IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43/71

BEFORE:: THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE MELVILLE J.A.
THE HON. MR. JUSTICE CARBERRY J.A.

BETWEEN HORACE JONES - DEFENDANT/APPELLANT

AND LETSIE WILSON - PLAINTIFF/RESPONDENT
(Administratrix Estate
Hubert Smith, Deceased)

Mr. W.B. Frankson and Miss P. Frankson
for Defendant/Appellant

Mr. E.C.L. Parkinson Q.C., for Plaintiff/Repondent

February 22, 23, 24, March 3, 1978.

CARBERRY J.A.

As long ago as the 5th August, 1967, between the hours of about 5.00 and 5.30 a.m., a collision took place between a taxi-cab driven by one Altora Wheby, the servant and agent of the Defendant/Appellant, and a bicycle ridden by the deceased Hubert Smith, son of the Plaintiff Letsie Wilson, who brought this action as Administratrix of her son's estate seeking damages under the provisions of the Fatal Accident's Law, Cap. 214 and the Law Reform (Miscellaneous Provisions) Law, (Law 20 of 1955).

The collision took place on the Bay Farm Road, St. Andrew and it is clear that the bicycle and the taxi were proceeding in the same direction, and that the cycle was struck from behind. Only two people appear to have been present, the deceased cyclist, and the driver of the taxi: the former was unable to give evidence while the latter was not called as a witness by the Defence, though he was a party and a Default Judgment had at one time been obtained against both him and the Defendant/Appellant, the proprietor of the taxi-cab.

In the event therefore the trial court did not have the assistance of any eye-witness to this accident, the Defence having elected to stand on their submissions and to call no evidence.

For the Defendants their counsel, Mr. Frankson, made at the trial of this action before Mr. Justice Zacca in October of 1971 two submissions: (a) that there was no evidence that the death of the deceased Hubert Smith was "caused by wrongful act, neglect or default" of the taxi-cab driver; and (b) that there was no evidence that the taxi-cab driver had been guilty of any wrongful act, neglect or default such as would have entitled the deceased (the party injured) to have maintained an action and recover damages in respect thereof, against him or his employer the Defendant/Appellant Horace Jones, the proprietor of the taxi-cab. These two submissions are the substantive questions raised by the Defendant/Appellant on this appeal.

A Defendant is of course entitled to submit that there is no case for him to answer, and is not obliged to provide evidence the effect of which may be to strengthen the Plaintiff's case against him. The Defendant is entitled to "rest on his submissions" but this course is not without risk. Those risks may be illustrated by the following passage taken from The Law of Torts by J.G. Fleming, 3rd ed. Chap. 12 entitled "Proof" at page 282, "Cause unknown to Plaintiff" which reads this:-

> "Yet courts are not insensitive to the litigants' comparative ability to shed light on what happened, and in various ways exert pressure to enable a plaintiff to get at facts known only to his adversary. Apart from widespread use of discovery and other pre-trial procedures, it is established practice, in cases where the facts are peculiarly within the defendants knowledge, to allow rather slight evidence of negligence to support a verdict and demand that the jury's attention be directed to the defendant's refusal to testify....."

The learned author then embarks on a discussion of the maxim res ipsa loquitur, and its companions; what the Court has in such situations to decide is whether there is on such facts as have been elucidated sufficient to justify a prima facie finding against the Defendant; if the Defendant "stands upon his submission" he runs the risk that the Court may hold him negligent even though the case be relatively weak. It is necessary in the instant case to examine such facts as were produced with a view to seeing whether they failed altogether to provide a case which the Defendant could be called upon to answer, or whether they provided sufficient on which, in the absence of any counter evidence, the Defendant could be held liable.

As to the first submission it should be said at once that the Plaintiff's difficulties were of her own making. The point made was that no evidence was led to show what injuries if any were received by the deceased cyclist in the collision, and to establish that he died of those injuries. This neglect was both unnecessary and well nigh unpardonable. No explanation has been vouchsafed at any stage as to why it was not possible to call medical evidence. The deceased cyclist was taken to the Kingston Public Hospital shortly after the accident, was admitted, was seen by the Plaintiff and the investigating police officer and died in the hospital later on that day at about 7.00 p.m. or twelve hours after the accident. The failure to call such evidence opened the door to much ingenious speculation as to whether or not there might have been some quite independent cause of death unrelated to the accident, such as a heart attack or drug allergy or the like.

The Learned Trial Judge rejected this submission, finding that there was just sufficient in the evidence to draw the inference that a death following relatively shortly after such a traffic accident or collision was

due to the collision. There was the mute evidence of the bicycle frame, pointing to the severity of the contact, then there was the fact that the windscreen or windshield of the taxi-cab had been smashed out, (from which the judge drew the inference that the deceased's body had been thrown in the air and struck thereby), there was also on the road a pool of blood, indicating where the deceased's body came to rest after the accident, and suggesting some injury. The pre-accident evidence, scant as it was, indicated a man running with the help of his mother a small restaurant, doing his own purchases in the market, making his own collections from customers, and riding on his bicycle in the cool of the morning. We cannot say that there was not sufficient evidence, scant as it was, to support the Learned Trial Judge's conclusion that the death of the deceased was due to the collision.

The substantial point remaining for decision was whether the collision was shown to be due to the act, neglect or default of the defendant taxi-cab driver, and whether his acts, neglect or default would have been actionable by the Deceased had he lived: in short was there evidence of negligence?

The Plaintiff produced two witnesses, the investigating constable, Constable Philip Robinson, and Mr. Sydney Browney the proprietor of a business that sold, made and repaired bicycles, and who had had some fifty-one years in this trade or business.

Shortly put, the investigating police officer, received a report of the accident and went to the accident scene at about 6.00 a.m. The Defendant's taxi-cab was then parked in the middle of the road, no one was in it, and the windscreen had been completely smashed out. There were dents in the left front of the grill and bonnet by the left front fender. The road was a wide one, some 29 feet 6 inches and looking west

(the direction from which the vehicles had come) was straight for some five or six chains. The cab was at a slight angle in the road, with the left front wheel some 15 feet from the left bank, and the left rear wheel some 13 feet 7 inches from the left bank. The bicycle appeared to be partially under the car, and seems to have been dragged along the ground by the car. There were drag marks running from the back wheel of the taxi some 24 feet 6 inches in length, these commenced at a patch of dirt which it is said seems to have fallen from underneath the fenders of the taxi, and may have indicated a point not far from the point of impact. This dirt stood some 12 feet 9 inches from the left bank. Mr. Frankson for the taxi-cab proprietor submitted that these details suggested that the cyclist had been 12 feet from his left bank, when hit, and that the course of the drag marks and length suggested some effort by the taxi-driver to avoid the cyclist and go to his right.

On the other hand Mr. Parkinson for the Plaintiff relied on the pool of blood found on the site by the constable some 5 feet 6 inches from the left bank, indicating where the cyclist's body came to rest, and said to be a better indicator of the point of inpact than the drag marks. A point midway between these two versions of 5 feet 6 inches and 12 feet 9 inches would be some 8 feet, 6 inches; this would suggest that while the cyclist was on his half of the road, he was riding about midway of his half, leaving however some twenty feet or more for any overtaking vehicle. As to visibility the police officer coming half an hour later said the area was not very bright: he can't remember if the street lights were on. There was enough light to see.

Cross examination elicited from him that in Court at any rate there was no light on the cycle, and no rear reflector: the wreck appeared however to have vestigial remains of a front lamp and rear brake,

and some reflecting tape. Whether these remains predated the accident, or whether they indicate that some damage was done to them in the accident is not clear. However they were used to ground a submission by counsel for the Defendant that the evidence exonerated his client: the light was bad, the cyclist far out in the road instead of close to his left hand bank where he should be if being overtaken (See Sec. 44 of The Road Traffic Act), without any light or rear illumination the cyclist was careless of his own safety. It was even suggested that he might in fact have been executing some sudden manoeuvre like turning right across the path of the overtaking taxi-cab.

These submissions of course were speculative, and no substitute for evidence. They were not accompanied by any admissions as to whether the taxi had its lights on (assuming visibility was still bad), or whether it blew its horn to indicate it was overtaking. As to these relevant matters Defence Counsel was content to say that these had not been alleged against him in the particulars of negligence in the Statement of Claim.

The other main evidence for the Plaintiff came from their "cycle expert," Mr. Browney. His clear evidence was that the cycle had been struck directly from behind, and in no other way. He ruled out all suggestions that it had been struck while at an angle or executing any turn or the like. It had been struck from behind and dragged or pushed along the road subsequently i.e. been caught up by the undercarriage of the car and pushed along. Mr. Browney saw no signs of damage indicating any damage other than a direct blow to the back. Defence Counsel has sought to minimize the effect of this evidence and the expertise of the witness. It must however be remembered that the cycle itself was an exhibit in Court. Unfortunately since the trial in 1971 seven years ago it has

disappeared, and is not available for inspection by this Court. However the Learned Trial Judge had the benefit of inspecting and seeing this "real evidence" and weighing the evidence of Mr. Browney as against the cycle. The Learned Trial Judge accepted that evidence and found that the deceased had been riding his bicycle when it was struck from behind by the defendant, and further that the deceased was riding on his correct side of the road.

During the hearing of this appeal, the Defendant's Counsel sought to take an objection to the admission of the evidence of this 'expert' on the ground that Sec. 368D of the Civil Procedure Code required that the oral evidence of such an expert should not be receivable unless a copy of his evidence had been made available to the other side, and an order made on the summons for directions authorising the admission of the proposed evidence. No such objection was however taken at the trial, and it appears to us to be too late to take it at this stage. In any event the rule (which corresponds to Order 38 Rule 6 of the U.K. Supreme Ct. Rules) gives a discretion to the Trial Judge to admit such evidence.

In the net result the evidence, so far as it goes, appears to show a man riding his cycle in the early morning light at 5.00 to 5.30 a.m. on a broad asphalted road, some 30 feet wide, even if one assumes he had no bicycle light on, either the light was good enough to see or drive by or the taxi should have had its lights on. In either event there is no reason established in the evidence why the taxi-cab driver should not have seen this cyclist, whether he was five feet, eight feet or twelve feet from his left hand bank, on a perfectly straight road for some 5 to 6 chains, and have taken any action needed to safely overtake him. The only possible explanations for such a collision are that the taxi driver

was keeping a poor lookout or none at all, or travelling too fast considering the visibility then available and the likely state of the traffic.

The alternative possible explanation that the cyclist executed some dangerous manoeuvre in the face of the oncoming taxi is not established on such evidence as there is. It would amount to an allegation of contributory negligence, or indeed that the deceased's negligence was the sole cause or major cause of the accident; allegations that would require not merely to be pleaded but to be established in evidence. The onus of proof would rest on the Defence, and the Defence elected to offer no evidence on this or any score.

This was an accident that ought not to have happened. The road was broad, there was no rain, the road was straight for several chains, and in the absence of evidence from the car driver there was no apparent reason why he should have run into a cyclist ahead of him. We think that on this evidence an inference of negligence against the car driver is one that can legitimately be drawn. It was drawn by the Learned Trial Judge and we see no reason to differ from his decision.

We have been reminded of cases exemplified by Baker v. Market Harborough Co-op. Soc: Wallace v. Richards (Leicester)Ltd. (1953) 1 W.L.R. 1472: where cars run head-on into one another on a perfectly straight road without apparent reason, and both drivers being dead the Courts have held the proper inference is that both were equally to blame. We agree however with Counsel for the Plaintiff that this case is better exemplified or falls better within the House of Lords' decision in Craig v. Glasgow Corp. (1919) 35 T.L.R. 214, where the Defendant's tram car ran into and struck from behind the Plaintiff who was driving cows along the road in front of it. The visibility was bad, but the tram should have had light. The man had a right to drive cows along the road

and it was the duty of drivers of vehicles not to run him down.

Finally it is useful to refer to another House of Lords' decision cited by the Plaintiff's counsel, Jones v. Great Western Railway (1930) 47 T.L.R. 39. That case, was like this, an action under the Fatal Accident Acts, and one in which the Plaintiff had no direct evidence as to how her husband's death had been caused. He had apparently been crushed while crossing between shunting railway carriages. The Plaintiff offered such evidence as she had and the Defendants there (as in the instant case) then made a no case submission and elected to stand on their submission. The House of Lords distinguished Wakelin v. London & S.W.Railway 12 Appeal Case 41 and found that there was just sufficient evidence in the absence of evidence from the Defendants, to hold them liable in negligence. Lord Buckmaster distinguished between cases of pure conjecture, and those in which a reasonable inference could be drawn from the evidence. He drew the inference of negligence, and concluded at page 42 in words which echo the passage earlier cited from Fleming on Torts:-

> "The Defendants were well within their rights in calling no witnesses. They were entitled to require that the case against them should be proved, but evidence which in itself might be readily displaced by further knowledge becomes strengthened by the fact that such knowledge is withheld."

Finally as to award of damages to the dependent children a... complaint was made that the name of the youngest child had not been specified in the evidence or the judgment, and it was argued that nothing should therefore have been awarded on behalf of this child. We do not accept this argument. The evidence accepted by the Learned Trial Judge established that there was such a dependent and the Judge having directed that the awards for the children should be paid into Court and Trustees

appointed this deficiency will be cured in the subsequent administration of these funds.

In our view then there was evidence to justify the inference reached by the Learned Trial Judge and the appeal will be dismissed and the judgment below affirmed, with costs to the Respondent.