JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 49/70

BEFORE: The Hon. Mr. Justice Eccleston, J.A. (Presiding)
The hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

RUEL BUCHANAN PLAINTIFF/APPELLANT

vs.

WEST INDIES SUGAR CO. LTD.)
and) DEFENDANTS/RESPONDENTS
HUBERT THORPE)

Horace Edwards, Q.C. for Appellant

R.N.A. Henriques for Respondent

Heard - 13th, 14th January, 1971
19th February, 1971

FOX, J.A.

This is an appeal from a judgment of the learned Resident Magistrate for the parish of Westmoreland in an action for negligence arising out of an accident on 2nd October, 1968 involving a station waggon owned and driven by the plaintiff, and a truck owned by the Company and driven by Thorpe. The Magistrate dismissed the plaintiff's claim with costs. There are three distinct versions of the accident, and in particular, of the manner in which the plaintiff's vehicle was being driven on the occasion.

1. The plaintiff's version. The plaintiff said that he was driving his station waggon on the main road from Green Island towards Savanna-la-Mar. In the vicinity of the manager's gate at Frome Sugar Estate, there was a car (McLeod's) ahead of, and a line of vehicles behind the waggon; all proceeding towards Savanna-la-Mar. McLeod's car stopped suddenly. The waggon was then on its left side of the road, and 20 - 22 feet behind the car. A tanker was coming in the opposite direction. The plaintiff gave a signal by putting out his right hand, and stopped the waggon behind McLeod's car. The Company's truck was behind the waggon. It came up and struck the waggon in the rear pushing it forward so that its front came in contact with the rear of McLeod's car.

2. The truck driver's version. The truck was loaded with sugar. It was being driven at a speed of about 15 miles an hour on the road towards the Manager's gate at Frome. McLeod's car was ahead of the truck. The station waggon overtook the truck and returned to its proper hand between the truck and McLeod's car. The truck was then about one chain behind the waggon, and the waggon one chain behind the car. The car stopped. The waggon swung to its right to pass the car. At the same time, with the intention of also passing the car, the truck too was swung to its right. The waggon hit the car and turned across the road. The truck was then still about one chain behind the waggon. The brakes of the truck were applied and it was swerved to the right in an endeavour to clear the car and the waggon. There was not enough space. The left front fender of the truck came in contact with the right rear fender of the waggon. The truck went into its right bank.

3. The Magistrate's version of the truck driver's version. This is given in the Magistrate's reasons for judgment where the station waggon is referred to as a car. The truck was ahead of the plaintiff's car. McLeod's car was ahead of the truck. The plaintiff's car overtook the truck. McLeod's car stopped. The truck "went to overtake both vehicles which were then stationary." As the truck was "approaching plaintiff's vehicle, it came out and went to overtake McLeod's car and in so doing, plaintiff's car collided with the right rear of McLeod's car and went diagonally across the path which was left in the road for second defendant's vehicle to pass".

In his reasons for judgment, the Magistrate observed that from these versions, that is versions 1 and 3 which he had stated, it was clear that "although there is some common ground, the accounts as to how the accident happened as stated by both sides are indeed poles apart". And so they are. The gap between versions 2, and 3 is not as wide, but almost so. We say this because of the significant difference between an account which places the plaintiff's waggon 1 chain ahead of the truck, and has it swerving to its right without stopping so as to overtake McLeod's car, and an account which brings the plaintiff's waggon to a stop behind McLeod's car, and then has it coming out and going over to its right to overtake McLeod's car as the truck was approaching with a view to overtaking the waggon and the car. It is a difference which is not rendered nugatory by the circumstance that in both accounts the waggon collided with McLeod's car. In the first account a distinct question mark emerges as to whether the accident was not in part due, at the lowest, to the truck driver's negligence. In the second account the plaintiff precipitated a sudden peril which the driver of the truck could in no way avoid by the exercise of care.

It is obvious that the Magistrate misdirected himself on the evidence in a fundamental respect. It is also beyond question that his conclusion that the plaintiff had "failed miserably" in discharging the onus of proving that "his account of the accident is the more probable of the two" is an assessment based upon an erroneous understanding of the contrasting factual pictures presented by the parties. In this situation, following the thinking of this court in R.M. Civil Appeal No. 66/1969 George Lemarsley v Manley McGill, it is impossible to say that the Magistrate would have found in favour of the defendants if he had correctly understood the evidence of Thorpe.

There is a further unsatisfactory feature of the Magistrate's conclusions on the facts which cannot be allowed to pass unnoticed. In the course of making his assessments on the evidence, the Magistrate said this in his reasons for judgment:

> "The evidence of the Plaintiff as to his account of the collision was unsupported in every single detail. There was not one iota of evidence brought by him to substantiate any of the material aspects in his evidence. One would expect that plaintiff having suffered injury as a result of the collision there would be some Medical evidence brought to support this aspect of his case. Furthermore that in the light of his account as to his vehicle having received a direct hit to the rear while it was stationary that some expert evidence would have been adduced in support of this. Alas! none was forthcoming."

The unhappy impression is distinctly given by this passage, that in coming to the conclusion that the plaintiff's account of the accident was not to be accepted, the Magistrate's judgment had been affected to an inordinate degree by the circumstance that no evidence was called by the plaintiff in support of his allegations. The plaintiff was unrepresented at the hearing. His solicitor did not appear on the date fixed for the trial. This is a circumstance which, although it does not justify the absence of supporting evidence, could perhaps have been noticed in explanation of that situation. Corroborative evidence was desirable, but not essential. It is unfortunate that its absence should have been discussed in a manner which suggests that the demeanour of the plaintiff had been relegated to an incidental role, and might not have been allowed its proper scope in determining the value of his evidence.

A Court of Appeal is often required to review the facts upon which the decision of a judge of first instance is based. In the realm of inferences, the Court is in as good a position as the judge, and will not hesitate to replace erroneous conclusions by those which it considers correct. Benmax v Austin Motor Co. Ltd. [1955] A.C. 370. The position with respect to primary facts is more delicate. The Court has not had the advantage of assessing the credibility of the witnesses. The judge has had this advantage. Consequently, those findings of fact which depend essentially upon impressions created by the demeanour of witnesses, will be questioned only if the Court of Appeal is convinced that the judge has not made proper use of the advantage which he had in seeing and hearing the witnesses. The Court may be so convinced if the reasons given by the judge for his decision are not satisfactory. Questions of fact then become at large for the decision of the Court. This whole subject has received classic treatment by the House of Lords in Watt v Thomas [1947] A.C. 484. The three propositions of Lord Thankerton in that case are now famous. Where the critical questions in issue are incapable of ascertainment by an examination of the printed record, and it is clear that the judge has misdirected himself in fundamental respects, his judgment cannot be allowed to stand. The Court of Appeal then has no other alternative but to order a new trial. This is the position here. The manner in which the principles which describe the nature of the burden of proof in a civil matter have been applied, seem open to question. In addition, it is obvious that in an important respect the facts have been misconceived. It is plain that there has not been a satisfactory trial of the issue as to which account of the accident should be accepted. The case must therefore be remitted to the Resident Magistrate's Court for that issue to be determined by another Magistrate. The appeal is allowed. The judgment of the Resident Magistrate is set aside and a new trial ordered before another Resident Magistrate. The Costs of the first trial is to abide the result of the new trial. The appellant is to have the costs of this appeal fixed at $40.