

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H 143 OF 1986

BETWEEN	OLIVE HALL	PLAINTIFF
AND	THE JAMAICA OMNIBUS SERVICES LIMITED	1ST DEFENDANT
AND	DOUGLAS BRYAN	2ND DEFENDANT
AND	ESTATE OF ROY FENTON BLAKE	3RD PARTY

B.E. Frankson and A. Kitchin for the plaintiff.

D. Goffe instructed by Myers Fletcher & Gordon, Manton & Hart for the Defendants

C.M.M. Daley and Miss C. Vassell for the Estate of the deceased third party.

Hearing: March 19, 20, 21 and July 12, 1990.

BINGHAM J.

JUDGMENT

On Labour Day May 23, 1983 the deceased Anne Marie Wright, a school girl 16 years of age residing at Wynters Pen in St. Catherine was a passenger in a Peugeot motor car owned and driven by one Roy Fenton Blake. This car which was licensed to carry five persons was proceeding from Wynters Pen in St. Catherine to the Regal Theatre in St. Andrew with seven other persons apart from the driver. They were on their way to view a movie "First Blood" and this show was scheduled to commence at 8:30 p.m. with the feature film due to start at around 9:00 p.m. They never made it to their intended destination.

While proceeding along the Spanish Town Road on the dual carriage way from the Cremo Factory at the Six Miles Round About towards Three Miles there was a collision between the Peugeot motor car and a J.O.S. Bus at the junction of that highway where it intersects with Weymouth Drive.

It is common ground that at the time of the collision the bus was in the process of turning to its right to enter from off the highway into Weymouth Drive. There is an issue of fact, however as to whether the bus had entered Weymouth Drive and had actually come to a stop at a point on that road where there was a very large pot hole which did not allow for easy access into Weymouth Drive.

The evidence of Devon Brown the sole survivor from the occupants who were in the car was that the collision took place while the bus was in the act of turning from Spanish Town Road into Weymouth Drive.

The evidence of Douglas Bryan, the second defendant was to the contrary that the impact occurred a few seconds after the bus had turned into Weymouth Drive and had come to a stop at the pothole which was some distance into Weymouth Drive with a section of the rear of the bus protruding out into the highway. It was while the bus was in this position with its left rear section occupying a section of the highway as one proceeds in an easterly direction towards Kingston that the collision occurred.

It was the front of the car which collided into the left rear of the bus at the section just over where the left rear wheels were located. As a result of the impact, a severe one, the car exploded and seven persons including the driver who were trapped in the vehicle perished. Only one survived to relate his account of that fateful occurrence of what was a tragic and gruesome incident. This person Devon Brown was then and still is a soldier serving with the Jamaica Defence Force. He, fortunately for him was seated to the left front of the car and was thrown from it upon the collision taking place by the force of the impact and was rendered unconscious.

The force of the impact caused the front of the car to be crumpled and pushed back to such an extent as to result in the doors becoming jammed trapping the other occupants into the vehicle which instantly became a blazing inferno.

The present action has been launched by the plaintiff Olive Bryan the mother of the deceased Anne Marie Wright then a 16 years old school girl, in the capacity as a near relative of her daughter under the Fatal Accidents Act, and also having regard to what is set out in the body of the Statement Claim, in a representative capacity as Administratrix under the Law Reform (Miscellaneous Provisions) Act, on behalf of the deceased estate to recover damages for the defendants including herself. This latter claim, however, in the light of the fact that at the time of the filing of the Writ no grant of Letters of Administration had been obtained by the plaintiff in that capacity to launch a claim, that aspect of the claim is therefore a nullity as the plaintiff then had no legal authority to bring such an action. The case of Bowler vs. John Molen and Company Limited (1954) 3 A.E. R. 556 referred to

by Mr. Frankson for the plaintiff in support of the locus standi of the plaintiff to bring an action under this head of the claim is when examined against the weight of the authority (referred to supra) in establishing the requirement for her to be clothed with authority to bring the action in such a representative capacity. As the grant of letters of administration did not supercede the filing of the Writ it followed that in so far as the statement of Claim sought to allege that the plaintiff was the Administratrix of the deceased estate that requirement was totally lacking.

The present action, therefore, will be considered on the basis of the Claim as it related to an action under the Fatal Accidents Act and to the right of the plaintiff to pursue a Claim as a near relative of the deceased.

Having regards to the Defence filed in the matter, the two issues that arose for determination were:-

1. Liability

2. Damages

1. Liability - In this regard that question must be determined in favour of the plaintiff as there is no issue as to the fact that the deceased was a passenger in the car at the time of the collision and all that remains is for this Court to determine as between the second defendant as the driver of the bus and the driver of the motor car as to which of these two persons were negligent and if so if it arose the question of contributory negligence in which event a determination as to how the blame ought to be apportioned between them, based upon the causative findings.

Given the fact that the highway in question was a dual carriage way capable of accomodating three lanes of traffic on either side of it and that at the time of the collision there were only these two vehicles in the immediate vicinity of the junction, it is difficult to conceive of such a collision taking place but a collision did occur and it is now necessary to examine the two accounts as related by the witnesses Devon Brown and Douglas Bryan in determining the question of which of the two drivers or both were negligent and if both the question of apportionment.

2. The Testimony of Devon Brown - According to the witness the party of eight left Wynters Pen in St. Catherine around 8:00 p.m. on their way to the Regal Theatre in the Peugeot car driven by Roy Fenton Blake. He was seated in the front of the car to the extreme left. The car was being driven

at a speed of between 30 - 35 miles per hour.

At about 8:30 p.m. the car reached about three car lengths from the intersection with Weymouth Drive when suddenly and without warning the bus which was approaching from the opposite direction turned across its path. The driver of the car had no time to apply this brakes before the collision, but swerved to his right in an attempt to avoid the collision but was unable to do so. The car collided into the left rear of the bus which was then positioned in the middle of the road facing Weymouth Drive. The bus was positioned across Spanish Town Road when the impact took place.

Following the impact he was rendered unconscious and regain consciousness some five days later in the Kingston Public Hospital. He has not seen the deceased Anne Marie Wright who was one of the five passengers seated in the rear of the car since the collision.

Clarence Bryan, a Sergeant of Police came on the scene at 9:30 p.m. a time which he estimated to be shortly after the collision and he saw the two vehicles on the scene. The car was then still ablaze and the occupants in it all appeared dead.

He also saw the witness Devon Brown lying on the left embankment in an unconscious state. A Fire Brigade came on the scene and the blaze was put out. He spoke to Douglas Bryan the driver of the bus who related to him how the collision occurred.

Devon Brown was taken to hospital for treatment and the bodies of the occupants of the car were removed by personnel from Maddens Funeral Home, but not until after a Police Photographer had come on the scene and taken photographs.

Following this he marked the wheels of both vehicles and had them removed. He then contacted the traffic division of the Constabulary at Elleston Road and the following morning he accompanied Inspector McKenzie of that division to the scene where measurements were taken by him.

Inspector McKenzie's Account

The evidence of this witness is of paramount importance in the light of the evidence given by both Devon Brown and Douglas Bryan as to how the collision occurred and having regard to the relative position of both vehicles

at the time of the collision.

He went to the scene on the morning following the collision around 9:00 a.m. by then both the car and the bus had been removed, but the burnt out shell of the car was still in the vicinity of Weymouth Drive. Given the evidence of Sergeant Clarence Grey that he had arrived on the scene shortly after the impact and marked the wheels of both vehicles before they were removed, these factors along with his evidence of the concentration of broken glass seen in that area and the burnt road surface, enabled him to arrive at a determination as to the point of the impact.

Inspector McKenzie took the following measurements with the assistance of Sergeant Grey who was present at the scene.

1. Width of road 36 feet 6 inches at point of impact.
2. From point of impact to left edge of road facing Kingston 14 feet.
3. Width of Weymouth Drive at intersection with Spanish Town Road 36 feet.
4. From point of impact to pothole 31 feet.
5. Length of bus 35 feet.
6. From rear of bus to damaged area of bus 15 feet 10 inches.
7. The width of pothole 14 feet.
8. Length of pothole 16 feet.
9. Depth of pothole 4 feet.
10. From point of turning of bus to the point of impact 40 feet.
11. Width of Island on dual carriage way 3 feet.

Having regard to the account as related by Devon Brown, had the collision occurred in the manner as he related one would have expected the car to end up on Spanish Town Road with the left of the car facing a southerly direction, as he described the bus swerving across the path of the car at the intersection with Weymouth Drive when the car was about three car lengths away and the driver of the car swerving to his right in an attempt to avoid the collision. This account is contradicted by the evidence of Sergeant Clarence Grey as to the relative positions in which he saw both vehicles on arriving on the scene shortly after the collision. The account of Sergeant Grey lends support to the statement made by the second defendant Douglas Bryan, the driver of the bus that "He was travelling in a westerly direction on Spanish Town Road when on reaching the junction with Weymouth Drive he

rear section of the bus. He came out of the vehicles and notice that a Peugeot motor car had collided into the bus."

It is not being disputed that the motor car was proceeding in the middle lane along the highway at the time of the collision. Given the width of the road at the intersection, the length of the bus and the distance measured by Inspector McKenzie from the point of impact to the entrance to the pothole, the bus driver failed to observe the state of the traffic approaching from the direction of Six Miles before turning, as irrespective of how fast the Peugeot car was approaching that junction, had he looked in that direction, for which there was unlimited visibility for over one mile and to as far as the Round About by the Creme Factory, he would have been able to observe the approaching car long enough to estimate its speed from the approaching headlights as they came nearer and nearer before attempting the manoeuvre into Weymouth Drive.

Learned Counsel for the defendants has contended that the journey into Weymouth Drive was one which the driver of the bus was obliged to make irrespective of the pothole and the hazzard that it presented. Nevertheless he was also obliged in so doing to have regard to the other users of the road and to make allowances for the obstacle which the pothole posed for the bus he was in control of in such a manner as not to endanger other users of the road as well as taking into consideration the safety of the passengers rather than leaving a large section of the bus obstructing the highway.

In short his duty of care was not discharged until he:-

1. Ensured himself before turning that the road ahead was clear of vehicular traffic.
2. That in executing the manoeuvre into Weymouth Drive no one would be incommoded by his change of direction.

In so far as he failed to execute both these precautionary measures in my view he was in breach of his duty of care and so negligent.

The only remaining question, therefore is whether the manner of driving by the driver of the Peugeot contributed to the collision that occurred. In this regard, the testimony of Devon Brown when tested by cross examination reduced his account to the level of a passenger who apart from accounting for the fact that he was a passenger in the Peugeot car and that a collision took place between that car and another vehicle, very little weight can be attached to the rest of his

evidence to the relative speed of the car and the position of both vehicles at the time of the collision.

I found his account to be for the most part unreliable, as from the cross-examination of the witness what emerged was that he did not appear to be paying attention to the traffic coming from the opposite end of the dual carriage way and so he was unable to state as to whether or not he observed the bus at the intersection before it made the manoeuvre which he described, or for that matter even more importantly, whether the right direction indicator of the bus was on, signalling that it was turning into its right.

There is no evidence negating the account as related by the bus driver that he took all the necessary precautions before turning into Weymouth Drive, which direction irrespective of the presence of the pothole was one which having regard to the bus route, he had to make. Having regard, however, to his account that the collision took place within a few seconds of his bringing the bus to a halt at the pothole this would have meant that a considerable portion of the bus would have been occupying at least two of the three lanes provided for traffic proceeding in an easterly direction towards Kingston. There is in effect on the totality of the evidence no real conflict that the bus was positioned with its left rear section occupying these two lanes which meant that the extreme right lane was still free for overtaking.

Given the fact of the free and unobstructed view from the intersection with Weymouth Drive in the direction of the Six Miles Round About, one has to consider the statutory duty which the Road Traffic Act places upon motorists using the highway to take such reasonable steps to avoid a collision.

In this regard it is of note that neither driver seemed to have been keeping a proper look out as the witness Devon Brown who was seated in the front of the car never saw the bus until it was three car lengths away from the car and the bus driver Bryan makes no mention of seeing the car until after the impact had taken place.

Given the unchallenged evidence of Sergeant Gray that the approximate time of the accident was about 9:30 p.m. or shortly before as well as the relative positions of the bus and car in relation to that of the fact that the force of the impact resulted in the doors of the car becoming jammed causing the other passengers and the driver to be trapped into the blazing vehicle, all this when related to the

account given to Sergeant Gray by the bus driver (2nd defendant) shortly after his arrival on the scene, as to how the collision occurred, this when coupled with the testimony of the two police officers when weighed, examined and tested against that of the witnesses Devon Brown and Douglas Bryan, what emerges is:-

1. That it contradicts Brown's account as to the time the collision took place.
2. The account of Brown as to the speed at which the car was proceeding at the time of the impact.
3. The distance that the car was from the intersection when the bus driver made this attempt to turn into Weymouth Drive.

In the light of the above I am of the view having seen and heard the witness Brown and on a consideration of these facts to which I have alluded that his account is highly improbable and in the circumstances is one to which very little, if any weight ought to be placed upon it when his account was further put to the test in cross examination what emerges from his evidence is that he did not seem to be paying attention to the state of traffic on the road during the fateful journey on the way to the Regal Theatre on the night in question. He was unable to explain how on an highway which it is common ground presented one with an unobstructed view from the Six Miles Round About to as far as the intersection with Weymouth Drive, he was not able to discern the bus as it approached at intersection and not before it made the manoeuvre that he has described.

Having regard to the time of the collision as related by Sergeant Gray when coupled with the fact that the movie that this party of persons in the Peugeot motor car were going to view "First Blood" was scheduled to start from around 9 p.m., it can clearly be seen that the only logical and reasonable inference that ought to be drawn from a combination of these facts is that the driver of the motor car Roy Fenton Blake was travelling far in excess of the allowed speed limit for that area of 30 M.P.H. Given the condition of the damage to both the bus and the car following the impact, the force of which caused the doors of the car to be jammed tightly entrapping the occupants into what turned out to be a "burning inferno", as well as the evidence that the bus was in a stationary position with its rear section taking up at least two of the three lanes of the section of the highway on which the car was proceeding; it would not be an exaggeration of the factual situation in stating that the car must have been driving at a fast rate of speed at the time of the collision. The speed of

the car in the circumstances contributed significantly to the collision.

In so far as the evidence of Devon VBrown is concerned, I am of the view that his account on that basis ought properly to be rejected.

On the other hand in so far as the account of Douglas Bryan as related to Sergeant Gray as to how the collision occurred when coupled with his evidence in Court, I found his evidence as to how the collision occurred to be the more probable of the two versions. His account when examined, however, does not absolve him from blame as has he been keeping a proper look out for traffic approaching from the opposite direction of the dual carriageway before turning into Weymouth Drive he would have been able to see and make out the Peugeot car as it made its approach towards the intersection from the direction of Six Miles and having regard to the evidence of there being a clear and unobstructed view in that direction to as far as the Six Miles Round About. This conclusion is further borne out by his evidence that he did not observe the bus until after the impact had taken place. Further to this in answer to a question posed by the Court as to how long after turning into Weymouth Drive and stopping at the entrance to the pothole the impact took place he said:-

"I had stopped at the entrance to the pothole for a few seconds before I felt impact."

In the light of this evidence it is apparent that the 2nd defendant irrespective of whatever precautionary measures he might have taken on approaching the intersection of Spanish Town Road and Weymouth Drive and before turning, he failed properly to see and observe the approaching car which must have been within view irrespective of the speed at which it was travelling towards that intersection section. This failure on his part is evidence of negligence.

On the basis that a reasonable and prudent motorist properly observing the Road Code and using all reasonable care approaching the intersection at a reasonable speed would have seen the bus turning and been able to take evasive action to avoid the collision I found that the deceased third party was also negligent in his maneuver of driving on the night in question from the fact of:-

1. The excessive speed at which he was travelling
2. The presence in the car of eight passengers instead of the permitted number of five with one extra passenger being in the front of the vehicle, a factor which must have impeded the driver of the car and made control of the vehicle even more difficult given the extra load that he was transporting.

As to the driver of the bus his negligence was brought about by the fact that:-

1. He failed in taking adequate precautions to ensure that the manoeuvre which he was attempting could be completed with safety in that he failed to observe the speed and approach of the car as it came from the direction of Six Miles before turning.
2. He stopped the bus at the entrance to the pothole and in so doing created an obstruction to the greater section of the road on which the car was approaching.

The Common Law principles enshrined in the duty of care placed upon the user of the road has been reinforced by the Road Traffic Act which lays down certain rules termed "Driving Rules" at sections 51 - 57 of the Act. The relevant sections in so far as the facts of this case are concerned are. Section 51 (1), (d), S. 51 (2) and S. 57 of the said Act.

- "51 (1) The driver of a motor vehicle shall observe the following rules -
- (a) A motor vehicle
 - (b)
 - (c)
 - (d) Shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic"
- "51 (2) Notwithstanding anything contained in the section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed upon him by this subsection."
- "57 (1) The driver of a motor vehicle constructed to be steered on the right or off side thereof, shall before commencing to turn to, or change direction towards the right extend his right arm and hand horizontally, straight out, from the right or off side of the vehicle with the palm turned to the front so as to be visible to drivers of all vehicles concerned"

In so far as this latter provision in the Act lays down certain requirements upon a motorist changing direction and executing such a manoeuvre as the bus driver (2nd defendant) he was by turning on his right indicator

lights was acting in compliance with this provision.

In so far as he executed a manoeuvre which left a portion of the bus taking up a considerable section of the road surface provided for motorists proceeding along Spanish Town Road in an easterly direction he was in breach of S.51 (1) (d) and S. 51 (2) of the said Act. A breach of any of these "driving rules" is per se evidence of negligence on the part of the bus driver. There was nevertheless still a Statutory duty placed upon the deceased Third Party (the driver of the car) to:-

"take such action as may be necessary
to avoid an accident" -

Based on the admitted fact on the part of the 2nd defendant that he knew of the existence of the pothole before turning into Weymouth Drive to do so in circumstances where it would cause an obstruction in the path that the car was being driven along, also amounted to negligence on his part.

The law is clear that the duty of care imposed upon a motorist changing direction is to first ensure that he can execute that manoeuvre with safety and this duty is one by which he must also ensure that no other motorist is inconvenienced by his change of direction.

Having regard to the factual situation as it relates to the manner of driving on the part of both drivers I would apportion the blame at 60% to the Second Defendant and 40% to the Third Party.

There being no issue as to agency in relation to the 1st and 2nd defendants, the liability on the 1st defendant part would also be established.

Damages This now brings me to a consideration of the plaintiff's claim which was launched under two heads:-

1. The Law Reform (Miscellaneous Provisions) Act.
2. The Fatal Accidents Act.

The Claim under the first head has already been considered and for the reasons which I have stated will not be considered at this stage.

The Fatal Accidents Act

The plaintiff, as the mother of the deceased does qualify to pursue a claim as a "near relation" of the deceased under this Act. Some difficulty however, arises in determining the value of the dependency. The authorities are clear that where the deceased was earning a livelihood this usually poses

no difficulty. Where, whoever, as in this case the deceased was of the age where she was still attending school, evidence has to be given as to whether she had prospects for advancing herself in life, as well as the capability for so doing. In the absence of such evidence one is left to resort to considering the status of her parents and forming an opinion that the deceased would at least have entertained similar ambitions and aspired to a like status.

In this case this 16 years old deceased was two years away from sitting the C.X.C. Examinations and was attending a high school. For her the future was still uncertain. According to the plaintiff, the deceased Anne Marie Wright who was her eldest child had entertained ambitions of becoming a registered nurse. Had she survived and attained her desired goal she would have been expected to assist her mother and the other siblings as is the common practice in Jamaica, especially in homes such as this one in which on the evidence the father figure and the male bread winner was non existent.

In this case given these circumstances one had to do the best that one can with the material available as there are no hard and fast rules applicable. The determining factor being of such a nature where one is dealing with a number of imponderables and one has to some extent to speculate in seeking to arrive at a just solution.

With such objectives in mind, therefore, and assuming that:-

1. The deceased Ann Marie Wright had managed to attain the minimum qualifications to be accepted for training in her chosen field by 1986.
2. That she had managed to successfully complete her training as a registered Nurse by 1989, at which time she would then be 22 years of age.
3. Given the evidence of the plaintiff that the deceased had entertained the hopes of marriage and raising a family.

There is every ^{likelihood} / that by the age of 27-30 years she would have got married and started raising a family and so taken unto herself the obligations which are part and parcel of that status.

Having regard to all the above imponderables it would be idle to contend that as learned Counsel for the plaintiff has urged that a multiplier of 16 would be reasonable in the circumstances.

I would consider a Multiplier of 6 years purchase as reasonable in the circumstances.

In determining the sum to be applied in arriving at the total dependency I will take the starting salary for registered Nurses and such allowances with the necessary increments over that period which would produce an average gross income in the region of \$39,000 per annum which when this sum is scaled down for tax purposes would amount to \$26,000 which when the multiplier is applied results in a datum of \$152,000. Of that sum the deceased as a young professional would be expected to spend at least three-fifth of this amount on herself and I would therefore assess the value of the dependency which the plaintiff would be entitled to receive at two-fifth of that sum.

The result will be that the plaintiff's share will be \$60,800.

For obvious reasons I have refrained from any mention of the claim of \$3,000 for funeral expenses which as Special Damages was proven and has not been challenged. There has also been no issue as to ownership in relation to the 1st defendant.

The result, therefore is that Damages are apportioned as between the defendants and the third party as follows:-

Defendants 60% to blame

Third Party 40% to blame

Judgment is therefore, entered for the Plaintiff against both defendants in the sum of \$63,800 with costs to be agreed or taxed.

Interest awarded on Special damages at 3% from 25/3/83 to 12/7/90.

Judgment entered for defendants against 3rd party for 40% of such sum as is payable to the plaintiff by defendants.

Costs of Third Party Proceedings to be paid by 3rd party to the defendants.