C.A. - Negligence - Evidence - Findings of fact by Judge - Hearing - Whether judge failed to assess or properly assess evidence - Whether finding of negligence supported by evidence - Power of appellate Court to intervene - circumstances when appellate court will interfere - Appeal allowed

(Case referred to p 8 (end))

JAMAICA

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IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL NO. 29/91

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

BETWEEN	ALGIE MOORE	PLAINTIFF/APPELLANT
AND	MERVIS L. DAVIS RAHMAN	DEFENDANT/RESPONDENT

Civil Procedure (Costs)

Berthan MaCaulay, Q.C. and Ainsworth Campbell for Plaintiff/Appellant

Donald Scharschmidt, Q.C. and John Givans for Defendant/Respondent

Negligence

February 1,2,3,4 & July 29 , 1993

PATTERSON, J.A. (Ag.)

This is an appeal from the judgment of Walker, J. who found for the respondent in an action brought by the appellant claiming damages for negligence. The appellant suffered serious personal injuries on November 6, 1984, in a collision between himself and a motor car driven by the respondent. The appellant alleged in his statement of claim that he was struck by the respondent's motor car whilst he "was lawfully standing on the sidewalk on the main road" in the vicinity of White Marl. The respondent, in her defence, denied that the appellant was standing on the sidewalk as he alleged, and that she was negligent. She averred that the appellant, in attempting to cross the road, stepped off the kerb on her near side, "and going into the side of the motor vehicle."

Both the appellant and the respondent sought to prove the question of liability by relying on the direct evidence of eyewitnesses. The appellant gave evidence and called two eye-

witnesses. The appellant testified that he was standing off the road on a grass verge awaiting a bus when a car came along and hit him. Beside him were three bags containing cheese trix. He denied attempting to cross the road and that he stepped into the path of the car while signalling a vehicle to stop.

The first eyewitness for the appellant said she saw the appellant standing on the sidewalk next to his baggage of cheese trix. She described the driving surface of the road to be asphalted and smooth. Adjoining the driving surface was rough asphalt and then grass. A signpost was positioned "between the walk way and the grass," and the appellant's baggage was between the appellant and that signpost. She saw the car swing off the road and hit down the signpost, and then it collided with the baggage and finally with the appellant where he stood. She was not able to say what part of the car was damaged. The other eyewitness said the appellant was "standing at edge of the grass" where it met the soft shoulder. She, too, said she saw the car run off the road, hitting down the signpost and then colliding with the appellant's baggage and then the appellant where he stood.

The respondent's eyewitness was a passenger in the car, but she did not see the appellant before the accident as her attention was focused on a boy in the rear seat of the car. However, she felt an impact to the forward half on the left side of the car, and she said that after the impact, the car ran off the road to the left. The car had been travelling in the extreme left lane when she turned to speak with the little boy and when she felt the impact. In cross-examination she said "it is a possibility that car could have been on the grass verge when I felt the impact." She was not certain if cheese trix had been scattered as a result of the accident. The respondent testified that she did not notice anyone standing

or walking on the sidewalk, she explained what she saw and what followed in the following terms:

> "A man came up from a ditch trying to get the attention of a moving vehicle. He ran into the path of my car. He ran into left hand front door. With reflex action, I applied my brakes and tried to swerve from him slightly to right. At this time there were fast moving vehicles in right hand lane, so I could not go too much to the right. At a point I had to swing back to the left with result that my car went off the road."

She said she did not see any signpost in the vicinity of the accident and she did not hit down any such post. She did not notice if cheese trix was scattered about after the accident, and her car did not plough into any bags by the side of the road.

The learned judge had to resolve a case that turned on a pure question of fact. He was faced with two conflicting stories of what happened, and therefore the credibility of each witness came into sharp focus. In a reserved judgment, he made it quite clear that he did not rely on the appellant's evidence as to how the accident occurred since the appellant had suffered serious head injuries resulting in retrograde and post-traumatic amnesia. He did not accept the evidence of the two eyewitnesses called by the appellant as they did not impress him as witnesses of truth. He said he accepted as true the evidence of the respondent and her witness, and that he unhesitatingly preferred their evidence to that of the appellant and his witnesses "whereever there is conflict between the two."

The judgment was challenged before us primarily on two grounds, namely, that "the learned trial judge failed to assess or properly assess the evidence given at the hearing"

in relation to the question of liability and that the verdict "was wholly against the weight of the evidence."

In fact, what counsel for the appellant asked the Court to do was to review and reverse the findings of fact of the learned judge who had the distinct advantage of seeing and hearing the witnesses give evidence, and to substitute therefor our own findings of fact. Counsel argued that the evidence of the witnesses for the appellant plainly proved that the respondent's motor car left the road and that it not only collided with the appellant, but that it also collided with the signpost and the bags of cheese trix which were near to where the appellant stood just before the accident. He said that it was never suggested to these witnesses in cross-examination that the car did not collide with the signpost and the bags of cheese trix. He argued that the evidence of the loss adjuster gave credence to the appellant's witnesses, and it supported the appellant's case. The loss adjuster saw damage to the left side of the vehicle involving "the front bumper, left front fender, left head lamp, left door, left door mirror, windshield glass, lower front panel, bonnet, left windshield post and the left rear fender." The respondent's evidence was that the appellant "ran into left hand front door" of her car. She said that her car left the road after the appellant collided into it and it went down into a drain and stopped. She explained that the impact in the drain caused the windshield to shatter and that damage was done to the under section of the car and the front bumper. What she failed to account for was the damage to the left rear fender. Counsel for the appellant submitted that the only reasonable inference to be drawn was that the left rear fender was damaged when the car collided with the signpost, and that finding supported the appellant's case that the car did collide with a signpost as well as with the appellant.

Counsel for the respondent agreed that the case hinged on the credibility of the witnesses. However, he argued that there was no evidence of any objective fact that could falsify the findings of the learned judge. He said that at the close of the appellant's case, there was no evidence as to the nature of the damage done to the car and that there was nothing in the respondent's case which explained the damage. He submitted that the appellate court ought not to reverse the findings of the trial judge based on the credibility of witnesses and their demeanour unless it was clearly demonstrated that those findings were wrong. He submitted further that the appellate court must not only entertain doubts regarding the findings of the trial judge, but must be convinced that he was wrong.

It is undoubtedly true that the learned judge in this case, saw and heard the witnesses, and he had the opportunity of watching their demeanour and, therefore, an appellate court should be reluctant to interfere where the question is one of credibility. But that is not an inflexible rule, and circumstances may give rise to the matter becoming at large for the appellate court. Lord Sankey, L.C. puts it this way when in Powell v. Streatham Manor Nursing Home (1935) All E.R. Rep. 58 (at p. 61) he said:

> "On an appeal against a verdict, if the evidence was such that no jury properly directed could reasonably have found the verdict in question, the verdict so found will be set aside. A verdict, however, will not necessarily be set aside merely because it is, in the opinion of the Court of Appeal, against the weight of evidence, but there is jurisdiction to grant a new trial in such a case: see Solomon v. Bitton (1881) 8 Q.B.D. 176, C.A.; Digest (Practice) 598,2386, and Metropolitan Rail. Co. v. Wright (1886) 11 App. Cas. 152;55 L.J.Q.B. 401;54 L.T. 658;34 W.R. 746;2 T.L.R. 553, H.L.; Digest (Practice) 599,2391, per Lord Halsbury (11 App. Cas. at p. 155). There is certainly jurisdiction in the Court of Appeal to reconsider the facts in the way they do reconsider them and to come to an opposite conclusion to that arrived at in the court below. The judge of first instance is not the possessor of infallibility, and,

> "like other tribunals, there may be occasions when he goes wrong on a question of fact, but first and last and all the time, he has the great advantage, which is denied to the Court of Appeal, of seeing the witnesses and watching their demeanour."

Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court "in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong" (per Lord Kingsdown in Bland v. Ross, The Julia (1980) 14 Moo P.C.C. 210 at p. 235). Lord Wright, in his opinion in Powell v. Streatham Manor Housing Home (supra) at page 67, quoted Lord Sumner's views as to "the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge:

> "(i) Does it appear from the President's judgement that he made full judicial use of the opportunity given him by hearing the viva voce evidence?
>
> (ii) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?
>
> (iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure,' that has had the same effect?"

Lord Wright considered Lord Sumner's views to be a statement of "principles which will guide the appellate court in the majority of cases." What follows (at p. 67) is apposite in the instant case, and deserves to be borne in mind:

> "Yet even where the judge decided on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified,

> "as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness; such cases have occurred in the experience of most judges and are covered by the third question propounded by Lord Sumner."

The live issue that confronted the learned judge was whether the appellant was standing off the roadway as he and his witnesses said he was at the time he was hit, or whether he stepped off the kerb or ran into the roadway and collided with the left side of the respondent's motor car, as she said he did. In deciding the issue, it was the duty of the learned judge to consider all the evidence in the case as a whole, and then arrive at his decision.. However, it appears to me that the learned judge overlooked the evidence of the loss adjuster, who testified to the precise nature of the damage to the car as a result of the accident. The respondent, in proof of her counterclaim for the damage to the car, did not attempt an explanation as to how the left rear fender came to be damaged. However, the evidence of both the appellant's witnesses support a finding that it is more probable than not that the damage was done by the signpost with which they said the car collided before hitting the appellant. That being so, it would give credence to their testimony and would give the lie to the story of the respondent.

It is clear that the learned judge, in considering the conflicting evidence, did not take into account the objective fact provided by the evidence of the loss adjuster, and consequently, his findings were falsified.

For the foregoing reasons, I concurred in holding that the appeal should be allowed, the judgment of the court below set aside, and that judgment be entered for the appellant on the claim and on the counter-claim and that the matter be referred to the learned judge to assess the damages.

CAREY, J.A.

I agree.

DOWNER, J.A.

I agree.

Cases referred to

(1) Powell v Streatham Manor Nursing Home (1935) AllER Rep 5

(2) Bland v Ross, The Julia (1980) 14 Moo P.C.C 210