

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.M.140 OF 1982

BETWEEN TOMLIN MENZIE PLAINTIFF
A N D WINSTON PASSLEY DEFENDANT

N. O. Samuels for the Plaintiff.

Crafton Miller and with him Mrs. Monica Earle Brown instructed by
Crafton Miller and Company for the Defendant.

February 4, 5, 6, 7, 1986; May 12, 13, 14, 15, 1986;
October 6, 7, 1986 and

MALCOLM, J:

THE CLAIM

In this action the plaintiff claims from the defendant to recover damages for personal injuries and for consequential loss and damage caused by the negligent operation of motor vehicle ND.0117 of which the defendant is the owner and who was operating same at the material time i.e. the 14th March 1981.

At the outset amendments were sought and granted on the application of both sides. The amendments concerned the Statement of Claim, the Defence and certain information supplied by the defendant to the plaintiff on his request for "further and better particulars". The applications were unopposed.

Before I deal with the plaintiff's case I pause to mention one factor. This case involves an important point of law. The undisputed evidence is that the plaintiff signed a "Third Party Release" under and by virtue of which he had accepted payment of Eight Thousand Two Hundred Dollars (\$8,200.00) in exchange for the release of the defendant Winston Passley and his insurers, Central Fire and General Insurance Company Limited from all claims and demands arising out of the accident.

The point was not taken in limine so I will, in no great detail, deal with the issues of facts.

*NEGLIGENCE
allegation of fraud - Court (Jamaica) finding fraud not discharged by plaintiff. Judge for defendant*

PLAINTIFF'S CASE

The plaintiff stated that he was a driver and on the 14th March 1981, he was doing "some buying and selling". Paragraph 1 of his Statement of Claim had been amended to read:

" The plaintiff was a taxi operator but at the material time was a food vendor and the owner of motor vehicle licenced and number W.7064".

To continue his allegations he testified that at about 8:20 p.m. on the day in question he was driving from Linstead towards Ewarton. It was dark. He had his two headlights turned on. After he had reached a slight bend and had come to a straight he saw two cars coming towards him from the Ewarton direction. One on right the other on the left.

He drove over on the left soft shoulder and stopped. The car on the right came over and hit him. He became unconscious and came to himself about 10 days after in the Linstead Hospital. He told of the time he spent in traction and of the pain he suffered. He stated that there were others in the car at the time of the accident two of whom died in the crash.

While in hospital and while still in traction two men came to him. He said when the two men came "the others were buried already and I knew that. I also knew then that my car was smashed up". I quote in extenso and verbatim the plaintiff's evidence as to the nature of the events: -

" When the men came I didn't feel too good in my mind - Mind did worry - due to death and car smash up. The men say they came from National Insurance. They took a statement from me and write it down. The left. About 4 days after the same two came and said I must sign paper - the statement they did take from me and go away - they came back and I sign it. I never saw the two men again".

He went on to testify further that only the police came after and took a statement - nobody else came. He never went anywhere about the accident. He said he left the hospital and went to his home. Nobody came to his home saying they came from any Insurance Company. Nobody came and brought any paper and asked him to sign saying they came from an Insurance Company. He said he never went to any Insurance

Company and sign any paper in respect of the accident. He testified that he knew Mr. & Mrs. Harold Smith but he never signed any paper and gave them to take back to any Insurance Company.

He said he knew Mrs. Esteena Menzie but he never signed and gave her any paper to give to the Insurance Company. She never brought any paper from the Insurance Company for him to sign. He never asked Mr. & Mrs. Harold Smith to settle any claim in respect of his accident. Further, he never signed any cheque "coming from any Insurance Company".

He was searchingly cross-examined by Mr. Miller and stated, after objection, that he had an account at the Workers Savings and Loan Bank at the time of the accident. While in hospital he put no money in it.

The account was in the name of his sister Nola and himself. There was not plenty money in the account when he went to the hospital. He said his mother never lodged money in his account.

He denied that on 21st July 1981, he opened an account in the names of his sister Nola and himself at the Linstead Workers Savings and Loan Bank account 13075 - Later, to Mr. Miller, he said "I don't know if I had an account before the accident - Eight Thousand One Hundred and Ninety-nine Dollars and Eighty Cents (\$8,199.80) - First lodgment opened on 21st July 1981 - Cheque from Central Fire. I didn't get any, I don't know if my sister or mother put it in - Didn't draw any money out of that account any time at all".

He denied the suggestion put to him that on the 4th August 1981, he made a withdrawal of Five Thousand Five Hundred Dollars (\$5,500.00).

Switching to another aspect Mr. Miller suggested to the plaintiff that he had one headlight at the time of the accident that the accident occurred on the asphalted portion of the road, that the car was in motion when the accident took place and in addition that the collision occurred not on the soft shoulder but in the middle of the road. All these suggestions were denied.

The plaintiff called Berris McLean and Carlos Johnson as eye-witnesses to the accident.

THE DEFENCE

The defendant Winston Passley gave his version of how the accident occurred, denied all liability for negligence and placed the blame squarely on the plaintiff's shoulders.

In his opening Mr. Miller pointed out that nowhere in the plaintiff's Statement of Claim was there mention of any payment from the defendant Passley. He had this to say:

" If the Court finds that the Third Party Release is a valid document having been signed by Menzie then there would be no necessity for the Court to deal with the question of liability. No evidence to prove fraud".

The only allegation of fraud was in the Reply to which I will later allude.

I have already referred to the "Third Party Release" admittedly executed by the plaintiff and under and by virtue of which he had, so it is contended, accepted payment of the sum of Eight Thousand Two Hundred Dollars (\$8,200.00) in exchange for the release of the defendant and his insurers, Central Fire and General Insurance Company Limited from all claims and demands whatever arising directly or indirectly out of the accident. This document which was tendered in evidence before me as Exhibit 2 reads in full as follows:

" Claim No. LD 7/3/81

(sic) Received from Central Fire and General Insurance Company Limited and Winston Passley the sum of Eight Thousand Two Hundred Dollars and cents in full satisfaction of all claims costs and expenses in respect of all personal injury and loss or damage to property suffered by me whether now or hereafter to become manifest arising directly or indirectly from the accident between motor vehicle No. ND.0117 the property of the said Winston Passley and myself (and car No. W.7064) which occurred at Ewarton Main Road in the parish of Linstead on the 14th day of March 1981.

This payment is received by way of compromise of the claim I have made and without any admission of liability on the part of the said Central Fire and General Insurance Company Limited

and Winston Passley and each of them of and from all claims and demands whatever arising directly or indirectly out of the said accident.

Dated the day of July 1, 1981,
Signature Tomlin Menzie
Address Wakefield Buxon P.A.
Witness R. Campbell
Occupation Clerk
Address 44 Duke Street, Kingston.

Please enclose 20¢ for Stamp Duty -
Total settlement \$8,200.00"↓

The first witness called by the defendant as to the validity of the Release was Rarane Campbell. She testified that she was employed at United General Insurance Company Limited in 1981 - Central Fire and General Insurance Company Limited. On 1st July 1981, she was employed to Central Fire as Typist - Clerk. She said she knew a Mrs. Esteena Menzie having met her in 1981 at Central Fire - 44 Duke Street - Claims Department. She took her to the Claims Manager and left her in his office. She went on : "Never spoke to her again that day. Saw her again - came back to Claims Department and I again took her to the Claims Manager. I was given instructions and in consequence prepared a release, I typed in information on a form". She was shown the Release, Exhibit 2, and said "This is it, I see my signature on the document as witness". She identified the entire document and said she prepared the document in July 1981. She gave the document to Mrs. Esteena Menzie with certain instructions. It was subsequently brought back to her and on it was written "July 1, 81" and on the line "signature" was written "Tomlin Menzie" also written was Wakefield Buxon P.A. also

" Witness:-

Occupation:

Address ".

When given back to her nothing was there. She said and I quote:

" I put my signature on the document at place indicated to me when I noticed it had not been witnessed. I made certain enquiries of Mrs. Menzie before witnessing Exhibit 2. I put my occupation and address on document. I witnessed it in presence of Mrs. Menzie. I took it to the Claims Manager - I had no further dealings with the document".

In cross-examination by Mr. Samuels she said, and this was quite apparent from her previous narrative - "At no time did I see Tomlin Menzie".

The other witness called as to the Release transaction was Mrs. Geraldine Fong. She testified that in 1981 she was Acting Secretary and cashier to Central Fire and General Insurance Company Limited and outlined the nature of her duties as such. She was shown a cheque by Mrs. Earle Brown and stated that she recognised it. She saw her signature and two others that she recognised. Objection was taken by Mr. Samuels for the plaintiff to the tendering of this cheque as this was the first time it was being introduced and ought properly to have been shown to Mr. Menzie when he was on the stand. The objection was over-ruled and the cheque was tendered in evidence as Exhibit 3. It is a cheque dated 17th July 1981 for Eight Thousand One Hundred and ~~Ninety~~-nine Dollars and Eighty Cents (\$8,199.80) payable to Tomlin Menzie and signed by a Mr. Mann, Mr. Enos Grant and the witness. It bears two Bank Stamps on its face, one of which is "Workers Savings and Loan Bank, Linstead Jamaica etc", on the back is "S/A 13075". She was shown the Release (Exhibit 2) and said this has to be signed and witnessed before preparation and issue of the cheque. She said this had been attached to the file. 20¢ Stamp Duty had been deducted from the amount of the cheque. In cross-examination she said she would not have drawn cheque before the Release was witnessed.

As part and parcel of the Defence Roderick Bogle, Manager of the Linstead Branch of the Workers Savings and Loan Bank gave evidence in this matter.

He produced out of his custody copy Saving Account Deposit voucher (Exhibit 4). On it is recorded the sum of Eight Thousand One Hundred and Ninety-nine Dollars and Eighty Cents (\$8,199.80) as credit. The account No. is 13705. It was a joint account between the plaintiff and his sister Nola Menzie. The commencement of the account was 21st July 1981.

I have already made reference to the plaintiff's Reply dated 24th November 1982 paragraph 3 thereof reads as follows:-

" 3. Paragraph (4) of the Defence is denied. The plaintiff says, if which is denied, his name appears on any document, statement, deed or writing in the possession of the defendant, such document, statement, deed or writing on which the plaintiff's name might appear was not the document, statement, deed or writing of the plaintiff. Further and in the alternative the plaintiff says that any document, statement, deed or writing if in possession of the defendant, being the signature of the plaintiff such signature of the plaintiff was obtained by fraud.

PARTICULARS OF FRAUD

- (a) Shortly after the accident and while the plaintiff was a patient at the Linstead Public Hospital and while the plaintiff was suffering discomfort and pain from his broken leg and mentally upset about the death of his brother and cousin in the accident in which he suffered his serious injuries two men visited him at the said hospital and told the plaintiff that they were from the National Insurance Office. The plaintiff gave them an account of how the accident happened and they appeared to be taking it down in writing.
- (b) After the lapse of three or four day from the alleged taking of a Statement from the plaintiff the said two men returned to the plaintiff at the Linstead Hospital where the plaintiff was still a patient and still suffering physically and mentally from the trauma of the accident.

The said two men told the plaintiff that he had omitted to sign the statement and that they had made copies which copies he should also sign. The said two men then placed documents before the plaintiff to which he added his signature;

- (c) The plaintiff says that the said two men or either of them did not represent to him that any of the documents which he signed was in the nature of an acceptance of any sum whatsoever in respect of the injuries he received in the said accident nor that he was thereby releasing the defendant Winston Passley and his insurers Central Fire and General Insurance Company from any liability from the accident in which he received his said insurers Central Fire and General Insurance Company from any liability from the accident in which he received his said injuries".

SUBMISSIONS

Mr. Miller submitted that there was no dispute that the plaintiff has suffered loss or that the Insurance Company has paid money. He dealt with (a) Accord and Satisfaction; (b) Release; (c) Estoppel and pin pointed as the crucial issue the question as to whether the plaintiff's signature was obtained by fraud.

Mr. Miller submitted, what is indeed trite law, that he who alleges fraud must prove it. He submitted further and here I quote him:

" If the plaintiff is setting up that his mental state was such that he could not appreciate the act - can't be done by him but by some third person".

He said Mr. Menzie did not deny that it was his signature on the release and asked the Court to accept that on July 7, 1981, the plaintiff did execute the Third Party Release which released both the Insurance Company and Mr. Passley. He submitted that if the Court

finds that the Release was executed in the month of July that would have been after his discharge from hospital. He posed the question: "If executed in hospital was the plaintiff suffering from mental disability which made unable to understand?". The plaintiff, he submitted had failed to prove this. He said that what the plaintiff was asking the Court to believe was that after nearly two years he still did not know of any payment in settlement. He cited the recent local first instance case of Barrett v. Darlington Supreme Court Suit C.L. 1982/B.018. The judgment herein was delivered by Walker J. on the 8th May 1986. As does the instant case that case turned on the issue as to whether a Third Party Release signed by the plaintiff was obtained by fraud and should be deemed valid and binding. He also cited the case of Imperial Loan Company v. Stone [1892] 1 Q.B. 599. He said as regards proof of a plea of mental incapacity the relevant law is clearly stated in that case. All in all Mr. Miller was painstaking in his examination of the question of fraud.

Mr. Samuels for the plaintiff submitted that on the issue of liability the plaintiff's version of the accident ought to be accepted.

On the subject of fraud he said that the cases cited by Mr. Miller showed that he had failed to appreciate the nature of the plaintiff's case. He said that in the instant case the plaintiff was not relying on any mental incapacity, what was being set up was that the Third Party Release was mistakenly signed. The plaintiff had executed the said document (Exhibit 2) in ignorance of its character and therefore the doctrine "non est factum" applied.

What the plaintiff was saying was that while in the hospital two men came there, led him to believe that they were from the National Insurance Office, he gave them a statement, they returned 3 - 4 days after and got him to sign a Release which he mistakenly believe to be the prior statement. Mr. Samuels said: "Up to when the plaintiff sought legal assistance he genuinely believed he had dealt with N.I.S. men and it was not until Defence was filed did the incident come into full force and meaning". He said the infirmity of the plaintiff was

that he was barely literate. I pause here to join issue with Counsel on his choice of language, I have never construed being barely literate as being an infirmity. To revert to his submissions, he said that if the depositor of the cheque Exhibit 3 was Esteena Menzie, Tomlin Menzie could well have been bypassed. He also addressed on damages.

I have spent a considerable time carefully scrutinizing Exhibit 2 in particular the dates, signatures, types of ink and the formation of the letters. On a totality of the oral and document any evidence adduced I find:

1. That the defendant was solely to blame for the collision which occurred on the 14th March 1981, and in which the plaintiff undoubtedly received serious injuries;
2. That on "July 1, 1981" the plaintiff Tomlin Menzie, executed the Release, Exhibit 2;
3. That he did not believe at the time of execution that he was appending his signature to a statement;
4. That he knew the nature of the document he signed and was aware that it was a settlement of his claim.

I repeat words I have already used from Mr. Samuel's address: "could well have been" and say that that possibly sums up the weakness in the plaintiff's case.

In the final analysis I find that the onus of proving the fraud alleged herein has not been discharged by the plaintiff.

There will be judgment for the defendant with costs to be agreed or taxed.

Before closing I am constrained to make this comment - If the parties were on equal legal footing at the time the plaintiff signed the release he would undoubtedly have received a far more realistic and reasonable settlement.