

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R 064/1978

BETWEEN	LILLIAN ROSWELL (Administratrix for the estate of Fitzroy Neufville, deceased)	PLAINTIFF
A N D	TENNYSON LINDO	1ST DEFENDANT
A N D	PLACEMENT & BUSINESS SERVICES LIMITED	2ND DEFENDANT

Mr. Horace Edwards Q.C. and Mr. E. Alcott for the Plaintiff

Mr. W.K.Chin See and Mr. J. Vassell instructed by Dunn, Cox & Orrett

for the Defendants.

Hearings on 11th and 12th June, 1981

JUDGEMENT

19th June, 1981

BINGHAM J.

The claim in this matter results from a motor vehicle collision on East Street in Kingston on 20th May, 1977 around 8 p.m. between a Toyota Pick Up truck owned by 2nd named defendants and driven by 1st named defendant and a Honda 50 motor cycle ridden by one Fitzroy Neufville.

As a result of the collision the rider of the motor cycle suffered injuries from which he died that same day.

Following the deceased death an Inquest was held to enquire into the circumstances in which he met his untimely end. Following upon this Letters of Administration were granted to the Plaintiff, Lillian Roswell, the mother of the deceased and on 18th April, 1979 the Plaintiff in her capacity as Administratrix of the deceased Estate launched these proceedings under the Fatal Accident Act and the Law Reform (Miscellaneous Provisions) Act for the benefit of the Estate and the dependents which included herself.

The Pleadings

The claim alleges negligence on the part of the defendants.

In paragraph 2 it is alleged that "on or about 20th May, 1977, the said Fitzroy Neufville was lawfully riding his Honda Motor Cycle registered No. K 8800 along East Street in a Southernly direction in the vicinity of North Street when the first named defendant the servant and or agent of the second named defendant so negligently drove, managed and or controlled a motor truck namely a Toyota Pick Up, Registration Number FN 8322 property of the second named defendant along the said road in a southernly direction that he caused the same violently to collide with the said motor cycle."

The Particulars of negligence alleged are then set out and were all embracing no doubt intended to cover just about any act on the part of the 1st defendant which bore the stamp of negligence.

The Particulars of the injuries suffered by the deceased is then set out and this is followed by particulars of the dependents for whose benefit the claim is brought in compliance with Section 5 of the Fatal Accident Act. This is followed by particulars of the age, occupation and earning capacity of the deceased.

The Particulars of Special Damages are thereafter set out and the claims ends with a prayer for Damages under both Acts referred to with interest at such a rate and for such a period as the Court thinks just.

The defendants in their defence do not challenge the allegations in the claim in so far as they relate to the fact that a collision took place on the date and place alleged between the vehicles referred to. Ownership and agency is also admitted.

At paragraph 3 of the defence it is specifically denied that "the first defendant was guilty of the alleged or any negligence as alleged or at all and state that the said collision was caused solely or materially contributed to by the negligence of Fitzroy Neufville."

The particulars of negligence as alleged follows and is equally as all embracing as that set out in the Claim and was again intended no doubt to cover just about every degree of negligence possible.

A reply is then filed in which issue is joined on the allegations in the Claim which were denied in the defence and in particular in so far as the defence went on to allege negligence on the part of the deceased.

On the pleadings two clear issues arise for determination namely:-

- I. Liability in the sense as to which of the parties were to be blamed for the collision and assuming that there was a finding of negligence on the part of the defendants -
- II. The question of Damages.

The Evidence

Two witnesses as to the facts and circumstances surrounding this collision were called; one in support the case for each side. The case for the Plaintiff rested upon the evidence of an alleged eyewitness one Randall Dunkley.

Mr. Dunkley who is from all appearances a young man, seemed to have made his entry into this matter in a most dramatic fashion. Although the collision took place on 20th May, 1977, over four years ago to date, Mr. Dunkley was totally unaware of any of the subsequent events following upon the incident until sometime in 1980 when he overheard a conversation between the Plaintiff, Miss Roswell and another lady along Sutton Street in which the Plaintiff was speaking of the death of her son by accident on East Street. It no doubt then suddenly dawned upon Mr. Dunkley that this was the same collision he had witnessed on East Street in May 1977. He was to coin a phrase the right man in the right place at the right time.

As if his presence at Sutton Street was a mere matter of coincidence what is even more remarkable is that the Claim was filed from in April 1979 at a time when Mr. Dunkley's presence at the scene of the accident has not yet been brought to the notice of the Plaintiff or her Attorney.

Mr.Chin See in his final submissions to me has made the most pertinent observation as to just where the instructions came from to draft the pleadings which forms the basis of the claim in this matter.

Be that as it may there is no gain saying the fact that without the existence of an eyewitness the claim which at the time of filing and certainly up to sometime in 1980 was doomed to certain failure, was now with the sudden and dramatic appearance of Mr. Dunkley on the scene given the very breath of life.

It is now necessary therefore to examine the evidence of this witness as to just what he had to say.

He recalls the incident on 20th May, 1977. He had to go to visit a friend who lived on Lockett Avenue which is off East Street. On his way back home to Run Lane, having chosen to go home by the longer route, by way of East Street he saw a friend of his at the intersection of East Street and Little North Street. He crossed over East Street and joined his friend at a point just above Little North Street. He puts himself on the sidewalk at a distance of 2 yards from Little North Street looking down East Street. While in this position he swore that he saw a Pick Up coming down East Street. It was about what was estimated to be a distance of 15 - 20 yards away from him when he first saw it. The witness placed the motor bike when he first saw it at corner of Little North Street and East Street. It is common ground that Little North Street runs off East Street to the right as one travels down East Street. The witness puts the bike ahead of him. Although he was facing down East Street it is of some concern to me how he was able to observe the

approaching Pick Up from 15 - 20 yards away as his back would then be to that direction.

Later on in his evidence he admitted that the impact took place at corner of Little North Street and East Street. The motor bike fell about 10 feet from where he was standing. He puts the van at about the same point. This is of even greater significance as although the witness gave the relative speeds of both vehicles, Pick Up and Motor Bike as 35 - 40 miles per hour and 10 miles per hour respectively, the Van on his evidence travelled no further than the point of impact. This by itself not only would seem to be highly improbable having regard to allowances necessary for thinking and stopping distances, but even more so having regard to his evidence that the Pick Up was travelling at a speed of 35 - 40 miles per hour.

It is when one comes to consider the evidence of the witness as to just how the collision took place that one is now faced with considerable difficulty in assessing his evidence as there are at least three separate and distinct accounts which he gave as what he in fact saw take place.

First Account

Under examination in Chief the witness first said:

"I saw a van coming down East Street and a bike was in front of the van. When I looked in the direction I heard a lick same time and same time I see an accident where the van lick the bike. Before I heard lick, it seemed to me as if the van was looking to turn right to go into Little North Street. The van was trying to overtake the bike. The bike was going around 10 miles per hour and the van about 35 - 40 miles per hour."

Second Account

Under ~~cross~~-examination the witness stated that he was standing just above Little North Street about 2 yards from Little North Street looking down East Street. He saw the Pick Up first about 15 - 20 yards from him and while it was just passing the intersection with Lockett Avenue the Pick Up was in the middle of three lanes which controls traffic coming down East Street and the Motor Cycle was in the right hand lane.

He admitted that his attention was first directed to the two vehicles when he heard a knock turned around fast and that was the first time he was seeing the van.

This account also contains its own contradictions as if the witness had been standing in the position which he puts himself he would not have been able to see the van approach as it would have made its approach from behind him.

Third Account

In this version the witness swore that he saw the van twice, once before hearing the impact when it was further up East Street and then again after hearing the impact then turning around and seeing the Pick Up, the motor bike and the deceased lying on the road.

It is common ground that a number of persons gathered on the scene following the impact and in all probability therefore this witness may have been in the area at the time of the collision. The critical question is, however, did the witness actually see how the collision took place?

On looking at all these three accounts there is a clear conflict between them and they are not reconcilable. What is clear, however, is that the witness on his own evidence, and this is common to all three accounts, puts the collision as taking place behind him. He heard a knock and then had to turn around to view what had taken place behind him. Despite this, however, the witness attempts to reconstruct in his mind's eye a picture as to just what had happened. This clearly is what accounts for the varied and conflicting accounts which he has given. His admission of having seen the bike only once, that is just at the time of the impact is critical, as had he been observing how the impact took place then he must have seen the bike as it approached from further up East Street. That is, assuming that it did come from up East Street and not from out of Little North Street.

On the evidence of this witness one can only conclude that he did not see how the collision took place.

I am further fortified in this view by a further examination of the witnesses' evidence as to the account which he gave of observing the Pick Up as it came down East Street. He describes it as crossing over lanes. With this situation before him, one wonders just how frank a person this witness is, for had he been in the position he puts himself, there would have been no necessity for him to have to turn around after hearing an impact, as the impact about which he was speaking would have been taking place right before his very eyes up East Street and not having regard to the direction in which he had earlier placed himself looking down East Street, behind him.

In the light of this earlier account in which the witness placed himself looking down East Street and having regard to where he puts the collision as taking place, behind him, then his account as to having to turn around after hearing a knock to see what had taken place is in those circumstances understandable.

His later account of following the movements of the van as van approached from up East Street is in the light of his earlier evidence, to say the least, conflicting and questionable as to its truth. When tested further as to whether he in fact followed the van as it came down East Street the witness now went on to deny that he gave such evidence. He is unable to give the Court any assistance as to the relative positions of both vehicles following the collision although this may be due to the fact that his attention was in this circumstances more taken up with what had happened to the deceased. He is, however, prepared to swear that he recalls the position in which the van ended up - slanted across the road with its front more to the right side of the road.

Having regard to the state of the evidence of Mr. Dunkley I am of the opinion that the accounts which he gave of the collision were in the main conflicting and to a large extent exaggerated, related in such a manner which I find to be totally

unacceptable as evidence capable of belief.

I now turn to consider the evidence of the 1st defendant, the driver of the Pick Up.

He describes an incident in which he was travelling in a Toyota Pick Up down East Street on the night in question around 8 P.M. The headlights of the Pick Up were on and he was travelling slowly around 15 miles per hour. He was on his way to the General Post Office on King Street and had intended in getting to his destination to travel by way of East Street and then unto Barry Street. As he approached North Street there was traffic in front of him and he kept to his right lane. He was travelling slowly for the lights were showing red against traffic coming from East Street. As he was coming down East Street and a little before getting to the intersection of East Street and Little North Street he felt a sudden impact to the right side of the van and he stopped immediately. He came out of his vehicle and saw motor cycle and a man on the ground. With the assistance of a passenger in the van and a little boy the deceased was placed in the van and taken to the Kingston Public Hospital where he died. He denies that the motor cycle was ever travelling ahead of the van and admits that at no stage up to the time of the impact did he see the motor cyclist. He also testified that he kept a straight course while travelling on East Street that night.

His evidence was tested by Mr. Alcott but his account remained consistent from beginning to end. Unlike Mr. Dunkley his evidence has not been shaken by cross-examination.

His account impressed me as a frank and truthful one. What this witness is saying is that he was at all material times unaware of the presence of the motor cyclist up to the time that the collision took place. Had the deceased been travelling ahead of the Pick Up then certainly he ought not to have escaped his attention. As the weight of the evidence clearly points to the fact that the Pick Up was not travelling

at a fast rate of speed, if the motor cyclist was in his path the 1st defendant would have had no difficulty in taking at least some evasive action. He did not stop until after he heard the impact. That being so then the probabilities clearly favour the fact that he was up to the time of the impact totally unaware of the presence of the motor cyclist. Why was this so? The only reasonable conclusion that one can draw from this evidence, assuming it to be so, is that the motor cyclist approached from a direction towards the right rear of the Pick Up as it came to the corner of East and Little North Street. It is common ground and not in dispute that the impact occurred in the vicinity of where these two streets meet.

As this case therefore stands at the end of the evidence and at the end of the day, it is one in which there is on the one hand an account which put in support of the Plaintiff's claim is varied and conflicting in the manner of its presentation and on the other hand an account by the 1st named defendant which is consistent from beginning to end.

It is the Plaintiff who must prove her case if she can and on the evidence of the 1st defendant there is nothing contained in what he had related which assists in making out a finding of negligence on his part.

I have no hesitation in accepting the account as related by the 1st defendant.

Conclusions and Findings of Fact

On the totality of the evidence adduced it is abundantly clear that neither of the two witnesses as to fact, Dunkley nor 1st defendant saw the deceased man or his bike until after the impact had taken place. The defendant admits this fact and on an objective assessment and analysis of the whole of Dunkley's evidence this is the only rational conclusion that can be arrived at. Dunkley admits that he was looking down East Street and his attention was taken up with speaking with his friend. This was what had taken him across East Street in the first place. There was no necessity for

his attention to be directed elsewhere. It was while so engaged that he heard the sound which cause him to become frightened and turn around to see both the Pick Up and the bike not very far off and the injured man lying on the street.

From the position of both vehicles it is further abundantly clear that neither vehicle moved much following the impact. This conclusion gives credence to the account of the 1st defendant that he was travelling slowly and the lie to the evidence of Dunkley that the Pick Up was travelling at a speed of 35 - 40 miles per hour.

Had the van been driving at the speed as related by Dunkley and manoeuvring in the way he has described one would have expected that much greater damage would have resulted to both vehicles than the evidence indicates. The fact that the front of the bike was damaged and the right rear fender of the Pick Up slightly dented leads me to conclude that the collision was in all probability caused by the bike encroaching out onto East Street at a time when the van was in the act of passing Little North Street and that it was front of the bike which collided into the right rear side of the van.

I am also fortified in coming to this conclusion as had both vehicles been travelling in the same direction one would have at least expected the bike to continue travelling with or without its rider, further to its right down East Street before finally coming to a rest; not as it ended up falling in the road beside the deceased.

In the light of these observations the rider of the bike was clearly negligent.

The only remaining question in whether on the facts which I have found, contributory negligence arises. As there is no evidence of speed on the part of the 1st defendant and as on the proven facts the impact took place to the right rear side of the Pick Up there is no evidence which in my opinion can form the least possible basis for such a finding.

As negligence on the facts is doing what a reasonable and prudent motorist would not do, placed in the situation in which the 1st defendant found himself on the night in question, he could hardly be expected to take reasonable steps to avoid a collision of which on the evidence he was totally unaware up to the time that it had taken place. He at least ought to expect that other users of the road including motor cyclists will act in using the highway in a manner which will make other users of the road aware of their presence and approach thereon, or to put it succinctly and in a more precise manner, he ought to expect that he taking all reasonable care for his own safety can expect others using the highway to at least do the same in order to ensure their own safety if not that of others.

As much as one might feel a great deal of sympathy for the untimely end to which this young man came and for his sorrowing relatives that by itself is no basis for a finding of negligence. Such a finding can only be reached on a rational and objective assessment of evidence adduced and tested as in this case. That is what the Judicial process calls for. The Plaintiff can only have as good a chance of succeeding on this claim based as it is on negligence as the deceased had he survived and elected to bring an action would have had. No negligence having in my opinion been established on the part of the defendants, the claim therefore fails and judgment must be entered for the defendants with costs to be agreed or taxed.

D. Bingham
Judge