

SUPREME COURT LIDWALL
KINGSTON
JAMAICA Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1982/S099

BETWEEN	SUNBEAM TRANSPORT SERVICE LIMITED	PLAINTIFF
AND	ST. ANN PARISH COUNCIL	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL	SECOND DEFENDANT

SUIT NO. C.L. S211/82

BETWEEN	LORNA SMITH	PLAINTIFF
AND	SUNBEAM TRANSPORT SERVICE LIMITED	DEFENDANT

SUIT NO. C.L. S210/82

BETWEEN	MILDRED SMITH	PLAINTIFF
AND	SUNBEAM TRANSPORT SERVICE LIMITED	DEFENDANT

SUIT NO. C.L. 270/82

BETWEEN	ELAINE McDONALD	PLAINTIFF
AND	SUNBEAM TRANSPORT SERVICE LIMITED	DEFENDANT

DAVID MUIRHEAD Q.C. and DR. ADOLPH EDWARDS for SUNBEAM TRANSPORT SERVICE LIMITED.

WENDELL WILKINS, DAVID HENRY and CHRISTOPHER HONEYWELL for the ATTORNEY GENERAL

RAVLIN GOLDING for the PLAINTIFFS

SUITS NO. C.L. S211/82, S210/82, M270/82.

HEARD; JANUARY 16, 17, 18, 1989.

REASONS FOR JUDGMENT

CORAM: WOLFE J.

On January 18, 1989 Judgment was entered in all the suits for the Defendants. I promised to put my reasons in writing. That promise is now being fulfilled.

These claims, which have been consolidated by an Order of Walker J. made on the 7th day of March 1983, arose out of an accident which occurred on the 2nd day of May, 1981 at Alderton in the parish of Saint Ann.

Mervin Hall, the holder of General P.P.V. driver's licence and a driver of eighteen (18) years experience up to the time of the accident, was employed to Sunbeam Transport Service Limited as a bus driver. On the ill fated day Mr. Hall was driving the company's bus licensed ND1333 from Kingston to Gibraltar in St. Ann. When the bus arrived at Alderton in St. Ann Mr. Hall stopped the bus to allow a passenger to alight therefrom. The passenger having left the bus the driver continued on his journey. At this stage, the driver

testified, the bus was travelling up a very steep hill at approximately eight (8) miles per hour. The roadway at this point, it is agreed by all parties, is narrow and there is a high bank on the right and a low bank on the left. Two large vehicles are unable to pass each other along the roadway. As the driver proceeded along he observed the light of an uncoming vehicle. Because of the nature of the road he pulled over and stopped. The uncoming vehicle, a motor car, passed whereupon the driver of the bus engaged the gear intending to proceed on his journey. Instead of moving forward the vehicle plunged sideways into the nearby gully. The plunge proved fatal for many of the passengers. The Plaintiffs in suits 211/82, 210/82, 270/82 were among the very fortunate who survived this unfortunate tragedy.

Technical evidence was adduced in an attempt to proffer some explanation as to what caused the accident but in my view the nature of the evidence, with all deference to the experts, was no more than speculative. Counsel for the Attorney General in cross examining the driver suggested to him that he stopped the bus with its wheels resting on the dry pack wall and that the weight of the vehicle caused the wall to collapse resulting in the break away of the road. This suggestion was stoutly denied and no evidence was adduced to support that theory.

Let me dispose of the claims in respect of suits No. C.L.210/82, 211/82, 270/82. All these claims were founded in negligence. The clear implication of having founded their claims in negligence is that the plaintiffs were each contending that the Defendant was in breach of the duty of care which it owed to them individually. The evidence which was adduced by the Plaintiffs failed in my view to establish any negligence in the Defendant. On the contrary the evidence supported the Defendant's version as to how the accident occurred and that version does not point to any act done or any omission by the Plaintiff which could even remotely support a finding of negligence in the Defendant.

Does the doctrine of Res Ipsa Loquitur assist the Plaintiffs? Before the doctrine of Res Ipsa Loquitur can come to the aid of a party two conditions must be satisfied viz.

1. The thing which caused the accident must be shown to be under the management of the Defendant or his servant or agent.

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2. The accident must be such as in the ordinary course of things does not happen if those who have the management, exercise proper care. In the instant case it is not the operation of the vehicle, which undoubtedly is under the management of the defendant's servant, that caused the accident but the unexplained collapse of the roadway. Hence the first condition necessary for the application of the doctrine has not been established.

See Scott v London and St. Katherine Docks Co. (1865) 3 H and C 596.

I turn now to deal with the claim brought by the owner of the ill-fated bus against the Attorney General, under the Crown Proceedings Act and the St. Ann Parish Council. The suit against the St. Ann Parish Council was discontinued with costs to be taxed if not agreed. Merely by way of information, this course was adopted because the St. Ann Parish Council is not the body entrusted with the responsibility to maintain the roadway which is the subject matter of the suit, the road being a main road.

The Plaintiff grounded its claim in negligence and nuisance.

The particulars of negligence and nuisance alleged are set out below.

1. Constructing the said roadway with a retaining wall which was insufficient in height, inadequately designed and improperly built.
2. Constructing the said wall with rubble stones packed in the dry without cement, mortar or concrete.
3. Placing the said roadway on a dry pack rubble wall with or/on insufficiently stable and/or on insecure foundations or support.
4. Failing to take any or any sufficient steps to prevent the said roadway from slipping or breaking away.
5. Failing to so inspect, or test the said roads so as to ascertain that it was reasonably safe for use by members of the public.
6. Inviting or permitting members of the public and in particular motor vehicles of all types to use the said roadway while it was inadequately or insecurely constructed or insufficiently pre-tested.
7. The Plaintiff will further rely on the fact of the break away of the said roadway as evidence of negligence and nuisance.

Section 6 of The Main Roads Act states:

"Subject to the directions of the Minister, the laying out, making, repairing, widening, altering, deviating, maintaining, superintending and managing of main roads, and the control of the expenditure of all moneys allotted there- to shall be vested in the Director....."

This section clearly vests in the Director of Public Works Department, now the Ministry of Construction, the management of main roads and the funds allocated for such purpose.

Section 21 states:

"That the Director or any person authorized by him, may do any or all of the following things in the execution of the works," and continues by detailing the powers which may be exercised by the Director in giving effect to section 6 of the Main Roads Act. The section does not impose a duty on the Director, This view was expressed by Morgan J., as she then was, in Suit No. C.L. 1974/W127 Herbert Walcott v The Attorney General (Unreported) May 26, 1978."

In our Jurisdiction the liability of Highway Authority is governed by the Common Law. The Learned author of Salmond on Torts, Twelfth Edition at page 238 states the law as follows:

"The law governing the liability of highway authorities towards individual members of the public exercising the common right of passage over the highway has no similarity or even analogy to the duties of occupiers of property to those permitted or invited to enter premises. No action will be against any authority entrusted with the care of highways for damage suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair. This exemption extends only to cases of pure non-feasance and the public authority is responsible in damages for any active misfeasance by which the highway is rendered dangerous."

It is plain from the citation that liability arises only where an act of misfeasance is proved. In the instant case the evidence adduced failed to establish any act of misfeasance.

Dr. Edwards for the Plaintiff cited and relief upon the decision in Mayor and Corporation of Shoreditch v Bull 1904 Vol. 90 L.T.R. 210.

Let me say at the outset that this case is readily distinguishable from the instant case. In the cited case "The appellants, who were both the sanitary and the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench and opened the road for traffic. About a week afterwards the Respondent was driving along the road in a cab at night. The driver found that the part of the

road where the trench had been opened was soft, and crossed on to the other side, and ran into a heap of rubbish, with the result that the cab was overturned and the Respondent was injured. The rubbish had been wrongfully deposited in the road without the permission of the appellants but they knew that it was there and had not lighted or fenced it. The jury found that the part of the road where the trench had been opened had been properly filled in but had been rendered soft by subsequent rain, and was dangerous to traffic at the time of the accident. (Emphasis mine) The Lord Chancellor (Halsbury) delivering the judgment of the Court at page 211 said:

"It is enough for me to say that the person who interfered in the first instance with the ordinary structure and normal condition of the road and that was an act - not an omission to do an act but an act - and until the road was restored in its entirety to the proper and normal condition so that it could be properly and without undue risk traversed by the public at large, it seems to me that it would be idle to say that you could put your finger upon any particular point of time and say that the liability of the sewer authority began ~~there~~ and ended then, and then it was handed over to an authority which is not responsible for non-feasance, and that if that authority did nothing nobody is responsible at all. That is a process of reasoning to which I for one will not assent. The moment the structure of the road is interfered with, and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a mis-feasance."

It is patently clear from the extract cited that there was a finding that the act of the authority amounted to a mis-feasance. In this case there is no evidence that the Highway authority did any act which amounted to a mis-feasance or at all.

In McClelland v Manchester Corporation [1912] 1 K.B. 118

"A street within the district of the defendants a municipal corporation, was dedicated to the public by its owner. Across the end of the street was an unfenced ravine. In 1904 the defendants took over the street under the provisions of a private Act of Parliament similiar to those contained in the Public Health Act 1875, and paved and made it up and subsequently maintained it. They also lighted it under their statutory powers, which authorised them to do such acts as they should think necessary for lighting their district. In 1910 a motor car containing the plaintiff while being driven along the street at night fell over the

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ravine in consequence, it was alleged, of the ravine being unfenced and the street being insufficiently lighted. In an action by the plaintiff to recover damages for injuries sustained the jury found that the street as made up and constructed was a danger to persons using it, that the unfenced ravine was a hidden trap and that the defendants had not taken proper care to warn the public of the danger. Held; the effect of the findings of the jury was that the defendants in taking over and making up the street and leaving it in a dangerous condition had been guilty of misfeasance, and also that they had acted negligently in the performance of their statutory duties with regard to maintaining and lighting the street and that the plaintiff was, therefore entitled to judgment."

Again this case is distinguishable from the instant case as there is no finding by me of any act done by the highway authority which could be classified as a mis-feasance.

Lush J. at page 127 said:

"If a highway authority, therefore leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues."

In Robinson v The Director of Public Works - Adrian Clark Reports 1917 - 1932

p.276 at p.280 Adrian Clark J. said:

"Whether any act or omission constitutes a mis-feasance, is a question of fact. Each case, in that respect, must be decided on its own particular set of facts."

On the evidence before me I find as a fact that the highway authority did cause the road to be inspected at regular intervals and that the inspections did not reveal any damage to the road which would require the Defendant to effect repairs. Further I am of the view that the Plaintiff has failed to adduce any evidence which is capable in law of establishing nuisance. By that I mean the Plaintiff failed to establishing any obstruction done by the Defendant or any act which rendered the use of the highway dangerous to the public.

It is on the basis of the aforesaid reasons that Judgment was accordingly entered for the Defendants in all the suits herein.