

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: FITU FUIMAONO of Lau'ii
Public Servant

PLAINTIFF

A N D: TAIVALE AUPITO of Lotofaga
Bus Operator

DEFENDANT

Counsel: RT Faaiuso for plaintiff
KM Sapolu for defendant

Hearing: 29 September 1997

Judgment: 1 October 1997

JUDGMENT OF SAPOLU CJ

This is an action in negligence for damages caused to the plaintiff's car by the defendant's bus. The evidence for the plaintiff and that for the defendant are quite conflicting on what happened and how it happened.

Essentially the evidence given for the plaintiff is that on 4 April 1996 the plaintiff's car was heading back home to Lau'i'i from Apia. Travelling in the car were the plaintiff's father, two younger brothers, and his brother in law who was driving the car. When they had just passed the second bridge at Fagali'i a truck with a load of

stones and rocks was seen travelling fast from the opposite direction. Some of the stones from the trucks load were falling onto the road. So the plaintiffs car pulled to the side of the road and stopped. A stone then hit the front windscreen of the plaintiff's car and the driver who became unconscious. About ten minutes later the defendant's bus which was also travelling from Apia collided into the rear of the plaintiff's stationary car causing damage.

The evidence given by the defendant is that his bus started to follow the plaintiff's car from about the turn of the road to Vaivase. The bus then continued to follow the plaintiff's car until the second bridge at Fagali'i when the defendant says he saw a truck with a load of rocks travelling from the opposite direction on the road. When the truck was going past the car, the car suddenly slowed down on the middle of the road. The bus had no time to stop and therefore collided into the rear of the car. The defendant who was driving his bus says at that time he did not know that a rock had fallen from the truck and hit the driver of the car injuring him.

Both the plaintiff's father and the defendant alighted from their vehicles. The defendant told the plaintiff's father to fix the damage to his car and give him the bill. The bill of costs for repairs to the plaintiff's car was subsequently given to the defendant but he refused to pay.

Faced with the conflicting evidence from the plaintiff's witnesses and from the defendant the Court has to decide which evidence to accept. After consideration of the evidence, I have decided to accept the evidence by the defendant as to what happened for these reasons.

In the first place, if the evidence for the plaintiff is accepted it would mean that while the plaintiff's car was stationary on the side of the road for about ten minutes, the defendant with his eyes fully open just drove his bus into the rear of the plaintiff's car which was not only stationary but parked on the side of the road. I find this to be somewhat implausible because there is no evidence that there was any other traffic on the road or that there was something wrong with the bus or anything unusual about the defendant who was driving his own bus. The defendant has also been a bus driver for more than 10 years so he is an experienced bus driver. And given that he was driving his own bus one would expect him to exercise care and prudence in order to protect his own bus from a collision.

Secondly, there are some slight inconsistencies between the evidence of the plaintiff's father and that of his brother Afemai. On their own, these inconsistencies may not have been significant. But taken together with other factors they do not inspire confidence in the evidence for the plaintiff. For instance, the plaintiff's father says that when his son in law who was driving their car was injured and became unconscious, he took off his shirt and sent his son Afemai to go and wet the shirt. He then tied the wet shirt around the head of his son in law. Afemai says when the driver of the car was injured and unconscious his father tied his dry shirt around his head. It was later that he took the shirt to the tap and wet it. When he returned with the wet shirt the bus had already collided into the rear of the car.

Afemai also says that the driver of the car regained consciousness when the car was hit by the bus. But if Afemai was at the tap when the collision occurred, then it

was rather doubtful whether he saw the driver of the car who was in the car regain consciousness when the bus hit the car.

There is something else about the evidence for the plaintiff. It is inconsistent with the particulars of negligence pleaded in the statement of claim. Insofar as they are presently relevant, those particulars allege that the plaintiff's car was in front of the defendant's bus and that the defendant was driving his bus too closely to the plaintiff's car and thus failed to keep a reasonable distance from the plaintiff's car. These pleaded particulars are clearly inconsistent with the evidence for the plaintiff that his car was stationary on the side of the road for about 10 minutes when the defendant's bus appeared and collided into its rear. The said particulars are more consistent with the evidence given by the defendant that his bus was following behind the plaintiff's car when the car suddenly slowed down without prior warning that it was going to stop or turn to the side of the road.

I have also considered what was said by the defendant to the plaintiff's father immediately after the collision, to fix the car and give him the bill. That statement from the defendant may, in the circumstances, be seen as an admission of liability. However the defendant says that the statement was made for the purpose of diplomacy and settlement. It also appears that at that time the defendant did not appreciate what had happened about a rock that had fallen from the passing truck causing damage to the front windscreen of the plaintiff's car and injuring its driver who became unconscious.

As I have accepted the defendant's evidence, the claim for liability in negligence has not been made out.

Accordingly it is dismissed

TFM Sapolu
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CHIEF JUSTICE

Solicitors:

RT Faaiuso for plaintiff

KM Sapolu for defendant