JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/91

COR: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	JAMES MITCHELL	3RD DEFENDANT/APPELLANT
	AARON GORDON	4TH DEFENDANT/APPELLANT
A N D	LEVIENE MCKENZIE	1ST DEFENDANT/RESPONDENT
A N D	DORRELL GORDON	2ND DEFENDANT/RESPONDENT

David Muirhead, Q.C. & Arthur Williams for Appellants

Charles Piper & Christopher Samuda for Respondents

September 28 & October 21, 1992

WOLFE, J.A. (AG.)

Gary Simpson, a roofer, residing at Central Village in the parish of St. Catherine was, on the 3rd day of February, 1989 a passenger travelling in Encava Mini-bus lettered and numbered PP5425. He was seriously injured as a result of an accident between this bus and motor truck lettered and numbered CC-419J. Simpson commenced proceedings against the respective owners and drivers of these vehicles to recover damages for negligence arising out of the said collision. During the course of the trial the defendants consented to judgment being entered in favour of the plaintiff, leaving the issue of liability to be determined as between them.

Walker, J., found the appellants wholly to blame for the accident and entered judgment for the first and second defendants against the plaintiff and the third and fourth defendants with costs to be agreed or taxed, such costs to be paid by the third and fourth defendants. This appeal is an endeavour to have that judgment set aside.

Essentially, the two issues which arose for determination were both questions of fact. Those two issues may simply be identified as:

(1) What was the cause of the accident?

(2) Who was to be blamed?

Any resolution of these two questions requires a thorough understanding of the evidence which was adduced in the court below.

This accident occurred on the northern carriage-way of the Spanish Town to Kingston Highway, more properly known as the Nelson Mandela Highway. This highway is a dual carriage-way. The northern section of the dual carriage-way accommodates traffic travelling from Spanish Town to Kingston. After leaving the Ferry Police Station, there are two minor roads on the left of the northern carriage-way which lead from nearby quarries. In the vicinity of the second road, there is a sign which reads "Trailer Crossing Here" and in the area of this sign there is a road which is directly opposite that leading from the second quarry and which connects the northern half of the Mandela Highway to the southern half. On leaving the Ferry Police Station, there is a slight right hand bend in the road. Each section of the highway takes two lanes of vehicles.

The plaintiff Gary Simpson, states on oath that he was a passenger on the mini-bus which was being driven by the second defendant/respondent along the northern section of the highway and proceeding from Spanish Town to Kingston. As the mini-bus travelled along in the right hand lane, a dumper truck emerged from the quarry on the left hand side of the road and drove right across the road into the path of the oncoming bus. The driver of the bus, in an effort to avoid the collision, applied his brakes but to no avail. Both vehicles collided. According to this witness, the collision took place on the connecting road. Under cross-examination, the witness is on record as saying that when he saw the dumper truck for the first time it was in the middle of the road and approximately

eighty feet away from the bus which was travelling at an estimated speed of 45 to 50 m.p.h.

Dorrell Gordon, the driver of the mini-bus narrates that he was driving along the northern section of the Mandela Highway and after leaving the Ferry Police Station, he negotiated a slight right hand bend in the road and proceeded to enter the right hand lane. A truck emerged from the road which leads to the first quarry, turned left and drove along the soft shoulder towards Kingston for a distance of 2 to 2½ chains. As the truck travelled along it suddenly turned right across the road without any indication or other warning. When this manoeuvre was executed, the bus was then about 1 to 1½ chains away from the truck and travelling at an estimated speed of 30 - 35 m.p.h. He tooted his horn, applied his brakes, swerved to his right where there was an embankment. His efforts were to no avail. The collision could not be averted. This collision, he said, took place on the main road in the right hand lane and before the truck had entered the connecting pathway. The left hand side of the bus collided with the right side of the truck at a point between the rear wheel and the front of the truck. The tailgate of the truck broke open and the material which was being conveyed in the truck was deposited on the main road. Both vehicles blocked the northern carriage-way. The driver released himself from the wreckage of the bus and spoke to the driver of the truck who was seated nearby. To quote him "I asked him if he never saw the bus coming. He said, he saw the bus but he believed that he could cross road before bus come down."

Elaine Farquharson, a passenger on the bus and who herself has commenced legal proceedings to recover damages for injuries sustained as a result of the collision, testified as to seeing the truck emerging from the quarry road and travelling along the soft s shoulder towards Kingston and then suddenly turn right across the road. A collision resulted between the bus and the truck "as the truck headed towards the open lot." She explained that the open lot to which she referred is the connecting path between the northern and southern halves of the highway. When the collision took place,

the front of the vehicle was on the connecting path.

Aaron Gordon, the truck driver, asserts that he drove from the road leading to the first quarry and on reaching the main road he turned left and drove along the soft shoulder towards Kingston to the point where there is the "Trailer Crossing Here" sign. There was plenty traffic on the road. He waited for approximately five to ten minutes with his right hand indicator flashing. Upon satisfying himself it was safe so to do, he set out to traverse the northern carriage-way intending to enter upon the southern section of the carriage-way via the connecting path. Having completed crossing the carriage-way and entering the connecting path, he felt an impact to the right side of the truck in the area of the right rear wheel. He denied that the road was blocked after the collision and he further denied that he had used the words attributed to him by the driver of the bus. He first became aware of the presence of the mini-bus on the highway after the impact, notwithstanding that as the truck remained stationary waiting to cross, he could see a distance of half mile towards Spanish Town. He was confronted with a statement which he had given to Mr. Trevor Myrie an accident investigator, and which he admitted was his statement, in which he is alleged to have said:

> "At the first time I took notice of the bus it was crossing the bridge which is situated above the Ferry Police Station when one faces Kingston direction."

Having been reminded of this statement, he maintained that what he had said during the trial was the truth.

It is on the basis of this evidence that Walker, J., had to resolve the issues as to what caused the accident and who was to be blamed. He found that the 4th defendant/appellant was not a credible witness. He concluded that the cause of the accident was due to the 4th defendant/appellant attempting to cross the northern section of the highway without stopping, at a speed of 5 m.p.h. when it was unsafe so to do and adjudged the 4th defendant/appellant to

be the sole cause of the accident.

Before us, Mr. Muirhead, Q.C. argued some eight grounds. The first five grounds may be summarised as a complaint that in adjudging the appellant solely to be blamed for the accident, the learned judge came to a finding which was unreasonable and against the weight of the evidence. The bases for the argument in support of these grounds were:

> 1. That the finding was premised on the conclusion that the accident had occurred on the main road when there was evidence from witnesses that the accident took place on the connecting path.

This argument ignores completely the fact that there was also evidence before the learned judge to the effect that the accident occurred on the main road. The driver of the bus testified that the accident occurred before the truck had entered the connecting path. Miss Farquharson's evidence, which is unappreciated by the submission, is that "the front of the truck was in a little road at the time," which would indicate that the greater portion of the truck would have been on the highway.

> 2. The finding disregarded the evidence that after the accident the traffic on both highways flowed freely and ignored the effect of the finding by the learned judge that the bus driver travelling in the right lane, stepped on his brakes and swerved to the right to avoid the collision.

Whether the road was blocked or not subsequent to the accident, or whether the driver stepped on his brakes and swerved right to avoid the collision, can be of no import. The question remains what was the cause of the accident. The learned judge accepted the evidence of the bus driver, the plaintiff and Miss Farquharson that the truck driver came across the main road from the soft shoulder without any indication that he intended so to do, and afforded the bus driver no opportunity of avoiding the collision. That was the manoeuvre which caused the collision. In the absence of any evidence that he was acting as an automaton, then clearly he must be adjudged negligent.

and solely to blame for the resultant collision, since in the circumstances, the other driver did nothing to contribute to the accident. Contrary to the view that the finding of the learned judge was against the weight of the evidence, we are satisfied that the findings arrived at by him were consonant with the evidence.. We therefore hold that there is no merit in any of these grounds.

Ground 6

This ground contends that the learned judge fell into error in failing to find the 2nd defendant/respondent negligent for the following reasons:

1. He ignored or failed to pay due regard to the warning sign "Trailer Crossing Here."

2. Having regard to the position of other vehicles on the highway, he failed to swerve to his left and/or take such other action and thereby avoid the collision; and

3.

3. having regard to the warning sign, he was negligent in driving at a speed of 45 - 50 m.p.h. in that area.

We will assume for purpose of argument that the speed of the bus driver exceeded the speed at which one would reasonably expect a vehicle to be driven in an area where a warning sign is sited, the question arises - Was that the effective cause of the accident? The answer must, of course, be in the negative. Had the truck continued along the soft shoulder towards Kingston rather than suddenly turning across the road into the path of the uncoming vehicle, the accident would never have occurred, or alternatively, had the truck waited until it was safe to traverse the carriage-way the accident would have been avoided. Failure to swerve left is in no way indicative of negligence. The evidence was that the driver swung right. He took such action as he thought best in the agony of the moment. For this, he could not properly be faulted.

Ground 7

In this ground complaint is made of the use made by the learned judge of the statement given by the 4th defendant/appellant to the private investigator and which was admitted into evidence as exhibit 2.

The appellants contend that the trial judge ought to have looked at the entire statement and use it to compare the consistency between the contents of the statement, exhibit 2, and the sworn testimony of the 4th defendant/appellant in assessing the credibility of the 4th defendant/appellant. This approach is clearly wrong. In the first place, it is not the entire statement that is admitted into evidence. It is only that portion of the statement which is inconsistent with the evidence given during the trial, and so proved, which can and shall be admitted into evidence. Hence the term, previous inconsistent statement. Secondly, such parts of the statement as are consistent with the witness' testimony are not admissible and cannot be used to bolster his credit. Such an approach would amount to self-corroboration, unless there is a suggestion of recent fabrication.

Finally, ground 8 joins issue with the learned judge's approach to certain cases cited before him. We indicated at the outset of this judgment that the issues which arose for determination were factual and Mr. Muirhead, Q.C. conceded this. However, in an effort to establish contributory negligence in the respondents he referred to **Humphrey & Anor. v. Leigh & Anor.** [1971] R.T.R. p. 363 and sought to distinguish it from the instant case by citing and relying on **Garston Warehousing Co. Ltd. v. O F Smart (Liverpool) Ltd.** [1973] R.T.R. p. 373. In Humphrey's case Russell, L.J. at p. 365 said:

> "What is the situation when somebody driving dangerously comes straight out of one of the side roads, and straight across the main road at a speed of something of the order of 20 miles an hour, emerging from the buildings? It was argued by counsel on behalf of the first defendant

> "that there was a failure of due care on the part of the second defendant, although he was driving in a manner which witnesses as well as he described as in effect the universal way of driving up Gipsy Hill; that is to say, you keep your eyes open but you drive along at a steady pace. The question is whether it is to be said that you are negligent if you do that, or whether it can be propounded as a matter of law that in such circumstances a person in the position of the second defendant has a duty, if he is to avoid a charge of negligence every time he comes across a a side road of this kind leading out of Gipsy Hill, to take his foot off the accelerator and poise his foot over the brake, being prepared to stop short of the crossing. In so far as anything to that effect was said by Ormerod, L.J. in **Williams v. Fullerton** (1961) 105 SJ 280, it was, so far as one can judge from the report, an obiter dictum, and I personally would not follow it at all; otherwise, you would approach a situation in which no traffic moves about the country at any reasonable speed whatsoever." [Emphasis supplied]

Walker, J., found the facts of the instant case sufficiently analogous to the Humphrey case and relied upon the dictum of Russell, L.J., cited above. Mr. Muirhead argued that the cases were not similar and that the judge ought not to have relied on Humphrey's case. He cited the observations of Cairns, L.J., in **Garston Warehouse Co. Ltd. v. O F Smart (Liverpool) Ltd.** (supra) commenting on **Humphrey & Anor. v. Leigh & Anor.** at p. 382:

> "Similarly in the case to which our attention was drawn, **Humphrey v. Lee** [1971] RTR 363 where, in a collision occurring between a car travelling at about 30 miles per hour along a main road and a car which emerged from a side road without stopping, and was driven straight across at 20 miles per hour, it was held that the driver of that car was wholly to blame and that there was no blame to be attributed to the driver on the main road. It appears from the leading judgment of Russell, L.J. in that case that it was sought to be argued that there, as a matter of law, it must be held that the driver in the main road was negligent because he had not paid attention to the possibility of somebody driving out from a side road. Russell, L.J. with the other members of the court agreeing, said that no such proposition of law could be laid down.

> "That is obviously right, but it would be quite wrong to seek to suggest that that case had established the proposition of law that any driver in a main road is entitled to drive at any speed which pays no regard to the presence of side roads or the possibility of vehicles emerging from a side road."

Having said all this Cairns, L.J. went on to point out that the circumstances in **Garston's** case were quite different from those in **Humphrey's** case. Both cases turned on the circumstances peculiar to each. Needless to say we agree with the approach taken in both cases and reiterate that in the circumstances of the instant case, the learned judge came to the correct decision.

For the reasons contained herein, we dismissed the appeal and affirmed the judgment of the Court below. We ordered that the costs of this appeal which are to be taxed if not agreed, be the respondents.