Privy Council Appeal No. 31 *of* 1934

Antonio Dias Caldeira - - - - - - - - - *Appellant*

v.

Frederick Augustus Gray - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1936.

Present at the Hearing:
LORD ALNESS.
LORD MAUGHAM.
SIR SIDNEY ROWLATT.
[*Delivered by* LORD ALNESS.]

In this case the respondent, who is a sales manager, sued the appellant, who is a doctor, for damages. The claim was based on negligence. The respondent was treated for malaria by the appellant, and the former affirms that, in giving him a quinine injection in the right buttock, the appellant travelled beyond the safe area for injection, and that the quinine injured the respondent's sciatic nerve, with the result that he is permanently lamed.

The claim made by the respondent against the appellant was based upon two grounds:—(1) that the appellant negligently inserted the needle of a hypodermic syringe into the sciatic nerve in the right buttock of the respondent, and/or negligently injected quinine into the said nerve, or, alternatively, injected quinine so near to the said nerve as to injure the same and destroy the tissue of a portion of the sciatic nerve, (2) that the appellant had not the skill and knowledge necessary for the administration of the said injection, or alternatively, in breach of his duty to the respondent, negligently omitted to exercise the necessary skill or knowledge when administering the said injection.

The learned Trial Judge in the Supreme Court of Trinidad and Tobago (Mr. Justice Manning) had no hesitation in holding that the appellant had the necessary skill and knowledge for administering intra-muscular injections in the buttock with safety, and that he had considerable experience in such administration. Their Lordships are accordingly absolved from considering that aspect of the case.

But the question of the appellant's alleged negligence remains for consideration, and manifestly the result of that enquiry is of much importance to both parties to the suit. In its elucidation, the Board received valuable assistance from the Bar.

The statement of claim by the respondent was dated 25th April, 1932. The defence was filed on 31st May, 1932. Evidence was led on 22nd October, 1932, and for three weeks thereafter. The learned Trial Judge delivered judgment in favour of the respondent on 7th October, 1933. The Board cannot refrain from expressing their appreciation of the care and the fairness which characterise his judgment.

Now, the first observation which falls to be made is that their Lordships are manifestly and indeed admittedly confronted with a pure question of fact for determination. There is no question of law at issue between the parties. Moreover it is agreed between them that the *onus* of proof is upon the respondent, and that, if he is to succeed, he must demonstrate, beyond reasonable doubt, that the appellant was negligent, and that his negligence caused the injury of which the respondent complains.

Had the case been tried by a Judge and jury, their Lordships are of opinion—and Mr. Pritt did not seriously contest the proposition—that an appeal against a verdict for the respondent would be well-nigh hopeless. There is ample evidence to support such a verdict, and it could not be seriously contended that a verdict for the respondent would on the evidence led have been unreasonable. The case, however, was not tried by a Judge and jury, but by a Judge sitting as a jury. The distinction is, of course, important.

The appellant is exercising a right of appeal which is his by right, and their Lordships recognise that they cannot, merely because the question is one of fact, and because it has been decided in one way by the learned Trial Judge, abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. None the less, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact moreover in which, as here, questions of credibility are involved, are limited in their character and scope.

This is familiar law. It has received many illustrations—and, in particular, in the House of Lords—,the most recent of these being the case of *Powell and Wife* v. *Streatham Manor Nursing Home* ([1935] A.C. 243). In that case it was held that

> " Where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better

> position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the Trial Judge has formed."

Lord Wright, in the course of his speech, said

> "Two principles are beyond controversy. First it is clear that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'"

That view is in strict accord with previous authoritative expositions of the law in the same sense by Lord Loreburn and Lord Halsbury in two cases in the House of Lords, which do not appear to have been cited in *Powell's* case, viz., *Kirkpatrick* v. *Dunlop* (1916) S.C. 631, and *Taylor* v. *Burger* 35 S.L.R. 400. It remains to be seen whether, and, if so, to what extent, these judgments affect the decision of this case. In order exactly to equiparate the decisions in these cases with the present case, a conflict of testimony between the appellant and the respondent would be required. Here there is none; for, while the appellant affirms that the injection was administered by him within the safe area in the buttock, the respondent not unnaturally is unable to say where precisely the injection was given. There is however a sharp conflict of testimony between the expert witnesses.

In limine of the case, it falls to be said that the Trial Judge did not believe the testimony of the appellant on vital points—an incident which will be developed later—and that, *quoad ultra*, the decision of the case rested on the evidence of medical men, two of whom were examined as witnesses for the respondent, and three for the appellant, and who expressed diametrically opposite views regarding the cause of the respondent's disability. The learned Trial Judge accepted the view of the medical men adduced as witnesses for the respondent, and rejected the view of the medical men adduced as witnesses for the appellant. Their Lordships see no reason to doubt that, in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the Trial Judge—e.g., whether, as Mr. Wallington said, they confined themselves to giving evidence, or acted as advocates—may powerfully and properly influence the mind of the Judge who sees and hears them in deciding between them. These advantages, which were available to the Trial Judge, are manifestly denied to their Lordships sitting as a Court of Appeal.

Having considered the general principles which are applicable to a case of this kind—and this would seem to be a proper avenue of approach to the problem before the Board—their Lordships proceed to consider the facts which give rise to the appeal.

Prior to 1930, the respondent had suffered from recurring attacks of malaria. He had also been addicted to spasmodic " sprees ", as he describes them; but, as regards the extent or quality of the alcohol which he consumed on such occasions, the evidence is silent. On 28th February, 1930, the appellant was called in to treat the respondent for an attack of malaria, and advised quinine injections. The appellant had on many previous occasions administered such injections to his patients. On 3rd March, 1930, the respondent received the first injection from the appellant in his right buttock.

The vital question in the case is—where was that injection administered? Admittedly there is an area in the buttock within which such an injection may be safely administered. That fact would appear to be elementary in medical science and practice. If the injection be made within that area, no main muscle of the patient can or will be injured, and, in particular, the sciatic nerve will be immune from danger. When the injection was administered to the respondent, he felt a tingling sensation, but nothing which he described as pain. Immediately he left the operating table, however, the respondent found that he had foot drop, and he had to cling to the appellant for support. The respondent had no such symptoms before the injection was administered, and it seems a fair inference, as the learned Trial Judge says, that the injection contributed to, if it did not cause, the foot drop.

To explain the disability of the respondent, two theories were propounded in evidence—one by the respondent, the other by the appellant. The respondent's theory is that his foot drop was caused by the action of quinine upon his sciatic nerve, either because the nerve was pierced by the appellant's needle, or because the quinine injected by the appellant permeated into the nerve, in consequence of its proximity. The appellant's theory, on the other hand, is that the respondent was suffering before the injection from latent alcoholic neuritis, and that the alcoholic toxins in his system were lit up, and precipitated by the shock of the injection. It is not unimportant to observe that there is no trace in the appellant's pleadings of the cause to which he now attributes the respondent's disability, and that although Dr. Ritchie states in evidence that he was told before he entered the witness box that the defence to the action was that the respondent was suffering from latent alcoholic neurosis.

In the expiscation of the two theories referred to much medical learning has been expended, and elaborate evidence has been led. Indeed the evidence is throughout so voluminous, and is occasionally so obscure as, in familiar phrase, to make it difficult to see the wood for the trees. No doubt, it is on the one hand antecedently improbable that the appellant, whose skill and experience are certified by the Trial Judge, should have committed the cardinal and elementary

blunder attributed to him by the respondent. On the other hand, one knows from experience in life that " familiarity breeds contempt ", and that an ordinary practice is sometimes lacking in the constant care which the circumstances demand. There are many cases on record of signalmen and engine drivers of experience, who, on occasion, neglect their duty, and whose lapses illustrate the principle stated. Moreover, the respondent's theory offers a simple and convincing explanation of the respondent's plight, while, as will presently be seen, the appellant's theory is speculative and difficult.

Their Lordships have carefully considered the evidence adduced by the parties, and they have reached certain conclusions upon it, which may be thus expressed.

(1) The respondent and his witnesses have established, if their testimony be believed, a strong case to the effect that the respondent's disability is due to the negligence of the appellant. Now the learned Judge believed the respondent, and indeed he receives a certificate of credibility from the appellant himself. The respondent's medical witnesses, moreover, were also believed by the learned Trial Judge when they said that they were satisfied that the injection was administered by the appellant outside the safe area, that in consequence the injected quinine injured the respondent's sciatic nerve, and that latent alcoholic neuritis did not and could not account for his condition. For these views the medical men examined for the respondent advanced certain reasons, which the learned Trial Judge accepted.

(2) The question next arises—Has the appellant established such a case as to throw doubt on the case for the respondent? The theory of the appellant, as already stated, is that the respondent's disability was due, not to injury by quinine to his sciatic nerve, but to latent alcoholic neuritis, which was precipitated by the shock of the injection. This theory depends (*a*) upon the appellant's evidence, and (*b*) upon that of the medical experts who were adduced by him as witnesses.

Now, in the first place, the learned Trial Judge refused to accept the evidence of the appellant as reliable on various vital points: and their Lordships are not surprised at that refusal. The Trial Judge disbelieved the evidence of the appellant when he stated that he inserted quinine in the safe area of the respondent's buttock. He also disbelieved the appellant when he said that he diagnosed neuritis at an early stage of the case, and that he communicated that diagnosis to the respondent. The learned Judge did not mince his words. He affirmed that the appellant deliberately told falsehoods in the witness box. It is true that that finding is based, not on the appellant's demeanour in the box, but on certain other reasons which the learned Judge details.

Mr. Pritt endeavoured to belittle these reasons, but in their Lordships' opinion, without success. The fact remains that the learned Trial Judge found that the appellant was a person capable of committing perjury. If the appellant diagnosed latent alcoholic neuritis at an early stage of the case, it is to their Lordships inconceivable that he should not have referred to the subject of alcohol in his conversation with the respondent and his wife. The respondent depones that the appellant did not refer to the subject of drink, and, in particular, did not advise him to stop drinking, as the appellant swears that he did. The respondent's wife was asked no question upon the subject. Certain it is, on the respondent's evidence, that he did not in any way alter his habits with regard to alcohol after his disability occurred. On the evidence by the respondent on this matter, which the Trial Judge accepted, there was no cross-examination by the appellant.

Further, there are two matters regarding which the appellant gave evidence of such a character that their Lordships cannot accept his testimony regarding them. In the first place he says that he does not remember the respondent developing foot drop in his office and holding on to him for support, and in the second place he says that he did not look at the respondent's foot there. Having regard in particular to the respondent's evidence, which the Trial Judge accepted, this testimony frankly seems to their Lordships to be unworthy of credence. They are, therefore, not surprised that the Trial Judge evinced, in Mr. Wallington's phrase, " an indisposition throughout to rely on the appellant's testimony." If the evidence of the appellant be not worthy of credit, it is manifest that his case must be difficult to establish.

(3) Passing from the appellant's evidence, their Lordships now proceed to consider the competing theory of latent alcoholic neuritis advanced by the appellant, and supported by three medical witnesses on his behalf. Of these it is not unimportant to note that one—Dr. Ritchie—never saw the respondent, and that the other two saw him for the first time a week before the trial.

Now, apart from the fact that the appellant did not treat the respondent for alcoholic neuritis, the appellant's theory suffers from this disadvantage—that it is based on speculation rather than on experience. None of the witnesses adduced for the appellant have had actual experience of latent alcoholic neuritis precipitated by shock. Such a happening, on the evidence, is rare. The appellant's witnesses admit that, on their theory, the respondent's case was exceptional. These witnesses do not cite one authentic case which lends full support to their theory. It is a scientific theory, based on conjecture. Even assuming the theory to be sound, there is no evidence that the respondent was, in

point of fact, suffering from latent alcoholic neurosis. His alcoholic history may have been such as to render this possible, but to hold that he in fact so suffered would be, as the learned Trial Judge truly points out, to pass from the region of inference to the region of conjecture. The case for the appellant, in short, rests on mere speculation. It requires for its establishment the concurrence of two features—(*a*) the existence of latent alcoholic neuritis, (*b*) latent alcoholic neuritis lit up by so slight a shock as an injection entails. Both these conditions must concur: and that, on the evidence, is highly improbable.

It would, in their Lordships' opinion, be profitless to attempt a detailed analysis of the medical evidence. That has been exhaustively and satisfactorily done by the learned Trial Judge. It may be sufficient to say that the respondent's symptoms were, in their Lordships' judgment, consistent with the case which he made, and were by no means consistent only with the case sought to be made by the appellant.

In the result, their Lordships are of opinion that the respondent's theory of his disability, as supported by the medical evidence which he adduced, has not been displaced by the evidence adduced by the appellant. The former is clear, simple, and straightforward. The latter is speculative, theoretical, and unconvincing. In any event, their Lordships are clearly of opinion that, the respective theories having been carefully and dispassionately weighed by the learned Trial Judge, and a clear conclusion in fact having been reached by him, it would not be proper or safe, or in accordance with sound practice, that their Lordships should reverse the conclusion in fact at which he arrived. The appeal therefore, in the opinion of the Board, falls to be dismissed. The appellant must pay the costs of the appeal. Their Lordships will humbly advise His Majesty accordingly.

(34092) Wt. 8084—41 90 3/38 P. St. G. 338

In the Privy Council

ANTONIO DIAS CALDEIRA

v.

FREDERICK AUGUSTUS GRAY

DELIVERED BY LORD ALNESS

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1936