A.D.C.A.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103/98

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**HOWARD DOURKA**	**APPELLANT**
A N D	**ROY DOURKA**	**APPELLANT**
A N D	**CURLINE DYER**	**FIRST RESPONDENT**
A N D	**PETER POTTINGER**	**SECOND RESPONDENT**
A N D	**GEORGE ROBINSON**	**THIRD RESPONDENT**

Carol Davis and Christopher Dunkley, instructed by Davis, Bennett and Beecher-Bravo for the appellants

Howard Malcolm, instructed by Henry and Malcolm, for the first respondent

Christopher Samuda, instructed by Brown, Llewellyn and Walters, for the second and third respondents

November 9, 10, 1999 and April 14, 2000

PANTON, J.A.:

On November 10, 1999, we dismissed this appeal and promised to put in writing our reasons for so doing. This we now do.

At the end of a trial that lasted five days, the attested copy of the judgment shows that Smith, J. had decided as follows:

> "1. Judgment in favour of the plaintiff against the 3rd and 4th defendants as follows:
>
> 2. **a.** Special damages in the sum of $48,090 by agreement, with interest at six percent (6%) per annum from December 9, 1993, to July 30, 1998;
>
> **b.** General damages in the sum of one million, two hundred and twenty-five thousand dollars ($1,225,000.00). Of that amount, by agreement, one hundred and seventy-five thousand dollars ($175,000.00) is for future medical expenses, the cost of prosthesis, one hundred and fifty thousand (sic) ($150,000.00) is for loss of future income, and nine hundred thousand dollars ($900,000.00) is for pain, suffering and loss of amenities, with interest thereon on the sum of $900,000.00 at the rate of six percent (6%) per annum from December 28, 1995 to July 30, 1998.
>
> 3. Costs to be agreed or taxed."

In addition, it was recorded at the time of the delivery of the oral judgment that judgment had also been entered for the first and second defendants against the plaintiff with "costs to the first and second defendants against the plaintiff, but to be borne by the third and fourth defendants."

In this appeal, the third and fourth defendants are the appellants while the plaintiff and the first and second defendants are the respondents.

The Case Presented by the Parties

The plaintiff/respondent's claim was for negligence against all the other parties involved in this appeal. She was a passenger in a bus owned by the third respondent and driven by the second respondent. This bus was involved in an accident with a truck on

Spanish Town Road, St. Andrew, in the vicinity of Kingston Industrial Agency. The truck was owned by the appellant Roy Dourka and driven by the appellant Howard Dourka.

The road on which the accident occurred is a dual carriage-way with an island in the middle. This island has a concrete curb with iron rails about 2ft. 6in. high. In the island are located exits leading from one side of the thoroughfare to the other.

The plaintiff/respondent's case was that she was sitting by a window in the rear section of the bus on the left, with the open rear door just in front of her. The bus was in the right lane at a point where there were three lanes. The truck which was in the middle lane, without any signal or warning, turned to its right in order to make a "U" turn to enter an exit so as to get to the other side of the carriage-way. Although the bus swerved to its right, a collision occurred resulting in damage to the left front fender and door of the bus, and to the right front door, wheel and fender of the truck. The plaintiff/respondent, who was thrown from the bus, was seriously injured.

The appellants agreed that the truck which was taking waste material to the Riverton City dump was in the middle lane. According to them, it was the bus that collided with the right rear and side of the truck, damaging the truck's door, fender, step, indicator and mirror. There was a denial of the "U" turn manoeuvre.

The Judge's Findings

The learned trial judge who visited the locus in quo at the invitation of the respondents' attorney-at-law, and without any objection from the appellants, found that it was more probable that the truck swerved to its right in the path of the bus and thereby caused the collision. The appellants' version, he said, did not account for the damage

that had been done to the left rear section of the bus. He found that the evidence of the respondent Pottinger (the driver of the bus) was the only evidence that accounted for the extensive damage to the left rear section of the bus. The learned judge found that:

> "The truck was in the middle lane and without indicating it turned to its right in the path of the bus. The driver of the bus swerved to his right to avoid a collision. This was to no avail. The vehicles collided - the left front of (the) bus hit the right front door of (the) truck. The swerving to the right caused the back of the bus to swing to the left crashing into the truck. The bus struck the rail of the island. The first defendant (Pottinger) was no longer in control. The bus went across the other side of the dual carriage-way and ended up in the premises of K.I.A. Limited."

In the face of these significant findings of fact the appellants argued that the judgment of the trial judge should be overturned, and judgment entered in their favour instead. Alternatively, they sought a new trial, a reduced award or an order for contribution from the plaintiff/respondent on the basis of contributory negligence.

THE GROUNDS OF APPEAL

The appellants complained in their amended grounds of appeal that the learned judge had "erred in law and in fact in awarding judgment to the plaintiff" and "against the second and third defendant" (Grounds 1 and 2). They particularised the other grounds of appeal thus:

> "**3.** The learned trial judge erred in that he improperly utilised the result of the view of the locus, and/or as follows:
>
> **(a)** The learned trial judge erred in that as a result of the view he introduced into the case new material which did not appear in the evidence before him.

(b) The learned trial judge erred in that he utilised material in the view which did not appear in the evidence before him for the purpose of rejecting the evidence of the 3rd defendant.

4. That the learned trial judge erred in finding that the 2nd defendant had already deposited a load of rubbish when there was no evidence before him which supported this view.

5. Having regard to the evidence, the learned trial judge erred in failing to properly consider the evidence of the speeding of the 1st defendant."

GROUND 3

The main thrust of this appeal was in respect of the visit to the locus in quo, and the alleged improper use made of that visit by the learned trial judge in arriving at his decision. Ground 3 therefore contains the substance of the appeal. For the appeal to have succeeded, the appellants would have had to succeed on this ground. They did not.

At the hearing below, during the closing address of the attorney-at-law for the respondents Pottinger and Robinson, an application was made by her for the judge to visit the locus in quo. The appellants' attorney-at-law indicated that he had no objection to the visit. The Court obliged. Although it may have seemed somewhat late for a visit to be made, it should be noted that it has been held that a view is permissible even after the conclusion of the summing-up in a criminal case: **R. v. Martin and Webb** (1872) L.R. 1 CCR 978. That being so, there can be no objection to a view during the closing addresses in a civil case. On their return to the courtroom, the attorneys-at-law made submissions based on what had been seen at the locus.

In commenting on the visit, the learned judge said:

> "I find the visit to the locus in quo very helpful in assisting the court to understand the evidence given. Without a visit the court would have been left with the impression that the accident happened at a point before one gets to the entrance to the Riverton City dump. In fact there are many entrances to the dump. Some of these entrances are located at points before one gets to the gap in the island where the collision took place and others are after this gap.
>
> The third defendant's (Mr. Dourka's) evidence that he had not actually reached the dump that afternoon cannot therefore be understood to mean that he had not yet reached any of the entrances to the dump. Indeed he had already passed some of the entrances. It follows therefore that the first defendant's (Mr. Pottinger's) evidence that the truck turned to the right "as if to make a U turn is not as improbable as Mr. Dunkley submitted."

Ms. Carol Davis, in her submissions before us, said that the view of the many entrances caused the judge to have arrived at a conclusion that he would not have made had he not gone to the scene. According to her, the judge had formed an impression before he made the visit; and he changed that impression after the visit. She complained that the judge never gave the appellants the opportunity to call any evidence in respect of the visit; and that the question of the entrances had dominated the judgment. Had there not been the impact of the entrances, she submitted, the judge may have determined the matter in another way. Accordingly, Ms. Davis urged us to order a new trial. In doing so, she relied heavily on two cases: **London General Omnibus Co. Ltd. v. Lavell** (1901) 1 Ch.135 and **Scott v Numurkah Corporation** (1954) 91 C.L.R. 300.

In the former case, after the opening of the plaintiff's case, the judge on his own motion "proposed that he should view two rival omnibuses of the plaintiffs and the defendant that were standing in the courtyard of the Royal Courts of Justice.

Thereupon, with the consent of the parties, his Lordship viewed the two omnibuses and on returning into Court stated that he was satisfied upon the evidence of his own eyesight alone, **without any further evidence,** that the defendant's omnibus was so painted and lettered on the side-panels as to be calculated to deceive the casual passenger." (p.135)

This was an action for deceit brought on the ground that a particular article used by the defendant was a colourable imitation of the plaintiff's. It was held that the conclusion of the judge, on the view by him of the two articles, that the defendant's article was calculated to deceive, was not sufficient by itself to support an injunction. There was need for independent evidence that there was at least a reasonable probability of deception.

The instant case before us is quite different, in that the judge had other evidence apart from the view.

In the latter case cited by Ms. Davis, a motion picture exhibitor had sued the municipality for nuisance. At the completion of the evidence, counsel for the defendant suggested to the trial judge that he should visit the town hall (the scene of the alleged nuisance) and witness a practical demonstration. The trial judge agreed. Counsel for the plaintiff did not acquiesce in the demonstration being regarded as part of the material before the court, nor did any consultation take place between counsel for the parties before the demonstration. No evidence was given after the demonstration that the noise heard by the trial judge was similar to that complained of.

It was held that whilst the trial judge was entitled to have a view of the locus, he had in fact gone further and witnessed an experiment or demonstration, a course which

should not have been followed except with the concurrence of both parties. The trial judge was at liberty to use the results of his view for the purpose of understanding the questions raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence and he was not at liberty to use conclusions formed or impressions gained as a result of the joint view and demonstration. A new trial was ordered.

Here, again, the instant case may be distinguished as Smith, J. did not put the result of the view in place of evidence. He used the visit to assist him in understanding the evidence that he accepted. Furthermore, there were no demonstrations conducted for his benefit.

In respect of the complaint that the judge did not afford the appellants the opportunity to call evidence in respect of the visit, it should be noted that the record of appeal does not show that any of the appellants or respondents made an application to call evidence. In the same manner that the parties had encouraged the judge to visit the scene during the addresses, they might have also sought to produce witnesses (if not yet called), or recall those already called. The judge cannot be faulted for not granting an application that was never made.

It is ironic that the appellants have complained as to the use made of the view by the judge considering that they themselves, through counsel who appeared below, had encouraged the judge to observe that the left turn from K.I.A. to the entrance to Riverton City was in accord with the evidence of the appellant Howard Dourka. They clearly wish to have their cake having already eaten it.

So far as the entrances are concerned, the appellants have laid too great a stress on the impact they had on the judgment. The entrances did not form the basis of the judgment. The real foundation of the judgment was the credibility of the respondent Pottinger. The learned trial judge was clearly impressed by this witness. That is the dominant feature of the judgment, not the entrances.

Having said that, however, we wish to point out that although it is in the judge's discretion whether he should visit a locus in quo or not, [see **R. v. Herman Williams** (1971) 12 J.L.R.541], it is desirable that:

> (a) there should be evidence to indicate that the locus at the time of the trial was substantially the same as at the time of the occurrence in issue;
>
> (b) witnesses who have given evidence at the trial should be called to indicate the positions and sites relevant to their evidence; and
>
> (c) the witnesses may be recalled for further questions to be put to them, on their return to the courtroom, in respect of the indications they made at the locus.

GROUND 4

This ground of appeal stems from a statement made by the learned trial judge as to a view that he had formed. This is what he said:

> "Having carefully considered the submissions of counsel and all the evidence including of course the photographs, I am firmly of the view that on a balance of probabilities the third defendant had already deposited the load of rubbish and was returning to Wherry Wharf."

It had been submitted on behalf of the respondents Pottinger and Robinson, that there was:

> "An entirely reasonable inference that the truck driver had already unloaded the truck...and was utilising that gap to head back to Wherry Wharf for his fourth trip which on his evidence he had to make that day."

It was clearly this submission that led to the formation and expression of the aforementioned view by the judge.

The appellants are correct when they say that there was no evidence that the load of rubbish had already been deposited by the driver of the truck. However, in the light of the relevant findings made by the judge, this expression must be seen as the offering of an explanation for the manoeuvre. In our view, the appellants cannot gain any mileage from this explanation as it does not in any way detract from the relevant findings in the case, that is, the findings as to the credibility of the respondent Pottinger, as well as the acceptance of the photographs of the physical damage to the vehicles. We think that the explanation offered by the judge was wholly unnecessary and irrelevant. Further, it does not advance the claim of the appellants. This ground also failed.

GROUND 5

The appellants complained that the learned trial judge had failed "to properly consider the evidence of the speeding of the first defendant". This complaint was unfounded. Firstly, it should be noted that the particulars of negligence alleged in respect of the first defendant did not include an allegation of speeding by him.

Secondly, the evidence of the plaintiff in cross-examination was to this effect. "I was happy with how the bus driver was driving the bus. The bus was not being driven too fast for me."

Thirdly, the evidence of the first defendant in examination-in-chief indicated that he was driving at a speed between twenty-five and thirty miles per hour. In cross-examination, he disagreed with a suggestion that he was driving faster than thirty miles per hour.

Fourthly, the appellant, Howard Dourka in his evidence at the trial said that he could not say that Pottinger (the bus driver) was speeding before the accident.

There was clearly no evidence of speed on the part of the bus driver. That being so, this ground of appeal was without merit.

In view of the failure of all the grounds of appeal, the appeal was dismissed, the judgment of the Court below affirmed and the appellants ordered to pay the costs of the respondents, such costs to be agreed or taxed.