IN THE COURT OF APPEAL

DOMINICA

Magistrate's Civil Appeal

No. 1 of 1973

Between: ANGE FELIX OLIVACCEE Defendant/Appellant

and

CHRISTFORD JNO. CHARLES Plaintiff/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

C.C. Beausoliel for defendant/appellant
R.H. Lockhart for plaintiff/respondent

1973, March 20

JUDGMENT

LOUISY, J.A. (Ag.)

This is an appeal from the decision of the Magistrate District E, given on a claim for damages for negligence. The particulars of the claim are as follows:-

"The plaintiff claims $132.00 for that on the 16th December, 1970 in Rosea the defendant so negligently drove his motor vehicle No. 998 as to cause it to collide with the plaintiff's motor truck No. 803 and damaged the same whereby the plaintiff has been put to loss and expense. The claim was subsequently amended to include negligence by the appellant's servant or agent."

The claim was heard on the 12th October, 1972 and after considering the evidence the learned Magistrate gave judgment for the plaintiff in the sum of $132.00 damages and cost $23.76. The appellant being dissatisfied with this decision appealed to this Court on the following grounds:-

(1) that the judgment pronounced by the learned magistrate is unreasonable.

(2) there is no evidence to support the learned magistrate's finding that the relationship of master and servant or that as of principal and agent

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existed as between the defendant and the person driving the defendant's motor vehicle.

(3) there is no evidence to support the learned magistrate's finding that the person driving the defendant's motor vehicle was negligent.

(4) the learned magistrate erred in granting the amendment to the plaintiff after the plaintiff had closed his case and after counsel for the defendant had concluded his address to the Court.

The facts of the case are very simple. Edric Jno Charles was driving his father's truck on the Loubiere road in the direction of Roseau when he reached somewhere at New Town he pulled up on the side of the road on a no parking spot as he said he saw a motor car approaching in the opposite direction. After the motor car passed he moved and got back in the line of traffic. As soon as he reached a motor car which was parked in front of him he heard a noise at the side of his truck. He looked and saw his right mudguard was cut in two by jeep No. 998. He spoke to the driver of the jeep, who told him that the jeep was not his and he, Edric Jno Charles told the driver of the jeep that the truck was not his either. As a result of the accident Edric telephoned his father Christford Jno Charles and the driver of the jeep also got in touch with the appellant. Later the police went to the scene of the accident and carried out investigations and took measurements.

At the close of the case for the respondent before the Magistrate the appellant's counsel elected not to call any evidence.

He submitted:-

(1) that the evidence adduced by the respondent was that the jeep owned by the appellant was driven by some other person and that he the appellant could not be made liable. The driver would be the person liable if the case was established and the appellant would be vicariously liable if there was a connection established between himself and the driver. The circumstances under which the

/jeep .....

jeep was used would also have to be considered; and

(2) that no negligence was made out against the driver of the jeep.

Counsel for the appellant before this Court made substantially the same submissions that he made before the Magistrate, and stated as regards his first submission that the learned Magistrate ought not to have granted the amendment; the claim should not have been amended to include servant or agent as the appellant would not have had an opportunity to answer the amendment or be in a position to do so.

He further stated on the question of negligence that there was no negligence at all by the appellant's driver, in fact, if anybody was negligent it was the respondent's driver, because the appellant's driver came from the back of a parked vehicle, and came back into the line of traffic without giving the necessary signal to indicate he was entering the line of traffic.

Counsel for the respondent submitted that the magistrate was quite right to grant the amendment even at that late stage. He referred to page 7 of the record of the Magistrate's reasons and stated that the Magistrate stated therein as follows:- "There were no new issues raised by the amendment and it was open to the defence counsel if he felt he was at a disadvantage to apply for leave to adduce evidence in rebuttal and if necessary ask for an adjournment with costs." He stated further that the appellant's counsel did not ask for an adjournment or for leave to adduce evidence in rebuttal both of which he could have applied for.

It is true that under Rules of Court the Magistrate can grant an amendment at any stage of the proceedings but in my view, the respondent's counsel had ample opportunity to apply for an amendment early in the proceedings. The evidence clearly indicated that he should have done so while the case was in progress. The kind of amendment applied for and

/which .....

which the Magistrate granted, should not have been granted because it put a new issue before the magistrate as to whether it was the servant or agent of the appellant who was negligent. Further the question of different defences would have had to be considered by the appellant.

The case was argued on the basis that it was the appellant who was driving the vehicle and in my view the amendment should not have been allowed in the circumstances of this case at this very late stage.

On the question of negligence, counsel for the respondent frankly admitted that the respondent's driver should have given a warning that he was coming out from behind the parked vehicle into the line of traffic, but nevertheless he submitted that although the respondent's driver did not give a warning, it was the duty of the appellant's driver to keep a proper look-out to see that no vehicle got into the line of traffic. He stated that as the appellant's driver did not do so, he was negligent. In my view there is no evidence to support counsel's contention that the appellant's driver was not keeping a proper look-out. The respondent's driver stated in evidence as follows - "I don't know whether there was any motor car at the back of me". It seems to me that it was the respondent's driver who did not keep a proper look-out. There is no evidence as to what distance the appellant's driver was from the respondent's vehicle before it came out in the line of traffic, or at what speed he was driving. It may very well be that the appellant's driver was some distance away and was travelling at a moderate speed, if so, he could not know or would not have anticipated that the respondent's driver was parked behind the other vehicle waiting to get in the line of traffic.

In my view, on the evidence before the Magistrate, there was no question of the appellant's driver being negligent, and the magistrate could not so find.

I would in the circumstances allow the appeal, set aside the decision of the learned Magistrate with costs

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to the appellant $50.00.

Allan Louisy
JUSTICE OF APPEAL (Ag.)

CECIL LEWIS, C.J. (Ag.)

I agree.

P. Cecil Lewis
ACTING CHIEF JUSTICE

ST. BERNARD, J.A.

I agree.

E.L. St. Bernard
JUSTICE OF APPEAL