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No. 3 of 1958

55569

O N A P P E A L

FROM THE SUPREME COURT OF BERMUDA

B E T W E E N

JOHN WESLEY PHIPPS (Defendant) Appellant

and

10 WINSTON EVERARD EUGENE POWELL an
infant, by GEORGE THOMAS EVERARD
POWELL, his next friend (Plaintiff) Respondent

C A S E FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment of the Supreme Court of Bermuda (the Honourable Sir Allan Smith, Assistant Justice) given the 9th day of October, 1957.

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20 2. The action was brought by the Respondent as Plaintiff on the 4th day of February, 1957, in the Supreme Court of Bermuda to recover damages for personal injuries suffered by the Respondent as the result of the Respondent falling off the pillion-seat of a motor bicycle driven by George Thomas Everard Powell, the father of the Respondent (hereinafter referred to as "George Powell") on the 30th day of May, 1956, in the City of Hamilton in the Colony of Bermuda. The Respondent alleged that the said injuries were caused by the Appellant in that the Appellant negligently drove his motor car so as to cause George Powell to swerve violently, thereby causing the Respondent to fall from the said motor bicycle.

p.1

30 3. The principal questions involved in this appeal are

- (1) whether the Appellant drove negligently;
- (2) whether the damages suffered by the Respondent

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are too remote from any act or omission of the Appellant, by reason of the acts of George Powell immediately before the said fall, and are thereby not damages for which the Appellant is liable;

(3) whether the damages suffered by the Respondent were caused partly by the fault of the Respondent and are thereby damages for which the Appellant is liable only to the extent of a just proportion; and

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(4) whether the general damages awarded are excessive.

Exhibit B

4. The facts affecting the issue of negligence generally are as follows: the accident took place at the junction of Cedar Avenue and Angle Street in the City of Hamilton aforesaid. Immediately before the accident the Appellant was driving his motor car along Angle Street towards Cedar Avenue. When he reached a point near the said junction where he could see to his right into Cedar Avenue the Appellant stopped his car in Angle Street and looked to his right along Cedar Avenue. He saw George Powell and the Respondent on George Powell's motor bicycle approaching the junction. The Respondent then very slowly advanced his motor car to the edge of Cedar Avenue in order to be able to see to his left along Cedar Avenue. George Powell then drove his motor bicycle towards the Appellant's motor car, swerved behind it and eventually hit a wall in Angle Street. Immediately before the accident one or two vehicles of the type known as "motoms" were being driven along Cedar Avenue in the direction that George Powell was driving, were overtaken by George Powell and the Respondent on the motor bicycle, and thereupon passed safely in front of the Appellant's motor car while George Powell collided with the wall.

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5. The Respondent's account of the accident was as follows:

p.6 1.25

"We were coming into town along Cedar Avenue and on the way overtook two cyclists on auxiliary cycles. I think they were boys - young men. Overtook them somewhere opposite Mount St. Agnes School. Saw a car come up the first road coming from the left and stop at the 'Stop' sign. Car then pulled out into Cedar Avenue, but the car seemed to be moving sluggishly. I don't know which way the car intended to turn.

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"When the car started to move we were then about
"opposite the convent gate at the corner of
"Cedar Avenue and Laffan Street. At that time we
"had already passed the cyclists and way down
"Cedar Avenue there was a bus coming towards us.
"That was the only other traffic.

"Car came out into Cedar Avenue and appeared to
"stall with its back bumper about in line with
"sidewalk opposite St. Theresa's.

10 "Father braked and swerved into the street on the
"left from which the car had emerged."

6. George Powell's account of the accident was as follows:-

"It was close on seven when we were coming along p.13 1.6
"Cedar Ave. When I got opposite St. Agnes School
"I passed two boys on auxiliary cycles. I was
"behind them for a good while and when I got
"opposite the school I speeded up and passed them.
"As I got opposite Mount St. Agnes gate at corner
20 "of Cedar Avenue and Laffan Street I saw a car
"pull up at the Stop sign at the junction of
"Cedar Avenue and Angle Street.

"I thought the car was going to wait for me to
"pass but the car paused a bit and then came out
"slowly into Cedar Avenue and turned right. I
"braked suddenly and turned left to avoid hitting
"the car."

"When he stopped at Stop sign I was about 30 ft. p.14.1.21
"from him."

30 7. The Appellant's account of the accident was as follows:-

"On morning 30th May, 1956, I was going west p.17 1.25
"along Angle Street on the way to work. Due there
"at 7 a.m.

"Reached Stop sign at Cedar Avenue at approx. 3
"minutes to seven. Stopped at Stop sign and
"looked left and right. I noticed two auto-
"cyclists coming along Cedar Avenue from the north.
"Powell was behind the cyclists. Both bikes were
40 "then approximately opposite the cedar gate at the
"north end of the convent property.

"As I looked Powell passed the auxiliary bikes.

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"He appeared to be coming pretty fast.

"I then pulled ahead in line with the west edge
"of the sidewalk in Cedar Avenue and I didn't
"notice anything coming out of town.

"I now looked to the right and I noticed Powell
"coming pretty fast and he appeared to be
"coming directly at me and I then pulled out
"and crossed Cedar Avenue.

"The auxiliary cycle crossed in front of me
"before I pulled out. There were two on one
"auxiliary bike." 10

8. Mr. Justice Smith, after summarising the
evidence stated:-

p.31 1.17

"But I feel that the evidence of the Defendant
"that he had reached the other side of Cedar
"Avenue by the time he heard the crash of the
"autocycle against the wall corroborates the
"story of the father and the son that the car
"came out into Cedar Avenue and blocked their
"path as they approached it. 20

"Therefore, as between the autocycle and the car I
"feel bound to hold that the cause of the
"accident was the Defendant, who had ample
"warning of the approach of the Plaintiff's
"autocycle, which had the right of way over him,
"pulling out and obstructing his passage when the
"autocycle was so close that it would be
"exceedingly dangerous for the autocycle to
"attempt to swerve and pass in front of him, and
"difficult to swerve to his left and turn up
"Angle Street, thereby passing behind him. 30

"Mr. Pearman for the Defendant, submitted that
"the fact that the autocycle was exceeding the
"speed limit was prima facie evidence of
"negligence. That is quite correct. But the
"Defendant said that he first noticed the auto-
"cycle when it was near the north gate of the
"Mount St. Agnes property, that is, over 100
"yards away, and saw it overtake and pass the two
"Motoms. He therefore had ample opportunity of
"estimating the speed of the autocycle and
"deciding whether it was safe to attempt to
"cross in front of it. 40

"As I have already observed, the autocycle,

"though probably exceeding the legal speed limit,
"was not travelling at any extraordinary speed
"which might have deceived the Defendant, or
"caught him unawares, and I do not believe that
"it was the speed of the autocyte which caused
"the accident."

10 9. The Appellant contends that his action in moving
his motor car slowly a few feet towards Cedar Avenue
was, contrary to the finding of the learned Judge,
not negligent. George Powell had ample warning of
such movement and could have controlled or
manoeuvred his motor bicycle so as to pass in front
of the Appellant's motor car (as did the "motom" or
"motoms") or bringing it to a stop, or otherwise
avoid the accident. The uncontradicted evidence that
one or two other vehicles passed safely in front of
the Appellant's motor car at the time of the accident
shows that the Appellant's motor car was not
entering or obstructing Cedar Avenue in a dangerous
manner.

p.18 l.12
p.23 l.23
p.31 l.11

20 10. The facts affecting the question of remoteness
of damage are as follows: Immediately before George
Powell's motor bicycle hit the wall in Angle Street
and immediately before the Respondent was thrown to
the ground, George Powell applied the brakes of his
motor bicycle, disengaged the clutch, and then
allowed the clutch to re-engage while at the same
time racing the engine, thereby causing his motor
bicycle to jerk forward.

30 11. The evidence of the Respondent in respect of
these matters was as follows:-

"I believe father lost control for a second and
"the cycle jerked. When he braked there was one
"jerk and I fell forwards towards him and then
"there was another jerk as if the cycle
"accelerated again and I fell off backwards into
"the road."

p.7 l.14

40 "Father braked and then the bike jerked forward.
"I think that when he braked he declutched and
"then he lost control and put the clutch in
"again."

p.10 l.6

12. The evidence of George Powell in respect of
these matters was as follows:-

"When I braked and turned I took out my clutch and
"when I lost my balance I accidentally let the
"clutch in again and the bike shot ahead".

p.13 l.21

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- p.15 1.31 "When I braked I closed the throttle but not
"right down and took the clutch out. Let clutch
"go and it engaged again and that put cycle
"ahead again."
13. The evidence of one Sinclair O'Brien, an
independent bystander at the time of the accident,
in respect of such matters was as follows:
- p.24 1.22 "After passing the Motoms Powell slowed down
"slightly, say to about 28. He didn't appear to
"brake until about 2 ft before he hit the wall. 10
"I estimate he was doing about 25 or more when he
"hit the wall".
- p.25 1.5 "Powell appeared to hit the wall head on. Powell
"wasn't wobbling. He took a straight course at
"the wall. He was holding the handles and
"letting her go".
- p.32 1.12 14. The learned Judge adverted in his judgment to
the evidence of the re-engaging of the clutch and
acceleration by George Powell, but only for the
purpose of determining whether the Respondent was 20
riding dangerously.
15. The Appellant contends that if he was negligent
at all (which he denies) the acts of George Powell
in re-engaging the clutch and accelerating the
engine, between the time of the alleged negligent
act or acts of the Appellant and the time that the
Respondent fell to the ground, were acts entirely
unrelated to any acts or omissions of the Appellant
and were not caused by any such acts or omissions. 30
The Appellant therefore contends that any damage
suffered by the Respondent is too remote from any
act or omission of the Appellant to render the
Appellant liable to the Respondent for such damage.
16. The facts affecting the question of
contributory negligence are that at the time of the
accident the Respondent was not holding on to George
Powell.
17. The evidence of the Respondent in respect of
this matter was as follows:-
- p.8 i.33 "I was an experienced pillion rider". 40
- p.10 1.11 "I was not holding on to father. My hands were
"resting on my knees".
18. Three persons were called as expert witnesses

at the trial to give evidence on the question of the danger or absence of danger, in the practice of a pillion passenger on a motor bicycle not holding on to the driver. Leonard Charles Dempster, the Chief Official Examiner of the Transport Control Board of Bermuda and formerly an instructor in driving motor bicycles in the British Army, gave evidence as follows:-

10 "In my opinion a pillion rider not holding on does p.26 1.26
 "not have as good a chance of overcoming a hazard
 "as one who is holding on. I think a person
 "who rides pillion without holding on is taking
 "a risk, but in my experience a good many people
 "do that here. It is probably all right if all
 "goes smoothly but if something happens the
 "pillion rider hasn't the proper control. If
 "pillion rider had been holding on he probably
 "would not have been jerked off when the bike
 "started forward suddenly".

20 Leroy Maxwell Clarke, a Sergeant in the Traffic
 Section of the Bermuda Police Force gave evidence
 as follows:

 "An experienced pillion rider in my opinion does p.28 1.11
 "not need to hold on. I would advise a beginner
 "to hold on to the driver as by holding on he is
 "more secure ... If the pillion rider holds on he
 "is less likely to fall off".

Roderick Young, a dealer in motor bicycles, gave
evidence as follows:-

30 "Putting hands on knees helps to stabilise the p.29 1.5
 "pillion rider. Not my practice to hold on to
 "the driver. It gives a false sense of security
 "to the pillion rider and the driver as one then
 "relies more on force than on balance."

19. Mr. Justice Smith, after summarising the evidence
of Dempster, Clarke and Young, stated as follows:-

40 "In this case the autocyple was travelling along p.33 1.5
 "a main road with only slight curves in it and
 "with gentle gradients and a smooth surface, and
 "there was little traffic and few people about in
 "the street at the time. The Plaintiff was an
 "experienced pillion rider and was sitting in his
 "normal position. The speed of the cycle,
 "although probably above the legal speed limit,
 "was nothing out of the ordinary, and although one

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"can never be quite sure that no emergencies
"will ever arise under such conditions, I find
"myself unable to say that the Plaintiff was
"riding carelessly and I must therefore hold
"the Defendant liable as the cause of the
"accident and responsible for the damage that
"resulted from it".

20. The Appellant contends that, contrary to the finding of the learned Judge, the Respondent was riding carelessly in that he was not holding on to George Powell, and that by reason of such careless riding the damages suffered by the Respondent were caused in part by the Respondent himself. The Appellant contends that if he was negligent at all (which he denies) the learned Judge ought to have apportioned liability in accordance with the Bermuda Law Reform (Liability in Tort) Act, 1951, Section 3(1) of which provides as follows:

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"Where any person suffers damage as the result
"partly of his own fault and partly of the fault
"of any other person or persons, a claim in
"respect of that damage shall not be defeated by
"reason of the fault of the person suffering the
"damage, but the amount of damages recoverable
"in respect thereof shall be reduced to such
"extent as the Court thinks just and equitable
"having regard to the claimant's share in the
"responsibility for the damage

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21. Medical evidence of the permanent damage suffered by the Respondent was given by David Spanton Ashdown, a Registered Medical Practitioner, who stated as follows:-

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p.11 1.25

"Nerve paralysis of bladder system still exists
"and I expect it to be permanent, and will be a
"permanent disability and a possible danger to
"his health.

"Vertebrae have healed but with deformity and
"this prevents him doing heavy manual work. This
"is also likely to be permanent and the sequel of
"the bone injury is probable arthritis with
"further probable disability. Doctors can't do
"anything more for him except to guard against
"subsequent results.

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"He also has anaesthesia of buttocks and is a
"possible cause of further incidental injury.
"He will always have to wear a bag at night."

"Postman's work suitable for him but he shouldn't lift heavy weights.

p.12 l.8

"He would not be advised to revert to mason's work".

22. Mr. Justice Smith awarded the Plaintiff £6,000 general damages. The learned Judge said of the Respondent:-

10 "It is also not disputed that the results of his injuries have incapacitated him from carrying on his former work as a skilled mason's labourer, at about £15 a week; and he has had to take up light work as a postman, losing thereby income of approximately £4 a week. The doctor's evidence makes it quite clear that the damage done to the Plaintiff's spine and bladder will affect him for the rest of his life. In addition to the loss of earning capacity the Plaintiff will suffer considerable inconvenience and discomfort and his activities will be restricted. For the first few weeks, or possibly a month, after the injury he also suffered considerable pain.

p.33 l.22

20 "It is very difficult to turn these items of damage and discomfort into pounds, shillings and pence, but in the nett result I award £562.14. 0 special damages and £6,000 general damages, and costs."

30 The learned Judge failed to take into account the Respondent's evidence that his earnings in his present work would increase. The Respondent's evidence in this respect was as follows:-

"I can't do much stooping and I am a postman again at £45 a month. I am at the bottom of the scale and if I stay on I will receive increments from time to time....."

p.8 l.14

In his Reasons for Judgment the learned Judge stated:-

40 ".....it was the assessment of the general damages that caused me some difficulty and I finally made my assessment of £2000 as representing pain, suffering, discomfort and general disability plus risk of further illness and shortening of life consequent on the serious and permanent injury to the spine and bladder, and £4000 as representing loss of earning capacity of approximately £200 a year."

p.34 l.17

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The Appellant contends that in all the circumstances, and in particular by reason of the fact that the Respondent's loss of earning capacity will be diminished by the increments he will receive, the general damages awarded to the Respondent are excessive.

p.37

23. On the 27th day of January, 1958, the Supreme Court of Bermuda ordered that final leave to appeal to Her Majesty in Council be granted.

24. The Appellant submits that the Judgment of the Supreme Court of Bermuda should be reversed and the action dismissed or that the said Judgment should be varied for the following among other

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R E A S O N S

1. Because there was no negligence on the part of the Appellant
2. Because the damage suffered by the Respondent was caused solely by the negligence of George Powell.
3. Because the said damage was too remote from any act or omission of the Appellant to render the Appellant liable in law.
4. Because the said damage was caused partly by the negligence of the Respondent.
5. Because the general damages awarded to the Respondent are excessive.

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FRANK SOSKICE

PAUL SIEGHART

No. 3 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF BERMUDA

B E T W E E N

JOHN WESLEY PHIPPS (Defendant) Appellant

- and -

WINSTON EVERARD EUGENE POWELL an
infant; by GEORGE THOMAS EVERARD
POWELL, his next friend (Plaintiff)
Respondent

C A S E FOR THE APPELLANT

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