A

CAUTATA BUS CO. LTD.

v.

B

RAM LATCHAN AND ANOTHER

[SUPREME COURT, 1969 (Thompson Ag.P.J.), 9th, 24th January]

Civil Jurisdiction

C *Damages—assessment—damage to vehicle—bill for repairs increased by reason of poor condition of bodywork prior to collision—vehicle in better condition after repair than originally—action founded on tort—full amount of cost of repair recoverable—loss of income—use of stand-by vehicle—mode of assessment.*

In an action for damages in respect of damage suffered by the plaintiff company's bus in a collision between that bus and one belonging to the first defendant, the trial judge assessed the degree of negligence of the first defendant's driver at 90%. The plaintiff company's claim was for D repairs and loss of income. Some of the bodywork of the plaintiff's company's bus had been in poor condition prior to the accident, a factor which raised the amount of the bill for repairs. During the period of repair, the work done by the damaged bus was taken over by a smaller standby bus.

E *Held*: 1. As the plaintiff company's claim was founded on tort and not on an insurance contract, it was entitled to *restitutio in integrum* even though the bus was restored to a better condition than it had originally been in; the whole repair bill (less the appropriate percentage) was recoverable as damages.

2. The measure of damages for loss of income was the difference between the amount that the damaged bus could have earned during the F period of repair and the amount which the stand-by bus was able to earn, plus the amount that the stand-by bus could have earned during the period on private hire work.

Case referred to :

The Gazelle (1844) 2 W.Rob. 279; 8 Jur. 428; 166 E.R. 759.

G

Action in the Supreme Court for damage to a vehicle suffered in a road accident.

The judgment is reported only on two aspects of the assessment of damages.

H *D. N. Sahay* and *A. Katonivualiku* for the plaintiff company.

F. M. K. Sherani for the defendants.

The facts are sufficiently stated in the judgment of Thompson J.

THOMPSON J.: [24th January 1969]—

The plaintiff company operates a bus service from Cautata to Nausori and Suva. The first defendant is another bus proprietor; he operates a bus service between Wainibokasi and Nausori and Suva. The second defendant is the brother of the first defendant and drives his buses. A

The plaintiff company's claim and the first defendant's counter-claim arise out of a collision between a bus belonging to the plaintiff company and a bus belonging to the first defendant which was being driven by the second defendant. The particulars of negligence pleaded by the plaintiff company are as follows :— B

(a) driving at a speed which was excessive in the circumstances;

(b) failing to keep any or any proper look-out;

(c) failing to slow down or to stop;

(d) causing or permitting the said bus to collide with the plaintiff's bus which was stationary at the left hand side of the road; C

(e) failing to exercise or to maintain any or sufficient or adequate control of the said bus;

(f) failing to stop, to slow down, or manoeuvre the said bus so as to prevent the said collision.

The particulars of negligence pleaded by the first defendant are :— D

(a) failing to keep any or any proper look out;

(b) that the plaintiff's driver or servant or agent in the course of his employment stopped vehicle No. D.865 at a place other than at an authorized Bus Stop;

(c) that the plaintiff's driver or servant or agent in the course of his employment stopped vehicle No. D.865 without giving a stop signal; E

(d) that the plaintiff's driver or servant or agent in the course of his employment brought the plaintiff's vehicles No. D.865 to a sudden stop whereby the defendant's vehicle was unable to avoid the accident by swerving to its right because of the presence of a P.W.D. truck there.

The plaintiff company has claimed a sum of £834.2.7. of which £514.2.7. represents the costs of repairs, which the defendants have admitted were carried out to the plaintiff company's bus after the collision, and £320 for loss of income, i.e. £8 per day for 40 days from the date of the collision. F

The first defendant has counterclaimed for £1410 of which £1050 is alleged to be the difference between the market value of the bus before the collision and the price at which the bus was sold afterwards, and £360 for loss of income for 45 days at £8 per day. G

It is not disputed that the collision occurred on the main Suva-Nausori road at Nasinu 10 miles and that the first defendant's bus ran into the back of the plaintiff company's bus which had stopped to allow a passenger to alight. The plaintiff company's case is that its bus slowed down and stopped at a bus stop in the normal manner and had been stationary for some time, sufficient for the middle-aged lady who was alighting to leave her seat half way down the bus, go forward to the driver and begin to pay him her fare, before the moment of impact. H

The defendants' case is that the plaintiff company's bus stopped suddenly A without the driver giving any signal and without the brake lights lighting up, that it stopped some way before the bus stop at a point where there was no reason to expect it to stop, and that the second defendant, who was driving his bus about 50 feet behind it at about 25-30 m.p.h. was unable to pass it because of a vehicle coming from the opposite direction and that, as a result, the collision was unavoidable so far as he was concerned and was due solely to the plaintiff company's driver having B stopped his bus suddenly without warning.

The plaintiff company called three eye-witnesses of the collision; two were travelling in the plaintiff company's bus and one in the defendants' bus. The two witnesses who were travelling in the plaintiff company's bus gave evidence that it had stopped and that the passenger wishing to alight, who gave evidence as P.W. 3, had got up from her seat after C the bus stopped, had walked half the length of the bus to the driver, had opened her purse and was giving the driver her fare when the collision occurred. The witness travelling in the defendants' bus gave evidence that it was travelling very fast, faster than buses normally travel. Two of these witnesses agreed that a vehicle did go past in the opposite direction at almost the moment of impact. They were unable to say whether the driver of the plaintiff company's bus gave any signal D that he was stopping. They stated that at the place where the bus stopped there was a bus stop sign. They denied that it stopped suddenly. The driver of the plaintiff company's bus did not give evidence.

The second defendant was the only eye-witness of the collision called by the defence. He gave evidence that the plaintiff company's bus had overtaken his bus about 3 chains from the place where the accident occurred; this allegation was not put to the three eye-witnesses called E by the plaintiff company when they were cross-examined. The second defendant stated that he was driving at only 25-30 m.p.h. and that the plaintiff company's bus stopped suddenly some distance before the bus stop without any signal and without any brake lights showing. He explained that as a result he was unable to stop behind the plaintiff company's bus, tried to pass it but was prevented from doing so because F a lorry was coming from the opposite direction, and had no alternative but to run into the back of the plaintiff company's bus. It is not disputed that the road at that point is fairly straight but that just beyond where the accident occurred the road dips down and traffic coming from the opposite direction cannot be seen from a distance.

The second defendant gave his evidence well but had a strong motive of self-interest to slant the evidence in his own favour. The three wit- G nesses called by the plaintiff company were patently honest and truthful. I have no hesitation in accepting their evidence in preference to that of the second defendant when it conflicts with his.

I find as fact that the plaintiff company's bus stopped at a marked bus stop, that it stopped in the normal manner in order to permit a passenger to alight and that it had been stationary for some seconds before the H defendants' bus ran into the back of it. I find as fact that immediately before the accident the defendants' bus was being driven faster than buses are normally driven. I reject the second defendant's evidence that the plaintiff company's bus had overtaken his bus three chains before the collision occurred; this allegation was not put to any of the plaintiff

company's witnesses and it is incompatible with my findings that the defendants' bus was travelling faster than normal and that the plaintiff company's bus stopped normally. A

The plaintiff company did not obtain a subpoena to ensure the attendance of the driver of their bus and he did not attend to give evidence. In the absence of evidence to the contrary and the matter having been put to the plaintiff company's witnesses in cross-examination I accept the second defendant's evidence that the driver of the plaintiff company's bus did not give any signal that he was going to stop his bus. I find this as fact. I am not willing to accept his evidence that the brake lights were not working. The managing director of the plaintiff company was cross-examined about the condition of the bus but was not asked any questions with regard to the condition of the brake lights. If it was to be the defence case that the brake lights were not working, this should have been put to that witness. B C

On my above findings of fact that the collision was a result principally of the negligence of the second defendant who was driving too fast to stop when the bus in front did so, I find that the driver of the plaintiff company's bus did contribute to the collision by failing to give a signal that he was going to stop; that, as he stopped at a bus stop where the second defendant as a bus driver himself might reasonably have expected him to stop, this was only a very small part of the cause of the collision. I assess the degrees of negligence in respect of the collision as 90% the second defendant's and 10% that of the driver of the plaintiff company's bus. D

I turn now to the quantum of damages. The defendants by their counsel have admitted that £38.2.6d. was necessarily paid to Millers Limited, Fiji Electrical Co. Ltd. and for paint and labour to repair damage caused by the collision. The defendants by their counsel have also admitted that £476 was paid by the plaintiff company to P. A. Lal & Co. Ltd. for repairs to the body work of the bus but assert that much of this work was necessitated by the poor condition of the body work. The company secretary of P. A. Lal & Co. Ltd. gave evidence as P.W. 2. He agreed that some of the studs and joists of the body work were rotten and should have been replaced before the date of the accident, if the plaintiff company was to comply strictly with the law. He said, however, it would have been possible to go on operating the bus for some considerable time to come without any repairs being carried out if the accident had not happened. He said also that, had the necessary repairs been carried out before the accident, the cost would have been approximately half of the cost of the repairs needed after the accident. E F

Clearly the bus was restored to a better condition that it was in originally as the result of the repairs carried out following the collision. However, as the plaintiff company's claim is founded on tort and not on an insurance contract "the company is entitled to *restitutio in integrum* and, if it derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing it to some loss or burden which the law will not place on it." (*The "Gazelle"* 2 W. Rob. 279 at 281.) The plaintiff company is, therefore, entitled to recover the full amount of £514.2.6d. which it paid for the repairs, less only the amount deductable in respect of its own contributory negligence. G H

With regard to the loss of income for which the plaintiff company has
A claimed, its managing director, P.W. 1, has admitted that the work done by the damaged bus was taken over by a stand-by bus and that the loss was not, as originally alleged, the total amount which the damaged bus could have earned during the period when it was off the road but the difference between that amount and the amount which the stand-by bus, a smaller bus, was able to earn, plus the amount which the stand-by bus could have earned doing private hire work during that period. The
B stand-by bus had a seating capacity of fourteen less than that of the damaged bus. The return fare is 5/-; the loss was therefore £3.10.0d. per day. P.W. 1 has given evidence that, on the basis of average income from private hire work done by the stand-by bus, the loss of such income was £16.2.0d. I, therefore, find that the loss of income suffered by the plaintiff company was £156.2.0d. The total loss which it has incurred therefore as a result of the accident is £670.4.6d.

C

The first defendant has given evidence that in his opinion the market value of his bus before the collision was £1250. He has not adduced any other evidence of its value at that time. He bought it about a year before, together with a Road Service Licence for the route, and he was unable to give any satisfactory account of how the purchase price was divided between the value of the bus and the value of the licence. He
D has admitted that he had insured the bus for only £1000. The bus was five or six years old at the time of the accident. It had been substantially rebuilt and the engine replaced some time before. Neverthless as the first defendant valued it at only £1000 for insurance purposes, I am unable to accept that its value was higher than that. I therefore find as fact that its value was £1000. It is not disputed that repairs to the vehicle would have cost more than £1000 and that he sold it for £200.
E I therefore find that he suffered a loss of £800 as a result of the forced sale of the bus.

The first defendant is also claiming loss of income for 45 days at £8 per day. He bought a new bus to replace the damaged bus 45 days after the collision. In the interim period he used his stand-by bus to run the service previously operated by the damaged bus. His loss therefore was the amount of the income which he would have received from operating
F the stand-by bus during that period. He has given evidence that he used the stand-by bus on three days a week to carry labourers for Carpenters and that on Fridays and Saturdays he used it for supplementary trips on the Wainibokasi — Suva service. He said that normally there was one supplementary trip on Fridays and as many as three on Saturdays. He said that on that basis the income which the stand-by
G bus would have earned was an average of £8 a day. In view of the evidence of the plaintiff company's managing director that the average daily nett income from a bus operating from Cautata to Suva with one trip a day each way was £8, I accept the first defendant's evidence that the income from the stand-by bus would have averaged £8 a day. He was not cross-examined about the time which it took him to obtain the new bus and the period of 45 days seems not unreasonable. I find,
H therefore, that the first defendant's loss of income as a result of the collision was £360 as claimed. I therefore find that his total loss was £1160.

The first defendant has admitted that he was paid £650 by his insurance company. Mr Sahay has submitted that the amount of his actual loss

has been reduced by that amount. I am unable to accept this submission. No doubt, as Mr. Sherani has pointed out, the first defendant, to the extent to which he succeeds in this action, will have to repay that sum to the insurance company. A

I have already made my findings with regard to the degrees of negligence of the parties. Applying these to my findings with regard to the losses they sustained, I find that the defendant must pay £603.4.0d. to the plaintiff company and that the plaintiff company must pay £116 to the first defendant. B

I enter judgment for the plaintiff company against both defendants for £603.4.0d, that is now $1206.40, and judgment for the first defendant on his counterclaim against the plaintiffs for £116.0.0d., that is now $232.00. With regard to costs, the plaintiff has succeeded to the extent of recovering nearly 75% of what he originally claimed. The first defendant has succeeded on his counterclaim to the extent of less than 10%. I order the defendants to pay 80% of the plaintiff's costs in respect of both the claim and the counterclaim and to bear their own costs. C