

TORTOLA:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 1977

BETWEEN:

MELVIN TURNBULL

Plaintiff/Appellant

Vs.

VERNE FREEMAN (an infant by
AONA FREEMAN, his next friend) Defendant/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: J. Smith Hughs for Appellant
J.S. Archibald for Respondent,
G. Farara with him.

1979; January 11 and 15

J U D G M E N T

BERRIDGE, J.A. (AG.)

This is an appeal against the judgment of Hewlett J in a running down action in which he found that the accident was caused wholly by the appellant's negligence and awarded to the respondent the sum of \$10,000.00 with costs agreed at \$550.00.

There were two grounds of appeal viz (1) that the decision of the learned judge was against the weight of evidence and (2) that the learned judge failed properly to consider that if the infant plaintiff, as he himself stated on oath, had crossed the road in the path of an oncoming vehicle such infant plaintiff had either wholly caused the accident or was at least guilty of

/contributory.....

contributory negligence.

The facts are that at the time of the accident the infant was just over 13 years old.

On the 26th August 1974 he was a passenger in a car which was being driven along the Long Bush road and he was sitting on a seat at the back. It was lunch time and he was returning home from school. The car in which he was travelling stopped on the left side of the road opposite his home. He raised the back lid of the car and got out.

His evidence is that he was standing at the side of the car and that as he was about to close the lid of the car he was knocked down by a jeep driven by the appellant. He admitted that he did not look in both directions. The driver of the car from which he emerged stated that the respondent had actually closed the lid and had made a step in the direction of his house when he was knocked down. The appellant's evidence supports this because he said that the respondent had gone about 2ft. from the car when he was struck.

The appellant was travelling in the same direction as the stationary vehicle. The width of the road at that point is about 17½ft.; it was straight and dry and there was no traffic in the opposite direction.

Immediately before the accident the appellant's vehicle had been following the vehicle in which the respondent was driving, according to the appellant himself at a distance of 5ft. but according to his witness at a distance of 15ft.

The appellant's account is that the respondent slammed the bonnet and ran across the road and was hit by his vehicle in the

/middle.....

middle of the road. He claims there was nothing he could do to avoid the accident.

The driver of the car in which the respondent was travelling gave the width of his car as 5 to 6 ft. Assuming that he stopped approximately 1ft. from the kerb the respondent must have been struck about the middle of the road.

The respondent suffered a supracondylar fracture of the left femur and a mid-shaft fracture of the right femur which required skeletal traction.

After relating his findings the trial judge went on to conclude as follows ".....but even if the evidence of his witness is accepted who puts the distance at 15ft., and says that the defendant was travelling about 15 m.p.h., it cannot exonerate the the defendant from liability - because to travel that closely behind a moving vehicle at that speed allows little or room for avoiding an accident."

I would agree. A following driver is, in my view, bound so far as reasonably possible to take up such a position and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated. Indeed, Counsel for the appellant has conceded that he was negligent but has disputed the judge's finding that he was wholly negligent and that there was no contributory negligence on the part of the respondent.

The only question therefore which falls to be considered is whether or not there was any contributory negligence on the part of the respondent.

As Denning L.J. said in *Davies v Swan Motor Co.* (1949)1 A.E.R. 620 "The test of contributory negligence in the case of a

/pedestrian.....