

5/83

IN THE PRIVY COUNCIL

NO: 3 of 1982.

ON APPEAL FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

PONNAMPALAM SELVANAYAGAM Appellant

-and-

THE UNIVERSITY OF THE WEST

INDIES Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal, by leave of the Court of Appeal of Trinidad and Tobago granted on the 9th day of March, 1981, from a judgment of that Court dated the 31st July 1980, whereby the Court of Appeal of Trinidad and Tobago allowed the Respondents appeal against the judgement of the High Court (Mr. Justice Scott) awarding the Appellant the sum of \$77,527.92 with costs and interest against the Respondent and substituted an

p.90

p.86

p.58

award of \$31,001.95 with interest.

p.86

2. The case for the Appellant was that on the 5th day of August 1975 he had fallen into an unguarded pit in a passageway at the Respondents' premises at the University campus at St. Augustine, Trinidad and had thereby sustained personal injuries, loss and damage. The Appellant claimed that the accident was caused by negligence and/or nuisance on the part of the Respondents. Among the injuries he claimed that he had suffered was an injury to his neck.

3. At trial the Respondents conceded that they were in breach of the duty of care they owed to the Appellant as a result of which he had sustained the accident alleged. But the Respondents contended:

p.37

(a) that the Appellant was himself negligent which negligence had contributed to his accident.

and (b) that the Appellant had acted unreasonably in failing to heed medical advice and to avail himself of medical treatment for the injury he had sustained to his neck

and that in consequence the damages to be awarded to

the Appellant should be calculated and reduced accordingly. The learned trial judge rejected both of these contentions. The Court of Appeal allowed the Respondents appeal on grounds that the learned trial judge was wrong in rejecting these contentions, and the Court of Appeal held that the Appellant was one third to blame for his accident and that he had acted unreasonably in not heeding and acting upon medical advice. The Court of Appeal accordingly reduced the damages payable by the Respondents to the Appellant as a result of the said accident.

p55,56

p78

p63

4. The issues which arise for determination on this appeal are whether the Court of Appeal was right to decide:

- (1) that the Appellant was negligent, and, if so, whether his entitlement to damages should be reduced to one third.
- and (2) that the Appellant had acted unreasonably in failing to heed and act upon medical advice in respect of the injury sustained to his neck in the said accident and, if so, whether his entitlement to damages should have been calculated upon the basis of what the Appellant's condition would have been

had he acted upon such advice.

5. The Respondents respectfully submit that the Court of Appeal approached their task and function in accordance with proper principles, namely:

(1) it being their duty to make up their own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw their own inferences from the facts proved or admitted and to decide accordingly.

p.76

(2) it being their duty to draw proper inferences from the evidence on the record when the trial judge has failed to make any necessary finding of fact.

p.78

6. The real issue of fact on the question of the Appellant's contributory negligence was what means of knowledge he had of the pit or trench into which he fell. The Respondents' case was twofold:

(1) that the Appellant had seen it before

the day of his accident and knew of its existence

and (2) that the Appellant could and should have seen the trench itself, rubble earth and gravel excavated therefrom and in the immediate vicinity of the trench and physical features such as the framework of the staircase which emerged from the trench up to ceiling level of the passageway in question.

7. The learned trial judge made no finding as to whether or not the Appellant knew of the existence of the trench before the day of the accident. There was a conflict of evidence in that respect. The Appellant asserted:

(a) that since October 1974 he had not been along the corridor in question nor had he been along another corridor parallel thereto marked Y to A on Exhibit A. p22 p59

(b) that he had had no conversation with another witness, Mr. Bruce, at the site of the trench in the last week of June 1975 or indeed at any time. p25

On the other hand the said Bruce stated:

(a) that between October 1974 and August 1975 he had seen the Appellant walking along the corridor marked Y to A on Exhibit A. p32

(b) that in the last week of June 1975 he had had a conversation with the Appellant at the site of the trench, i.e. in the corridor in question. p32,34

8. The Court of Appeal themselves did not attempt to resolve this conflict of evidence nor does it appear that they sought to draw any inferences from this evidence nor from the fact that there was a conflict. The Respondents respectfully submit that if any inference is to be drawn from this conflict of evidence, it is or should be one adverse to the Appellant as evidence of his unreliability as a witness of fact. Moreover if it be right that the learned trial judge proceeded upon the assumption that Mr. Bruce's evidence was correct as he appears to have done it is submitted that the proper inference to be drawn therefrom is that the Appellant knew of the existence of the trench some 5 or 6 weeks before the accident and p54

that he could hardly have forgotten about it or about the framework of the staircase (one of the subject matters of the conversation with Mr. Bruce) as he walked along the corridor on the 5th August 1975.

9. Moreover if it be right that the learned trial judge proceeded upon the assumption that Mr. Bruce's evidence was correct, such evidence was in stark conflict with that of the Appellant. The acceptance of Mr. Bruce's evidence must necessarily have thrown doubt upon the reliability of the Appellant as a witness of fact. The Respondents respectfully submit that the Court of Appeal were entitled to take this into account when deciding the issues before them and insofar as they did not do so, such was unduly favourable to the Appellant.

10. It is submitted that the learned trial judge made no proper findings of fact as to what the Appellant could or should have seen in the relevant corridor on the day in question. The highest at which the learned trial judge was prepared to go on this vital issue was as follows:

"...I accept the evidence of Mr. Suite who completed the construction that the hole was very dark, and the reinforcement in the hole could only be seen by

p55

artificial light. I find in all the circumstances...that mere inattention on the part of the Plaintiff would not render him contributorily negligent".

The Respondents respectfully submit:

- (1) that the learned trial judge misdirected himself as to the nature and effect of Mr. Suite's evidence
- and (2) that implicit in his above finding was the fact that had the Appellant been paying attention he should have observed something sufficient to put him on notice as to the existence of the trench such that he could and would have avoided falling into the same.

11. As to the nature and effect of Mr. Suite's evidence, while in examination-in-chief he said

"I saw no signs in corridor indicating work was in progress...corridor had been poorly lit...I could not see the reinforcements in the hole...it was very dark in the hole".

In cross-examination he said

"On 5th August 1975 there were 4 strips of lathes...when you turn left out of the doorway you could see framework North in the corridor, if there were lathes...you should have been able to see them...It was possible to see earth, gravel and rubble east of the corridor in the vicinity of the trench and stairway...I would not suggest that one would need light to walk down corridor".

The Respondents therefore submit that insofar as the learned trial judge was accepting Mr. Suite's evidence, such evidence clearly indicated that the Appellant should have observed and heeded the lathes, the framework of the staircase and earth, gravel and rubble in the vicinity of the trench and stairway. Moreover, the learned trial judge did find as a fact that plan exhibit B was to be preferred to plan exhibit A; the former showed that the trench was not concealed or in the shadow of equipment to the east of it.

12. The Respondents respectfully submit that the Court of Appeal was correct in deciding that the light in the passageway was sufficient for the Appellant to have seen the trench if he was paying proper attention and that there were also physical features like the

- (a) that in September 1975 he had advised the Appellant to have an operation to his neck; p20
- (b) that the Appellant had said that he was not a local resident and wanted to go home;
- (c) that had the operation been carried out in 1975 the Appellant would at the date of trial have been almost in the clear;
- (d) that in advising the operation, he, the Consultant neuro-surgeon had had all the risks (including the effect of the Appellant's diabetic condition) in mind.
- (e) that the operation advised was not very risky and that the chances of success in a patient like the Appellant were quite good; p19
- (f) that the effect of a successful operation would be to increase the Appellant's neck movements to 80% of normal, to give free movement of the neck and to dispose of cervical sponylosis in the areas operated upon, albeit the Appellant might still complain of pain. p19 p20

16. The Appellant himself offered no explanation as to why he had refused to accept such advice and no explanation was advanced on his behalf, either at trial or by way of application to adduce further evidence before the Court of Appeal. In the premises the Respondents respectfully submit that the only proper inference or conclusion that could be drawn from the unchallenged evidence of Mr. Ghouyalal was that the Appellant had failed to prove that such sequelae attributable to his failure to accept and act upon such medical advice were in law caused by the said accident.

17. The Respondents respectfully submit that the Court of Appeal were right in deciding:

(1) that the learned trial judge misinterpreted or misunderstood the medical evidence or the effect of it p81, 82

(2) that the learned trial judge applied the wrong test in law by holding in effect that it was the Appellant's right to decide whether or not to have an operation and that his decision was conclusive as to the legal consequences flowing from the accident. p82

(3) that the sequelae legally attributable to the accident did not include the consequences of the Appellant's failure to act upon the medical advice given to him.

(4) that the assessment of the Appellant's damages had to be made upon the basis that the Appellant had acted upon such medical advice.

(5) that the correct sum for damages on full liability was \$46,502.92.

17. The Respondents respectfully submit that the judgment of the Court of Appeal of Trinidad and Tobago was correct and should be affirmed, and that this appeal should be dismissed with costs for the following (among other)

REASONS

1. BECAUSE the learned trial judge failed to make findings of fact essential to his conclusion that the Appellant was not negligent.

2. BECAUSE the overwhelming weight of the evidence was to the effect that the Appellant was or had been

negligent which negligence had contributed to his accident.

3. BECAUSE the only proper inferences that could be drawn from such relevant findings of fact if any made by the learned trial judge and from the evidence were to the effect that the Appellant was negligent which negligence had contributed to his accident.

4. BECAUSE the Appellant had failed to prove that the consequences of his failure to act upon medical advice given to him were in law to be attributed to the said accident.

5. BECAUSE the weight of the evidence and/or the only proper inference that could be drawn therefrom or from such relevant findings of fact if any made by the trial judge was to the effect that the Appellant had acted unreasonably in failing to act upon medical advice.

6. BECAUSE the learned trial judge misunderstood or misinterpreted the medical evidence or the effect of it.

7. BECAUSE the learned trial judge wrongfully:

(1) refused to reduce the damages to be awarded

to the Appellant for his contributory negligence.

(2) assessed the damages to be awarded to the Appellant upon the basis that his failure to act upon medical advice was of no effect in law.

(3) refused to assess the damages to be awarded to the Appellant upon the basis of what the Appellant's condition would have been had he acted upon such advice.

8. BECAUSE the learned trial judge's assessment of damages was in any event too high.

PATRICK TWIGG

SERVED this 17th day of September 1982
by Messrs. Barlow Lyde & Gilbert of Drake
House, 3/5 Dowgate Hill, London, EC4R 2SJ
Solicitor for the Respondent.

NO: 3 of 1982

ON APPEAL FROM THE COURT OF APPEAL
OF TRINIDAD AND TOBAGO

B E T W E E N :

PONNAMPALAM SELVANAYAGAM

-and-

THE UNIVERSITY OF THE WEST
INDIES

CASE FOR THE RESPONDENT

Barlow Lyde & Gilbert,

Drake House,

3/5 Dowgate Hill,

London, EC4R 2SJ

Solicitor for the Respondent

