SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1988

BETWEEN:

FRANK RAMBALLY - Plaintiff/Appellant

and

TEXACO (WEST INDIES) LTD
GEORGE HAYNES - Defendants/Respondents

Before: The Honourable Sir Lascelles Robotham
The Honourable Mr. Justice Bishop
The Honourable Mr Justice Moe

Appearances: S. Bennett and C. Rambally for Appellant
S. McNamara for Texaco (West Indies) Ltd
George Haynes - No appearance in person or by Counsel

1988: Oct. 26,
1989: Jan. 23.

JUDGMENT

SIR LASCELLES ROBOTHAM, C.J.

The plaintiff/appellant herein Frank Rambally, brought an action on 7th October, 1977, in which he claimed damages against the second-named respondent George Haynes, by virtue of his negligent driving on 14th July, 1976 of a motor lorry owned by the first-named respondent Texaco (West Indies) Ltd., on the Bar d'Isle Road, whereby the plaintiff's coach subsequently fell into a precipice and was destroyed.

After a checkered passage involving interlocutary proceedings and the loss of the Registry file for a period of some 2 years, the matter only came on for hearing on 16th July, 1987, that being the 11th anniversary of the filing of the action. Judgment was delivered in favour of the defendants/respondents on 18th January, 1988, with costs to be agreed or taxed. It is this decision which is now on appeal.

The damages claimed by the appellant in his statement of claim were:

(1) Total loss of his motor coach valued at $57,000

(2) Loss of business for 6 months at $7,560 per month
= $45,360

(3) Special damages - $102,360

(4) General damages.

/The trial....

The trial Judge found that the respondent Haynes drove the truck laden with fuel oil whilst it was in a defective condition, and that he was negligent in his dealings and manoeuverings of the truck after the engine had cut out. As a result both defendants were liable for negligence.

Despite this finding of negligence however, the Judge found that the plaintiff as a reasonable person and with knowledge of the precarious position in which his coach was placed after the collision, had enough time in which to take or begin to take salvage action in order to avoid the subsequent destruction of the coach, and that he had failed to do this. His actual findings were:-

> "On the facts of the case I hold that the plaintiff had a duty to mitigate his loss after the collision between the first defendant's lorry and his coach, that he saw his coach in danger after the collision, that he had ample time and opportunity to rescue his coach, and he wilfully left it exposed to the danger which eventually befell it."

His final conclusions were that the plaintiff being fully aware of the danger, and having done nothing to mitigate it, the defendants cannot therefore be held liable in any way for the subsequent total destructioin of the coach.

Judgment was then entered as stated for both defendants with costs to be agreed or taxed.

The plaintiff appealed this decision, and when the matter came on for hearing before this Court, Counsel for the plaintiff/Appellant sought and was granted leave to discontinue the appeal against the Texaco driver George Haynes. Counsel for the defendant/respondent agreed to this and the entire appeal was argued in relation to the liability of Texaco and the application of the law on mitigation of damage. Only such evidence as is necessary for this therefore need be referred to for the purposes of this judgment.

The Destruction of Coach -

There were only two witnesses who gave evidence as to the circumstances surrounding the collision and destruction of the coach. In view of the fact that the defendant Haynes was the driver of the Texaco truck, I will refer first to his evidence and then to that of Clifton George, a witness called by the plaintiff.

Briefly it can be stated that the engine of the laden lorry owned by Texaco and driven by Haynes cut out for the second time whilst it was proceeding up the Bar d'Isle hill, and that it rolled back and hit the front of the plaintiff's coach. This coach had broken down

/earlier....

earlier that morning whilst being driven by the plaintiff, and it was left parked on the left side of the roadway whilst the plaintiff was away taking steps to have replaced a broken axle.

It was whilst the plaintiff's coach was so parked and in the absence of the plaintiff that the Texaco truck driven by Haynes rolled back down the hill in circumstances which the Judge found was negligent.

The truck hit the front of the plaintiff's coach, and thereafter the truck ended up on the right hand side of the road. The plaintiff's coach was pushed backwards on to a pile of stones. In the words of Haynes:

> "The right rear wheel was on the pile of broken stones and the left was just on the side of the precipice."

It is very significant at this stage to note that construction work was in progress on this section of the road on this morning in question.

The evidence of the defendant Haynes on the position of the plaintiff's coach after being hit was brought into sharper focus by answers he gave to the Court upon the conclusion of his cross-examination. I quote them as recorded by the Judge:

> "Court: The left back wheel was 1 foot to 1½ feet from the precipice and the left front wheel was about 3 feet from the precipice. The soil under the wheels was from piled up earth. Soil was thrown there."

It will be clearly seen therefore that the plaintiff's coach was pushed back into an extremely dangerous position. The outcome, which is not disputed, was that the earth under the coach eventually gave way and it fell some 200-300 feet into the precipice and was totally destroyed.

Haynes left the scene in a friend's car. The time of the accident as given by him in his evidence was between 11.30 a.m. and 12.00 noon. The time-frame I would state at this stage when tested against the background of the finding of the Judge that the plaintiff had ample time and opportunity to rescue his coach but yet failed to mitigate his loss is of great importance in the case.

The only other witness touching on the destruction of the coach was Clifton George who stated that he was walking up the Bar d'Isle hill on the morning in question and witnessed the Texaco truck driven by Haynes roll back and strike the plaintiff's coach.

/The time.....

The time given by him of the collision was "about 11.45 a.m.", which is in keeping with Haynes' evidence.

George said the road was being "repaired" at the time. The defendant Haynes left the scene in another vehicle and he (George) went to work in his garden. He then said:

> "While I was in the garden I heard a big noise. When I came down I saw the earth gave way and the coach down in the precipice."

In cross-examination he said:

> "It was about half-an-hour after I left the coach standing still that I heard the big noise."

I pause here to make one comment and that is that the consequence of the falling of the coach into the precipice within half-an-hour as stated by this witness is by no means far-fetched when viewed against the answers given by Haynes to the Court on the perilous position of the coach by the edge of the precipice after it was struck. The trial Judge however rejected the evidence of Clifton George when he found that George was not speaking the truth and was never on the scene although this was never put to him at the trial. I will return to this finding at a later stage.

Extent of the Plaintiff's knowledge

The evidence as to what knowledge the plaintiff had of the fact that his coach had been placed in a dangerous position is violently conflicting. The plaintiff Frank Rambally said that after his coach broke down at 5.00 a.m. he went to Castries some 9 - 10 miles away. He returned to the scene sometime between 12 - 1.00 p.m. and did not see his coach. On looking around he saw the bank and some reclaimed land had broken away and his coach was down a steep ditch. It was completely smashed. He said he did not return to the spot where the coach had broken down other than between 12 - 1.00 p.m. and when he did he had a replacement axle for it. He denied in cross-examination having spoken to George Haynes at any time concerning the accident. Therein lies the sharp area of conflict between the plaintiff and the defendant Haynes. Haynes said that after the collision and on his way back to Castries he saw the plaintiff Rambally travelling towards him in his van. He stopped him and told him that the Texaco truck had collided with his coach, but Rambally did not answer him, but instead, drove away. It is here to be noted that Haynes did not say to Rambally that the coach was in danger in the position in which it was left.

/Haynes further....

Haynes further said he followed Rambally back to Bar d'Isle to where coach was, but Rambally refused to speak to him and was very vexed. This was about 12.15 p.m. Then he made a report to the Police about 12.30 p.m. and thereafter he left for Castries. This meeting is denied by the plaintiff.

On reaching Castries he made a report to Mr. Pantin the Texaco Manager. This was about 1.00 p.m. Whilst telling Pantin that he should "get a wrecker fast" to get out Rambally's coach, because it was in danger, a call came through to say that the ground had given way and the coach went down. What then, from the evidence of Haynes is the established time-frame between the time of the accident and the coach going over?

It is as follows:-

(1) The time of the accident would be 11.30 to 12.00 noon. This is corroborated by George.

(2) Rambally and Haynes met on road to Castries and together they went back to the scene of the accident at Bar d'Isle - 12.15 p.m.

(3) Haynes left and made a report to the Police - 12.30 p.m.

(4) After leaving the Police, Haynes went to Texaco in Castries (9 - 10 miles from Bar d'Isle) and made a report to Pantin the Manager - close to 1.00 p.m.

(5) Whilst telling Pantin a wrecker should be got fast to move the coach word came that it had gone over - circa 1.00 p.m.

From the evidence accepted by the Judge it will be clear that the earliest possible time that Rambally could have known of the danger to his coach was at 12.15 p.m. when he returned to the scene with Haynes. This evidence of Haynes the Judge accepted over the denial by Rambally that any such thing took place. I am not prepared to question the finding of the Judge on this.

On the basis of this evidence then the time available to the plaintiff to have saved his coach and so mitigate his loss was between 12.15 p.m. when he first became aware of its danger, and around 1.00 p.m. when it went over. Although the Judge rejected Clifton George as a witness of truth, his evidence that the accident took place around 11.45 a.m. and that the coach went about half-an-hour after he left the scene is remarkably in conformity with the rest of the relevant evidence, when coming from a man who the Judge found was not there.

The opportunity to salvage

There was evidence in the case that Hezekiah Rambally the brother

/of the....

of the plaintiff had a garage at Bexon about 10 minutes drive away from Bar d'Isle where the coach went over. Haynes gave evidence that he had to pass this garage twice that day to go to Castries, but he said "I did not pass in there to seek assistance".

It is clear that Haynes most certainly thought a wrecker would be the thing to salvage the coach, hence his suggestion to Pantin. However, he never stopped on any occasion at the garage of the plaintiff's brother at Bexon as he passed, to see if there could have been any assistance coming therefrom. The logical inference is that he with his presumed localised knowledge as a tanker driver covering a wide area, knew that no wrecker was available from Hezekiah's garage.

During the course of the trial it came out in evidence that the plaintiff owned another coach called the "Italian Bee". Apart from this, there was no evidence adduced as to where the Italian Bee was on that day, or whether it would have been suitable for the salvage operation of this coach which was capable of carrying 60 passengers.

The Law and submissions on mitigation

The meaning of the term mitigation is avoiding the consequence of the wrong. The Judge found that there was negligence. We are now therefore only concerned with the application of the law of mitigation as it relates to the conduct of the plaintiff and the liability of Texaco.

There are several rules relating to mitigation but the one with which we are primarily concerned here is that stated in McGregor on Damages (14th edition) para. 209. It reads:-

> "The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent on the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed through unreasonable action or inaction to avoid. Put shortly, the plaintiff cannot recover for avoidable loss."

The onus of proof on the question of mitigation is clearly on the defendant. The trial Judge accepted this - so did Counsel for the respondent.

Counsel for the plaintiff/appellant submitted that on the facts the Judge could not reasonably have found that the plaintiff had failed to mitigate his loss and that is so even in the face of his finding that the plaintiff did nothing towards that end.

/There was....

There was he said no evidence to show that the plaintiff's other coach "the Italian Bee" was available. On the contrary, the only evidence was that this other coach was owned by him. There is no evidence that it would have been suitable for the salvage operations, which Haynes the truck driver thought should have been undertaken by a wrecker.

Counsel further submitted that the Judge found as a fact that there was no direct evidence as to how the coach went below, he having rejected the witness Clifton George who said it went over about half-an-hour after he left the scene. Counsel submitted that the Judge's finding on this must be questioned as it was never put to George that he was not on the scene. The appellant he submitted had no time to save the coach and in any event the respondents had failed to discharge the burden of proof.

Counsel for the respondent began his submissions by agreeing with so much of the law on mitigation as was referred to by Counsel for the appellant, then went on to cite the first rule laid down in McGregor on Damages quoted above.

He submitted that the Judge found that the plaintiff was wilfully inactive. I pause here however to point out that McGregor speaks of loss which a plaintiff could have avoided but for his "unreasonable action or inaction". Furthermore, we are here dealing with an accident which occurred in a rural area, some 10 miles from the nearest town Castries, and there was no evidence to suggest that a wrecker was available, but one telephone call away. The evidence is that Haynes had to come to Castries to try and get one.

It would seem to me therefore that it is impossible to measure the reasonableness and extent of the plaintiff's action or inaction without reference to the time span earlier set out in the judgment within which he could have successfully instituted much the less executed any action to salvage the coach.

Counsel for the respondent went on to say that he accepts that the onus of proof is on the defendant and more important he agrees that whether the plaintiff has acted reasonably is in every case a question of fact now law.

McGregor 14th ed. para 233

Payzu v Saunders - 1919 - 2 KB. 581.

However once a Court has devided at first instance that there has been a failure to mitigate, it is difficult for a Court of Appeal to come to a different view.

/Counsel went...

Counsel went on to submit that there was evidence from Rambally that a tractor working further down the road was available to assist his coach in climbing the hill early that morning. However this cannot avail the respondent as there is no evidence that at the time of the accident it was still there and available or that any assistance whatever was sought from it.

Conclusions

In his judgment the Judge found that the plaintiff Rambally was not a truthful witness when he denied the meeting with Haynes. There was sharp conflict here, but as previously indicated I would not question the Judge's findings on this.

However out of the mouth of Haynes himself, and as the Judge therefore must have accepted, Rambally did not see his coach in the precarious position until about 12.15 p.m. Word came to Haynes whilst he was speaking to Pantin at the Texaco plant in Castries that the coach had gone over. This was around 1.00 p.m. There is no road-side telephone in this rural area, and it is reasonable to assume that it went down before 1.00 p.m. This would have given the plaintiff a mere 45 minutes at the outside to have executed steps to save the coach.

Bearing in mind that

(1) The rural location of the scene of the accident was established;

(2) there was no evidence to show that the alternative coach the Italian Bee was available, or if available, suitable for the purpose;

(3) there was no evidence that any suitable services were available at Hezekiah Rambally's garage 10 minutes away, or anywhere else in the area;

(4) Castries where a wrecker service would probably be available was 9 - 10 miles away.

I would hold that the plaintiff had no sufficient time in which to take effective action to mitigate his loss by salvaging the coach. I am fortified in this view by the words of Lord McMillan in the case of

Banco de Portugal v Waterlow -
1932 A.C. 452, 456:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may

/be driven.....

> be driven to adopt to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which had been taken to meet it, but such criticism does not come well from those who have themselves created the emergency."

The learned author of McGregor 14th edition at para 223 says that the remarks of the learned Law Lord apply equally to tort.

In short I am firmly of the view that even if the plaintiff had been galvanized into action, rather than remaining inactive as the respondent's Counsel suggests, nothing could have been done to save the coach in the short space of time before it went over.

I would also be prepared to hold if such further finding is necessary that the trial Judge was wrong in rejecting the evidence of Clifton George the only eye-witness. I have carefully checked his evidence against that of Haynes, and they are mutually corroborative of each other in every material aspect but one, and that is, whereas George said he spoke to Haynes and asked him what had happened and Haynes replied, Haynes on the other hand said he spoke to no one other than a little boy whom he asked to place stones behind the wheel of his truck as it was folling back.

It was never put to George that he was not there, and his evidence that the coach went over within an interval of half-an-hour after he left the scene makes the consequences totally in keeping with the position it was placed in by the edge of the precipice as given by Haynes, and also within the time-frame

My conclusions that the plaintiff had no, or no sufficient time to have effectively done anything in the circumstances to save the coach is buttressed by the Judge's findings as follows:-

> "If the plaintiff did not know that the accident had occurred after he had parked his coach on the road that morning, and the whole incident, that is the collision and the falling below of the coach had occurred as Clifton George stated within an interval of half-an-hour then the plaintiff could hardly be responsible for not mitigating his loss hence the significance of the evidence of the plaintiff and George."

My findings on this would be the same even if the plaintiff had been inactive.

In addition or as an alternative to my finding that the plaintiff

/had no....

had no sufficient time to effectively mitigate his loss, I also would hold that the defendant Texaco failed to discharge the onus of proof placed on them as was submitted by Counsel for the appellant. They led no, or no sufficient evidence to show what options were open to the plaintiff to mitigate his loss.

Role of Court of Appeal

The conclusion which I have reached that the trial Judge ought not to have rejected out of hand the evidence of the witness George is a finding based on the credibility of the witness. There is no doubt that truth did suffer a casualty in the entire case, as was submitted by Counsel for the respondent in his address to the trial Judge.

My other conclusion that within the indisputable time-frame and the opportunities available to the plaintiff he had no time in which to effectively take steps to mitigate his loss, is based on an evaluatioin of the evidence, and the proper inference to be drawn therefrom.

The case of Benmax v. Austin Motor Co. Ltd., 1 All E.R. (1955) 326, highlighted the distinction between the approach of a Court of Appeal to a finding of the trial Judge based on a question of fact, and that based on the perception of facts and the evaluation thereof.

In England, an appeal to the Court of Appeal is by way of rehearing. (See Order 59 rule 3(1)). This is in the same terms as rule 3(1) of Order 64 of our Supreme Court Rules 1970. On the hearing of an appeal to this Court of Appeal, sec. 28(1)(b) of the Supreme Court Act No. 17/1967 gives the Court power to draw inferences of fact. The postiion is the same in England - (see Order 59, rule 10(3)).

Professor A.L. Goodhart in his article on "Appeals on Questions of Fact" published in 71 L.Q.R. at page 402 reviewed the Benmax case and said this:-

> "In recent years there has been considerable doubt concerning the practice to be followed both by the Court of Appeal and by the House of Lords in regard to appeals on questions of fact decided by a trial Judge sitting without a Jury.....
>
> It was argued for the appellant (in the Benmax case) before the House of Lords that the Court of Appeal ought to have held itself bound by the trial Judge's findings of fact but Their Lordships held that there was no such limitation on the powers of the Court of Appeal. Viscount Simonds emphasised that "some confusion may have arisen from the failure to distinguish between the findings of a specific fact and a finding of fact which is really an inference from facts specifically

/found....

> found or as it has sometimes been said between the perception and evaluation of facts. .....An appellate Court will be reluctant to reject a finding of specific fact which may be founded on the credibility of a witness but it will not hesitate to form an independent opinion concerning the proper inference from the specific fact."

Viscount Simonds' statement is to be found at letter H of page 327 of the Benmax case (supra). Then the learned Professor went on to quote from the speech of Lord Reid at letter G of page 329 of the same report:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial Judge and ought not to shrink from that task though it ought of course to give weight to his opinion."

Professor Goodhart concluded by saying "there can therefore be no further doubt concerning this matter".

I have said enough to indicate why I must differ from the findings of the trial Judge on the evaluation and perception of the evidence. I repeat that in my opinion the irresistable conclusion to be drawn from a careful examination and assessment of the evidence as a whole is that the plaintiff in the time which the evidence shows was available to him, did not have sufficient time to take and execute effective action to salvage his coach. Further, that the defendant/respondent Texaco failed to discharge the burden of proof which lay upon them.

I would therefore allow the appeal, set aside the judgment entered for the defendants/respondents and substitute therefor a judgment for the plaintiff/appellant for $57,000 being the value of his coach. This is the only damage which the plaintiff made any serious effort to substantiate.

I also would order that the plaintiff/appellant Frank Rambally have his costs of this appeal, and his costs in the Court below, to be taxed or agreed, as against Texaco (West Indies) Ltd.

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal

G.C.R. MOE,
Justice of appeal.