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THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Appellant

and

KEVIN SYLVESTER BOURKE AND KENNETH PALMER

Respondents

J U D G M E N T.

This is an appeal from a decision of the Magistrate at Port Moresby sitting in Petty Sessions wherein the Plaintiffs were awarded damages. The claim was for £250 for damage caused by the negligence of the Defendant and its servant to the Plaintiffs' launch lying at Koki.

On the night of 26th March, 1955 at about 7.45 the Defendant's servant was driving a motor vehicle on the main road apparently on the way into Port Moresby. As it rounded the corner at Koki, the vehicle, travelling at an estimated speed of 45 miles per hour, left the road, when the driver jumped out, leaving the vehicle to continue across the foreshore and to collide with the Plaintiffs' launch, which was lying, and had been lying for six or eight months, on the beach sixty to eighty feet from the edge of the bitumen surface of the roadway. From the Picture Theatre close by there was sufficient light for an eye-witness to see what happened.

The Defendant called no evidence except as to the quantum of damage. The Magistrate applied the doctrine of res ipsa loquitor, but there was also the evidence of the eye-witness independent of the doctrine of res ipsa loquitor, of facts which disclosed a prima facie case of negligence.

The Appellant's ground of appeal is that the Magistrate's judgment for the Plaintiffs given on a finding that the Defendant was liable to the Plaintiffs in negligence was wrong in law in that there was no evidence or not sufficient evidence on the part of the Defendant or its agent or servant of a duty to take care.

The argument based on this ground is that the Plaintiffs have not proved a duty to the Defendant which in law they are bound to prove. It is true that it is necessary to prove a duty but when negligence is shown in such circumstances as in the present case, the breach of duty is also shown. The

duty is that of the user of a highway to take care that injury is not done to other users or persons or property near to the highway. Lord Justice Atkins puts it thus in Hawbrook -v- Stokes 1925 1 K.B. 141 at p. 156.

> "It appears to me that if the plaintiff can prove that her injury was the direct result of a wrongful act or omission by the defendant, she can recover, whether the wrong is a malicious and wilful act, is a negligent act, or is merely a failure to keep a dangerous thing in control, as for instance a failure to keep a wild beast in control. Once a breach of duty to the plaintiff is established, one has no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission. The full effect of the decision in In re Polemis and Furness, Withy & Co.(1) had not yet, I think, been fully realized, even though that case laid down no new law. I agree that in the present case the plaintiff must show a breach of duty to her, but this she shows by the negligence of the defendants in the care of their lorry."

In that case the negligence was admitted in the pleadings. In this case the doctrine of res ipsa loquitor is applied with the additional evidence of negligence given on the part of the Plaintiffs.

It was put by Counsel for the Appellant that in order to succeed upon the appeal, he must satisfy the Court that the onus is on the Plaintiff to show that the Defendant owes him a duty to take care and that that onus was not discharged as res ipsa loquitor is not available to satisfy that duty.

As appears above, there was evidence of negligence apart from res ipsa loquitor but let us consider the doctrine of res ipsa loquitor. If the facts are within the Defendant's knowledge, which they were in this case, it requires little to have the doctrine applied; sometimes only a scintilla of evidence will suffice. Res ipsa loquitor is a matter of evidence. If the doctrine is applied where it can be and there is no answer from the Defendant, the proof of negligence is complete, carrying with it a breach of duty to take care. Vide Laurie -v- Raglan Building Co. Ltd. 1942 1 K.B. 152, cf. Parker -v- Paton 41 S.R. " N.S.W. at p. 243 per Jordan J.

Counsel for the Defendant contended that there is no duty owed to a trespasser. He quoted many authorities in support of this contention. These authorities, however, comprising a long line, are statements of the law as applied

to cases between the owner of the premises and the person who comes on to the land as a trespasser and who must take the premises as he finds them. They have, in my view, no application to a breach of duty as in the present case.

It is being assumed in this case that the Plaintiffs were trespassers. I am unable to see in the judgment of the Magistrate where he found that the Plaintiffs were trespassers. In fact, he sought to find, perhaps incorrectly, that the Plaintiffs were not trespassers.

The onus of proving that the Plaintiffs were trespassers was upon the Defendant and he did not discharge that burden. That should really be sufficient to dispose of the matter. I think, however, that it might be as well to take the matter further, for in the view I take, it did not matter if the Plaintiffs were trespassers in that the launch which they owned was left on the Defendant's land beside the roadway.

Here we have a motor vehicle driven negligently by the Defendant's servant on a highway, leaving the highway and coming into collision with the Plaintiffs' boat lying in the near neighbourhood of the highway, and doing damage. I do not believe it is the law that a person may drive his vehicle along a highway as negligently as he pleases and do damage to the person or property of another being or lying on the driver's land close to the highway, and escape liability because the driver happened to own the land.

The matter appears to me to be covered by the judgment of the Master of the Rolls, Lord Greene, in Currumfia -v- Great Western Railway Co.1947 2 All Eng. Reports at p. 567. :-

> "It appears to me that the defendants and their driver, having created between them a potential source of danger which would impinge on anybody on the highway in the near neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully. I cannot see, on any ground of principle or common sense, why a distinction should be made between the plaintiff running in the road to get on the lorry and a foot passenger lawfully crossing the road immediately behind the lorry. I should have thought the duty was a duty to take care vis-a-vis anyone - not this plaintiff as such, but anyone - the general class of persons who, at the moment when the danger materialised, might happen to be in the near neighbourhood."

And again, lower down on the same page:-

"The duty, as it appears to me, is a duty to anybody who happened to be at the crucial moment in the neighbourhood of this dangerous thing."

In my judgment the Plaintiffs proved all they had to prove. There was a duty oved by the Defendant; a breach of that duty and damage.

In the result the Magistrate's finding was correct. I dismiss the appeal with costs.

Ralph A. Gore

A/C.J.