SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 313 OF 1989

BETWEEN:

MARCEL FEVRIER
JENNY FEVRIER

Claimants

and

BRUNO CANCHAN
ASPHALT PRODUCT ET AL
THE SUCCESSION OF JOSEPH FELICIEN

Defendants

Appearances:

Miss Brender Portland for Claimants
Mr. O. Wilkinson Larcher for the First and Second named Defendants
Mr. Kenneth Foster Q.C. with Miss Isabella Shillingford for the Third Defendant

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1991: 15th May;
2002: 4th and 7th February;
28th March.

JUDGMENT

d'AUVERGNE, J.

[1] On the 21st October 1986 at about 9:00 p.m. an accident occurred on the Castries/Gros-Islet Highway near the Marina involving the following vehicles namely, motor vehicle, a van Registration No. T6004 belonging to the Claimants, Motor vehicle, a Truck Registration No. T3888 belonging to the Second-named Defendant and Motor vehicle, a mini bus

Registration No. H2776 belonging to the deceased Third-named Defendant. At the time of the accident vehicle registration No. T3888 belonging to the Second-named Defendant and driven by the First-named Defendant who was then the second-named Defendant's agent, was parked on the left hand side of that road facing Gros-Islet.

[2] The Claimants gave evidence on their own behalf and called two witnesses.

[3] The First-named Claimant told the Court that he was a Civil Servant attached to the Ministry of Health employed as Chief Environmental Health Officer; that he lived at Bois d'Orange Gros Islet and was the husband of the Second-named Claimant.

[4] He said that on the 21st October 1986 he owned a four month old Motor Van Registration No. 6004 valued at $35,000.00; that the said vehicle was owned jointly with the Second-named Claimant; that on that day he had driven his van from Castries to Gros-Islet and at 9:00 p.m. was returning from Gros-Islet to his home at Bois d'Orange on the Castries/Gros-Islet Highway; that his wife sat on the passenger side of their vehicle.

[5] He told the Court that on his way to Gros-Islet he had observed a truck filled with aggregate parked on the left hand side of the road near the "A" frame houses and Mako sports facing Gros-Islet; that there were no lights or reflectors on that truck but only two orange or pinkish cones immediately below the back of the truck which could only be seen on close proximity to the truck.

[6] He said that at 9:00 p.m. while traveling to Bois d'Orange in the direction of Castries near the "A" frame houses in the vicinity of where he had seen the parked van, he saw from a distance of about 150 feet a green van zig zagging being driven reasonably fast coming towards him; that when that vehicle was about 80 – 100 feet away from him he stopped his vehicle and parked on the left hand side of the road; that the incoming vehicle smashed into the front of his stationary vehicle injuring both his wife and him. He told the Court that they were trapped in their vehicle and in his case, for another hour and a half; that he sustained a fracture to his left leg; fractures of the toes of both feet, a fracture of the right hip and a fracture of the right knee; that he suffered tremendous pain, was hospitalized for

two months and remained out on sick leave for a further four (4) months. He said, "during that period, I was in bed most of the time I was suffering. I could not move around."

[7] He said that he was claiming $3,000.00 the costs of hospital expenses, $35,000.00 the value of vehicle No. 6004, general damages for pain and suffering, for loss of amenities and negligence and also the costs incurred for the case.

[8] The Second-named Claimant confirmed the evidence of the First-named Claimant. She said, "the approaching vehicle continued at a very fast speed and ran directly into our vehicle at a slight angle;" that after the collision she suffered excruciating pain to her right thigh and right side of her head and a drop in the thigh where it was broken; that after her discharge from Victoria hospital after three months, she remained on sick leave for a further six months, that she was unable to walk because of the fracture of her right femur.

[9] She further told the Court that because of the broken right femur she suffered pain to her spine and that her right leg was shortened; that as a result, all her right shoes had to be raised to compensate the shortening of that leg; that she could no longer enjoy too much dancing and other outdoor activities as she was accustomed to do.

[10] She also told the Court that she was 25 years old at the time of the accident; an Environmental Health Officer employed with the Ministry of Health as a Field Officer and that at the time of the accident her children were five years and three years old respectively. She was also claiming damages for pain and suffering, for loss of amenities, general damages for negligence and costs of the action.

[11] Dr. Richardson St. Rose, a Surgeon of many years standing told the Court that he examined and treated the Claimants. He said that when he saw the First-named Claimant on the 22nd of October 1986 he had the following injuries; a six inch laceration to the right knee region, a six inch laceration to the outer aspect of the right leg, a commuted fracture of the left tibia and fibula, fracture dislocations of the metacarpals and metatarsal joints in both feet; that on the 28th day of October he did an operative reduction and K wire fixation of the fractures and dislocation of his feet; that the fractured tibia and fibula were

manipulated, reduced and immobilized in a plaster cast and that the First-named Claimant was incapacitated for about six months. He told the Court that the injuries in the feet may result in chronic pain and produce permanent disability of about 2%.

[12] He said that when he examined the Second-named Claimant she suffered from the following injuries; abrasions and superficial laceration over her body and a commuted fracture of the right femur, that he performed surgery on her on the 28th October 1986 and inserted a K wire into her femur; that she was incapacitated for about six months. He said that there was a one (1) inch shortening of the right lower limb which would produce chronic joint pains in that limb, resulting in a permanent disability of about 10%.

[13] Clement Christopher Ettienne retired civil servant told the Court that on the day in question accompanied by his wife and daughter he left his home at Reduit Orchard, Gros-Islet and visited his deceased brother at Bonne Terre. He said that while driving to his destination at about 7:00 p.m. he observed a parked truck on the left hand side of the road facing Gros-Islet; that on his return journey at about 9:00 p.m. he stopped to allow a van to proceed ahead of his and kept at a distance of approximately 50 yards behind that van. He was driving at about 35 to 40 miles an hour; that he heard an impact and noticed, "an oncoming minibus began to swerve to and fro"; that the van in front of him came to a stand still and that oncoming minibus crashed head on into the van ahead of him.

[14] He said that he immediately went to the scene and recognized the Claimants; that the First-named Claimant was seated on the driver's side of the van and he spoke with him; that he also spoke to the Second-named Claimant and then went to the minibus.

[15] He told the Court that he observed the driver of the minibus lying over the steering wheel bleeding from his mouth, nose, eyes and ears; that he lifted the driver's head which dropped and that he came to the conclusion that the said driver appeared to be dead.

[16] He said that the two collided vehicles appeared as if welded together; that after much banging and lifting of both doors of the van which were jammed, with the assistance of two

other men the Second-named Claimant was removed from the vehicle but it took about three hours to get the First-named Claimant out of the vehicle.

[17] Under cross-examination this witness said that it was his view that the driver of the minibus was traveling with speed; that he heard the impact, that he had not seen the parked truck before the impact but he "knew it was there"; that there were no lights or reflectors on the truck. He categorically said that after the impact the minibus "went out of control".

[18] He told the Court that he concluded that since he was able to maintain 16 feet from the van after it overtook him, it was his belief that the van was being driven at the same speed as he was driving his vehicle viz 35 to 40 miles an hour.

[19] BRUNO CANCHON the First-named Defendant told the Court that on the day in question he was employed as a driver by the Second-named Defendant of which Oliver Sampson was the owner.

[20] He said that on that day he was driving truck T3888 with a load of ¾ inch stones to Cap Estate. He was accompanied on that trip by a mechanic named Ezra Alphonse.

[21] He told the Court that when he arrived in the Rodney Bay area he noticed that the deferential of the truck was broken so he parked it on the verge, as close as he could to the water's edge. He said that the vehicle was parked on the left hand side of the road facing Gros-Islet with "three wheels on the pitch and the other on the grass;" that he left one functioning reflector at the back of the truck.

[22] Under cross examination he said that he had placed oil in both the truck and the deferential at least one week before, that the deferential had broken down "at least twice before; that the last time was three months before that date", that he intended to have the truck repaired but he could not get hold of his employer and therefore the truck had to remain in its parked position till the following day.

[23] He further said, "I took no precaution about light since I did not expect the truck to be there for the night. I did not place any cones. The reflector was on the right side; if clear would reflect light, if dirty would not reflect light …" He concluded by telling the Court that the reflector was not dirty and that there was sufficient space on the road near where the truck was parked for two vehicles to pass freely.

[24] Oliver Sampson told the Court that he owned Asphalt Products Company Ltd., the Second-named Defendant and that Bruno Canchon was employed by him on the 21st October 1986; that the following morning upon hearing of the accident he went up to the Rodney Bay area in Gros-Islet and he "saw the truck parked a slight distance ahead of Marko Sports going towards Gros-Islet on the left hand side with the right rear wheel of the vehicle parked on the pitched surface while the left rear was parked on the verge in close proximity with the sea.

[25] He concluded that he saw a functioning reflector on the right rear and that there was more than sufficient space for vehicles to pass.

[26] Ezro Alphonse told the Court that he was on board T3888 along with the driver; that they left Vieux Fort en route to Cap Estate; that while they were traveling along Rodney Bay they developed a problem with the deferential of the truck; that they parked the said truck close to the shed which housed the yacht Marco.

[27] He categorically said that the truck was not in the road "….. two vehicles could pass freely …… I returned to the spot where the truck was the next day. The truck was lower down, not where I had left it …… on the right side of the box was scraped ….. I saw oil on the road."

[28] The last witness to give evidence was retired Police Officer, Evariste Ambrose who said that upon arrival at the scene of the accident near the "A" frame houses, Gros-Islet he saw "motor van T6004 at a stationary position on the pitched surface of the road on the left side of the road facing Castries, motor omnibus registration No. H2776 facing Gros-Islet close to the center lane and motor lorry registration no. T3888 facing Gros Islet; the lorry's two

left wheels were off the pitched surface of the road and the two right wheels were on the pitched surface of the road." He inspected the vehicles and saw "the complete front of T6004 was badly damaged and that there were blood stains inside the vehicle; the complete front of the motor bus H2776 was badly damaged, the left pole on the left side on the wind shield and the left front door was so badly damaged that it was wrapped up." He told the Court that there were many people around and he "assisted them in removing Joseph Felicien who was trapped in the driver's seat of motor omnibus H2776; that he appeared to be dead."

[29] He further said that a few days later he spoke to the driver of T3888, Bruno Canchon who told him that he was on his way to Cap Estate carrying a load of ¾ inch stones when something broke in the deferential of T3888. The witness said that he had noticed a load of stones in the truck and that the vehicle was parked on the verge close to the water; that he saw cones around the truck to the front, to the right side and rear of the truck, that he also saw the sliding door of H2776 hanging down from the rear of T3888.

[30] Officer Ambrose described the road around the area on which the accident took place as being of pitched surface, dry with a pot hole in the centre of the road. He said that the width of the road was 22 feet 8 inches and the truck T3888 was occupying 3 feet 2 inches of that road; that the width of T3888 was 7 feet 2 inches or 7 feet 1 inch with the dry shaft hanging out of the deferential; that vehicle H2776 was 5 feet 2 inches while van T6004 was 5 feet 6 inches. He said that he saw two reflectors on the truck, T3888.

[31] Under cross-examination he said he could not recall whether he had said at the Inquest that there were no reflectors. He said that there were two points of impact; that they were more than 92 feet apart; that the first point of impact was 3 feet 2 inches into the road; that T6004 and H2776 were in a locked position; that T6004 was on its right and proper lane, the left lane going to Castries and that H2776 was also in that lane and that he saw two cones under the bus but later said "there were three cones to the front of the vehicle facing Castries; that there were no brake impressions on the road."

[32] Patrick Compton, the Insurance agent for the Second-named Defendant told the Court that he went to the scene the next morning; that he saw T3888 parked on the left hand curb and that he saw cones and functioning reflectors.

[33] Finally Veronica Felicien, the daughter of Joseph Felicien, told the Court that her father died on the 21st day of October 1986 and exhibited a copy of a grant of Letters of Administration.

Arguments

[34] Learned Counsel for the Claimants told the Court that all three Defendants were negligent and though not pleaded she was also relying on the *Maxium Res Ispa Loquitur.*

[35] She argued that the Claimants exercised the reasonable amount of care which an ordinary, skilful driver or rider would have exercised under all circumstances. (Charlesworth at paragraph 812).

[36] She said that this could not be said to be the case with regards to the Third-named Defendant who unfortunately passed away on that day. Both claimants said that they saw H2776 zig zagging and that the vehicle was traveling very fast. Clement Ettienne said after hearing "an impact an oncoming minibus began to swerve to and fro, the van in front of me slowed down and came to a stand still"; Officer Ambrose said that vehicle H2776 travelled 92 feet towards the Claimants' vehicle and that there was no evidence to show that the driver of H2776 even attempted to apply brakes; the Police Officer said, "There was no evidence of brake impressions". She told the Court that it had to be inferred that Joseph Felicien was guilty of negligence for he failed to drive his vehicle with due care and attention, with a degree of skill expected of a competent driver.

[37] Learned Counsel submitted on behalf of the Claimants that they had exercised on the road that evening the reasonable amount of care which an ordinary skilful driver or rider would have exercised under all the circumstances. She quoted the case of Nettleship vs Weston (1971) 3 AER which held that a driver or road user owes a duty of care to anyone

who uses the road to drive with the degree of skill and care to be expected of a competent and experienced driver and that the standard to be adopted is that of the average competent and reasonable driver.

[38] She further submitted that in Wiltshire v. Essex Area Health Authority (1987) QB 730 it was held that the characteristics of the drivers do not make a difference in determining whether or not a driver owes a duty of care to another road user.

[39] She argued that the First-named and Second-named Defendants are guilty of negligence (vicarious liability not disputed) since the evidence discloses that the truck measuring 7 feet 2 inches broke down and the First-named Defendant being the driver parked the vehicle on the side of the road with 3 feet 2 inches of the said vehicle on the pitched surface of the road. She contended that both the driver and owner of the T3888 owed a duty of care to road users.

[40] In support of her argument she quoted the case of Kunwarsingh v. Rambelawan 20 WIR at page 440 in which Maitand v. Raisbeck 1944 2 All ER 272 was referred to. In that case at page 273 Lord Greene stated:

> "Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances but the mere fact that it has become an obstruction cannot turn it into a nuisance. It must depend on the facts of each case as to whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on a road would be turned into an insurer in respect of latent defects in his own machine."

[41] Learned Counsel urged the Court to consider the evidence of the First-named Defendant and his companion Ezra Alphonse. The former said "I took no precaution about light since

I did not expect the truck to be there for the night, I did not place any cones" and then later said, "when I got out of the truck neither myself nor Bruno put anything on the road."

[42] She argued that the fact that cones were seen by other witnesses does not absolve the duty of care owed by the First and Second-named Defendants to the Claimants since they could not state with any certainty when any cones, if any, were placed and by whom they were placed.

[43] Learned Counsel quoted from Lord Denning in Hill-Venning vs Beszant 1950 2 AER 1151 where he said, "the presence of an unlighted vehicle on a road is prima facie evidence of negligence on the part of the driver and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic."

[44] Learned Counsel concluded that the Claimants did not in any way contribute to the damage and injuries suffered by them; that the Defendants were the cause of all damages and injuries suffered on that said evening.

[45] Learned Counsel for the First and Second-named Defendants argued that the success of the Claimants case depends substantially on the facts of the matter. He said that the First Defendant with his companion Ezra Alphonse did all that was reasonably possible on that day; they parked T3888 "close to the edge, very close to the sea, front and back wheels were in the grass and that on the left side going to Gros-Islet there was not much space there."

[46] He asked the Court to note that the First-named Defendant mentioned a reflector that was functioning and that the following day the owner of the Second-named Defendant said he saw a reflector on the right rear; that Officer Ambrose said he saw reflectors and eight cones of international standard and that Patrick Compton said he saw many cones the following morning.

[47] He urged the Court to note the speed at which the vehicles were traveling on that night and that it is always a question of fact if a driver strikes an object without seeing that object.

[48] Learned Counsel emphasized the following; that it was for the Claimants to prove facts from which the proper inference is that the injury complained of was the result of the Defendants' negligence and that it was also necessary to prove that there was no negligence on their part; that there was *prima facie* connection between the negligence and the damage.

[49] Learned Counsel for the deceased Joseph Felicien argued that there was no evidence of speed on the part of the said Defendant and that there was no reliable evidence of the cones as reflectors, that they should have been tendered in evidence. He noted the evidence of the First Claimant who said that "there were no lights or reflectors on the truck …. I am positive about that …. I was suddenly on the truck when I saw the cones. The cones could not be seen from a distance, in effect, only when you got close to it that you saw it ….. It is only when I got on the truck I saw truck and cones despite my lights being on. My lights were functioning properly….. I first saw the truck about 9 feet away and cones were immediately below back of truck", the Second Claimant said "I did not see any lights on that parked truck" and under cross examination said, "I did not see any cones."

[50] Learned Counsel said that since no evidence of the position of the pothole was led n Court then the reasonable inference should be that Felicien was zig zagging because he was trying to avoid that pothole.

[51] He concluded his arguments by urging the Court to apply the decision of Bullock v. The London General Omnibus Company and others (1907) 1 KB page 264. He further urged the Court to enter judgment for the Third-named Defendant and the Claimants with costs against the First and Second-named Defendants applying the Bullock order.

Conclusion

[52] In Searle v Wallbank (1947) A.C. 341 it was pointed out that "an underlying principle of the law of the highway is that all those lawfully using the highway ……. must show mutual respect and forbearance."

It therefore follows that the duty of a person who drives on the highway is to use the care which an ordinarily skilful driver should exercise under all the circumstances which involves an "avoidance of excessive speed, keeping a good lookout; observing traffic rules and signals and so on". Bowhill v Young 1943 A.C. 92 at page 104.

[53] The evidence reveals that the Claimants having observed the vehicle (later known as H2776) coming towards them in a zig zagging manner, slowed down, stopped their vehicle on the left and proper side of the road facing Castries. The evidence further revealed that after the first point of impact the said vehicle H2776 traveled approximately 92 feet towards the Claimant's vehicle and struck it while it was stationary on its right and proper side of the road.

[54] It is my view that the Claimants exercised reasonable care, in other words the care that an ordinary skilful driver could have exercised in the circumstances and were therefore not negligent.

[55] The evidence also reveals that vehicle H2776 which was then being driven by the now deceased Joseph Felicien was being driven in a zig zagging manner and was also traveling fast. Officer Evariste Ambrose who took measurements told the Court that H2776 travelled 92 feet towards the Claimants' vehicle, a clear indication that the car was being driven with excessive speed. He also said that he found no brake impressions and that he saw and noted that vehicles viz registration no. H2776 and vehicle registration no. T6004 driven by the Claimants, collided in a "locked position" on the claimants' left and proper side of the road facing Castries. It is noteworthy that the Claimant's evidence of the manner in which the accident took place was not rebutted but was confirmed by the evidence of Clement Etienne; that the Third-named Defendant did not plead negligence on the part of the Claimants.

[56] In my judgment Joseph Felicien was not driving H2776 at the time in question with the due care and attention and the degree of skill expected of an average competent and reasonable driver and as a result breached that duty of care owed to the Claimants which resulted in damage.

[57] I find that Joseph Felicien acted negligently and is entitled to pay damages to the Claimants.

[58] I now turn to consider the case for the First and Second-named Defendant. It is undisputed that the First-named Defendant was the agent of the second named Defendant and therefore if the Claimants are successful in their claim against the First-named Defendant then the Second-named Defendant would be equally liable.

[59] The First-named Defendant claimed that there was one functioning reflector at the rear of the truck T3888. I do not believe him. It is my view that it was not functioning moreover it would be insufficient in my view to notify other road users of any imminent danger. The First-named Defendant told the Court that he did not place any cones. The only conclusion to be arrived at, concerning the cones seen and found, was that a third party realizing the danger that the truck caused on the road placed cones beneath the truck.

[60] It is my view that the common sense proposition of Denning L.J. in Hill-Venning v Beszant (1950) 2 AER 1151 is applicable.

> "The presence of an unlighted vehicle on a road is prima facie evidence of negligence on the part of the driver; and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic."

[61] Evariste Ambrose, the investigating officer, said that on arrival at the scene of the accident he saw motor lorry registration no. T3888 facing Gros-Islet, the lorry's two left wheels were off the pitched surface of the road and the two right wheels were on to the pitched surface of the road; that he took measurements of two points of impact; the first point of impact

was 3 feet 2 inches on the road and that the second point of impact was 92 feet away from the first point of impact; that the width of the road was 22 feet 8 inches and the lorry was occupying 3 feet 2 inches of that road and that there was a pot hole in the center of that road.

[62] In my judgment the First-named Defendant was grossly negligent with regards to the parking of T3888 on that day. It was his duty to park T3888 in such a place and in such a manner that it would not be a danger to other users of the highway but instead he left it unlighted overnight and occupying 3 feet 2 inches of the road near a pothole.

[63] It is significant to note that the first point of impact of vehicle H2776 measured the same distance that vehicle T3888 occupied on the pitched surface of the road where it was parked, that the First-named Claimant said that it was not possible to see the cones until one got on to the truck T3888. I find that the First-named Defendant acted negligently and should be liable in damages to the Claimants.

[64] I find the First and Second-named Defendants liable to pay 75% of the damages incurred and the estate of Joseph Felicien, the remaining 25%.

[65] Learned Counsel for the Claimants in her address informed the Court that the Claimants were also relying on the doctrine of Res Ispa Loquitur and quoted the case of Bennett v Chemical Construction (Great Britain) Ltd. (1971) 3 AER 822 which held that it is not necessary to plead the doctrine of Res Ispa Loquitur, that it is enough to prove the fact which made it applicable.

[66] I agree with the pronouncement but in order to prove the fact there must be reasonable cause of negligence and I have already found that on the day in question all three named Defendants acted negligently, that they breached the duty of care owed to the Claimants and must therefore be liable in damages. That the Claimants suffered injuries as a result of the accident cannot be disputed.

[67] In assessing damages the Court has taken into consideration the guidelines set out in Cornilliac v. St. Louis (1964) 7 WIR 491 and the principles set out in Fenton Auguste v. Francis Neptune Civil Appeal No. 6 of 1996 (St. Lucia). I have considered comparative awards, the nature and extremity of the injuries sustained and the nature and gravity of the resulting physical disability.

[68] Dr. Richardson St. Rose stated that the First-named Claimant may have to undergo chronic pain in the feet which may produce permanent disability of about 2% whereas the second-named Claimant a young outgoing female of 25 years old who has suffered a one inch shortening of the right lower limb may have to undergo chronic joint pains resulting in permanent disability of 10%.

[69] I will award the First-named Claimant $50,000.00 and $150,000.00 to the Second-named claimant.

[70] Special Damages

The First-named Claimant has admitted being paid by the Insurers though he could not recall the amount paid. I will not grant any further award.

I will award the sum of $3,000.00 for hospital expenses

The damages awarded are as follows:

First named Claimant

Pain and suffering and loss of amenities of life 6% per annum from the date of service of Writ 23/10/89 to date of trial 15/5/91.	$50,000.00

Second named Claimant

Pain and suffering and loss of amenities of life 6% per annum from date of service of Writ 23/10/89 to date of trial 15/5/91	$150,000.00

The above awards with the interest added as aforesaid will represent the total damages which will bear interest from 28th March 2002 until payment at rate of 6%.

[71] The Defendants do pay to the Claimants costs of the action in the sum of $20,000.00.

Suzie d'Auvergne
High Court Judge