[2014] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**IGOL COKE**	**APPELLANT**
AND	**NIGEL RHOOMS**	**1ST RESPONDENT**
AND	**ADRIAN ANDERSON**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**3RD RESPONDENT**

Robert Fletcher and Ms Sharon Gordon instructed by Gordon and Watson for the appellant

David Johnson instructed by Samuda and Johnson for the 1st respondent

Ms Tamara Dickens instructed by The Director of State Proceedings for the 2nd and 3rd respondents

17, 18 November and 19 December 2014

PHILLIPS JA

[1] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and his conclusion and have nothing that I can usefully add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA, and I am satisfied that, based on his reasoning and conclusion, with which I entirely agree, a serious wrong has been righted.

BROOKS JA

[3] A passenger of a motor vehicle, without fault on his part, was injured when the vehicle that he was in collided with another motor vehicle. He sued the owners and drivers of both vehicles in negligence but failed against all. He was ordered to pay the costs of the defendants. What could have caused such an unlikely result?

[4] In this appeal by the passenger, Constable Igol Coke, each party had a different explanation for that result. Constable Coke contended that it occurred as a consequence of the learned trial judge wrongly placing the burden on him to prove liability. Constable Adrian Anderson and the Attorney General for Jamaica, the parties who succeeded on a no-case submission, asserted that Constable Coke had failed to prove negligence against them. The remaining party, Mr Nigel Rhooms, who gave evidence in his defence, attributed Constable Coke's failure to his attempt to ascribe blame to the party who was not at fault, and in failing in this attempt was left without having proved negligence against anyone. Before assessing these contending submissions, it would be helpful to outline the factual background to the claim.

Factual background

[5] The collision occurred at about 5:10 am on 29 May 2008. Constable Coke was in a police service vehicle that was travelling along the Spanish Town By-Pass in the parish of Saint Catherine. Constable Anderson was the driver of the police vehicle, a Toyota Corolla. The crash occurred at the junction of the by-pass and March Pen Road. The other vehicle, a Nissan motor car, was travelling in the same direction as the police vehicle. Mr Rhooms was the owner and driver of the Nissan.

[6] Constable Coke filed a claim against Mr Rhooms, Constable Anderson, the Commissioner of Police, who is the owner of the police vehicle, and the Attorney General. The Attorney General was sued by virtue of the Crown Proceedings Act.

[7] In his particulars of claim, Constable Coke alleged negligence on the part of both Constable Anderson and Mr Rhooms. Each driver pleaded in his respective statement of defence that the other was the negligent party and was the cause of the collision. There was no attempt on the pleadings to ascribe blame to Constable Coke, although in a statement of facts and issues, the Director of State Proceedings, on behalf of Constable Anderson and the Attorney General did, very unworthily, raise as a legal issue in dispute, the question of whether Constable Coke was contributorily negligent. Those parties asked this question at page 52 of the record of appeal:

> "If the 2nd Defendant is at all, liable, did the Claimant, a passenger in Toyota Corolla motor car, registered 203672, and driven by the 2nd Defendant, having accepted the risk of travelling therein, contribute to his own injury and was contributorily negligent?"

[8] At a case management conference, the Commissioner of Police, who was initially the third defendant, was removed as a defendant. This is apparently because it was accepted that Constable Anderson was, at the material time, the servant and agent of the Attorney General. The case then proceeded to trial.

The trial

[9] The trial was conducted over the course of several days between December 2012 and January 2013. Constable Coke's evidence was taken first and, at the close of his case, learned counsel for Constable Anderson and the Attorney General submitted that they had no case to answer, as Constable Coke had ascribed no blame for the crash to Constable Anderson. The learned trial judge agreed with that submission. He found, on 5 December 2012, that Constable Coke had not proved his claim against Constable Anderson or the Attorney General. The claim against them was therefore dismissed.

[10] Learned counsel for Mr Rhooms made an unsuccessful no case submission. Mr Rhooms was not put on his election, however, and the trial continued with Mr Rhooms presenting his case. In his testimony, Mr Rhooms sought to place the blame for the collision on Constable Anderson. At the end of the trial, the learned trial judge stressed that the burden of proof lay on Constable Coke to satisfy him of Mr Rhooms' liability. He found that Constable Coke had not discharged that burden. Accordingly, on 1 February 2013, he gave judgment for Mr Rhooms. Constable Coke was ordered to pay the costs of all the defendants.

The appeal

[11] Constable Coke has filed a number of grounds of appeal. They are:

> "i. The trial Judge erred in law in his judgment when he stated that it use [sic] to be the law that the Defendant had to be put to his election and that there are exceptions in England.
>
> ii. The trial Judge erred in law when, he without an application being made by any of the parties in the claim, asked Counsel for the 2nd and [3rd] Respondents at the close of the Appellant's case whether she was in agreement with the Court that there is [sic] No Case to Answer against them.
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> iii. The trial Judge erred in law and in fact by holding that there was No Case to Answer by the 2nd and [3rd] Respondents after only hearing the Claimant's evidence, when in the Statement of Case of both sets of Respondents they enjoined the issue of liability between themselves by stating in their respective Statements of Case that the other was liable leaving only the issue of the cause of his injury which was a collision between the two vehicles and expenses to be proven by the Claimant. As between the Respondents, the issue of liability had been enjoined and was to be determined by the Court. The issue of liability having been enjoined between the 1st Respondent on the one hand and the 2nd and [3rd] Respondents on the other hand, it was therefore the function of the trial Judge to determine to what percentage. The Court failed in its duty when it failed to hear from the 2nd and [3rd] Respondents so as to be able to determine that joined issue of liability.
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> iv. The Judgement was not reasonable in that [sic] Court ruled that there was no evidence of negligence on the case of the Claimant when his Witness Statement states that the [police] vehicle changed lanes and started to turn right just before the collision.

v. The Judgement was not reasonable in the circumstances bearing in mind the case of all the parties and the evidence where the Claim involved a collision of two vehicles, in which the Claimant was merely a passenger in one of the vehicles and on the Claimant's Statement of Case and evidence both the 1st Respondent's vehicle and [police] vehicle swerved or veered right resulting in a collision of both vehicles.

vi. Having amending [sic] the Amended Particulars of Claim the Judge erred in law by reverting to the original Particulars of Claim in coming to a decision in the Claim stating that the wording was still relevant at the trial.

vii. Although the trial Judge acknowledged that a Defendant's evidence can assist in supporting the Claimant's case he failed to take into account the many admissions of negligent acts on the part of the 1st Defendant and the many contradictions in the 1st Defendant's evidence in his cross examination which supports the Appellant's case."

Grounds ii, iii, iv and v – the learned trial judge's approach to the case

[12] Mr Fletcher, on behalf of Constable Coke, argued these four grounds together. He submitted that the common thread running through them was that "the learned trial judge underappreciated an aspect of the law which ought to have instructed his approach to the issues raised and his decisions" (paragraph 8 of the written submissions). Learned counsel relied on the fact that Constable Coke was a passenger. He submitted that although it was not pleaded, the doctrine of *res ipsa loquitur* (the thing speaks for itself) was relevant and applicable.

[13] According to Mr Fletcher's submission, the circumstances of the case satisfied the two requirements for the doctrine. At paragraph 11 of the written submissions he named those requirements:

> "i. That the thing causing the damage was under the management or control of the defendant or his servants, and
>
> ii. That the accident was of such a kind as would not in the ordinary course of things have happened without negligence on the part of the defendants."

[14] Learned counsel argued that the fact that each of the drivers blamed the other as being the negligent party, "reinforced the fact that *res ipsa loquitur* is applicable" (paragraph 12 v of the written submissions). In that event, Mr Fletcher submitted, the evidential burden had shifted but the learned trial judge did not appreciate that fact. Learned counsel submitted that had the learned trial judge appreciated the applicability of the doctrine he would not have:

a. stressed the fact that the evidential burden lay on Constable Coke;
b. allowed Constable Coke to present his case first;
c. allowed and acceded to the no-case submission on behalf of the Attorney General and Constable Anderson;
d. failed to put Mr Rhooms on his election; and
e. found that Constable Coke had not satisfied him in respect of Mr Rhooms' liability.

Those failures, Mr Fletcher submitted, were instalments of one continuing misdirection by the learned trial judge as to where the evidential burden lay. Based on those failures, he submitted, the judgment must be set aside and a new trial ordered.

[15] Mr Johnson, on behalf of Mr Rhooms, submitted that the basis of Mr Fletcher's submissions did not exist, that is, that the doctrine of *res ipsa loquitur* did not apply to this case. Learned counsel argued that an essential element for the doctrine to be applicable is the fact that the claimant does not know how he came to be injured. In this case, submitted Mr Johnson, Constable Coke not only averred that each of the drivers was negligent, but pleaded particulars of the negligence of each.

[16] Mr Johnson also pointed out that, in addition to his statement of case, Constable Coke had said in his witness statement that it was Mr Rhooms who had carried out the manoeuvre that had resulted in the crash. This was, therefore, on Mr Johnson's submissions, the situation that faced the learned trial judge at the start of the case. It was not a case of *res ipsa loquitur*, learned counsel submitted, and there was no reason for the learned trial judge to proceed with the trial other than in the normal way, with Constable Coke presenting his case first.

[17] Constable Coke, Mr Johnson submitted, created the situation in which he has found himself. He did so when he elected to advance his case against Mr Rhooms only. Mr Johnson pointed to the fact that when it was suggested to Constable Coke that it was Constable Anderson who had caused the collision with Mr Rhooms' Nissan, Constable Coke said, "No".

[18] Ms Dickens, on behalf of Constable Anderson and the Attorney General, candidly accepted that on the pleadings, it could not be said that either defendant was entitled to succeed. Learned counsel indicated that once Constable Coke's evidence was taken, however, that situation changed. She submitted that the legal and evidential burden of proving negligence lay on Constable Coke and that at the end of Constable Coke's testimony there was no evidence against Constable Anderson and the Attorney General. He had, therefore, failed to discharge the burden placed on him in respect of Constable Anderson's driving. Accordingly, learned counsel submitted, the learned trial judge "did not err in law or fact in finding that there was no case for the 2nd and [3rd] Respondents/Defendants to answer".

[19] In assessing these competing submissions it is necessary to first examine the relevant case law. In **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20, Morrison JA, in his characteristically thorough style, assessed the application of the doctrine of *res ipsa loquitur*. In his judgment, with which the other members of the court agreed, he cited the leading cases on the doctrine and, at paragraph [57], summarised the relevant principles:

> "[57] *Res ipsa loquitur* therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19th Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) **there must be no evidence as to why or how the accident**

> **took place.** As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on **Henderson v Jenkins & Sons** [[1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'." (Emphasis supplied)

[20] It is fair to say, based on the highlighted portion of that extract, that the present case is not one where there is "no evidence as to why or how the [collision] took place". Constable Coke both pleaded in his particulars of claim and testified as to what occurred. *Res ipsa loquitur*, therefore, does not apply in this case. That is however, not an end to the matter. The conduct of the case by the learned trial judge has to be examined to determine whether it contributed to this unusual result.

[21] A concise analysis of the learned trial judge's approach in this case may, by juxtaposition, be gleaned from the judgment in **Hummerstone and Another v Leary and Another** [1921] 2 KB 664. The facts of that case are materially indistinguishable from this case. A Divisional Court in England described as wrong, a trial judge's approach of allowing a no-case submission against one defendant and then finding, on a balance of probabilities, that the remaining defendant had succeeded. Bray J, giving the judgment of the Divisional Court, said at page 666 of the report, that the trial judge had, in error, divided the case into compartments. He said:

> "In our opinion the learned judge took an entirely wrong course in allowing Leary to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, **he divided it into what we may call compartments**

> **and tried each separately**, the result of which was that it was never really tried at all. He treated it as a claim against Leary alone and a claim against Foster alone, overlooking the fact that the plaintiffs, as they were entitled to do under the Rules, were alleging that either Leary or Foster or both were responsible for the accident." (Emphasis supplied)

The rule to which the court referred was that which allowed a claimant to "join several defendants when he is in doubt which is liable". It provided that "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties" (see page 667 of the report).

[22] In Jamaica, the Civil Procedure Rules (the CPR), by rule 8.3, entitle a claimant to "use a single claim form to include all, or any other claims which can be conveniently disposed of in the same proceedings". The claimant may, of course, join as many defendants as he wishes (see rule 8.4 of the CPR). Rules 8.3 and 8.4 are not identical in import to the rule to which Bray J referred, but coupled with the overriding objective, and the issue of fairness (which will be expanded on below) these rules of the CPR allow that which the rules, referred to by Bray J in **Hummerstone**, achieved.

[23] In this case, as mentioned above, Constable Coke pleaded negligence against both drivers. As was the case in **Hummerstone**, the learned trial judge applied the incorrect approach and therefore arrived at a decision where, in the face of each driver casting blame on the other, neither was found to have been negligent.

[24] As in **Hummerstone**, Constable Coke described what he saw. The fact that what he saw did not implicate Constable Anderson, was, in the scheme of this case, not sufficient to order that Constable Anderson had no case to answer. Because of the similarity with the circumstances in **Hummerstone**, an extended quote from the judgment in that case will provide guidance. Bray J explained, at page 667, that the circumstances of the case required both defendants to state their respective cases:

> "**When once a state of facts was proved, as it was, from which the reasonable inference to be drawn was that prima facie one if not both drivers had been negligent, the plaintiffs were entitled to call on the defendants for an answer, and the proper time at which to decide whether on the evidence one defendant or the other defendant or both the defendants were liable was at the close of the whole case.** That the plaintiffs did prove such a state of facts is clear. The collision took place in broad daylight, there was no other traffic in the road, and there was nothing to indicate inevitable accident. If the learned judge was right, then if all that the plaintiffs could have proved was the collision itself, which under such circumstances as these would raise a presumption of carelessness on the part of one or both drivers, each defendant would be entitled to judgment because the plaintiffs would have failed to prove which driver was to blame." (Emphasis supplied)

[25] It may, not unreasonably, be said that that explanation for the required approach is very close to that required by *res ipsa loquitur*. His Lordship did not use that nomenclature and it may only cause confusion to attempt to import that principle where there is a clear distinction between the present situation and that on which *res ipsa loquitur* is based. Bray J explained that the rules of court required the procedure

mentioned above but he explained that fairness also required it. He continued at page 667:

> "…and, apart from the special language of the rule, it is in our opinion clear that when the difficulty of procedure is got over and a plaintiff can present his case against two defendants in the alternative **he is just as much entitled to have the case tried out where he has made a prima facie case in support of his cause of action as a plaintiff is who proceeds against one defendant alone**. It must not be supposed from our judgment that if a plaintiff fails to make a prima facie case at all he is entitled to call on two defendants under such circumstances as these to give evidence and ask for judgment if no such evidence is given. **He must of course prove facts from which in the absence of an explanation liability could properly be inferred.**" (Emphasis supplied)

The learned judge then referred to the previous cases that dealt with the point.

[26] It is accepted that Constable Coke was required to provide evidence of the collision. He, in fact did so. It should also be stated that the suggestion made to Constable Coke, and stressed by Mr Johnson, that it was Constable Anderson who had caused the collision, was an improper suggestion, as that was the issue for the court to decide based on the evidence.

[27] In **Hummerstone**, having given its reasoning, the court ordered that "judgment in favour of each defendant must be set aside and a new trial ordered". Fairness requires no less in this case. Having decided that there should be a new trial there is no need to assess the additional grounds of appeal. It is for that reason also that an outline of the evidence at the trial was kept to a minimum.

PHILLIPS JA

ORDER

1. The appeal is allowed.
2. The case must be tried anew in the Supreme Court before a different judge.
3. The costs of the first trial must be in the discretion of the judge who conducts the new trial.
4. Costs of the appeal to the appellant.