

43/82

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

CLIVE MALCOLM

(Plaintiff)  
Appellant

- and -

REX KNIGHT

(First Defendant)  
First Respondent

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- and -

EZEKIEL WILLIAMS

(Second Defendant)  
Second Respondent

CASE FOR THE APPELLANT

RECORD

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1. This is an Appeal from the Judgment of the Court of Appeal of Jamaica (Henry, Kerr and Rowe, J.J.A.) dated the 14th day of February 1980, and Grounds of Judgment of the 14th March 1980, which allowed the Appeal of the Appellant/Plaintiff from the judgment entered for the Defendants/Respondents after a trial before the Supreme Court of Judicature (Allen J.), whereby it was ordered that there should be judgment for the Defendants/Respondents and the costs of the action. The Order of the Court of Appeal was that there should be a new trial.

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The Appellant/Plaintiff sought, and is seeking, an Order that Judgment be entered for him with costs of the hearing below. Damages to be assessed.

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2. The action was brought by the Appellant as Plaintiff in 1976 claiming to recover damages in negligence for that on the 28th day of June, 1973 the Second-named Defendant/Respondent, the servant or agent of the First-named Defendant/Respondent, so negligently drove and or controlled motor truck licensed FB 818, belonging to the First-named Defendant/Respondent, along the Thompson Pen main road in the parish of Saint Catherine that it collided with the Appellant/Plaintiff causing bodily injuries, pain,

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suffering and loss.

p.18 The Particulars of Negligence as set out in the Statement of Claim were that the Second-named Defendant/Respondent

- (1) Hit the Appellant/Plaintiff from behind.
- (2) Failed to see the Appellant/Plaintiff and to take evasive action to avoid hitting the Appellant/Plaintiff.
- (3) Speeding around a curve.
- (4) Failing to have any regard for other users of the road including the Appellant/Plaintiff. 10

p.18 The Statement of Claim alleged, and the evidence at the Trial established, that the Appellant/Plaintiff was at the material time of the collision riding a bicycle. The allegation by the Appellant/Plaintiff that he was hit from behind by the truck was the main question in issue. This question was decided at the trial in favour of the Defendants/Respondents.

p.33-52 3. Three witnesses as to the circumstances of the collision gave evidence on behalf of the Appellant/Plaintiff. The Appellant/Plaintiff himself, one McFarlane, a man seventy five years of age, and McLennon. Professor James Cross gave evidence as to injuries for which he treated the Appellant/Plaintiff. The Second-named Defendant/Respondent and a police officer and one Oliver, a private detective employed by the Insurance Company, gave evidence for and on behalf of the Defendants/Respondents. Dr. Chutkan was also called for them. Some photographs of the scene of the collision and adjacent areas were put in by and for them. 20

p.25 The essence of the evidence for the Appellant/Plaintiff was that he was riding down a road on the left hand side of the road and was approaching a left hand corner when he was hit from behind by a truck which, as admitted by the Defendants/Respondents, is the truck in issue. 30

p.69 4. The sum total of the evidence for the Defendants/Respondents was that the Appellant/Plaintiff rode the bicycle in the opposite direction to which the second-named Defendant/Respondent was driving the truck and cut the corner so short that he came over into the path of the truck and collided with the extreme left of the truck and fell on the left of the truck into a concrete culvert. 40

p.77 There was agreement between the parties that the Appellant/Plaintiff was hit by the left side of the truck and that he fell on a culvert on the left side of the road in the direction the truck was travelling.

5. The Defendants/Respondents had argued at the trial that none of the witnesses called by the Appellant/Plaintiff, save for himself, was at the scene of the collision at the material time and much time was spent in cross-examination at the trial by Counsel in an effort to establish this allegation. p.72 pp.49-52

10 6. The learned Trial Judge did not accept the evidence of the Appellant/Plaintiff or his witnesses. She dismissed the evidence of the Appellant/Plaintiff and the witness McFarlane on grounds that it was not open to the Appellant/Plaintiff to question. But she dismissed the evidence of the witness McLennon for a reason that the Court of Appeal found wholly untenable. p.89 p.90 p.11

20 The learned Trial Judge had found that the witness McLennon was present at the scene of the collision. Then that he was an apparent witness of sincerity. And that he saw the collision happen before his eyes. But she reversed herself on this finding by stating, "However, in view of the position in the road where he must have been when he 'bent' the corner, the statement which he made as to the pre-accident movement and direction of the truck and of the Plaintiff is inconsistent with the immediacy of the earlier statement." p.90 p.91

30 Among other grounds of appeal argued before the Court of Appeal was "That the learned Trial Judge erred when she rejected the evidence of the witness Noel McLennon for the Plaintiff/Appellant after having assessed him as a witness of sincerity who was present at the scene of the collision and did see the collision." p.90

40 7. The Court of Appeal examined the photographs and came to the decision that the witness McLennon, being where he described himself as being at the time of the collision, was in a very good position to see the direction in which the Appellant/Plaintiff was travelling at the time of the collision. And based on the Trial Judge's finding that McLennon was present at the scene of the collision the Court held that the finding of the learned Trial Judge that "in view of the position in the road where he (McLennon) must have been when he 'bent' the corner the statement which he made as to the pre-accident movement and direction of the truck and of the Appellant/Plaintiff is inconsistent with the immediacy of the earlier statement", is untenable. p.11

50 8. With the above finding of fact by the Court of Appeal what is really left is the witness McLennon, a witness of apparent sincerity who was at the scene of the collision who could have seen all that he said he saw, and who saw all that he said he saw and whose evidence is that he saw the truck swerve from a pot hole and hit the Appellant/

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Plaintiff pedal cyclist behind so that he fell in a concrete culvert. On these findings the Court of Appeal ordered a new trial with costs of the Appeal to the Appellant/Plaintiff.

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9. The Trial Judge had said "There being no credible evidence offered by the Appellant/Plaintiff of the direction in which the Appellant/Plaintiff was travelling before the collision, the Court considered the inanimate evidence presented to see how it fits in with the two versions of the parties."

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As a matter of fact there had been no inanimate evidence before the Court. There had only been evidence of inanimate objects before the Court. The evidence in respect of these inanimate objects was not challenged, in that the police witness had disposed of the bicycle with a haste that is inconsistent with the seriousness of the charge that could have been laid against the second-named Defendant/Respondent who as far as he was concerned the Appellant/Plaintiff might have died as a result of the collision.

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10. The Court of Appeal took the view that both the evidence of Professor James Cross F.R.C.S. and Dr. Chutkan as well as the evidence regarding the condition of the truck and the bicycle was equivocal.

The questions raised for decision in this Appeal are

(1) Should the Court of Appeal have ordered that Judgment be entered for the Appellant/Plaintiff with costs to the Appellant/Plaintiff or should it have ordered a new trial with costs to the Appellant/Plaintiff.

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p.11

(2) Would the reinstatement of Mr. McLennon's evidence and consequently entry of judgment for the Appellant/Plaintiff, involve not merely the drawing of inferences but the finding of such primary facts as ought properly to be left to a trial judge?

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11. The Court of Appeal made reference to the fact that "The learned trial judge nowhere in her judgment says she accepted the second-named defendant/respondent Mr. Williams as a witness of truth". This is understandable. The second-named defendant had given evidence under cross-examination which amounted to his saying, that the collision took place at various different points in the road and even in the apex of the corner which was about 15 - 20 feet beyond the relevant culvert on the Sligoville side of the corner.

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The learned Trial Judge's reference to his evidence, that is, "On Defendant's version, the Plaintiff collided

with the truck and continued on his path for fifteen to twenty feet to the culvert. There is no evidence as to how he reached there, whether in one fling, somersault or carried on the bicycle" suggests strongly she was not impressed by his evidence. Defendant Williams evidence was that "you have to come to apex of corner before you can see up grade - because I am driving a righthand vehicle".

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10 12. It is submitted that the Court of Appeal was in possession of such primary facts that it ought, in the interest of at least bringing litigation to an end, to have ordered that Judgment be entered for the Appellant/Plaintiff with costs to the Appellant/Plaintiff both in that Court and the Court below.

20 13. It is further submitted that the primary findings of fact by the learned Trial Judge: "That McLennon was present at the scene of the collision and was an apparent witness of sincerity and saw the accident" coupled with the findings of the Court of Appeal, "That the learned Trial Judge reversed herself in the question of the witness McLennon's opportunity to see the direction the Appellant/Plaintiff was riding at the time of the collision as most untenable" requires that judgment be entered for the Appellant/Plaintiff.

30 14. It is further submitted that where a witness is assessed as a witness of apparent truth by a Judge having the opportunity to see and to hear him and the Judge subsequently reverses her opinion as to the credibility of that witness for a reason that is utterly untenable, a Tribunal rehearing the case is entitled and should make those primary findings of fact that are consistent with the evidence of that witness.

15. The Plaintiff/Appellant respectfully submits that the judgment of the Court of Appeal ordering a new trial is wrong and ought to be reversed and that Judgment should be entered for the Plaintiff/Appellant with costs throughout, for the following, among other

R E A S O N S

- 40 (1) BECAUSE the learned Trial Judge save for the wrong conclusion arrived at in respect of Mr. McLennon's opportunity to see the direction in which the Appellant/Plaintiff was riding at the time of the collision showed that every facet of the evidence had been clearly examined.
- (2) BECAUSE the Court of Appeal was in as good a position to examine the photographs as the Trial Judge.

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- (3) BECAUSE the Court of Appeal was in as good a position as the Trial Judge to evaluate the inanimate evidence.
- (4) BECAUSE the learned Trial Judge had reversed herself on the question of McLennon's credibility for a reason wholly untenable.
- (5) BECAUSE the witness by his demeanour and general deportment was assessed by the Trial Judge as a witness of apparent truth who saw the accident.
- (6) BECAUSE there was doubt in the mind of the Trial Judge with regard to the veracity of the witness Williams. 10
- (7) BECAUSE the Respondent/Defendant Williams contradicted himself many times with regard to the point where the collision occurred and therefore could not be relied upon.
- (8) BECAUSE the logical conclusion following from McLennon's evidence is that the Respondent/Defendant Williams was liable in negligence for hitting the Appellant/Plaintiff from behind.

AINSWORTH W. CAMPBELL

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CASE FOR THE APPELLANT

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