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1961

JALLOH
v.
WHITE CROSS INS. CO. LTD.

Luke Ag.J.

the accident; whether or not the insured had fulfilled all conditions of the policy and in particular 5. Applicant abandoned his other grounds.

The arbitrator having heard evidence as to how the lorry was loaded before entering the ferry pontoon held that the lorry was overloaded when in the ferry pontoon and that the insured's driver was negligent when he drove an overladen lorry into the ferry pontoon.

Under the circumstances this motion to either set aside or remit the award is dismissed with costs.

Freetown
March 27,
1961

Cole J.

[SUPREME COURT]

JERIMIAH TUGBEH . . . . . *Plaintiff*

v.

KALIL A. AKAR AND STAVELEY & COMPANY LIMITED . *Defendants*

Tort—Negligence—Submission of no case—Res ipsa loquitur—Whether affidavit filed before issue joined could be received in evidence—English Rules of Supreme Court, Ord. 37, *r.* 24.

On August 29, 1956, plaintiff was knocked down and injured by an automobile owned by Kalil Akar (defendant) and operated by one Davies. Plaintiff brought suit against defendant for negligence. Defendant's defence stated that on the day in question he had sent the car in the morning to Staveley & Co. Ltd. Plaintiff thereupon requested that Staveley & Co. Ltd. be joined as co-defendant. Plaintiff also filed an affidavit in support of this application, to which was attached a copy of a letter from co-defendant to plaintiff's solicitor. This request was granted, but neither the writ of summons nor the statement of claim were amended so as to include a claim against co-defendant.

At the trial, plaintiff testified as to the accident and his injuries. He said that he never saw the car that hit him nor its driver. At the close of plaintiff's case, defendant and co-defendant submitted that there was no case for them to answer. Plaintiff's counsel argued that the doctrine of res ipsa loquitur applied, and also that the court should treat as evidence the affidavit and letter which plaintiff had filed in support of his application for leave to add the co-defendant as a party.

Held, for the defendants, (1) plaintiff failed to make out a case for defendant to answer.

(2) The doctrine of res ipsa loquitur was not applicable, as there was no evidence to show that the car was at the material time under the management of the servant or agent of the defendant or co-defendant.

(3) The affidavit and letter which plaintiff had filed in support of his application for leave to add co-defendant as a party could not be received in evidence, because the requirements of rule 24, order 37, of the English Rules of the Supreme Court had not been complied with.

Case referred to: *Scott* v. *The London and St. Katherine Docks Company* (1865) 3 H. & C. 596; 159 E.R. 665.

Rowland E. A. Harding for the plaintiff.
Gershon B. O. Collier for the defendant.
Claudius D. Hotobah-During for the co-defendant.

COLE J. The plaintiff in this action issued a generally indorsed writ of summons on June 12, 1958, against Kalil A. Akar, of 29 Little East Street, Freetown, as defendant. The indorsement on the writ reads as follows:

"The plaintiff's claim is for damages for injury caused by the negligent driving of the defendant servant or agent."

The defendant entered an appearance to the writ of summons on June 16, 1958, and on June 30, 1958, the plaintiff delivered and filed his statement of claim which reads as follows:

"1. The plaintiff is a seafarer and prior to his injuries was employed on various ships plying between Europe and Africa. The defendant is a general merchant with business premises at 29 Little East Street, Freetown, and the registered owner of car F 6491.

2. On August 29, 1956, the plaintiff was walking along Kroo Town Road, in front of City Market, when the defendant's car negligently driven by one Gilbert O. Davies, defendant's servant or agent, struck the plaintiff with great force, and knocked him down and he was injured.

3. The plaintiff was removed to the Connaught Hospital, Freetown, and was admitted for about seven months receiving medical treatment.

4. *Particulars of Negligence*

(i) The defendant drove the said car too fast along Kroo Town Road, a congested one-way thoroughfare with no footpath. (ii) Failed to keep any proper look-out. (iii) Failed to give any sufficient warning of his approach. (iv) Failed to apply his brakes sufficiently or in time to avoid hitting the plaintiff and knocking him down. (v) Failed to so manage the said motor car as to avoid striking the plaintiff. (vi) Failed to keep the car under proper control.

5. *Particulars of Injury*

Compound comminuted fracture of the lower third of the right leg, resulting in half-inch shortening of his right leg. Limitation of movement of the right ankle. Right foot swollen and suffers pain in walking.

6. *Particulars of Special Damage*

1 shirt	£0 15s. 6d.
1 grey flannel trousers	£2 10s. 0d.
1 pair black shoes (lost)	£2 0s. 0d.
1 grey felt hat (lost)	£1 10s. 0d.
Medical examination and report	£5 5s. 0d.
	£12 0s. 6d.

And the plaintiff claims damages."

The defendant delivered and filed his defence on October 15, 1958. The defence reads as follows:

"1. The defendant is a general merchant resident at 29 Little East Street, Freetown.

2. The defendant was owner of car F 6491 which was insured with Messrs. J. P. Holmen.

3. On or about August 29, 1956, the defendant sent his car in the morning hours to Messrs. Staveley & Co. Ltd. at Charlotte Street by his driver, one Alpha, for servicing.

4. At about 2 p.m. defendant got information that his car was involved in an accident around Kroo Town Road.

5. At the time of hearing about the accident the defendant's driver Alpha was in defendant's shop waiting to go and receive the car when it was ready.

6. The defendant promptly reported the matter to the police and made inquiries from Messrs. Staveley & Co. Ltd., who sent to collect the car.

7. The defendant denies: (a) That at the time of the accident the car was driven by his driver or agent. (b) That the car was out on defendant's instructions or with his knowledge or approval.

8. If the plaintiff suffered any injuries, loss or damage, which is disputed, it was not through the negligence of the defendant or his agent and the defendant denies liability."

On October 21, 1958, the plaintiff took out a judge's summons applying for co-defendant in this action, Messrs. Staveley & Co. Ltd., of Water Street, Freetown, to be joined as a defendant in this action. An affidavit in support of this application sworn to on October 20, 1958, by Rowland Eugene Alexander Harding, the plaintiff's solicitor, was filed. To this affidavit was exhibited a copy letter dated April 25, 1958, purported to have been written by Messrs. Staveley & Co. Ltd. to the plaintiff's solicitor.

On October 27, 1958, it was ordered "that the plaintiff be at liberty to amend the writ of summons by adding Messrs. Staveley & Co. Ltd. as co-defendants in this action the writ of summons and all subsequently proceedings to be amended accordingly."

I have examined the papers before me in this file and both Mr. Harding, counsel for the plaintiff, and Mr. Hotobah-During, counsel for the co-defendant, informed me that the only statement of claim delivered to the co-defendant Staveley & Co. Ltd. was in every detail a word for word copy of the statement of claim already delivered and filed and to which I have already referred. It is to be noted that Messrs. Staveley & Co. Ltd. was not even mentioned in that statement of claim nor was the company referred to at all. The first mention of Messrs. Staveley & Co. Ltd. as co-defendant in any pleading was made in the defence delivered and filed by that company on November 19, 1958, and reads as follows:

"1. The co-defendant Staveley & Co. Ltd. does not deny any of the allegations contained in paragraph 1 of the plaintiff's statement of claim (hereinafter referred to as "the claim").

2. The said co-defendant denies each and every of the allegations contained in paragraph 2 of the claim.

3. The said co-defendant states that the defendant Kalil Akar did not either himself personally or through the agency of any one else request the said co-defendant to deliver up the said motor car F 6491 to the said defendant Akar after it had been serviced by the said co-defendant.

4. The said co-defendant denies that it did either impliedly or otherwise by any of their workmen or servants undertake to deliver or did any act towards delivering the said motor car to the defendant. Further, the co-defendant denies that it or any of its workmen or servants by its instructions drove the said motor car along Kroo Town Road in Freetown or along any other highway or thoroughfare on August 29, 1956.

5. The said co-defendant avers that it is not generally and in particular it was not part of the contract for servicing the defendant's car F 6491 that the co-defendant should drive it along a highway or highways for the purpose of delivering the said motor car to the said defendant after completing the servicing of the said car.

6. The said co-defendant admits that one G. O. Davies was in their employ on August 29, 1956, but denies that it was part of the said G. O. Davies' duty as such employee to drive a customer's motor car along the highway for the purpose of delivering up the said motor car or that the said G. O. Davies was instructed to drive and deliver the said motor car to the defendant Akar on August 29, 1956, or at any other time.

7. If the said G. O. Davies in fact drove the defendant's motor car as alleged on August 29, 1956, the said co-defendant states that G. O. Davies did so without the instructions, knowledge or consent of the said co-defendant and outside his working hours."

On December 15, 1958, the plaintiff joined issue with the defendant and co-defendant on their respective defences. As I understand the pleadings in this case the position at the close of the pleadings was as follows:

The plaintiff alleged that through the negligent driving on August 29, 1956, of the defendant Akar, his servant or agent, one G. O. Davies, as specified in the particulars of negligence, the plaintiff was hit by the defendant's car F 6491, knocked down and injured and for this he claims damages. No allegation of any sort was so far ever made by the plaintiff against the co-defendant. The defendant by his defence disputed the allegations of the plaintiff and put the plaintiff to proof thereof—the co-defendant who filed a defence —on what grounds I do not know, perhaps ex abundantia cautela—also in effect disputed the plaintiff's claim.

At the hearing the plaintiff gave evidence. He deposed that at about midday of August 29, 1956, he was standing opposite the City Market at Kroo Town Road, Freetown, on the other side of the road with his face turned to the market buying pepper when a car which was travelling along Kroo Town Road in a north-easterly direction hit him on his left foot. He fell down flat and the car rode over his right foot resulting in fracture of that foot. He was momentarily unconscious but recovered consciousness in sufficient time to observe that he was being lifted from the ground by some policemen and put into another vehicle and driven to Connaught Hospital where he was admitted. He added that he never saw the car that hit him nor the driver nor did he hear any sound of any warning of the approach of the car. He also gave evidence of the medical treatment he received at the hospital from time to time, his pain and suffering and damage suffered. He called Dr. Hebron, his only witness, who gave evidence of the plaintiff's physical condition when he, Dr. Hebron, examined plaintiff on May 29, 1958.

At the close of the plaintiff's case, Mr. Collier, for the defendant, submitted that on the evidence no case had been made out for the defendant to answer. He elected to rely on his submission without calling any evidence. Mr. Collier submitted that no evidence had been led by the plaintiff—(a) to establish negligence, or (b) that it was defendant's car which hit plaintiff, or (c) that the car which hit plaintiff was being driven by defendant, his servant or agent. Mr. Hotobah-During also submitted no case to answer on behalf of the co-defendant and also elected to rely on his submission without calling evidence.

In his submission nothing had been alleged against the co-defendant by the plaintiff in his statement of claim nor any evidence led by the plaintiff from the witness-box against the co-defendant.

The question of no case to answer is to be decided not by weighing the evidence of the plaintiff against that of the defendant or co-defendant, but by disregarding altogether the evidence of either the defendant or co-defendant, and by asking whether that of the plaintiff is, per se and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable mind. I have applied this test to the evidence in this case and I find that the evidence before me is insufficient for me to say that a case has been made out either against the defendant or the co-defendant. There is no evidence before me that the act which caused the injuries of which the plaintiff complains is that of the defendant, his servant or agent. I agree with Mr. Hotobah-During that neither in the pleadings nor in the evidence before me has there been any allegation by the plaintiff against the co-defendant—Mr. Harding asks me to treat the case against the defendant as one to which the maxim res ipsa loquitor applies. With respect, I differ. In the leading case of *Scott* v. *The London and St. Katherine Docks Co.* (1865) 3 H. & C. 596; 159 E.R. 665, it was stipulated that this maxim can properly be invoked only "where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." In the case before me as I have already found there is no evidence to show that the car was at the material time under the management of the defendant his servant or agent.

Mr. Harding strenuously urged me to treat as evidence in this case his affidavit and exhibit filed in support of his application for leave to add the co-defendant as a party in this case. This I cannot do because the practice which the law requires to be followed in a matter of this kind has not been followed. By Order 37, rule 24, of the English Rules of the Supreme Court it is stated that "No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of intention in that behalf."

I hold therefore that counsel for the defendant and co-defendant succeed in their submission. This action is dismissed with costs—such costs to be taxed.

Freetown
April 10,
1961
Luke Ag.J.

[SUPREME COURT]

REGINA . . . . . *Applicant*

v.

WILLIAM S. YOUNG, ACTING MASTER AND REGISTRAR, SUPREME COURT

EX PARTE BERTHAN MACAULAY . . . . . *Respondent*

[Misc.App. 3/61]

Practice—Mandamus—Application for order directed to Master and Registrar compelling him to accept Supreme Court documents filed in District Registry at Bo—Whether district registries constituted—Whether district registrars