SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 0443/2004

BETWEEN

MICHAEL AIMABLE
MARGARET MELIUS AIMABLE

Claimants

AND

PROSPERE COLLINS
INTERNATIONAL TRAVEL CONSULTANTS LTD.,

=

Defendants

Appearances:

Mrs. Edith Petra Jeffrey - Nelson for Claimants
Mrs. Veronica Barnard for Defendants

……

2005: September 27
2006: May 05, 19
July 19
November 1

……

JUDGMENT

Mason J

[1] On Sunday 11th August 2002 an accident occurred on the Castries/Gros Islet Highway near the Corinth/Marisule junction. Involved in this accident were a 1998 14 seater Toyota

Hiace minibus registration number HB 2949 belonging to the Claimants and driven by the first Claimant and a truck registration number TA 3650 owned by the second Defendant and driven by his agent, the first Defendant.

[2] The first Claimant gave evidence on behalf of both Claimants, the second Claimant being his wife.

[3] It is the testimony of the first Claimant as taken from his witness statement that on that day he stopped at the traffic lights at the said Corinth/Marisule junction, that when the light turned green he began moving and the first Defendant traveling at a speed, appeared to be attempting to overtake his vehicle. At the same time, a vehicle was approaching and turning into the Corinth gap, the first Defendant attempted to pull back into his lane and struck the Claimants vehicle. It was the opinion of the first Claimant that the first Defendant was driving too fast and too close to his, the Claimant's vehicle.

[4] Under cross examination the Claimant stated that the accident happened when he had passed the junction, past the traffic light. He admitted that it was a "slow" day and he would normally stop for people who flag him down on a slow day but he denied being stopped by anyone at the Corinth junction that day. He stated that he saw the first Defendant coming down "at speed and attempting to overtake but a vehicle "came out of the blue" and the first Defendant had to pull back so as not to hit the other vehicle coming in the centre lane. According to the Claimant, the highway has three (3) lanes going in both directions and the first Defendant could have used the middle lane if there were no vehicles on it. The Claimant continued that before his vehicle got hit, he saw the first

Defendant's vehicle in the rear view mirror. It was about 9 feet away. He did not attempt to accelerate when he saw the first Defendant. The Claimant stated that as soon as he saw the first Defendant in the rear view mirror his vehicle was struck. What caused him to look in the mirror was the vehicle's heavy sound. He saw the brake marks after the accident; the marks started right after the junction.

[5] Evidence for the Defence was given by the two (2) Defendants and two (2) other witnesses.

[6] The first Defendant's version of the accident according to his witness statement is that when he arrived at the traffic lights at the Marisule junction, the lights were green and he continued driving. There was a minibus ahead of him and since the lights were green, the minibus proceeded and he followed. Just as he passed the traffic lights, he saw two (2) pedestrians walking towards the said junction. One of the pedestrians "flagged" towards the direction of the minibus and the minibus suddenly stopped. The first Defendant believed that the reason for the stop was to pick up the pedestrians. According to the first Defendant, the driver of the minibus did not signal that he was stopping, he did not pull off the road, he simply immediately stopped. As a result, the first Defendant stated, he applied his brakes and the truck which he was driving being fully loaded could not come to an immediate stop. Since there was traffic in both lanes going in the opposite direction, he could not swerve to the right to avoid the minibus and so the truck came into contact with the rear of the minibus.

[7] Under cross examination, he admitted not coming to a halt at the traffic light but stated that the light was green and so he did not have to reduce his speed at the junction. He also admitted having to increase speed to go over the incline. The first Defendant stated that he drives by that road five (5) to six (6) times per week. He was not aware of a bus stop going towards Castries at the junction. He knows that there is a bus stop before the lights but not of one after the lights. The first Defendant was adamant that there is no bus stop after the lights at the Corinth junction.

[8] The witness denied the suggestion from Counsel for the Claimants that he tried to "rev up" to go over the lane and that the lane being clear, he tried to overtake and that because there were vehicles in the middle lane going towards Corinth, he had to swerve to go back into his lane.

[9] The first Defendant stated that he has been driving that type of vehicle for a while and was aware that it would be difficult to stop a vehicle of that type if it "had speed", he was aware of how difficult it is to stop a truck carrying a load. He denied driving too close to the minibus but accepted that the Claimant was on his proper side, was in front of him and that his vehicle went into the back of the Claimant's vehicle.

[10] According to the first Defendant, there is a bar by the lights and there were people by that bar; the Claimant stopped about 10 – 15 feet past the people. The people who "flagged" were about 15 feet away when they "flagged' the Claimant and the Claimant stopped about 5 feet past them. He denied that the accident occurred at the bus stop because there was no bus stop.

[11] Also giving evidence was the Chief Executive Officer of the second Defendant. His evidence however related mainly to the economic costs to the company as a result of the damage to the truck and will be referred to later.

[12] Mr. Amos Demille, witness for the Defence, in his witness statement, spoke of being in his pickup that morning and of being stationary in the middle lane at the intersection. He spoke of noticing someone standing on the roadside a short distance away from the bus stop in the no stopping double yellow line zone. He noticed that individual "flagging" the minibus which stopped suddenly. According to him, the driver of the minibus did not give any indication that he was stopping nor did he pull to the side of the road. He also noticed the truck behind the mini bus trying to move to the side away from the minibus but the truck "dragged" a bit and came into contact with the rear of the minibus.

[13] Under cross examination, Mr. Demille admitted to being a friend of the first Defendant. He said that he saw someone standing at the bus stop which was on the left side of the road going towards Gros Islet. The person he saw was on the opposite side of the road by the rum shop. He stated that there is no bus stop in the area where the person was standing. He saw someone "flag" the bus down; the bus was just crossing the light when he saw the person "flagging" it, this person was about 15 feet from the junction. He said that he saw the minibus stop suddenly, about 27 feet from where it was "flagged' down. There was only one person. The truck had already passed the junction and was actually in the middle and then he saw the truck pull back and hit the mini bus. According to him, the truck "dragged a bit" but he was unable to say how far the truck "dragged".

[14] The other witness for the Defence was Mr. Claudius Francis, who in his witness statement attested to his qualifications as an insurance loss adjuster, investigator, surveyor, consultant and arbitrator.

[15] He spoke of having investigated the accident, having had sight of the Police report, having visited the scene and having interviewed the first Defendant.

[16] He was not in agreement with the Police that the accident occurred directly beneath the traffic lights and that the force of the impact pushed the omnibus some 45 feet forward. In his opinion the point of impact was more than 40 feet past the traffic light going in a southerly direction. It was his opinion that the accident occurred because the omnibus driver stopped suddenly in order to pick up a passenger standing at a bus stop located at the point of impact suggested by his findings and that the first Defendant, though driving at a moderate speed, was too close to the rear of the omnibus to have avoided the impact.

[17] Cross examination of this witness revealed that the witness visited the scene two years and three months after the accident. He noted however that in investigations of accidents, time is not important. He admitted that he did not have sight of the Claimant's vehicle but it was because his instructions were to determine the cause of the accident but not the damages. He did not agree that he needed to see the vehicles and the damages in order to come to an unbiased decision. According to him, he came to his conclusion based on his experience and experiment.

[18] Mr. Francis accepted that the Police would have had the benefit of the statements given by the Claimant and the Defendant, that the Police would have had the benefit of seeing where the vehicles ended up and seeing the damage to both vehicles and that he would have had the benefit of seeing brake impressions. He contradicted the police report where it stated that the accident occurred prior to the traffic light because given the position of the vehicles post accident, it would have been impossible for the vehicle of the Defendant to achieve the speed needed to go over the gradient based on the weight and size of the truck.

[19] The witness was of the opinion that it was not in all cases that the nature of the damage determined how the accident occurred but it could give an idea of the speed, that is the extent of the damage is what gives the average speed of the vehicle. He said that speed of the vehicle is important but not the most important feature. The witness took exception to the police report where it was stated that the Claimant's vehicle was a "total write off" on the ground that the Police do not have the expertise to determine when a vehicle is a "write off".

[20] The final witness was the Police Officer, PC Emanus who said that he responded to a call with respect to an accident and that upon arrival at the scene, he saw the two vehicles. He observed the omnibus with its entire rear damaged and it was partially off the road. The motor truck was parked in the direction facing Castries with damage to its front windscreen, bumper, front park light, its step and front fender.

[21] He spoke to the two drivers and got a verbal explanation as to how the accident occurred. He asked each one to indicate the point of impact. They agreed and he invited them to watch as he took the measurements which he recorded.

[22] The officer stated that the accident occurred just underneath the traffic lights where there was a double yellow line. He continued that in his report that the Defendant was travelling to the rear of the motor omnibus failed to pay careful attention to the flow of traffic ahead and collided with the omnibus. Based on his investigations and findings at the scene, he concluded that the first Defendant should be charged with the offence of driving without due care and attention.

[23] Cross examination of the Police Officer resulted in him repeating quite frequently that he "could not recall". He stated that he was not in possession of the relevant notebook, that he did not know where it was because when his notebook is finished, he usually discards it. In addition he had since moved house. He did not prepare the typed police report but he had "browsed" through it. As a result he "could not say for sure" that the information in his pocket book was the same as what was in the report.

[24] The officer recalled giving evidence in the Traffic Court and being cross examined but could not recall the details. He was asked about his taking of various measurements and for each measurement queried he replied that he had not taken it. He could only refer to those which had been included in the report. The officer could not remember if the double yellow lines started at the junction. He could not recall the width of the omnibus nor did he know the width of a truck. He recalled from referring to the report that there were particles

of glass on the road but did not take any measurements in relation to either the glass or other debris on the road, nor did he ask any questions of the drivers regarding the glass. He admitted that he did not have a driver's licence although he could drive. He denied automatically assuming that the Defendant was wrong because the minibus was hit from the back. According to the officer, he ascertained this from the bits of glass. He agreed with the suggestion from Counsel for the Defendants that after a stop at a traffic light a driver would have to "rev up" in order to move off and that the truck being loaded with cargo, the driver would have to "rev up" to go up the incline. He was not sure however if the driver would have been able to make a sudden stop. He stated that he did not see the cargo, that the vehicle was a dump truck.

[25] In re-examination, the Police Officer could not recall if there had been a dispute between the drivers as to the lane in which the accident occurred. He did not "necessarily" agree that the measurements taken relate only to the collision.

Submissions

Claimants

[26] Counsel for the Claimants submitted that the Claimant though a simple man gave evidence which was uncontroverted in many respects e.g. that his vehicle was struck in the back and that the Defendant's vehicle left brake marks measuring 56 feet.

[27] Counsel disparaged the evidence given by Claudius Francis, describing it as tenuous, biased, unreliable and replete with hearsay, having regurgitated the statements of the first

Defendant and purported to come to a conclusion without ever having spoken to the Claimant or having sight of either vehicles to verify the nature and extent of the damage or having requested a re-construction of the collision. Counsel was of the view that Mr. Francis, not having given any evidence of specialized knowledge could not be deemed an expert and therefore his evidence was that of a layman and by section 48 of the Evidence Act must be excluded as being hearsay evidence. She argued that Mr. Francis' only reliable statement was that he was able to glean from interviewing the first Defendant that the first Defendant was driving too close to the rear of the omnibus to have avoided impacting the Claimant's omnibus. This evidence therefore supported the Claimant's claim as to the negligence of the first Defendant.

[28] Counsel submitted that the evidence of the first Defendant being contrary to that of the Claimant was an issue for the court to decide. However she argued that the Claimant's version of the events is correct and in any event the Defendant should have been a safe distance from the Claimant's vehicle to take into account and be prepared for all contingencies and sudden occurrences on the road.

[29] It was Counsel's view that the witness, Amos Demille sought to corroborate the evidence of the first Defendant but proved to be unreliable under cross examination and the only part of his evidence which should be regarded as having any weight was that the truck was in the middle lane going to Castries past the light. The statement she suggests, supports the Claimant's case that the truck was attempting to overtake him and went into the middle lane but due to traffic on the opposite he was forced to steer the truck to avoid collision with other oncoming vehicles and struck the Claimant in the back.

[30] Counsel stated that the evidence of Police Constable Emanus corroborated that of the Claimant. The fact that there were measurements he did not take did not derogate from the facts that he was on the scene, that he saw the vehicles at the time and was able to assess the nature and extent of the damage, that he took measurements that were agreed to, that both the point of impact and the brake impression were agreed to. Counsel felt that the fact that the police officer being a traffic officer but did not have a driver's licence did not derogate from the fact, that being on the scene, he was able to conclude who was liable for the collision and to proceed to charge the guilty party. In addition, although the police officer did not give evidence of the conviction of the first Defendant, that evidence was admitted by the court and it is relevant to the issue of negligence.

[31] Counsel noted that the present proceedings are subrogation proceedings for recovery of insured and uninsured losses and referred the court to Articles 1085 to 1087 of the Civil Code for the definition of subrogation – legal and conventional. Counsel also referred to Article 917A which provides for the reception of the Laws of England relating to the law of tort in St. Lucia and to Articles 986 and 986 with respect to the issue of negligence which she argued is committed when damage, which is not too remote, is caused by the breach of duty of care owed by the first Defendant to the Claimant.

[32] Counsel quoted a number of cases:

1) *Nettleship v Weston (1971) 3 AER in which it was established 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, the standard or test to be applied being that of the average, competent and reasonable driver

2) *Brown and Lynn v Western Scotland Motor Traction Co. Ltd (1945) SC 31 reported at page 3 of Bingham and Berrymans Motor Cases where Lord Cooper stated that the distance which should separate two vehicles travelling one behind the other must depend upon many variable factors – their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up and many other things. "The following driver is, in my view, bound, so far as reasonably possible, to take up such a position and to drive in such a fashion, as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated, but whether he has fulfilled this duty must in every case be a question of fact, whether, on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances".*

3) *Jungnikel v Laving (1966) 111 SOL JO 19 CA and*

4) *Thompson v Spedding (1973) RTR 312 CA – both reported on page 84 of Bingham and Berrymans' (supra). All of these cases Counsel submitted, supported her argument that the Defendant did not drive at a proper distance from the Claimant's vehicle and thereby caused the collision by his negligent and imprudent driving.*

[33] Counsel stated that the doctrine of res ipsa loquitur which is similar to Article 986 of the Civil Code was pleaded by the Claimant and that under the doctrine, the Claimant established a prima facie case of negligence where:

1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the collision and

2) On the evidence as it stands at the relevant time it is more likely than not that the effective cause of the collision was some act or omission of the Defendant or someone or something for when the Defendant is responsible which act or omission constitutes a failure to take proper care for the safety of others.

[34] This Counsel stated was the principle established in the case of Lloyde v West Midlands Gas Board (1971) 2AER 1240 and also in the unreported case of McAree v Achille (1970) High Court of Trinidad and Tobago in which reference was made to the statement of Earle CJ in Scott London and St. Katherine Docks Co. 1865 159 E. R 665 at 667. This therefore gives credence to the view that the undisputed evidence of the truck being driven too close to the Claimant's vehicle finds liability upon the first Defendant for had he been a safe distance from the vehicle and was able to manage the vehicle, the collision would have been avoided.

[35] Counsel argued that the proof of the conviction of driving without due care and attention is admissible evidence. The conviction could not have been pleaded since it occurred on 24th October, 2005 several months after the Witness Statements had been filed and evidence, except for that of the police officer, had been heard.

[36] Counsel quoted sections 78 and 80 of the Evidence Act of St. Lucia and suggested that the Evidence Act being "quiet" on the effect of the evidence of convictions and since in St. Lucia there is no cut off date for the reception of Laws from England, that one must look to the English Laws. Referring to Article 1137 of the Civil Code of St. Lucia and the case of Caribbean Home Insurance Company Ltd v Webbs National Ice Cream Civil Appeal No. 4 of 1993, Counsel submitted that from the 12th January 1957, the Laws of England on evidence with any amendments are applicable when any question of evidence is not provided for in the laws of St. Lucia. As a consequence, section 11 (2) of the Civil Evidence Act 1968 of the United Kingdom would be of effect and the burden of proof in this case shifts to the Defendant where there is evidence of a conviction. The first Defendant must now discharge the legal and the evidential burden.

[37] Counsel also argued that the evidence of the conviction is so relevant to the issue of negligence that the Defendant would not be permitted by way of defence and counterclaim to relitigate the same issues as were tried criminally because it would be an abuse of the process of the court unless the Defendant could 'prove that new evidence which entirely changed the aspect of the case was not called at the criminal trial but was at the civil trial. To illustrate this point, Counsel referred to the cases of:

Anthony J. S. Hall and Co. v Simons (1999) 3SLR 873

Brinks Limited v Abu-Saleh (1995) 1 WLR 1478

[38] Counsel stated that the Defendant never informed the Court of the conviction and that this amounted to a material disclosure,

[39] Counsel concluded that the issue of contribution did not arise as the undisputed fact was that the first Defendant drove too close to the Claimant and had he been a safe distance and driven with competence, alertness and care, he would have avoided the collision. The Claimants therefore are entitled to recover their losses with interests and costs.

Defendants

[40] Counsel for the Defendants submitted that the evidence of the Police Officer was unreliable on a number of grounds: his description of the truck as a black and white dump truck while both the Claimant and Defendant described it as a silver and white cargo truck, no nexus between the bits of glass and the point of impact when the determinant factor in his charging the first Defendant was the location of these bits of glass; the general inadequacy of his measurements, his assumption that since the first Defendant's vehicle hit the Claimant's vehicle from the rear that the first Defendant was culpable; he did not establish a correlation between the brake impression measurements taken and the vehicles; no evidence that the Defendant's vehicle caused the brake impression.

[41] Counsel was of the view that the evidence of the witness Amos Demille supported the first Defendant's assertion that the Claimant stopped suddenly in the lane and that there being traffic in the middle lane, the first Defendant could not swerve to avoid the collision, thus contradicting the evidence of the Claimant that the first Defendant was overtaking.

[42] Counsel made reference to the opinions and conclusion given by Claudius Francis; that the impact occurred past the traffic lights,, that the Claimant did stop suddenly and that the

first Defendant was driving at a moderate speed but too close to avoid the impact into the minibus.

[43] Counsel contends that the Claimant's stopping suddenly without indication and in an area clearly demarcated by no stopping, no parking, double yellow lines was unreasonable and unlawful.

[44] In support of her contention Counsel quoted from Wilkinson Road Traffic Offences 13th Edition at pages 401 to 405 e.g.

> *"An obstruction only comes into existence if there is an unreasonable use of the right of stopping" and also:*
> *".....to constitute an offence the obstruction must be unlawful, and whether or not obstruction is unlawful depends on whether the action of the person was, or was not reasonable.*

[45] Counsel also referred to and quoted extensively from the case of Clift v Andrew Paul Hawes and Motor Insurers Bureau United Kingdom Court of Appeal (Civil Division) where Sir Christopher Straughton stated at page 6.

> *"It was at one time thought to be the law that a following driver was always at fault if he ran into a car in front of him at any rate if there was a sudden stop by the front car. This is no longer the case".*

And Lord Justice Peter Gibson stated at page 11 – 12:

"The main issue in this case is whether or not the accident was caused by the negligent driving of the Defendant, or by a state of affairs created by the Claimant which was unexpected and wholly unpredictable situation brought about by the Claimant……. It is well known that whenever an obstruction that is placed on the road, which is not one as will enable an oncoming driver to deal successfully with that traffic exigency reasonably which was not anticipated, that one would expect that when such an obstruction is placed on the road, there would normally be a warning some time before the obstruction, and warning lights leading to the obstruction".

[46] Counsel argued that the Claimant had a duty to take care while driving. That duty is a duty to avoid doing anything which has as its reasonable and probable consequence, injury to other road users and it is a duty owed to those to whom injury may reasonably and possibly be anticipated if the duty is not observed – per Lord McMillan in Kay v Young Bingham and Berryman's Motor Cases, pages 6 – 7.

[47] Counsel further argued that the Claimant's actions were not what would be expected of an ordinary careful driver.

[48] Counsel concluded that the collision having been caused by the Claimant's negligent act of making an illegal stop without warning the Claimant created an obstruction to the first Defendant and was therefore the master of his own misfortune.

Findings

[49] In incidents/accidents each person whether involved or looking on tends to recall things differently, noting different aspects of the same situation. The facts might correspond but very rarely are they recorded or related identically. When the matter reaches the Court, it is therefore up to the Court to put the pieces together, whether in the criminal or the civil arena. However, unlike a criminal case where the burden of proof is beyond reasonable doubt, in a civil case the decision is reached on a balance of probabilities.

[50] The Castries/Gros Islet highway at the Corinth/Marisule junction has three (3) lanes going in both directions. Going towards Castries, and away from Gros Islet, of the three (3) lanes the immediate left lane is for traffic going either to Castries or for turning onto the road to Corinth, the second or middle lane goes towards Marisule Beach and the third lane on the far right takes the traffic coming from the direction of Castries. Going towards Gros Islet, the immediate left lane takes traffic to Gros Islet, the second or middle lane is for traffic turning into Corinth and the far left lane is dedicated to traffic going to Castries. There is a set of traffic lights at the junction of these two sets of lanes - the Corinth/Marisule junction – which regulates the flow of traffic going in the various directions. There is an incline at that junction, going uphill towards Castries and downhill towards Gros Islet.

[51] On the day in question, both the Claimant and the first Defendant were going towards Castries, the Claimant traveling ahead of the Defendant. At some point **after** the traffic

lights, the vehicle being driven by the Defendant ran into the rear of the Claimant's vehicle.

[52] What is clear from the testimony of both the Claimant and the Defendant is that the accident occurred at a point past the traffic lights and not as reported by the Police Officer in his oral testimony: "The accident occurred just underneath the traffic light", and in cross examination "I would not say that the point of impact was at the junction". In addition, under cross examination, the Claimant stated that the brake marks started right after the junction.

[53] The Claimant in cross examination stated "The accident happened when I had passed the junction, past the traffic light", and later "when I moved off from the light I had to accelerate. I first saw him (first Defendant) when I was about 20 feet from the light. This was after I had passed the light". The first Defendant in his witness statement said "just as I passed the traffic light, I saw two pedestrians who were walking towards the intersection of the Castries/Gros Islet highway and the Corinth junction. One of these pedestrians flagged towards the direction of the minibus and then he suddenly stopped. "Under cross examination with respect to the junction and where the Claimant stopped he stated. There were people by the bar by the lights. Mr. Aimable stopped past the people about 10 – 15 feet past the people". Also the evidence of witness for the Defence, Mr. Amos Demille: "When I came up (to the traffic light) the minibus was moving already. The truck had already past the junction and the truck was actually in the middle lane and then I saw him pull back and hit the vehicle. "I saw the truck drag a bit". "I cannot tell how far the truck dragged".

[54] It is the submission of Counsel for the Claimant that usually it is accepted that where there are vehicles going in the same direction – one following the other and the one in the back collides with the one in the front it is prima facie that the driver in the back would be negligent. The follower must be alert and drive defensively to allow for the exigencies of traffic in front of him.

[55] While this is the generally accepted position, the responsibility of the driver following behind is reduced if it can be shown that the behaviour of the driver in the front was such as to have been the effective cause of the collision: and that effective cause must be determined by the application of commonsense: per Sir Christopher Staughton in Clift v Andrew Paul Hawes at al (supra).

[56] In the case of Rouse V Squires (1973) QB 889, Cairns LJ stated:

> *"If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person".*

[57] Counsel for the Claimant argues that the truck is bigger than the minibus, it was loaded with luggage and all these go to the particular fact that it was following a minibus usually known to stop anywhere.

[58] Could it be that Counsel is implying that the driver of a minibus is entitled to act with impunity and to defy or flout traffic laws and commonsense by stopping anywhere and that judicial notice should be taken of this behaviour?

[59] Counsel also argues while denying that if the first Defendant were a prudent driver, when he saw the two pedestrians coming to the junction, one of whom flagged the minibus, he should have expected the minibus to stop to pick the passenger up and should have decelerated in anticipation of this action.

[60] If this argument is to be accepted, then the same must be said of the Claimant: that he should also as a prudent driver, have exercised the same degree of good judgment, skill, alertness and commonsense, taking in the exigencies of traffic as is expected of the first Defendant.

[61] I should at this juncture deal with the evidence of the witnesses other than the Claimant and the Defendant.

[62} Counsel for the Claimant urged the Court to disregard the appellation of “expert” assigned to the witness Mr. Claudius Francis, that he was never deemed an expert by the court and therefore his evidence was that of a layman and subject to the law with respect to hearsay.

However perusal of the court's documents reveal that an order was made by the Court on 23rd March 2005 in which leave was granted for this witness to be called in as an expert witness at the trial and there was no objection at that point to the designation. In addition Mr. Francis' witness statement adverts to his compliance with rule 32 of the Civil Procedure Rules. Counsel also disapproved of his method of executing his functions – that Mr. Francis did not use two vehicles similar to the Claimant's and the Defendant in his exercise and that since Mr. Francis was not on the scene that day he was not in a position to challenge the point of impact as shown by the Police Officer who was on the scene on the material day and took measurements and interviewed the parties. This last suggestion in my view is a non sequitur given the role and function of Mr. Francis as an expert in accident investigations.

[63] However I accept his conclusion with regard to the point of impact. In his witness statement Mr. Francis said:

> *The exercise (attempting to propel his vehicle forward without the intervention and use of the acceleration pedal) was undertaken to prove how incorrect the point of impact as suggested by the police was. For the police conclusions to be correct it would mean that Mr. Prospere's vehicle – a heavy duty vehicle more than four times the weight of my vehicle (a motor car) thereby making it even more difficult to move uphill would have had to be travelling at approximately 90 miles per hour to have been able to push the "stationary" omnibus more than forty five feet uphill".*

And under cross examination he said:

> *"The police report states that the accident occurred prior to the light but for the position post accident it would have been impossible to achieve that based on the weight of the truck, the gradient and the size of the bus. From the police report it is said that the vehicle stopped before the light. The vehicle of the Defendant would not have had the speed to go over the gradient and strike the Claimant's vehicle".*

[64] As stated before – see paragraph 52 – the point of impact as reported by the Police Officer was incorrect although it was given in the police report as having been agreed to by the parties.

[65] I should wish to state at this juncture that, despite the protestation of Counsel for the Claimant as to the reliability of the evidence of PC Emanus, I have felt constrained to discount his evidence. A police officer called in his professional capacity to give evidence is expected to be an officer of the court upon whom a judicial officer can rely to assist in determining cases of this nature. However I found the officer's attitude to the performance of his functions to be cavalier and nonchalant. Witness his responses with respect to his official notebooks. I am sot in possession of my pocket book. I am not sure where it is. Usually when I finish my notebook, I discard it. I have since moved ……. I last saw the pocket book years ago. I cannot say for sure that the information in the pocket book is the same as what is in the report". "And with respect to having given evidence in Traffic Court about this incident: "I recall giving evidence in the Traffic Court in this matter. I remember

being examined about the width of the road at point of impact. I remember being cross examined but as to details I cannot recall". Then when cross examined about the taking of certain measurements, he indicated that he had not taken any.

[66] Counsel for the Claimant was correct when she suggested that the fact that there were measurements he did not take did not did not derogate from certain other facts but in light of his having been found to be unreliable in other areas makes his testimony in my view to be highly suspect, especially with regard to the measurements that he did take and more importantly the point of impact which he misjudged.

[66] Now to the evidence of the parties. The Claimant told his story on a number of occasions:

- at the scene to the Police Officer he said:

  "I was coming down the road cruising speed and felt an impact at the back of me and send me in the next seat".

- to the insurance company:

  "Just past the lights at Marisule as I was accelerating from the lights, the truck that was behind me slammed into the back of the van and pushed me in the gutter".

- in his written statement for the Police:

I left the traffic lights when it turned green and was proceeding to Castries. I heard the loud humming of the engine. I looked up to the mirror and saw half of the truck in the back of the bus".

- in his witness statement:

  "When the light turned green, I began moving and the First Named Defendant travelling at a speed appeared to me to be attempting to overtake my vehicle using the lane going in the direction of Castries. At the same time a vehicle was approaching turning into the Corinth Gap when the First Named Defendant attempted to pull back into the lane and struck my vehicle".

- at trial under cross examination:

  "Mr. Prospere was coming down at speed and he was attempting to overtake and a vehicle came out from the blue and (he) then had to pull back. He had to pull back in order not to hit the gentleman coming in the centre lane. He could have used the middle lane if there were no vehicles in it. Before my vehicle got hit, I saw Mr. Prospere's vehicle in the rear view mirror. It was about nine (9) feet away".

The Defendant also recounted his story:

- at the scene to the Police Officer:

  I was traveling along the road crossing the lights, the bus driver stopped to pick up passengers and I hit him from behind"

- in his written report of the accident:

  "Just after passing the Marisule traffic lights which was green at the time, minibus number 7977 which was about 20 feet ahead of me stopped suddenly to pick up two (2) passengers. Because there was traffic on the other lane travelling in the opposite direction I had no alternative but to apply my brakes".

- in his witness statement:

  "Just as I passed the traffic lights I saw two pedestrians who were walking towards the intersection of the Castries/Gros Islet highway and the Corinth junction. One of these pedestrians flagged towards the direction of the minibus and the minibus suddenly stopped. I believe it was to pick up the pedestrians. The area where the minibus stopped consists of double yellow parking lines on the left hand side of the road facing Castries. The driver of the minibus did not signal that he was stopping, he did not pull off the road, he simply immediately stopped. As a result of the sudden stop of the minibus ahead of me, I applied brakes and motor truck registration number TA 3650 which was fully loaded with cargo could not come to an immediate stop. As a result of traffic in both lanes facing Gros Islet, I could not swerve to the right to avoid the minibus, and so motor truck registration TA 3650 came into contact with the rear of the said minibus".

- at trial under cross examination:

I am aware that the vehicle would be difficult to stop when it has speed. The truck takes a longer time than other vehicles to stop. I am aware of how difficult it is to stop a truck with load. I agree that when you are driving a truck you have to be a further distance away because it takes longer and more difficult to stop. It is not true that I was driving too close to the Claimant. ……..I don't know what speed I was driving at. The speedometer was not working. I know that I was driving at a moderate speed. Since my speedometer was not working I gave an approximate speed from my judgment.

[68] It is my view that the truth of the matter lies somewhere among these various versions given by the parties. It is my conviction that the Claimant moved off from the traffic lights after they changed to green and was travelling along past the Corinth/Marisule junction, that the Defendant was travelling closely behind, that the Claimant stopped suddenly, that the Defendant attempted to overtake, that the middle lane having been occupied, that the truck being laden with cargo, was unable to effect an urgent and complete stop ran into the rear of the minibus.

[69] Under cross examination, the Claimant admitted: "On that day I was driving the bus and looking for passengers" but he denied that he was concerned that "I was halfway in the trip and that I only had one passenger. You have fast days and slow days. On a slow day I would stop for people who flag me down. Nobody stopped me at the Corinth junction". In my view the Claimant was being inattentive to the possible circumstances and exigencies

of traffic on the road at the time. It is therefore my judgment that the Claimant was contributorily negligent.

[70] In the cases cited by both Counsel with respect to leading and following vehicles, while it is accepted that "the following driver is bound so far as reasonably possible to take up a position to drive in such a fashion as will enable him to deal successfully with all traffic exigencies to be anticipated", it was also stated that whether the following driver has fulfilled this duty must in every case be a question of fact, whether on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances. Brown and Lynn v Western Scottish Motor Traction Co., Ltd (supra).

[71] It should be noted that in all of these cases, that is concerning leading and following vehicles: Sharp v Avery and Kerwood, Smith v Harris, Jurgnited v Laing, Thompson v Spedding, there was held to be some measure of accountability and contributory negligence on the part of the leading vehicle.

[72] In the case at bar, I have come to a similar conclusion. In my opinion the Defendant cannot be held solely responsible because he appeared to "behave unwisely in the face of the hazard created by the Claimant". I am firmly of the view that the Claimant by stopping when and where he did was unreasonable and created an obstruction which could not have been entirely avoided by the Defendant.

[73] With respect to the conviction of the first Defendant, Counsel for the Claimant argued that having been convicted in the Traffic Court for driving without due care and attention, it is now incumbent upon the first Defendant to prove that he was not negligent.

[74] Counsel argued that in accordance with Article 1137 of the Civil Code of St. Lucia, since the law of St. Lucia is silent on the effect of the evidence of convictions, English law and more particularly section 11 (2) of the Civil Evidence Act 1968 UK must be applied.

[75] Article 1137 of the Code states:

> *"Any question relating to evidence which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by law of England".*

And section 11 (2) of the Civil Evidence Act 1968 UK provides:

> *"In any civil proceedings in which by virtue of this section is proved to have been convicted of an offence by or before any court in the United Kingdom ……*
>
> *(a) he shall be taken to have committed that offence unless the contrary is proved and*
>
> *(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information .complaint, indictment or*

charge street on which the person in question was convicted, shall be admissible for that purpose".

[76] While I am in agreement with Counsel's submission that a conviction having been secured against the Defendant, to allow the Defendant to be seen to be relitigating the issue, would be an abuse of process, I would wish however to refer to the case of Brinks Ltd v Abu-Saleh ((supra) cited by Counsel in which Jacob J, in dealing with this same issue said:

"……I remind myself of the high standard of case which a plaintiff must have to win….

Glidewell LJ put the matter succinctly in National Webminister Bank v Daniel (1993) 1WLR 1453, 1457: I think it right to ask ……. Is there a fair or reasonable probability of the defendants having a real or bona fide defence…. Is what the defendant says credible ……."

[77] It should be noted that the greater part of the evidence in this case was taken on 27th September 2005. The case was then delayed for some nearly eight (8) months due to the intransigence of the police officer. When he did give that evidence, it was so unreliable and unhelpful as to have been discounted by this court. It can therefore be taken that the case was concluded on 27th September 2005. The traffic case was heard and determined on 24th October, 2005.

[78] I am therefore persuaded by the words of Lord Denning MR in the case of Stupple v Insurance Co. Ltd (1970) 3AER 230:

"In my opinion therefore the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he shall evaluate that probative force of the conviction".

[79] My determination of this matter finds the first Defendant liable to the extent of 75% of the damage caused with the remaining 25% apportioned to the Claimant.

Damages

[80] There is no denying that the first Defendant or that date was the agent of the second Defendant and that in accordance with Article 986 of the Code which provides:

"Masters and employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed".

the second defendant would be liable to the Claimants to the extent of 75% of the damage caused.

[81] It is apparent that with the exception of two (2) items listed in the schedule of the particulars of special damage – storage fees and cost of renting a substitute vehicle – the claim of the claimants can be accepted.

[82] Counsel for the Defendants however submitted that the Claimant having admitted that from as early as the day following the collision he knew that his bus was a total loss, he is claiming a storage fee for what amounts to 67 days and also claiming for rental of a replacement vehicle for 72 days. Counsel is of the opinion that this claim is excessive because the Claimant should have sought to mitigate his loss, to have taken steps within 7 days to secure another vehicle. In addition he was paid by the insurance company on 14th October 2002 and his losses should stop on that date.

[83] The Claimant in cross examination stated:

> *"I would say that my vehicle was written off. I knew from the date of the accident that I had a write off. The insurance paid me. I reported the accident the following day – a Monday. The insurance takes over the vehicle for the write off. We had to pay storage. The insurance took it over after a couple of days. I had to rent a vehicle. The insurance settled on 14th October. I continued to rent up to 31st October because I had no means to get another vehicle. "I had to pay my loan".*

[84] He denied that he did not make an attempt to mitigate his losses and stated that when he checked with the agent for the buses there were none in stock.

[85] I accepted this position of the Claimant's evidence but am of the opinion that the claim for the storage fees as well as a replacement vehicle must be reduced. The insurance company " took over the vehicle after a couple of days" and while these are subrogation proceedings, the Defendant is not to be burdened with the delay the insurance company

took in divesting itself of the wreck. The court will therefore allow for storage of 4 days from 11th to 14th August 2002. In addition, the insurance company having settled the claim by 14th October 2002, the court is of the view that 65 days is a reasonable time within which the Claimant should have been able to secure a replacement, having been aware that the vehicle was a "write off" from the date of the accident" and aware that the insurance company had almost immediately accepted liability. The claim with respect to the rental of a vehicle will therefore be reduced to 65 days.

[87] The Claimant's claim is allowed as follows:

Value of vehicle	$36,000.00
Storage fees from 11th to 14th August, 2002	40.00
Inspection of vehicle	250.00
Estimate of repairs	150.00
Police report	200.00
Excess on Policy	3,500.00
Cost of rental of substitute vehicle from 11th to 14th October, 2002	12,800.00

	$52,940.00
	=========

reduced by 25%

Counter claim of Defendants

[88] The Claimants made a counterclaim in the sum of $24,147.43 for the damage resulting to the truck in the collision. Evidence was given by Mr. Newman Monrose, Chief Executive Officer of the second Defendant and employer of the first Defendant.

[89] In his witness statement, Mr. Monrose stated that as a result of the collision a similar vehicle was hired at a rate of $950.00 per day, that the vehicle remained out of service for a number of days. This was a cost of $3,600.00 to the company. The witness exhibited documents indicating that sums were expended for certain repairs and other documents giving estimates of the cost of parts which had to be imported.

[90] Under cross examination the witness admitted to having produced 2 estimates for the repairs but stating that since their business is usually conducted with the author of the higher estimate, the company gave the business to that company. He however was unable to produce a receipt for the repairs and stated “I cannot say how much I paid”.

[91] In claims for special damages, it is expected that the relevant supporting documentation would be produced to the court. The witness produced an undated, unsigned invoice with respect to the claim for the sum of $3,600.00 which the court found unacceptable and therefore refused that aspect of the claim.

[92] The court found the counterclaim of the Defendants to be unsubstantiated and therefore dismissed it.

ORDER

Judgment entered for the Claimant in the sum of $39,705.00 which is 75% of $52,940.00.

Interest at the rate of 6% per annum on the said sum of $39,705.00 with effect from date of accident until payment.

The counterclaim of Defendant is hereby dismissed.

Costs prescribed to the Claimant.

SANDRA MASON QC

High Court Judge