JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12/2004

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MRS. JUSTICE McCALLA, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	**WAYNE STEWART**	**APPELLANT**
AND	**TEAPE JOHNSON LTD.**	**1ST RESPONDENT**
AND	**JUNIOR BAILEY**	**2ND RESPONDENT**

Mr. Christopher Honeywell and Carleen McFarlane instructed by McNeil and McFarlane for the appellant.

Mr. David Johnson instructed by Samuda and Johnson for the respondents.

May 29, 30, June 1, and December 20, 2007

COOKE, J.A.

1. On the 11th July 1995, the appellant received serious injuries as a result of a collision between a pick-up in which he was a passenger in the cab and a truck driven by the 2nd respondent. This accident occurred, in the words of the learned trial judge, "late evening, twilight probably or a little later" but as he observed "the state or quality of prevailing light formed no part of the final submission".

2. The pleadings, and evidence adduced in support by the contending parties, as to where and how the collision occurred were diametrically different. In essence the appellant's case was that the pick-up in which he was travelling along the highway through Phoenix Park was making an exit turn to the right at the time of the impact. The respondents' position was that the collision occurred some distance away, when the pick-up heedlessly entered the highway and collided with the truck. Suffice it to say that the learned trial judge rejected the account of the respondents. However, he, nonetheless, found that the driver of the pick-up Ronald Newell was "substantially at fault" and concluded that there would be judgment for the respondents (i.e. the driver and owner of the truck).

3. A number of grounds of appeal were filed but at this hearing there was one amended ground which was:

> "(a) The learned trial judge totally rejected the defendants' case yet erroneously found totally in favour of the defendant. (Respondent).
>
> (b) Such a finding was erroneous as there was no evidence to permit such a finding.
>
> (c) Alternatively the learned judge erred in finding that on the pleadings and evidence before him contributory negligence did not arise."

4. Having rejected the account of the respondents as to where and how the collision occurred, the only probative *viva voce* evidence was that given on behalf of the appellant. The essential aspects were:

(a) The appellant was in the cab of a pick-up.

(b) The driver Newell was driving along the highway and he signaled to turn right into a "pathway" which would take him to his furniture shop. Apparently Newell was returning from acquiring lumber which at the relevant time was in the pick-up.

(c) The pick-up was in the process of executing the manoeuvre of exiting from the highway into the "pathway" leading to his shop at the time of the impact.

(d) At the time of the impact "three quarter" of pick-up was on the pathway and the "other quarter" was on the highway. (See p. 64 of bundle)

(e) The impact was to the right rear of the pick-up.

5. The learned trial judge accepted as a fact that "the truck would have completed a left hand bend on the roadway some three chains before arriving at the accident spot". At the trial, an assessor, Mr. Michael Forrest, gave evidence on behalf of the respondents. He described damage all over the body of the pick-up. This is not surprising in view of the fact that after the collision the pick-up hit a light-post and then fell into a culvert. The damage to the pick-up is of no probative significance in the determination of the issue of liability.

6. The learned trial judge posited three questions, the answer to which, he reasoned, would lead to the resolution of the issue of liability. These were as follows:

> "1. Did the driver of the pickup enter the highway from the left, that is, into the path of the truck?
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> If the answer is no, then,
>
> 2. Did the driver of the pickup make an exit turn to the right without due care, or,
>
> 3. Did the truck's driver, indifferent to the signal by the other, precipitately attempt to overtake?"

7. He answered the first question in the negative. As to the other two questions this was what he had to say:

> "As to the second and third issues, several factors must be balanced. The excellent road surface, slightly down-gradient, might be conducive to speeding, particularly by a big truck returning to base, Kingston, after delivery of goods and virtually empty. Even at a moderate pace, its momentum would be considerably greater than that of the pick-up, the latter presumably slowing for its exit turn.
>
> Save that the pickup came to rest by a light-post and sustained considerable damage as the photo-print Exhibit 5 shows, it was certainly not pushed beyond its exit turn nor into a turn-around position ordinarily associated with an impact of considerable force. But, neither could it be said to have pushed the truck [sic] except to impart moderate deflection. The position of the latter suggests moderate speed just before impact, its momentum, relatively controlled.
>
> Newell's failure to be aware of the truck before the impact denotes his omission to satisfy himself that he could safely make the exit turn.
>
> In the event, I find that he was the driver substantially at fault."

8. In assessing the "several factors" to "be balanced" the learned trial judge ignored a critical aspect of the evidence. He made no mention of the fact that at the time of the impact three-quarters of the body of the pick-up was in the "pathway". There was no evidence as to the width of the highway, neither was there evidence of the length of the pick-up. However, utilizing my local knowledge of the highway in question and taking into consideration the usual length of a vehicle designated as a pick-up, it would not be unreasonable to infer that at the time of the impact the truck was travelling on the right hand side of the roadway. It therefore does appear that the truck at the point of impact was endeavouring to overtake the pick-up. This would have been in flagrant disregard of the signal that the pick-up was about to turn to the right, to exit the highway. There is no direct evidence of the speed at which the truck was travelling. The learned trial judge in the passage from his judgment excerpted in par. 7 (supra) came to the view that the truck at the time of the accident was travelling at a moderate speed. He founded this view on the fact that:

> "the pick-up ... was certainly not pushed beyond its exit turn nor into a turn-around position ordinarily associated with an impact of considerable force. But, neither could it be said to have pushed the truck except to impart moderate deflection."

This conclusion is questionable since, as earlier stated, there is no probative evidence as to where exactly the point of impact on the pick-up was located. The evidence of Newell, was that the impact was to the rear of the pick-up. It cannot be said that the position of the pick-up after the accident is necessarily

determinative of the estimated speed at which the truck was travelling. It would appear that it is the finding that the truck was travelling at a moderate speed which underpinned the learned trial judge's definitive statement that:

> "Newell's failure to be aware of the truck before the impact denotes his omission to satisfy himself that he could safely make the exit turn."

The driver of the truck (the 2nd respondent) had just before the point of impact negotiated a corner some three chains away. This was no great distance away. Having rejected his account as to where and how the accident occurred, there is no evidence from the driver of the truck as to the truck's involvement in the collision. The driver of the pick-up had a duty of care to see that it was safe to turn right to exit the highway. Equally the driver of the truck had a duty of care to be aware of the pick-up travelling ahead of him and not to undertake any dangerous manoeuvre which could place the pick-up in peril. The driver of the truck should:

> "Always be able to stop your vehicle well within the distance for which you can see the road to be clear, and make allowance when the road is wet or slippery." (par. 4 of part 2 of the Island Traffic Authority, Road Code 1987).

Based on the foregoing it is my view that the learned trial judge was in error to find that the driver of the pick-up was "substantially at fault".

9. In respect of the issue of contributory negligence which was broached before us, I will content myself by reproducing the view of the learned trial judge with which I agree.

> "Contributory Negligence
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> In the light of the findings above, this merits only passing mention, and only because of submissions by the defence. On neither presentation was it an issue. The plaintiff opted not to join Newell (incidentally his employer at the time) as a defendant; neither did the defendants make him a third-party for indemnity or contribution in the event of an adverse finding.
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> Section 3 of the Law Reform (Tort-feasors) Act explicitly deals with:
> "Proceedings against and contribution between joint and several tort-feasors."
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> Sub-section 3(1)(a) reads:
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> "Where damage is suffered by any person as a result of a tort (whether or not such tort is also a crime)- judgment recovered against any tort-feasor liable in respect of such damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage." (emphasis supplied)

10. I would allow the appeal, and set aside the order of the Court below. Judgment should be entered in favour of the appellant. This matter should be

remitted to the Supreme Court for damages to be assessed. The appellant should have his costs both here and in the Court below.

McCALLA, J.A.

I agree.

DUKHARAN, J.A. (Ag.)

I also agree.

COOKE, J.A.

ORDER:

The appeal is allowed. The order of the Court below is set aside. Judgment is entered in favour of the appellant. This matter is remitted to the Supreme Court for damages to be assessed. Costs to the appellant both here and in the Court below.