

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO.C.L 1994/T130

BETWEEN	TROPICAL TOURS LIMITED	PLAINTIFF
AND	TELFORD FRANCIS	1 ST DEFENDANT
AND	ONIEL FRANCIS	2 ND DEFENDANT

Mr. Ernest Smith instructed by Ernest Smith & Co for Plaintiff.

Mr. Ainsworth Campbell for Defendants.

Heard : November 14, 1996; November 18, 19, 1997; February 20, 1998

REASONS FOR JUDGMENT

HARRISON J.

On February 20, 1998 I awarded judgment for the Plaintiff in the sum of \$376,700.00 with interest thereon and costs to be taxed if not agreed. I had promised to put my reasons for judgment in writing so, I now seek to fulfill that promise.

Case for the Plaintiff

The plaintiff claimed against the defendants jointly and severally to recover damages for negligence for that on or about the 2nd day of October, 1993 along the Runaway Bay Main Road in the Parish of St. Ann, the second defendant, the servant and or agent of the first defendant so negligently operated and or controlled his motor truck as to cause same to collide with the plaintiff's motor bus, in consequence of which the plaintiff suffered loss, damage and incurred expenses. The following particulars of negligence were alleged :

"A. Failing to keep any or any proper look-out having regard to the condition of the road.

B. Driving at a speed that was excessive in the circumstances.

C. Failing to maintain sufficient or any control over the said motor vehicle so as to avoid colliding with the Plaintiff's motor vehicle.

D. Failure to slow down, swerve or otherwise manoeuvre, manage or control the said motor vehicle so as to avoid a collision with the Plaintiff's vehicle."

Daniel Marsh was called as a witness for the plaintiff. He testified that on the 2nd day of October, 1993 at about 6:00 p.m., he was the driver of the

plaintiff's motor bus. He left Ocho Rios sometime in the evening and was conveying tourists to the Club Caribbean Hotel in Runaway Bay. This hotel is located on the right as one proceeds towards Runaway Bay. When he was about two chains away from the entrance of Club Caribbean he turned on his right indicator and slowed down in order to turn right. He was then travelling on his left hand but had to stop because of on-coming traffic. He observed from his rear view mirror that two motor cars stopped behind him. When the oncoming vehicles passed, he commenced crossing. He then saw a truck overtaking the motor cars which had stopped behind him and shortly thereafter it slammed into his bus. He later found himself in hospital.

The truck had slammed into the back of the bus more to the right side and the damage ran along the right side up to the door. He denied that he turned suddenly across the road without giving any signal and maintained that he had stopped to allow oncoming vehicles to pass. Under cross-examination he said that the road was straight at the point of collision.

He was unable to say at what distance he had reached when he saw the truck approaching from behind but he recalled that he was moving before he saw it. He also said:

"The truck was behind the cars that were behind me. While going across the truck overtook the cars and came and hit me. That was the first time I was seeing truck."

On seeing the truck for the first time he estimated that it was between 30 - 40 ft away. He could see "a good way from the gate of Club Caribbean down in the direction of Ocho Rios" which stretched for a distance of approximately twenty (20) chains. About ½ minute after the oncoming vehicle passed he began to turn and no other vehicle was coming from the opposite direction. He could not say what was the distance the vehicles reached before he moved off but he was quite sure that the cars behind him were stationary when he commenced crossing.

Marsh had also testified that the vehicle directly behind him was a motor car but he corrected himself and said that it could have been a van. He also said that the truck which was coming behind the second car never stopped.

Counsel for the defendants put the following suggestions to the witness:

Suggestion: "....the collision began like this, you began to turn right and the van behind you hit into your left rear.

Answer: That is not true.

Suggestion: That the truck had to veer to its right to avoid crashing into car before it.

Answer: No.

Suggestion: That your sudden turning was the real cause of the accident.

Answer: No sir."

When he was re-examined he said, he saw the truck on the right hand side of the road overtaking the cars as he was going across. He was unable however, to say at what speed the truck was travelling but he knows that it was "coming fast".

Case for the Defendants

The defendants denied negligence and alleged in their defence and counter claim that it was by reason of the negligent driving of the plaintiff's motor vehicle that the first defendant's motor vehicle sustained extensive damages and that the defendants were put to expense and sustained loss. The particulars of negligence alleged against the plaintiff's driver were:

A. Turning suddenly to the right.

B. Turning right before the defendants' motor vehicle without giving any sign of his intention to do so.

C. Failing to have any or any proper regard for other users of the road including the second defendant.

D. Failing to see the defendants' motor vehicle.

E. Failing to observe traffic on the road.

The second defendant testified that he was the driver of the motor truck at the time of the collision. Whilst he was on his way towards Runaway Bay he came up behind three vehicles, namely, a bus, a van and a car. The bus was travelling ahead of the van and the car was behind the van. Then he said:

"I saw the bus make an immediate turn and the van hit in the left back.

The bus turn in direction to go to Club Caribbean. Club Caribbean is on right as you go along. The bus turn across the road. I was about three (3) chains from Club Caribbean then. The bus was less than ½ chain from Club Caribbean when it start to turn. As the bus turn across, I saw the van hit it in the left back. As the van hit the bus it turn across the road. Just before the van hit the bus, the bus was turning towards Club Caribbean gate.

When I saw what happened I stepped on my brakes and swerved to avoid hitting the car in the back. I swerve to the right. I elected to swerve to the right and not to the left as the car was in the way and a light post on the left. I collided in the right front of the bus. I touched by the door up by the column. After this the bus swerve back to the left. I went around and stop on the left.

The van had stopped for a while and then drive off. I did not get licence number for van as I went back to see what happen to the bus.....”

He maintained that he did not see the bus indicating to turn right. Neither did he see any vehicle going towards Ocho Rios direction nor did he see the driver of the bus stop in order to allow any vehicle to pass.

Under cross-examination he said he was about one chain away when the van collided in the left rear of the bus. He did not see the van attempting to overtake the bus and at that time he was travelling between 20 - 25 mph. The car was about ½ chain away from him when the van collided with the bus and he was then travelling behind the car. According to him, the car was less than ½ chain from the van at the time of its collision with the bus. In relation to the position of the vehicles at the time of impact he had this to say:

“ I collided with the bus on the right hand side of the road in the middle. I now say, bus was across the road in the middle. When the van hit the bus, the bus was turned towards Club Caribbean entrance. After I collide with the bus it swerve back to the left hand side of the road....”

He said he had actually stopped and was travelling at about 15 m.p.h when he hit the bus. This was his account of what transpired after he hit the bus:

“ When I hit the bus it was moving and actually coming back towards me. The right front of the bus was coming back towards me.”

When he was asked why he could not have stopped before the collision, he said this:

“ I was down too near to the car to stop so this is why I swerved to the right. I was not exactly $\frac{1}{2}$ chain away. I was about $\frac{1}{4}$ chain away when I realize that there was an accident.

.....

I swerved to the right but could not stop as I was too

near to accident between the bus and the van. I was about 20 ft from the bus when I swerved away from the car.”

He also said this:

“I saw when the van hit the bus. I believe I could go around the bus like the other small vehicles but as I go down to the back of the bus I realize I could not go through and I step on brakes and swerve to the right. I could not stop at the moment as I was carrying load, that is, utensils, box and pans. These things prevented me from stopping as I was too near the accident scene.....at that distance I could not stop. Rain was drizzling so surface of the road was damp.....”

Findings and application of the relevant law

There were no independent witnesses in the case so, I had to assess the evidence of both drivers in order to determine the issue of liability. Their demeanour came into focus and at the end of the day I was most impressed with Daniel Marsh. I accepted his version of the accident as I found him to be a credible, honest and truthful witness. Oniel Francis on the other hand, was far from being truthful. His account of the accident was most incredible and I had no choice but to reject his version of the accident.

It was my considered view, that the evidence which was presented,

raised four essential issues for my decision. Firstly, did the plaintiff's driver, who was at the head of the line of traffic, suddenly turn across the road in order to enter Club Caribbean, without first indicating to the traffic behind him that he was going to do so? Secondly, did vehicles stop behind the motor bus whilst it was crossing? Thirdly, did the defendant commence overtaking without regard for other traffic on that stretch of road? Fourthly, did a van collide into the rear of the bus due to its sudden turning?

The answer to these questions must be given in the awareness of the provisions of Sections 51 and 57 of the Road Traffic Act.

Section 51 enunciates the Rules of the road. A motor car overtaking other traffic shall be kept on the right or offside of such other traffic; the vehicle overtaken shall be kept to the near side of the road, and it shall be driven so as to allow the vehicle overtaking to pass; and shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic. It also enjoins that a motor vehicle shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead. The clear injunctions of Section 51 (1) are to be read in conjunction with Section 51 (2).

"Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident; and the breach by a driver of any motor vehicle of any of the provisions of this section shall not

exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

In any given case, it will be a question of fact whether the driving rules formulated in Section 51 were observed in whole or in part, and what are the consequences of such non-observance. The driver of each motor vehicle is therefore under a duty to exercise such care while he is driving so as to avoid an accident.

Having assessed the evidence, I do believe that there were vehicles travelling towards Ocho Rios shortly before the accident occurred, hence the driver of the bus was unable to make the right turn into the entrance of Club Caribbean Hotel. I also believed and accepted that he had turned on his right indicator and remained stationary on the left until the oncoming vehicles passed. I also accepted the bus driver's account that vehicles had stopped behind the bus whilst he was indicating to turn right and when it was safe to proceed he began crossing the roadway. It was at that moment the second defendant began overtaking vehicles on the stretch of road when it was definitely unreasonable and unsafe to do so. He then found himself in a dilemma and could not avoid colliding into the bus. In my view, it was an extremely dangerous manoeuvre on the part of the second defendant.

The evidence also demonstrated that the second defendant must have been travelling at an excessive speed to have caught up with the bus having regard to the distance he claimed he was from the van which he said had

collided into the bus. The extent of the damages to the bus (it was a total write-off) is a clear indication that there was a severe impact. The evidence also revealed that the driver of the bus was thrown from it after the impact so there could be no truth in what the second defendant said about travelling at about 15 m.p.h at the time of impact. It was my considered view also, that the plaintiff had established by evidence, the other particulars of negligence alleged.

I did not believe the second defendant when he told the court that a van travelling behind the bus had collided with the bus as the bus turned across the roadway. Neither did I believe that he had to swerve to the right in order to avoid colliding into its rear. He said he had to swerve to the right and not to the left as the car was in his way and there was a light pole on the left embankment. It was also his evidence that the van had hit the bus in the back section towards the left and that he had collided in the right front section of the bus in the vicinity of the door. According to him, the driver of the van stopped for a moment and then proceeded. But, there was uncontradicted evidence coming from Mr. Marsh that the truck had slammed into the back of the bus more to the right side, and there was damage running along the right side up to the door. There was no evidence that the bus had overturned or that another vehicle was involved in the collision. How was it then, that the damages to the right of the bus occurred? This was another factor which weighed heavily against the defendants and it demonstrated once more that the second defendant's story was indeed implausible.

Before closing, there is one matter which must be commented on. It

concerns the issue of overtaking by the second defendant. The statement of claim did not allege any act of overtaking by the second defendant but evidence of overtaking was given however, by Marsh when the plaintiff's case was presented. He said under cross-examination, that the truck was behind the cars and whilst he was going across, the truck driver overtook the cars and then hit him. The witness repeated this evidence of overtaking when he was re-examined and just before Counsel for the plaintiff closed his case, he applied to amend the statement of claim to plead the act of overtaking on the part of the defendant's driver. Counsel for the defendants objected to this application but the Court ruled in favour of the application to amend. In the Court's view, this amendment amounted to a "tidying up" of the pleadings in order to bring it in line with the evidence which was elicited through cross-examination. Counsel for the Defendants requested an adjournment having regard to the amendment, for the purpose of taking additional instructions. This request was granted and the case was part-heard. The matter did not return to the trial list until months later. It was finally re-listed, but Counsel for the defendants made no application for the recalling of the Plaintiff's witness for further cross-examination.

The above findings of facts on the evidence, therefore influenced me into arriving at a decision in favour of the plaintiff on the issue of liability. So far as damages were concerned, I made an award in respect of the bus on a total loss basis having regard to the Assessor's Report which was admitted in evidence. The plaintiff had amended its statement of claim to substitute "loss of income" from the bus, in lieu of "loss of use". It was my considered view

however, that the evidence adduced to prove this head of special damages, was insufficient. The witness who was called by the plaintiff confessed to his lack of knowledge in the area of the company's earning of income from the bus.

Karl S. Harrison

Puisne Judge

28th April, 1998.