CA · Civil · RM Court – Negligence — Evidence — Finding of facts
RM · R.112 — conflicting evidence for parties — real evidence — NMLS
Damage to vehicles — whether evidence supported R's finding of fact.
Appeal allowed. Cases referred to:
① Industrial Chemicals (Ja) Ltd v Ellis (1986) 35 W.I.R. 303
② Watt (or Thomas) v Thomas [1947] 1 All ER 582
③ Adcock Plus v Pepper (1986) 39 W.I.R 76
④ Powell v Streatham Manor Nursing Home JAMAICA (1935) All ER Rep 58.

Evidence

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 4/93

COR: THE HON. MR. JUSTICE CAREY P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON J.A. (AG.)

BETWEEN	WEST INDIES PULP & PAPER LIMITED	PLAINTIFF/ APPELLANT
A N D	ALBERT MITCHELL MITCHELL ELLIOTT & ASSOCIATES LIMITED	DEFENDANTS/ RESPONDENTS

Miss Carol Davis for Appellant

Alexander Williams for Respondents

May 10 & 11 & June 7, 1993

HARRISON J.A. (AG.)

This is an appeal against the judgment of His Honour Mr. J. Moodie, one of the Resident Magistrates for the parish of St. Catherine on the 15th day of December 1992, in a claim for negligence, in which he entered judgment for the defendants with costs to be agreed or taxed. We allowed the appeal and promised to put our reasons in writing. We do so now.

The appellant contended that at about 9:00 a.m. on the 18th day of April 1988, its driver was driving their Subaru motor car westerly along the Old Harbour main road in the parish of St. Catherine, when the first respondent who was driving a Chevrolet pickup and proceeding in the opposite direction, in attempting to overtake a line of vehicles, swerved and in the words of the appellant's driver, came "half way over in my left lane." The latter swerved to his left and the Chevrolet pickup collided with the right side of the Subaru, causing damage "right along the side of the car from about six inches from the end of the front right fender all along to the ... right rear bumper." There was no damage to

the front of the Subaru. The right front bumper and the leading edge of the right front fender of the Chevrolet pickup were damaged.

The respondents' case was that whilst driving, the first respondent Albert Mitchell saw the Subaru "... pulling out ... as if to overtake," causing him to swing to his left. The Subaru motor car which was then "three or four feet on the right hand side of my side of the road," hit the Chevrolet pickup which was on its correct side of the road; the Subaru then "pulled off to its side of the road." The damage to the Chevrolet was to the right front fender "behind the wheel."

On the basis of these accounts, each driver is blaming the other, saying that the other veered from his correct side of the road and so caused the collision.

The learned Resident Magistrate was more impressed by the witnesses for the defence and added quite pointedly, "this is not out of the mere fact that more witnesses were called for the defence." He accepted the evidence of the respondent Mitchell and his witnesses Maxwell Morgan and one Constable Nelson, the latter described as an "independent witness." He found that the collision occurred on the respondents' side of the road while the appellant's driver was overtaking, that there were no vehicles in front of the said respondents' pickup, and that each driver was pulling away at the time of the collision. He found further that the damage to each vehicle was consistent with his, the Resident Magistrate's findings.

Miss Davis for the appellant argued that, in view of the physical damage, i.e. the damage to the right side of the appellant's vehicle and the damage to the "leading edge of the right front fender" of the respondents' vehicle, the collision could not have occurred in the manner described by the first respondent; that the evidence of damage to the plaintiff's

vehicle was unchallenged and that the evidence was consistent with the plaintiff's account of the collision. Consequently, she concluded, that the finding of the learned Resident Magistrate was unreasonable, against the weight of the evidence and could not be supported by the evidence.

Mr. Williams for the respondents submitted that the weight of the evidence supported the learned Resident Magistrate's findings, that the collision occurred on the respondents' side of the road, that the appellant's driver was overtaking at the relevant time and that the damage to both vehicles supported the findings of the learned Resident Magistrate who had the advantage of hearing and seeing the witnesses and assessed their credibility. He argued finally that the case "could have been decided either way" and that the Court should not interfere, as the learned Resident Magistrate came to the correct conclusions on facts. In support of his arguments, he referred to **Industrial Chemical Co. (Ja.) Ltd. v. Ellis** [1986] 35 W.I.R. 303; **Watt (or Thomas) vs. Thomas** [1947] 1 All E.R. 582, and **Adolphus vs. Popper** [1986] 39 W.I.R. 76 to show that the Court should be slow to interfere with the findings of fact.

Each side has given conflicting accounts. In those circumstances a trial court may well seek to utilize the real evidence, e.g. the physical damage to the vehicles, if any, in order to resolve the issues. A helpful approach is found in dicta of Lord Wright in **Powell vs. Streatham Manor Nursing Home** [1935] All E.R. Rep. 58. He said at p. 67:

> "Yet even where the judge decided on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects of their relative or final position may be determinant and indisputable facts ... such cases have occurred in the experience of most judges."...

In the instant case there was real evidence before the learned Resident Magistrate that could have so assisted.

The unchallenged evidence of the appellant's witness was that the collision to the right side of the Subaru Motor car

caused damage right along the side "from about six inches from the end of the front eight fender ... to the ... right rear bumper" and that there was no damage to the front of the said car. This shows that the front of the said car did not come into contact with the respondents' Chevrolet motor car. The assessor's report, exhibit 1, in the case, confirms this. This exhibit was admitted by consent. In addition, this witness testified that the front bumper and the right front fender of the Chevrolet were damaged, "... the leading edge of the front right fender" was the portion of the fender damaged; neither was this evidence challenged in cross-examination.

Curiously, the first respondent said in cross-examination

> "The impact to my vehicle was not to the right front bumper. It was to the right fender - front right fender ... behind the wheel."

He said also, on seeing the appellant's Subaru "pulling out" attempting to overtake, he had "pulled" to his left, "not fast enough to avoid him hitting me."

On the evidence, it is unlikely on the respondents' version, that there would be damage to the leading edge of right front fender and bumper of the said respondents' pickup and no damage to the right front of the appellant's motor car. Acting Corporal Nelson, a witness for the respondents said that there was "... slight damage to the right front fender" of the respondents' Chevrolet pickup. The evidence of damage to the right front of the respondents' pickup and the right side of the appellant's motor car was more consistent with the appellant's evidence of the manner in which the collision occurred and inconsistent with the respondents'. Parodoxically, the first respondent stated that when the appellant's motor car hit his Chevrolet pickup the left side of his vehicle, the Chevrolet pickup, was "between one (1) and two (2) feet from the soft shoulder," that the Chevrolet is "about five (5) feet wide, that the road, at that point, is twenty-six (26) feet, ... a line

down the middle. My lane would be close to thirteen (13) feet wide." He said also that the said car was then, "... three (3) or four (4) feet on ... my side of the road." On this account, the closest distance that the side of the appellant's motor car could have approached the side of the Chevrolet pickup was a distance of two to three feet. There could have been no collision, in those circumstances.

There was therefore ample real evidence that could have assisted the learned Resident Magistrate in arriving at his decision.

When considering the facts as found, at a trial before a judge, who had the opportunity of hearing and viewing the demeanour of witnesses and the evidence led, an appellate court is empowered to interfere only where it is shown that the said judge did not take into consideration vital aspects of the evidence or failed to appreciate the significance of such evidence and came to his decision against the weight of such evidence.

In the instant case, the learned Resident Magistrate did refer to the damage to both vehicles and found it "consistent with my findings." His reason for this finding, in particular, was a conclusion that:

> "The plaintiff's vehicle in an attempt to return to his side of the road came partially across the path of the Defendant's vehicle causing the right side of his vehicle to hit into the right front fender of the Defendant's vehicle." (Emphasis added)

The evidence did not support this conclusion and his other findings of fact.

This Court concludes that the learned Resident Magistrate failed to recognize and appreciate the impact of the real evidence in his evaluation of all the evidence in this case and as a consequence, arrived at a decision against the weight of such evidence.

For the above reasons, we allowed the appeal; the judgment of the court below was set aside and judgment entered for the appellant company in the sum of $10,000 with costs to be agreed or taxed. Costs of the appeal is $500.

CAREY P. (AG.)

I agree.

DOWNER J.A.

I agree.