IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUPREME COURT LIBRARY
KINGSTON
JAMAICA

SUIT NO. C. L. 1974/W127

BETWEEN HERBERT WALCOTT PLAINTIFF

AND THE ATTORNEY GENERAL DEFENDANT

Mr. Scharschmidt /instructed by Mr. Bruce Barker of Livingston, Alexander and Levy/ for plaintiff.
Mr. Lloyd Ellis and Mr. Orr /instructed by the Crown Solicitor/ for defendant.

Heard: May 25, 26, 1978

J U D G M E N T

Morgan, J. :

This claim arises from an incident which took place on the 18th December, 1973. Calvin Deer, a driver, loaded the plaintiff's six wheeler Leyland truck with 720 bags of fertilizer weighing 150 lbs. each at Rio Bueno in the parish of Trelawny and along with three sidemen drove off on his journey to Kingston about 9:00 p.m.

It had been raining and the entire road was filled with water. The rain was continuous and falling heavily and negotiating the water caused the driver some trouble. Visibility was not very good. He had on two head lamps, two park lamps and his windscreen wiper, but his brakes were perhaps wet as he had been driving all along in the water. There was no traffic on the road.

It was a road to which he was well accustomed as he used it for the same purpose approximately twice per week. At a certain point in the road there is a bend and about twenty-five feet from this bend there is a bridge with rails approximately four feet high, on both sides, with the road bank approaching it approximately one foot high. At about 10:00 p.m., Mr. Deer reached this spot. The road was filled

with water up to the bank and he had been travelling along at fifteen to twenty miles per hour. As he turned the bend, approaching the bridge, he reduced his speed to 10 miles per hour. He then saw a mass of water which had filled up the bank and the bridge path. It was then he realised that there was no bridge. The water was running with some force. He could not stop and the truck "went down headlong into the stream". All the men escaped but the contents were washed away down stream and around a corner.

The plaintiff now claims damages against the defendant in negligence.

A part of the special damages having already been agreed, the plaintiff called Mr. Delvallie, a Director of the company, who owned and contracted the removal of the fertilizer to prove the damages pertaining to the cargo and to the loss of use of the vehicle. Plaintiff then closed his case.

Mr. Ellis for the defendant submitted that there was no case to answer and elected to stand on the following submissions:

(1) There was no evidence of negligence as the plaintiff failed to prove any or all the "Particulars of Negligence" as pleaded in his statement of claim.

(2) That the cause of the occurrence was known hence the doctrine of "Res Ipsa Loquitur" was not applicable.

(3) A duty to take care must be established by the plaintiff which he had failed to do. The defendant owes no such duty as Sec. 6 together with Sec. 21 of the Main Roads Act confer only a power on the Chief Technical Director to carry out certain functions in relation to main roads, and places no duty on him. This is so because these powers are subject to the

availability of funds voted by Parliament - funds which he receives through the Minister.

(4) There is no breach of statutory duty as the evidence did not disclose any misfeasance on the part of the defendant. Jamaica is bound by the common law in that responsibility flows only from proof of misfeasance as distinct from the statutory enactment in England of the Highway Authority Act (1961) which abolishes misfeasance and nonfeasance.

In support he quoted Municipality of Picton v. Geldert /1893/ A.C. 524.

(5) That the plaintiff's servant was himself negligent and did not exercise sufficient care and caution in all the circumstances. Accordingly, the plaintiff must fail.

Mr. Scharschmidt for the plaintiff conceded that the principle of misfeasance and nonfeasance as supported by the Municipality of Picton's case as cited was still applicable to Jamaica and submitted:

(1) That the evidence produced by the plaintiff has taken the case out of the realm of nonfeasance and because the defendant has failed to call evidence, the doctrine of Res Ipsa Loquitur applied. The "res" was not known - the only fact known to the plaintiff was that no bridge was there when one ought to have been there in circumstances as outlined in plaintiff's case. The reason for the disappearance of the bridge was not known to the plaintiff.

(2) The court ought to find as proved the particulars of negligence as pleaded:

(a) that the bridge is of faulty design;

(b) not constructed with reasonable skill or workmanlike manner; and

(c) was not properly maintained.

Such findings are to be found against the background of defendant's pleading in his Defence at paragraph 4 that "the bridge collapsed because of an exceptionally heavy rainfall".

(3) That the mere fact that the bridge failed to stand up in totally unprecedented rainfall was sufficient evidence of "faulty design". In support he quoted Queensland Government Railways v. Manufacturers' Mutual Ins. /1969/ 1 Lloyds 214 onwards.

(4) That the workmanship of the bridge was bad; that the defendants were vicariously liable for the negligence of their workers, and the damage occasioned by the accident was foreseeable. In support he quoted Hill v. James Co. Cases Limited /1978/ 1 All E.R. 812.

He asked for judgment for the plaintiff.

From the evidence of the plaintiff, I find that torrential rains caused this violent streem to wash away the bridge - a stream so forceful that the weight of the large truck and its equally weighty contents were carried down stream and around a bend.

Section 6 of the Main Roads Act confers on the Chief Technical Director and staff of the Public Works Department the "power" to repair, maintain etc. the main roads and to manage the funds thereof allotted. Section 21 of this Act details these powers. In my view, the Act places no "duty" on this officer to maintain. What he acquires by it is a "power".

At common law, a highway authority (such as the

Public Works Department) has a duty of care imposed on them and is liable for "doing work on the highway without taking reasonable care for the safety of users of the highway" - that is, misfeasance. This duty arises from two factors "interference of the highway" and "lack of reasonable care".

I hold that in order to establish liability, it is necessary to show some act amounting to positive misfeasance.

The plaintiff proved no act of misfeasance and the defendant called no witnesses. Counsel for the plaintiff submitted that the court should in the circumstances apply the doctrine of "Res Ipsa Loquitur".

The plaintiff cited in support of his argument, two cases:

(1) Queensland Government Railways v. Manufacturers' Mutual Inc. (supra);

(2) Hill v. James Co. (Cases) Limited (supra).

In the former, the plaintiffs were replacing a bridge which had been swept away by a flood. The work commenced then a flood higher than any recorded brought down three concrete piers which had been erected in the bed of the river as support for the bridge. An indemnity for loss of the piers was claimed under a policy of insurance with the defendants who covered the loss - but not if it fell under the description of "loss or damage arising from faulty design".

Evidence was adduced by both the plaintiff and defendant before the arbitrator who held:

(1) The bridge collapsed in torrential rain.

(2) The designer was not negligent.

(3) There was "faulty design".

He then went on to analyse the meaning of the words "faulty design" as per the policy of insurance and put forward two propositions, viz:

(1) "a design inadequate in the sense that it was capable of improvement";

(2) "an element of personal failure or non-compliance with standards which would be expected of designing engineers."

He accepted the proposition at (1) and found that the insurance company was liable.

On appeal before the High Court, it was held:

(a) As to the first proposition - it was a common instance of faulty design.

(b) That the piers fell because the design was defective though the designer was not negligent.

(c) That exclusion in the policy was not against "negligent designing" but "faulty designing".

(d) That loss was due to the "faulty" designing and it was wrong to confine it to the second proposition.

Windeyer, J., in his judgment after tracing the derivation use and meaning of the word "fault" concluded with these words:

> " I think that readimg in those words (faulty design) in their ordinary meaning the collapse of the piers was a result of their design being faulty. "

This case is distinguishable in that - and I emphasise - <u>evidence was adduced</u> that work was being done, that the object of the new bridge was to replace one which was already destroyed by a similar phenomenon, that is, a flood and upon that evidence the court came to the decision that the three concrete piers on part of the bridge which was washed away/was of "faulty design".

The words of Windeyer, J., must be construed broadly and not in isolation and taking the judgment as a whole, I am unable to read into these words or indeed into any part of

the judgment any basis for a submission that the fact that this bridge collapsed in unprecedented weather - by itself was sufficient evidence of faulty design.

In the latter case, the plaintiff was injured when he was engaged in loading a lorry. He had stood on a wooden case; the case broke causing him to lose his balance and fall. Evidence was given by a witness for the plaintiff that he examined the box and there was an insufficient number of nails to fasten it. This was the act of negligence alleged and even though the manufacturers gave evidence that there was a good system of work and adequate supervision, it was held that the mere fact that the case broke proved contra the evidence and that he was vicariously liable for the negligence of his workmen.

This case is distinguishable in that:

(a) The plaintiff proved an act of negligence by evidence.

(b) The liability - a manufacturer's liability - arose from a duty to take care, a duty which arises sans misfeasance, and there was a presumption of negligence because the losening of the nails was unexplained.

Is the maxim Res Ipsa Loquitur applicable to this case? Does the accident speaks for itself? Did something happen, the cause of which is unexplained? To answer these, one must have a look at the doctrine. This doctrine does not alter the general principle that the onus of establishing the case rests on the plaintiff. Where, however, the evidence of the circumstances is meagre, but sufficient, the court can infer facts to prove the negligence out of the circumstantial and meagre evidence. Where the "res" is unknown, a reasonable inference may be drawn, if supported, on a mere balance of probabilities. It follows that the doctrine is not applicable if the thing ("res") is known.

209 /.....

The plaintiff not only relied on the fact of the occurrence that the bridge was absent, and the truck was washed away, but himself adduced evidence of the probable cause of the washing away, that is, torrential rains and gave evidence to support this. Hence the "res" is known. In these circumstances, the defendants are not the only persons capable of explaining the cause. On a balance of probabilities, as I have found, the bridge was washed away by the force of the water as a result of the torrential rains - the force of which the truck itself experienced. It is the duty of the plaintiff to displace that probability for on his own case it was the only reasonable inference to draw. The plaintiff submitted that the structure of the bridge was faulty and the workmanship was bad, from the mere fact that it collapsed in torrential weather. Is that a reasonable inference to draw? I find not.

In my view, the doctrine does not take away the fact that a duty of care owed to the plaintiff must be proved, that is misfeasance - this has not been proved. There was no evidence as to the characteristic of the bridge or as to the unusualness of the occurrence. There was no evidence of any nature that some work was done on the bridge or any evidence at all to raise the inference that whatever was done or not done on a balance of probabilities was badly done. There was no evidence to raise a presumption of negligence. It was difficult if not impossible to find that the accident was due to any act of negligence on the part of the defence.

I hold that this is not a case in which the doctrine of Res Ipsa Loquitur can be invoked.

In Sochacki v. Sas /1974/ 1 A.E.R. p. 344, where a fire was left burning in a room which caught fire in some unexplained way, Lord Goddard, C.J., in holding that the doctrine did not apply said:

> " Everybody knows fires occur through accidents which happen without negligence on anybody's part. "

I see no difference in this case.

I adopt the words of the learned Chief Justice:

"Everybody knows that bridges get washed away in floods without negligence on anybody's part. "

Additionally, even if the doctrine applied contra my finding, I would have to give consideration to the plaintiff's own evidence - a truck carrying 720 bags of 150 lbs. each, loaded with great weight, driving at night in extremely heavy rainfall, at 10:00 p.m., with head lamps - not good visibility - on wet road, travelling fifteen to twenty miles per hour - comes to a bend the approach to a bridge and goes through at 10 miles per hour in road filled with water one foot high - the height of the bank.

It is clear that he was driving at a speed excessive in all the circumstances, was not or at most unable to keep a proper look out and as a result was unable to stop on time. Indeed, the bridge carried rails and the very absence of the rails should have put him on his guard.

I would perforce have had to come to a finding of fact on this evidence that the plaintiff failed to exercise reasonable care, did not drive as a reasonable and prudent driver ought to have driven and that the measure of negligence on his part, contributing to the accident, was indeed great, if not complete. For these reasons there will be judgment for the defendant with costs to be agreed or taxed.

211