

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 201 OF 2001

Reported
CILK 2004-5
N 5
S-04-04

BETWEEN: CHRISTOPHER IAN PANTON BY HIS GUARDIAN
PRENTICE EDDLESTON PANTON PLAINTIFF

AND: EUSEBIO SEYMOUR DEFENDANT

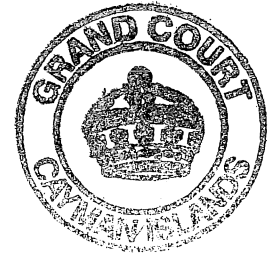
Appearances:

Mr. Ramon Alberga, Q.C., instructed by Lee Freeman of Ogier Boxalls for the Plaintiff

Dr. Claude Denbow instructed by Sara Collins-Francis of Walkers for the Defendant

Before: The Hon. Justice Levers

Heard: March 23 & 24, 2004



JUDGMENT

Levers, J.

By a consent order dated the 8th October 2003, it was ordered that there be a split trial of Cause No. 201 of 2001 with the first trial being on the issue as to whether or not the Plaintiff was contributory negligent and if so the percentage of blame if any that should be attached to him. That application now comes before me.

The Agreed Facts

At or around 4 p.m. Sunday 22nd of November 1999 the Defendant Eusebio Seymour and the Plaintiff Christopher Panton drove in the Defendant's mother's four door Toyota

Camry motorcar to the East End to watch the car races at High Rock. Prior to going there, earlier in the afternoon they had on the Defendant's admission been smoking marijuana. At around 7 p.m. they all drove together to the Eastern Star Bar and Restaurant with the Defendant driving, Jerry Anderson in the front left hand side passenger seat and the Plaintiff Christopher Panton in the rear back. There they played dominoes, drank alcohol and socialized until sometime after midnight.

Sometime after midnight they left the Eastern Star Bar. They were sitting in the same position as previously in the car when they drove away. The Defendant states that he must have dosed off, lost control of the vehicle and ran off the side of the road in the vicinity of Reef Point Bar and Restaurant. After the accident the vehicle flipped onto its offside and was stationary in that position. The Defendant had to crawl over Jerry Anderson's seat and out the same window.

The Plaintiff was badly injured and was bleeding. An ambulance arrived and conveyed the Plaintiff to George Town Hospital. The breathalyser reading in relation to the Defendant was 0.163 alcohol and the blood taken from the Plaintiff at the hospital at 5.15 a.m. indicated two readings namely 118.217 and 127.312 alcohol.

The Defendant was charged with driving while intoxicated and dangerous driving. He pleaded guilty to those charges. The Defendant admits liability but states that this admission should be qualified as he contends that the sum of damages if any found due to

the Plaintiff should be reduced by the Plaintiff's negligent failure to take care of himself for the following reasons:

- 1) That the Plaintiff's level of intoxication on the night in question was such as to deprive him of his capacity to appreciate that it was dangerous to travel as a passenger in a car driven by the Defendant.
- 2) That the Plaintiff as a reasonable person should have known that the Defendant had consumed alcohol in such a quantity as to impair him in his driving to the extent that it was dangerous for the Defendant to drive.
- 3) That ganja had been smoked early in the day and that this would have had a material effect on the Defendant's driving or upon, the Plaintiff's decision to accept a ride in the Defendant's car.
- 4) If the Plaintiff is held to be guilty of contributory negligence the amount that the damages should be reduced by would be between 20% and 50%.

In response Mr. Ramon Alberga Q.C. on behalf of the Plaintiff submits as follows:

That the burden of proof rests on the Defendant to prove on a balance of probabilities and that the Defendant will have to establish that:

- 1) That the Plaintiff knew that the Defendant Seymour had consumed alcohol in such quantity that his capacity to drive safely would thereby be reduced.
- 2) That the dangerous character of the Defendant's driving did come about as a result of the intoxicated condition of the Defendant.
- 3) That the Plaintiff by virtue of the quantity of alcohol that he consumed deprived himself of the capacity to appreciate that there would be a danger in travelling as a passenger driven by the Defendant Eusebio Seymour.
- 4) He further submits that in relation to the question of whether the Defendant has discharged the burden of proof, the court would have to determine *inter alia*:
 - (a) What was precisely the knowledge that the Plaintiff had as to the amount of drinks that had been consumed by the Defendant Eusebio Seymour?
 - (b) What exactly was the behaviour of the Defendant Eusebio Seymour during the time that he was at the Eastern Star Bar?
 - (c) What impression did he create on onlookers?

(d) How did the Plaintiff conduct himself during the course of the time spent at The Eastern Star Bar and Restaurant?

(e) How was the Plaintiff perceived by onlookers?

He submits that these are critical relevant matters on which the court would have to focus its attention in order to make its final determination as to contributory negligence.

The Evidence

In support of its case the Defense called the Defendant and a forensic pathologist. The statement of the Defendant was taken as evidence in chief and he was subjected to cross-examination. The Defendant was clear that he had smoked marijuana early that afternoon. What he said in evidence was that two sticks of marijuana were passed around but he cannot vouch for exactly how many puffs were taken by the Plaintiff. The important aspect of his evidence for purposes of this application is that he confirms that they went to the Eastern Star Bar and Restaurant where he had approximately ten drinks. The Defendant's evidence as to the quantity drunk is a guesstimate, but it is confirmed by the forensic pathologist. The Defendant also confirms that the Plaintiff and he consumed approximately the same amount of drinks and that they were drinking together during the course of the evening. The Defendant also states that these drinking evenings were a fairly common feature. Although not stated in any previous statements, in cross-examination, he admits that food was in fact consumed during the course of the evening and that initially he

stated that he believed that the accident was caused by excessive speed. He also however confirms that he had no difficulty in finding the car that evening, and had no difficulty in putting on his seatbelts. He describes his eyes as normal, his speech coherent and not slurred. He says he did not experience any difficulty communicating nor did he have any problems walking, and that he did not lose his balance or stagger. He further says that he did not feel sleepy; he did not have any nauseous feelings or sickness. In fact, he says, he won some dominoes games and he had no difficulty in seeing the dominoes. No one he says suggested that he was drunk and no one advised him that he should not drive. He confirms also that the Plaintiff was not impaired in any way or disorientated nor did he have any problems communicating.

The second witness was the expert pathologist who confirmed that the alcohol level in both the Defendant and the Plaintiff was well over the legal limit. His evidence was that the consumption of that quantity of alcohol would have certain effects on the driver of a vehicle – observable effects and non-observable effects. The observable effects are self-evident and in cross-examination those possible effects were put to the Defendant who denied that he had any. The non-observable effects were that:

- 1) Mr. Seymour would have decreased reaction time, that his response to factors in his environment would have been delayed, and
- 2) That Mr. Seymour's ability to see objects clearly would have been diminished, and further that

- 3) Mr. Seymour's ability to see objects that came into his periphery would have been diminished,
- 4) Mr. Seymour's ability to move and perform physical tasks would have been diminished.

The expert also goes on to describe the effects of marijuana use. For purposes of this application in order to assess the combined effect of marijuana and alcohol on Mr. Panton it is my view that I would need some positive evidence as to exactly how much was smoked by Mr. Panton. The evidence in this regard is not sufficient to enable me to decide whether Mr. Panton was adversely affected. In those circumstances I will not take the smoking of marijuana on that afternoon into account.

The Law

Contributory Negligence is a typical expression of law used to describe a special defense available to a negligent Defendant, namely, failure on the part of a Plaintiff to exercise sufficient care for his own safety when such failure cannot be excused under any well-recognized rule of law.

The burden of proving Contributory Negligence is on the Defendant. Lord Ellenborough C.J. in *Butterfield and Forrester* [1809] 103 E.R. 926 stated when delivering the classic

judgment which may be regarded as the legal course of the doctrine of Contributory

Negligence:

“A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another’s using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff”.

The principle is that if the Plaintiff had by his own negligent conduct caused or assisted to cause the injury of which he complained, he could not recover in full. Dr. Denbow for the Defendant relies heavily on the case of *Owens v. Brimmell* [1976] 3 All E.R. 705. He submits that the case is practically on all fours with this particular case. The case establishes that where two friends have been drinking together and have consumed a substantial amount of alcohol in each other’s company then the Court should be prepared to infer that the person who is to be the passenger in the vehicle to be driven home would have known as a reasonable person that it would be dangerous to take the lift home. The case he submits established that a person could be found contributory negligent: -

- (a) If he travelled as a passenger with the driver whom he knew had consumed alcohol in such a quantity as to impair to a dangerous extent the driver’s capacity to drive safely or if knowing that he was going to be a passenger in the driver’s car later, he accompanied the driver on a bout of drinking which as well as diminishing the driver’s capacity to drive safely also had the effect of depriving the passenger of his own capacity to appreciate the danger.

He urges that on the evidence in this case the Plaintiff knew that the Defendant had consumed alcohol in such a quantity as to impair to a dangerous extent the Defendant's capacity to drive safely. Dr. Denbow submits that the test is an objective one and that the court can draw certain inferences from the evidence laid before it.

Mr. Alberga, on the other hand, submits that knowledge is peculiar to the individual and that if there were no overt signs of drunkenness then the court cannot infer that the Plaintiff knew that the Defendant was so drunk that he could not drive safely.

In my view it is insufficient proof to lead evidence that the Defendant's alcohol level was over the legal limit. There must be more. The Defendant has to lead evidence that will enable the court to come to the conclusion that the Plaintiff knew that the Defendant was impaired to a dangerous extent and could not drive safely. Knowledge can be imputed from a certain set of facts.

I have no doubt in my mind that alcohol contributed or was the cause of this accident. The exact reasons for the accident or why it occurred is unclear. Whether it was through speed or the fact that the Defendant dozed off at the wheel, I find that the alcohol was the fundamental cause of the accident.

Mr. Alberga relies on *Malone v. Rowan* [1984] 3 All E.R. 402 and the case of *Booth v. White* (18th November 2003). In *Malone v. Rowan* (supra) he submits that the Court held

that it had no direct evidence of the deceased's knowledge of what the Defendant had consumed, nor did it have any evidence of the state of mind of the deceased and whether he ever appreciated or was reckless as to any risks that were being run. He relies on this case in support of his contention that there is no evidence in this case that Panton knew the Defendant was drunk. In other words there were no observable effects of drink on the Defendant. In the case of *Booth v. White* (supra) the court came to a finding on the particular facts of the case but stated: -

“the law requires the passenger to make an assessment of the driver when deciding in the interest of his own safety he should have a lift”.

The question in this case is in the absence of observable effects manifesting themselves, can knowledge be attributable to the Plaintiff that the Defendant had consumed so much alcohol that he was unfit to drive safely. As I have stated previously, consumption over the legal limit is insufficient for a finding of knowledge to be arrived at. In the absence of direct evidence as to knowledge, can the court infer that the Plaintiff knew that the consumption of alcohol would make it dangerous to drive in the Defendant's car? The fact that evenings such as this have been spent by both parties on a fairly frequent basis does not to my mind assist the court on this point. In any event, there is no evidence before me, as to any details of who drove on those previous occasions. It is not only a question of did the Plaintiff have knowledge that it was unsafe to drive in the Defendant's car but ought he to have had knowledge that it was unsafe to drive in the Defendant's car? The law requires the passenger to make an assessment of the driver's condition.

The Plaintiff and the Defendant were drinking together; the Court can infer that they were each aware of the fact that substantial drinks were consumed. The Plaintiff is a driver, and in this day and age, it can be justifiably inferred that any driver must be aware of the dangers of drinking and driving. The very law that limits consumption of liquor to enable a person to drive legally must put the passenger (Plaintiff) on notice. It cannot be said that this particular Plaintiff could not have known that there was danger in being driven by the Defendant who together with the Plaintiff had consumed substantial alcohol during the course of the evening.

On the facts of this particular case, I hold that the Plaintiff was contributory negligent. I wish to stress that the question of knowledge of the Defendant's condition is peculiar to the facts of every case and it cannot be said that because a man was drunk and a passenger permitted himself to be driven by a drunken driver the passenger is automatically guilty of contributory negligence. The Defendant must establish knowledge by leading sufficient evidence to enable the Court to come to a finding on a balance of probability. The Plaintiff is guilty of contributory negligence if he ought reasonably to have foreseen that he might be hurt, by his action.

I now have to decide by what percentage the damages to be awarded to the Plaintiff should be reduced by reason of the Plaintiff's alleged knowledge of the impairment of the Defendant through drink: In view of the lack of observable effects, I do not find that the

Plaintiff's action was blatantly reckless. I therefore hold that damages should be reduced by 20%.

Costs of this application to the Defendant to be agreed or taxed.

Dated this 5th day of April, 2004



Levers, J.
Judge of the Grand Court

