NEGLIGENCE

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 18/79

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

BETWEEN	CLIVE MALCOLM	PLAINTIFF/APPELLANT
A N D	REX KNIGHT	FIRST DEFENDANT/RESPONDENT
A N D	EZEKIEL WILLIAMS	SECOND DEFENDANT/RESPONDENT

Mr. Ainsworth Campbell for the Plaintiff/Appellant

Clinton & Elizabeth Hines for Defendants/Respondents

January 30, 31 February 1, 13,14, March 14, 1980

HENRY J.A.

On June 28, 1973 a collision occurred between a truck owned by the First Defendant/Respondent and driven by the second Defendant/Respondent and a bicycle ridden by the Plaintiff/Appellant. The Plaintiff sustained serious injuries. He brought an action for negligence and at the conclusion of the trial of that action judgment was given for the Defendants. This is an appeal against that judgment.

At the trial three witnesses gave evidence on the Plaintiff's behalf in respect of the actual collision - the plaintiff himself, George McFarlane and Noel McLennon. The Plaintiff had suffered brain damage in the collision, there was evidence that his memory was not always reliable and his mother also gave evidence to suggest that subsequent to the accident he was not always truthful.

The learned trial judge concluded that "it would be extremely unsafe to accept Plaintiff's evidences as to how the accident happened" and rejected his evidence. In so far as Mr. McFarlane was concerned she said "The impression I formed of this witness was not favourable. I doubted that he saw how the accident happened and that he spoke to the driver of the truck as he alleged. I formed the opinion that he was untruthful and unreliable and rejected his evidence of how the accident happened on those grounds." She was therefore left with the evidence of Mr. McLennon for the Plaintiff and of the Second Defendant Mr. Williams the only eye-witness called for the Defendants. The gist of Mr. McLennon's evidence was that the collision occurred in circumstances where the two vehicles were travelling in the same direction and the truck ran into the rear of the bicycle. On the other hand Mr. Williams gave evidence to the effect that the vehicles were travelling in opposite directions with the Plaintiff riding on his incorrect side of the road. It was not in dispute that the Plaintiff fell near a culvert on the side of the road on which the truck was travelling. Evidence from Mr. Williams as to the damage to the bicycle indicated that the front fork and front wheel were damaged. Mr. Williams saw no damage to the handle. Corporal Britton who investigated the accident found the front wheel of the bicycle damaged, the handle bent, the front fork slightly damaged and the frame bent. Neither witness saw any damage to the rear of the bicycle.

Professor James Cross a Neuro-Surgeon who treated the Plaintiff for injuries received in the accident stated that those injuries were

consistent with the plaintiff riding a bicycle and colliding with a truck going in the opposite direction. He also however agreed that those injuries were consistent with a fall. Dr. Chutkan an orthopaedic surgeon who also treated the Plaintiff stated that the injury which he found to the brachial plexus and shoulder could be caused by a fall on a hard surface but was more likely to be caused by a moving object. He considered the fracture to the metacarpals consistent with the Defendant's version of the accident but he later conceded that any of the injuries could be caused by the cyclist being hit from behind going up in the air and falling in an open culvert. Finally he said that if the Plaintiff fell on his outstretched palms the fracture of the metacarpals was less likely but possible although he would then expect a fracture of the lower forearm. A fair appraisal of this medical evidence would seem to be that the injuries which the Plaintiff received were consistent either with his version or the Defendant's version of the accident although Dr. Chutkan's evidence would suggest a balance of probabilities slightly in favour of the Defendant's version.

There was no expert evidence as to the significance of the damage to the bicycle. On the face of it it is obviously consistent with the defendant's version of a headon collision. It does not however negative the Plaintiff's version since the relatively slight impact between the two vehicles moving in the same direction could have occurred without damage to the rear of the bicycle if it was stuck on the tyre, the other damage occurring when the bicycle was

propelled forward and struck some other object. It was therefore crucial to a resolution of the issue between the parties that there be a proper appraisal of the credibility of the respective witnesses. This is essentially a matter for a trial judge.

The learned trial judge clearly was favourably impressed by the witness McLennon. She said 'McLennon.....impressed me with his apparent sincerity...This witness impressed me with the shock he felt as he made the bend and saw the accident happen right before his eyes, and I believe and accept that he did see the collision." In this respect she accepted his evidence in preference to that of Mr. Williams who stated that apart from an 18 year old youngster he did not see anybody else on the scene. She however found that Mr. McLennon lied when he said that he saw the Plaintiff coming down the road towards him, the truck behind Plaintiff because in her opinion he could not from his position in the road see the movement of vehicles approaching him and travelling on their correct hand. Having rejected this aspect of Mr. McLennon's evidence the learned trial judge then proceeded "there being no credible evidence offered by Plaintiff of the direction in which Plaintiff/cyclist was travelling before the collision "to consider " the inamimate evidence presented to see how it fits in with the two versions of the parties." She then concluded.

> "On the balance of probabilities I find that the plaintiff has failed to prove that the defendant Williams drove negligently as alleged, or that his negligence caused this accident. I find that the accident was due to plaintiff's own negligence."

Nowhere in her judgment does the learned trial judge say that she accepted the second Defendant Mr. Williams as a witness of truth. Nevertheless implicit in her ultimate judgment is an acceptance of his evidence as to the circumstances of the collision. At the same time she has specifically accepted Mr. McLennon's evidence that he saw the collision. It would be reasonable to conclude that if he saw the collision he must at least have seen the direction in which the respective vehicles were facing at the moment of impact. However she rejected his evidence at to the direction in which the vehicles were travelling prior to the collision for the specific reason that in her opinion he was unable to see. An examination of the photographs tendered in evidence however makes it clear that the witness would have been able to see what he said he saw. Yuill v. Yuill (1945) 1 All E.R. 183 is authority for the proposition that in those circumstances it would be open to this court to substitute its own view of the evidence for that of the learned trial judge. The matter does not however end there. Neither the Plaintiff nor his witnesses (and in particular McLennon) gave evidence to account for the specific damage to his bicycle. Accordingly to reinstate Mr. McLennon's evidence and consequently enter judgment for the plaintiff would involve not merely the drawing of inferences but the finding of such primary facts as ought properly to be left to the trial judge. At the same time we do not consider that a judgment in favour of the defendants ought to stand in circumstances where the learned

trial judge having accepted that Mr. McLennon witnessed the accident, went on to reject the vital part of his evidence for a reason which is wholly untenable. Counsel for the Respondents contended that the factors set out by the learned trial judge towards the end of her judgment indicate her ultimate rejection of the evidence of Mr. McLennon. These are as follows:

> "1. That damage to the bicycle was to the front wheel and front fork and handles.
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> 2. That there was no damage to the rear wheel and rear fork.
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> 3. That there was fracture of the metacarpals of both the left and right hands of plaintiff, and that this evidence points with telling effect in support of Defendant Williams' version.
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> 4. That Mr. Aubrey Robinson, the employer of plaintiff and a person having an interest in plaintiff, made efforts to find, but never found a witness who said he saw the accident.
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> 5. That Mr. Aubrey Robinson is well acquainted with witness McLennon and that both men had spoken with each other."

Therefore he submitted that following the well known principle enunciated in Watt v. Thomas (1947) 1 All E.R. 58 2 and Benmax v. Austin Motor Company (1955) 1 All E.R. 326, this court ought not to interfere with findings of primary facts made by a trial judge in consequence of an evaluation of the credibility of a witness having regard to the particular advantage which a trial judge enjoys of observing the witness. We recognize and accept this principle. The difficulty in this case however arises from the fact that, as we have pointed out, the learned trial judge has expressly accepted at least part of Mr. McLennon's testimony (and in preference to that of Mr. Williams) and rejected the other part

on grounds which were not dependent on seeing and hearing the witness; these grounds being manifestly untenable. As regards factors (4) and (5) above it is enough to say that they are inconsistent with her positive finding that McLennon saw the collision, as McLennon's not telling Robinson that he was an eyewitness could only be relevant to the question of whether or not he was present on the scene at the material time.

We consider that in all the circumstances the credibility of these witnesses ought to be properly assessed by the tribunal with competence to do so and therefore the interest of justice requires that the appeal be allowed, the judgment of the court below be set aside and a new trial take place. For these reasons on February 14, 1980 we so ordered.