

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1977 - H 125

BETWEEN	ESTELLA HARRIS (Administratrix of the Estate of ABRAHAM LEOPOLD HARRIS deceased)	PLAINTIFF
AND	DANIEL RAJOO	1ST DEFENDANT
AND	DONALD RUSSELL	2ND DEFENDANT

Claim under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions Act.)

Raphael Codlin for the plaintiff.

Clinton Hines for the 1st named defendant.

2nd named defendant not served and not a party to the action.

Hearing on March 12, 14, 15, 19 and 18th September, 1991.

JUDGMENT

BINGHAM, J.

The plaintiff claims against the defendants in a personal and representative capacity as the widow and administratrix of the estate of late Abraham Leopold Harris who died as a result of a motor vehicle collision with a Cortina Motor car B.W. 21 registered in the name of the first named defendant and which was being driven along Burke Road, Spanish Town in the parish of Saint Catherine on 13th September, 1976. The deceased suffered injuries from which he succumbed on 19th September, 1976 in the Spanish Town Hospital. There is no issue that the first named defendant was the driver of this motor car at the time of the collision.

Having regard to the claim and defence filed a number of issues fall for determination namely:-

1. Ownership
2. Agency
3. Liability
4. Damages

The driver of the motor car involved in the collision with the deceased, Donald Russell who is named as the second defendant in the suit was not served and is therefore not a party to the action.

As to the issues raised on the pleadings, if the plaintiff's claim in establishing any of the first three questions raised fails, the question of damages does not fall for my consideration.

It is clear from the outset that based on the pleadings that none of the four issues referred to admit of an easy solution as on the pleadings, apart from the admission by the defence that the car was a Cortina motor car B.W. 21 and that it was being driven at the material time by the second named defendant Donald Russell, the matter is one which as the evidence emerged is riddled with conflict from beginning to end. It will be my task, therefore, to attempt to deal with what is a seemingly impossible task. In doing so I shall follow the order in which the issues have been identified.

1. Ownership.

The motor vehicle in question was on the date of the collision registered in the name of the first named defendant. This was the name which appeared on the motor vehicle register as to whom was the registered owner of the vehicle. The evidence of Police Sergeant Jeffeth Seville was that following the report of the accident the defendant Bajoo came to the Police Station at Ferry and produced the documents for the car. This is, however, denied by Bajoo who testified to having sold the vehicle, to one Beresford Ricketts on a day in about March, 1976. There was no attempt by Bajoo on the date of the alleged sale of the vehicle in March 1976 or in the many intervening months up to 13th September when the collision occurred, to attend at the Collectorate with the alleged new owner Beresford Ricketts and effect a transfer of ownership.

The state of the register being prima facie evidence of ownership, the fact that Daniel Bajoo's name appeared thereon as the registered owner of the said motor car raised a presumption that he was the owner of the vehicle on the date of the collision. This presumption was, however, rebuttable by evidence to the contrary.

On the evidence of Sergeant Seville as to what transpired following the report which I accept I hold that the evidence of the state of the register was supported by Bajoo's conduct in taking the documents for the vehicle to the Police Station. There is no evidence of any executed transfer suggesting an intention to effect a change in the ownership of the vehicle. What Bajoo is said by Sergeant Seville to have done is equally consistent with the conduct of any responsible registered owner. No mention was made to Sergeant Seville of any change in the status of the ownership of the vehicle. I would accordingly hold that there has been no credible evidence adduced upon which I ought not to find that there was sufficient proof based upon a preponderance of probability that the 1st defendant was the owner of the vehicle.

2. Agency

There is no issue that the vehicle which was registered in the name of Daniel Bajoo was being driven by the 2nd named defendant Donald Russell on Burke road when it was involved in a collision with the deceased on 13th September, 1976. The fact that the vehicle, a taxi was being driven by Russell did not ipso facto imply that he (Russell) was using the vehicle as the servant or agent of Bajoo and not, as the evidence also sought to establish as the servant or agent of Beresford Ricketts. Being a taxi the evidence required to infer an agency would in my opinion be not the same as in the case of a private motor vehicle. The sole purpose of the use to which vehicles of that class are ordinarily put being to carry passengers for hire or reward. The registered owner would be the person ordinarily responsible for bringing about this state of affairs.

As the presumption is that the driver was using the vehicle as servant or agent of the registered owner, the onus of proof rests upon the registered owner to establish that such a state of affairs did not exist.

Although both Russell, Ricketts and Bajoo have affirmatively stated that the car was being used by Russell on business otherwise than as the servant or agent of Bajoo, I am minded to hold on the testimony of Sergeant Seville that:-

1. The failure of Bajoo to assert that there had been a change in ownership at the time of the tendering of the documents relating to the vehicle.
2. Coupled with the fact that Bajoo owned a fleet of taxis - is sufficient affirmative evidence to establish that Russell, contrary to what he said was using the said vehicle as an agent for Bajoo, his former school mate, as a taxi on the date in question.

3. Liability

This question is in my opinion the most difficult to resolve. That this is so is due to the almost total absence of any witnesses to support the allegation of negligence contended for by the plaintiff.

This situation is further compounded by the allegations as set out in the pleadings.

A. The Pleadings

Paragraph 2 of the statement of claim alleged inter alia that:-

"the 2nd named defendant being the servant and agent of the first named defendant and driving in the course of his duty so negligently drove, managed, or controlled motor vehicle lettered and numbered B.W. 21 owned by the 1st named defendant that the 2nd named defendant caused or permitted the said vehicle to collide into the back of a pedal cycle ridden by the deceased Abraham Leopold Harris causing severe injuries.

PARTICULARS OF NEGLIGENCE.

The 2nd named defendant was negligent in that:-

- (a) He drove at a speed which was excessive in the circumstances.
- (b) He failed to keep any or any proper look out or to have any or any proper look out or to have any or any sufficient regard for traffic that was or might reasonably be on the said road.

(c) He permitted the said motor vehicle to collide into the rear of the deceased's vehicle.

(d) He failed to stop, slowdown, to swerve or in any other way to manage or control the said motor vehicle so as to avoid a collision."

(Emphasis supplied)

The burden of proof rested upon the plaintiff to establish the allegations set out in her claim. Based upon the account as related by the 2nd named defendant that the collision was caused by the act of the deceased in stepping out suddenly into the path of the car driven by the 2nd defendant, no proof of negligence or contributory negligence could arise upon this account.

B. The Evidence

This consisted of statements given by Donald Russell and the deceased, while injured and suffering from head injuries in particular and a patient at the Spanish Town Hospital.

According to Sergeant Seville, Russell following the report of the accident, drove the vehicle back to the scene and told him that "I was travelling along Burke Road going towards Cumberland Road and on reaching the intersection of Burke Road and Wellington Street I saw when the deceased stepped off the sidewalk into the path of the motor car and he was hit." Sergeant Seville on proceeding to the hospital later on in the day of 13th September, 1976 saw the deceased but he was not in a condition to enable a full statement to be taken from him. He, however, said to Sergeant Seville that "I was standing on the sidewalk when the car swerved over to the right and hit me."

The next statement made by the deceased was to his widow Estella Harris. As this statement was allegedly made to her around 11:00 a.m. on 13th September, 1976 it would have been shortly after the deceased was taken to the Spanish Town Hospital.

As the widow of the deceased she clearly falls into the category as does all the other witnesses, save and except Sergeant Seville, as parties with an interest to serve. Their evidence has therefore to be approached with caution

(See R. vs. Prater) [1960] 2 Q.B. 464 [1960] 1 ALL. ER 298 which although a criminal

matter is cited as being of general application to both civil and criminal matters.

According to Mrs. Harris on seeing her husband at the hospital "he was wearing the clothes he left home with that morning. The shirt had on blood and it was wet. His pants was also wet. I spoke to him. He told me what had happened to him. He said I was crossing the road and as I reached to the bank of the road-side there was a car coming to the keep to left and it was very fast coming down and it hit me down."

From these two statements made by the deceased there is a conflict as to where the deceased was positioned when hit by the car. If the account given to his wife is to be believed he had crossed the road and had reached the bank of the road. To Sergeant Seville he was on the side-walk when the car swerved and hit him. What is significant however, is the total absence of any evidence to support the allegations as set out at paragraph 2 of the statement of claim and amplified in the particulars of negligence. The Supreme Court, being a Court in which civil causes or matters are governed by pleadings, a party who alleges certain material facts in setting out the case that they are relying on must prove that case.

In this regard there is nothing to alter the fact that the Statement of Claim was filed as far back as 31st August, 1982. In a material particular it sought to allege that the deceased was hit off a bicycle. This was what the plaintiff was required to prove as being brought about by the negligent manner of driving of the 2nd defendant for which the 1st named defendant would have based upon the proof of agency, been vicariously liable. This allegation in the pleadings was totally lacking as to the evidence adduced in support of the claim. In short the evidence adduced by the plaintiff did not support her case as to what she sought to allege in the statement of claim.

In this regard the evidence lead at the hearing contained in the two statements made by the deceased to the Police and his widow at the Spanish Town Hospital placed him in the role of a pedestrian when the collision occurred. These statements are not without some measure of conflict as to the circumstances in which the deceased was injured.

When the evidence adduced by the plaintiff in proof of negligence is weighed, examined, evaluated and assessed, it does not in my opinion establish negligence by the second defendant as to his manner of driving on the date in question. He is the only eye witness whose account fails to be considered. His account has not been shaken by cross examination.

The onus of proof being on the plaintiff, the evidence contained in the statements made by the deceased when examined is clearly lacking as going towards proof of the allegations as set-out in the Statement of Claim and repeated in the particulars of negligence.

When one examines the evidence of Donald Russell there is nothing, based on his account, that establishes either negligence or contributory negligence on his part. The act of the deceased in suddenly stepping out into the road into the path of the car was not an act which the witness Russell could reasonably have foreseen and in so doing take steps to avoid or minimise the impact.

On the totality of the evidence and for the reasons I have attempted to set out the claim fails. Judgment is entered for the 1st named defendant against the plaintiff with costs to be agreed or taxed.