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IN THE PRIVY COUNCIL

No. 3 of 1958

55570

ON APPEAL
FROM THE SUPREME COURT OF BERMUDA

B E T W E E N

JOHN WESLEY PHIPPS
(Defendant) ... Appellant

- and -

10 WINSTON EVERARD EUGENE POWELL,
an Infant, by George Thomas
Everard Powell, his Next Friend
(Plaintiff) ... Respondent

C A S E FOR THE RESPONDENT

RECORD

20 1. This is an appeal from the judgment of
the Honourable Sir Allan Smith, Assistant
Justice of the Supreme Court of Bermuda, given
on the 9th October 1957 awarding to the
Respondent £562.14.0 special damages and
£6,000 general damages and costs in respect of
injury loss and damage sustained by the
Respondent as the result of an accident at or
about the junction of Cedar Avenue and Angle
Street in the City of Hamilton on the 30th May
1956.

2. The site of the said accident is shown
on the plan produced at the hearing of the
action. Exhibit B

30 3. The Respondent's case is that at the
material time he was riding as a pillion
passenger on a motor-cycle driven by his
father, the said George Thomas Everard Powell
and proceeding in a Southerly direction along
Cedar Avenue when a Private Car P. 6150 driven
by the Appellant emerged suddenly into Cedar
Avenue from Angle Street so close in front of
the said motor-cycle as to cause the
Respondent's father to check and swerve so pp. 3-4

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violently in an attempt to avoid a collision that the Respondent was thrown into the roadway sustaining serious injuries.

p.5.

4. By his Defence, the Appellant, apart from admitting that he was driving his private car P.6150 on the day alleged and generally in the location referred to by the Respondent, denied or made no admissions as to the Respondent's allegations and contended that the cause of the accident was the negligence of the Respondent's father in driving the said motor-cycle at an excessive speed, in failing to keep proper lookout and in failing to have proper control of the said motor-cycle.

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p.32.

5. In the course of the hearing, although no amendment to this effect was made to the Defence, the Appellant further contended that the Respondent was guilty of contributory negligence in riding as a pillion-passenger without holding on to his father, the driver of the motor-cycle: and leave, accordingly, was given to both parties to call expert evidence in this connection.

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6. On the primary issue of liability, evidence was led on behalf of the Respondent to the following effect:

pp.6,12.

(i) at a few minutes before 7.0 a.m. on the 30th May 1956 the Respondent was riding to work as usual as a pillion-passenger on his father's motor-cycle travelling South into the City of Hamilton along Cedar Avenue.

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Exhibit B

(ii) In order to reach their destination, they had to pass, first, on their right, the junction of Cedar Avenue and Laffan Street (shown on the Plan as lying between Mount St. Agnes Academy and St. Theresa's Church) and, second, on their left, the junction of Cedar Avenue and Angle Street.

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pp.6,9,13.

(iii) At some point opposite Mount St. Agnes' Academy and North of the junction

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between Cedar Avenue and Laffan Street, they overtook two auxiliary cycles (or motors) travelling along Cedar Avenue in the same direction as themselves.

10 (iv) Shortly after overtaking these auxiliary cycles, they saw the Appellant's motor-car halt at the Stop sign at the Western end of Angle Street at its junction with Cedar Avenue. If it had remained in such a position moreover (as the Respondent's father assumed that it would do) the motor-cycle could have passed safely in front of it.

pp.6,9,13.
p.13 L.15.
p.10 L.1.

20 (v) As they neared the junction of Cedar Avenue and Angle Street, however, and when (according to the Respondent) they were "about opposite the convent (Mount St. Agnes' Academy) gate at the corner of Cedar Avenue and Laffan Street" or some "25'-30' from the (Appellant's) car", this car moved forward into Cedar Avenue and directly into their intended path. According to the Respondent it then "appeared to stall with its back bumper about in line with the sidewalk opposite St. Theresa's".

pp.6,7,10,13,14,16.
p.6 L.34.
p.10 L.3.
p.7 L.4.

30 (vi) In the result and in an effort to avoid the car the Respondent's father braked, declutched and swerved to his left. These movements, moreover, aggravated by the further jerk given to the motor-cycle when the Respondent's father momentarily lost his balance and accidentally re-engaged his clutch, caused the Respondent to be thrown off the vehicle and on to the roadway in the centre of the junction. The motor cycle itself, however, continued on its way to collide with a wall on the South side of Angle Street at a point about 18' East of the Stop sign.

pp.7,9,10,11,13-17.
p.7 L.14.
p.13 L.21.
p.13 L.32.

40 (vii) The speed of the motor-cycle, after it had overtaken the auxiliary cycles and before the Respondent's father backed and swerved to avoid the Appellant's car was something between 15-20 m.p.h.

pp.9,15.

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7. The Appellant, in his evidence, in effect stated or conceded:

pp.17-19.

(i) that when he stopped his car at the 'Stop' sign in Angle Street, he saw the motor-cycle ridden by the Respondent and his father immediately behind the two auxiliary cycles "approximately opposite the cedar gate at the North end of the convent property" (i.e. some 100 yards away to his right).

p.18 L.1.

p.18 L.3.

(ii) that he then saw the motor-cycle overtake these auxiliary cycles.

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p.18 L.7.

(iii) that he then moved forward beyond the 'Stop' sign to draw level with the Western edge of the sidewalk to his left in Cedar Avenue.

p.20 L.3.

p.18 L.11.

(iv) that when the motor-cycle ridden by the Respondent and his father was some 14'-15' from him, he "pulled out and crossed Cedar Avenue".

8. The Appellant, however, contended:

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p.20 L.11.

(i) that he had stopped his car for a second time on drawing level with the Western edge of the sidewalk to his left in Cedar Avenue.

p.18 L.11.

p.21 L.11.

(ii) that he had then "pulled out and crossed Cedar Avenue" and "shot across the road" in order to avoid the motor-cycle which was coming "pretty fast" and directly at him. In his own words :

p.18 L.16.

" It appeared that Powell was trying to make the bend to turn into Angle Street and it seemed to me that he had lost his balance and was coming towards me. He appeared to be out of control and I thought he might hit my car. "

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9. The Appellant in evidence also stated:

p.18 L.21.

p.19 L.30.

" I don't know exactly what happened but I heard the sound of a crash behind the car. I had reached the other side of the street (Cedar Avenue) by the time I had heard the crash. "

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10. Evidence was also given in this connection by one O'Brien, called as a witness by the Appellant, who stated that at the material time he was standing by the Bus Stop shown on the Plan near the corner of Cedar Avenue and Laffan Street. According to him:
- pp.22-25.
Exhibit B
- (i) the motor-cycle ridden by the Respondent and his father had drawn abreast of the two auxiliary cycles "about 60' from the curve into Angle Street."
- 10 p.24 L.9.
- (ii) after passing these auxiliary cycles the Respondent's father had reduced his speed to about 28 m.p.h. and "came in close to the wall on his left".
- p.24 L.22.
p.24 L.11.
- (iii) it then "appeared as if he were going at such a speed that he couldn't turn one way or the other" and "as if when (he) got within 30' of the car he didn't know what to do and lost control."
- p.23 L.12.
p.23 L.16.
- (iv) the Appellant's car was "just short of the Pedestrian crossing (across the mouth of Angle Street) when Powell (the Respondent's father) was coming at him and, when Powell got within about 30' of him, (the Appellant) jumped his car ahead a few feet" - moving "3'-4'."
- 20 p.25.L.13.
- (v) the driver of the motor-cycle "wasn't wobbling" but "took a straight course at the wall", "holding the handles (of the motor-cycle) and letting her go" and "made no attempt to turn up Angle Street": "he didn't appear to brake until 2' before he hit the wall" and "was doing about 25 m.p.h. and more when he hit the wall".
- 30 p.25 L.6.
p.25 L.26.
p.24 L.24.
11. Further evidence was given by one Police Constable Wingood as to the marks seen by him on the wall on the South side of Angle Street and as to the damage to the Respondent's father's motor-cycle.
- pp.21-22.
12. Apart from other points of conflict, in one particular and material respect however (to which the learned Judge referred in his Judgment) the evidence given both by the Appellant and by O'Brien was in itself
- 40 p.31 L.11.

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inconsistent. Thus:

p.19 L.29. (i) the Appellant, although he stated that the motor-cycle ridden by the Respondent and his father, after passing the two auxiliary cycles, had "reached him (the Appellant) first", also stated that one "auxiliary cycle with two men on it" and travelling at about 25 m.p.h. had 'passed safely in front of him (the Appellant) while (the Respondent's father) appeared to be trying to turn into Angle Street' and before he (the Appellant) had "pulled out" into Cedar Avenue. 10

(ii) the Appellant also stated in answer to questions by the Court, as follows :

p.21 L.9 " I was at the second stop in line with the sidewalk when I saw Powell within 15' of me apparently going to run into me and I then shot across the road to avoid him. At this time the auxiliary cycle was right behind Powell but further out in Cedar Avenue and the auxiliary cycle passed safely across in front of me while Powell passed behind me and hit the wall." 20

(iii) O'Brien, after stating that, when approaching the Angle Street junction, the motor-cycle ridden by the Respondent and his father was about 10' ahead of the auxiliary cycles which it had passed previously, and although stating that the auxiliary cycles were "not far behind" the motor-cycle when it hit the wall, also stated that they (the auxiliary cycles) had passed in front of the Appellant's car when the Appellant "was still standing at the Stop sign" and before he had made any move to avoid the motor-cycle - i.e. before the motor-cycle had got within 30' of the car. 30

pp.29-34. 13. In the result, the learned Judge, as appears from his judgment, preferred the evidence led by the Respondent and found as a fact, inter alia: 40

p.30 L.34. (i) that the speed at which the motor-cycle was travelling at all material times was "not ... such a speed that it could not quite easily have taken the gentle right-hand curve in Cedar Avenue at that point"

10 (ii) that "the cause of the accident was the (Appellant), who had ample warning of the approach of the (Respondent's) autocycle, which had the right of way over him, pulling out and obstructing his passage when the auto-cycle was so close that it would be exceedingly dangerous for the auto-cycle to attempt to swerve and pass in front of him and difficult to swerve to his left and turn up Angle Street, thereby passing behind him."

14. On the issue of contributory negligence, the learned Judge, after hearing the evidence of one Dempster one Police Sergeant Clarke and one Young as to the normal and correct method of riding pillion on a motor-cycle, held that the Respondent, who was an experienced pillion rider sitting in his normal position, was not riding carelessly at the material time. pp.26-29. p.33 L.9.

20 15. Accordingly, the learned Judge awarded the Respondent, as stated, the admitted sum of \$562.13.0 in respect of Special Damage and a further \$6,000 in respect of General Damages.

30 16. In calculating or assessing such General Damages the learned Judge had before him the uncontradicted evidence of the Respondent and of a Registered Medical Practitioner, a Dr. D.S. Ashdown, to the effect, inter alia, that the former had received a spinal injury which had left him with permanent anaesthesia of the buttocks, a permanent nerve paralysis of the bladder system with consequential inability to control his passing of urine, permanent inability to do heavy manual work (and so to continue his pre-accident work and training as a mason) and the probability that his bone injuries would later result in arthritis and further disability. pp.7,8,10. pp.11-12.

40 17. On the 27th January 1958 the Appellant was granted by the Supreme Court of Bermuda final leave to Appeal to Her Majesty in Council. p.37.

18. On behalf of the Respondent it will be contended that the judgment of the learned

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Judge was right and that it should be upheld for the following and other

R E A S O N S

- (i) BECAUSE there was ample evidence to justify the findings of the learned Judge
- (ii) BECAUSE the findings of the learned Judge are findings of fact based upon the evidence of the witnesses called before him and upon his observation of their demeanour 10
- (iii) BECAUSE on his findings as to the circumstances of the said accident the learned Judge was entitled (if not obliged) also to find (as he did) that the Appellant was negligent and so wholly or partly to blame for what took place
- (v) BECAUSE there was ample justification for the finding of the learned Judge that the Respondent was not in any way guilty of contributory negligence. 20
- (vi) BECAUSE in law and in the absence of contributory negligence on his own part the Respondent is entitled to succeed wholly in his claim against the Appellant if the Appellant was in any way negligent or to blame for the said accident 30
- (vii) BECAUSE the learned Judge was right in law and had ample justification in fact in regarding the items included in the Respondent's claim for Special Damage and the Respondent's injuries and his past and probable future disabilities of which evidence was given as matters arising directly from the said accident. 40

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(viii) BECAUSE in all the circumstances the amount of General Damages awarded by the learned Judge was both reasonable and proper.

J.G.K. SHELDON

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