The Court of Appeal for Bermuda

CIVIL APPEAL NO 1 of 2015

Between:

DAVID DILL

Appellant

-v-

GORDON BELBODA

Respondent

Before: **Baker, P.**
Bell, J.A.
Bernard, J.A.

Appearances: Mr. Peter Sanderson, Wakefield Quin Ltd., for the Appellant
Mr. Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Respondent

Date of Hearing: **4 November 2015**

Date of Judgment: **20 November 2015**

JUDGMENT

Bell, J.A

Introduction

1. This appeal arises from a road traffic accident which occurred on North Shore in Pembroke Parish on the 24th September 2011. At that time the Respondent ("Mr. Belboda") was driving a motor car in an easterly direction, and the Appellant ("Mr. Dill") was driving a motorcycle in a westerly direction. The accident happened at or about the junction of North Shore Road with Stepney Lane.

2. The trial took place before Hellman, J. on the 22nd of December 2014, and the evidence was heard during the course of a morning. Upon conclusion of the evidence, the learned judge adjourned until mid-afternoon, and at that point gave an oral judgment.

3. I will return to the terms of the judgment shortly, but will first refer briefly to the evidence which was given at trial. Mr. Dill, who was the plaintiff at first instance, gave evidence, and no witnesses were called on his behalf. The essential part of his evidence is contained in the second paragraph of his witness statement, when he said that Mr. Belboda "came around the corner in his car, out in my lane. He came so quickly that I had no time to react. He tried to swerve back into his lane, but he was already too close and clipped me with the side of his car." As to the suggestion that Mr. Dill himself was not in his correct lane, he said "that is not possible, as it would have been a head-on collision if I had been in his lane."

4. For Mr. Belboda, the defendant at first instance, he gave evidence, as did his partner Ms. Latoia Richardson, and the police officer who had attended at the scene, PC McKeon Stevens.

5. PC Stevens gave evidence first, and indicated that when he arrived at the scene, the motor car driven by Mr. Belboda was in the eastbound carriageway of the road, facing east. It was put to the police officer that the car had been moved after the accident, but his evidence was that he had been advised that only one vehicle, the motorcycle, had been moved following the accident. The officer's evidence was that the car had a broken wheel hub and dented panels on the driver's side.

6. The second witness called for Mr. Belboda was Ms. Richardson. Ms. Richardson had been sitting in the rear of the car, on the driver's side, with her

infant son, and according to her witness statement looked up immediately before the accident to see the motorcycle ridden by Mr. Dill travelling towards the car in which she was a passenger, and she described it as being "on the wrong side of the road coming straight towards the car." She described Mr. Belboda as having attempted to swerve to the left to avoid the bike hitting the car, but said that there was nowhere for them to go.

7. In his evidence, Mr. Belboda described the motorcycle ridden by Mr. Dill as "travelling at high speed through the corners." He said that he was proceeding in his lane, and that Mr. Dill was on the wrong side of the road and in his (Mr. Belboda's) lane. Mr. Belboda said that if he had not turned to avoid a head-on collision, Mr. Dill's motorcycle would have hit the windscreen of the car.

8. Essentially, Mr. Belboda's evidence was not shaken in cross examination, so the judge had before him conflicting evidence, given by the respective sides, both as to the speed at which Mr. Dill's motorcycle was being ridden, and as to which of the two vehicles involved in the collision was in its correct lane.

The Judgment

9. The judge summarised the evidence and the conflict between the two sides. He noted one area of disagreement between the two sides, and this was whether or not Mr. Dill had complained to the attending police officer that Mr. Belboda was to blame for the accident. The police officer's evidence was that he had not questioned Mr. Dill about the accident at the scene, and that Mr. Dill had declined to give a statement at the hospital when he had attended there the following day. The judge preferred the officer's account, on the basis that he could think of no good reason why the officer would have failed to record Mr. Dill's allegation that Mr. Belboda was at fault, if such allegation had in fact been made. In fact, as appears below, there was a further aspect of their exchange at the hospital which was significant.

10. The judge then referred to the relatively narrow width of the road at or close to the point where the accident had occurred, noting that Mr. Belboda had accepted that there was little room to maneouvre and his evidence that this was the reason that the collision had taken place. He noted that he had not had the benefit of expert evidence seeking to reconstruct the accident, and described Mr. Dill's evidence as "plausible". But he then carried on to say that he was "unable to conclude solely from evidence about the width of the Defendant's motor car and the width of the road at the point where the Plaintiff says the accident took place that it is probably correct." The judge then proceeded to deal with the question of fault as between Mr. Dill and Mr. Belboda in these terms: -

> "This is a case where I have insufficient evidence to determine who was properly at fault. It follows that the Plaintiff has failed to prove his case and the action is therefore dismissed. This does not mean that I prefer the Defendant's account, simply that the Plaintiff has failed to prove that his version of events is probably correct and hence the Defendant was probably negligent."

Grounds of Appeal

11. The grounds of appeal were essentially that the judge erred in failing to discharge his judicial duty to make proper findings of fact, in order to dispose of the action. With reference to authority, it was submitted that when faced with two inconsistent accounts, the role of the tribunal of fact is to decide between them as to where the truth lies, and it was submitted that this is particularly the case in respect of a road traffic collision case. The notice of appeal therefore sought to have the matter re-heard.

The Relevant Law

12. The line of authorities on which counsel for Mr. Dill relied to support the statement of a judge's judicial duty referred to above begins with the case of *Bray v Palmer* [1953] 2 All ER 1449. In that case, Jenkins LJ said:

> "The judge's reasoning appears, in effect, to have been: "The choice lies between the plaintiffs' story and the defendant's story, either of which may, and one of which must, be true. If the plaintiffs' story is true, they are entitled to succeed, but I am unable to say whether or not it is true, as it is equally possible that the defendant's story may be the true one. On the other hand, if the defendant's story is true, he is entitled to succeed, but I cannot say whether it is true or not, as it is equally possible that the plaintiffs' story may be the true one. I will, therefore, grant no relief either way". This seems to me to fall short of a decision of the case. Having come to the conclusion that the accident happened either in the way asserted either by the plaintiffs or by the defendant, he said, in effect, that he was unable to decide which story was right. With the greatest respect to Oliver J, that seems to me to be a denial of justice. It can only mean that the parties are deprived of relief to which they are entitled. In my view, it behoved the learned Judge to form some conclusion in the matter ..."

13. The case of *Bray* was the authority on which the subsequent case of *Morris v London Iron Co.* [1988] 1 QB 503 was decided. And in that case, May LJ said:

> "Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know on which side of the line the decision ought to be. In any event, where the ultimate decision can only be between two alternatives, for instance negligence or not, or, as in the instant appeal, dismissal or resignation, then when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on that totality of the evidence, on the balance of probabilities, drawing whatever inferences may be thought to be appropriate, the alternative which

> it is necessary for the plaintiff to establish in order to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails. But in those cases in which the ultimate decision could be between more than two possibilities, as for instance in the two running-down actions to which I have referred, again the judge should at the end of the day look at the whole of the evidence that has been called before him, drawing inferences where appropriate, and ask himself what has or has not been shown on the balance of probabilities, and then, bearing in mind where the onus of proof lies, decide whether the plaintiff or the defendant succeeds, or both succeed."

14. Finally, we were referred to the case of *Cooper v Floor Cleaning Machine Ltd* [2003] EWCA Civ 1649]. In that case, the leading judgment in the Court of Appeal was given by Scott Baker LJ, who referred to the judgment of May LJ in *Morris*, and particularly the category of exceptional cases described by May LJ, where a judge may be forced to reach the conclusion that he or she does not know on which side of the line the decision ought to be. Baker LJ said that in his judgment, it would be rare indeed that a motor accident case would fall into that exceptional category described by May LJ in *Morris*.

15. *Morris* was an unfair dismissal case, dealt with at first instance by the Employment Appeal Tribunal. However, the case of *Bray* did involve a motor traffic accident, as did the case of *Cooper*. It appears that in both of those cases, the issue of negligence was determined as between the one side and the other. As Jenkins LJ said, if the plaintiffs' story is true, they are entitled to succeed, but if the defendant's story is true, he is entitled to succeed. Similarly in *Cooper*, there was both a claim and a counterclaim, and since the trial judge had felt unable to accept the evidence of one over the other, he concluded that neither had established negligence on the part of the other, and accordingly that both claim and counterclaim failed.

16. The case before us differed in terms of its material facts, insofar as the trial was concerned only with Mr. Dill's claim in negligence against Mr. Belboda. By agreement made between the insurance companies, the repairs to Mr. Belboda's car had been paid for, and he did not pursue a claim against Mr. Dill. So there was a denial of negligence on Mr. Belboda's part, together with a pleading that the accident had occurred by reason of negligence on the part of Mr. Dill, but there was no counterclaim, and no issue raised of contributory negligence.

The Judge's Finding

17. In the circumstances, I find that the judge was entitled to distinguish the cases referred to above, and to dismiss Mr. Dill's case on the basis on that he had failed to prove that his version of events was probably correct, and hence that Mr. Belboda was probably negligent. I think that the lack of both claim and counterclaim puts the case outside the ambit of cases such as *Bray* and *Cooper*. And it is therefore beside the point that this Court, having been referred to the authorities mentioned above, might have reached a conclusion on the basis that there was sufficient evidence to do so.

18. In the skeleton arguments provided by counsel prior to the hearing of the appeal, Mr. Sanderson for Mr. Dill had submitted that the consequence of the judge's finding that there had been a failure to discharge the burden of proof had been that the matter should be remitted to the Supreme Court for re-hearing by another judge. Mr. Elkinson for Mr. Belboda took the primary position that the judge was entitled to hold as he did, but that in the event that the Court took the view that the judge was at fault for not having reached a decision as between plaintiff and defendant, rather than send the matter back for re-hearing, this Court was entitled to make its own findings, and should, if necessary, do so and find that Mr. Dill was responsible for the accident. That was the course which had been followed in *Bray*. In his opening, Mr. Sanderson accepted that it was open to this Court to review the transcript and

make its own determination. In case I am in error in deciding that the judge was entitled to hold as he did, I will therefore proceed to consider matters in the alternative, substituting my view of the pertinent facts for those of the judge.

Alternative Finding

19. The first area to be looked at is the nature of the conversations between Mr. Dill and the attending police officer, PC Stevens. He said that when he attended at the scene, Mr. Dill was complaining of pain to his right leg. PC Stevens could see that the injury was serious and summoned medical attention. The following day he went to the hospital, and his statement records that he asked Mr. Dill about the accident and that Mr. Dill told him that he did not remember the accident.

20. Mr. Dill's evidence had been that he had told the police officer that Mr. Belboda had definitely been on the wrong side of the road, and that he had not said to the police officer that he did not remember the accident. PC Stevens said that Mr. Dill had not said anything about the car hitting him at the scene.

21. This is the conflict of evidence described by the judge in paragraph 9 above, where he set out the conflict between the two, and understandably concluded that he preferred PC Stevens' account, putting the matter in these terms: "I prefer the officer's account as I can think of no good reason why he would fail to recall the plaintiff's allegations that the defendant was at fault, if the plaintiff had in fact made them."

22. And when the judge came to consider the credibility of the two sides, he said:

> "The fact that I am satisfied that the plaintiff declined to give a witness statement, saying that he could not remember what happened, but that he claimed to remember now, more than three years later, tends to undermine his credibility."

23. With respect to the learned judge, that is something of an understatement. If Mr. Dill did indeed not remember how the accident had occurred the following day, one might be entitled to think that the version of events contained in his witness statement and his evidence at trial amounted to no less than a wishful reconstruction of events on his part.

24. There was one other matter to which I drew to counsel's attention during the course of the hearing, and this covered the calling of the ambulance. As I have said, PC Stevens said that he had called for the ambulance. Mr. Dill's evidence was that the ambulance had been there when PC Stevens arrived at the scene. The point is not an important one, save that it demonstrates that Mr. Dill's recollection of events immediately following the accident is unreliable. Just as there would have been no good reason for the officer to fail to recall the allegations of blame if Mr. Dill had in fact made them, so it is unlikely in the extreme that he would have said that it was he who called the ambulance, had that not been the case.

25. The second significant event seems to me to be the position of the motor car driven by Mr. Belboda when PC Stevens arrived at the scene. As indicated in paragraph 5 above, the latter had described it as "facing east, in the eastbound carriage way of the road", with the driver side front wheel damaged, the actual wheel hub having been broken. When asked if the vehicle was in a drivable condition, the officer responded that he personally would not drive the car in that condition. Mr. Belboda's evidence was more detailed. He said, "When I stopped and got out, our car was still on our side of the road. We couldn't even move it 'cause the tire was completely - it's mangled, we couldn't roll on it. It was no longer a wheel, it - it was destroyed. So we couldn't even move the car..."

26. It seems to me, looking at these various matters, that there was more than sufficient evidence for the judge to have found that Mr. Belboda's vehicle had

come to a halt immediately following the accident in its own eastbound lane. And having reached that conclusion, it necessarily follows from the fact that there was a collision that Mr. Dill must have been in the wrong lane when the accident occurred. Mr. Sanderson stressed the "swerve" which had been referred to by both Ms. Richardson and Mr. Belboda as having occurred immediately prior to the collision. It does not seem to me that the appropriate inference to be drawn from this language is that the car driven by Mr. Belboda had travelled from its incorrect side of the road to the correct side of the road following the collision. Clearly, judging from the evidence of Mr. Belboda and the police officer, the car could not have travelled any appreciable distance after the accident. And as Ms. Richardson said in her evidence (and I quote from the transcript), "He had swerved over a little bit, but it wasn't nowhere else for him to go."

Substitute Decision

27. It follows that in the event that this Court were required to substitute its own decision for that made by the judge, I would hold that Mr. Dill had failed to establish that the accident had been caused by Mr. Belboda's negligence and that, unfortunately for him, the accident was the consequence of his own negligence.

28. I would therefore dismiss the appeal.

Bell, JA

I Agree

Baker, P.

I Agree

Bernard, JA