

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L.R. 209 OF 1994

BETWEEN GEORGE REID PLAINTIFF

AND EARL JOHNSON DEFENDANT

Heard on the 15th, 16th and 17th of January, 2003 and 14th November, 2003.

Misses Nesta Clare Smith and Marsha Smith instructed by Ernest Smith & Company for the Plaintiff.

Mr. Leroy Equiano instructed by the Kingston Legal Aid Clinic for the Defendant.

ANDERSON .J

The claim arises out of an accident on the 17th October, 1992 between a Nissan Caravan bus, (licence number PP 1135) in which the plaintiff was traveling, and a Leyland motor truck which was traveling in the opposite direction. In this accident, the plaintiff sustained severe injuries to his right elbow, as a consequence of which, his arm is now quite deformed. The defendant was the owner of the bus which was being driven by his son and agent.

According to the plaintiff's evidence, he had taken the bus from Cave Valley on a journey to Borobridge in St. Ann. He said that on reaching a bend in the road, the bus which was on the right hand side of the road suddenly swerved to avoid a truck which was approaching from the opposite direction. According to the Plaintiff

the truck avoided a head on collision but struck the right rear of the bus. He testified that he was sitting on the right hand back corner seat, along with four other persons who were on that seat. He said that after the collision the truck ran off the road on the left side and the bus stopped on the bank on its left side of the road. He claimed that the rear of the bus was "extensively damaged" and he discovered that his elbow on his right arm was "mashed up".

Although his evidence was to the effect that he subsequently visited the scene of the accident and saw a large pothole, it emerged in cross examination that the alleged visit did not take place until two (2) to three (3) months later. He did not speak with the driver at the scene of the accident, but was taken to Percy Junor Hospital and later transferred to the Kingston Public Hospital on the same day, at which institution, he was admitted. He spent approximately two (2) months in the hospital, where he was treated. However, the only doctor he could remember treating him was Dr. Guy. After his discharge from hospital, he attended the St. Ann's Bay Hospital for physiotherapy and there were six (6) visits for is purpose. He also alleged that he had to return to the Kingston Public Hospital for treatment about twelve (12) times and on those occasions he travelled by private motor car for which he paid and received receipts.

The Plaintiff alleged that at the time of the accident he was a Tinsmith and that it took approximately two (2) years and three (3) months before he could go back to work fully. During that time he was unable to work because he could not

hold anything, since he needed both hands to work at his trade. The Plaintiff also stated that at some point after the accident he had spoken with the defendant and had been assured by him that he need not worry because the insurance "will take care of him."

The defence called three (3) witnesses one being the owner of the bus and the defendant, Mr. Earl Johnson; the second witness was the driver of the bus Mr. Clyde Johnson, also the son of the defendant, and the third, a Mr. Dennis Spence, a passenger on the bus who said he was seated in the middle of the bus. In so far as the defendant himself was concerned, the only relevant evidence that he could give was in relation to the physical state of the bus when he had seen it in the morning before it left for the day's journey, compared to that when he saw it later in the afternoon on the same day of the accident. According to the testimony of the defendant, when he saw the bus near the Cave Valley Police Station that afternoon at about 3 o'clock, the only indication of anything different between the condition in the morning and the condition at 3:00 p.m. when he next viewed it, was a "scrape" on the side of the bus from the back wheel to the tail near the window.

Under cross examination the defendant, upon being shown a copy of the insurance policy in respect to the bus was constrained to admit that he, the defendant, was the only named driver on the policy.

The other main witness called by the defence was the driver Mr. Clyde Johnson. He testified that he was the driver of the bus in question on the 17th October, 1992 and that an accident did take place around 11:30 that morning while he was driving on a trip from Cave Valley to Spauldings. He had just completed a left hand corner and was heading towards a right-hand corner when he first saw the truck which was coming towards him. He said he pulled over to his left as far as he could go and stopped on "the banking". As the truck passed, "it draw on the rear right side of the bus." He said that in fact, the bus was on the embankment on its side of the road, the embankment being about three (3) feet high on that side of the road. The passengers in the bus climbed out onto the embankment and he saw a man who he now knows as the plaintiff holding his hand with blood all over it. The plaintiff was taken away in another vehicle and he saw the plaintiff later that day at the hospital.

After the incident, he had examined the bus and noticed that there was a "scraping" at the right rear side where the paint had been scraped off, but there was no "extensive damage" to the bus as alleged by the plaintiff. There was no damage of any kind to the front section of the bus. He agreed that there were potholes on the road, but there was no pothole in the vicinity of where the accident occurred.

Under cross-examination, he stated that the width of the bus was about six (6) feet and the length about twelve (12) feet. When he first saw the truck that morning, it was about half ($\frac{1}{2}$) a chain from the bus. The witness pointed out a

distance which the court estimated at about one (1) chain, and he estimated that the truck was traveling at around twenty (20) miles per hour. The width of the road at the point of impact was about sixteen (16) feet. In answer to the court, he described the damage to the bus as being a "scrape" about one and a half (1 ½) to two (2) inches in width and about a foot long, but there was no "dent". He formed the view that it was the tipper section of the truck, described as a steel body ten (10) wheeler truck, which had caused the damage to the side of the bus.

The defence also called Mr. Dennis Spence, a farmer from Spauldings, Clarendon who was also a passenger on the bus on the day in question. He said that he had taken the bus from Cave Valley and recalls that there was an accident with a truck. He was in the middle of the bus and he felt something "draw on the bus side". Persons were screaming and trying to come out of the bus and he, in fact, jumped through a window. When he looked on the right side of the bus he saw where the paint had been scraped by the truck from the side of the bus. Under cross-examination he indicated that the reason why he jumped through the window was that the bus was on the embankment and he feared that it would capsize. He was sure that at the time of the impact the bus had stopped to allow the truck to pass. He estimated the height of the banking to be two and a half (2 ½) feet which was similar to the estimate of three (3) feet given by the driver.

The court must decide, a the balance of probabilities, whether the plaintiff has made out a case of negligence. It has to form a view as to which of the accounts put

forward by the plaintiff and the defence is more believable, on a balance of probabilities. In making this assessment the court must have regard, inter alia, to the credibility which it ascribes to the testimony of the respective witnesses.

There are two (2) important areas of the plaintiff's testimony which called his credibility into question. In the first place, while he alleges that there was "extensive damage" to the rear of the bus where he was sitting, he also admitted that the window by which he was sitting was not broken. He also could not say if the large glass window at the back of the bus had been damaged, and indeed there was no evidence that this was the case. He claimed that there was a dent at the side of the bus "but not dented far in". Nor could he say whether the lights at the rear of the bus was damaged. In other words, even his own observation does not bear out his evidence of "extensive damage" to the bus. This is also consistent with the evidence of both the defendant, the driver and the other witness Mr. Spence.

It should be noted that under cross-examination the plaintiff had also volunteered that since he was sitting in the back, he was "not in a position to see the road in front of the bus" unless he was looking out the window. This was different from his evidence in-chief where he had stated that he saw the truck coming towards the bus.

Secondly, in advancing his claim for loss of earnings the plaintiff stated to the court that in 1992, prior to the accident, he had been earning approximately Seven

Thousand Five Hundred Dollars (\$7,500.00) per week or approximately Three Hundred and Ninety Thousand Dollars (\$390,000.00) per year. At the same time, he admitted that in 1993 he had received five (5) summons with regard to failure to file income tax returns which could only have been in respect to the years prior to 1993. However, according to his testimony, the summonses had all been dismissed on the basis that his income was below the taxable threshold, which in 1993 was a mere Eighteen Thousand, Four Hundred and Eight Dollars (\$18,408.00) and in 1992 Fourteen Thousand, Three Hundred and Fifty Two Dollars (\$14,352.00).

There was a suggestion by Mr. Equiano in cross-examination that the plaintiff had had his arm out through the window of the bus, and the plaintiff acknowledged in answer to a question in cross-examination, that the window by which he sat would have been about the level of his arm. Although the witness denied that his arm was through the window, it seems that that may provide a logical explanation as to the extensive damage to the Plaintiff's elbow and to the total lack of damage to any other part of his body or indeed any significant damage to the body of the bus. I accept that the evidence of the defendant's witnesses is being more credible in that respect.

It may very well be that the plaintiff could have sustained an action against the driver of the truck, for I accept the bus driver's contention supported by the evidence of Mr. Spence, that the bus was on an embankment on its side of the road. If that is correct, then it may well be that the truck driver was negligent in not keeping

to his side of the road, and being causa causans the jury to this unfortunate plaintiff.

But, the credibility of the plaintiff's testimony cannot be relied upon and I accept the evidence of the witnesses for the defence as being more truthful and reliable.

This is most unfortunate case and the plaintiff's injuries will have lifelong negative implications for him and his ability to earn a living. But, I must go where the evidence leads me, and I find that the plaintiff has, regrettably, not discharged the burden of proof which the law says he must bear.

Accordingly I give judgment for the defendant with costs to be agreed or taxed.