Privy Council Appeal No. 10 of 1981

Gabriel Marra and Another – – – – – *Appellants*

v.

J. B. Astwood & Son Limited – – – – – *Respondents*

FROM:

THE COURT OF APPEAL FOR BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY 1982

Present at the Hearing:

LORD KEITH OF KINKEL

LORD SIMON OF GLAISDALE

LORD EDMUND-DAVIES

LORD BRIDGE OF HARWICH

LORD BRANDON OF OAKBROOK

[*Delivered by* LORD BRIDGE OF HARWICH]

The appellants are husband and wife. They reside in New Jersey, U.S.A. In July 1977 they went to Bermuda for a week's holiday. On 25th July 1977 the first appellant hired from the respondents a small motor bicycle (sometimes referred to as an auxiliary) with seats for driver and pillion passenger. In the evening of the following day the first appellant was riding the cycle with his wife on the pillion when they collided with a taxi. Both appellants suffered injuries, the husband's serious, the wife's relatively minor.

The appellants sued the respondents in the Supreme Court of Bermuda claiming damages for breach of warranty and negligence alleged to arise from defects in the condition of the cycle. The case was tried by Robinson A.C.J. who, on 9th October 1979, gave judgment for the appellants, holding that the respondents had been guilty of negligence, but reducing the damages otherwise recoverable by 30 per cent. in respect of the contributory negligence of the first appellant. On 30th June 1980 the Court of Appeal for Bermuda (Blair-Kerr P., Duffus and Summerfield JJ.A.) reversed this decision and gave judgment for the respondents with costs in both courts. The appellants now appeal to Her Majesty in Council pursuant to final leave granted by the Court of Appeal for Bermuda on 15th December 1980.

A major issue in both courts below concerned the effect of certain clauses in a document signed by the first appellant on taking delivery of the hired cycle, which purported to limit the respondents' liability and

to take an indemnity from the first appellant in favour of the respondents in respect of any pillion passenger's claim. This issue was resolved in favour of the appellants by the trial judge and against them by the Court of Appeal. The Court of Appeal, however, also based their judgment in favour of the respondents on the wholly distinct ground that the trial judge's findings of fact in support of his conclusion that the respondents had been guilty of negligence could not be sustained. Their Lordships only found it necessary to hear argument directed to the issue raised by this latter ground of the decision of the Court of Appeal and accordingly now confine their judgment to that issue.

The appellants' case was that the accident was caused primarily by the fact that the throttle control twist grip of the cycle stuck firmly in the open position so that it was impossible for the first appellant to close it, secondarily by the failure of the brakes.

In brief summary, the first appellant's evidence, relevant to this central issue, was as follows. When he took delivery of the cycle, both brakes and throttle control were working normally. He said in terms that the "throttle automatically decelerated when I let go of it". On several occasions before the accident the first appellant claimed that he experienced difficulty with the brakes and the throttle control. The brakes he described as "inadequate". The cycle seemed to accelerate automatically and the throttle control did not spring back of its own accord to the closed position when released, but had to be turned back. The first appellant acknowledged that this did not cause him any concern or difficulty. It may be mentioned in parenthesis that the first appellant's failure to report these alleged defects to the respondents was the basis of the trial judge's finding of contributory negligence against him.

The first appellant's account of the accident itself can perhaps best be given in the form of the trial judge's note of his evidence in chief. It reads:

> "As I was approaching the turn, which I know as Warwick Bay, ... into the first left hand turn, the bike increased in speed. I was negotiating that turn and trying to throttle down at the same time—the cycle persisted in picking up speed—I did not brake at first turn as there was sand there on the left hand side of the road. I made the first turn successfully—I did not feel I could negotiate the second turn at the speed I was going, I was trying to throttle down with no success. I looked for traffic, I saw no traffic in front of me and none behind me. I decided to cross over the road onto a grass area—starting to ease down on brakes—prior to hitting the grass I had applied both brakes—hoping bike would come to abrupt stop and we should be thrown onto the grass or into the shrubbery. I was trying to negotiate that—but nothing worked with the brakes or throttling down. I just veered off the grass portion—constantly having pressure on both brakes. I saw a vehicle coming towards me. I tried desperately to avoid it. I proceeded straight into him—hit him in the front at an angle."

Their Lordships were told that the S bend described by the first appellant is on a downhill gradient in the direction he was travelling. It is common ground that the other vehicle was stationary by the time of the collision.

The respondents called evidence of two witnesses as to their system of inspecting and testing cycles for faults before they are let out on hire.

A police witness testified that after the accident the front wheel of the cycle was buckled and the fork bent.

The principal evidence relied on by the respondents was that of Sergeant Pratt, the officer in charge of the police garage where the damaged cycle was held after the accident and inspected by Sergeant Pratt, an expert mechanic, nine days later. The effect of his evidence with regard to the throttle control (together with the cable and carburettor which were in order) was that a high spot on the inner sleeve had been rubbing against the outer sleeve; that this could cause the throttle to stick, in the sense that it would not close automatically when released; but that it was impossible for this to have prevented the throttle being closed manually, using no more force than would be required to open it. Of the brakes he said:—

> "I checked the brakes—I was not able to road test the bike—but brakes appeared to be in good working order, they were properly adjusted. Lever was applied, the brakes prevented the wheels from turning. Not possible for brakes to have previously failed and then been in condition they were when I found them."

The cornerstone of the learned trial judge's finding against the respondents is expressed in these terms:—

> "The First Plaintiff impressed me as being a reliable and honest witness who was not given to exaggerating his case and having heard and seen him and the other witnesses in this case and having considered the entirety of the evidence which is before me I find on the balance of probabilities that the auxiliary cycle supplied to the Plaintiffs by the Defendant did not function properly, in that the manipulation of its throttle control did not effectively control the acceleration or deceleration of the cycle; nor was the cycle in the best condition which the Defendant's available skill could put it, and it was therefore defective."

But before reaching this conclusion, the learned judge had effectively rejected both the evidence led by the respondents as to their system of inspecting and testing cycles before letting them out on hire as being of no weight, and the evidence of Sergeant Pratt as being unreliable.

Blair-Kerr P., delivering the first judgment of the Court of Appeal, with which Duffus and Summerfield JJ.A. agreed, very properly reminded himself of the well known statement by Lord Thankerton in *Watt v. Thomas* [1947] A.C. 484, at page 487, of the principles which limit the circumstances in which an appellate court can properly differ from a trial judge's findings of primary fact. Their Lordships follow that good example. Lord Thankerton said:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he had not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The Court of Appeal's principal criticism of the judgment was directed to the learned judge's approach to the evidence of Sergeant Pratt. Having referred to Sergeant Pratt's conclusions as to the condition of the cycle's brakes, the learned trial judge said this:

> " It may forever remain a mystery as to how Sergeant Pratt could come to such a conclusion in respect of the brakes applicable to the front wheels of the auxiliary cycle if as has been attested by his colleague Sergeant Counsell the front forks and the front wheel were respectively bent and buckled as part of extensive damage of the cycle upon impact."

He added later:

> " . . . . it is inconceivable that Sergeant Pratt could have tested the brakes particularly of the front wheel in any way which would justify his conclusion that it was not possible for the brakes to have failed previously and yet be in the condition he found them."

These views led the judge to conclude that he could not " rely on Sergeant Pratt's evidence as being more than speculative ".

When one turns to the judge's notes of Sergeant Pratt's evidence, however, there is no indication that either counsel for the appellants or the judge himself directed any question to Sergeant Pratt to suggest that he could not have tested the brakes in the way he claimed that he had done. Still less is there any hint of a challenge to Sergeant Pratt's honesty or to his competence as an expert.

In their Lordships' view, it is entirely wrong for a judge to base his rejection of an expert witness's evidence on a theory of his own as to an inconsistency between that evidence and some other evidence in the case without at least first himself putting the point to the witness, if not put by counsel, and giving the witness an opportunity to explain. It is not suggested that this was done. Accordingly, the learned judge's expressed reasons for rejecting Sergeant Pratt's evidence as to the condition of the brakes at the time of the accident cannot be regarded as satisfactory.

Far more significant, however, is the judge's total disregard of the more important and quite unchallenged evidence of Sergeant Pratt as to the condition in which he found the throttle control mechanism, which, as the Court of Appeal pointed out, " cut clean across " the account of the accident given by the first appellant. If the judge intended to reject this evidence also as being merely " speculative ", he gave no plausible reason at all for doing so.

These considerations might be sufficient to dispose of the appeal, but their Lordships think it right to advert, as did the Court of Appeal, to another aspect of the evidence, where it seems to them that the learned trial judge fell into error. Having referred to the respondents' evidence of their system of inspecting and testing cycles before letting them out on hire, the learned judge pointed out that there was no specific evidence of an inspection and test of the cycle in question. He added:

> " There is therefore no evidence upon which a finding even on the balance of probabilities can be made that the auxiliary in question was inspected by or on behalf of the Defendant before delivery."

In their Lordships' view, this is, at the least, an inaccurately expressed conclusion. Evidence of a system which, according to the witnesses, is regularly followed, although not conclusive, is certainly *some* evidence that the system was followed in a particular case. But here again what the judge said is perhaps less important than what he disregarded, viz. the first appellant's own evidence that when the cycle was first delivered to him both brakes and throttle mechanism were working normally. In the light of this evidence, the question whether the cycle had been inspected and tested before delivery was of no real importance. If it had been, there was no reason to expect that faults would have been found. The inference from the first appellant's own evidence was that whatever faults there were had developed later.

There is no reason whatever to quarrel with the learned trial judge's view of the first appellant as an honest witness. Having experienced minor difficulties with brakes and throttle control he thought these of insufficient importance to report them to the respondents. But if he subsequently lost control of the cycle when negotiating an S bend on a downhill gradient, it is readily understandable that he should have convinced himself, after the event, that the loss of control was due to defects in the cycle rather than in his driving of it. It was vitally important that the learned judge should test the accuracy of the first appellant's evidence in the light of all the other relevant evidence. The critical issue was as to the condition of the throttle control. It will be remembered that, according to the first appellant himself, before he made any attempt to apply the brakes his inability to close the throttle had prompted his decision to cut across to the grass verge on the off side of the road. Counsel for the appellants properly conceded that it was essential to his case to establish that the throttle stuck fast in the open position. For the reasons already stated, the learned trial judge's approach to two aspects of the evidence directly relevant to this issue, more particularly his treatment of the evidence of Sergeant Pratt, was, in their Lordships' opinion, unsatisfactory. This brings the case squarely within Lord Thankerton's third principle and leaves the matter at large for the appellate courts. Their Lordships can find no fault with the judgment of Blair-Kerr P., and, in agreement with the reasons given by him, which accord substantially with those their Lordships have sought to express, are satisfied that the Court of Appeal for Bermuda reached the right conclusion.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be dismissed with costs.

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In the Privy Council

GABRIEL MARRA and ANOTHER

v.

J. B. ASTWOOD & SON LIMITED

DELIVERED BY
LORD BRIDGE OF HARWICH

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