

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 7 OF 1970

BEFORE: The Hon. Mr. Justice Eccleston  
The Hon. Mr. Justice Luckhoo  
The Hon. Mr. Justice Smith

BETWEEN                      ETHEL WALTERS                      PLAINTIFF/RESPONDENT  
  
AND                              TOMMY LOWE                      )  
                                    GERALD BENNETT                      )                      DEFENDANTS/APPELLANTS

30th October, 1970;                      November, 1970.

Mr. H. G. Edwards, Q.C. for Plaintiff/Respondent  
Mr. Dennis Daly for Defendants/Appellants.

ECCLESTON, J. A.

This appeal is against the judgment of one of the Resident Magistrates for St. Andrew on a claim and counter claim in an action for negligence in which he found that the collision was wholly caused by the second defendant's negligent driving and awarded damages for the plaintiff on her claim for £458. 12s. and on the counter claim with Costs to be taxed.

The case for the plaintiff was that her motor car in which she was a passenger was being driven by Cyril Knight on the night of the 16th January, 1968 along the Spanish Town Road in St. Andrew in a westerly direction. It was their intention to turn into West Road which runs northerly from the Spanish Town Road; West Road forms a 'T' junction with Spanish Town Road. Approaching this junction her car slowed to a stop with the right front wheel of the car 1½ feet to the left of the centre line along Spanish Town Road. The indicator light was flashing, thus signalling an intention to turn to the right. A motor vehicle was approaching from the west along Spanish Town Road and while waiting in this position for that vehicle to go by, her motor car was run into by the defendant's motor van which came from behind and was attempting to overtake in the face of the oncoming motor vehicle. The

impact resulted in the driver of the plaintiff's car losing control of her car, which went off to the left and ran into a light pole on the southern side of the street. The damage caused by the collision with the light pole was more extensive than that caused by the impact with defendant's motor van. She called as witnesses Cyril Knight, her driver, and Elvin Dessard, a pedestrian.

The case for the defendant as given by his driver, the second defendant, was that he was travelling behind plaintiff's car for a distance of 12 to 14 chains at about 25 m.p.h. He accelerated to 30 m.p.h. to overtake and that no motor vehicle was approaching at that time. He dipped his lights and sounded his horn and commenced to overtake and before completing this act he heard a bang on the left side of his vehicle. He stated that plaintiff's car was moving at the time of the impact, and that the plaintiff gave no signal of intention to turn to the right.

The defences to both the claim and counter claim were denial of negligence, and that each party was solely to blame for the collision. In his reasons for judgment the Resident Magistrate said:

"A vital issue in the case was the presence and position of a third motor vehicle travelling easterly on the Spanish Town Road. There was no conflict on the evidence given by both sides as to the presence on the road, but as regards its position the plaintiff contends that the defendant overtook at a time when the east bound car was passing her car. Put another way she says that defendant manoeuvred in between the east bound car and hers in order to overtake. If this is so then defendant is clearly guilty of negligent driving. The defendant however disagrees with this, saying that the east bound car had already passed on before he commenced to overtake plaintiff's car.

On this issue I found for the plaintiff. I believed the plaintiff and her witnesses. From the evidence of defendant that he dipped his lights, I drew the inference that he dipped his lights because of the approaching car and not to signal intention to overtake. On the other issues viz. whether plaintiff had given a signal of intention to turn right and whether her car was stationary or moving at the time of the impact, I also found in favour of the plaintiff."

Before us Counsel for the appellant has taken three grounds

of appeal. The first is that the finding of the Resident Magistrate that the collision was wholly caused by the negligence of the second defendant was unreasonable having regard to the evidence.

He submitted that the finding that the plaintiff's vehicle was stationary at the time of the collision cannot be supported having regard to the evidence that the driver of the plaintiff's vehicle lost control of the said vehicle after the collision with the defendant's van and ran into an electric light pole on the southern side of the Spanish Town Road and the evidence of the damage sustained by the first defendant's van as a result of the collision.

It was the submission of Counsel that in the reasons for judgment the Resident Magistrate omitted to stress the importance of the issue whether or not the plaintiff's car was in motion. He contended that the evidence that the driver lost control of the vehicle which ended up against a light pole with more damage than it received in the collision indicates that the finding that it was stationary was not as probable as would be a finding that it was moving as a glancing blow to a stationary vehicle would not have the effect that such a blow would have to one that is moving and the severe damage is more in keeping with a vehicle moving with its movement accelerated by the glancing blow and causing the driver to lose control. It was his contention that if in fact the plaintiff's car was not stationary the defendant's driver did what was correct. He dipped his lights twice to indicate he was overtaking and the damage on defendant's van was more consistent with plaintiff's vehicle moving into the left side of defendant's while he was overtaking than that it was stationary at the time of the impact. He submitted that the damage along the entire right side from the front fender to rear fender of plaintiff's vehicle is inconsistent with the facts in this case, bearing in mind the damage to the defendant's vehicle.

I find it extremely difficult, because of a lack of explanation, to picture how this collision occurred based on what is stated as the physical effects of the damage sustained

on the sides of each vehicle. The record discloses that in his address counsel for defendant brought to the attention of the court the probability of the plaintiff's vehicle being in motion rather than stationary, but I see no mention about the damage on the side of each vehicle. This, however, is not surprising in view of the admissions made at the beginning of the trial. No witnesses were called on this aspect of the case from whom evidence may have been forthcoming which may or may not have been helpful. To use the physical evidence of damage without the assistance of factual evidence from witnesses in the particular context and thus to theorise how an accident happened, is to say the least, a hazardous venture, which may only compound confusion. It is noteworthy that the learned Resident Magistrate did not embark on such an exercise. Rather, he preferred to found his judgment on other evidence that was factual and in his judgment reliable.

The second ground of appeal concerned the refusal of the Resident Magistrate to admit the photograph showing the damage to the defendant's van which refusal prejudiced the defendant's case as it was graphic testimony to the fact that the plaintiff's vehicle ran into the left side of the first defendant's van.

How a photograph of damage can be graphic testimony to the fact that one vehicle ran into another can only be classified as hyperbole.

However, with the consent of counsel for the respondent, in keeping with the usual practice at the trial of cases of this kind, we were afforded an opportunity of seeing the photograph. It does show that the damage was to the defendant's van at or about the area as given in evidence. It does not, however, assist in resolving the problem of whether the plaintiff's vehicle was stationary or moving at the time of the collision as the cause of the damage along the entire right side of plaintiff's vehicle was never ventilated at the trial. The omission to do so was evidently because of the admissions at the commencement of the trial. Looking at the photograph, without more, affords no assistance as to the probability of the plaintiff's vehicle being stationary or moving.

The third ground of appeal dealt with the inference drawn by the learned Resident Magistrate that the dipping of the lights by appellant's driver was because of the approaching vehicle and not as a signal to overtake. I may say the Resident Magistrate drew an inference in keeping with the narrative that he believed.

There were two conflicting stories, neither of which is supported by the physical damage without explanation and this explanation is not forthcoming.

The Resident Magistrate therefore proceeded to evaluate the factual evidence and I cannot say he has not correctly done so.

In *Khoo Sit Hoh v. Lim Thean Tong* (1912) A.C. 323

Lord Robson in the course of delivering the judgment of the Privy Council, said at p. 325:

"The case was tried before a Judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions, or by the explanations of Counsel given in the presence of the parties. Of course, it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

With that approach I find no good ground advanced why the impression the learned Resident Magistrate formed as to the credibility of the respective witnesses which justified him in the conclusion

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at which he arrived should be considered to be wrong.

I would dismiss the appeal with Costs. \$30.00.

I AGREE.

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