never looked behind him before he went back;

(c) that if he had used his rear view mirror he would have seen the approaching bus.

The injury as described in the medical report is consistent with his account and inconsistent with that of the plaintiff. On the totality of the evidence and taking into consideration my impression of the credibility of plaintiff and defendant respectively, it is my view that on the preponderance of probability the version of the defendant is to be accepted. Now how does this conclusion affect my judgement in this action? In this regard I will next deal with the closing submissions of counsel.

Mr. John Givans, counsel for the defendant, having asked the court to reject the version given by the plaintiff proceeded to argue that a rejection must produce a result adverse to the plaintiff. The authorities, he said, are clear that he who avers must prove and there can never be any variance with this principle. The plaintiff is not entitled to seek or find any aid in what the defendant says. The court was referred to passages from text books. From **Elliott and Phipson - Manual of th Law of Evidence**, 12th Edition at p. 93, he called attention to the following passage:

> The general rule is that he who asserts must prove, whether the allegation be an affirmative or negative one and not he who denies... The effect of his rule is that the obligation of satisfying the court on an issue rests upon the party (plaintiff, prosecutor or defendant) who, in substance, asserts the affirmative of the issue; that is to say, where a given allegation, whether affirmative or negative, forms an essential factor of a party's case, the proof of such an allegation rests on him.

From **Best on Evidence**, 10th Edition at p. 243, 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 passage from **Cross on Evidence**, 4th Edition at p. 83 is in similar general terms:

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

Mr. Givans also cited **Blay v Pollard and Morris** [1930 1KB.p.628] to establish that a court must find for a party

on that party's pleadings and in this action he invited the court to hold that the truth and the pleadings of the plaintiff were entirely different.

Mr. Graham for the plaintiff stuck to his guns as to the version given by his client. In any event, he submitted, "that even though a party does not lead evidence by himself or his witnesses, which the court accepts to be supportive of the case as pleaded, if other evidence in the case would attach the other party with liability then the only circumstance in which that party could escape liability would be if there was such a radical departure from the case pleaded on the record in that the defendant could not reasonably have perceived that case which was in fact accepted." For this proposition reliance was placed on the House of Lords decision in **John G. Stein & Co. Ltd. v O'Hanlon** [1965.1AER p.547]. He argued that a finding by the court that it was the rear of the motor car rather than the front which collided with the plaintiff would not be in the nature of such a radical departure which should lead to an adverse finding against the plaintiff. Such a finding he said would not in any way have prejudiced the defendant as regards the case to be met.

I now turn to the pleadings. Paragraph 3 of the Statement of Claim states:

> On or about the 21st day of November, 1980, along Strand Street, Montego Bay in the parish of Saint

James, the defendant so negligently drove, operated and/or controlled the aforesaid motor car that he caused and/or permitted same to collide with the plaintiff.

PARTICULARS OF NEGLIGENCE

i) drove at a rate of speed which was excessive in the circumstances;

ii) failed to keep any or any proper look out;

iii) failed to have any or any sufficient regard for pedestrian using the said road;'

iv) collided with the plaintiff who was lawfully walking along the said road;

v) drove too close the sidewalk;

vi) failed to stop, slow down, swerve, turn aside or in any manner to so manage and control the motor car and avoid the collision.

Paragraph 5 of the defence states:

The defendant will say that the collision aforesaid was caused or contributed to by the negligence of the plaintiff.

PARTICULARS OF NEGLIGENCE

i) stepping backwards into the path of the defendant's motor car;

ii) failing to have any or any adequate regard for her own safety;

iii) failing to heed the presence of the defendant's motor car in the said road in sufficient time to avoid colliding therewith or at all.

The plaintiff's "Particulars of Negligence" when read together conveys a picture of the defendant negligently executing a maneuvre while going forward. The plaintiff's

evidence sought to establish negligence in the manner pleaded. This she failed to do. The defendant also failed to establish his case according to his pleadings. He cannot say what was taking place behind him in respect to the plaintiff immediately before the impact. Accordingly, his pleading that the plaintiff stepped backwards into the path of his motor car is groundless. From his evidence there is an admission of negligence on his part.

In **John G. Steim & Co. Ltd. v O'Hanlon** (supra) on which the plaintiff relies, Lord Guest considered the situation where there was difference between the finding of facts and the case alleged by the plaintiff. Part of the head note in this case is as follows:

> In his pleading the pursuer averred a long-standing overhang of clay at the side of a road until December, 1959, and that its fall injured him. He alleged breach of s. 48(1) of the Act of 1954, pleading as the ground of fault, that the manager failed to take the steps necessary for keeping the road secure in respect that clay, forming a side of the road, was unsupported and fell on the respondent. The pursuer did not establish at the trial the long-standing overhang that he alleged; but he succeeded on appeal on the basis of facts which were the facts alleged by the defenders in their answer, viz., that the firing of shots on the day preceding the accident had disturbed the strata of the

place. The Second Division took the view that the likelihood of clay falling as a result of the firing of the shots was foreseeable, and it was not in question that no step was taken to support the sides to make the road secure. On appeal by the defenders to the House of Lords,

Held: there was not such a radical departure from the case averred on record as would justify absolving the appellants from liability, and the appellants would not have been prejudiced when the facts on which liability was established were those that they alleged in defence (see p. 551, letter I, p. 552, letter H, p. 554, letters A and C, and p. 556, letter F, post).

Test laid down by the Lord Justice-Clerk (LORD THOMSON) in **Burns v Dixon's Iron Works, Ltd.** (1961 S.C. at p. 107) applied.

This is how Lord Guest dealt with the issue:

The question is whether the case on which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a long-standing overhang some thirty feet from the corner; but in the way in which the evidence came out this became immaterial where the accident was proved to have taken place at about the corner. The facts on which the respondent succeeded before the

Second Division were in effect the facts as alleged by the appellants in answer 2:

> 'Explained and averred that the point at which the fall occurred was just round the corner from the position in which shots had been fired. The side of the road from which clay fell on the pursuer had been secure until the said shot-firing had taken place. The strata at said place was not weak nor dangerous prior to said shot-firing. It is believed and averred that the two explosions accompanying the said shot-firing had the effect of disturbing the strata of said place.'

On these facts the Second Division (7) held that there was a breach of s. 48 by the manager. Although this finding was to some extent a variation or modification of the respondent's case on record, it was based on the same ground of fault and it related to the facts as found by the Lord Ordinary on evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability. The test was well expressed by the Lord Justice-Clerk (LORD THOMSON) in words which I should

like to adopt, when he said in **Burns v Dixon's Iron Works, Ltd.** [1961 S.C. 102].

> 'The court is often charitable to records and is slow to overturn verdicts on technical grounds. But where a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realm of technicality.'

In **Waghorn v George Wimpey & Co. Ltd.** [1970 1AER p. 474] Geoffrey Lane J. (as he then was) had to deal with this issue where there is a departure from the case as originally pleaded. In this case the plaintiff was employed by the defendants who were engaged in installing and maintaining the pipework on an oil refinery site. For the convenience and domestic comfort of its employees the defendants had stationed caravans at various points on this site. If an employee desired to go to any of these caravans he would have to cross earthworks which were about 4 1/2 feet high and sloped at an angle of about 30 degrees. The plaintiff complained that on the day in question while walking down one of the earthworks he "just went" and from his fall he sustained injuries. The evidence adduced was directed to

showing that it was on the 30 degree slope, albeit two-thirds down it, that he fell; that the slope was dangerous; that the danger of the slope was apparent to the defendants; that they should have taken precautions to prevent men from slipping on that slope because the necessity of going over the earthwork must have been known to the defendants; that they did not take any such precautions and that was the cause of the accident. The judge unhesitatingly rejected the account given by the plaintiff of how and where the fall took place. He found that the accident occurred beside one of the caravans and down a little gully which was beside that caravan. As in this case counsel for the plaintiff sought to rely on the passage from the judgement of Lord Guest which I have already quoted. This is what Geoffrey Lane J. had to say pertaining to that submission.

> In the present case, counsel for the plaintiff seeks to bring himself within the terms of that passage saying that this is just a variation or a modification or a development of what is averred and is not something new, separate and distinct. The only similarity between the plaintiff's allegations in his pleadings, in the way the case was presented and what in fact took place were these: first of all, the plaintiff slipped, secondly, he slipped at his place of work; thirdly, he slipped somewhere near a caravan. It is alleged that he did slip somewhere near a caravan. But, the whole

> burden of the claim put forward by the plaintiff and the whole burden of the defence to that claim prepared by the defendants and put forward on their behalf by their counsel, has been the safety or otherwise of the right-hand side of the caravan where it runs alongside the dip.
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> In my judgement this is not a case which is just a variation, modification or development of what is averred. It is a case which is new, separate and distinct, and not merely a technicality.

The plaintiff therefore failed.

The unswerving thrust of this plaintiff is that she suffered her injury through the negligent driving of his motor car. At all times the defendant knew that the case he had to meet was that of negligent driving. This he squarely tried to do. There is no denial that the defendant's motor car collided with the plaintiff at the time and place averred. In this there has been "no variation, modification or development of what is averred." The defendant is in effect saying I am negligent but not in the manner you describe. It is my view that there has not been such a radical departure from the case averred by the plaintiff which would justify the court in absolving the defendant from liability.

what was her burden? It was the legal burden to satisfy the court that (a) the defendant was negligent and (b) that his negligence caused her injury. This burden has been discharged. **Huyton with Roby Urban District Council v Hunter** [1955. 2AER p. 338] was concerned with whether or not a lane was a highway reparable by the inhabitants at large. In the course of his judgement Lord Denning made observations on the legal burden of proof and the shifting weight of evidence. This is what he said:

> The Divisional Court made a mistake in failing to distinguish between a legal burden imposed by law and a provisional burden raised by the state of the evidence. Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, a provisional presumption arises that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden -- sometimes apparent, sometimes real -- which may shift from one party to the other, or may remain suspended between them. That is not a legal burden, however, but only a provisional burden -- a burden raised by the state of the evidence -- from which the court may draw an inference one way or the other, but is not bound to do

the evidence -- from which the court may draw an inference one way or the other, but is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is reparable by the inhabitants at large or not. If it can come to determinate conclusion, no question of the legal burden arises; but, if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to say that the local authority have not proved the case.

In an article which I wrote in 1945 in the **Law Quarterly Review** (at p. 375) I tried to point out the distinction between a legal burden imposed by law and a provisional burden raised by the state of the evidence. The part played by a legal burden of proof was well stated by VISCOUNT DUNEDIN in **Robins v National Trust Co.** (4)([1927] A.C. at p. 520):

> '...onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion,

> the onus has nothing to do with it, and need not be further considered.'

When the text books speak to burden of proof it is the legal burden which is being addressed.

In **Blay v Pollard and Morris** (supra) the judge erred in that he raised an issue without any amendment to the pleadings and decided the case on that issue -- a course he was not entitled to take. This case reinforces the principle that the legal burden of proof must be within the legal framework which the parties themselves have already determined.

I now turn to the issue of damages. The submission by the defendant that the plaintiff is contributorily negligent finds no favour. There is neither direct evidence to support such a contention nor are there any circumstances from which contributory negligence may be inferred. As regards the quantum of damages there has been agreement. The award under special damages is $5,114.07 with interest thereon @ 3% from the date of accident to date of trial. There will be an award for loss of future earnings for 3 years which sum @ $250 per week is $39,000 which will be taxed down for immediacy of payment and other contingencies to $23,400. The award for pain and suffering and loss of amenities is $50,000. General damages will therefore amount to $73,400 of which there will be interest of 3% on $50,000 from date of the service of the writ until the date of judgement.