Privy Council Appeal No. 34 of 1972

Jacqueline Awon – – – – – – – – *Appellant*

v.

Elsie Allard – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1974

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD SALMON]

At about 8 p.m. on the evening of 15th April, 1965, the plaintiff's husband was driving his bicycle along Frederick Street, the main street in Port of Spain, when he was knocked down and run over by a motor car driven by the defendant. As a result of the injuries which he suffered in this accident, he died. The plaintiff, as the administratrix of her husband's estate, brought an action against the defendant claiming damages on behalf of herself and her six children under the Supreme Court of Judicature Act 1962 and the Compensation for Injuries Ordinance Chapter 5 No. 5. She alleged that her husband's death had been caused by the negligence of the defendant. The learned trial judge gave judgment for the defendant. This judgment was reversed by the Court of Appeal which ruled that there had been negligence on the part of the defendant and contributory negligence on the part of the deceased. The Court of Appeal apportioned liability as follows: 75% to the defendant and 25% to the deceased. They assessed the total damage suffered as a result of the death at $24,349·50 — $849·50 under the Supreme Court of Judicature Act and $23,500·00 under the Compensation for Injuries Ordinance. Judgment was accordingly entered against the defendant for $18,262·10 in all.

The defendant now appeals to this Board, contending that the Court of Appeal were not justified in finding negligence against her, alternatively that the amount of damages was excessive and in the further alternative that the apportionment was wrong.

At the trial, the plaintiff called two witnesses to the accident. The first was David Munro whom the learned trial judge found to be wholly unreliable. The Court of Appeal rightly concluded that they must

accept this finding. The other witness was Clarence Gaskin. The defendant's Counsel at the trial said, " I will support Gaskin's evidence ", and contended that he was the more reliable witness. The only other person who could have given evidence about the accident was the defendant herself but her Counsel elected not to call her.

Gaskin said in evidence that he was riding his bicycle in Frederick Street (a long straight road), within a few feet of a row of motor cars parked by the curb on his left, and that there were no motor cars parked on the other side of the road. He said that he was passed by the deceased who drove between him and the parked motor cars; he was then passed by the defendant's motor car on his right. The defendant had her headlights on, kept on a straight course and at no time sounded her horn or slowed down, nor did she at any time take any other action to avoid colliding with the deceased. Gaskin said that when the deceased was 25 to 30 feet ahead of him, the deceased swung out a foot or two, but not suddenly, in order to avoid one of the parked motor cars which was directly in his path. As he did so the defendant ran him down. The defendant drove on and Gaskin drove after her shouting for her to stop. She did so about 200 feet further on.

The learned trial judge said that as the defendant's headlights were on, the cyclist should have been aware of her presence and kept on a straight course. This left out of account that had he done so, he would have run straight into the back of the stationary car immediately in front of him. The deceased must no doubt have been aware that there was a motor car behind him which was about to overtake him. He had no reason to suppose however that the driver had not seen him and the parked motor car immediately in his path; nor had the deceased any reason to suppose that in these circumstances the driver was giving him so little clearance. There was no evidence to suggest that any other traffic was approaching the defendant which would have prevented her from giving the deceased a reasonably wide berth. Gaskin's evidence, which it seems that the defendant's Counsel accepted and which the learned trial judge certainly did not expressly reject, showed conclusively that the defendant must have had every opportunity of observing the bicycles and the parked motor cars for a considerable time before the collision and when she was a long way away from the point of impact. She should have realised that the deceased would have to pull out a few feet to avoid running into the parked motor car which was projecting immediately in his path. Any prudent driver in the defendant's situation would have slowed right down or pulled over to the centre of the road to avoid the risk of colliding with the deceased. The defendant did none of these things. Their Lordships consider that the Court of Appeal were fully justified in concluding that Gaskin's evidence established a strong *prima facie* case of negligence against the defendant.

It is, no doubt, possible that if the defendant had given evidence she might have rebutted the *prima facie* case against her. On the other hand, she might have strengthened it by admitting that she never noticed the deceased before she ran him over. She elected not to give evidence, and left the evidence against her uncontradicted. The learned trial judge in his judgment failed to consider any of the factors which established the case against her. Instead, by relying on what is sometimes called " accident mathematics ", the learned trial judge reached the conclusion that the deceased must have swung out some four feet as the defendant was about to overtake him and that this was the sole cause of the accident for which the defendant was in no way to blame. Their Lordships agree with the Court of Appeal's criticism of the learned trial judge's approach. Accident mathematics may sometimes be a guide—but by no means always a certain guide—in deciding which witnesses should be

believed when there is conflicting evidence as to how an accident occurred. In circumstances such as the present, however, when there is a strong *prima facie* case against the defendant and she chooses to keep out of the witness box, accident mathematics cannot afford any justification for holding that no liability attaches to the defendant.

Counsel for the defendant strongly relied on the line of authority exemplified by *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243 in support of his submission that the Court of Appeal were wrong to interfere with the finding of fact by the trial judge. Their Lordships cannot agree that this line of authority is in point. It lays down the well known principle that when a decision of fact has turned upon the trial judge preferring the evidence of the witnesses on the one side to that of those on the other, the Court of Appeal, not having had the opportunity of hearing the witnesses and observing their demeanour, should not interfere with the decision save in the most exceptional circumstances. It has however always been well recognised that where the decision turns upon the proper inference to be drawn from uncontradicted evidence, the Court of Appeal which is an appellate tribunal on matters of fact as well as matters of law is in as good a position as the trial judge to decide the matter. For the reasons already indicated, their Lordships consider that in the present case the Court of Appeal was fully justified in reversing the learned trial judge. He erred in concentrating solely on the last moment before the impact, when it was clear from the evidence, which the defendant chose not to contradict, that long before that time she should have realised the likelihood of the deceased drawing away from the parked car in his path and an accident occurring unless she slowed right down or pulled out to the centre of the road.

As to the appeal against the apportionment of responsibility and the measure of damages, it is well settled that

> "the apportionment of responsibility raises no question of law, nor does the measure of damages. Neither issue is one in which their Lordships' Board would lightly set aside the decision of the Court of Appeal of the country in which the accident took place." *Skeete v. John* (Privy Council Appeal No. 50 of 1970) (unreported).

Their Lordships are certainly not satisfied that the apportionment was unjust to the defendant. Indeed they are doubtful whether the apportionment may not have been too favourable to her.

Some complaint has been made that Counsel were not heard in the Court of Appeal on the measure of damages, and it has been submitted that this issue should be remitted for consideration after argument. Counsel could, however, have asked to be heard in the Court of Appeal. They chose perhaps wisely not to do so. All the evidence was before the Court as it is before this Board, and in the circumstances of this case there is really very little to be argued on the issue of damages. Dependency was assessed at $1,560 a year. The defendant does not quarrel with this assessment. The deceased was 36 years of age, and the plaintiff about the same age, at the time of the accident. After allowing for the fact that the award was made as a lump sum, the Court of Appeal applied a multiplier of 15·4 years. Counsel for the defendant has argued before this Board that that multiplier should have been only 14 years. Their Lordships consider that although a multiplier of 15·4 years may be on the generous side, the difference between that and 14 years is so slight that it would not be right to disturb the award.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent her costs of this appeal to be taxed on the pauper scale.

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In the Privy Council

JACQUELINE AWON

v.

ELSIE ALLARD

DELIVERED BY
LORD SALMON

Printed by HER MAJESTY'S STATIONERY OFFICE
1974