[2023] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE V HARRIS JA

PARISH COURT CIVIL APPEAL NO COA2022PCCV00012

BETWEEN	**LASCELLES SALES**	**APPELLANT**
AND	**ALDEAN MCBEAN**	**RESPONDENT**

Wilwood Adams instructed by Robertson Smith Ledgister and Company for the appellant

Mrs Denise Senior Smith instructed by Oswest Senior Smith and Company for the respondent

28 February and 1 March 2023

ORAL JUDGMENT

V HARRIS JA

[1] This appeal has its genesis in a claim for negligence brought by the respondent, Ms Aldean McBean, against the appellant, Mr Lascelles Sales, arising from a fire that destroyed her motor car, a grey 2007 Toyota Wish, at Manchester Road, Mandeville, in the parish of Manchester on 27 May 2019. On 3 May 2022, following a trial before His Honour Mr John Tyme, senior judge of the Manchester Parish Court ('the learned judge of the Parish Court'), the appellant was found liable for negligence and ordered to pay damages of $909,000.00 plus costs.

Background facts

[2] The respondent's case at trial was that on 27 May 2019, at about 5:30 am, Mr Nigel Williams, the respondent's stepfather, was driving her motor car, which was being

operated as a taxi, on Manchester Road, Mandeville, in the parish of Manchester. On reaching the vicinity of Sinclair Bargain Centre, the motor car, according to Mr Williams, "just shut down". Later that morning, he went in search of an electrician and found the appellant at his workplace on Ward Avenue. Mr Williams had prior knowledge that the appellant was an auto electrician. Having explained his dilemma to the appellant, Mr Williams travelled with him to where the disabled motor car was. Mr Williams testified that the appellant used his "tester" to check under the bonnet of the motor car to see if any fuse had "blown" but found nothing. The appellant then checked the gas pump beneath the back seat. Mr Williams observed two wires connected to the gas pump, one of which was covered with tape. The appellant removed the tape and instructed Mr Williams to switch on the ignition. Nothing happened. At this point, the appellant removed the hose from the gas pump and gas spilt from the hose in the general area where the pump was located. He then connected a wire from the battery to the gas pump. After the appellant touched the wire, there was a spark, which caused a fire. Despite their best efforts to extinguish the fire, it quickly engulfed the motor car and completely destroyed it. The motor car was assessed as unrepairable, with a total loss value of $900,000.00. The respondent also relied on the doctrine of *res ipsa loquitur* to prove her case.

[3] The appellant's evidence was that he is an auto electrician. At about 7:15 am on 27 May 2019, he stated that Mr Williams came to his garage on Ward Avenue and told him that his vehicle was not starting, but he did not explain why this was so. They went to where the car was. When they arrived, the car's bonnet was up, and he checked to see if any wires were burnt. The appellant said he told Mr Williams to start the car for him "to see what was going on". On the first try, the appellant said he heard a click and instructed Mr Williams to try again. On the second attempt, there was another click, and the car burst into flames. The appellant denied using his tester, removing the gas hose and the tape from the wire connected to the gas pump, as well as running a wire from the battery to the gas pump. In summary, the appellant denied that he was liable for negligence.

The decision of the learned judge of the Parish Court

[4] In his analysis of the evidence, the learned judge of the Parish Court decided that the appellant owed a duty of care to the respondent by applying the test in **Anns and others v London Borough of Merton** [1977] 2 All ER 492 ('**Anns v Merton**'). He also considered the principles in **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118 ('**Bolam**'). Having done so, he opined that as an auto electrician who offers his service to the general public, the appellant was expected to demonstrate the average competence of persons who engage in this line of work, and should he fall short of this standard, he would be negligent. The learned judge of the Parish Court, having accepted Mr Williams' evidence, found that the appellant's conduct fell short of the standard expected; he breached the duty of care owed to the respondent, and her motor car was destroyed due to his negligent act. The learned judge of the Parish Court concluded that the damage caused by the appellant's negligence was foreseeable and awarded damages as indicated at para. [1]. However, he did not find the doctrine of *res ipsa loquitur* to be applicable in light of the evidence adduced on the respondent's case.

The appeal

[5] The appellant filed notice and grounds of appeal on 9 May 2022, challenging several findings of fact and law. The grounds as filed are:

> "a. The Judge wrongly concluded that the parties were engaged in an employment contract.
>
> b. The concept of Duty of Care:
>
> (i) Foreseeability
>
> (ii) Proximity
>
> (iii) Fairness
>
> were not properly established by the [respondent]/Court in the circumstances, whereby the [appellant] was found to be negligent.

c. Whether in the light of the evidence, a duty of care can be put on the [appellant]."

Submissions of the parties

[6] The appellant's position, as advanced by learned counsel Mr Adams, was that the respondent's case was anchored on the doctrine of *res ipsa loquitur,* and once the learned judge of the Parish Court found that this principle was inapplicable to the case, he should have non-suited the respondent. However, having failed to do so, he went on to consider whether the appellant owed a duty of care to the respondent and incorrectly applied the test in **Anns v Merton**, which was outdated and had been replaced by the three-tier test in **Caparo Industries plc v Dickman and others** [1990] 1 All ER 568 ('**Caparo**'). As a consequence, the learned judge of the Parish Court's misapprehension of the law was fatal to his decision.

[7] On the respondent's behalf, learned counsel Mrs Senior Smith indicated that her written submissions were tailored to address the appellant's grounds of appeal. Accordingly, the respondent's position was that firstly, regarding ground a, the learned judge of the Parish Court, in his written reasons for decision, made no finding that the parties were engaged in an employment contract; secondly, in respect of ground b, in determining whether a duty of care ought to be ascribed to the appellant, the learned judge of the Parish Court placed heavier reliance on **Bolam**, which is still good law, than on **Anns v Merton**; and finally, concerning ground c, given the evidence that the learned judge of the Parish Court accepted, he did not fall into error when he found that the appellant owed a duty of care to the respondent.

The issue

[8] The appellant has not challenged the learned judge of the Parish Court's findings of fact. Instead, the focus of the appellant's attack has raised the issue of whether the learned judge of the Parish Court misapprehended the applicable law and thereby erred when he ascribed a duty of care, as well as liability for negligence, to him. However,

before addressing this issue, it is necessary to consider the relevant authorities that will assist the court in resolving it.

Discussion

[9] It is now well-settled that to prove the tort of negligence, the existence of a duty of care, a breach of the duty, a causal link between the breach and the damage, and foreseeability of the particular type of damage that resulted, must be established.

[10] In **Caparo**, Lord Bridge of Harwich, after reviewing the authorities (including **Anns v Merton**), propounded the modern test of whether a duty of care exists in a particular case at pages 573 – 574 of the judgment:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. …"

[11] In applying **Caparo** in **Glenford Anderson v George Welsh** [2012] JMCA Civ 43, Harris JA succinctly restated the principle in this manner:

> "[28] In establishing a duty of care there must be foreseeable damage consequent upon the defendant's negligent act. There must also be in existence, sufficient proximate relationship between the parties making it fair and reasonable to assign liability to the defendant. …"

[12] **Caparo** has also been applied in other decisions of this court, including **The Jamaica Public Service Co Ltd v Winsome Patricia Crawford Ramsey** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 17/2003, judgment delivered 18 December 2006 (pages 62 - 63) ('**JPS v Ramsey**') and **Adele Shtern v Villa Mora Cottages Ltd and Monica Cummings** [2012] JMCA Civ 20 (at para. [49]).

[13] Before **Caparo**, Lord Wilberforce, in **Anns v Merton**, established a broad test (commonly referred to as the "two-stage test") for determining the existence of a duty of care in the following terms:

> "… the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. …"

[14] In short, the two-stage test articulated by Lord Wilberforce in **Anns v Merton** required a sufficient relationship of proximity based upon foreseeability of damages; and, secondly, considerations of factors (or reasons) that would negate or restrict the scope of the duty of care. However, the test was severely criticised in later decisions of the Privy Council and House of Lords (see **Yuen Kun-yeu and others v Attorney General of Hong Kong** [1987] 2 All ER 705 and **Rowling and another v Takaro Properties Ltd** [1988] 1 All ER 163, decisions of the Privy Council; **Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd and others** [1984] 3 All ER 529 and **Hill v Chief Constable of West Yorkshire** [1988] 2 All ER 238, decisions of the House of Lords). Inevitably, it was overruled by the House of Lords in **Murphy v Brentwood DC** [1991] 1 AC 398. Consequently, as the law now stands, the test to determine the existence of a duty of care is as pronounced in **Caparo**.

[15] Therefore, in principle, we agree with the appellant that, in deciding whether he owed a duty of care to the respondent, the learned judge of the Parish Court's consideration of **Anns v Merton** was erroneous. The question that now arises is whether, in all the circumstances, this error of law is fatal to the learned judge of the Parish Court's decision so that this court must intervene and set it aside. We are not convinced that the

application of the test in **Anns v Merton**, *ipso facto*, has rendered his decision susceptible to interference by this court. On the contrary, the court is of the view that, in any event, in determining whether the appellant owed a duty of care to the respondent, the evidence the learned judge of the Parish Court accepted amply satisfies the test in **Caparo**. We say so for the following reasons.

Proximity

[16] The learned judge of the Parish Court accepted that the appellant offered his services as an auto electrician to Mr Williams to check the respondent's motor car to determine what had caused it to become disabled. As the owner of the motor car, the respondent was a person who would have been "closely and directly affected" by any acts of carelessness or omissions to take reasonable care on the appellant's part that could cause damage to her motor car. Additionally, the appellant's services were engaged by the respondent's agent (Mr Williams), who had the ostensible authority to do so, given the unchallenged evidence that he was responsible for maintaining the motor car. Therefore, there was a sufficiently proximate relationship between the appellant and respondent.

Foreseeability

[17] In our view, it cannot be seriously debated that the damage that resulted from the appellant's act was not foreseeable. The evidence accepted by the learned judge of the Parish Court was that the appellant caused gas to spill in the general area where the gas pump was located when he removed the hose from the pump. Following that, he attached a wire from the battery to the gas pump, which emitted a spark upon being touched by him, and this caused a fire that rapidly engulfed and totally destroyed the motor car. We feel compelled to observe that it seems to us that the appellant's act was quite frankly a recipe for an inferno, and true to form, this was precisely what occurred. This limb of the **Caparo** test is, therefore, satisfied.

[18] In light of the evidence and the circumstances of the case, we consider that it would be fair, just and reasonable that the law should impose a duty of care on the

appellant for the benefit of the respondent. Accordingly, the learned judge of the Parish Court was correct to so find.

[19] Having found that the appellant owed a duty of care, the learned judge of the Parish Court determined that the appellant had acted in breach of that duty and that the breach caused the damage the respondent sustained. Having evaluated the evidence, the learned judge of the Parish Court correctly stated that the standard of care and skill that was demanded of the appellant as an auto electrician while he was examining the respondent's motor car was the degree of care and skill that was to be expected of a reasonably competent auto electrician doing the work in question. The learned judge of the Parish Court also correctly concluded that should he fail to meet this standard due to a lack of reasonable care, he would be liable for negligence.

[20] As Harris JA in **JPS v Ramsey** stated at page 64 of the judgment:

> "… [W]here the service which is offered by the defendant, by carelessness on his part, creates a danger causing damage to a claimant, and there is proof that the defendant neglected to exercise due care to prevent the damage, it is without doubt that the defendant would be liable."

[21] In the present case, there was overwhelming evidence on which the learned judge of the Parish Court could find that the appellant's negligence created the danger that caused the fire that destroyed the respondent's motor car. There was also sufficient proof that he neglected to exercise reasonable care to prevent the fire. Accordingly, the learned judge of the Parish Court did not fall into error when he found the appellant was negligent and ordered him to compensate the respondent for the damages she suffered.

[22] Before concluding, we wish to make two observations. Firstly, we agree with the respondent that the learned judge of the Parish Court made no finding that the parties were engaged in an employment contract. What he stated was that, given the evidence, he believed that the respondent "would have a strong case that there was a contractual relationship". However, he correctly acknowledged that "the manner in which the evidence was presented suggest [sic] that the action lies in tort". This finding by the

learned judge of the Parish Court cannot be faulted as the plaint note, and particulars of claim clearly showed that the appellant was claiming damages for negligence. Ground a, therefore, would fail. Secondly, the appellant's submission that the learned judge of the Parish Court should have non-suited the respondent once he found that the doctrine of *res ipsa loquitur* was not applicable, is entirely devoid of merit. The respondent had averred in her particulars of claim that this doctrine was being relied on in so far as it was applicable. Having decided that the principle was inapplicable, it was for the learned judge of the Parish Court to determine nonetheless whether the respondent, on a balance of probabilities, had otherwise proven her claim.

Disposal of the appeal

[23] In disposing of this appeal, we are mindful of the powers of this court when considering appeals in civil proceedings from the Parish Courts as set out in section 251 of the Judicature (Parish Courts) Act, and in particular, the proviso to that section:

> "251. … And the Court of Appeal may either affirm, reverse, or amend the judgment, decree or order of the court; or order a non suit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
>
> **Provided always that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between to the parties to the cause:** …" (Emphasis added)

On an evaluation of the error made by the learned judge of the Parish Court in failing to apply the relevant law, we are of the view, having assessed this case, that that error has not caused any injustice to the appellant against whom the judgment and subsequent order were made.

[24] Consequently, for the reasons we have sought to explain, we make the following order:

1. The appeal is dismissed.

2. The judgment of His Honour Mr John Tyme given on 3 May 2022 is affirmed.

3. Costs of $40,000.00 to the respondent.