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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 81/94

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON MR. JUSTICE GORDON, J.A.

BETWEEN ORVILLE NEMBHARD
A N D KENNETH ARATRAM PLAINTIFFS/APPELLANTS

A N D MELROSE TRANSPORT AND EQUIPMENT
COMPANY LIMITED DEFENDANT/RESPONDENT

Garth McBean instructed by Dunn, Cox, Orrett & Ashenheim for Appellant

David Batts instructed by Livingston, Alexander and Levy for Respondent

6th 7th and 8 October and 30th November, 1998

FORTE J.A.

This is an appeal against the judgment of Karl Harrison, J in the Supreme Court, in which he adjudged that there should be judgment for the defendant.

The action arose out of allegations by the appellants of the negligent driving of the driver of a 'tractor-head' belonging to the respondent and which collided with the car of the appellant/plaintiff, Orville Nembhard which was being driven by him and in which the second appellant was a passenger. As is usual in these negligence actions, the accounts given by the parties on either side were diametrically opposed to each other. In this case however, there was some additional evidence, which aided the learned judge in coming to his

decision. Before dealing with the merits of the grounds, however, it is necessary to state in brief outline the versions of each side.

Both appellants gave evidence which do not vary substantially, if at all and so a reference to the evidence of Mr. Nembhard, can accurately describe the facts upon which both relied.

The appellant Nembhard, a medical practitioner was on the 4th January, 1990, driving his Opel Corsa motor car down the Braco Hill in the parish of Trelawny travelling in the direction of Kingston. He was travelling at 30-40 mph. He maintained that he was travelling on his correct side of the road, when 'rounding' a corner a tractor-head travelling in the opposite direction pulled out from behind a laden truck and came over unto his side of the road. He applied his brakes and steered to his left but was unable to get away, before the tractor - head collided with the front right side of the Opel. At this time he lost consciousness, but later regained consciousness to find himself in the car which was then at the bottom of a ditch on the left side of the road 'going to Kingston'. His car was on fire. He was taken from the car, but could not give any account of what transpired thereafter, as he had blood and glass in his eyes, and was suffering great pain. He was taken to the Casualty Department of the Cornwall Regional Hospital, and thereafter to the University Hospital, where he spent two(2) days awaiting surgery. Because of the lack of the required equipment for his surgery at the University Hospital of the West Indies, he was transferred to the St. Joseph's Hospital where he had surgery on the 9th

January, 1990 and on the 17th January, 1990 he was discharged. In the meantime, Mr. Aratram managed to get out of the car when it was in the ditch, and he too was taken to the Cornwall Regional Hospital from where he was transferred, the next day to the Medical Associates Hospital where he remained for about nine (9) days.

In support of the plaintiffs' testimony was the evidence of Mr. Andrew Collins, who was driving his Honda Accord, behind Mr. Nembhard, at the time of the collision between the Corsa and the tractor - head. Here is his account: He was travelling about 30 yds behind the Corsa, descending a slight incline when the 'trailer head' swung unto his side of the road from behind a heavily laden truck to overtake it . As it swung out it collided with the Corsa hitting it over the gully which was on the left side. He immediately 'braked' but the truck got out of control and continued on his side and collided with the right front side of his car. The tractor-head then mounted the bank on the left side of the road facing Kingston. On impact , he closed his eyes, and on opening them subsequently he saw 'the truck was reversing over to the left hand side of the road going to Duncans. ' It was reversing on a hill. It eventually stopped at an angle across the road. The back of the trailer was to the left bank going to Duncans, and the front slightly at an angle across the road'.

Apart from the Constable who visited the scene and whose evidence the learned judge rejected that was the evidence for the appellants.

The respondent tendered one eye-witness to the accident and that was the driver of the tractor -head. He deponed that he was driving the tractor head, proceeding up Braco Hill, and on approaching a left hand corner, he observed two cars coming down the hill " at a fast speed". They came around the corner on his side of the road and collided with the right hand side of the trailer "one right after the other". the Black Honda Accord motor car was behind. There was about one car length between the cars. The first car continued down the hill and went over the 'precipice'. The other 'bumped off' the trailer. He maintained that at the time of the collision, the tractor-head was on its correct side of the road i.e. the left as it proceeded towards Montego Bay. After the accident his truck was slightly slant on the road, the right front wheel about one foot from the white line, and the rear right wheel about two feet from the white line, and on his side of the road. Both cars had come over the white line about two feet at the time of the collisions. When the first car hit his trailer, he had already come to a stop, and was still stationary when it was hit by the second car. He denied that he attempted to overtake a laden truck and that he moved the vehicle after the collisions. However, his vehicle moved with the impact of both cars, each time to the right. Both vehicles collided with the right front wheel, and after the collision the right front tyre burst.

The allegation of the witness Andrew Collins that he saw the tractor-head reverse off the bank, to the other side of the road, formed the basis of substantial arguments on appeal as it was challenged at trial by an expert who was called to

establish that the tractor-head, in the condition it was found to be in subsequent to the accident, could not move ,or if so, very little, after the collision. The latter evidence forming as it did one of the bases for the learned judge's findings led to the following grounds of appeal.

1. The learned trial judge erred in finding as follows:

   (i) That he accepted the evidence of the defendant's/respondents' expert witness and accepted that the tractor-head became immobile at the time of the collision and remained so on the left side of the road facing Duncans.

   (ii) That the expert's evidence had been corroborated by exhibits 7 (a) to 7 (c).

2. As a consequence of erring in finding as aforesaid the learned trial judge also erred in finding as follows:-

   (i) That the collision took place on the left side of the road as one proceeds toward Duncans/Montego Bay;

   (ii) That the evidence of the Plaintiffs/Appellants and their witness runs counter to and was in conflict with all the expert evidence in the case.

   (iii) That the Defendants/Respondents driver Errol Shaw Smith was a witness of truth.

3. As a further consequence of the learned trial judge erring in accepting the Defendant's/Respondent's expert witness the learned trial judge also erred in accepting the Defendant's/Respondent's witness

account of the accident and rejecting the account given by the Plaintiffs/Appellants and their witness.

4. The learned trial judge also erred in finding that the plaintiff's/appellant's case is riddled with inconsistencies and contradictions which are so major that they seriously affected the credibility of their witnesses.

These grounds readily disclose that the real issue advanced in this appeal relates to the judge's assessment and conclusions in respect of the evidence of the two experts who testified, i.e. one for the appellant and one for the respondent. This issue assumed importance because after the collisions and at the time of the arrival of the police at the scene, the tractor-head was seen on its correct side of the road. If therefore because of its condition it could not have been moved after the collisions then that would most certainly support the testimony of its driver that the accident took place on his side of the road and that he did not reverse it to that side of the road after the accident, as was alleged by Mr. Aratram the second plaintiff/appellant who testified that he saw that happen. On the other hand if the evidence of the expert called by the appellant was accepted, then the appellants say that that would support Mr. Aratram, and explain why the tractor-head was on its correct side, although the collision took place on the other side of the road.

With that background it is convenient now to look at the relevant findings of the learned judge. He found inter alia:-

1. That the collision took place on the left side of the road as one proceeds towards Duncans/Montego Bay...

2. That I accepted the evidence of the defendant's expert witness and hold that the tractor-head became immobile at the time of collision and remained so on the left side of the road facing Duncans.

3. That the expert's evidence had been corroborated by Exhibits 7 (a) to 7 (c).

4. That the plaintiffs' case has been riddled with a number of inconsistencies and contradictions and which are so major that they have seriously affected the credibility of their witnesses.

5. That the defendant's driver Errol Shaw-Smith impressed me as a witness of truth. I accepted his version of the accident and accordingly the plaintiffs failed in my view to establish and prove their case on a balance of probabilities.

The learned judge's finding at (5) i.e. that he accepted the witness for the respondent as a witness of truth, and thereby found that his account of the accident was accurate, effectively shuts out the appellant from a reversal of that finding unless they can establish the following:

(i) That any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the learned trial judge's conclusion.

(ii) That the reasons given by the trial judge are not satisfactory or it is unmistakably so from the evidence.

(iii) That the learned judge has not taken proper advantage of his having seen and heard the witnesses.

(See ***Watt v Thomas*** [1947] A.C 484).

Mr. McBean tried valiently to accomplish this task by an analysis of the physical evidence, and an attack on the learned judge's acceptance of the defence expert and an implied rejection of the plaintiffs'.

Given the contentions in this case it may be appropriate to remind ourselves of the words of Lord Reid in ***Benmax v Austin Motor Co.Ltd*** [1955] 1 All E.R. 326 at 328:

> "Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to mimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not , trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness' memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is,

> and should be, slow to reverse any finding which appears to be based on any such considerations".

Later (at pg. 329) Lord Reid said:

> "...But in cases where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though, it ought of course, to give weight to his opinion".

Mr. McBean in attempting to impugn the learned judge's finding referred us to some physical evidence, which he contended supported the plaintiffs' evidence that the collision took place on the left side of the road as one proceeds to Kingston i.e. the plaintiff's Nembhard correct side of the road. The evidence to which he referred us, is the finding of debris and broken glass on that side of the road, which he contended established the point of impact. This argument in my view is nullified by the fact that the plaintiff and his witness all established that after the impact the plaintiff's car was pushed to its left, a movement which would cause broken glass and other debris to be carried across the road, as the car traversed it and went into the ditch. Mr. McBean also referred to the presence of oil on both sides of the road. The oil it was agreed came from the tractor-head, but as the road was an incline the oil would run from wherever it started to the other side of the road, and therefore that evidence would be unhelpful in determining the point of impact. That left the case with:

(i) The evidence of the witnesses in this regard. The learned judge found the respondent's witness to be a credible witness, a finding which I would be slow in reversing for the reason expounded in the cited case (supra); and

(ii) the evidence of the experts which as I have said before is the real basis for the appellant's complaints. I now turn to that evidence.

EVIDENCE OF EXPERTS

The learned judge accepted the expert witness for the defence and concluded that the tractor-head became immobile after the collision and consequently remained where the collision took place i.e. on the left side of the road facing Duncans.

To understand the contention of Mr. McBean for the appellant, an analysis of the evidence of the experts is necessary.

Firstly, the evidence of Mr. Ivor Leach , the expert for the respondent. This witness gave his opinion based on an examination of the tractor-head, subsequent to the accident. Following is a list of damage he found:

(i) a bent front axil beam

(ii) bent and broken track-rod

(iii) broken spring bracket

(iv) broken fuel tank

(v) broken by pass filler and pipe

(vi) busted up tyre

(vii) a damaged front panel cap

(viii) windscreen & bumper damaged

(ix) right hand door damaged

(x) a cab -mount rubber broken

(xi) a broken brake-pipe which controls right hand wheel brake

(xii) right hand light wire damaged

(xiii) front panel damaged.

In his opinion, based on the damages he observed, the vehicle could not be driven on its own power. The vehicle would be unable to start because it carries a safety device that prevents damage to the engine. The safety device switch is connected to the oil pressure. If the oil pressure falls, that switch is activated in seconds and shuts down the engine. Because of the fact that the pipe from the bypass filter was broken, he was able to come to the conclusion that the switch had come into effect at the time of the accident. Then he states:

> "The only way vehicle could move is by towing. It would have to be towed as the tyre is resting on the cab then front axel is on the ground, it is making its own lock in a fuel tank. By saying it is making it's own lock in a fuel tank it means that there is a broken track rod, and a disassembled spring bracket. It is making its own lock under no control".

In cross-examination the witness maintained his opinion. He was asked:

> "If oil was still in the line and the safety device switch had not yet tripped in and if engine was still on even for a few seconds couldn't the push or pull of the rear wheels still move the vehicle?".

He answered:

> "No way it could move."

And in re-examination he re-affirmed his opinion:

> "If the same truck got damage with the broken track rod it could not move. It could not move because the broken air pipe would lock brake automatically, the tyre resting on cab, binding of axel in ground and the broken track rod, the engine would be unable to start".

If that evidence is believed, as it was by the learned judge it is clear that there could be no other finding but that the vehicle became immobile after the accident.

On the other hand, the expert for the appellant, Mr. Collin Young proffered a somewhat different opinion . His opinion it must be remembered was not as a result of a physical examination of the vehicle, but on the basis of a photograph of the damaged vehicle, (Ex. 7) and on questions as to the effect of the damage to the vehicle. It is the following evidence that the appellants relied upon:

> "If a gas tank and oil filter on a tractor-head such as one in Ex. 7 (photograph) is knocked off the vehicle would still run but not for a long distance. It would run because of fuel in line. A combustion chamber would have some of the fuel left in it and this will run for a few seconds. If vehicle is on a steep incline with track rod, gas tank and oil filter hit off it would still run backwards".

He then agrees with the opinion of Mr. Leach that the tractor-head has a safety device to shut down the engine so as to protect it from damage, but he

goes on to say 'If safety device trips in and vehicle on steep incline with its face up, the vehicle run backwards'. Mr. Young , however, in cross-examination gave answers which put a different complexion on his evidence in chief. Asked the following question:

> " Could a vehicle move if in a bent front axle beam shared off spring brackets broken springs, bent and broken track rod, broken by-pass filter, broken fuel tank, broken cab mount, rubber, a busted right tyre and other miscellaneous damage such as broken windscreen glass and damage to a cab panel?"

The witness answered:

> "Very little if any".

Then on further cross-examination he stated:

> "If tyre is busted and the springs are damaged then the vehicle would list to side of impact. It is possible if cab mount rubber is busted, the cab could touch wheel. It is true to say then that such a vehicle could not move unless towed. If you put this vehicle on earth banking it would be even less likely for vehicle to move. Vehicle in Ex. 7 carries a power steering. If power steering goes it could be hard to steer. If track rod is broken it would be impossible to steer".

Then he avers that on a steep incline a vehicle such as the damaged tractor-head could run back depending on the distance. ' The distance would be small. It would be a small possibility. I would say it would run back for about one foot'.

Then further:

> "The busted tyre would have affected the movement. Bent front axel beam would affect movement. It would throw out alignment. It depends on how badly distorted the spring clamp were. Not much

> effect if any if the clamps were not distorted. Shared offspring brackets, bust tyre and broken springs are those factors which would have affected movement. These would depend on the position they were after damage. If springs were broken from spring clamps so that they go in different directions then wheel would not be in a position to turn. If they were not badly distorted then vehicle could have run back. In my estimation if tyre was busted vehicle would run back for only a foot ".

It is obvious that the lack of physical examination of the vehicle was a clear disadvantage to this witness as his answers depended so much on variables which were not to his personal knowledge. Importantly however, when the total damage of the vehicle was put to him he conceded firstly that it would be able to move 'very little if at all'. Then in considering the 'busted tyre' touching the cab, he admitted that the vehicle would have to be towed; and even where he spoke of the vehicle running back on the incline, he limited that distance to one foot. This evidence in my view must have placed doubt on the veracity of the evidence of Mr. Aratram who professed to have seen the vehicle mount the bank and then reverse to the other side of the road.

Needless to say, if the plaintiff's experts could have had that effect, what then of the respondent's expert who consistently stated throughout his evidence that with the type of damage he saw, the tractor-head would have become immovable.

In those circumstances, we see no reason to interfere with the finding of the learned judge because it follows that if the tractor-head could not move after

the accident then the collision must have taken place at the spot where it was found to be after the accident.

For the stated reasons the appeal is dismissed and the order of the court below affirmed. The appellant should pay the costs to be taxed if not agreed.

It should be noted for the record, that GordonJ.A (deceased) approved this judgment in draft before his passing.