[2022] SC (Bda) 55 Civ (20 July 2022)

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2020 : No. 319

B E T W E E N:-

KHAMISI TOKUNBO

Plaintiff

and

ALAN ROBINSON

Defendant

J U D G M E N T

WESTWATER HILL & CO., MR. PAUL WILSON FOR THE PLAINTIFF

THE DEFENDANT – IN PERSON

DATE OF JUDGMENT: 20TH JULY 2022

DATE OF HEARING: 14TH JULY 2022

ELKINSON, J. P. (ASSISTANT JUSTICE)

The Facts

1. The Plaintiff is a Magistrate. The Defendant is a retired government worker, a carpenter, who has been retired for some years and has ill-health due to chronic obstructive pulmonary disease, referred to by the initials COPD. They live close to each other, four houses apart and Defendant would often go to the Plaintiff's home to chat and have a drink and watch sports together. They were friends. The Plaintiff's significant other[1] is a cousin of the Defendant.

2. On 19th January 2019 Defendant went to Plaintiff's house. At around 5 p.m. they left to visit a very good friend of the Plaintiff, Ms. Deborah Blakeney, with Defendant driving Plaintiff's BMW 3 Series car. Plaintiff would often allow Defendant to drive and on this day he drove with Plaintiff in the passenger seat, first to collect some food and then on to Ms. Blakeney's home in Devonshire Parish. The two of them stayed there for approximately 2½ hours, had some drinks and then they left, again with Defendant driving and Plaintiff in the passenger seat, to return home.

3. At approximately 7.40 p.m., Defendant, in the vicinity of the Paraquet Restaurant, felt dizzy. He put on his seat belt while he continued to drive. He remembers nothing after that. The car came off the road and went into a ditch causing extensive damage to the car such that it was written-off. It was beyond economic repair. The cost of repairing it was in excess of $66,000 and its replacement cost was approximately $40,000. Both parties had bodily injuries but nothing too severe. The police report described the accident. It was a single vehicle road traffic collision on South Road, Paget half way between Tribe Road No. 4B (Elbow Beach entrance) and the access to Coral Beach and Tennis Club. The driver failed to negotiate a sharp right hand bend whilst travelling west and subsequently veered completely off the road and over an embankment which was a few feet below the road level. The car was facing west and tilting towards the passenger side at an approximate angle of 45 degrees. Neither the Defendant nor the Plaintiff gave a sample of breath or blood. Defendant pleaded guilty to refusing to provide a sample and was fined $1,000 and disqualified from driving all vehicles for 18 months.

CAUSATION

[1] This is the term used by the Plaintiff in his evidence.

4. The Plaintiff said that Defendant was not impaired that evening and that in any event Defendant was a moderate drinker. He said Defendant typically drank vodka and ginger beer but that he was someone who preferred marijuana to alcohol. Plaintiff's evidence is that Mr. Robinson did not spend the full five hours in his house on the 19th January but that he came and went. When they left to go to Ms. Blakeney's house in his view Defendant was not impaired. Plaintiff said he would only let Defendant drive if he was fit and able. Defendant also said that he was not impaired. He said he would not have driven if he considered he was not able to.

5. At Ms. Blakeney's house, as corroborated by Ms. Blakeney in her evidence, they had at most two drinks. Under cross-examination by Mr. Wilson on behalf of the Plaintiff, the Defendant said he was not impaired. Ms. Blakeney said they were not impaired. She gave evidence that she would be always quite prepared to have the Plaintiff stay over in her house if he were to be in any way impaired and that even the Defendant could stay over if that was necessary.

6. Whilst Defendant in his evidence sought to say that he may have had more than two drinks, alcohol consumption, and in particular excess consumption, as it transpired from the evidence, appears to have been limited to a maximum of 5 drinks over a period of 7 hours. I am satisfied that whilst there may have been the possibility that either or both of Plaintiff and Defendant would have failed the breathalyser or a blood alcohol test, from the evidence of Ms. Blakeney and the parties themselves they did not display any signs of impairment.

7. Counsel for the Plaintiff focused on the issue of impairment for the purpose of defending the Plaintiff from the allegation that he knowingly allowed the Defendant to drive in an inebriated state. However, Plaintiff in his evidence properly identified the issue which needs determination:-

> *"I believe that the accident and damage to my car was the result of the negligence of Alan Robinson when he realised he was not feeling well while driving in the area of the Paraquet Restaurant but failed to stop the vehicle, or discontinue driving, and/or notify me of how he was feeling or request that I drive."*

8. The Plaintiff had a conversation with the Defendant a week after the accident when the Defendant told him that:-

"He was overcome with a strange feeling as he drove past the Paraquet Restaurant in Paget. He glanced over at [the Plaintiff] in the passenger seat, noticed he was asleep and fastened his seatbelt, which had been unfastened, and continued to drive. He admitted to police in police interviews that he was the driver but did not recall the accident; that he simply blacked out and had been consuming alcoholic beverages prior."

9. Evidence was given by Ms. Blakeney that Plaintiff has a condition which affects his eyes and that he gets relief when his eyes are closed. She said that it was common for people to assume that he is asleep when he is in fact resting his eyes. It was unresolved from the evidence as to whether his eyes were simply closed or whether he was sleeping at the time of the accident.

10. Defendant informed the court in response to a question I raised with him that he had some previous experience of black-outs. He had two incidents of black-outs when he was walking. I asked him if any doctor had ever told him that he should not drive or operate machinery and he said that he had not been told that. He said even though retired, he did carpentry work and used machinery. Unfortunately, there was no expert evidence before the court in respect of the medications which the Defendant takes or even whether COPD can cause black-outs by the very nature of the illness. No evidence was adduced as regards the effect, if any, alcohol would have had on any of the medications being taken by the Defendant.

11. The issue which the court considers most relevant to the determination of liability in this case is the one which the Plaintiff identified; whether the Defendant, when he felt unwell, should have stopped the car. There is then to be considered the allegation from Defendant that Plaintiff knew of his previous blacking-out episodes and his alcohol consumption but still had allowed him to drive.

STANDARD OF CARE

12. What is the duty of care of a reasonably competent driver who is aware that he suffers from a condition which may impair his ability to drive? Is that duty of care breached

by the driver in circumstances where the driver had previously suffered black-outs and in the course of driving feels dizzy but continues to drive?

13. In the case of **Mansfield v Weetabix Ltd. [1998] 1 WLR 1263**, a truck owned by Weetabix crashed into Mr. Mansfield's shop causing extensive damage. The driver suffered from malignant insulinoma which resulted in a hypoglycaemic state which had impaired the driver's ability and had caused the accident. The driver was unaware of his condition. The evidence was that the driver would not have continued to drive had he been aware that his ability to do so was impaired. The court held that the standard of care to be expected was that of a reasonably competent driver unaware that the condition from which he suffered impaired his ability to drive. There was evidence that the driver was a sensible, careful and conscientious man such that he would not have continued to drive if he had appreciated and was conscious that his ability was impaired because of some illness or because of some condition which was affecting him.

14. Expert evidence was given in that case that the driver should not be blamed in any way for continuing to drive because he would have lacked appreciation of the significance of what had occurred and would not have realised that he was in a less than fit state to continue to drive. It was held that there was no reason in principle why a driver should be liable where the disabling event is not sudden, but gradual, provided that the driver is unaware of it.

15. Lord Justice Leggatt said that the standard of care which a driver was obliged to show in these circumstances was that which was expected of a reasonably competent driver unaware that he is or may be suffering from a condition which impairs his ability to drive. To apply an objective standard in a way which would not take account of the Defendant's condition would be to impose strict liability. That is not the law.

16. Lord Wilberforce said in the case of **Snelling v Whitehead**, the relevant portion which is extracted in the **Mansfield v Weetabix** case, the following:-

> *"The case is one which is severely distressing to all who had been concerned with it and one which should attract automatic compensation regardless of any question of*

fault. But no such system has yet been introduced in this country and the courts, including this House, have no power to depart from the law as it stands. This requires that compensation may only be obtained in an action for damages and further requires, as a condition of the award of damages against the [driver], a finding of fault, or negligence, on his part … it is …not disputed that any degree of fault on the part of the [driver], if established, is sufficient for the [plaintiff] to recover. On the other hand, if no blame can be imputed to the [driver], the action, based on negligence, must inevitably fail."

17. So in that case the driver was not at fault because it was demonstrated that he exercised the standard of care which is to be expected of a reasonably competent driver and that the circumstances were such that he did not know and could not reasonably have known of his infirmity which was the cause of the accident. His actions did not fall below the standard of care required.

THE RESPECTIVE KNOWLEDGE OF THE PARTIES

18. The Defendant was driving, knowing he had suffered black-outs, and admitted that in the vicinity of the Paraquet Restaurant and the Elbow Beach Hotel entrance, he started to feel dizzy. He continued to drive as he put on his seatbelt. He says that he did not think anything of the dizziness as sometimes that happens due to his COPD. He remembers nothing after that. Plaintiff says that Defendant should have stopped the vehicle. That must be right. The standard of care expected of a reasonably competent driver must be that if, as in this case, the driver feels unwell in circumstances where he has an history of black-outs, albeit a limited experience as the Defendant described, the driver should pull over and stop. It was a serious error of judgment on the part of the Defendant to continue to drive. Not only did he continue to drive when he felt dizzy, he put on his seatbelt. Leaving aside the fact that he should have had the seatbelt on prior to driving off from Ms. Blakeney's house, it demonstrates a concern for his own safety, a concern which he did not have prior to '*feeling dizzy*'. It also is an action in itself which could have contributed to the accident but I make no finding on that. He was negligent. His driving fell below the standard of care expected of a reasonably competent driver.

CONTRIBUTORY NEGLIGENCE

19. Defendant says that the Plaintiff was aware that he had black-outs and that he was also aware that he had been drinking alcohol that evening. I find that from the evidence of both parties, corroborated by Ms. Blakeney, that with the amount of alcohol consumed there was no visible evidence of impairment and that the Plaintiff reasonably formed the view that Defendant was capable of driving. Further, Plaintiff disputes that he was aware of the Defendant's previous black-out episodes. Having observed the Plaintiff giving evidence, I find that his demeanour and his answers to some difficult questions from the Defendant, were truthful. I accept that he did not know of the Plaintiff's previous black-outs.

20. On the evidence, I cannot accept that the Plaintiff was culpable of any contributory negligence in these particular circumstances. I use the expression "*these particular circumstances*" because at the moment in time when Defendant felt dizzy and he continued to drive, this was the critical moment when his driving fell below the standard of care of a competent driver. Further, Defendant choose not to involve the Plaintiff in his decision to continue driving. If the facts had been that Defendant had no indication that he suffered black-outs prior to the accident, the court may have been engaged in a more comprehensive analysis of the amount of alcohol consumed, the likelihood of it to impair the driver over a period of 7½ hours and whether the knowledge of the Plaintiff in respect of that consumption would attach some contributory negligence.

21. However, in the circumstances of this case, the Defendant breached the standard of care expected of a competent driver. He made a decision to continue to drive without regard to other road users' safety, the safety of his passenger and the risk of damage to the vehicle. As regards himself, he simply put on his seatbelt to perhaps give him some protection from a situation which, by this action, he appears to have recognised was dangerous.

DISPOSITION

22. In the circumstances, I find that the Defendant failed to exercise the expected standard of care of a reasonably competent driver and caused the damage to the vehicle. I find that there is no contributory negligence on the part of the Plaintiff in allowing Defendant to drive. The cost to the Plaintiff to replace his car with one of comparable age and condition was $40,000 but I take into account the salvage value which Plaintiff received of $5,000. I find that as a consequence of the Defendant's negligence, the Defendant is liable to the Plaintiff in damages in the amount of $35,000.

23. I will hear the parties as to costs.

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JEFFREY ELKINSON (ASSISTANT JUSTICE)