

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-04139

BETWEEN

CENTRAL EQUIPMENT RENTAL LIMITED

Claimant

AND

**MICHAEL MOONILAL
(TRADING AS MICHAEL TRANSPORT)**

First Defendant

AND

NAZOOOL ASGALI

Second Defendant

Before the Honourable Mr. Justice G. Smith

Appearances:

Mr. K. Sagar for the Claimant

Mr. W. Seenath for the Defendants

REASONS

1. The First Defendant's truck collided with the rear of the Claimant's garbage truck. At the time of the collision the First Defendant's truck was being driven by the Second Defendant. The collision occurred at around 5.00 a.m. on the 4th October 2005.

The Claimant contends that its garbage truck (TBA 8016) had broken down and was lawfully parked off the Highway when the First Defendant's truck (TBS 8606) negligently collided with the rear of its truck.

The Defendants contend that the Claimant's garbage truck had been parked on the highway at the time of the collision. Further, the Claimant's garbage truck was left unlit in a part of the Highway which itself was dark and unlit. In these circumstances, the Defendants contend that the accident was caused or contributed to by the negligence of the Claimant.

2. After hearing the evidence, I prefer the evidence of the Claimant's witnesses on a balance of probabilities and I find that the accident was caused by the negligence of the Second Defendant. The Second Defendant was the servant or agent of the First Defendant.

I give the Claimant judgment on its claim against the Defendants. I assess damages in the sum of \$69,000.75. I order the Defendants to pay the Claimant's costs and to pay interest on the damages awarded.

I will set out my reasons for my findings after I deal with a preliminary issue raised at the trial.

3. At the start of the trial the Defendant unsuccessfully sought leave to let the First Defendant put a photograph of the area of the collision into evidence. The Defendants alleged that this photograph had been taken by the First Defendant. It had been misplaced but was recently discovered. The Defendants argued that it would be helpful in determining the issues of fact. Further, it would not delay the trial as the evidence to be led by the First Defendant was short.

I accepted the objections of the Claimant to the introduction of this photograph at this late stage for the following reasons:

The parties had agreed some ten months earlier that all evidence in chief in this matter was to be by way of witness statement. The First Defendant failed to file a witness statement and by virtue of Part 29.13 of the Civil Proceedings Rules (CPR) the First Defendant could not give any evidence without the permission of the Court. In any event, the Defendants did not satisfy the following three of the conditions set out in Part 26.7 of the CPR for obtaining permission to call the witness at the trial.

Firstly, Part 26.7(1) of the CPR prescribes that the application must be made promptly. The Defendant merely stated that he “recently” found the lost photograph. He did not say when he found it. I had no means of knowing that it was found so recently as to make this application “prompt”. The Defendant failed to prove that the application was prompt.

Secondly, Part 26.7 (2) prescribes that the application must be supported by evidence. There was no evidence to support the application other than a statement by Counsel from the bar table that the photograph had been recently found. This is not evidence.

Thirdly, Part 26.7(3) (b) prescribes that there must be a good explanation for the breach. The mere assertion by Counsel from the bar title that the photograph was recently found leaves a void as to how recent it was found. It does not assist me as to being a good explanation for not making this application until the trial date. Further, I am not aware of why this photograph was misplaced and then recently found. Is it that the photograph was simply forgotten in a file or drawer? Was it always available but its significance overlooked? The mere assertion that it was misplaced and recently found is not a good enough explanation for the failure to make this application until the trial.

Further, I was not informed of when the photograph was taken. Was it close to the date of the accident (4th October 2005) or not? Were the road conditions the same at the time of the accident? I could not assess whether the photograph would have any material evidential value.

For these reasons, I did not give the Defendant permission to be called as a witness to put the photograph in evidence.

4. Four witnesses testified on behalf of the Claimant. Two gave evidence on liability. Two gave evidence on quantum. Only the Second Defendant gave evidence for the Defendants. There was no independent evidence of road markings or measurements. I had to rely on the oral testimony of witnesses who gave conflicting testimonies. I will now deal with liability then with quantum.

Liability

5. The driver of the Claimant's garbage truck on the day of the collision and an assistant testified for the Claimant. The evidence in their witness statements was much the same. They stated (in brief) that they had been driving the garbage truck in an Easterly direction along the Churchill Roosevelt Highway when the truck started to overheat, just after the Piarco intersection. They pulled completely off the Highway on to the grass shoulder and came to a stop. This was at about 3.00 a.m. They put on the lights on the truck, including a revolving light on the hood of the truck. The driver called the office of the Claimant to inform them of the breakdown and they waited for a mechanic to come. They went back into the truck and fell asleep. At about 5.00 a.m. they felt an impact to the rear of the garbage truck. It pushed their truck further forward on the grass shoulder. They came out of the truck and noticed that the Defendant's truck had run into the rear of their vehicle.

Cross-examination of the Claimant's two witnesses was uneventful. The only inconsistency revealed was that the Statement of Case alleged that the area was well lit at the time. Both witnesses stated in their witness statements that at the time of the accident the road was unlit and the area was very dark. They affirmed this on cross-examination. This inconsistency with the pleaded case did not materially affect their testimony which remained unshaken and consistent.

6. The Second Defendant was the only witness to testify for the Defendants. In his witness statement he stated (in brief) that he had been driving in an Easterly direction along the Churchill-Roosevelt Highway at around 5.00 a.m. He was driving on the left or slow lane. The area was dark and unlit. On reaching the vicinity of the Piarco

Intersection he suddenly observed an unlit garbage truck parked on the left side of the Highway. As soon as he saw this he swerved to his right. In spite of this, the left front of his truck hit the right rear of the garbage truck. His truck ran off the road and turned over. Unfortunately, the passenger in his truck died as a result of this collision.

Cross-examination of the Second Defendant revealed the following flaws in his evidence.

Firstly, the Second Defendant stated in paragraph 14 of his witness statement that after the collision the driver and occupants of the garbage truck admitted to him that they should have moved the same off the highway or they should have taken steps to make known the presence of the garbage truck on the Highway. In cross-examination the Second Defendant denied that the driver and occupants of the garbage truck told him this. Yet soon after he sought to say that his original statement at paragraph 14 was correct. Finally he stated that he couldn't remember saying what he did at paragraph 14.

Secondly, the Second Defendant stated that at the time of the collision he had on his bright lights but could only see to a distance he pointed out to me as 10 to 12 feet ahead. This seemed improbable especially when he had said earlier in cross examination that he could see 200 feet ahead at the Piarco Intersection. According to his witness statement the accident occurred in the vicinity of the Piarco Intersection. He should have been able to see about 200 feet ahead at the time of the collision.

Thirdly, the Second Defendant stated in cross-examination that at the time of the collision, he was driving at about 50 kph. When he first saw the garbage truck it was 10-12 feet away. He then applied his brakes, released them and swerved to his right. It seems improbable that the Second Defendant would have done all this while driving at 50

kph and when he only saw the garbage truck when it was 10-12 feet away. In fact, according to accepted speed tables in Bingham's Motor Claims Cases (10th ed pg 77), at 30 mph which roughly equals 50 kph, average thinking distance is 30 feet, average stopping distance is a further 45 feet. Even if I accepted his story that he only saw the Claimant's garbage truck when it was at 10-12 feet away, the Second Defendant would not even have had time to react, much less to apply brakes, release them and to swerve away as he alleged.

7. On a balance of probabilities I prefer the evidence led on behalf of the Claimant to the evidence of the Second Defendant. The evidence of the Second Defendant is seriously flawed and is much less credible than the evidence led on behalf of the Claimant. I find as a fact that at the time of the collision, the Claimant's vehicle was parked off the Highway on the grass shoulder. It was also parked with its lights on, including a revolving light on its hood. The Second Defendant negligently drove, or swerved off the Highway on to the shoulder of the Highway and hit the rear of the Claimant's truck. On this evidence, the Defendants are wholly to blame for the collision.

Quantum

8. The Claimant claimed \$69,600.75 as damages. I awarded this sum to them. The evidence on the quantum of damages was provided by Mr. Danny Leed (a professional loss adjuster) and one Douglas Marsan (the General Manager of the Claimant company). Their testimony was consistent, uncontradicted and unshaken by cross-examination. They were credible witnesses and I accepted their testimony in proof of the damages

claimed. Further, the Defendants provided no evidence to challenge the veracity of the claims for damages.

9. The Claimant's damages is comprised of four items:
- | | | |
|-------|--|--------------------|
| (i) | Cost of Repairs | \$39,546.50 |
| (ii) | Depreciation | 6,500.00 |
| (iii) | Adjuster's Fee | 454.25 |
| (iv) | Loss of Use for 15 days at \$1,540 per day | <u>23,100.00</u> |
| | | <u>\$69,600.75</u> |

10. Danny Leed, a professional loss adjuster, provided a witness statement. That statement proved the following three items.

- (i) The cost of repairs:

Mr. Leed surveyed the Claimant's garbage truck on the 10th December, 2005 and prepared a report of his survey. The report stated that the Claimant provided an estimate of the repairs from SMI Industries Ltd. The estimate of repairs was in the sum of \$53,546.30. Mr. Leed detailed the nature of the work to be done and adjusted the estimate downward to \$39,596.50. The adjustment was to cater for 25% depreciation on parts, fabricating material and labour.

- (ii) Depreciation

Mr. Leed stated his opinion of the depreciation of the garbage truck in the sum of \$6,500.00 as a result of the damage it sustained.

- (iii) Adjuster's Fee

Mr. Leed stated his fee for his services in the sum of \$454.25. This fee was paid by the Claimant.

With respect to Loss of use (item (iv) Mr. Leed's report stated that it would take 15 days to repair the garbage truck, provided that parts were available.

The cross-examination of Mr. Leed was uneventful. In fact his cross-examination reinforced his witness statement. In cross-examination he provided credible rationale for his findings. I also noted that he was not cross-examined upon the depreciation and his fees. I accept his expert and unshaken evidence in proof of items i, ii and iii above and in proof of the time it should have taken to repair the garbage truck.

11. Mr. Douglas Marsan's witness statement proved the Claimant's ownership of the garbage truck and the loss of use (item iv). He stated that the vehicle was used for business purposes. The company lost approximately \$1,540.00 per day as a result of not having the vehicle during its repair.

Cross-examination of Mr. Marsan was uneventful. He admitted that he had brought no documents to prove loss of use. He was not asked for any. He stated that it took over thirty days to repair the garbage truck, yet he accepted the adjusted period of fifteen days for the repairs. This suggests to me that he was not trying to inflate his claim. His evidence is unshaken and credible, I accept him as a truthful witness. His evidence is sufficient to prove the loss of use for the following four reasons.

Firstly, the garbage truck was used in his business and Mr. Marsan would be in a position to evaluate the average daily earnings in respect of the truck.

Secondly, the sum claimed seems reasonable for the use a chattel of this nature.

Thirdly, he was not cross-examined on his estimate of the loss of use. He was only asked if he had brought bills to prove the same. Further, there was no evidence to contradict his evaluation of the loss of use. (And see Uris Grant v Motilal Moonal Civil Appeal 162 of 1985).

Fourthly, as I stated before, he impressed me as a truthful witness and I felt that I could rely on his evaluation of the loss of use.

12. I award the Claimant the sum claimed, namely, of \$69,600.75 as damages.

The Order

I give judgment for the Claimant against the Defendants in the sum of \$69,600.75. I award interest on the sum of \$69,600.75 at the rate of 6% per annum from the 4th October 2005 (the date of the accident) to the 4th December 2008 (the date of the award of damages).

I order the Defendants to pay the Claimants prescribed costs in the sum of \$17,920.00.

With the consent of the parties, I grant a stay of execution for 28 days.

Dated this 2nd day of April, 2009

Mr. Justice G. Smith
JUDGE