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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1988/G102

BETWEEN	MARJORIE GREEN	PLAINTIFF
AND	CLIFFORD VINCENT	DEFENDANT

Mr. O.K. Tonsingh for Plaintiff.
Miss Dorothy Lightbourne for Defendant

Heard: July 13 - 17, 1992; July 21, 1992; May 13, 1993;
June 8, 1993; April 6, 1994.

Judgment

HARRISON (K.) J. (Ag.)

The plaintiff's claim against the defendant lies in negligence. She alleges that at all material times she was a passenger on a minibus owned by the defendant and that on the 18th day of April, 1986 the said bus overturned as a result of the negligence of the defendant's servant and/or agent thereby causing her personal injuries, loss, expenses and damages.

She has pleaded and sought to rely upon the doctrine of res ipsa loquitor.

The defence has denied negligence and reliance is placed on the doctrine of inevitable accident. The pleadings state inter alia:

> ".... The ball joint of the left upper control arm suddenly jumped out of its socket thereby causing the left front wheel to become unsteady whereby the bus became unbalanced and notwithstanding the exercise of all reasonable care and skill in the emergency thereby created, the defendant's said servant was unable to avoid the said accident and the motor bus fell on its side ...."

A reply was filed by the plaintiff and issue joined with the defence save and except for admissions.

In **Scott v. London and St. Catherine Dock Co.** 159 E.R. 665, Ex. Ch. Erle C. J., described conditions for the application of the doctrine of res ipsa loquitor in the following statement:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care."

In light of the above statement the plaintiff must prove two facts, namely:

1) that the "thing"causing the damage was under the management of the defendant or his servants, and
2) that in the ordinary course of things the accident would not have happened without negligence.

The defence of inevitable accident amounts essentially to a denial that due care was not exercised. It is but another way of saying that the defendant has not been negligent. It shows that an essential ingredient of liability, namely, carelessness has not been established. The success of this plea therefore depends upon the facts of the individual case.

The plaintiff gave evidence that on the 18th April, 1986, she was a passenger on the defendant's mini-bus which was on its way to St. Anns Bay. According to her, the bus left Claremont and "as it bend a corner and going on straight, it turn over. It turn over on the top." She further stated that she was thrown to the floor of the bus and as a result of this she sustained serious injuries. She called no witness.

Selwyn Mattis, the driver of the mini-bus testified that about eleven (11) passengers who were on the bus were picked up in Claremont. These passengers had an agreement with the owner/defendant to transport them daily to and from St. Anns Bay.

Mattis' evidence further revealed that he was on his way to St. Anns Bay travelling between 15 - 20 m.p.h. along Gully Road. This road has been described by him to be "bumpy" and "have nuff corner going down." Whilst proceeding and as he was about to cross a little sink in the road which he says is like a trench, he applied his brakes and he heard a sound go "clow."! He then felt the steering "fly out" of his hand and the bus went and lean on the banking.

After the passengers and himself alighted from the bus he observed that the front wheels were off the road surface. The left front wheel was turned inwards and locked under the bus.

Glenroy Simpson, the mechanic for the bus arrived shortly after. He discovered that the left upper ball joint was dislodged from its socket. At one point in his evidence he had mentioned that the ball joint was broken but changed his evidence subsequently to say it was "loose out of the socket". He replaced the damaged ball joint with an old one which was kept in the bus and it continued its journey to St. Anns Bay.

Passengers who were on the bus were called as witnesses by the defence. They all stated that the plaintiff was not a passenger on the bus that morning. They have maintained that the bus rested on the embankment after it went across the trench and have outrightly denied that the bus had overturned on its top with the four wheels in the air.

Evidence in the case has revealed that the defendant owned this bus since 1984. He testified that the bus was constantly maintained. Every Sunday his mechanic, Glenroy Simpson, carried out servicing. Three months before the accident the mechanic had replaced the two upper ball joints. The lower ball joints were changed at an earlier date. He testified that servicing included oil checks, jacking up the front end, checking steering ends, checking ball joints and servicing the brakes. According to Simpson all four ball joints were greased the Sunday before the accident. It was his opinion that the left upper ball joint was dislodged because the bus had driven over the ditch.

Leonard Bernard, a witness called by the plaintiff was of the opinion that the ball joint should not have jumped out unless it was worn. He agreed however that a good ball joint could jump out but only if the vehicle ran into a big or deep pot-hole. There was no evidence as to this witness' qualification as an expert in the field of motor mechanic.

It was Miss Lightbourne's contention that the defendant had shown a cause for the accident and how the accident had occurred. She therefore submitted that the onus had shifted to the plaintiff to show negligence. She relied upon the authorities of Barkway v. South Wales Transport Ltd. [1950] 1 All E.R. 392,

Walsh v. Holst & Co. Ltd. [1958] 3 All E.R. 333, and Swan v. Salisbury Construction Co. Ltd. [1966] 2 All E.R. 138 in support of her submissions.

Mr. Tonsingh submitted on the other hand, that the defendant had failed to show the cause of the accident. It was insufficient he said, for the defendant to say that the ball joint jumped out or that it tore loose. He further submitted that the reason why it jumped out or tore loose must be explained since the defendant was not relying upon a latent defect.

In so far as the doctrine of res ipsa loquitor is concerned, Lord Porter had this to say in Barkway case (supra) at page 394:

> "The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether on the facts as established, negligence is to be inferred or not."

I therefore ask myself this question: Has it been established that the facts surrounding the cause of the accident were sufficiently known in this case? I would think not. I accept Mr. Tonsingh's submission and I hold that it was insufficient for the defendant to say that the ball joint jumped out or that it tore loose. In my view the reason why it jumped out or tore loose must be explained.

I am further of the view that based upon the facts and circumstances of this case, the doctrine of res ipsa loquitor is applicable. The onus therefore shifts upon the defendant to establish on a balance of probabilities the defence of inevitable accident.

What is the evidence in this respect? Selwyn Mattis has stated that he knows quite well the road and the sink where the accident occurred. He was travelling slowly, that is between 15 - 20 m.p.h. before he approached the sink. He then applied his brakes and shortly after hearing the "clow" sound, the bus "overturned" and leaned on its side on the embankment. He then alighted and observed that the upper ball joint was dislodged.

It is my view, that for the ball joint to jump out or tear loose in these circumstances, that event would not have happened in the ordinary course of things unless negligence was the cause.

There was evidence that the upper ball joints of the bus were changed three (3) months before the accident, and that they were greased the Sunday previously to the accident. But, was this a satisfactory state of affairs in view of its use as a public passenger vehicle? It is my considered opinion and I so hold, that more detailed and specific mechanical checks were required to be done. Jacking up of the front end and greasing ball joints are in my view insufficient measures to ensure road worthiness of such a vehicle.

I must say that I am quite astonished that an old ball joint was used to replace the dislodged one so as to allow the bus to continue its journey with passengers on a road which the driver describes as dangerous. A story has been told, and it is to my mind, clear and un-ambigious.

I find that on the date of the accident the defendant's servant and or agent was in fact operating the mini-bus with a left upper defective ball joint. The probabilities are that he was travelling at a greater speed than he has tried to make out to this Court with the result that he was unable to maintain proper control of the vehicle as it proceeded to cross the sink along Gully Road. The defendant has in my view, failed to establish the defence of inevitable accident and on a balance of probabilities there was negligence on the part of his driver.

There is one further issue for determination and this is whether or not the plaintiff was a passenger on that bus at the time of the accident. Issue was joined in this respect from as early as the filing of the Defence. It was pleaded in the Defence that she was never on the bus and witnesses were called by the defendant to establish this fact.

The plaintiff testified that the bus overturned as it negotiated a corner and went on the straight. She further stated that it ended on its top with the four wheels up in the air. The driver and passengers maintain on the other hand that it was whilst on the straight road and as the bus was crossing a trench or sink that it tilted to the left and rested on the left embankment with the two front wheels off the road surface.

The plaintiff further testified that her young child was also with her on the bus but none of the defence witnesses saw any child.

She also contended that a conductor was on the bus but he had not yet collected her fare at the time of the accident. The driver and defendant maintain that with the system in place there is no conductor on the bus. Furthermore on the date of the accident the driver states that no conductor was on the bus.

Credibility and reliability of the witnesses are fundamental issues for consideration in this case. It was submitted that the plaintiff would have been bold if not brazen to come to this Court and present a case when in fact she was not a passenger on the bus. I have borne in mind her response to the suggestion that she was not a passenger but having considered the demeanour of the witnesses and their evidence, I have concluded that I cannot safely rely on the evidence of the plaintiff. She has failed to impress me as a witness of truth.

On a totality of the evidence, the probabilities are that the bus had rested on the left embankment after the ball joint was dislodged. I therefore accept that version. The plaintiff's story is incredible and whimsical and I accept the evidence that she was not a passenger on the defendant's bus on the day of the accident.

In these circumstances, the plaintiff's claim is dismissed and judgment is awarded to the defendant with costs to be taxed if not agreed.