JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 26/98

COR. THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	TERRI TENN PATRICK CHANG	APPELLANTS
AND	DEVON CLUNIS	RESPONDENT

Michael Hylton Q.C. and Carlton Williams instructed by Williams, McKoy and Palmer for Appellant.

Ian Wilkinson instructed by Grant, Stewart, Phillips & Company for Respondent

May 25 and December 20, 1999

PANTON, J.A.

On May 25, 1999, we dismissed this appeal from a judgment delivered by Theobalds, J on March 20, 1998. We now state our reasons for having done so.

The matter that was before the learned judge was a notice of motion to set aside the judgment of Marsh, J entered on November 25, 1997. In that notice, the appellants herein claimed that they were applying under and by virtue of Section 354 of the Civil Procedure Code and they had a good defence to the claim.

In the action filed on October 11, 1995, the respondent sought damages for negligence as a result of serious physical injuries sustained by him in a motor vehicle accident. **Paragraph 4 of the Statement of Claim reads thus:**

> "On or about the 16th day of June, 1995, the plaintiff was lawfully riding his motor cycle westerly on Retirement Road in the parish of St. Andrew in the vicinity of the Brentford Mall when the second defendant who was travelling in the opposite direction so negligently drove, managed or controlled the said motor vehicle registration number 2268BD, to wit, making a sudden right turn into the Brentford Mall and colliding violently into the plaintiff's motor cycle as a result of which the plaintiff suffered injury, loss and incurred expenses."

PARTICULARS OF NEGLIGENCE

a) Driving at a speed which was too fast in the circumstances.

b) Failing to keep any or any proper look out or to have any or any sufficient regard for other users of the road.

c) Driving without due care and attention for other users of the road and in particular the plaintiff.

d) Driving in a careless and /or dangerous and/or reckless manner.

e) Failing to stop, slow down, swerve or in any other way so to drive, manage and/or control the said motor vehicle so as to avoid colliding with the plaintiff.

f) Failing to see the plaintiff in sufficient time to avoid colliding with him.

g) Failing to give any or any adequate warning of your intention to turn.

h) Failing to ensure that the road was clear and it was safe to turn before doing so."

No appearance was entered, so in interlocutory judgment was entered against the appellants on November 2, 1995. Appearance was entered fifteen days later. Damages were eventually assessed by Marsh J on November 25,1997 - that is, more than two years after the entry of appearance.

The record of appeal indicates that a summons for an order to set aside the default judgment was lodged in the Registry of the Supreme Court on or about February 8, 1996 - that is, about three months after the entry of the judgment. That summons was mislaid. The appellants filed another summons on May 9, 1996. This was set down for hearing June 4, 1996, but was not heard due to the illness of the appellants' attorney-at-law whose health subsequently deteriorated to the point that the appellants had to retain the services of another attorney-at-law. This, it is to be noted, was done on November 24, 1997, a mere day before the scheduled assessment of damages. On the date of assessment, the appellants' new attorneys-at-law were, according to the first defendant/appellant, "not in a position to persuade the Court to adjourn the hearing pending the application to set aside the judgment." The assessment was proceeded with by Mr. Marsh, J. who awarded $4,505,500.00 as general damages and $378,778.45 as special damages, plus interest and costs.

Theobalds, J refused the application to set aside the judgment as, in his view, it was without merit. He noted that there was inconsistency in the proposed defence and that the second defendant/appellant had been driving a

vehicle she was not qualified to drive. He also said that there was no consideration for the plaintiff's predicament, and that the plaintiff would be severely prejudiced should the judgment be set aside.

The following are the amended grounds of appeal:

> "(1) That the order is unreasonable having regard to the evidence.
>
> (2) That the learned trial judge failed to have properly considered the affidavit of Terri Tenn which dealt with the merits of the defendants' case.
>
> (3) That the learned trial judge fell into error in holding that there was no merit in the defendants' case.
>
> (4) That the fact that the second defendant may not have had the appropriate licence for driving the vehicle is a matter which is irrelevant to the question of liability in the particular circumstances and ought not to have been used in determining whether the defendants had shown that there was a triable issue".

So far as ground 4 is concerned, it appears that there is some misunderstanding on the part of the appellants. In the note of the judgment, this is what the learned judge said:

> "Statement in correspondence - Tenn driving a vehicle she is not qualified to drive".

This does not indicate the learned judge placed any reliance on the statement so far as the determination of liability was concerned. He was merely stating a fact—that the appellant had been driving a vehicle without the appropriate driver's licence. There is nothing to indicate that that indisputable fact played any part whatsoever in the judge's decision. That being so it cannot be said that there is any merit in this ground of appeal.

The remaining three grounds of appeal may be dealt with together as they relate to the question of the merits of the defence. Theobalds, J was required to determine whether there was an arguable defence. He would have been guided by the decision of the House of Lords in ***Evans v Bartlam*** [1937], A.C 473. In that case there was an appeal by the defendant from an order of the Court of Appeal reversing an order of Greaves -Lord J, sitting in Chambers, setting aside on terms a judgment obtained against the defendant on default of appearance. The House of Lords allowed the appeal and restored the order of Greaves-Lord J.

Lord Atkin said at pages 479 to 480:

> "I agree that both rules... give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a **prima facie** defence".

Lord Wright at page 489 said:

> "In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is **whether he has merits to which the Court should pay heed;** if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

Before Theobalds, J was an affidavit by Terri Tenn setting out the circumstances in which the plaintiff/respondent came to be injured. It is to that

affidavit that one must look to determine whether there was **"a prima facie defence" or "whether (there are) merits to which the Court should pay heed".**

In her affidavit, Terri Tenn, the driver of the offending vehicle, speaks of travelling along Retirement Road in an easterly direction with the intention to turn into Brentford Mall. She was in a line of traffic" which was moving very slowly". When the vehicle "was approaching the point at which (she) would start turning into Brentford Mall", she put on" the right side blinker light"... and "started to turn... right towards the entrance to Brentford Mall and saw a vehicle inside the Brentford Mall approaching the driving gate of the Mall and as this vehicle would block (her) path through the gateway of the Mall (she) came almost to a stop". As that point, she says, she was **at an angle in Retirement Road** with the front more towards (her) right than the back and with the front pointing towards the Mall". According to her, "suddenly a motor cyclist travelling at a fast speed came into view from the opposite direction and (she) stopped. The motor cyclist swung to his left and then appeared to swing back to his right and crashed into the extreme right end of (her) front bumper".

The affidavit clearly establishes that -

(1) the accident occurred on the plaintiff's side of the road at a time when the second defendant/appellant's car was turning right, thereby going across the path of on-coming traffic;

(2) the driver of the car was attempting to enter the Mall at a time when another vehicle was attempting to leave the Mall by the said entrance/exit; and

(3) the plaintiff/respondent tried, unsuccessfully, to avoid the danger that was created by the second defendant/appellant's negligent manoeuvre".

The manner of driving of the second defendant/appellant is frowned on by the statute law, in the form of Section 51 (1) (d) and (e) of the Road Traffic Act which reads as follows:

> "The driver of a motor vehicle shall observe the following rules - a motor vehicle
> ...
>
> (d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic.
>
> (e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road".

The provisions of this section merely accentuate the dangerous and negligent nature of the second defendant/appellant's driving. On the other hand, the plaintiff/respondent's reaction was as contemplated by Section 51 (2) which reads thus:

> "Notwithstanding anything contained in this section, it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

According to the second defendant/appellant's affidavit, it is clear that the plaintiff/respondent had nowhere to go in that to his left was the vehicle leaving the Mall whereas straight ahead was the second defendant/appellant's vehicle blocking the path; to his right was the line of traffic.

The defence as put forward in the affidavit amounts to no defence at all. It shows the second defendant as having violated at least two important rules of the road thereby endangering the life, well-being and safety of the plaintiff/respondent who tried to take evasive action which proved unsuccessful.

In the circumstances the appeal failed. Costs are awarded to the respondent and are to be taxed, if not agreed,