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IN THE COURT OF APPEAL

R.M. CIVIL APPEAL NO. 37/68

BEFORE: The Hon. Mr. Justice Henriques, President
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Fox, Actg.

CONSOLIDATED BAKERIES) & VICTOR WILLIAMS	Defendants/ Appellants
vs.	
PAULINE BELL (by her next friend Adeline Thompson)	Plaintiff/ Respondent

Mr. Norman Hill for the Defendants/Appellants
Mr. P.J. Patterson for the Plaintiff/ Respondent

4th, 5th and 31st July, 1968

ECCLESTON, J.A.,

In an action for negligence, the learned Resident Magistrate found that both plaintiff and second defendant were equally to blame and assessed 50% of the damages against both defendants. From that judgment, the defendants have appealed, and the plaintiff has cross-appealed the finding of contributory negligence.

The plaintiff, Pauline Bell, who at the time of the accident on the 20th January, 1966, was eight years of age, by her next friend brought action against the first defendant as owner and second defendant as driver of a motor car which she alleged struck and hit her down from behind, while she was standing in the water table with one foot resting on the kerb wall along Grants Pen Road, St. Andrew. She was injured and was hospitalised and incurred expense.

Among other injuries, she suffered a fracture on the right side of the skull, laceration over the right eye, abrasion of the left elbow, laceration of the right lung with fluid in the ride side of the chest and in right lung. Luther Green gave supporting evidence and stated that

when she fell, she dropped on the side of the kerb wall and not in the middle of the road.

The second defendant stated that he was driving at 20 m.p.h. There was a lot of traffic on the road with pedestrians on either side. On his right about 30 yards ahead was parked a cart. He was travelling about four feet from his left kerb and when about fifteen yards from the cart, he saw movements on his left side in front of him. He applied his brakes, and heard the screech of brakes. Between pressing and hearing screech he realised that a little girl had run across the road. It was a quite/ sudden movement, and she came in contact with the front of the car: the centre of the grill in between the two head lamps. As she was running across the road, she came into vision about ten inches above the bonnet after the impact. She was propelled up and on to the car and carried about five feet from the left kerb to the sidewalk. Constable Barnes arrived soon after and measured the drag marks of the rear wheel as 16 feet and front wheel as 6 feet, and stated the drag mark was three feet from the kerb on the left of the car. The width of the road was 18 feet 6 inches and it was a straight road.

A witness, Winston Pessoa, gave evidence of seeing the girl run across the road and crash with the centre of the front of the car.

The learned Resident Magistrate found -

(1) that the dragmarks from the left tyres of the car were a distance of three feet from the northern kerb wall;

(2) that the plaintiff did attempt to run across the road and was struck while so doing;

(3) that the defendant's brakes were defective and had they been holding efficiently, there was a strong probability that he would have stopped before reaching up to where the child was;

(4) according to the defendant's own admissions, he was not keeping a proper lookout. He could not say positively that he saw the child run across the road. He said he saw a blur to his left when he was about 20 feet from the child. He went on to say that " the road was very busy and I was not noticing pedestrians on either side."

On fact (1) above clearly the plaintiff's story that she was standing in the water table with one foot on the kerb wall was untrue. And this evidence was given by the defendant's witness Constable Barnes who was the only witness on whom much reliance could be placed. In any event this measurement was never challenged by the plaintiff.

On fact (2) clearly the plaintiff was the author of her own injuries.

On facts (3) and (4) the defendant contributed by his own negligence to these injuries.

I apportioned liability on a basis of 50% to either party, awarded plaintiff special damages of £37. 16/- and general damages of £122. 4/- and entered judgment accordingly for £80 with costs.

For the defendants/appellants, counsel has taken two grounds of appeal:

(1) The learned Resident Magistrate erred in finding that the second defendant's car brakes were defective and that had they been holding efficiently there was a strong probability that he would have stopped before reaching the child.

(2) The finding that the second defendant by his own admissions was not keeping proper lookout is unreasonable in all the circumstances.

On ground (1), Mr. Hill's submission is that where in civil proceedings you allege and attempt to prove what amounts to a criminal offence, the onus of establishing same or the constituents of this type of offence is a heavy one and lays on the plaintiff. He referred to People of State of New York v. Heirs of late John Phillips (1939) 3 All E.R. 952, where, at p.955D, Lord Atkin said:

" The issue in this case was substantially the same as in the criminal proceedings in New York. The evidence had, of course, to be given afresh. xxx xxx xxx

The trial judge, Mercier, J., considered afresh the whole of the evidence. The only complaint made of his judgment in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill-founded. The proposition of the judge has been laid down

...../time and

> time and again in the courts of this country: and it appears to be just and in strict accordance with the law."

He further submitted that the only evidence before the court concerning brakes was given by the second defendant in cross-examination, viz., "car had disc brakes. I believe best type of brakes. 1964 model. Car in good condition. I stop in less than 20 feet. I could stop in 20 feet. I did stop in 16 feet" which evidence was unchallenged and supported the view that the brakes were in good working order as at a speed of 20 m.p.h., the car was stopped within its own length, hence on the totality of the evidence and considering the burden and on who it lay, for the court to come to the conclusion that the brakes were defective was unreasonable and the judge misdirected himself.

It is the submission of Mr. Patterson for the respondent, that Lord Atkin was saying no more than that in situations that involve allegations of fraud, the usual rule as to the onus of proof does apply, and the case of the People of State of New York v. Heirs of late John Phillips is totally irrelevant to the circumstances of the instant case, and that the proof need only be on the balance of probabilities as in civil cases. He further submitted that one drag mark does not merge into the other, hence the judge drew the inference that the brakes were not holding evenly. Further, the drag marks do not assist the court as to the point at which the accident occurred.

Turning to page 11 of the record, in cross-examination, Constable Barnes said:

> "Pressure on pedal stop wheels from turning. Force of car may cause it to continue and leave drag marks . The drag marks I saw would be created by pressure on brakes."

There is then the following -

> "Mr Dayes objects - witness not an expert on his own evidence. Mr. Jones replies: Question disallowed."

The question was not recorded so we have not been afforded an opportunity to know what was being solicited. However, it would seem that although the question was disallowed and this/no answer given, the plaintiff's solicitor, at page 13 in his address to the court, theorised without any evidence in support when he said:

> "drag marks - difference of 10 feet - brakes not holding properly, that could have contributed to accident."

This may have accounted for the learned Resident Magistrate's finding

that the brakes were defective and were not holding efficiently, for in finding of fact at p.14, No. 3, he stated - "Defendant's brakes were defective see length of drag mark 16 feet 6 inches."

Mr. Hill directed the attention of the court to the Australian case of Nominal Deft. vs. Haslbauer (1967) Vol. 41 A.L.J.R. 1 wherein the principles of the law as to the consequences in a trial of an inference of negligence being capable of being drawn from the fact of an occurrence as evidenced by a plaintiff in a case in chief were referred to, and the application of these principles was discussed. The facts of that case were however different to the instant case and afford little help.

On the second ground of appeal against the finding that the second defendant by his own admissions was not keeping proper lookout, Mr. Hill has submitted that the facts do not justify the conslusion that he was not keeping a proper lookout. On such a finding, he says, the evidence that he saw a movement to his left which was the stimulus for applying his brakes, which movement turned out to be the plaintiff, and that he stopped within a reasonable distance, showed that he acted reasonably in taking steps to avoid her, for he could not be expected to observe each pedestrian individually. Moreover, the situation was a dilemma for any driver even without persons on the road as the girl ran quietly across.

It is the contention of Mr. Patterson that the evidence of the second defendant at page 7 of the record does substantiate the finding of the Resident Magistrate, and he submits that it is not whether defendant acted properly and with dispatch when he first detected the child, but whether he detected the child when he should have if he was keeping a proper lookout; for, had he been he would have detected the persence of the child on the roadway before he did, and by prior application of his brakes, averted an accident.

I will now refer to such portions of the evidence as may assist in resolving the conflicting contentions. On page 7, the second defendant said :

> "Speed about 20 m.p.h. as lot of traffic on road. Pedestrians on either side. On right I saw a cart parked about 30 yards away. I about 4 feet from left kerb. When about 15 yards from cart,
>
> ..../I saw

> I saw movements on my left immediately in front of me. I applied brakes and heard screech of brakes. Between pressing and screeching I realised that a little girl had run across the road. Quite a sudden movement, the centre of grill hit her. She was running across road and came into vision about 10 inches above bonnet at impact. My vehicle left drag marks as measured by police. Car 20 feet long. I was about 20 feet from her when I saw blur to my left."

In cross-examination, he said:

> "Car has disc brakes, best type of brakes known to me. Car 1964 model in good condition. I stop in less than 20 feet. I did stop in 16 feet. Road very busy so I not noticing pedestrians on either side. Not true I never saw child."

And Constable Barnes at p. 11, said he measured the drag marks, viz., rear wheel 16 feet; front wheel 6 feet; left drag mark to northern kerb 3 feet; road 18 feet 6 inches wide and asphalted. In cross-examination, he said pressure on the pedal stops wheels from turning - force of car may cause it to continue and leave drag marks.

In Bingham's Motor Claims Cases, 5th Edition, p.41, under the heading and sub-heading Braking Tests - The Approximate Minimum Stopping Distnaces, for four wheel brakes, pneumatic tyres, it is stated that at 20 m.p.h. when brakes are applied on a dry asphalted road, a motor car is expected to stop in 19 feet. If, as in the instant case, the drag mark is 16 feet long, can one be persuaded on the evidence into a finding as recorded by the learned Resident Magistrate at No. 3? The learned Resident Magistrate has in No. 4 stated that the defendant said he saw a blur to his left when he was 20 feet from the child. In his evidence, the defendant said that on seeing the blur, he applied his brakes. The Police measured the drag marksof the rear wheel as 16 feet.

In Brophy v. Shaw, The Times June 25,1965 (C.A.), where two men who were about to be apprehended by the Police ran along a pavement past a bus which was just pulling away from a stop and shortly afterwards darted out into the carriageway running across at an angle of 45 degrees. The defendant was driving at about 30 m.p.h. He failed to see the men crossing from his left, even though his headlights were on until they got a substantial way across the road. They ran right across in front of his

...../car and

car and were hit by it. It was held that defendant was not liable. It had been alleged that he should have seen the men running along the pavement, but his duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist. It was going too far to say he should have observed the negligent and irresponsible action of the two men earlier than he did.

In the instant case, the driver going at 20 m.p.h. saw the blur to his left, applied brakes, and immediately stopped in 16 feet; however, he collided with an eight year old girl who had run across his path. On this evidence, is the finding of the Resident Magistrate at No. 4 not open to question?

In Benmax v. Austin Motor Co. Ltd. (1955) 1 All E.R. 326, Viscount Simonds at p.327G, had this to say:

> "R.S.C. Ord 58, r.4 prescribes that the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made. This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it do to so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence."

In the instant case, the facts concerning the operation of the motor car are all from the defence and are unchallenged, so the finding does not turn on the credibility of witnesses. The question for this couft is, has the Resident Magistrate found the facts correctly in Nos. 3 and 4 and drawn the proper inferences from those facts, when he said "On facts 3 and 4, the defendant contributed by his own negligence to these injuries?" In my opinion, he did not.

The plaintiff/respondent filed a cross-appeal against the finding of contributory negligence on her part, and the submissions

...../were based

were based on whether the judge was correct in rejecting the evidence of the plaintiff that the accident happened as she stood in the water table with her foot resting on the kerb as against the acceptance of the defendant's evidence that she ran across the road in the path of the moving vehicle.

In No. 2 of his reasons, the Resident Magistrate found that the plaintiff was the author of her own injuries, and there is evidence on which he could so find.

I would allow the appeal and set aside the judgment in the court below. I would enter judgment for the defendants with costs. I would dismiss the cross-appeal of the plaintiff/respondent: the defendant/appellant to have the costs of the appeal fixed at £15.

HENRIQUES, P. : I agree.

FOX, J.A. : I also agree.

In view of the distance of the drag marks from the kerb, the magistrate really had no alternative but to accept the evidence of the driver of the car. This evidence described a dilemma situation precipitated by a child running suddenly across a busy road in front of a car travelling at about 20 miles per hour at a time when the car was very close to the child. It is incapable of sustaining a finding on a "blance of probability" that the brakes were defective or that the driver was not keeping a proper look out. Consequently, there is no real necessity to answer the interesting question posed by the rival submissions of counsel as to the standard of proof required in coming to a conclusion in a civil action on facts which may constitute a crime. Out of deference to these submissions, however, it may be helpful to point out that Lord Atkin's statement in The People of the State of New York v. The Heirs of Phillips (1939) 3 All E.R. 952 that the correct standard was that which was appropriate to criminal proceedings could surely not have been intended to apply to all civil cases in which criminal conduct was alleged. In Hornal v. Neuberger Products Ltd. (1957) 1 Q.B. 247, the view that the balance of probability standard was the correct one was upheld on the ground

that it was most strongly supported by authority. This case is regarded as having settled ~~settl~~ the English law for the time being: Cross on Evidence, Third Edition, page 98. For those courts subject to the authority of the Privy Council, the limits of Lord Atkin's statement must be left to be defined in a more appropriate case than this. It is sufficient to say that in the judgment of Hodgson, L.J., in Hornal's case a clear answer to the question which has been raised up in the submissions before us is given when that learned judge said at page 260:

> "In the ordinary case arising from a collision between two motor-cars involving charges of negligence, I have never heard of a judge applying the criminal standard of proof on the ground that his judgment might involve the finding of one of the parties guilty of a criminal offence."

HENRIQUES, P. : The appeal is allowed; judgment of the court below set aside and judgment entered for the defendant with costs: the cross-appeal of the plaintiff/respondent be dismissed and the appellant to have the costs of the appeal fixed at £15.