8-12-00

IN CHAMBERS

N THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 429 OF 1995

BETWEEN:	CINDGY M.D BANKS DURK M. BANKS	PLAINTIFFS
AND:	ROY C. PARSONS & CICO RENT-A-CAR SYSTEM LTD.	DEFENDANTS

CAUSE 182 OF 1995

	PARSONS V BANKS	PLAINTIFF
	AND BANKS	DEFENDANTS

Appearances:
Mr. Howard Roberts of Bruce Campbell & Co. for the plaintiffs in Cause 429/95 and for the defendants in Cause 182/95.
Mr. Ramon Alberga QC instructed by Mrs. Linda DaCosta of Myers & Alberga for the first defendant in Cause 429/95 and for the plaintiffs in Cause 182/95.

Coram: Hon Chief Justice Anthony Smellie

RULING

These are an application and cross-application in respect of the pleadings in the captioned Causes.

In Cause 429 of 1995 the plaintiffs seek leave to amend their statement of claim to include averments in respect of the conviction of the first defendant Parsons for the offence of refusing to give a blood specimen to be tested for blood alcohol levels.

In that action the plaintiffs seek to recover damages for personal injury and loss sustained in a motor vehicle collision in which the first plaintiff was a driver and the defendant Parsons the opposing driver.

As well as being convicted for refusing, the defendant Parsons was also convicted for careless driving arising from that collision but that conviction was quashed on appeal.

Parsons opposes the plaintiff's application for leave to aver in Cause 429/95 the fact of his conviction for refusing.

In Cause 182/95 in which he sues for damages, Parsons also seeks orders to strike out certain aspects of the Banks' defence.

I am here primarily concerned with the plaintiffs Banks' application for leave to amend in Cause 429/95. Depending on the outcome of that application, everything else will follow.

Background

On Tuesday 6th July 1993 the collision occurred on the West Bay Road, Grand Cayman between a Honda motor car driven by plaintiff Cindgy Banks and a Daihatsu van driven by defendant Parsons.

The vehicles were being driven in opposite directions; the Banks Honda car towards George Town and the Parsons Daihatsu van towards West Bay.

It is undisputed that after the collision the vehicles ended up as depicted on a diagram drawn and presented by the police: the Daihatsu completely off the west Bay Road unto a side road leading to the beach on its (the south side) of the West Bay Road. The Honda was found straddling the center line of the West Bay Road at ninety-degrees

with its front towards the side road on which the Daihatsu ended up and its rear to its (the north side) of the West Bay Road.

There was a concentration of debris from the collision of the two vehicles on the south side (the Daihatsu's) of the West Bay Road.

The real issue is on whose side of the roadway did the collision take place. That issue will define the negligence in the actions. The Banks say that the Daihatsu driven by Parsons towards West Bay suddenly and unexpectedly came across the center line of the roadway and struck their vehicle whilst it was proceeding on its correct lane towards George Town.

Parsons' case is the opposite: that the Honda being driven by Cindgy Banks towards George Town came across the center line and struck his vehicle whilst he was driving towards West Bay.

Notwithstanding that at the trial an expert testified that the collision - by reference to the physical evidence at the scene - could not have happened in the manner asserted by the Banks, the learned Magistrate accepted their version and convicted Parsons for careless driving. He was also then convicted for the offence of refusing a blood specimen after being required by the police to submit to giving one. As already indicated, his conviction for careless driving was quashed on appeal but the conviction for refusing stands. This is the conviction which the Banks now seek leave to amend their statement of claim to plead.

The basis, according to Mr. Roberts, is that a Civil Court at trial is entitled to draw the inference that the reason why any individual (here Parsons) would fail or refuse to

provide a specimen of blood, is that it would show him to have been driving whilst intoxicated. The further inference to be drawn in this case would be that as a result of that intoxication, the defendant Parsons was probably at fault in crossing over into the Banks' lane.

Mr. Robert also submitted that once the averment is allowed, if Parsons does not wish for the Court to draw these inferences, then he will have an opportunity to explain himself if he chooses to give evidence at the trial. This is notwithstanding the obvious leap in logic from the fact of conviction for refusing to the inferences to be drawn from it.

Accordingly, it is Mr. Roberts' further submission that *any conviction* may be pleaded, but it is up to the trial judge to accord such weight to it at trial as he thinks fit.

Thus it is apparent that the basis upon which Mr. Roberts would seek to aver the conviction for refusing is that it would serve, at least prima facie, to reverse the onus of proof at the trial. It would create a legal and evidential onus against which Parsons will have an opportunity to explain himself if he so chooses at the trial.

Mr. Alberga submits that this is impermissible. That as the offence of refusing a blood specimen implies no element of negligence as to the manner of Parson's driving, the conviction cannot be relevant and can only be prejudicial to the issues at the civil trial. As such it is irrelevant and vexatious and an abuse of process to allow it to be averred. The risks of prejudice are all the more pronounced having regard to the acquittal on the charge of careless driving following from the state of the physical evidence at the scene. Parsons' explanation for refusing was that he had been injured in the collision and had been hospitalised. When approached there by the police, he felt very much the victim, having in his mind done nothing wrong, and so he refused. That explanation was no

proper defence to the criminal offence of refusing, as the learned Magistrate found, and so his conviction followed. It perhaps, however, serves to demonstrate why there might be no direct logical or relevant nexus between a conviction for refusing and a claim of careless or negligent driving.

The matter turns upon what the law contemplates where in Section 39 of the Evidence Law (1995 Revision), it speaks of proof of a conviction in civil proceedings "where to do is relevant to any issue in those proceedings -----."

The historical context of section 39 (1) and (2) must be borne in mind. Section 39 (1) and (2) are in terms identical to section 11(1) and (2) of the English Civil Evidence Act 1968. Prior to the enactment of that Act, the common law determined that a conviction was not admissible in evidence in civil proceedings: see Hollington v Hewthorne & Co Ltd. [1943] 2 All. E R. 35 and Stupple v Royal Insurance Co Ltd [1970] 3 All. E.R 230 at 234 letter d.

I can therefore properly only allow the conviction to be pleaded if it meets the requirements of the Evidence Law and can be admitted in evidence for the purposes contemplated by it.

I set out here the provisions of section 39 (1) and (2) before continuing:

> "39 (1) In civil proceedings, the fact that a person has been convicted of an offence before any Court in the Islands is, subject to subsection (3) admissible in evidence *for the purpose of proving where to do so is relevant to any issue in those proceedings that he committed the offence*, whether he was convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil

proceedings, but no conviction other than a subsisting one is admissible in evidence by virtue of this section.

(2) In civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by any court in the Islands-

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person was convicted, is admissible in evidence for that purpose."

The effect of admitting a conviction in evidence in a civil action, is to shift the legal burden of proof from the party who would otherwise have to prove the elements of the offence to make good his claim, to the party who had been convicted. When that burden shifts, the party convicted must prove on a balance of probabilities, that he was innocent of the offence and, unless he discharges that burden, must be treated for all relevant purposes of the civil action as having committed the offence for which he was convicted. The respondent discharges the burden if he adduces evidence which causes the judge in the civil trial to come to a different view of the allegations than that taken at the criminal trial. See Stupple v Royal Insurance Co. Ltd. Supra (at 236 c- h and 238 j).

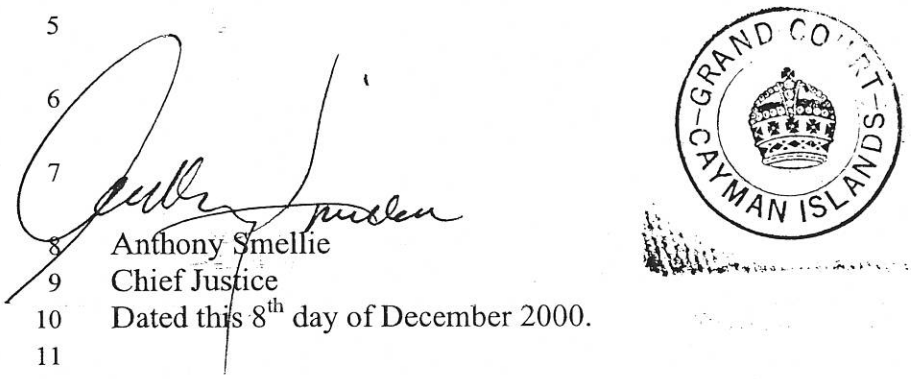
Thus, the effect of proof of the conviction is to raise the presumption that the respondent committed the act relevant to proof of liability against him in the civil trial but, on a balance of probabilities; this is a presumption which can be rebutted. See also Woods v Francis 1986 CILR 207 (per Georges JA at 228, line 22 – page 20 line 30).

What then would be the presumption here which could properly arise from the proof of the conviction for refusing, as to the liability of the defendant Parsons in the civil trial? This question is really another way of putting the test of relevance. The answer remains the same: no logical presumption arises. The offence is the refusal itself. It required no proof of conduct or omission one way or another pointing to incapacity or negligence in the operation of the vehicle such as would make evidence of the conviction anything but prejudicial. Thus, evidence of conviction could give rise only to conjecture of incapacity or negligence which were not elements involved in the offence of refusing.

The legislative policy behind the statute (section 72 (2) of the Traffic Law 1999 Revision) mandates that the offence is the refusal itself of a lawful request, absent any exceptional circumstances pointing to reasonable excuse for refusing. See Jackson v Regina 1996 CILR 338.

I conclude that the offence of refusing a blood specimen is not one the conviction for which is itself relevant to any issue in these proceedings and so the application for leave

to amend the Statement of Claim to aver it is refused. In the circumstances of this case the conviction is not one coming within the contemplation of section 39 of the Evidence Law.



Anthony Smellie
Chief Justice
Dated this 8th day of December 2000.