J A M A I C A

IN THE COURT OF APPEAL

R.M. COURT CIVIL APPEAL NO. 27/70

BEFORE: The Hon. Mr. Justice Shelley (Presiding)
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Smith

B E T W E E N FLORENCE HEADLAM - Plaintiff/Appellant

A N D SUNRIDGE FARMS LIMITED
and GEORGE POTTINGER - Defendants/Appellants.

Mr. C. Rattray, Q.C., for the Plaintiff/Appellant

Mr. R. Williams for the Defendants/Appellants.

23rd OCTOBER, 1970

SHELLEY, J.A.,

This is an appeal from a judgment of Mrs. E.B. Allen, a Resident Magistrate for the parish of St. Catherine in which she awarded damages to the plaintiff to the extent of two-thirds of her claim, having found the plaintiff's driver one-third to blame for the accident. The claim was one against the defendants for the sum of £150 damages for negligence, for that on the 17th of October, 1968 the second-named defendant, the servant and/or agent of the first-named defendant, so negligently drove, managed and/or operated motor truck licensed No.E-4519, which was at the material time owned by the first-named defendant, along the Bog Walk Road in the parish of St. Catherine that it caused a collision between the plaintiff's motor vehicle licensed No. AM-244 and itself, whereby the plaintiff suffered loss and incurred expenses. Details of the special damages were of course given.

The defences raised at the trial were a denial of negligence and in the alternative contributory negligence.

I go straight to the facts found by the learned Resident

Magistrate:

"(a) that on the 17th October, 1968 at 7.30 p.m. the plaintiff's van, driven by Irving Hutchinson, drove along Church Road in the parish of St. Catherine in the direction of Linstead towards Bog Walk at 30 miles per hour;

(b) that at the same time and date the truck owned by Sunridge Farms Limited and driven by George Pottinger drove forward into Church Road and turned in the Linstead direction and reversed in order to park on its right side of the road beside a shop on that side;

(c) that while so reversing it displayed the right side to oncoming traffic from the Linstead direction and formed an obstruction in the path of such traffic;

(d) that when it engaged in reversing the driver of the truck paid no attention to traffic which may be approaching from the Linstead direction;

(e) that the driver of the van saw the truck reversing on his right side when it was about three feet from his steering wheel (his van is a right-hand drive) and swung to his left;

(f) that the truck and the van collided on the van's left side of the road near to the edge of the asphalt;

(g) that the collision damaged the last three up-rights of the wooden body of the truck;

(h) that the van got out of control and ran on the soft shoulder to the piazza of the shop and turned on its right side 37 feet 7 inches away from the point of impact;

(i) that the van was damaged to its right front above the door of the driver's side and all along the side;

(j) that bottles of syrup, shandy and empty bottles were broken to the value of £65 or $130;

(k) that the defendant's driver was negligent in -

(i) presenting an unlighted side, an obstruction in the path of oncoming traffic, at night time;

(ii) at night time reversing on the incorrect side of the road thus providing an unexpected hazard to such oncoming traffic;

(iii) failing to keep a proper or any look-out ahead of him to be able to warn oncoming traffic of his presence;

(iv) failing to stop immediately he became aware that the van was approaching;

(l) that the driver of the van was negligent in -

(i) failing to keep a proper look-out;

(ii) failing to stop when he became aware another vehicle was on the road which was a threat to his safety;

(m) I find both drivers negligent and I assess the driver of the van's contribution to be one-third and the driver of the truck's contribution to be two-thirds. "

I should also mention an inference drawn by the learned Resident Magistrate -

" I drew the inference", she said, "that the truck showed its right side to the oncoming van; that the driver of the van would not immediately see the lights of the truck to alert him to an obstruction in his path, and the fact that the truck was reversing proved an additional hazard, for even when the driver recognized the amber lights of the vehicle he would hardly be prepared for a reversing vehicle but might more reasonably assume that it is a vehicle going forward to get out of his path, and which would induce him to keep as close left as possible while he was moving."

That is really part of the reasoning upon which the findings are based. Another section of the reasoning I will quote says -

" However, on the plaintiff's side the driver of the van had a straight road for four chains before reaching the intersection. Even if the driver of the truck had advanced some of this distance before starting to reverse he ought to have enough warning of the presence of an obstruction in his path from the lights of his own van and if he did not see the truck before he says he did

then he could not have been paying sufficient attention to keep a proper look-out of the road ahead."

I do not propose to go into the details of theevidence upon which these findings are based. I am content to say for my part that the findings of fact and the inferences drawn by the learned Resident Magistrate are unimpeachable.

Mr. Rattray for the plaintiff/appellant has not challenged the findings of fact; what Mr. Rattray has really said is that, put very briefly, upon these findings of fact the learned Resident Magistrate ought not to have found the plaintiff's driver negligent; alternatively, if he was negligent the apportionment of the blame was too great, so far as he was concerned. He contended that driving on his correct hand, as the plaintiff's driver was doing, in a proper manner, faced with the obstruction by the truck, contributory negligence could only be established if it was shown that at the time the obstruction was created the plaintiff was at a point on the road where he could reasonably have seen the obstruction and at a distance where he could reasonably have appreciated what was happening, that is that the truck was reversing across the roadway, and that he could reasonably have taken steps at that stage to avoid the accident. Mr. Rattray contended that the finding of contributory negligence on the part of the plaintiff's driver was based on speculation. He submitted that if the plaintiff's driver were at all to blame, the finding of 33 1/3 per cent liability was unreasonable. He cited to us Jennings vs. Norman Collison (Contractors) Limited (1970) 1 A.E.R. 1121, and Brown and another vs. Thompson (1968) 2 A.E.R. 708, as authority for the principle that unless there is something really seriously wrong or some mistake appears in the apportionment then the Court of Appeal ought not to interfere. So Mr. Rattray relies very heavily, as he says, on the fact that there was an absence of evidence of contributory negligence.

Mr. Williams, in reply to Mr. Rattray's contention, places great emphasis upon the statement of the plaintiff's driver that he first saw the truck when the nearest part of it to his vehicle was three feet to the right; if that was what happened, and there is no evidence to the contrary, indeed the learned Resident Magistrate so found, then the

plaintiff's driver must have failed to keep a proper look-out and was therefore guilty of contributory negligence.

On the cross appeal Mr. Williams contends that the learned Resident Magistrate's inference and/or finding of fact that the truck was reversing at an acute angle thereby presenting an unlighted side or obstruction to the plaintiff's driver, was unreasonable or unsupportable on the evidence in the case, and together with that he argued that the learned Resident Magistrate ought to have held on the facts that the second defendant was in no way negligent; if negligent, then such negligence neither caused nor contributed to the accident, and that the plaintiff's driver was solely negligent, and that it was his failure to keep a proper look-out or his failure to slow down or stop which caused the accident.

Well, I have already said in my view the learned Resident Magistrate's findings of fact and the inferences based on the evidence before her were unimpeachable. I need hardly say more.

The alternative ground is that if the second defendant was negligent the negligence of the plaintiff's driver was far more serious and the learned Resident Magistrare should therefore have found that the plaintiff's driver was far more negligent than the second defendant/appellant and should have apportioned liability accordingly. This is where I must confess I find some difficulty. Both gentlemen have conceded the difficulty that one runs up against when it comes to interfering with apportionment of blame. Mr. Williams on the one hand urges us to reverse the apportionment and make the plaintiff two-thirds negligent and the defendant one-third negligent. He says that the facts fall within the authorities in that the apportionment was seriously wrong because the major causative act of negligence which resulted in the accident was the failure of the plaintiff's driver to keep a proper look-out. He says it is the breach of that duty that was responsible for the accident, and in support of that he emphasises that when the truck started to reverse on this road, upon the evidence, the van driven by the plaintiff's driver had not yet come into view on this straight four chains, therefore he contended that allowing for the length of the truck and for some movement towards Linstead, the van

driver must have had some three and three-quarter chains in which to take note of what was happening ahead of him and to take action to avoid an accident. He submits that it is almost incredible that the van driver should not have seen the truck or its lights, which the evidence shows the truck had on, until it was three feet from the truck. He said there were several things the driver of the van could have done - he could have slowed down, he might very well have stopped, or he may have passed on the other side, had he kept his proper look-out and appreciated or seen what was happening.

Mr. Rattray on that point shows that what the learned Resident Magistrate found - although she did reject the suggestion that the truck came out backways from the side road - was that the truck presented an unlighted right side to oncoming traffic from Linstead, and he submitted that what the plaintiff's driver did was to keep as close to his left as possible and having done that he could do no more. His point is that it would have taken some time for the plaintiff's driver not only to see but to appreciate what the true position was, that is that this truck was reversing across his path rather than going ahead, and that the driver of the van did all that he could do in the circumstances, and, therefore, he submitted, that the clear cause of the accident was the manner in which the driver of the truck reversed, presenting an obstruction to the plaintiff's driver in the way the Resident Magistrate found, and therefore, he says, liability rests squarely with the defendant's truck driver.

Looking carefully at the findings of the learned Resident Magistrate I find myself in this position, where I would probably say, if I were trying this case I should not have apportioned the liability in the manner in which the learned Resident Magistrate did; I would probably have attached less responsibility to the plaintiff's driver, but the authorities clearly indicate that that would not be good reason for interfering with the apportionment of the learned Resident Magistrate, and in the circumstances it seems to me that I would be going contrary to the well established authorities if I attempted to interfere.

To sum up briefly, I think the learned Resident Magistrate's finding that both parties were to blame, upon the evidence before her,

was reasonable. I think also that she was correct in attaching greater blame to the defendant's driver than to the plaintiff's. Although I should myself have attached less blame to the plaintiff's driver I am not prepared to interfere. I could very well use the words of Warrington, L.J., in The Karamea (1921) P.76 at p. 83, 84 -

> " It may well be, and probably is the case, that if the Court arrives at the same conclusion, both on the facts and in law, it would not interfere merely because the learned judge in his discretion has given proportions which this Court thinks it would not have given."

I would therefore dismiss both the appeal and the cross appeal.

ECCLESTON, J.A.,

I agree.

SMITH, J.A.,

I also agree.

SHELLEY, J.A.,

The appeals are dismissed; no order as to costs.