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J A M A I C A

IN THE COURT OF APPEAL

CAYMAN ISLAND CIVIL APPEAL NO. 1/68

BEFORE: The Hon. Mr. Justice Moody, Presiding
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Luckhoo

B E T W E E N VERA RHODEL MANDERSON, Plaintiff/Respondent

A N D ALVEY SMITH, Snr. & Jnr., Defendants/Appellants

Mr. C. Rattray for the Defendants/Appellants

Mr. K. Brandon for the Plaintiff/Respondent.

31st May, 1968

ECCLESTON, J.A.

Plaintiff, as administratrix of the estate of George Edison Manderson, deceased, brought action under the Fatal Accidents Law on behalf of the estate, for the benefit of herself as widow and their two lawful children.

On the 22nd of December, 1965, about 8.30 in the morning, George Manderson was walking on the left side of the road at George Town, Grand Cayman, when he was involved in an accident with motor truck C.I. 408 which was overtaking him. The motor truck was owned by the first defendant and driven by the second defendant, son of the first defendant. Manderson died from the injuries he suffered in the accident, and this action was brought to recover damages resulting from the negligent manner in which the motor truck was operated. The

defence to the action was a denial of negligence.

On the issue of negligence the learned trial judge rejected the evidence brought by the plaintiff, in particular the evidence of Zenia Andrews, but found that there were certain admissions in the evidence for the defence, and here I quote from his judgment:

> "(3) Zenia Andrews gave evidence that she was an eye witness, but I accept the second defendant's evidence that she was no where on the road; that only the deceased was on the road. I accordingly reject all her evidence. Plaintiff, therefore, has produced no eye witness as to how the accident occurred, but there are certain admissions in the evidence for the defence. The second defendant admitted he was driving his father's, first defendant's, truck fully loaded with sand on the West Bay/George Town main road, 19 to 22 miles per hour, about 3 to 3½ feet from the left edge of the asphalt, and that he saw the deceased walking normally in a side track 7 feet from the point of juncture with the main road, that there was no other vehicle on the road at the time, that he passed and felt and heard nothing, but 60 to 70 feet away Hervie Russell, who sat with him against the right door of the cab spoke to him and he returned to the spot and saw the deceased lying injured between the shoulder and grass at the left side of the main road, 4 to 5 yards from the track, and that there is a slight right hand bend near there.
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> (b) I reject second defendant's evidence that deceased was 7 feet off the track, and accept his witness Hervie Russell's evidence that the

truck overtook deceased walking normally at the side of the main road in grass 6 to 8 inches tall. He said that the cab of the truck passed deceased there; he did not hear anything or any sound, but after the truck travelled 60 to 70 feet he looked into the outside rear-view mirror affixed to the cab and noticed something lying at the side of the road, and spoke to defendant who returned to the spot where he saw deceased lying injured at the side of the road. He agreed there was no other vehicle on the road. He admits hearing second defendant, but not at the scene, say, "that the cab of the truck passed o.k. and it must have been the back that touched him."

The judgment continues -

"(4) Now, the following are the undoubted facts of the defence:

(a) that deceased was normally at the side of the road off the asphalt surface;

(b) that there was no other vehicle on the road, and

(c) that truck C.I. 408, owned by the first defendant and driven by second defendant, passed deceased for a distance of 60 to 70 fe returned to the scene, found deceased lying in jured on the grass at side of the road."

"(5) There is authority for the proposition that if there is no evidence indicating whether the man ran against the truck or the truck ran against th man, then the proper holding is that they should held equally to blame; but here, on the facts stated at paragraphs 3 and 4, deceased was walkin normally on the left side of the road in the gras

Down cases, 3rd Edition, page 2, where it is stated,

> " In an action claiming damages for injuries suffered as a result of negligence, it is the plaintiff who alleges the negligence, and, therefore, the burden of proof rests on him. As a general rule he must prove, by his own evidence or that of his witnesses, a definite breach of duty by the defendant. It is not sufficient merely to prove the facts upon which it might be surmised by the court that the defendant had been negligent, for in such a case the judge would be entitled to non-suit the plaintiff."

Mr. Rattray submitted that no prima facie case was established which showed negligence on the part of the second defendant, as he and his witness did not admit any negligence.

Mr. Brandon referred to the case of Watt v. Thomas (1947) 1 A.E.R., 582, and submitted that although the trial judge rejected the evidence of the witnesses for the plaintiff on the issue of negligence this court should examine that evidence, as it was his submission that that evidence did not differ entirely from the evidence of Hervie Russell, but was in support of the issue of the negligent manner in which the truck was driven. Later he discontinued this approach and instead asked the court not to disturb the finding of the trial judge, in particular he asked the court to accept that deceased was walking normally on the side of the road and not on the main road, and that the driver admitted that he had said, "the front of the truck cleared him, it must have been the back of the truck that hit him", and he asked the court to draw the inference that the truck passed too close to deceased and endangered his safety.

There was an absence of external injury to deceased. His injuries were internal and that assumes importance because of the submission of the appellant's counsel that deceased may have

walked into the side of the truck.

I have not been persuaded that the inference that the learned judge has drawn from the evidence is not the correct one. It is supported by his finding that the truck passed too close to the deceased, and ran against him as he walked normally along the side of the road, and that the driver was negligent in so doing.

On ground 2 Mr. Rattray submitted that the method used by the trial judge was wrong in arriving at the quantum of damages. It was his submission that the deceased was 63 years of age at his death, and the figure of 7 instead of 12 was more realistic as the years of purchase.

Mr. Brandon asked the court not to disturb this figure as persons in Cayman have very long life spans and are able to do work for which there is much scope after they have retired from the usual occupation of working on ships at sea. I think 7 years purchase is more appropriate. I would award -

Average earnings £57 per month for 7 years		£4,788
Less £20 per month spent on husband	)	1,680
" ¼ of gross for contingencies	)	1,197
" Insurance	)	500
Balance		£1,411
Add funeral expenses		70
Total		£1,481
When the sum of £200 awarded under Reform & C. Law is deducted it leaves		£1,281
which is apportioned as follows:		
Child Guildene - dependency		£ 288
" Allan "		96
Widow		897
		£1,281

In his judgment the trial judge said:

"I have no evidence that the second defendant in operating the truck was doing so as the servant

or agent of the first defendant, and I dismiss the case against the first defendant, and I dismiss the case against the first defendant with costs."

Plaintiff/respondent appealed against this finding of the learned judge. Mr. Brandon informed the court that on the question of the owner's liability he intended to rely on the judgment in Mattheson v. Soltau, 1933 J.L.R., page 72, in support of this ground of appeal. However, after informing himself of the judgment in the case of Barnard v. Sully (1931) 47 Times Law Reports, at page 557, and the judgment of Lewis, J. in Hopkinson v. Lall, 1 W.I.R., page 385, he decided not to persist in this appeal.

The cross appeal of Vera Manderson against Alvey Smith, Snr. will be dismissed with costs. The result is that the appeal of Alvey Smith, Jnr. on liability is dismissed. The damages, however, are reduced to £1,481, so that the respondent will have/-a judgment for £1,481 with costs in the court below. On this portion of the appeal the respondent will have half the taxed costs. On the cross appeal of Vera Manderson, against Alvey Smith, Snr., which is dismissed, Alvey Smith, Snr. will have his costs of appeal.

MOODY, J.A.

There is only one thing I would like to mention for the purpose of the record, and that is that in so far as the quantum of £1,481 is concerned, the award under the Fatal Accidents Law is £200.

I agree with the judgment just given.

LUCKHOO, J.A.

I also agree.

so that I find as a fact the truck with the protruded wooden body passed too close to him and ran against him, and the driver, second defendant, was accordingly negligent."

On that finding of negligence Mr. Rattray argued as a ground of appeal that there was no evidence acceptable by the learned judge on which he could have come to a finding of negligence in the second defendant as the judge rejected the evidence of plaintiff's witnesses and there was no negligence established by the witnesses put forward in support of the second defendant's case. His submission is that there was contact with the side of the truck after the cab had passed deceased but that there was no evidence ofhow contact was made, and if the inference to be drawn is equally consistent with the truck hitting deceased as with his walking into the moving truck without taking care for himself, then the plaintiff, on whom lies the onus of proving negligence, would have failed.

The attention of the court was directed to the following passage in Charlesworth on negligence, 4th Edition, page 93, para.94:

"If the plaintiff's evidence is equally consistent with negligence on the part of the defendant as with other causes there is no evidence of negligence and judgment cannot be given against the defendant. The party seeking to recover compensation for damages must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or the fault of the other party he cannot succeed."

He also referred the court to Terrell's Law of Running