ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2005

BETWEEN:

YOLANDA RODNEY

Appellant

and

OSBOURNE QUOW

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]
The Hon. Mr. Kenneth Benjamin	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Samuel Commissiong for the Respondent

2005: May 24;
June 27.

JUDGMENT

[1] BARROW, J.A. [AG.]: On Boxing Day 1997 Curtis Rodney was a passenger in a motor vehicle being driven by his friend, Osbourne Quow, the Respondent, along a mountain bypass road. The Respondent drove the vehicle to the right side of the road to avoid a donkey that was galloping towards him. The surface beneath the right front wheel broke away and the vehicle fell some 150 feet. Curtis Rodney died.

[2] The widow of the deceased, as his administratrix, claimed that the Respondent was negligent. She relied on the maxim *res ipsa loquitor* by which she contended that vehicles do not fall off mountains as a matter of course and that the very occurrence afforded reasonable evidence that the accident arose from lack of care on the part of the driver. That reliance obliged the Respondent to provide an

explanation for the occurrence that showed that the accident occurred without negligence on his part.

[3] The Judge accepted the explanation given by the Respondent. The Judge found that it was reasonable to conclude that a driver of the Respondent's experience and knowledge of the road was not and would not have been driving negligently. The Judge said he accepted the evidence of the Respondent that "he was careful not to swerve or veer to the right and that his turn in the direction he took was very slight, and his front wheel never completely left the hard surface of the road." The Judge found that there was no evidence that the Respondent drove too close to the edge of the road. He agreed with the submission of Counsel for the Respondent that the road contained a latent danger that was not there before in the form of the sodden soil caused by overnight rains. The Judge agreed with the submission of Counsel for the Respondent that the Respondent "kept as far as he would (sic) from the actual edge of the road as the circumstances would permit. His right front wheel was still partly on what he considered the solid part of the road and that he cannot be guilty of negligence."

[4] The essence of the Appellant's complaint was that the evidence did not support the Judge's finding. Mr. Richard Williams, Counsel for the Appellant, came fully seised of the reality that an appellate Court will not easily disturb findings of facts made by a trial Judge who has had the benefit of seeing and hearing the witnesses and evaluating their credibility. However, Counsel submitted, this case comes within the ambit of Benmax v Austin Motor Co Ltd[1] which established that while an appellate Court should not lightly differ from a finding of the trial Judge on a question of fact, a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. The proposition is stated in the headnote as follows:

> "Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge".

[1] [1955] 1 All ER 326

[5] Consistent with what is thereby permitted Counsel relied on the testimony of the Respondent himself to impeach the findings of the trial Judge. The pleaded case of the Respondent was that there was a latent or hidden defect in the road in that "overnight rains had so saturated the soil on that part of the road from which the vehicle fell that the same became soft and easily breakable." The contention of Counsel for the Appellant was that the evidence showed that the road did not break away. Counsel argued that the evidence showed that the grass verge, as distinct from the road, broke away.

[6] Mr. Samuel Commissiong, Counsel for the Respondent, was unable to point this Court to any evidence that the road broke. Indeed, there was clear testimony from the Respondent, under cross-examination by Mr. Williams, that it was the verge that broke away.

[7] It was negligent, Mr. Williams argued, for the Respondent to drive on to a grass verge that the Respondent stated was covered by grass about two and a half feet high. As the Respondent accepted, he could not see the soil of the grass verge. It followed, as I therefore find, that he could not estimate the weight-bearing capacity of what he could not see.

[8] It was to meet the thrust of this case that was put to him in the Court below that the Respondent steadfastly maintained that his wheel never went completely on to the grass verge. He repeatedly stated that his wheel went only as far as being partly on the pitch surface of the road and partly on the grass verge. The Judge accepted this assertion.

[9] It was a crucial error. On an independent evaluation of the Respondent's own testimony it is the fact that the grass verge broke and not the road. Had the Judge appreciated that this was what the Respondent testified he may also have given consideration and appropriate weight to the Respondent's own witness statement that put him clearly on to the grass verge. This is what the Respondent stated:

> "In doing so I got close to the edge of the road that appeared to be perfectly normal. There the front right wheel sank in the soft sand that

broke and the weight of the vehicle took it over the bank and down a precipice."

[10] The road was pitch; not sand. When the wheel sank in the 'soft sand' the wheel could only have been on the verge, not on the road.

[11] It follows that Mr. Williams has succeeded in showing, on the Respondent's own evidence, that the Respondent fell below the standard of care that he owed to the deceased by driving on to a verge whose weight-bearing capacity he did not know and could not assess.

[12] For the sake of completeness it may also be mentioned that there was no heavy rain the night before to have caused the road to break away. The Respondent himself testified that it was not a lot of rain that fell the night before. The statement in the Defence that the overnight rains had saturated the soil of the *road*, buttressed by the Respondent's submission to the same effect, misled the trial Judge. That was not the evidence. As Mr. Williams accepted, if it had been the fact that the road itself broke away he would not be appealing.

[13] In the result I would allow the appeal and enter judgment that the claimant recover damages from the defendant for negligently causing the death of Curtis Rodney. Damages are to be assessed by the Master. I would award prescribed costs, to be calculated by the Master.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Kenneth Benjamin
Justice of Appeal [Ag.]