

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C-260 OF 1988

BETWEEN	ANTHONY CUNNINGHAM	PLAINTIFF
A N D	AARON SMITH	DEFENDANT

Mr. Ainsworth Campbell and Mr. Alvin Mundell for plaintiff.

Mrs. Pamela Benka-Coker - instructed by Mr. Christopher Samuda of Messrs. Piper and Samuda for defendant.

JANUARY 30, 31, FEBRUARY 1
AND JULY 25, 1991.

COOKE, J.

The first question for the Court to answer is as to the location where the plaintiff sustained his injuries. The plaintiff Anthony Cunningham swore that it was at a bus stop along the Constant Spring Road while the defendant contended that it was not at a bus stop but in the second lane of the Constant Spring Road as the minibus proceeded towards Constant Spring. Cunningham complains that as he was coming off the minibus the driver, Vincent Walters - the servant or agent of the defendant - negligently drove off the minibus from the bus stop. Walters denied this. He said he never stopped at the bus stop as asserted - that the plaintiff received his injuries as a result of his coming off a moving minibus.

When Cunningham gave evidence it appeared to be a simple and straightforward account. With the minimum of economy he stated that he took the minibus at parade, which is in downtown Kingston. When the minibus was traversing the Sandy Gully bridge he rang the bell of the minibus and it stopped at a bus stop. He continued, "When the bus stop - right in front of a Shell gas station, some passengers came out before me. I don't remember how many - me is last person come off bus. When reach at step to come off stop, bus drive off. I fell on the ground - when fell, back rear wheel ran over right leg - bus drove away - at same time a man at the bus stop run down bus". Thereafter he was taken to the hospital. The impression that the Court had at this stage was that the plaintiff was an ordinary fee paying passenger - but this was not so. Through cross-examination it was revealed

that at the time of the incident he was employed to the defendant as a welder and was having a free ride. It was further revealed that on the night prior to the day of the incident the plaintiff had worked all night at the defendant's home and had boarded the said minibus as it set off for Lawrence Tavern on the first leg of its day's journeys. But back to the plaintiff's account as it was amplified under cross-examination. He said before he rang the bell he got up from his seat and at this point he was beside the exit door. About three to four people came off the bus before him. In passing it seems a bit curious that since he was beside the door he did not come off first - but to continue - he further said that at the time he was coming off the bus, he did not know the whereabouts of the conductor. The plaintiff's evidence as regards the position of the minibus and himself at the time of his fall is as follows:

"Bus 1½ feet from sidewalk. I fell on my side.
I fell on the road. Fell on asphalted road,
all my body fell on the road. I fell on my
left side. When I fell my head was near the
sidewalk."

The distance, according to the plaintiff, of the last rung of the step of the bus to the roadway was some two feet. Bearing in mind the distances given, albeit approximate, I find it difficult to conceive a fall in these circumstances which would not have propelled a least part of the plaintiff's body on to the sidewalk. Cunningham maintains that Walters drove off the bus without any indication from the conductor that he should so do.

Partick Peart gave evidence on behalf of the plaintiff. He said he was at the bus stop. He saw passengers come off the bus, the last of whom was Cunningham. As Cunningham was coming off the bus, it moved off.

Cunningham fell and the back wheel of the bus ran over his leg. He shouted to the driver of the bus, "Driver, driver, stop the bus, you no see you kill a man in the road here". The bus then went across the lights which was some three chains away and stopped. At this stage, the conductor and driver came out of the bus and proceeded to the fallen plaintiff. He, Peart accompanied the plaintiff to the hospital where he provided him with his name and address. Under cross-examination Peart said he never knew the plaintiff before that day

and never saw him again until the Saturday before the trial date. His version as regards the position of the plaintiff after the fall is different from that of the plaintiff. He said that "part of man fell on road and part fell on pavement". He differs also from the plaintiff in two respects pertaining to the conductor. He said that the conductor was on the step of the bus and gave the go-ahead - "drive driver". It will be recalled that the plaintiff stated that no signal was given to the driver to proceed and that he did not know the location of the conductor when he fell. From the evidence of Peart it is an inescapable inference that the conductor would have been on the step of the bus at the time the plaintiff fell.

Vincent Walters' evidence is that on the day of the incident, 17th April, 1988, he went to his employer's premises at 16 Primrose Road at about 5:00 a.m. to begin his tour of duty for that day. When he set off for Lawrence Tavern, the plaintiff was on the minibus. The plaintiff soon fell asleep and he was captive to his slumber all the way even as the bus reached parade where it was parked to secure its passengers. The minibus then set off for Lawrence Tavern. When the bus was approaching the stop lights at Dunrobin Road and Constant Spring Road the light showed red. He is now in the vicinity of the bus stop and the Shell gas station to which mention has already been made. He stops on a lane of traffic - for the red light was on. At this stage, he says he was about 1½ chains from this stop light. Then he began to proceed at which point he heard the conductor say 'you must have some respect'. He then heard a rattling on the exit door and the scream of a female passenger. He looked through the left hand rear mirror and there was "a figure the left hand lane turn across the road". He then stops and as traffic began to pile up behind him he moved the minibus across the lights and parked. Before this, the conductor and one other person had come off the bus and put the injured plaintiff on the sidewalk. The inference which the Court is being asked to draw is that the plaintiff, despite the words of remonstrance from the conductor, was heedless thereof - opened the door and in trying to come off the minibus - fell. He flatly contradicted the account of the plaintiff and to buttress his position stated

that his minibus was a 'Lawrence Tavern' bus. Transport regulations only permitted him to stop at specified stops. The bus stop in question was not one such stop.

Under cross-examination Walters denied he was stopping at various 'unauthorised' stops on his journey from parade to Constant Spring. He said that the traffic at the material time was moving slowly - about 10 m.p.h. It is a fact that the plaintiff was on the minibus when it left from Primrose Avenue for Lawrence Tavern. The plaintiff denies he fell asleep. He said he got off the bus and went to pay a call to his girlfriend and took another bus for downtown. When it was suggested to the plaintiff that he fell asleep on the bus, it was as if he was in a quandary as to what to say. After a very long pause, he denied that he fell asleep.

In Jamaica, there is a popular perception that minibus drivers do not observe the normal courtesies expected of those who are in control of motor vehicles on the road. Nor do they obey the regulations laid down for their designated route. As regards the latter, the driver Walters said his route was known as S.R. 5A. and that each minibus which plied that route had designated bus stops of which prospective commuters were all well aware, and the bus stop in question was not one of them. The central thrust of the cross-examination of Walters was that on that day he was making many unauthorised stops along the way and that he did stop at the bus stop as alleged by the plaintiff. Walters denied that he made any such stops. At this point it is to be noted that the plaintiff in his evidence never adverted to these unauthorised stops being made. This was his evidence:

"Took bus at parade - many others took bus - bus leave downtown, drove on to Constant Spring, through Half Way Tree. When reach Constant Spring Road I ring the bus."

Further in cross-examination Walters said that the line of traffic in which he was proceeding was moving slowly, estimated at 10 m.p.h. He was not asked anything pertaining to traffic on his left lane. There is therefore no evidence as to the presence or absence of traffic in the lane in which, according to Walters' evidence, the plaintiff fell.

I accept as a fact that the plaintiff was on the minibus when it left from Primrose Avenue to Lawrence Tavern. The plaintiff denies he fell asleep on the minibus. He said he got off the bus and went to pay a call to his girlfriend and took another bus downtown. When it was suggested to him that he fell asleep it was as if he was in a quandary and it seemed an interminably long time before he answered in the negative. I have no difficulty in accepting that he fell asleep - he had been working all night. Did he take another bus to go downtown? I think not. I accept that he went downtown on the same minibus and he did not pay any amorous call that morning. When asked why he had gone downtown that morning, his was the vague answer that "he went for something". The plaintiff has not created an impression of candour. He has not been forthright as to how he happened to be on the defendant's minibus. Why is he being untruthful about being asleep on the minibus? Is it because he believed this would weaken his case? It would not necessarily do so - and I bear in mind that witnesses sometimes lie to buttress what is without more a strong case on their behalf. Or is it that from the very start the plaintiff has embarked on a course of deception. In resolving this issue, I cast my mind back to the beginning of the case when the plaintiff conveyed the impression that he was a complete stranger to the defendant - and this was not so. Why is there this concealment? Then there are the discrepancies between the plaintiff and the witness called on his behalf - discrepancies to which I have already pointed out. It is my view that within the context of this case these discrepancies are material because they go to the root of what was taking place when the accident occurred. It was central to the plaintiff's case that the driver left the bus stop without heeding any go ahead signal and that the conductor was nowhere to be seen. But the witness Peart contradicts this. To him the conductor was on the step and gave the signal to go. Then both witnesses do not agree as to where the plaintiff fell. These discrepancies do not inspire confidence in the plaintiff's cause.

So now I return to the question posed at the beginning of this judgment. Where did the accident take place? I reject the contention of the plaintiff that he fell at the bus stop. On the balance of the preponderance of probability

the plaintiff fails as I prefer the account given by the defendant. The plaintiff has not discharged the burden placed on him. Accordingly, there will be judgment for the defendant with costs to be agreed or taxed.