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COURT OF APPEAL (UK) — CIVIL DIVISION

FOOKES v SLAYTOR

Stamp, Orr LJJ and Sir David Cairns

9 June 1978 — (1979) 1 All ER 137; [1978] 1 WLR 1293

NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – APPORTIONMENT OF LIABILITY – JURISDICTION – DEFENCE OF CONTRIBUTORY NEGLIGENCE NOT PLEADED – WHETHER COURT CAN APPORTION LIABILITY IN ABSENCE OF SUCH A PLEA.

On a dark night a motor vehicle driven by the plaintiff ran into the rear of an unlighted articulated vehicle parked by the roadside. As a result the plaintiff sustained personal injuries. He brought an action for damages against the driver of the articulated vehicle, claiming that he had been negligent. The defendant filed no defence even though ordered to do so by the Court, and was accordingly debarred from defending the action. He was given notice of the date and time of the hearing of the action but did not attend. The Judge found that the plaintiff was one-third to blame for the accident and reduced the damages accordingly. The plaintiff appealed contending that the judge was not entitled to do so because contributory negligence had not been pleaded.

HELD: The defence of contributory negligence was only available if it was pleaded. It followed that in the absence of a pleading by the defendant of contributory negligence, the judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff. Accordingly the appeal would be allowed and the plaintiff awarded the full amount of the damages.

SIR DAVID CAIRNS: This is an appeal from a judgment of His Honour Judge McDonnell given in Lambeth County Court on 27th June 1977. It was a judgment delivered in an action arising out of a collision between two motor vehicles. The plaintiff the driver of one of the vehicles, had suffered personal injuries. He claimed damages for negligence and the judge awarded damages in the sum of £398.66 with the appropriate costs. He had found that the full amount which would be required to compensate the plaintiff for his suffering and his special damage would be the sum of £598.00 but he went on to find that the plaintiff was guilty of negligence which contributed to the accident and therefore reduced the damages by one third. The plaintiff appeals, contending that the judge had no jurisdiction to make that reduction in the damages.

The circumstances were these. The accident took place on 21st November 1974. Driving a motor vehicle in a London street, the plaintiff came into collision with the rear of the trailer of an articulated vehicle which was parked by the side of the road. It was during the hours of darkness, the weather was bad and the articulated vehicle was unlighted.

The plaintiff commenced his action against the driver and the owners of the articulated vehicle. The owners filed a defence alleging that the driver of their vehicle was not acting as their servant or agent at the time. The driver filed no defence. The plaintiff then issued notice of discontinuance against the owners. At that stage the driver had not delivered a defence. An application was made to the registrar for an order for the delivery of a defence by him within a stated time and the registrar ordered that he should deliver a defence within seven days and if he failed to do so he should be debarred from defending. He did not deliver any defence.

He was therefore debarred from defending. He was given notice of the date and time of the hearing in the county court but he did not attend. The plaintiff gave evidence describing the accident as well as he could, regard to the fact that he suffered from retrograde amnesia, and further gave evidence of the nature of his injuries. That evidence was supported by a doctor's report. It was contended by counsel, who appeared in that court for the plaintiff and has appeared for him in this court, that in those circumstances the judge was not entitled to reduce the damages on the grounds of contributory negligence because no such matter was in issue, the defendant having delivered no defence and having been debarred from defending. The judge did not accept that contention. There is no indication in his judgment as to the view he took about it. It is implied that he rejected it because he simply said:

> "I reach the conclusion that the plaintiff must have been contributorily negligent and that the blame for the accident should be apportioned as to one third to the plaintiff and two thirds to the defendant."

There appears to be no direct English authority on the question of whether in the absence of a pleading of contributory negligence the court has jurisdiction to make a finding that there was negligence on the part of the plaintiff. Contributory negligence is dealt with, so far as the statute is concerned, in the *Law Reform (Contributory Negligence) Act* 1945, s1(1), which provides:

> "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 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 ..."

That leaves open the question of whether the court can only make a finding of contributory negligence if there is a plea to that effect. It appears to me that, with all respect to Judge McDonnell, it was not right in this case to treat the matter as if there were a plea of contributory negligence before the court. That seems to me to be the rule in relation to procedure. The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at the trial. It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be given to establish negligence on the part of the defendant, but circumstances are reasonably conceivable in which it might be.

In my view, this appeal should succeed and the Judgment should be amended by increasing the amount of damages to £598 with the appropriate costs.

STAMP LJ: I entirely agree with what Sir David Cairns and Orr LJ have said. I find that the language of the sheriff-substitute is as applicable to the instant case as it was to that case, and convincing. The action here, like the action there, was not an action for damages resulting from the negligence by both parties, but an action for damages resulting from negligence of the defendant. There was no allegation that the plaintiff had been negligent. In my view it was wrong for the learned judge to make a finding against him of negligence. I would also sympathise with the judge who, of course, did not have the advantages we have had of having the authorities referred to. I would allow this appeal.
