

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2010/0237

BETWEEN:

GLENDIA SAMUEL-CHURCH
(Personal Representative of the Estate of
Kervin Samuel, deceased)

Claimant
and

KADIE MC EWEN

Defendant

Appearances:

Ms. K. Johnson for Claimant
Mr. A. Clouden for Defendant

2010: September 27
2012: January
May 2

JUDGMENT

- [1] PRICE FINDLAY, J.: This claim was filed as a result of a tragic road accident where Kervin Samuel (the deceased), aged 28 years, was killed.
- [2] The claim brought by the Personal Representative of the estate of the deceased, claims as follows:
 - (a) Damages for negligence
 - (b) Damages under the Law Reform (Miscellaneous Torts) Act, Cap. 167
 - (c) Interest thereon pursuant to s. 27 of the West Indies Associated States Supreme Court Act Cap. 336
 - (d) Further and/other relief

(e) Costs.

- [3] It is not disputed that on the afternoon of 27th June 2009 the deceased was one of the passengers in the Defendant's Nissan minibus Registration No. HX992.
- [4] The route to be travelled that fateful afternoon was from the St. George's Bus Terminal to Victoria in the parish of St. Mark.
- [5] The deceased was seated in the rear of the bus on the right-hand side of the vehicle, close to a window.
- [6] According to the evidence led at trial for and on behalf of the Claimant, the driver of the bus, the Defendant, was observed pumping the brakes of the vehicle when proceeding downhill prior to the accident.
- [7] Both front seat passengers, Kelly George and Shalem Julien, testified that upon reaching Marigot, St. John's, in the area of Mt. Nesbitt Hill, they both heard what was described as "a flopping sound" and "a scraping noise" coming from the bus.
- [8] Kelly George stated that whenever the bus accelerated the sound became louder and more frequent, and when the brake was applied the sound seemed to disappear.
- [9] He also testified that Ms. Julien, the passenger seated next to him, asked the Defendant about the sound, and he informed her that it was the shocks on the vehicle which were giving trouble.
- [10] He further stated that upon arrival at Dougaldston, when the Defendant applied the brakes there was a loud sound from the bottom of the bus as if something had dropped off, and the front of the bus could be heard dragging on the road's surface. He said he was troubled by the sounds he heard.
- [11] He also observed the Defendant applying the brakes but the bus did not slow down.

- [12] He testified that when they got to a place known to him as Dougaldston Hill, when the bus began its descent, he heard a loud noise from beneath the bus and there was a sudden drop at the front left of the bus. He heard a dragging sound.
- [13] The Defendant applied brakes more than once but the bus did not stop.
- [14] He said that he observed the driver swerve to the left but the bus failed to stop. It crossed the drain, went up a driveway, hit a wall and flipped onto its right side in the road and skidded for about 15-20 seconds before coming to a halt.
- [15] Ms. Julien testified that when the vehicle got to Nesbitt Hill, there was a motorcade which stopped the progress of the vehicle.
- [16] When the bus moved off, she heard the scraping noise she had heard earlier, again. It was at this time the Defendant told her it was the shocks.
- [19] Coming down Nesbitt Hill, the vehicle picked up speed. She heard someone in the back shout, "Oh God, help us!"
- [20] The bus veered to the left, climbed a bank near the gate to a house. The bus then canted over to the right-hand side, coming to rest with the wheels of the bus to the left side.
- [21] She said when they were going down Mt. Nesbitt Hill the bus became uncontrollable. It picked up speed and persons in the bus started to panic.
- [22] Both witnesses testified that after the bus came to a stop, passengers left the vehicle through windows and through the door by the conductor. Passengers were assisted to exit the overturned bus.
- [23] Mr. George said the Defendant did not exit the bus and assist with the evacuation, but Ms. Julien testified that he did.
- [24] Neither witness observed what the passengers behind them were doing during this frightening, harrowing experience.

- [25] When they exited the bus they both observed the deceased. He was lying on the ground on his stomach, the bus was resting on the lower half of his body. One witness testified to having seen the deceased moving as if he were in pain.
- [26] Ms. Julien testified that when she saw the deceased outside of the bus he was visibly in pain around his midsection. She observed a big piece of his skin was gone; she could see the underlying white layer. She called the deceased by his name and he answered her.
- [27] Both of the passengers testified that several persons volunteered and together they lifted the bus and removed the deceased from under the bus.
- [28] Kelly George testified that he did not know how the deceased got under the bus.
- [29] The Defendant in his evidence stated that he is a bus driver by profession, and is the owner of the bus which was involved in this accident. He testified that he was an experienced bus driver.
- [30] He said that on the day in question he left St. George's heading to Victoria in St. Mark's. He had a full load of passengers, that is, 18 passengers.
- [31] He stated that he usually runs the bus six days a week. The bus would make four trips per day.
- [32] He described the bus as having five rows of seats in all, and he recalled both Mr. George and Ms. Julien as being the passengers who were seated in the front of the bus with him on the day in question.
- [33] When he reached Dougaldston Hill in St. John, driving down the hill, the brake pedal dropped from under his foot. He realized he had no brakes. The pedal dropped right to the floor.
- [34] He tried to keep the bus on the left side of the road. He recalled Ms. Julien asking him about certain noises coming from the bus during the trip that day. He told her

- it was the shocks making the noise. He described the sound as a screeching sound.
- [35] After he realized the brakes failed, he denied pumping the brakes. He said that after the brake failure all he could do was to get the bus to come to a stop. He did not pump the brakes because that would not have solved the problem.
- [36] He described the bus' journey down the hill as slow, and he estimated the speed at 15 mph. He acknowledged that the bus hit the driveway and capsized even though it was travelling at slow speed. He was trying to avoid the collision.
- [37] He testified that the bus hit the driveway because he directed the bus to hit the said driveway and then the wall. He wanted the bus to hit the wall so it could stop. If he had not hit the wall, he said, the bus would not have stopped.
- [38] He claimed the passengers did not panic; they appeared calm even when the bus hit the driveway and wall. This is in contrast to the testimony of Ms. Julien, who stated someone had shouted out during the descent of Dougaldston Hill.
- [39] The Defendant said that during this descent, he took his eyes off the road to look in the rear view mirror and observed the deceased jumping out of the window of the bus.
- [40] He testified that a prudent driver would have taken his eyes off the road while trying to avoid a collision.
- [41] The Court finds it astonishing that the driver of a bus, descending a hill (however gentle a slope), with a full load of passengers, with no brakes, trying to avoid a collision with either a driveway or a wall, would take his eyes off the road for any period of time to observe a passenger or anything trying to jump through a window.
- [42] One would think that the total concentration of the driver would be to avoid an accident and to manoeuvre the vehicle to limit the damage to life and limb and vehicle.

[43] I find the Defendant's assertion that the deceased jumped through the window of the bus to be unfounded and unsupported by any evidence before the Court.

[44] The Defendant disputed the findings of Insp. Andrews, who had inspected the bus after the accident and who had concluded that:

"I carried out inspection of the shocks on the vehicle and found the two (2) front shocks were in good condition, also the right rear was in good condition. However, the left was damaged, because of the vehicle going off the road, thus causing the bold holding the bottom to break on impact.

I also carried out an inspection of the brakes on the vehicle and found that a piece of brakes on the left side was missing, the wheel hub was slack and wobbling. This was due to the fact that six bolts should have been holding the brake disc to the hub, however three were missing, two broken and one was very slack. I also observed the rotor disc was damaged.

This happened when the piece of pad fell out the brake began to rub against the disc causing the damage.

In my opinion the cause of the accident was due to lack of proper servicing done on the vehicle on the part of the owner of the vehicle."

[45] In answer, the Defendant asserted that it was his duty to assure that the vehicle he was driving was road worthy and safe.

[46] He also stated in his witness statement that two weeks prior to the accident he had his mechanic change the front brakes of the bus. However, this mechanic was not called to give evidence and not even his/her name was divulged to the Court.

[47] Further, in cross-examination, the Defendant stated: "I had a mechanic do some work on the vehicle two weeks before the accident. He did not change the front brakes. He changed the back brakes."

- [48] These statements appear to be contradictory and leave the Court unable to accept the evidence of the Defendant as reliable in respect of the maintenance of the vehicle.
- [49] Counsel for the Claimant submitted that it was clear from the evidence that the cause of the accident was two-fold:
- (i) The negligent driving and management of the bus by the Defendant; and
 - (ii) The failure by the Defendant to properly maintain the vehicle.
- [50] It is clear from the evidence that on that fateful day the brakes on the Defendant's bus failed while he was on the journey from St. George's to St. Mark's.
- [51] It is clear that a statement by the Defendant that the brakes of a vehicle have failed and that the vehicle had been serviced (in this case, two weeks) before the accident is not sufficient to rebut a presumption of negligence.
- [52] Both Counsel referred to the text Commonwealth Caribbean Tort Law by Kodilinye, 2nd Edition at p. 124, referring to the judgment of St. Bernard J in **Brown v Brown** – No. 13 of 1967:

"... the mere statement "I had no brakes" is a neutral event equally consistent with negligence or due negligence on the part of the defendant. To displace the presumption of negligence, the defendant must go further and prove, or it must emerge from the evidence, the specific cause of the failure of the brakes. If the statement, "I applied brakes, no brakes" was a defence, then all a motorist would have to do to escape damages for his negligence would be to say, "had no brakes". He must go further and prove that he exercised due diligence in the driving of his car and equal diligence in the maintenance and use of his vehicle, and that negligence was not a probable cause of the accident ...

The mere statement, "I applied my brakes, no brakes" is negligence on the part of the Respondent in this case. The statement, "I had no brakes" is equal to saying, "My tyre burst" or "I had a skid". These statements are not defences in actions for negligence and do not, in our view, rebut the presumption of negligence."

- [53] I cite the words of Thom J in **Spencer v Browne** SVGHCv2007/0097 at paras 17 & 18 where she states:

"Learned Counsel also referred the Court to the cases of **Granger v Murphy** 1975 Court of Appeal of the Bahamas No. 11 of 1974, and **Henderson v Henry Jenkins and sons** (1970) A.C. 280. In **Henderson**, a lorry owned by the First Respondent was descending a hill when the brakes failed and the lorry struck a post office driver who died as a result of the injuries he sustained. The House of Lords held that the First Respondent could not rely on the defence of latent defect which could not be discovered by the exercise of reasonable care unless they had taken all reasonable care to do so. They were required to lead evidence to show that they did so, this they failed to do.

A similar approach was adopted in the case of **Granger v Murphy**. In that case the Appellant's vehicle ran into the back of the Respondent's car which was in a stationary position at an intersection. The Appellant alleged the accident was due to failure of his brakes. Georges J.A. in dealing with the Appellant's submission on latent defect said:

"He has led no precise evidence establishing exactly what part of the braking mechanism failed or the cause for such failure. He had led no evidence detailing the type of inspection carried out in the periodic maintenance services of which he testified. One is left therefore, in doubt as to precisely what was the defect which caused the brakes to fail and similarly one cannot tell whether failure to discover the defect may not have been due to obviously faulty maintenance procedures".

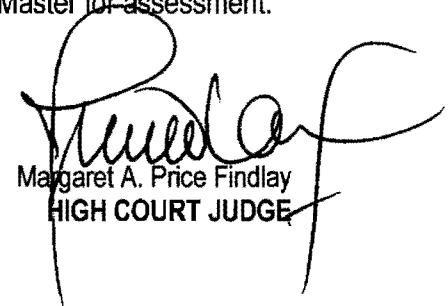
- [54] In this case the Defendant has given conflicting evidence of the maintenance which he claims was done on the vehicle, and we have the evidence in the report of Insp. Andrews which speaks to the lack of proper servicing of the Defendant's bus.
- [55] The Court believes the Claimant and the witnesses for the Claimant in their testimony as to what happened on the day of the accident.
- [56] I find that the Defendant's assertion that the deceased jumped out of the window of the bus but could not be thrown out of the same window to be untenable.

- [57] I also find that he had time to observe what he alleges the deceased was doing while at the same time trying to control what was a runaway bus to be less than convincing.
- [58] I agree with the law as submitted by the Claimant.
- [59] I find that in this case the deceased was a passenger in the bus driven by the Defendant. The brakes of the bus failed which led directly to the overturning of the bus, resulting in the deceased being thrown from the bus. The bus subsequently turned on its side, landing partially on the body of the deceased. The deceased died as a result of the injuries he received as a result of the accident.
- [60] I find that the Defendant has failed to satisfy the Court that the accident was not due to his negligence. He failed to control the vehicle adequately and he failed to maintain the vehicle in a manner which made it fit to be driven on the road.
- [61] I adopt the words of Lord Pearson in *Henderson v Henry Jenkins and Sons* as follows:

"... the decision in this appeal turns on what is sometimes called "the evidential burden of proof" which is to be distinguished from the formal (or legal or technical) burden of proof. Passages which bear on this distinction will be found in *Esso Petroleum Co. Ltd v Southport Corporation* (1953) 2 AER 1204 at 1212; ... and in *Barkway v South Wales Transport Co. Ltd.* (1950) 2 AER 392 ... For the purposes of the present case the distinction can be simply stated in this way. In an action for negligence the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The general burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression "burden of proof" with this meaning, as there

is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."

- [62] The Defendant in this matter never lead any evidence to show how or why the brakes of the bus failed, he merely asserts that they did. He led no evidence from the mechanic he said had serviced the vehicle some two weeks prior to the accident. The mechanic was not called as a witness.
- [63] It cannot be determined what if anything caused the brake failure in the Defendant's bus, but we do have evidence that the defect was the result of lack of proper maintenance of the vehicle by the Defendant.
- [64] I find that the Defendant has failed to provide the Court with sufficient evidence to displace the *prima facie* inference that he was negligent.
- [65] The Claimant has proved to the satisfaction of the Court on a balance of probabilities that the accident was caused by the Defendant's negligence.
- [66] I find that the Defendant was solely responsible for the accident and the unfortunate death of the deceased.
- [67] The issue of damages and costs are to be referred to the Master for assessment.



Margaret A. Price Findlay
HIGH COURT JUDGE