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SUIT NO. C.L.H.219/87

PLAINTIFF

DEFENDANT

Revised
Civil Procedure

Bingham J.

In paragraph 6 of the Amended Statement of Claim the plaintiff alleged that "the overturn of the said vehicle was caused by the negligence of the defendant its servant and or agent." The particulars of negligence further alleged that the servant or agent of the defendant company was negligent in:-

- "(a) Detailing the plaintiff to drive a defective vehicle.
- (b) Failing to effect repairs on the said vehicle despite several reports of its defectiveness.
- (c) Failing to regard sufficiently the safety of the plaintiff.
- (d) Res Ipsa Loquitur."

The defendant in its defence apart from a denial of negligence on their part at paragraph 5 alleged that:-

"the plaintiff was the author of his own misfortune or, alternatively, contributed thereto by his own negligence in the conduct and management of motor vehicle CC 309C."

The relevant particulars of negligence further alleged at (2) that:-

- "(2) Failing to have any or any adequate regard for his own safety."

Arising from the pleadings the two main issues which emerged were:-

(1) Liability on the basis of a finding of negligence and/or contributory negligence and given such a finding the question of damages.

The plea of "Res Ipsa Loquitur" alleged in (d) of the particulars in the Statement of Claim which gives rise to a presumption of negligence on the part of the servants or agents of the defendant company is on the face of it clearly inconsistent with (a) - (c) of the particulars alleged in the statement of claim (supra) as if any of these allegations are substantiated on the facts there can be no basis for such a contention as stated to support such a pleading.

The plea presumes an event or series of events arising suddenly and unexpectedly in circumstances which leads to an inference that some person or person under the Management or control of the defendant were negligent. A classic text book example given is Scott v London and Saint Catherine Docks Co. [1865] 3. H&C596. Where the facts were that six bags of sugar fell from the defendants warehouse on the plaintiff injuring him while he was lawfully walking pass the warehouse. The defendants who called no evidence at the trial were found to be negligent. In giving judgment for the plaintiff Erle C.J. in laying down the principle which now forms the basis of the doctrine to be applied said:-

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from lack of care."

Given the pleadings at paragraphs (a - c) of the particulars it is here being alleged that the defendants servants had prior knowledge of the defective condition of the vehicle but nevertheless persisted in its use with serious consequences for the plaintiff. Such a pleading if established by the evidence although capable of establishing the claim in negligence could not give rise to the application of this doctrine. On the pleadings therefore the plea of Res Ipsa Loquitur is unsustainable.

This state of affairs ought to have resulted in learned counsel for the plaintiff being put to his election or defence counsel moving to strike out the pleading on the ground of what was a clear inconsistency which offended

the rules as to pleadings. No objection was however, taken by defence counsel.

The Plaintiff's case

In his account the plaintiff related driving the defendant's Land Rover CC 309C in the Winchester Area of the Eastern Banana Estates in Saint Thomas. While driving the vehicle there was "a sudden outburst of fire and smoke coming from the dashboard where there were a lot of loose wires." He tried to see if he could stop the vehicle, but although he was travelling at a speed which he estimated to be about 15 miles per hour and going up a gradient, he was unable to do so as he was going around a curve. On reaching a point where he could stop the vehicle he realised that the vehicle had mounted a bank. He then lost control and the vehicle overturned. In the act of overturning his drivers door which was unable to be locked properly opened and he fell out of his vehicle which rolled over pinning him to the ground. His assistant one Sloley Wright who was also in the vehicle at the time of the incident sought and obtained the assistance of some passers-by and they were able to lift the vehicle off the plaintiff thereby allowing him to be released. The plaintiff was taken in a passing vehicle to the Princess Margaret Hospital at Morant Bay where he was admitted. He was later transferred to the Medical Associates Hospital. He spent eight weeks in this institution. After his discharge he was confined at his home recuperating. He received further treatment at the hospital of the University of the West Indies.

While he was a patient at Medical Associates the plaintiff received a letter of dismissal. Following this he has not worked with the defendant company. He received no salary following the incident on 14th February, although his Medical expenses were paid by his employers.

The plaintiff was eventually discharged from hospital on 11th April 1987. Following this he was laid up at home until 7th December at which time he was now able to walk independently but with a limp. He was, however, able to secure employment in October 1987 at the University of the West Indies. He is now employed in a similar capacity to the job which he had at the defendant company.

Although paragraph 7 of the Statement of Claim sought to allege that the plaintiff was wrongfully dismissed that head of the claim was not pursued during the hearing and nothing further need to be said in that regard.

By way of supporting the Particulars of Negligence alleged in (a) - (c) of the Statement of Claim the plaintiff testified under cross examination that he had made several reports to Mr. Michael Thomas the Operations Manager employed to the defendant company at the time of the incident about the Land Rover malfunctioning. These reports related firstly to mechanical problems and later included electrical problems. The plaintiff said that these complaints were noted in a logbook. According to the plaintiff there was also a problem of the fender getting hot while he drove the vehicle at nights and the lights brighting and dimming. This evidence as to the condition of the vehicle was an essential part of the plaintiff's claim. It was strange therefore that it did not arise until the plaintiff was being cross examined. This fact was even more highlighted as when Mr. Thomas testified he denied any such reports being made to him. As he is no longer employed to the plaintiff company, he ought not to be regarded as a witness who has an interest to serve.

Dr. Gary Geddes Dundas an Orthopaedic Surgeon also gave evidence supporting the injuries suffered by the plaintiff. His account was for the most part unchallenged. He first saw the plaintiff on 15th February 1987 at The Medical Associates Hospital. During his examination he got a history that the plaintiff has been involved in a motor vehicle accident about a day and a half previously. The account which he received from the plaintiff was that "his vehicle had caught fire went over an embankment and rolled over onto him (plaintiff) as he tried to jump clear. He was pinned under the vehicle and released by by-standers." His main area of complaint related to his pelvis, low back and right lower extremity.

An examination of the plaintiff revealed the following:-

"This was a well built man with a mild elevation of his B.P. 130/100. This was abnormal. He had tenderness under the right rib cage and more acute tenderness in the pubic area. He was also quite tender in the region of the iliac bone. This discomfort was in the area of his buttock. There was reduction in his ability to detect touch sensation in the right lower extremity. There was no distinct tenderness in the upper spine. X Rays revealed that he had a fracture through the left iliac bone with mal displacement of the fracture. There was also a shift (asymmetry) of the pubic bone. (The bones were shifted out of alignment.) The X Rays of the spine indicated a lateral curvature of the spine. Examination over a period ending on 10th April 1992 confirmed that this was a pre-existing condition." (Emphasis Supplied)

The plaintiff following his discharge from hospital spent several months recuperating. When seen by Dr. Dundas in December 1987 he was now walking independently although with a limp. Dr. Dundas opined that the plaintiff's injuries except for the curvature of the spine were all due to the motor vehicle accident. The doctor was also of the opinion that the plaintiff will be permanently disabled. He assessed this disability at 8 percent of the whole person. The plaintiff will be unable to run, lift weights, sit for extended periods without discomfort, or to engage fully in contact sports.

The Defence's Account

The evidence adduced by the defence went towards establishing affirmatively that there was no fire occurring in the vehicle in question as contended by the plaintiff which resulted in the vehicle getting out of control and overturning injuring him. Having regards to the evidence of both the defendant's mechanical supervisor Roland Wright and the former Operations Manager Michael Thomas, the latter who examined the Land Rover shortly after the accident and whose account rules out any such condition existing in the vehicle. Mr. Thomas testified that upon hearing of the incident on the night in question he travelled to the scene and examined the vehicle. He observed that the Land Rover was extensively damaged but found no evidence to suggest that it had been on fire. This he concluded as he saw no exposed wires, charred wires or experienced any smell that burning had taken place.

The witness Roland Wright also testified that he had received no reports of any electrical problems being experienced in connection with that vehicle prior to the incident on 14th February 1987. He also mentioned that the vehicle in question has since the accident been repaired and at the time of the hearing was giving satisfactory service, being operated between the company's offices and the Clarendon Estates area. He also testified that although the company's drivers do come to him from time to time with complaints about vehicles malfunctioning which complaints are followed up by checking and where necessary servicing the vehicle, no such reports as to an electrical fault was received in relation to the Land Rover in question.

At the end of the day, given the account that the vehicle overturned injuring the plaintiff, a matter which is not in issue, the determination of

this claim focussed on the question as to which of the accounts was the more credible. Apart from the bare ipse dixit of the plaintiff as to the circumstances of the vehicle overturning there was no supporting evidence to establish on a balance of probabilities that any fire occurred in the vehicle.

It was this account which the plaintiff has advanced as to the cause of the vehicle getting out of control and overturning. This account when examined and assessed is in my opinion highly improbable and raises grave doubts as to its credibility when put to the test. I find it strange that driving at fifteen miles per hour up a slight gradient the plaintiff would have encountered the least difficulty in stopping the vehicle and alighting from it had a fire started in the area of the dashboard as he would have me believe. Although on the evidence of Michael Thomas the Operations Manager, the plaintiff was requested to furnish a written statement as to how the accident occurred, he had up to the time of the hearing failed to do so. The plaintiff's evidence of complaints about the condition of the vehicle being recorded in log books in the absence of any attempt being made to produce such evidence throws further doubt on his veracity as to this story being true. When to all this is added the failure to elicit the testimony of Soley Wright, the security guard who the plaintiff testified to being in the vehicle at the time of the incident and who on the evidence is still available to testify one is left to question just how reliable is the plaintiff's account?

On the defence's part Mr. Michael Thomas the former Operations Manager went to the scene of the accident that same night following a report which he received. Based upon this report he checked for evidence of a fire and found none. Both Mr. Thomas and Mr. Roland Wright the Mechanical Supervisor struck me as truthful witnesses who went about their respective duties in a responsible manner. It was Mr. Thomas who was responsible for recruiting the plaintiff and who recommended him for further advancement to the position of a supervisor guard. When the plaintiff proved to be no longer displaying the level of competence expected of him, he was the same person who following the accident and after completing his investigation recommended his dismissal.

Mr. Campbell has submitted that the defendant ought to have adduced some independent evidence as to the condition of the vehicle towards negating the

allegation of a fire occurring in the area of the dashboard of the Land Rover. He needs to be reminded that there is no such onus on the defendant to establish this fact. It is the plaintiff, who alleged that there was a fire occurring in vehicle and who has that burden placed upon him to prove that which he asserts. Had the defendant sought to adduce such evidence, the argument could still be advanced, if the evidence of the expert favoured the defence, that such a witness was being recompensed by the defendant.

Conclusions and Findings:-

Although the plaintiff in his account referred to "a sudden outburst of fire coming from the area of the dashboard," and his counsel in his opening of the case stated that "while he (plaintiff) was trying to put out the fire while the vehicle was being driven, the vehicle overturned," the plaintiff's evidence although mentioning a fire occurring in the vehicle was devoid of any attempt by him in putting out a fire. On the evidence it is not being disputed that the injuries suffered by the plaintiff, save for the injury to his spine, were the result of the Land Rover overturning. When the evidence is examined and assessed I hold that this fact was due entirely to the plaintiff's own negligence in not taking such reasonable care in operating the said vehicle. I find that the plaintiff's account of there being a fire in the area of the dashboard of the vehicle to be a total concoction on his part and an account given no doubt to cover up what was clearly gross negligence on his part in operating the vehicle on the night in question.

I accepted the account of the defence witnesses Roland Wright and Michael Thomas as truthful and credible and I regarded them as witnesses whose testimony I can rely on. In the light of this finding the issue of liability is determined in favour of the defendant. The issue of damages accordingly does not fall for my consideration and judgment is entered for the defendant with costs to be agreed or taxed.

*Case referred to
Scott v London and Saint Catherine Docks (1865) 3 H & C 576*