BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 217 of2002

BETWEEN:

RECO BROOMES (by his mother and next friend ARLENE BROOMES) (Plaintiff)

AND
BRIAN GIBBONS (1st Defendant)

ROSCO GRAHAM

(2ndDefendant)

Before the Honourable Mr. Justice CarlislePayne, High Court Judge.
2003: October 23
November 5, 6, 7

Mr. Deighton Rawlins for the Plaintiff
Mr.Gregory P. B. Nicholls for the Defendants

[1] The Plaintiff then aged 12,was injured by the propeller of a speed boat owned by the 1stDefendant and driven by the 2nd Defendant on 12th July,2000.

[2] I find that the Plaintiffhad just got off a banana tied to the boat. I also find that the boat was not in gear when the Plaintiff got off thebanana.

[3] Paragraph 3 of the AmendedStatement of Claim is as follows:

"On or about the 12thJuly, 2000, the Plaintiff was bathing in beach behind Cobblers Cove Hotel, RoadView, St. Peter, when the Second Defendant so negligently drove, managed orcontrolled the said speed boat carrying a banana that as he spun the boat to gofurther into the sea causing the rope which holds the banana to the boat towrap around the Plaintiff's feet throwing him onto the boat's propellerresulting in injury, loss and damage to the Plaintiff."

[4] In his evidence thePlaintiff denied that there was any such contact with the rope.

[5] Mr. Nicholls contends thatthis is a radical departure from the case as pleaded and that the plaintiff'scase must therefore fail. He citesWaghorn v George Wimpey & Co. 1970, 1 AER 474 and Lloyds v West Midlands GasBoard 1971, 2 AER 1240.

[6] In Waghorn the plaintiff'scase as presented in the pleadings was that he fell on a dangerous slope, whichthe defendant should have taken precautions to prevent. The plaintiff said in his evidence howeverthat the incident took place at a different location. In the result, the pleaded allegations ofnegligence were found to be irrelevant.

[7] InLloyd v West Midlands Gas Board the Plaintiff was injured when there was anexplosion in an outhouse where there was a gas meter. The plaintiff's case as pleaded was that thedefendant was negligent in disregarding constant complaints and failings torectify gas leaks. The trial judge foundthat there were no complaints, and no perceptible gas leaks, but he nonethelessgave judgment for the plaintiff because he inferred that the explosion was dueto defective installations or maintenance. This judgment was set aside on appeal because defective installations ormaintenance had not been pleaded, and on the basis that the defendant had thereforebeen confronted with an entirely different case.

[8] Inthe case before me, was the plaintiff's case as presented at the trial aradical departure from the case as pleaded, so as to disintitle the plaintiffto succeed? I think not.

[9] Theessence of the plaintiff's case as pleaded and as presented in evidence is thatthe defendant failed to keep a proper look out, failed to exercise due care andattention, and drove without regard for the safety of the plaintiff, who was inthe water. I accept the evidence of thePlaintiff that the boat was turning and the rear came towards him.

[10] Ialso accept the evidence of Kerry-ann Broomes:-

“...I saw mybrother on the boat and it was too crowded and I told him to get off and he gotoff. The boat was then stationary. There was a banana attached to the boat. When he got off the boat he was at first inthe sea. I left the jetty and went intothe sea. When I was in the sea the boatturn quick and I was about 30 yards away and I saw my brother and I heard himshout for someone, then he went to stand up and then just went back under thewater where the boat turn quickly, it happen real fast, and then my brother tryto stand up.”

[12] Ishould address one other point made by Mr. Nicholls, namely the absence of anypleading that the plaintiff was a visitor on the banana. In light of my finding, on the evidence ofKerryann Broomes, that the plaintiff was already in the water for some moments,it does not seem to me that he can be considered to be a visitor at thematerial time. In any event, it would inthe circumstances make no significant difference to the defendant’s duty ofcare to the plaintiff.

[13] Therewill be judgment for the plaintiff. Special damages are agreed in the sum of $ 902.76.

[14] Asto general damages, the plaintiff suffered severed tendons to the right ankleand a fracture of the oscalcis. The painwas intense and severe. He wasdischarged from hospital after 6 days. In a medical report dated 27th July, 2001 his prognosis wassaid to be excellent with no further orthopaedic treatment required. The site of the wound however continues tohypertrophy. The Court saw the site ofthe injury and there is still a noticeable scar. Keloids continue to growdespite injections. He is still afraidto do sports like football, cricket and track and field. He said that his foot still feels too weakfor these sports.

[15] Counselhave referred me to a number of cases which I have considered. I award general damages in the sum of $28,000.

[16] Thespecial damages will bear interest at 4 percent per annum from 7thFebruary, 2002, the day of the writ, until today.

[17] Interestis awarded on all damages at 8 percent per annum hereafter until payment.

[18] Costsfor the plaintiff to be agreed or taxed.

[19] Stayof Execution for 6 weeks.

Carlisle Payne

Judge of theHigh Court.