IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.4/84

1357

BETWEEN G.L. GLOVER
Appellant

A N D VICTOR BROWN ELECTRICAL (1977) LIMITED
First Respondent

A N D IAN JOY
Second Respondent

Hearing: 18 October 1984

Counsel: P.S. Rollo for Appellant
G. Wilson for Respondents

Judgment: 18 October 1984

---

ORAL JUDGMENT OF HOLLAND, J.

---

The appellant, who was the defendant in the Court below, was found negligent in causing property damage totalling just over $11,000 in proceedings brought against it by the first and second respondents in the District Court at Dunedin. The appeal is against the judgment. The appeal was out of time but the judgment was given shortly before the legal vacation, and an affidavit of explanation has been filed and counsel for the respondents has very properly not objected to leave being granted to hear the appeal. Had the argument of the appeal established that the judgment was in error I have no doubt that leave to appeal should have been granted.

The claim arose out of a motor accident when a vehicle operated by the appellant towing a trailer became detached from the trailer and the trailer went off the road causing damage to the respondents' property. The statement of claim alleged that the accident was caused by negligence on

behalf of the appellant in operating a defective trailer in that:

> "(a) It had a worn towing eye attachment;
> (b) It had a worn shackle plate.
> (c) It had a safety chain with one or more worn links."

It was then alleged that the separation of the towing vehicle and the trailer and the subsequent accident arose as a result of one or more of the above listed defects.

The issues before the District Court Judge were essentially ones of fact and of credibility in so far as it was necessary to assess the relative merits of the conflicting opinions of expert witnesses who had either examined the trailer and its parts and the coupling attachment or photographs thereof.

The District Court Judge in the course of reaching his conclusion referred, without naming the doctrine, to res ipsa loquitur. He said:

> "I take the view that prima facie a trailer will not come away from its towing vehicle if it is securely coupled. The fact of its coming apart therefore speaks for itself that there must either be a defect in the coupling mechanism or some carelessness in attaching the vehicles one to the other. There is no direct evidence as to how the vehicles parted company, nor any evidence that they were not properly secured in the first instance. There is evidence, however, that the coupling was worn and could lead the vehicles to part if they hit a bump. That then puts the responsibility on the defendant to show that the prima facie inference ought not to be drawn because there is some other explanation. Here the explanation is the failure of the stub axle as a result of impact, in this case impact with the edge of a recessed manhole in the road. But I have no evidence as to when or how that failure occurred."

He then goes on to reject part of the opinion evidence called on behalf of the appellant.

It was perhaps a pity that the respondents did not plead res ipsa loquitur, but this was clearly a case for the application of the doctrine. I am satisfied that res ipsa loquitur is not a rule of law but is a rule of evidence and it was so applied by the District Court Judge, although in the end it did not play a very material part in the conclusions which he reached because he recognised that the issues before him were essentially preferring or rejecting one or other of the theories advanced by the experts. The law, however, is in my view correctly stated by F.B. Adams J. in Attorney General v J.M. Heywood & Co. Ltd (1955) N.Z.L.R. 1055, expressly approved by Shorland J. on appeal in (1956) N.Z.L.R. 668, not disapproved by Barrowclough C.J., although disapproved by Gresson J. In so far as the disapproval of Gresson J. was concerned it was clearly obiter dicta and minority.

Mr Rollo has recognised the difficulties in his path on appeal in endeavouring to set aside a judgment where the issue is one essentially of credibility. Such an appellant faces a difficult task. Although of course a right of appeal is given on fact and the appeal is legally a rehearing, nevertheless the onus is clearly on the appellant to establish that the judgment appealed against was wrong. Mr Rollo has submitted with great care, and a good deal of preparation, that there are good reasons for rejecting the evidence of Mr Johnson, the expert called for the respondents, and preferring the evidence of the experts called for the appellant. He has had to acknowledge that some of that submission has arisen following the evidence and has given rise to submissions which were not put by way of challenge to the expert at the hearing, and they are now submitted on

the basis of what he has said in this Court, that common sense requires rejection of the evidence. I am not satisfied that common sense requires that rejection, and indeed it obviously did not strike the common sense of counsel at the time because had it done so one would have felt that the opposing theory or the criticism would have been put more forcefully and directly to the witness.

There is one point which concerns me. Mr Rollo has submitted that at the conclusion of the evidence he wished to make submissions to the District Court Judge as to why his expert witnesses should be preferred to those called on behalf of the respondent. He says that he was not permitted by the District Court Judge to make the address. Rule 203 of the District Courts Rules 1948 covers the situation. It says:-

> "Where both parties appear at the hearing of any action or matter the (Judge) shall decide which party shall have the right to begin or to reply, and as to the order and number of addresses by counsel; but, unless the (Judge) otherwise directs at the hearing, the following shall be the order, of proceedings: The defendant shall be asked if the case is defended. If undefended, judgment may, with the consent of defendant, be entered up accordingly. If the defendant does not so consent, the action shall be dealt with as if the defendant had not appeared. If defended, the plaintiff (or his counsel) shall state his case, and adduce evidence; the defendant (or his counsel) shall state his case and adduce evidence, and also sum up the evidence, and then the plaintiff may reply on the whole case. If the defendant at the close of the plaintiff's case states his intention not to adduce evidence, the plaintiff shall sum up his evidence, and the defendant shall reply generally. Where a case not merely answering the case of the plaintiff is set up by the defendant and evidence is adduced in support thereof, the plaintiff may adduce rebutting evidence and shall postpone his general reply until he has called such rebutting evidence and the defendant has replied on his new evidence."

Mr Rollo submits that if the rule is not to apply because the Judge has decided otherwise that decision must be made prior to the commencement of the hearing. I see no reason why the rule should be interpreted so narrowly. It is clear that the rule contemplates that after a defended hearing counsel for the defendant should be permitted to sum up the evidence, but I am equally satisfied that the rule permits the Judge to decide that such an address is unnecessary. It is not common practice in the District Court for counsel to address the District Court Judge at the conclusion of the evidence on the facts. There are good reasons for that based essentially on expediency. Where as here, however, the amount involved is almost of the maximum level of jurisdiction of the District Court Judge, and more importantly the factual issues involved are of a technical nature where there is a clear conflict between qualified expert witnesses, a Judge will usually be helped by an address of counsel. I am not satisfied that in refusing to hear counsel in this case the Judge has caused any injustice. It is unfortunate, however, that this was not a case where he was going to give an immediate decision. He reserved his decision and it was not delivered for three months.

I had originally been so troubled about the matter that although on reading the evidence I was not satisfied that the judgment should be reversed, I nevertheless felt it might be necessary to ensure that justice was seen to be done to allow the appeal and direct a rehearing. I have carefully read through the evidence. I am satisfied that counsel for the appellant did not have a right to address the Judge and having read through the evidence with great care I am satisfied that no injustice occurred because he was unable to do so.

Notwithstanding the very persistent and eloquent submissions that have been made by Mr Rollo, he has failed to persuade me that considering all the evidence, which I have done with the greatest care, the District Court Judge was not entitled to prefer the evidence of Mr Johnson, the witness of the appellant, and to reject the evidence of the witnesses for the defendant. In this regard I am sure he was to some extent influenced by the lack of calling of evidence by the defendant driver of the vehicle which could have removed some imponderables and made the dependence on theory less important than it became. Everything has been said on behalf of the appellant that can possibly be said, but in the end I am not satisfied that the decision imposed by the District Court Judge was wrong and I accordingly dismiss the appeal. The appellant shall pay the respondent costs of $150 and disbursements in respect of the appeal.

A D Holland J.