

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1991/NO97

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| BETWEEN | ORVILLE NEMBHARD | 1ST PLAINTIFF |
| A N D | KENNETH ARATRAM | 2ND PLAINTIFF |
| A N D | MELROSE TRANSPORT & EQUIPMENT CO. LTD. | DEFENDANT |

Mr. Garth McBean instructed by Dunn Cox & Orrett for Plaintiffs.

Mr. David Batts instructed by Livingston Alexander and Levy for Defendant.

REASONS FOR JUDGMENT

Heard: 27th January, 1995

Harrison J. (Ag.)

Judgment was delivered in favour of the defendant in this matter and I promised to put my reasons in writing. I now seek to fulfil this promise but must apologise for the delay in doing this.

The plaintiffs' case is that on the 4th January, 1990 they were travelling in an Opel motor car driven by the plaintiff Orville Nembhard whilst the other plaintiff, Kenneth Aratram, was a passenger in this vehicle. They have contended that they were on their way from Montego Bay to Kingston when on reaching in the vicinity of Braco Hill, some miles out of Duncans, Trelawny and whilst proceeding on their correct side of the road, a tractor head, proceeding in the direction of Montego Bay and driven by one Errol Shaw-Smith employed by the defendant, collided into the Opel car in an attempt to overtake a laden truck. As a result of the impact, the tractor head also collided with another car travelling behind the Opel. The Opel car lost control, went over its left embankment and ended in a ditch with the result that it caught fire. Both plaintiffs were removed however from the car before the fire started. They received personal injuries, lost personal belongings and the car was a total loss.

Errol Shaw-Smith, driver of the defendant's tractor head contended on the other hand that he was on his way to Montego Bay and driving on his correct side of the road. Whilst going up-hill at about 20 m.p.h and on approaching a corner, he saw the plaintiff, and another motorist travelling behind the plaintiff's vehicle, proceeding down hill at a fast rate of speed. Both vehicles were approaching on his side of the road when the plaintiff's car according to him, struck the right front section of the tractor head, "chinked" off, lost control and went over its left embankment. The second car also struck the tractor head and ended up on the left embankment as one proceeded towards Ocho Rios. It was Shaw-Smith's contention also that the collisions took place on his correct side of the road.

On the plaintiffs' case the tractor head had moved after the collision, that is, from the right side of the road going towards Duncans to the left side of the road. It was the defendant's case on the other hand that the tractor head was parked on the left side of the road going towards Duncans and that it did not move from that position after the accident.

The police was summoned to the scene and Sgt. Ashenheim Stewart then stationed at Duncans Police Station carried out investigations.

Submissions

Mr. McBean submitted that the main issues to be decided by the Court were:

- "a) On which side of the road did the collision take place?
- b) Did the tractor head move after the accident?"

Mr. Batts submitted on the other hand that there was only one issue of fact and that was, "by what means did the defendant's tractor head end up on the left side of the road facing Montego Bay? Is it that it was always there? Or is it as the plaintiff contends that it was reversed there by the defendant's driver after the collision?"

Let me deal firstly, with the evidence in relation to the relevant point of impact.

The plaintiffs' case is that the collision took place on the right side of the road going towards Duncans, that is, the defendant's incorrect side of the road. Mr. McBean submitted that there were a number of factors which established this.

Firstly, he states, that the evidence of Sgt. Stewart, reveals that there was dirt and glass on the left side of the road going towards Ocho Rios. This fact, he says, has been supported to some extent by the defendant's driver who stated that there was dirt and glass on the said left side although some was in the middle of the road and on the left going towards Duncans. He further submitted that if Mr. Shaw-Smith's story that both vehicles "chinked" and "bounced" off his vehicle whilst they were some 2 feet over the white line then one would expect to find a concentration of dirt and glass from the middle of the road to the left side going towards Duncans.

Secondly, Mr. McBean submitted, that the plaintiffs' witness, Andrew Collins stated that the truck had reversed from the right side of the road to the left and was parked in a slant position. He argued that the evidence of a slant position was consistent with a vehicle which could not be steered because of a broken track rod.

Thirdly, Mr. McBean argued that the damages to the Honda and Opel Corso motor cars would not be consistent with a vehicle merely "bouncing off" the tractor head. He pointed out that the photographs 7(a) (b) (c), showed severe damages. He has admitted however, that there are other damages which were caused when for example, the Opel car overturned.

Fourthly, the Court ought to examine the evidence relating to the position of the vehicles in the road before the collision. He pointed out that based on Shaw-Smith's evidence, shortly before the collision, the right side of the tractor head was about 2½ feet from the white line and the Honda Opel and cars were about 2 feet over the white line on his side of the road.

Shaw-Smith had further stated that both vehicles swerved left before the collision. Mr. McBean submitted that it would have been impossible then for the vehicles to have collided because:

- "1. Both vehicles would be six inches away or more from the truck i.e. the difference between 2½ feet to 2 feet or less.
2. The cars would have moved further away as a result of the swerve."

Fifthly, Mr. McBean argued that based on the evidence of Shaw-Smith that the distance between the Opel and Honda cars as they came towards him was about one car length, hence the following would have taken place:

- "a) As a result of the impact with the truck it is most probable that the speed of the Opel would have been suddenly and considerably reduced particularly in view of the damage which resulted.
- b) If the Honda Accord was travelling so close behind the Opel and at such speed it is reasonable to expect that the Honda Accord would have collided with the Opel.
- c) In view of the foregoing it is highly unlikely that both cars were travelling in the manner described by Mr. Shaw-Smith."

Mr. McBean in his assessment of Sgt. Stewart, was of the view that this witness did not appear to be a very or highly intelligent witness and according to him, "it may be fair to say that his memory is not the best..." Sgt. Stewart had said in chief that on his arrival at the scene of the accident, he saw the tractor head parked on the right side of the road as it proceeded towards Duncans. In light of a previous testimony it was established that Sgt. Stewart's evidence was inconsistent with his previous testimony when he had told another Court that he had seen the tractor head on the left side of the road as one faces Montego Bay. Mr. McBean asked me to find however, that Sgt. Stewart had made a mistake when he gave evidence to say that he had seen the tractor head on the right as one faces Duncans.

The plaintiffs called Mr. Colin Young as an expert witness on their behalf. He had testified in chief that if a track rod was broken on the tractor head it would not have prevented the vehicle moving nor would it prevent the wheels turning but the vehicle would not be in a position to be steered. Under cross-examination he did admit however, that if the vehicle sustained other damages, such as a blown out right front tyre, a burst spring and axle the vehicle would have listed to one side and would have been unable to move for more than one foot. It was borne out that Mr. Young did not examine the vehicle hence he was at a disadvantage to say what was the exact extent of the damage on the tractor head.

Finally, Mr. McBean submitted that the plaintiffs and their witness Andrew Collins were witnesses of truth. He submitted that there was conclusive evidence to support the contention that the defendant's tractor head was in the process of overtaking on its incorrect side of the road when it collided with the cars.

Mr. Batts in making his submissions described Sergeant Stewart's evidence as being "intoxicated". He argued that the inconsistency in so far as his evidence here and his previous testimony are concerned was so gross and germane to the issues that this should be sufficient to lead to a rejection of the Sergeant's evidence. It was his view that the Sergeant had been contradicted on both major and minor parts of his evidence and his memory was so poor as to be unreliable. He further argued that if what the Sergeant said about the driver moving the vehicle to clear the road was true, then it showed that the defendant's vehicle was on its proper side of the road after the collision.

Mr. Batts also submitted that the Court ought to accept the expert evidence of Mr. Ivor Leach who gave evidence on behalf of the defendant. He has been repairing tractor heads for many years and has received training in England and the United States of America. He had examined the tractor head in question on the 17th January, 1990.

In his professional opinion such a vehicle could not be moved after the collision unless it was towed. Mr. Batts submitted therefore that the Court ought to accept his evidence since there was no legal basis on which it could be rejected. He further argued that if this evidence were accepted, it would follow that the tractor could not have removed from where it was at the time of the collision or could have moved no more than 1 foot from the point of collision. He further submitted that Mr. Leach's evidence was also corroborated by the photographs - Exhibits 7 (a) to 7 (c).

Mr. Batts also highlighted a number of internal inconsistencies in the plaintiffs' case.

In the final analysis, he argued that the evidence of the plaintiffs and their witnesses have been so discredited with the result that judgment ought to be given for the defendant. It was also his view that the physical damage to the vehicles ran counter with their explanations as to how these impacts took place.

Findings

It seems beyond dispute that the tractor head was on the left side of the road facing Montego Bay by the time the police arrived at the scene of the accident. The question which looms largely for a decision therefore, is how did it end up on this side of the road. Mr. Batts asked the question - "Is it that it was always there, or is it as the plaintiff contends that it was reversed there by the defendant's driver after the collision?"

After a careful consideration of the evidence adduced in this trial I have arrived at the following findings:

1. That the collision took place on the left side of the road as one proceeds towards Duncans/Montego Bay.

2. That both plaintiff and his witness Collins were proceeding in separate vehicles one behind the other, down hill and, in close proximity to each other at a fast rate of speed when they collided with the tractor head shortly after negotiating a bend.
3. That the defendant's truck was travelling up hill at the material time at approximately 20 m.p.h.
4. I accept as true that the plaintiff's car struck the right front section of the tractor head and "chinks" off, lost control and went over the embankment and finally caught fire. Further that the Honda car driven by Collins also struck the tractor head in the said right front section and finally ended up on its left embankment.
5. That I accepted the evidence of the defendant's expert witness and hold that the tractor head became immobile at the time of collision and remained so on the left side of the road facing Duncans.
6. That the expert's evidence had been corroborated by Exhibits 7 (a) to 7 (c).
7. That it would have been most improbable if not impossible for the tractor head to have travelled towards Collins' car some twenty yards away with a blown out right front tyre and broken axle after colliding with Nembhard's car.

8. Further that the evidence of Nembhard, Aratram and Collins runs counter to and was in conflict with all the expert evidence in the case.
9. That the plaintiffs' case has been riddled with a number of inconsistencies and contradictions and which are so major that they have seriously affected the credibility of their witnesses.
10. That the defendant's driver Errol Shaw-Smith impressed me as a witness of truth. I accepted his version of the accident and accordingly the plaintiffs failed in my view to establish and prove their case on a balance of probabilities.
11. That Shaw-Smith was not intoxicated at the time of the collision. There was no evidence to support this contention on the part of the plaintiffs. It was merely a figment of the witness Stewart's imagination.
12. Mr. McBean had submitted that as an alternative to a finding of full liability on the part of Shaw-Smith the Court should on the basis of his evidence find him at least 30% contributorily negligent. I find that there was no merit in this submission and certainly the evidence did not reveal any contributory negligence on the part of the defendant's driver.

It was for these reasons why I gave judgment for the Defendant with costs to be taxed if not agreed.