Judgment Book

IN THE SUPREME COURT OF JUDICATURE IN JAMAICA

IN COMMON LAW

SUIT NO. C.L. C164/87

BETWEEN	WALLACE CAMPBELL	PLAINTIFFS
AND	WINSTON MAHFOOD	
AND	KINGSTON & ST. ANDREW CORPORATION	DEFENDANTS
AND	ATTORNEY GENERAL	
AND	NATIONAL WATER COMMISSION	
AND	ASPHALT PAVING CO. LTD.	

Paul Dennis for the plaintiffs
Anthony Pearson for the first defendant
David Johnson for the second defendant
David Henry for the third defendant
Dennis Morrison for the fourth defendant

June 16, and December 16, 1992

PANTON, J.

The plaintiff Campbell was the only witness to testify in the case. His evidence was not seriously challenged by any of the defendants. On May 15, 1986, he was driving his Alfa Romeo motor car along Hope Road, St. Andrew, in a line of traffic. He was driving at about 15 miles per hour at a distance of about 15 feet behind the vehicle immediately in front of him. The free flow of traffic had been interrupted as repair work was in progress. The two lanes that normally carry traffic up this road converged into a single lane and the two lanes that normally take traffic down converged into a single lane. There were two wooden barriers at the point of the convergence. There was also a man with a green flag, "edging" the traffic along, directing motorists into the single lane. There was an asphalt machine immediately behind the barrier and a short distance down there was also a steam roller. There were workmen working around the machines along the road which was being paved. As the witness was about to pass the entrance to Devon House, the car in front of his stopped. As the witness was about to apply the brake of his car, a raised manhole suddenly appeared in the path of his vehicle. He braked but by then the entire undercarriage of his car with the oil and parts had fallen to the ground, the direct result of contact having been made with the raised manhole.

There was nothing to indicate that this unusually raised manhole and its cover were features of the path into which motorists were being ushered by the man with the flag. Indeed, it merits more than a passing notice that the flagman was urging motorists to move as quickly as possible.

There was no evidence to link the third defendant to the activities on the road on the day in question so the plaintiffs' attorney-at-law conceded that judgment had to be entered in favour of that defendant. So far as the first defendant was concerned, I held that it was improperly made a party to the action in view of a declaration by the Minister of Construction charging the Chief Technical Director with responsibility for all roads under the jurisdiction of the Kingston & St. Andrew Corporation in the parishes of Kingston and St. Andrew. This declaration was made on the 23rd January, 1985, under the Main Roads Act and published in the Jamaica Gazette Vol. CVIII dated 7th February, 1985, (No. 6), at page 65. This was admitted as Exhibit three (3).

There are therefore only two defendants left in the proceedings.

The second defendant has been sued "by virtue of the Crown Proceedings Act as the representative of the Crown and as such is the representative of the servants and/or agents of the Public Works Department of the Ministry of Construction (Works) which is a department of the Crown and which department individually or collectively ..... has the responsibility inter alia for the repairs of and maintenance to main roads in particular the Hope Road at the material time."

The fourth defendant has been sued as it is a company involved in road construction and asphalt paving and was at all material times the servant and/or agent of the first named defendant and/or the Public Works Department of the Ministry of Construction who is sued by its representative the second defendant and/or the third defendant or alternatively the fourth named defendant was a contractor bearing its own liability. Further, the plaintiffs allege that on the day in question the fourth defendant was involved in doing repairs on the said Hope Road and negligently diverted traffic and caused the manhole to be negligently constructed in the path of vehicular traffic without any warning or indication of its presence. The plaintiffs further allege that the works were inherently dangerous and so the defendants had a duty to properly warn road users of the dangers.

The second defendant agrees that the fourth defendant was a contractor bearing its own liability and that repair work was being done on the road in question. The second defendant contends that the plaintiff Campbell caused or contributed to the damage to his car; and further or in the alternative that the damage was solely caused or contributed to by one Tasman Weir an independent contractor his servants and/or agents. In particulars supplied by the second defendant it is stated that Weir was at the relevant time employed to the Ministry of Construction as an independent contractor, and that he had undertaken to excavate and remove existing manhole covers, provide and transport materials to the site and raise manhole covers/valve boxes to the required level on several roads in the Corporate Area including Hope Road.

The fourth defendant admits being a contractor bearing its own liability, and that it was working on the road in question. It denies any negligence in its operation and says that it did warn users of the roadway to approach the area under repairs with due care.

In view of the pleadings and the particulars supplied by the second defendant, the first question that arises is whether the second defendant can and ought to escape liability for the negligence of the contractor Weir, if negligence is proved. It is admitted that the second defendant is the representative of the Crown and as such is the representative of the servants and/or agents of the Ministry of Construction (Works) which is a Department of the Crown. Tasman Weir is said by the second defendant to be an independent contractor employed to the Ministry to excavate and remove manhole covers ... and to raise manhole covers on Hope Road at the time in question.

In my judgment the second defendant cannot escape responsibility by merely stating that the work was done by some other contractor. The only evidence that has been presented, which evidence I accept, shows that the manhole cover had indeed been raised to a level which proved dangerous to the plaintiff's car. The work was clearly not properly done as consideration had not been given to the likely consequences to vehicles. I find that there was negligence in the manner that the work was done by the Ministry's contractor.

In Penny v. Wimbledon Urban Council (1899) 2 Q.B. 72, a district council, acting under the Public Health Act 1875, section 150, employed a contractor to make up a highway which was used by the public. In carrying out the work the contractor negligently left on the road a heap of soil unlighted and protected. A person walking on the road after dark fell over the heap and was injured. An action was brought against the district council and the contractors to recover damages for the injuries sustained. It was held that as, from the nature of the work danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual, or collateral to his employment and the district council were liable.

A.L. Smith, L.J., at page 76 of the report, said this:

> "My brother Bruce laid down with great accuracy the law applicable in such a case ..... he had stated .....
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> 'The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor'".

Smith, L.J. added:

> "I agree with this entirely, but would add as an exception the case of mere casual or collateral acts of negligence, such as that given as an illustration during the argument — a workman employed on the work negligently leaving a pick-axe, or such like, in the road ..".

Later, at page 77, Vaughan Williams, L.J., said:

> "In cases like the present, where a statutory authority has power to do something to a road which involves stoping it, or to do something to it which will make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of it that which has to be done".

In Holliday v. National Telephone Co. (1895-9) A.E.R. Rep. 359, A.L. Smith, L.J., at page 362, said:

> "I am of the opinion that, according to the principle established in Hughes v. Percival (1883) 8 App. Cas. 443 and Black v. Christchurch Finance Co. (1894) A.C. 48, where a person is executing work upon a public highway, he cannot escape liability by employing an independent contractor because there is a duty cast upon him to see that the work upon the highway is so carried out as not to injure persons who are using the highway".

It seems to me, and I so hold, that the Ministry of Construction cannot in a situation such as this pass off the negligence of Tasman Weir as not being theirs. Weir's negligence was not a casual one. The nature of the work that the Ministry employed him to do was such that danger and injury were likely to result therefrom unless precautions were taken. It is clear that no precautions were taken and that the Ministry shirked its responsibility in this respect.

It follows that the second defendant is liable for the Ministry's negligence.

The second question for consideration is whether the fourth defendant, in its admitted role, had a duty of care to the plaintiffs and, if so, whether there was a breach of that duty. In its defence, the fourth defendant admits working in the area at the relevant time but denies negligence on its part. It asserts that it fulfilled its duty to properly warn users of the roadway to approach the area under repairs with due care. This assertion inferentially is an admission of the existence of a duty of care to the plaintiffs. The area of contention therefore is whether the fourth defendant has lived up to the obligation that was on it. The fourth defendant was not responsible for the raising of the manhole cover. However, it was engaged in carrying out repairs as an independent contractor in the area of the manhole-cover and saw it fit to divert traffic to suit its operations. It must have noticed the raised cover and thereby recognised the implications of ushering vehicles over it. In my judgment, utilizing the services of a lone flagman was an insufficient response to the obvious danger. The flagman was merely channelling vehicles into the lane without alerting the drivers to the peculiar danger ahead. This was negligence on the part of the fourth defendant.

Finally, there is no evidence of contributory negligence on the part of the plaintiff Campbell. His smooth progress along Hope Road was interrupted by the activities of the Ministry of Construction and the fourth defendant. He followed the limited instructions of the flagman and thereby suffered loss. He contributed nothing to his misfortune. Judgment is accordingly entered in favour of the plaintiffs against the second and fourth defendants for $46,570.00 plus interest at 6% from May 15, 1986 to December 16, 1992. Costs to the plaintiffs are to be agreed or taxed.