

24/84

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

GEORGE AKL

Appellant

- and -

JOHN AZIZ ,

Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment of the Court of Appeal of the Gambia (Foster, A.P., Livesey Luke and Amin J.J.,) dated the 25th day of May 1981, which allowed an appeal by the Respondent and set aside the judgment of the Supreme Court of the Gambia (Aboagye, J.) dated the 6th day of March 1981 by which the Appellant was awarded, by way of damages for personal injury, a total of D250,000 and costs.

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2. The following facts were common ground at the trial:

(i) At about midnight on the 31st October 1975 the Respondent gave the Appellant a lift from the Casuarina night club, Fajara in the Respondent's Hillman Avenger car number G0717.

(ii) On the Kambo to Banjul road, as the car approached the bend near milestone 5, the Respondent was driving at speed and an oncoming vehicle was encountered.

(iii) The Respondent swerved to his right (near) side of the road, and lost control of his car, which crashed into a rice field.

(iv) As a result the Appellant sustained the injuries in respect of which this action was brought.

3. (i) The Appellant alleged that the accident was caused by the negligence of the Respondent. By the amended Statement of Claim it was alleged:

"5. Along the Kambo to Banjul road and on approaching mile 5 the (Respondent) was driving very fast and negligently. As the said vehicle approached the bend near mile 5 there was an oncoming vehicle from the opposite direction. The (Respondent) who was still driving very fast swerved to the

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right, left the road, tried to regain the road and lost control of his vehicle.

....

13. PARTICULARS OF NEGLIGENCE

1. The (Respondent) drove the said motor vehicle G0717 too fast.

2. The (Respondent) failed to slow down or stop or control his vehicle in such a way as to avoid the accident.

3. The (Respondent) failed to keep any or any proper lookout".

(ii) The Appellant's evidence as to the cause of the accident was not materially different from what was contained in his pleading. In particular, he stated that on looking at the speedometer he saw that the Respondent was driving at 80 mph, and that this was the reason for the Respondent losing control of his car.

(iii) The Respondent by his defence denied negligence, and in paragraph 4 thereof stated:

"Coming down from Bakau and arriving before Denton Bridge, the (Respondent) was completely blinded by the highlights of a car coming from the opposite direction in the (Respondent's) lane and it was while the (Respondent) was avoiding this car coming in the opposite direction the accident the subject matter of these proceedings happened."

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(iv) The Respondent's evidence was that he had been driving at about 70 mph but that his speed at the material time was 50 mph. He stated that he was blinded by the lights of the oncoming vehicle when the two vehicles were about 30 metres apart, and that in driving close to his nearside to avoid a collision he lost control of his car. He identified the oncoming car as a white Renault 4, driving in the middle of the road. The Respondent further stated that in driving close to the side of the road one of the rear tyres of his car was punctured by gravel, and that this caused his loss of control of the car.

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(v) Save for Badara Fye, Police Sergeant, who gave evidence as to the scene of the accident, there were no other witnesses of fact.

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4. The learned Trial Judge held that he must ignore the Respondent's evidence as to the tyre burst as it had not been pleaded on the Respondent's behalf that this was the reason for the accident. In the course of his judgment the Learned Judge said

"... Counsel for the (Appellant) should have objected to the evidence of the tyre burst and that evidence should not have been admitted as a party is bound by his pleading and cannot at the trial set up a case different from what he has pleaded ... Where evidence is by oversight admitted on a matter which has not been pleaded such evidence should be completely ignored ... I would therefore ignore the defence of tyre burst."

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11.27-47

The Learned Trial Judge went on to say:

"Although I have ignored the story of the tyre burst, I must

state that even if I had considered it I would have rejected it as it was most unconvincing. Sergeant Badara Fye who visited the scene of the accident said that he did not observe any tyre burst on the (Respondent's) car when he saw it and the (Respondent) himself stated that before the accident he did not feel anything which suggested a tyre burst."

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11.15-22

5. It consequently fell to the Learned Trial Judge to evaluate the evidence of the Appellant and the Respondent on the two issues of whether or not the Respondent was in fact blinded by the lights of the oncoming vehicle and whether the Respondent was driving at an excessive speed. The Learned Trial Judge began by stating the test for the standard of care owed by the Respondent :

"It has been held in a number of cases that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation":

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11.21-48

see Hazell and British Transport Commission and Another (1958) 1 WLR 169 at p.171 per Pearson J.

..."it is a question of fact to be determined from the facts and circumstances of each particular case whether a driver has been negligent or not."

He went on to consider the evidence as to the high lights in these words:

"The (Appellant's) denial of the suggestion that the (Respondent) was blinded by the high lights of the oncoming vehicle is supported by common sense and the (Respondent's) own evidence ... common driving experience shows that if indeed the (Respondent) had been completely blinded by the high lights of the oncoming vehicle when he was about 30 metres away from that vehicle he would not have been able to see anything until that vehicle had passed him. He would therefore not have seen the position of the oncoming vehicle when they were between 15 and 20 metres apart nor would he have seen the type of vehicle and its colour... The (Respondent) further stated that he was driving at a speed of about 50 mph when he was meeting the other vehicle and that he did not apply his brakes to stop when he was blinded by the lights from that vehicle. His explanation for not braking was that because of the speed at which he was driving his car would have somersaulted if he had done so. Again, if the (Respondent's) story was true, common driving experience shows that he would not have had time to think of what would happen to his car if he braked. He would instinctively have applied his brakes. His failure to apply his brakes confirms the (Appellant's) case that he was not put into any sudden dangerous situation by the oncoming vehicle. On the evidence I accept the (Appellant's) version that the (Respondent) was not blinded by any high lights from the oncoming vehicle."

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11.1-48

The Learned Trial Judge then turned to the issue of the speed at which the Respondent was driving, and after recapitulating the Appellant's evidence as to this he said:

"The (Respondent) had observed the approach of the oncoming vehicle before the accident and his own evidence was that the accident could have been avoided if he had been driving at about 30 mph, he admitted that he was approaching a bend (which he described as slight) when the accident occurred but said he didn't see the bend before the accident.

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11.2-14

On the totality of the evidence I find that the accident was caused by the (Respondent) driving too fast in the night when he was meeting another vehicle and when he was either in the bend or approaching it."

And the Learned Trial Judge gave judgment for the Appellant for D250,951.

6. The Respondent appealed to the Court of Appeal of the Gambia on the issue of liability on the sole ground:

"That the decision is against the weight of the evidence before the Court."

p.54
11.17-18

7. In allowing the appeal the Court of Appeal held:

"The Learned Trial Judge failed to evaluate the primary facts correctly and misled himself further in applying the objective principle on which the case of Hazell and British Transport Commission and Another was decided and which, in my opinion, is a wrong proposition of the test of liability so clearly defined in Donoghue and Stevenson."

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11.35-42

8. There are four particular criticisms of the Learned Trial Judge's findings made by Counsel for the Respondent which the Court of Appeal appears to have accepted:

(i) That the trial Judge did not express a finding on the position on the road of the oncoming vehicle Foster A.P. said:

"Perhaps if the Learned Trial Judge had made a finding and on the true resolve of the evidence, he may well have found negligence established on the part of the driver of the oncoming vehicle."

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11.30-34

(ii) That the Learned Judge erred in finding that the cause of the accident was that the Respondent drove too fast.

Foster A.P. commented:

"But, with respect to the Learned Trial Judge, fast driving on a freeway does not, of itself, amount to negligence."

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11.38-40

(iii) That the Trial Judge was wrong to accept the evidence of the Appellant that the Respondent was not blinded by the highlights of the oncoming vehicle. As to this Point Foster A.P. said:-

"Assuredly, seeing the situation from the passenger seat cannot be the same thing as seeing the situation from the driving seat, especially in the light of the evidence of the instant case on appeal

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11.46-50

before this Court."

(iv) That the Trial Judge was wrong to ignore the evidence of the Respondent as to the burst tyre. Foster A.P. cited Domsalla and Barr 1 (1969) 3 All E.R. 487 at 493 per Edmond Davis L.J. in support of his criticism.

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9. In reaching the further conclusion that Aboagye J. applied the wrong "test of liability" by relying on the passage stated above from Hazell and British Transport Commission and Another the Court of Appeal stated:

"The correct test is as stated in the case of Donoghue and Stevenson (1932) All E.R. (reprint) page 1 per Lord Atkin":

"The rule that you are to love your neighbour because in law: you must not injure your neighbour; and the lawyer's question; who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

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11.16-31

10. This appeal is based upon three grounds:

(i) Though in citing Watt and Thomas (1947) AC 484 the Court of Appeal indicated that it had in mind the principle that an appeal court should adopt before interfering with the trial Judge's findings of fact, the Court of Appeal in fact wholly disregarded that principle and disturbed Aboagye J's findings of fact on erroneous and insufficient grounds.

(a) The Appellant respectfully submits that the criticism that the trial Judge made no finding as to the position on the road of the oncoming vehicle is misconceived; it is plain from the judgment of the Learned Trial Judge that he did not accept the Respondent's evidence as to the car's position. It follows that he rejected the suggestion that the car's position contributed to the accident. In the circumstances an express finding as to the position of the car would have been superfluous.

(b) The Learned Trial Judge did not find the Respondent negligent by reason of fast driving alone, but supported his finding with cogent reasons. The Court of Appeal made no criticism of these reasons and with respect, failed to identify any error by the Learned Trial Judge in his evaluation of the evidence.

(c) It is further respectfully submitted that the Court of Appeal was mistaken in its third criticism of the Learned Trial Judge, in that he related his findings that the Respondent was not blinded by high lights to the Respondent's own evidence, and in so doing accepted the Appellant's pleaded version of events, not his evidence.

(d) It is therefore submitted that the Court of Appeal misconstrued the judgment of the court below and in effect substituted its own decision for that of the Learned Trial Judge who had the advantage of seeing and hearing the witnesses.

(ii) The Court of Appeal erred in law in reversing the Trial Judge's decision that he should ignore the Respondent's evidence as to the burst tyre. It is respectfully submitted that Domsalla and Barr (1969) 3 All E.R. 407 should be distinguished on the ground that in that case the Plaintiff sought to adduce evidence to enlarge his claim in an area of which the Defendant had already notice. In the instant case the evidence adduced set up a defence which in no form appeared from the pleadings, and the Trial Judge was correct to hold that the evidence should be ignored; Lloyde and West Midlands Gas Board (1971) 2 All E.R. 1240. Moreover, the Court of Appeal failed to deal with the Learned Judge's alternative finding that the evidence was, in any event, unconvincing.

(iii) It is respectfully submitted that the Court of Appeal fell further into error in criticising the Trial Judge's adherence to the objective principles stated in Hazell and British Transport Commission. In stating that the correct test was provided by the well known words of Lord Atkin in Donoghue and Stevenson, it is submitted that the Court confused the standard of care with the duty of care. It was not disputed in these proceedings that the Respondent owed the Appellant a duty of care, and it is submitted that the dictum of Pearson J. cited by the Learned Trial Judge correctly expresses the standard of care owed by the Respondent.

11. It is therefore respectfully submitted that on each of these three grounds the Court of Appeal was incorrect in allowing the Respondent's appeal.

12. On the 9th December 1982 the Judicial Committee of the Privy Council granted special leave to the Appellant to appeal to their Lordships. The Appellant respectfully submits that the appeal should be allowed with costs for the following among other

REASONS

1. BECAUSE the Court of Appeal were incorrect in reversing each and every material finding of fact of the trial judge without any or any substantial reason.

2. BECAUSE the Court of Appeal erred in law in reversing the Trial Judge's decision that he should ignore the Respondent's evidence as to the burst tyre.

3. BECAUSE the Court of Appeal confused the standard of care and of the duty of care owed by the Respondent to the Appellant.

4. BECAUSE having seen the witnesses and heard their evidence the learned trial judge was entitled to reach the decision he reached for the reasons he gave.

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

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