IN THE COURT OF APPEAL OF BELIZE AD 2010

CIVIL APPEAL NO 17 OF 2010

(1) **GERMAN VEGA & SONS LIMITED**
(2) **MICHAEL ESCALANTE** Appellants

v

(1) **YOLANI REVOLORIO HERRERA**
(2) **NATIONAL TRANSPORT SERVICES LIMITED**
(3) **TYRONE GILLETT** Respondents

AND

CIVIL APPEAL NO 20 OF 2010

(1) **NATIONAL TRANSPORT SERVICES LIMITED**
(2) **TYRONE GILLETT** Appellants

v

(1) **YOLANI REVOLORIO HERRERA**
(2) **GERMAN VEGA & SONS LIMITED**
(3) **MICHAEL ESCALANTE** Respondents

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BEFORE

The Hon Mr Justice Elliott Mottley	President (up to 31December 2010)
The Hon Mr Justice Manuel Sosa	Justice of Appeal (President as from 1 January 2011)
The Hon Mr Justice Dennis Morrison	Justice of Appeal

N Barrow for Germán Vega & Sons Limited and Michael Escalante.
A Matura Shepherd and D Molina for Yolani Revolorio Herrera.
H E Elrington SC for National Transport Services Limited and Tyrone Gillett.

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14 October 2010 and 24 June 2011.

MOTTLEY P

[1] I have read the judgment in draft of Justice of Appeal Sosa. I concur with his reasons and conclusions.

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MOTTLEY P

SOSA JA

I - *Introduction*

[2] The first-named respondent in the original appeal, Yolani Revolorio Herrera ('Ms Revolorio'), sustained very serious bodily injuries ('the injuries') on 20 September 2007, when, between mileposts 35 and 36 on the Western Highway, a collision occurred between a bus, in which she was a paying passenger, and a truck. In January 2009, Ms Revolorio filed in the court below a claim form specifying no cause of action but seeking damages for the injuries from the other respondents in the original appeal, namely, National Transport Services Limited ('NTS'), as the owner of the bus and the employer of its driver, and Tyrone Gillett ('Mr Gillett'), as such driver, as well as from both appellants in the original appeal, namely, Germán Vega & Sons Limited ('GV & S'), as the employer of the driver of the truck, and Michael Escalante ('Mr Escalante'), as such driver. The hearing of the claim, which had turned out to be one in negligence, commenced on 28 September 2009 and ended on 22 February 2010. In a judgment delivered on 22 March 2010, Legall J awarded Ms Revolorio damages in the total sum of $211,661.22 (made up of the sums of $75,000.00 in general damages and $136,661.22 in special

damages), with interest at the rate of 6 % per annum from 20 September 2007 until payment, and ordered that 70 % of that total sum be paid by GV & S and Mr Escalante (whom he found 70 % liable for the injuries) and the remaining 30 % by NTS and Mr Gillett (whom he found 30 % so liable). Ms Revolorio was further awarded costs against all defendants. Before this Court, GV & S and Mr Escalante seek, in the original appeal, to (a) have the decision of the trial judge set aside insofar as it concerns their liability and (b) be adjudged not liable in any degree whatever, whilst NTS and Mr Gillett, as appellants in the cross-appeal, seek for themselves the like relief against Ms Revolorio, GV & S and Mr Escalante as the first-named, second-named and third-named respondents, respectively.

II - *The grounds of appeal*

(a) In the original appeal

[3] The grounds of appeal of GV & S and Mr Escalante are as follows:

(i) "The learned trial judge misdirected himself in fact in accepting the evidence of [Mr Gillett] as believable by failing to consider or to give any sufficient weight to the effect upon the credibility of [Mr Gillett] of the contradiction of his oral testimony contained in his previous statement to the police.

(ii) The learned trial judge misdirected himself and acted upon a wrong principle by rejecting the testimony of the witness René Juàrez because of evidence at the trial that during the luncheon

adjournment on one day of the trial and after the visit to the locus on another day the witness René Juàrez sat for lunch at the same table in a restaurant with [Mr Escalante] and conversed with him while completely ignoring the fact that the testimony of the witness René Juàrez remained consistent with statements he previously made to the police, long before he became acquainted during the course of the trial with [Mr Escalante] and sat for lunch with him."

(b) In the cross-appeal

[4] The sole ground of appeal of NTS and Mr Gillett reads:

"The conclusion of the Learned Trial Judge that [Mr Gillett] was negligent and his negligence made him responsible for 30% of the negligence that caused the accident, is against his own findings of fact. The decision of the learned Trial Judge cannot be supported by the evidence."

It is convenient to proceed straight to the second of the grounds of GV & S and Mr Escalante.

III – *The second ground of appeal of GV & S and Mr Escalante*

(a) The causing of the accident: version 1

[5] There were at trial two conflicting versions as to the causing of the accident**.** The first, derived mainly from the evidence of Police Constable

Danny Mesh and Ms Kimako Broaster, both witnesses called by Ms Revolorio, but also, to some extent, from that of Mr Gillett himself, was that the collision was the fault of the driver of the truck (admitted by Mr Escalante to have been him). Given the particular course which the Court ought, in my respectful view, to take in disposing of this appeal, I do not consider it appropriate to comment at any length upon the evidence adduced at trial. The constable, whose police experience spanned no more than ten months at the time of the accident, gave evidence that it was the truck that had crashed into the bus, in which he was a passenger, and that the truck had, before so doing, suddenly swerved towards the left hand side and "veered directly towards the bus" (para 8, witness statement, which became his evidence-in-chief at trial). The impact occurred, according to his testimony, "somewhere between where the driver [of the bus] was seated and the middle of the bus". At para 16 of his witness statement he went so far as to say that the truck, in fact, "crossed over to the left lane and directly into the path of the approaching bus". Ms Broaster, aged 22 at the time of the accident, also testified that the truck left its own proper lane and entered that of the bus before crashing into it.

(b) The judge's acceptance of version 1

[6] The judge, who must be taken to have seen and heard all of the witnesses, expressly said (para 23, judgment): "I accept the evidence of Danny Mesh as to how the accident occurred." It may safely be concluded from this that, although he nowhere so stated, he also accepted such parts of the evidence of Ms Broaster as lent support to that of PC Mesh, including that

part just alluded to. It may equally safely be concluded that, although he never referred to it, the judge accepted the part of the evidence of Mr Gillett in which the latter said that the truck came into his proper lane and crashed into the bus.

[7] Having accepted the evidence so far adverted to in this judgment, the trial judge nevertheless went on to find, on his interpretation of the evidence of Mr Gillett and, as well, on the evidence of Duncan Smith, another passenger on the bus but a witness for both GV & S and Mr Escalante, that Mr Gillett was contributively negligent, primarily in having failed to drive the bus off the road in time to avoid the collision.

(c) The causing of the accident: version 2

[8] The other version of how the accident came to occur ("version 2") arises chiefly from the evidence of René Juàrez, a witness called by both GV & S and Mr Escalante. That evidence, given by way of witness statement (paras 8 and 11) as well as under cross-examination (p 142, Record), was to the effect that the collision occurred in the proper lane of Mr Escalante, behind whose truck he (Mr Juàrez) was trailing, driving a Ford F-350 pickup truck. Having seen, from a distance, the bus rounding a curve on the highway (p 139, Record), he, after deciding against attempting to overtake the truck because of the approaching bus and the slipperiness of the wet road surface, saw the bus slide to its left. The collision occurred, according to his evidence under cross-examination by Mrs Matura Shepherd, when the truck crashed into the part of the bus which was still in its (the truck's) lane; and there was,

in his opinion (as a person with 24 years' driving experience (p 146, Record)) nothing which the driver of the truck could have done to avoid it. The part of the bus so crashed into was its left side (p 175, Record). Mr Juàrez's evidence, as that of a detached observer with long driving experience who claimed in cross-examination to have witnessed the accident from a distance initially estimated at only about 30 feet, would ordinarily have stood to be received as something of a godsend by a trial judge. After all, Mr Juàrez's pickup was neither involved in the accident nor, on the evidence, at any stage in danger of colliding with either motor vehicle. All other things being equal, it is improbable in the extreme that he would have been as excited by the imminence of the crash as those, eg PC Mesh and Ms Broaster, bracing themselves for the impact inside the bus undoubtedly were. In the instant case, however, this generally welcome type of evidence (though finding support in that of Mr Escalante that it was the bus that entered his lane) was to be rejected in short order by the judge.

(d) The judge's rejection of version 2: explanation and analysis

[9] The reason for the rejection was not so much perceived inherent weakness or improbability in Mr Juàrez's evidence as the supposed effect of admissions made by him, whilst under cross-examination by Mr Elrington, to the effect that he had "socialized" with Mr Escalante on two different occasions during the course of the trial. These supposedly costly admissions were reproduced by the judge in his judgment (at para 12) and are as follows:

> "After the incident I drank something with the truck driver. This occurred twice not far from where the accident happened at a place called Amigo's. One time at Amigo's and the other time at Belize City at a restaurant. The day when the court inspected the accident [scene] we went to Amigo's. I picked up the driver of the truck at Orange Walk and I took him to the scene in my vehicle. After visiting the scene we went to Amigo's and then I took him back to Orange Walk."

[10] I will not presume to say that the judge did not seek to level some criticism at the evidence of Mr Juàrez on grounds of its putative relative weakness when considered with other evidence. There are in paragraphs 10 and 11 of his judgment two comments which may be said to approach, to differing extents, criticism of that sort but which, in my respectful view, were, on examination, entirely lacking in validity. First, the judge seemed obliquely to suggest in para 11 that Mr Juàrez was contradicted by two things, viz (a) that which was indicated in a sketch of the accident scene prepared by Cpl Ich (as he then was), and admitted in evidence and (b) evidence of the respective post-collision locations of the bus and truck arising from what Sgt Ich (as he had by the time of trial become) pointed out at the scene during a visit by the judge, counsel and certain witnesses. He said, with an emphasis on contrast that is otherwise hard to explain, that the sketch and the demonstration at the scene made it plain that "the accident occurred not on the curve … but on the straight road some distance away from the curve". But, as para 10 of the judgment unquestionably acknowledges, what Mr Juàrez had earlier said in evidence was that the bus had started sliding as it

came out of the curve. That is a far cry from saying the accident took place at the curve. It was evidence whose importance, evidently overlooked by the judge, was, rather, to show that the curve, whilst not the scene of the accident itself, had, to put it metaphorically, played the villainous role of taking the bus out of its proper lane, the essential proem to the tragic collision that followed. The crash occurred, according to Mr Juàrez, as a result of the bus's failure fully and quickly to return to its proper lane.

[11] Secondly, the judge, paying, it seems, tacit tribute to the efforts of Mr Elrington in cross-examination, apparently bought in, so to speak, on the frankly preposterous suggestion of the latter, flatly repudiated by the common, everyday experience of all those who use motor vehicles on the highways, that someone travelling inside a vehicle following another on a straight stretch of road cannot possibly see anything occurring in front of that other vehicle, or even see whether the road ahead of such other vehicle is clear. Quoting from his notes again, the judge (at para 11) set out the following replies given by Mr Juàrez under cross-examination by Mr Elrington:

> "I was behind the big truck. I cannot see around or above the truck. I could not see under the truck. I could still see the curve from where I was behind the truck. From where I was behind the truck, I could see the bus. It was a clear view."

This excerpt from the judge's necessarily incomplete note does not begin to reveal what is shown by the corresponding portion of the Record (at p 156) to

be an acute inability on the part of Mr Juàrez to explain himself in fielding a succession of frankly simplistic questions from his cross-examiner. This witness, it must be recalled, claimed to be a man of scant formal education (p 167, Record) whose first language is Spanish (claims hardly to be doubted) and, besides, had come in for his fair share of brow-beating in the witness-box. At one point later on, when he was accused (unfairly, as it seems to me) of recalcitrance (p 162, Record), his counsel was driven to complain to the judge who, to his credit, did not hesitate to point out to Mr Elrington that he was being abusive of the witness. These considerations notwithstanding, the judge, when he came to write his judgment, set out the replies of Mr Juàrez just quoted and proceeded immediately to say (para 12):

> "From the above cross-examination of this witness, it may be argued that it was not likely for him to see how the accident occurred."

[12] I beg most respectfully to differ. The evidence of Mr Juàrez was not that he was driving at a distance of, say, 3 feet from the truck. It is only natural to suppose that the distance would have varied; but, at the point when the collision occurred, he was, he clearly said, about 30 feet away (the very distance at which he had earlier, as he testified, been following the truck: p 148, Record). (This estimate, as already noted above, was only his initial estimate and was later replaced by one of 45 yards.) Moreover, it is extremely unlikely (and no one suggested) that he was driving his Ford F-350, a full-size pickup, in an absolutely straight line throughout. It was, indeed, his testimony, under cross-examination by Mr Elrington, that he went so far, at one point, as

to leave his proper lane in preparation for an overtaking manoeuvre, only to end up aborting it on second thoughts (pp 150-151, Record), another common, everyday experience of motorists which can hardly have placed Mr Elrington's credulity under any strain, the tenor of his cross-examination notwithstanding. And, again, a little later when the bus went off his radar, as it were, Mr Suàrez said that he "pulled from my vehicle to see where the bus went" (p 142, Record), a point also made in his witness statement, at para 7.

[13] What all of this boils down to, if the colloquialism be indulged, is that the judge resorted to the extreme measure of rejecting Mr Juàrez's evidence, lock, stock and barrel, for no reason other than that, on the latter's own showing, he had been together with Mr Escalante on the occasions in question.

[14] This readily-acknowledged interaction with Mr Escalante, termed "socializing" by the judge, was evidently shocking to him. He said:

> "Though the witness swore that he did not know the truck driver before the accident, his socializing with him, causes grave doubts about the truthfulness of his evidence that he did not know the defendant before the accident and also causes grave doubts about the truthfulness of this witness (*sic*) version of the accident. For the reasons above, I do not accept this witness's version of the accident."

[15] Whilst I would agree with anyone who deprecates as wholly undesirable meetings between witnesses such as these admitted by Mr Juàrez to have taken place, I must dismiss as an unfortunate descent to the level of the *non sequitur* the assertion that an admission of their having taken place can properly form a basis for legitimate doubts as to the truthfulness of Mr Juàrez's sworn evidence that he had not known Mr Escalante prior to the accident. This lapse is particularly perplexing in a case, such as the instant one, where there was no shred of evidence from any other witness to suggest that Mr Juàrez and Mr Escalante had previously known each other. As to the fact that Mr Juàrez transported Mr Escalante from Orange Walk Town to Belize City and back on the day of the visit to the *locus* (16 October 2009), how can one, with any degree of confidence, read into such a gesture more than mere common courtesy towards a new acquaintance in circumstances where these men had previously eaten/drunk at the same restaurant table (on 1 October 2009) and one was now driving from the Corozal District to Belize City via Orange Walk Town, where the other lived, on a day when both were required to attend court again? Indeed, it is the case that the relevant portion of the Record (at p 76) does not indicate that counsel for NTS and Mr Gillett dwelled at any length, in cross-examination, on the suggestion of a pre-existing friendship between Mr Juàrez and Mr Escalante at the time of the collision. (This portion, which is based on the judge's own note, shows only one reply by Mr Juàrez to the effect that he did not know Mr Escalante before the date of the collision.) Once it is appreciated that the foundation for the judge's conclusion that there was a pre-accident friendship is more apparent than real, his doubts about version 2 must inevitably go from flutter to gutter,

so to speak, for the simple reason that, far from being a version coming into being only after the incidents of so-called socializing, it was given expression by Mr Juàrez in (a) an interview with Mr Jules Vàsquez of Channel 7 on the day of the accident (Tab 8l, Record), (b) his statement to the police on that same day (Tab 9d, Record), (c) his pre-trial witness statement dated 28 April 2009 to the attorneys-at-law for GV & S and Mr Escalante (Tab 11, Record) and (d) his *viva voce* evidence at trial prior to the taking of the adjournment of 1 October 2009, which last-mentioned date preceded those of both the incidents of "socializing". In fine, this was, in my view, a case of gross overreaction by the trial judge to the witness's relevant admission. In a real sense, what occurred here was that both the proverbial baby (ie version 2) and the unused bath water (ie the denial of prior friendship) were wrongly thrown out. The appeal of GV & S and Mr Escalante must perforce succeed, in my opinion, to the extent, at least, that the decision of the trial judge as to liability should be set aside.

IV - *The first ground of appeal of GV & S and Mr Escalante*

[16] Accordingly, there is, in my view, no need to consider ground (i).

V - *The further order to be made*

[17] Counsel for GV & S and Mr Escalante in the original appeal submitted, in reliance on *Hoy et al v Awe et al*, Civil Appeal No 2 of 2006, judgment delivered on 27 October 2006, that this Court can properly form its own view on liability since the finding of Legall J as regards the truthfulness of Mr Juàrez was "based on the evaluation of the evidence and not on the

perception of the witness". I agree with counsel that nowhere in the judgment is there an indication that the judge's perception of Mr Juàrez played any part in the making of the finding that he was untruthful in testifying as to both his relationship with Mr Escalante and the occurrence of the accident. And I bear in mind that Carey JA, writing for this Court in *Hoy*, referred to the well-known authorities and went on to say, at para 4:

> "The principles to be derived from the cases counsel caution on the part of an appellate court in respect of findings of fact. When the finding is based on the credibility of a witness, that is, on perception, then an appeal court ought not to interfere. Where, however, the finding is based on inferences drawn from proven facts or on the evaluation of evidence then this court is at liberty to form its own view and act on it."

What, however, is, in my opinion, before the Court in the instant case is, unusually, a finding as to the credibility of a witness which is based neither on the judge's perception of him nor on the judge's evaluation of his evidence. The judge saw fit to reject the evidence of Mr Juàrez as a result of the former's reliance on reasoning fatally flawed by the presence in it of a glaring *non sequitur*. He refrained from commenting adversely on Mr Juàrez's demeanour and, apart from the two feeble attempts at criticism already discussed above, made no effort to conduct a disciplined and analytical evaluation of Mr Juàrez's evidence, with due concentration on its own merits and demerits rather than on purely peripheral points. Had that evidence not

been so rejected, and instead subjected to a fair and proper evaluation, it may well have been accepted, with very far-reaching results, including, conceivably, a finding that GV & S and Mr Escalante are not at all liable in negligence to Ms Revolorio.

[18] The Court was further referred by counsel for GV & S and Mr Escalante to the judgment of the Court of Appeal of England and Wales (Civil Division) in *Baird v Thurrock Borough Council*, [2005] EWCA Civ 1499, delivered on 7 November 2005. Counsel submitted that, as in that case, the trial judge in the present case had not provided sufficient reasons for the rejection of the evidence supporting the case of GV & S and Mr Escalante, thus rendering it impossible for them to fathom the arrival at a decision adverse to them. In my view, however, that is not the case here. In a quote contained in the leading judgment of Gage LJ in *Baird* (at para 16), Phillips MR, as he then was, in the case of *English v Emery Reimbold & Strick Ltd & Orrs,* [2002] 1 WLR 2409, pertinently said:

> "The second [lesson to be drawn from this appeal] is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

In the instant case, it is perfectly clear, as has been demonstrated above, why the judge reached a decision which is in large measure adverse to GV & S and Mr Escalante. But the reasoning by which the judge reached his decision is entirely unacceptable.

[19] Notwithstanding the difference already noted above between it and the present case, *Baird* affords, to my mind, general guidance as to the decision whether or not, justice having substantially miscarried below, this Court should now go on to make its own finding on liability. The court in that case was urged by counsel for the council to itself decide the case rather than remit it to the court below for a re-hearing. Gage LJ, having arrived at the conclusion that the judge's reasons for decision failed the test of adequacy, said, at para 19:

> "The tragedy of this case is that, having reached this conclusion, in my judgment the matter will have to go back to be re-heard by a different judge. [Counsel for the appellant} has sought to persuade this court that we should decide the case on the transcript of the evidence of the witnesses. In my judgment it is quite impossible for the court to accede to that submission. The judge accepted the claimant's evidence. We have not heard either him or the two witnesses before the defendant. The result of the case depends upon which witness was accepted as truthful and accurate. There is now no way that this court can make that decision."

The court in *Baird* proceeded to allow the appeal and direct the remittal of the case to the lower court for re-hearing by a different judge.

[20] As regards this aspect of the original appeal, commonality between it and *Baird* cannot be gainsaid. Legall J accepted the evidence, in whole or in part, of the witnesses already named at para [6], above, having both seen and heard them, an advantage not, of course, afforded to this Court. Whilst the reasons for rejecting version 2 have been successfully impugned, that fact alone does not entitle this Court to conclude that such version ought properly to have been preferred. That is a task best reserved for a trial judge. In all the circumstances, I consider that the proper further order, once the appeal is allowed to the extent already stated above, should be that the case be remitted to the court below for re-hearing by another judge, on the issue of liability, and that GV & S and Mr Escalante have 75% of their costs in the original appeal, to be taxed if not agreed. I consider that costs to date in the court below should be costs in the cause. Given that it will be entirely up to the judge presiding at the new trial which witnesses to believe and which to disbelieve, it is inevitably the whole question of liability which is being re-opened, that is to say not only the matter of the liability (if any) of GV & S and Mr Escalante.

VI - *The cross-appeal*

[21] In my respectful view, the cross-appeal does not properly arise on the disposition of the original appeal in the manner proposed above.

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SOSA JA

MORRISON JA

[22] I too have had the advantage of reading in draft the judgment of Sosa JA, as he then was. I agree with it and there is nothing that I can usefully add.

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MORRISON JA