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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.S. 306/91

BETWEEN	CHARLES SCOTT	PLAINTIFF
A N D	JAMAICA TELEPHONE CO. LTD.	DEFENDANT
	NEWTON TOMLINSON	FIRST THIRD PARTY
	DENNIS REID	SECOND THIRD PARTY

Leonard Green and Michael Brown for Plaintiff
Gordon Robinson and Miss Winsome Gordon Somers for Defendant
Third Parties absent and not represented.

HEARD: June 7, 1994 and July 6, 1995.

CHESTER ORR, J.

In this action the plaintiff claims damages for injuries he sustained when he became entangled in one of the wires of the defendant Company hereafter referred to as "the Company".

THE PLEADINGS

STATEMENT OF CLAIM

1. The Plaintiff is at all material times a Pensioner.
2. The Defendant is a company incorporated under the Jamaica Companies Act and carrying an inter alia the business of installation, maintenance and repair of telegram and telephone wires.
3. On or about the 27th March, 1991, the Plaintiff was lawfully walking along the sidewalk at Grange Hill in the parish of Westmoreland when he became entangled in a telephone wire which was hanging loosley from the telephone pole and which had snagged into a passing motor vehicle as a result of which the Plaintiff was dragged along the main road for some distance.
4. The said telephone wire is owned by the Defendant and it was under their custody and control and by causing it to hang loose along the sidewalk the Defendant had created a danger to users of the highway.

5. That the said telephone wire had been hanging loose for about three (3) weeks.
6. The Defendant, its servants or agents acted negligently in causing and/or permitting the said wire to be hanging from the pole along the sidewalk.

PARTICULARS OF NEGLIGENCE

- (a) Allowing the said wire to hang loose from the pole along the sidewalk without regards to users of the sidewalk.
- (b) Failure to remove and or reconnect the said wire immediately on learning that it was hanging from the said pole along the sidewalk.
- (c) Failure to inspect the telephone wire regularly.
- (d) Failure to provide adequate maintenance for their telephone wires.

DEFENCE

1. No admission is made as to the allegation contained in paragraph 1 of the Statement of Claim.
2. With regard to the allegations contained in paragraph 2 of the Statement of Claim the Defendant is a licensee under and by virtue of the TELEPHONE ACT and carries on the functions permitted by the said Act subject to the conditions of its said License and the Regulations thereof.
3. Save that the Defendant denies that the Plaintiff was, at the material time, walking along the sidewalk, paragraph 3 of the Statement of Claim is admitted.
4. The allegations contained in paragraph 4 of the Statement of Claim are denied save that the Defendant admits ownership of the said telephone wire.
5. No admission is made as to the allegations contained in paragraph 5 of the Statement of Claim.
6. The Defendant denies that it was negligent as alleged in paragraph 6 of the Statement of Claim or at all and each and every allegation contained in the particulars thereto is denied. The Defendant specifically denies that it owes any statutory or other duty to the

public including the Plaintiff to ascertain that none of its wires are hanging loose and avers that no act of misfeasance on its part is alleged or occurred.

7. The Defendant avers that the incident complained of in the Statement of Claim was solely caused or alternatively contributed to by the negligence of Newton Tomlinson, the driver of the passing motor vehicle mentioned in paragraph 3 of the Statement of Claim or, in the further alternative, by the combined negligence of the said driver and the Plaintiff.

Particulars of Negligence were supplied.

The Company duly obtained leave to serve third Party Notices on the third parties who did not enter appearance or appear at the trial in person or by the Attorney.

PLAINTIFF'S CASE

On the 27th March, 1991, at about 8.00 p.m. the plaintiff was walking on the sidewalk of the road in the direction of Grange Hill in the parish of Westmoreland. A bus approached from the opposite direction travelling on the same side of the road as he was. When it reached him a loose telephone wire which was attached to the rear of the bus became entangled with him, across his shoulder, spun him around and he fell on the road and was dragged a distance of some four yards in the direction from which he was coming. The wire broke. The bus stopped some distance away and then drove off. His left arm was injured and he was taken to the Savanna-la-Mar hospital where the left arm was amputated. He was discharged on the 3rd May, 1991.

He stated that he did not see the wire before it became entangled with him. He had observed loose wires on the posts for some weeks prior to the accident.

It was dark at the time and he described the speed of the bus as "not so fast".

Dr. Jeffrey Earl treated the plaintiff and his certificate was admitted in evidence by consent.

The Certificate stated inter alia:

"Examination revealed a massive wound in his left armpit with marked devitalization of muscle and skin and marked contamination by street dirt. The bone was exposed and the axillary artery and vein (the blood supply to the limb) were both completely severed. The main branches of the nerves supplying the limb were also exposed and frayed. The forearm and hand distal to the wound were cold and lifeless.

Despite attempts to cleanse the wound and preserve the limb, the muscles and other soft tissues became rapidly, severely infected and gangrenous. On 28/03/91, the limb was amputated proximal to the wound in an attempt to clear what was now a life threatening infection. The wound was left open to allow adequate drainage of infective fluids.

The infection in the open amputation wound gradually subsided after appropriate treatment, including drugs, dressings and the removal of additional dead tissue on 8/04/91. On 25/04/91 a split skin graft was done. He was discharged on 3/05/91, the amputation site having healed.

Clearly, the permanent disability here is considerable, particularly if he is a manual worker. It will be virtually impossible for him to be able to earn a living doing manual work, whether he is right handed or not, and it is not possible to consider a prosthesis because of the high level of the amputation."

THE DEFENCE

The sole witness for the defence was Mr. Desmond Drummond an Electrical Engineer who was employed to the Company as a Supervisor for external plant outside facilities. His duty was to inspect the telephone wires in the area once per month to ensure that the lines were in order. During the months of January to April 1991, he had made regular monthly visits and saw nothing wrong on those visits. He received no reports during this period of any defect in the line. The lines in the area were subject to vandalism and as a result portions of the wire would be cut and stolen.

In cross-examination he stated that he became aware of the plaintiff's case in November 1991. No remedial work was done as there was no evidence that remedial work was necessary. In view of the stealing of wires and poles in the area he was of the opinion that it would be proper for the Company to increase surveillance of its property in the area.

Mr. Robinson submitted that the plaintiff has failed to establish his claim. There was no evidence that the defendant caused the wire to be hanging loose. The plaintiff was unable to identify the wire involved in the accident as one which he had seen hanging loose some weeks before the incident.

The evidence was that the company was not aware of any loose wires and thus could not have permitted the wire to be hanging loose. The negligence of the driver of the bus was the sole cause of the accident in that he failed to see the wire or having seen it failed to manoeuvre the bus so as to avoid contact with it.

He submitted further that the action did not lie because there was a breach of a statutory duty imposed on the company by the licence and an action for negligence at Common Law did not lie. He referred to section 5 of the Telephone Act and the licence granted to the company.

Mr. Green submitted that in paragraph 3 of the defence filed there was an admission that the plaintiff became entangled in a telephone wire which was hanging loosely from the telephone pole. On the evidence, the checks carried out by the company were inadequate and the company was therefore negligent. Mr. Drummond the witness for the defence agreed that increase surveillance would be appropriate. On the evidence there was no basis to conclude that the accident was due to negligence other than that of the company. There was no evidence of excessive speed by the bus or that the loose wire was so prominent that the driver of the bus could reasonably have noticed it.

On the question of a breach of statutory duty he submitted that the Telephone Act does not impose a duty on the company nor does the licence. The action arose in negligence. The evidence indicated that the checks carried out by the company were inadequate to protect the public.

FINDINGS

I find as a fact that the plaintiff became entangled in a wire of the company. This wire was hanging from a telephone pole and hitched on to

the bus which pulled the wire and entangled the plaintiff thus causing him injuries to his left arm. I find that the wire was hanging loose prior to the accident. That the system of inspection once per month by the company was inadequate. That the loose wire would have been discovered by a better system of inspection and this was all the more desirable having regard to the admitted knowledge of the company that the wires were subject to vandalism. This is reinforced by the evidence of Mr. Drummond, that increased surveillance would be proper. In addition, I am unconvinced by his evidence that during the months of January to April 1991 he discovered no defects to the wires and that no repairs were done because none were necessary. This indicates a lack of proper maintenance on the part of the company in light of the evidence of the plaintiff, which I accept, that the wire was loose.

I find that the company failed to inspect the telephone wires regularly and failed to provide adequate maintenance for their telephone wires as alleged in the Particulars of Negligence and that such failure was the cause of the injury to the plaintiff.

The question of negligence by the driver of the bus falls to be considered. I accept the evidence of the plaintiff that it was dark at the time, and that the speed of the bus was not excessive. As Mr. Green observed, there was nothing in the evidence to indicate that the loose wire was visible to the driver of the bus. The plaintiff was under the impression that the wire became attached to the rear of the bus. In these circumstances, I hold that there is insufficient evidence to establish negligence on the part of the driver.

Re Breach of Statutory Duty

Section 5 of the Telephone Act empowers the Minister to grant a licence to the defendant company -

"to establish telephone communication within any area specified in the licence and for that purpose to erect and maintain poles and wires along, over, under or across, the public roads, within such area."

Section 6 states inter alia:

"Every licensee shall be subject to such regulations and conditions as may be inserted in his licence with regard to the following matters "

- (c) the securing of the safety of the public;
- (f) the enforcement of the due performance of the duties of the licensees as laid down on the licence, but the imposition of penalties or otherwise"

Paragraph 23 of the licence repeats the provisions of section 5 of the Act supra.

There is no statutory duty of care created by statute or the licence.

Paragraph 36 of the licence imposes a penalty for any neglect or wilful contravention of any of the provisions of the licence and contains this proviso.

"PROVIDED that any person having any civil claim against the Company shall in no way be prejudiced in enforcing the same by the fact that any penalty or penalties has or have been recovered against the Company in respect of the same act or omission or default out of which the civil claim aforesaid arises."

The learned authors of Halsbury's Laws of England 4th ed. Vol. 1 state at 484:

"A right of action in negligence may arise where a statutory power is exercised without reasonable care and diligence, thereby causing unnecessary injury."

The allegation of negligence in this case does not arise from any breach of a statutory duty but from a lack of care on the part of the company. Indeed Mr. Robinson did not indicate what breach of duty had been committed by the company.

I find that the company was negligent and that such negligence was the sole cause of the injury to the plaintiff.

Re Damages

Special Damages agreed at .. \$680.00

General Damages

Mrs. Gordon Somers cited the following cases from Mrs. Khan's Cases, Vol. 3. P. 93. Shaw v. Francis and Moodie - November 1989.

Plaintiff aged 24. Above elbow amputation of upper right limb and injury to left chest.

Award for pain and suffering -- \$125,000.00

P.97. Fitten v. Black and anor - July 1987.

Plaintiff 37. Above elbow amputation of right arm and loss of libido causing impotence -- \$88,000.00.

Mr. Green at P.95. Smith v. James and anor.

Plaintiff 22 years. Above elbow amputation of right arm --
\$180,800.00.

I consider this last case as most applicable to this case. Using the latest Consumer Prices Index for May of 734.5 -- that award today would be in the region of \$1,303,846.

The plaintiff whose age was not ascertained is a pensioner. I accept the age of 65 years suggested by Miss Gordon-Somers. The award to him is scaled down by $1/3$ = \$870,000.00.

There will therefore be Judgment for the plaintiff against the defendant for \$870,680.00 with costs to be agreed or taxed. There will be no order in the Third Party Proceedings.