(8)

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 of 1982

BETWEEN:

CYNTHIA ALFRED - Plaintiff/Appellant

and

1. LEON THOMAS
2. JOHN DE CAUL — Defendants/Respondents

Before: The Honourable Sir Neville Peterkin - Chief Justice
The Honourable Mr. Justice Berridge
The Honourable Mr. Justice Robotham

Appearances: S. John for the Appellant
O.R. Sylvester for the Respondents

1982: Dec. 8
1983: Apr. 26.

JUDGMENT

BERRIDGE, J.A.

This is an appeal from the judgment of Renwick, J. in which he ordered that judgment be entered for the plaintiff/appellant against the first-named respondent in the sum of $20,000.00 with costs to be taxed and dismissed the claim against the second-named respondent on the ground that he was not vicariously liable for the acts of the first-named respondent, his servant, with the award of half of his costs to be taxed.

The grounds of appeal are:

(i) That the learned trial judge failed to evaluate the evidence and in consequence thereof the quantum of damages awarded the Plaintiff against first-named Defendant was inadequate estimate of the damage suffered by the Plaintiff.

/(ii) That.....

(ii) That the learned trial Judge erred in law in dismissing the Plaintiff's claim against the second-named Defendant;

and the relief sought is:

(a) That the sum of $20,000.00 awarded by the Court for damages be varied and that the same be substituted by an award in the discretion of this Honourable Court.

(b) That the order of the learned trial Judge that the Plaintiff's claim against the second-named Defendant be dismissed, and that the latter should be entitled to half of his costs, be set aside.

(c) That judgment be entered for the Plaintiff against both Defendants in an amount to be assessed entirely in the discretion of this Honourable Court and costs.

(d) That the costs of this Appeal be provided for.

The first-named respondent did not appear at the hearing of this appeal nor did anyone do so on his behalf.

The facts of the case as found by the trial judge or accepted are that the first-named respondent who was the driver of a truck owned by the second-named respondent offered the appellant a lift which she accepted. There were no signs on the truck, contrary to the evidence of the respondents, forbidding the carriage of passengers. The appellant entered the truck and sat beside the driver. There were no doors on either side of the vehicle, the tray of which was heavily laden with sand.

While ascending a hill engine trouble developed, the truck travelled backwards, the brakes failed to stop the heavily laden truck and in an attempt to bank the vehicle on the right hand side of the road it capsized

on its.....

on its left side throwing the appellant out and pining her leg to the truck. The appellant suffered serious injuries as a result of the negligent driving of the first-named respondent and she was hospitalised for about ten weeks having to resort to the use of a crutch for some three months.

It was pleaded in the appellant's statement of claim that the accident was due solely to the negligence of the first-named respondent who, as agent of the second-named respondent, offered the appellant a lift in the said truck which she accepted. It was further pleaded that the first-named respondent drove the said truck on a public road so negligently and recklessly that he caused it to overturn by reason of which the appellant is permanently incapacitated and has suffered pain and injury, loss and damage. The appellant claimed $2703.00 Special Damages also General Damages.

It was asserted in the defence that the appellant was being carried gratutiously in the truck contrary to the express instructions of the second-named respondent and subject to the express condition that the first-named respondent should be under no duty to carry the appellant with care or safety and to be free from all liability to her arising from personal injuries or loss or damage to her property however caused.

It was further asserted in the defence that the first-named respondent was employed to drive the truck on or about the business of the second-named respondent and not to transport passengers and that the act complained of was not done within the scope of such employment and was wholly unauthorised by the second-named respondent.

It was also denied in the defence that the appellant suffered the alleged or any damage from the negligence of the first-named respondent.

The principles to be applied in cases of this nature are laid down in the well known case of Cornilliae v St. Louis 7 W.I.R. 491.

/Learned.....

Learned Counsel for the appellant who was well acquainted with these principles argued that their proper application should inevitably lead to an award greater than that made by the trial judge.

There can be no doubt that the appellant suffered injuries of a very serious nature indeed. One has only to look at the evidence of the doctor - Dr. Rampersaud - to see what they were. He said:

> "Examination revealed supported by X-ray comminuted compound fracture with associated dislocation of left ankle joint and involved several bones. No registered surgeon was present in State I being surgical registrar in Obstetrician and Gynaecology was asked to treat patient. I sought opinion of Mr. Waldron who happened to be passing through State. His advice was to amputate left leg below the knee. Because of severe dist. and devitalised tissues possibility of gangrene etc. I decided to attempt surgeon correction. This was done. All devitalised muscles, tendons, splinters of bone were removed. Nerves and three tissues which it was possible to surgically repair was done under general anesthetic and leg finally placed in plaster of parris cast with an open window over the area of the wound to facilitate dressing, drainage and to keep a check for the possibility of Gangrene. She was taken back to ward and placed on large doses of antibiotics, heavy sedation for the obvious intense pain she was experiencing and I visited her over a bi daily basis and subsequently passed the case over to Dr. Sunderam in September 1975 when he returned to the State. I saw the patient mid 1976 when she arrived at my office. I was pleasantly surprised to find that she was able to walk with a limp. She had no movements of the ankle joint - as a result of a subsequent operation. I again saw her some 9 months later - condition unchanged. She was finally seen by me early 1980 when I issued medical report. She has 100% permanent disability of movement of left joint, slight shortening of left leg, she walked with an obvious limp. It is very likely she will develop arthritis of left ankle joint in ensuing years. The physical pain and suffering was of the highest degree - injection for pain every 6 hours, this continued until I passed her on to Dr. Sunderam."

No specific attempt was made by Counsel for the appellant to refer the Court to comparative awards made and as the hearing progressed it became apparent that the substance of his complaint was that the trial judge did not in his judgment quantify the award of damages under separate heads bearing in mind the decision in Cornilliae v St. Louis 7 W.I.R. 491

/so as to....

so as to indicate how he arrived at the total sum awarded. I pause here to state, however, that there is no obligation on the part of a judge to mention arithmetical calculations on the several amounts under the separate heads of damages in his judgment provided he takes into account all the relevant factors, keeps in mind the various heads under which damages should be awarded and applies the correct principles.

It is not clear that these factors were taken into account by the judge and there is no indication to that effect in the judgment. The question of the age of the appellant, for example, is of relevancce but it was only elicited at the hearing from her Counsel that she was 40 years of age.

The question now arises whether in the light of the foregoing there is any justification to interfere with the trial judge's assessment of damages bearing in mind the test laid down by Wright, L.J. in Davies & anr. v Powell Collieries Ltd. [1942] 1 All E.R. 657 at p.664 which was adopted, inter alia, in (a) Ramkissoon v Kissman & anr. [1961] W.I.R. 540 (b) Boochoon v Ramsing & Gokool [1967] W.I.R. 359 which is that in order to justify interference with a judge's assessment of damages, an appellant must show that the award was inordinately high or low or to be a wholly erroneous estimate of the damage suffered.

Taking all the relevant factors into consideration and having regard to awards which have been made in cases in the Caribbean similar to this, I am of the considered opinion that the damages awarded were inordinately low and that an appropriate figure for General Damages is $30,000.00. I would allow the appeal in so far as the quantum of damages is concerned and order that judgment be entered for the Plaintiff/Appellant in the sum of $30,000.00.

I will now advert to the second ground of appeal and the question to be determined is: "Was the second-named respondent, the owner of the vehicle, vicariously liable for the negligence of the first-named respondent?"

/Learned.....

Learned Counsel for the appellant contended that specifically forbidding the driver of a truck from carrying passengers does not exempt the owner from liability in the event of a passenger sustaining damage and he questioned the authority of Conway v George Wimpey & Co. Ltd. [1957] 1 All E.R. 363 upon which the trial judge relied in arriving at his finding.

Counsel also cited the following cases in support of his contention:-

(i) Ilkin v Samuels [1963] 2 All E.R. 879, 884

(ii) Hayle v Bruce & Stephens 18 W.I.R. 313

(iii) Bhairoo & de Castro v Khan [1970] 17 W.I.R. 192

Counsel's attention was invited by the Court to the case of Zepherin v The Gros Islet Village Council & anr. [1979 26 W.I.R. 561, a case of St. Lucia orgin, the facts of which though not identical with those of the instant case, make interesting reading.

The first and second-named respondents were the owners and driver respectively of a lorry used for conveying corpses for burial. The driver having been instructed to carry a corpse from the house of mourning at Monchy to Gros Islet was expressly forbidden from carrying passengers in the tray of the truck. Contrary to those instructions he took not only the corpse but a number of mourners in the tray of the truck and instead of parking the lorry outside the house of the clerk of the Village Council as he was bidden to do at the end of each day he left Gros Islet with the mourners in the tray of the lorry for Monchy and on his way the lorry collided with the appellant who was riding a horse on the highway. She suffered serious personal injuries and the horse - a thorough bred - was killed. It was held that the employers were not liable.

At page 564 letter J, however, there is the following obiter dictum of Davis, C.J.:

/"Applying....

> "Applying the law to the facts in the case before the Court, it is clear that the first defendant would have been liable had the accident occurred during the journey from Monchy to the burial ground at Gros Islet".

Counsel for the appellant placed much emphasis on this obiter dictum. He observed that in the instant case the accident occurred during the journey when the first-named respondent was transporting sand for his employer's business and urged that the obiter dictum supported his contention that the second-named respondent was vicariously liable for the negligence of the first-named respondent. I do not agree.

In the instant case the appellant was a trespasser in a vehicle driven by someone who had been expressly forbidden from carrying passengers while in Zepherin's case the appellant was lawfully using the public highway when she was injured by a vehicle the driver of which stated that no one ever told him not to take mourners to and from the funeral and more specifically "The assistant clerk told me that they come to him about the corpse, go and collect the dead and the people and take them down to Gros Islet". This aside, the obiter dictum must not be taken out of context. It follows immediately after reference had been made to the case of Hilton v Thomas Burton Rhodes Ltd. & anr. 1 W.I.R. 707 in which Diplock, J., as he then was, posed himself the question "Was the second defendant doing something that he was employed to do?"

To put matters in true perspective it becomes necessary, if not essential, to summarise briefly the facts of the Hilton case (supra) which are as follows: The first defendants permitted the workmen to take their lunch and other necessary refreshment with them or get it at some cafe/ public house of their choice and were willing for them to have the use of the van for this or any other reasonable purpose of their own.

On the afternoon of the accident of the deceased, the second defendant and another member of the gang who had visited a nearby public

/house.....

house at mid-day for refreshments, taking the view that they had done enough work to pass muster and to fill in the remaining hours of the day, set out to have tea at a cafe some 7 or 8 miles from the site. The second defendant, though not the normal driver of the van, like any other servant with a driving licence, drove the van, being permitted to do so by the first defendants. An accident took place and it was held that although the second defendant was driving the van with the permission of the employees, the first defendants, he was not at the time doing that which he was employed to do and accordingly, the first defendants were not vicariously liable for his negligent driving.

It is in this context that the obiter dictum of Davis, C.J. must be construed. In other words in the Zepherin case had the accident occurred during the journey from Monchy to Gros Islet when the second-named respondent was doing something which he was employed to do, i.e. transporting the corpse and the corpse alone, the first-named respondents (the owners) would have been liable. In the instant case, however, the first-named respondent by giving a lift in the truck, an act which he was strictly prohibited from doing, cannot be said to have been doing what he was employed to do and that is where the difference lies.

Another case in point is Twine v Bean's Express Ltd. [1946] 1 All E.R. 202 in which the driver was expressly instructed that no one other than those employed by Bean's Ltd. should be allowed to travel on the van. These instructions were disregarded and Twine, an unauthorised passenger, was injured. It was held that the duty of the driver's employers to take care in the driving of the van was only to persons who might reasonably be anticipated by Bean's Ltd. as likely to be injured by negligent driving of the van at the time and place in question and that in the circumstances of the case Twine was a trespasser in the van in relation to Bean's Ltd. who owed no duty to

/Twine.....

Twine to take care in the driving of the van because they could not reasonably anticipate that he would be a passenger in the van at the time and place of the accident. They did not owe a duty to the world at large to take care.

I am fully satisfied that the first-named respondent was not acting within the scope of his employment when the accident involving the appellant occurred and that the appellant was a trespasser to whom the second-named respondent owed no duty to take care as to the proper driving of the truck.

The second ground of appeal is accordingly dismissed.

In fine, I would allow the appeal in respect of the quantum of damages and enter judgment for the appellant in the sum of $30,000.00 against the first-named respondent with costs to be taxed and I would affirm the decision of the trial judge dismissing the claim against the second-named respondent with half of his costs, similiter as in the court below, to be taxed.

N.A. BERRIDGE,
Justice of Appeal

I agree.

L.E. ROBOTHAM,
Justice of Appeal

I also agree.

N.A. PETERKIN,
Chief Justice