

SAINT LUCIA

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: SLUHCV 2007/0119

Between:

BARBARA MC QUILKIN

CLAIMANT

AND

SYLVESTER DEVAUX

DEFENDANT/ANCILLARY CLAIMANT

AND

ALOYSIUS POLIUS

ANCILLARY DEFENDANT

APPEARANCES:

**Mr. Horace Fraser for the Claimant and Ancillary Defendant
Mr. Peter I. Foster with Ms. Rene St. Rose for the Defendant/Ancillary Claimant.**

**2010: April, 20th;
November 25th,**

JUDGMENT

[1] **WILKINSON J.: Mrs. Barbara Mc Quilkin by her amended statement of claim filed 25th June 2007, sought the following:**

- (1) Special damages in the sum of \$87,709.68
- (2) General damages

- (3) Costs
- (4) Interest
- (5) Further or other relief.

Mr. Devaux filed a counterclaim and therein sought the following:

- (1) Damages
- (2) Interest
- (3) Costs
- (4) Further or other relief

- [1] During the late afternoon, sometime after 5.00p.m on 18th June 2004, Mr. Devaux was driving his car P20 along the Pigeon Point Causeway towards the intersection where that road meets with the Gros Islet highway. Mr. Polius was driving a Toyota Coaster bus licenced HD 5253 along the Gros Islet highway in the direction of Cap Estate and driving in this direction meant that he had to go pass the Pigeon Point Causeway intersection with the highway. An accident occurred in the vicinity of that intersection.
- [3] Mrs. Mc Quilkin said that she was the owner of the bus driven by Mr. Polius. She did not produce any registration to confirm this statement. The bus was used to transport hotel staff to and from work, and hotel guests to and from the airports and seaports. According to Mrs. Mc Quilkin services were provided under ALLMAC TRANSPORT INC., a company with which she was associated. No documentation was provided to show her relationship with the company. Mr. Polius, the driver of the bus was paid by ALLMAC TRANSPORT INC.
- [4] Mrs. Mc Quilkin outlined the damage to the bus as being to the front bumper, front runner, grill, radiator, right headlight, right indicator, right door, and rear bumper. Repairs to the bus were delayed as she had to await the arrival of parts from overseas. She hired a bus to carry out the company's contract to transport hotel staff.
- [5] Under cross-examination Mrs. Mc Quilkin admitted that the document upon which she relied to prove ownership, an agreement drawn between herself and Club St. Lucia Smuggles Village Ltd, was unsigned by the company, secondly, the police traffic accident report showed the owner of the vehicle as Philip George & Club St. Lucia, and thirdly, several of the receipts from Freddy's Garage Ltd, including the estimate for repairs, stated that the payment was received from ALLMAC TRANSPORT INC.
- [6] Mr. Polius, driver of the bus said that as he approached the Gros Islet highway and Pigeon Point Causeway intersection he saw Mr. Devaux who failed to stop and proceeded onto the highway in the direction of Castries. Mr. Devaux came directly into the path of the bus. As soon as Mr. Devaux entered the highway, the vehicles collided, and there was nothing he could do.

- [7] Under cross-examination he admitted that the speedometer on the bus was not working and so he did not know whether he was driving at 20 mph or 30 mph. It was put to him that he could be driving at 40 – 50 mph and to this he replied that he could not have been doing more than 40 mph. He subsequently said that he was driving between 35 – 40 mph. He said that after the collision the bus went onto the right side of the highway.
- [8] Initially under cross-examination Mr. Polius said that he could not recall if the bus and the car had collided on the right side of the highway facing Cap Estate. When it was put to him that the police traffic accident report recorded the impact on the right side of the highway, and asked if this was correct, he said that it was correct. He agreed that the bus had pushed back Mr. Devaux's car in the direction of Cap Estate. He agreed that he had shown the police a distance of 94 feet 8 inches as being the distance he was at when he first saw the car. He also agreed that if he was at 94 feet 8 inches and driving at 30 mph he could have comfortably stopped the bus before collision.
- [9] Mr. Devaux gave his evidence via video-link. He was 84 years old at the time of the accident and a self-employed nutritionist operating a holistic clinic. He was travelling from Sandals Grande at Pigeon Point Causeway to the Castries direction. When he arrived at the Pigeon Point Causeway and Gros Islet highway intersection, he stopped. He saw a bus coming around the corner headed in the direction of Cap Estate, the bus was approximately one thousand feet away from him, he looked north saw a car around the curb from Cap Estate but it posed no danger to him and so he proceeded to cross over to the left side of the Gros Islet highway in the direction of Castries. While crossing over he glanced south, noticed the bus swerve to the right like it was avoiding something on the highway but the bus was still at least seven to eight hundred feet away from him. He continued travelling into the Gros Islet highway and onto his left side in the direction of Castries. He observed the bus on his side of the highway and travelling at a terrific speed. Mr. Devaux said he thought that Mr. Polius would apply brakes but the bus kept coming towards him. He attempted to move off the highway, the collision occurred nevertheless and his car was pushed backwards in the direction of Cap Estate. The bus then hit his motor car twice again. His motor car was pushed back approximately one hundred and thirty feet.
- [10] On the first collision between the bus and car, Mr. Devaux said he broke his windshield as he slammed against the steering wheel and windscreen, on further collision between the bus and car he was thrown forward repeatedly and hit his head. The bus struck his driver's door crushing in the metal on the side of his car and this broke his right leg. He was taken by ambulance to Tapion hospital where he underwent surgery on his leg. His car was written-off.

- [11] He referred to and relied on the medical reports of Dr. Christopher Beaubrun, Dr. Horace Jeffers, and Dr. Ndidi Nagbue.
- [12] Under cross-examination he said that he had stopped long enough at the intersection to look both ways, he did not know how long he was stopped. By the time he got to the right side of the highway, he was traveling at about 20 mph. He was adamant that he had crossed the intersection and was travelling in the direction of Castries. He said that he had travelled approximately 60 – 100 yards on the highway when the collision occurred. It was approximately a half a minute between when he saw the bus, crossed over the intersection, and travelled between the 60 – 100 yards in the direction of Castries.
- [13] Mr. Tennyson Gajadhar, a qualified licenced land surveyor was a witness for Mr. Devaux. He was proffered as an expert. To his witness statement was a plan of the Pigeon Point Causeway and Gros Islet highway intersection. He said that he was present on the day the police were taking measurements at the site and also took measurements. He observed markings on the highway from the accident. There were several measurements shown on the plan.
- [14] Under cross-examination Mr. Gajadhar admitted that Mr. Devaux showed him the three points of impact which he recorded on his plan.
- [15] Another witness for Mr. Devaux was Mr. Dexter Justin. They knew each other prior to the collision. On the day of the accident, Mr. Justin was heading south from Cap Estate and driving at approximately 20 mph when he first saw Mr. Devaux. He was about 100 yards away from Mr. Devaux when he saw him driving out to the intersection. He saw Mr. Devaux come to a complete stop at the intersection for one or two seconds. He first saw the bus just after Mr. Devaux had completed his entry onto the highway and after he had heard the screeching of tyres.
- [16] Under cross-examination he said that he was not able to see the bus before because the highway had a slight bend in it. He saw the bus hit the side of Mr. Devaux's car. Mr. Devaux's vehicle spun around and the bus hit it again and then it went into the bush. Mr. Devaux's car spun up the slight incline of the highway towards his car.

Issues

- (a) Who is liable for the accident?
- (b) Was there contributory negligence by either or both parties?
- (c) What quantum of damages, if any, the Court should award?

Law

- [17] Each party is alleging negligence on behalf of the other driver. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.¹ Traffic entering a major road from a minor road ought to give way to traffic on the major road.² It is a well recognized and conventional practice that where there is a doubt as to priority, the vehicle that has the other on its right hand side is the give-way vehicle.³ The rate of speed that will be considered negligent varies with the nature, condition and use of the particular highway, the amount of traffic that actually is, or may be expected to be on it.⁴ The driver of a motor vehicle should usually drive at a speed that will permit him to stop or deflect his course with the distance he can see is clear, though it is not conclusive evidence of negligence to exceed that speed.⁵

Findings

- [18] On a point of procedure the Civil Procedure Rules 2000 Part. 29.5(1) (g) provides: "29.5.(1) A witness statement must –
(g) sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the document."
- [19] A review of the witness statements show that in the case of Mrs. Mc Quilkin there was no identification of any the documents which she disclosed, and in the case of Mr. Devaux there was only identification of some of the documents which he disclosed. Both parties disclosed the police traffic accident report made 26th October 2004 but it was not identified in their witness statements. At the trial neither counsel raised the issue of compliance with Part 29.5.(1)(g) and indeed counsel for Mr. Devaux cross-examined Mrs. Mc Quilkin on all of her disclosed documents. In closing submissions however, counsel for Mr. Devaux sought to raise the non-compliance issue. I am of the view that since counsel relied on the same documents to test the veracity of Mrs. Mc Quilkin's evidence and so brought the documents into the evidence before the Court, he cannot after the fact raise the issue. I have therefore taken into consideration all of the documents identified in the witness statements, and those not identified in the witness statements but which were brought into evidence by cross-examination.
- [20] At trial counsel for the Defendant was able to throw some doubt as to the ownership of the bus however, I will accept Mrs. Mc Quilkin's evidence that she owns the bus as indeed the agreement for sale is made out

¹ Blyth v. Birmingham Waterworks Co. (1856) 11 Ex. 781.

² Brown v. Castral Scottish Motor Traction (1948) 98 LJ 671 Court of Sess. Scot.

³ Mac Intyre v. Coles [1966] 1 ALL E.R.723.

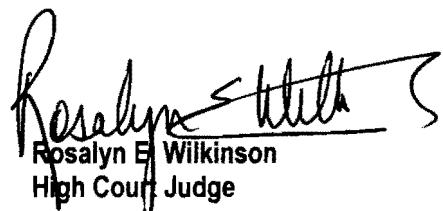
⁴ Laurie v. Raglan Building Company Ltd (1942) 1 KB 152 at 154-155.

⁵ Morris v. Luton Corp (1946) 1 All ER 1.

in Mrs. Mc Quilkin's name. If I were to follow counsel for Mr. Devaux's position to its logical conclusion i.e. that Mrs. Mc Quilkin was not the owner of the bus then surely Mr. Devaux ought not to have filed a counterclaim against Mrs. Mc Quilkin for damages.

- [21] Counsel for Mrs. Mc Quilkin and Mr. Polius, in closing submissions objected to the evidence of Mr. Gajadhar because there had been no compliance with the Civil Procedure Rules 2000 Part 32 and which provides that a party may not call an expert witness or put in the report of an expert witness without the court's permission. Neither the case management order of 10th January 2008, nor the pre-trial review order of 10th July 2008, record that Mr. Gajadhar or any other expert for that matter would be called as an expert witness by Mr. Devaux.
- [22] I am of the view that had Mrs. Mc Quilkin and Mr. Polius wished to object to the witness statement of Mr. Gajadhar, they had ample time to do so between 21st August 2008, and the date of trial, some one and a half years. In addition, by placing the objection to Mr. Gajadhar in closing submissions, Mr. Devaux was not given an opportunity to respond to the objection. An objection of this magnitude, that is to ask that the evidence of a witness be thrown out after the trial has concluded, ought to have been made in writing at the earliest and Mr. Devaux given an opportunity to respond.
- [23] As has been declared in several cases of the Court, the days of ambush practice are over under the dispensation of the Civil Procedure Rules 2000. However, Mr. Gajadhar having not been deemed an expert by order of the Court, he will be treated as an ordinary witness.
- [24] In relation to Mr. Gajadhar's evidence which is concentrated in the plan annexed to his witness statement, I find it unsafe to rely on the points of impact shown without the crucial measurements of the width of the highway to give me some perspective as to the width of the left and right sides of the highway.
- [25] Mr. Polius, did not at any time deny that at some point before the collision that he had swerved onto the right side of the highway and kept moving on that side of the road or explain what he was doing there in the first place.
- [26] I also find that Mr. Polius contradicts himself. He said that on the one hand that he was approximately 94 feet away when he saw Mr. Devaux, and that he could have stopped, and on the other hand, he says there was nothing he could do. Further, he says that as soon as Mr. Devaux got onto the highway, this is when the collision happened. Since Mr. Devaux would have had to cross over Mr. Polius' left lane, his statement does not explain how the impact occurred on Mr. Polius' right side of the highway.

- [27] Mr. Polius having said that the bus' speedometer was not working and that he estimated that he was travelling between 35 -40 mph, and that at that speed he could have stopped within the 94 feet 8 inches, I find that the bus must have been travelling faster as even when the bus came into contact with the car which was travelling in the opposite direction to it, it did not stop, but rather went on to have two further contacts with the car and with such force that it caused the car to move in a backward motion up the incline to Cap Estate.
- [28] Upon review of the police traffic accident report, I have found it lacking certain details which would have assisted the Court. It fails to state (a) when the information recorded therein was recorded, (b) who was present when the information therein was recorded, (c) who was present at reconstruction of the accident when additional measurements were taken and recorded, (d) greater details as to the damage to the vehicles and (e) the measurements of the two vehicles. Since neither of the parties questioned the accuracy of the data recorded in the report, on review I have found that all the relevant police measurements point to the accident having occurred on Mr. Polius' right side of the highway.
- [29] It is not doubted that Mr. Devaux could have waited until the bus had cleared the intersection but he saw the bus when he glanced to the south at approximately one thousand feet away. He never waivered on this fact. He made the decision that it was safe to travel into the highway in the direction of Castries. Even though there was a greater burden on a driver exiting from a minor road to a major road to ensure it is safe to do so, than a person driving straight on the highway, in this instance, the weight of the evidence shows that on a balance of probability, Mr. Polius caused the accident.
- [30] It is my judgment that Mr. Polius caused the accident. Judgment is entered for the Defendant against Mr. Polius as driver, and Mrs. Mc Quilkin as owner of the bus. Damages and costs are to be assessed in Chambers.



Rosalyn E. Wilkinson
High Court Judge